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THE DISAPPEARANCE OF A NATURAL PERSON WHO IS A SOLE PROPRIETOR (SELF-EMPLOYED) – CONSIDERATIONS UNDER THE POLISH AND SLOVAK LAW

/ Alexandra Löwy, Karin Raková, Paweł Lewandowski

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Abstract: *The disappearance of a natural person, especially when he or she is also a sole proprietor of a business, causes legal problems. Such situations are not directly regulated by legal acts, i.e., the legislators do not refer to the impact and consequences of the disappearance on the performed business activity. Meanwhile, the fact that a sole proprietor goes missing may have a negative impact on his or her situation, including the content of the obligations binding on him or her. This paper discusses how the relatives, in particular the spouse of the missing person, may behave in such circumstances. The considerations carried out concern Polish law and Slovak law, as there is no specific regulation of the declaration of missing person who is a sole proprietor introduced on the model of foreign regulations, the article places emphasis on the comparison of both selected regulations. The conclusion indicated that until the missing person is recognised as dead, family members or other relatives do not have any competence to take any action on behalf of the missing sole proprietorship circumstances, other entities may operate, i.e., attorney-in-fact, proxy, according to Polish law custodian established pursuant to Art. 184 of the Family Code, the custodian established pursuant to Art. 144 of the Code of Contentious Civil Procedure, or prosecutor. Similarly, under the Slovak law, until the missing person is declared dead, a guardian, or a representative appointed by the court pursuant to Section 68 of the Civil Procedure Code, acts for such person.*

Key words: *Commercial Law; Business Activity; Missing Person; Responsibility for Obligations*

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1. INTRODUCTION

Usually, the legal regulations are limited to the issue of the declaration of death (Burch, 2017), such as the provisions in force in Poland (Articles 29-32 of the Polish Civil

Code).[1] This is because a disappearance is a factual, not legal, event, and therefore the law does not regulate the particular and specific consequences of the disappearance, such as what about the rights and obligations of the missing person during his or her absence, whether and who can protect them/fulfil them, etc.[2] From a legal point of view, a disappearance is not the same institution as death. What distinguishes them is a kind of uncertainty as to the fate of the person (the missing person may still be alive, for example). From the legal point of view, a missing person is, until a document declaring him or her dead is issued,[3] a living person who can participate in established civil relations, including economic ones. Above all, the disappearance of a person does not constitute a reason for ceasing to treat such a person as an entrepreneur (Sailasri, 2020), with all the consequences. From the legal point of view, the disappearance of a person ("owner" of the enterprise) does not affect the existence of business activity, for example a suspension or termination of business activity does not occur *ipso iure*. The norms of law generally applicable in do not regulate the impact of the disappearance of a natural person on the conducted business activity registered in the Central Register and Information on Business (CEIDG) (sole proprietorship).[4]

It should be noted that the regulation of the declaration of missing person was introduced on the model of foreign regulations. Among other, there is for example appropriate regulations in Czech civil law, *id est* §§ 66 - §§ 69 of the Act of Civil Code of the Czech Republic.[5] The indicated regulations apply to a missing person, not specifically to an entrepreneur, although in the case of a sole proprietor it should be assumed that it will be appropriate. The declaration of missing person, according to Czech law, is not strictly to protect the rights of the absent person, but rather to facilitate legal action in situations where the absent person would be required to consent to, consent to, vote for, or otherwise take legal action (Čuhelová and Pondikasová, 2022). What is worth to note the declaration of missing person is reserved only for a specific group of disappeared persons (those who have full legal capacity, and those who can be considered missing within the meaning of §§ 66 Act of Civil Code of the Czech Republic) and persons who have specific legal relations with them. However, what is most important in view of these considerations - the effects of a declaration of disappearance do not apply to the actual legal actions of the missing person in private law relations (Čuhelová and Pondikasová, 2022). That makes this institution rather exceptional and causes that the appointment of a guardian is a general solution (Čuhelová and Pondikasová, 2022).

Similarly, under the Slovak legislation, the reasons for declaring a natural person dead are regulated by the provisions of Art. 7 of the Civil Code, if, taking into account all the circumstances, it can be assumed that he/she is dead (proof of death) or in the case of a missing person, and also on the condition that it can be assumed that this natural

[1] More about declaration of death: Bartoszewicz (2007, p.11 et seq.); Bartoszewicz (2017, p. 147 et seq).

[2] As Schoeman-Malan points out: „Rarely do authorities consider 'missing' to be a legal status. This lack of recognition affects families' rights to property, inheritance, guardianship of children, even remarriage. Family members are seldom entitled to the same social benefits as those whose relatives are confirmed as deceased. They might not have access to bank accounts or savings." (Schoeman-Malan, 2018, p. 219)

[3] The legal effects of declaring a missing person dead are the same as those of a natural person's death (Kalus, 2018).

[4] Natural persons conducting business activity in Poland should obtain an entry in CEIDG (that requires their legality). At the same time, the lack of an entry does not deprive a person of the attribute of an entrepreneur, CEIDG is regulated in The Act of March 6, 2018 on the Central Register and Information on Business Activity and the Information Point for Entrepreneurs, Journal of Law 2022, item 541; more about Central Registration and Information on Business Activity: Lewandowski (2013), generally about business activity registers: Breges and Jakupak (2017).

[5] Act. No. 82/2012 Call. Civil Code.

person is no longer alive. The procedural procedure for declaring a person dead is governed by the Code of Non-Contentious Civil Procedure, in particular Article 220 and following of the Code of Non-Contentious Civil Procedure. The decision to declare a person dead is of a constitutive nature, and therefore, until the decision to declare a person dead becomes final, it is assumed that the person is alive and is therefore the subject of legal relations in which he or she can enter and, therefore, acquire rights and obligations. The Slovak legislation does not provide for a specific substantive prerequisite for the appointment of a guardian for a missing person, although the above cannot be excluded with reference to the provision of Article 29 of the CC, which will be dealt with in more detail in the next part of this paper.

However, the subject of this publication is not to discuss the issue of the disappearance of a natural person,[6] but to draw attention to the consequences of this event in relation to a person who is a sole proprietor. The issues have not been discussed in the literature so far, which justifies making it the subject of considerations. Therefore, it is worth analysing how the disappearance of a natural person – a sole proprietor – affects the legal obligations of such an entrepreneur, which, in consequence, requires considering the premises and legal consequences of suspending or even terminating the business activity conducted by the missing entrepreneur. Moreover, attention should be paid to how the closest, in particular the spouse of the missing person, may behave in the signalled situation. After all, it is important to establish who can act at all (including running cases and business) on behalf of the missing entrepreneur. This study may be of use to the relatives of the missing sole proprietorship. Above all, however, it may contribute to a broader scientific discussion, and perhaps in the future, lead to the introduction of appropriate legal regulations (Lewandowska, 2021), especially in connection with the movement of people and entrepreneurs and their activities in various EU Member States.

2. SOLE PROPRIETOR

Considerations as to the consequences of the disappearance of a sole proprietor should begin with outlining the concept of an entrepreneur. In the Polish legal system, an entrepreneur is defined in various legal acts (Etel, 2012), including in particular Art. 43^1 of the Polish Civil Code (**PCC**). Statutory definitions of an entrepreneur have a different normative structure and different binding force (e.g., they go beyond a legal act or apply only to a normative act, taking into account the specificity of the regulated matter).[7] In particular, it is worth noting the definition of an entrepreneur found in The Act of March 6, 2018, Entrepreneurs' Law.[8] Pursuant to Art. 4 sec. 1 of the aforementioned Act, the entrepreneur is a natural person,[9] legal person or an organisational unit that is not a legal person, to which a separate act grants legal capacity, carrying out business activity on its

[6] More about the disappearances of natural persons: Lisnicha (2011); Ramghani, Roshan and Khah (2017); Citroni (2014).

[7] In such a situation, the legislator uses the term "an entrepreneur within the meaning of the Act is ..." or another equivalent expression.

[8] The Act of March 6, 2018, Entrepreneurs' Law, Journal of Law 2021, item 162, hereinafter: **Entrepreneurs' Law** (Lewandowski, 2019).

[9] According to the Central Statistical Office (GUS) data, as of December 31, 2017, it is the most numerous category of entities engaged in business activity (natural persons conducting business activity constitute 69.64% of the number of all entities); Zmiany strukturalne grup podmiotów gospodarki narodowej w rejestrze REGON, 2017 r. GUS 2018, s. 18, available at: https://stat.gov.pl/obszary-tematyczne/podmioty-gospodarcze-wyniki-finansowe/zmiany-strukturalne-grup-podmiotow/zmiany-strukturalne-grup-podmiotow-gospodarki-narodowej-w-rejestrze-regon-2017-rok,1,21.html (accessed on 22.06.2024).

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own behalf. In sec. 2 of the cited provision as entrepreneurs qualifies partners of a civil partnership in the scope of their business activity. Thus, the entrepreneur is defined by the subjective criterion (entities that may be entrepreneurs) and functional criterion (performing business activity).

Characteristic features of business activity (Art. 3 Entrepreneurs' Law) are organisation, profitability, continuity and performance on one's own behalf.[10] Those features must be met jointly to treat a person's activity as a business activity (Sieradzka, 2018). Organising means that the activity must take a formalised form, e.g., it must be entered in a relevant register. Importantly, in connection with the analysed issue, a natural person conducting business activity is subject to the obligation to register in the CEIDG, the register mentioned previously. Failure to comply with this obligation is incompatible with statutory regulations (Article 17 sec. 1 of the Entrepreneurs' Law) and even constitutes an offense (Article 60[1] of the Act of May 20, 1971, Code of Petty Offenses[11]). It is worth noting that business activity is not an activity performed by a natural person whose income due from this activity does not exceed 50% of the minimum wage in any month, referred to in the act on the minimum wage for work and who has not performed business in the previous 60 months. Profitability means that a given activity must be profit-oriented (income),[12] but obtaining profit is not really necessary. Generating losses instead of the expected profits (e.g., due to the operating costs exceeding the income), does not preclude its profit-making nature. Performing on one's own behalf means that the person is responsible for the obligations of the business with his or her own property, and the profits are his or her personal income (the benefits and risks are borne by this person). Continuity is manifested in the intention to constantly perform activities that make up the business activity.[13] It can be noted that the judicature additionally emphasises that business activity should be characterised by a professional character (permanent, not amateur, not occasional), compliance with the rules of profitability and profit, repetition of activities (e.g., serial production, typing transactions, constant cooperation) and participation in the course of trade.[14]

The Slovak legal regulation differentiates between the terms entrepreneur, entrepreneurship, and enterprise. It also should be stated that the single definition of these terms is missing, as it is spread out in many legal regulations.[15] The basis of the legal regulation of entrepreneurs - both legal and natural persons, can be found in the Commercial Code,[16] which defines an entrepreneur either as a person that is registered under the Commercial Register, or conducts its business based on the registration with the Trade Register or any other register under the specific law. A Trading Licence[17] or Commercial register registration is just one of many types of business authorisation, as but it is always necessary to have a certain authorisation for performance of entrepreneurship. An entrepreneur, either natural person or legal entity, is regarded as the

[10] See also Kruszewski (2019, pp. 46-65); Komierzyńska-Orlińska (2019, pp. 48-58).
[11] The Act of May 20, 1971, Code of Petty Offenses, Journal of Law 2021, item 2008, consolidated text from November 5, 2021.
[12] Judgment of the Supreme Administrative Court in Warsaw of September 26, 2008, II FSK 789/07, lex database no. 495147.
[13] Judgment of the Supreme Administrative Court in Warsaw of September 17, 1997 (II SA 1089/96), lex database no. 31312.
[14] Resolution of 7 judges of the Supreme Court of June 18, 1991, III CZP 40/91, lex database no. 3682; resolution of 7 judges of the Supreme Court of December 6, 1991, III CZP 117/91, lex database no 3709.
[15] For example: Act No. 40/1964 Call. Civil Code, as amended, Act No. 455/1991 Call. Trade Licensing Act, as amended, Act No. 530/2003 Call. On Commercial Register, as amended.
[16] Act No. 519/1990 Coll. Commercial Code, as amended.
[17] Act No. 455/1991 Coll. Trade Licensing Act.

subject of legal relationships, both rights and obligations. The Commercial Code[18] defines entrepreneurship as a continuous activity carried out independently by an entrepreneur in his own name and on his own responsibility for the purpose of making profit. Therefore, it is only activity which is carried out by an entrepreneur and at the same time cumulatively meets all requirements of the Commercial Code: continuity,[19] independence, conduct under the own name of an entrepreneur and under its own responsibility. An enterprise[20] is defined as a set of tangible as well as personal and intangible assets of a business. An enterprise includes things, rights and other property belonging to the entrepreneur and serving the operation of the enterprise or, by their nature, intended to serve that purposes (Eliáš, 1997). An enterprise can be defined as an economic and organisational unit formed by combining the activities of persons with means of a material nature.[21] The term enterprise is used in the legal order in different meanings, sometimes as an object of legal relations, sometimes as a subject of legal relations. According to the statutory definition, an enterprise for the purposes of the Commercial Code is not a subject of law (it has no legal personality) but is an object of legal relations. We can say that the enterprise is actually understood as a kind of a complex of business activities, carried out within one business entity.

3. DISAPPEARANCE OF A SOLE PROPRIETOR AND HIS BUSINESS ACTIVITY

3.1 Private Law Obligations

There is no doubt that the disappearance of a natural person who performs a business activity has an impact on the private law obligations binding such an entrepreneur. The fact of disappearance of the entrepreneur, due to the lack of care for the proper conduct of matters (i.e., payment of receivables or failure to receive correspondence) may have a negative impact on his or her situation and the content of obligations. For example, non-performance may result in the maturity of a liability or an increase in debt. In the event of non-voluntary performance of the service, the creditor may bring an action before the court (e.g., if the case concerns an unpaid invoice – an action for payment). When a missing debtor is obliged to pay, he or she must first be served with a copy of the statement of claim with attachments, which would be impossible in the analysed situation. Legal regulations do not provide for the so-called fiction of delivery. In connection with the above, it is worth considering the suspension or perhaps even termination of the business activity carried out by the missing sole proprietorship.

In the conditions of the Slovak Republic, in view of the above-described assumption of the existence of the legal personality of a natural person until the final

[18] Art. 2 Sect. 1 and 2 of the Commercial Code states that an entrepreneur is: a) a person registered in the Commercial Register, b) a person who conducts business on the basis of a trade licence, c) a person who conducts business on the basis of a licence other than a trade licence pursuant to special regulations, d) a natural person who carries out agricultural production and is registered in the register pursuant to a special regulation.

[19] Judgment of the Supreme Court of Slovakia of July 11, 1997, No, 4Sž 38/97 issued that: *"Continuity as a feature of entrepreneurship is related to the professional scope of the entrepreneurial licence and not all activities of the entrepreneur which are related to his/her entrepreneurship. The framework of the business is a defined range of activities which are fulfilled by the subject matter of the activity specified in the business licence and, at the same time, by activities which fall within this range according to the Trade Business Act and which are at the same time directly related to the implementation of the authorised activity."* (Patakyová, 2022, p. 21).

[20] Art. 5 of the Commercial Code.

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decision on the declaration of death, a missing person is regarded as a legitimate and proper subject of legal relations.

From a practical point of view, however, disappearance may create defects in the functioning of legal entities. The abovementioned can be seen in two ways. The first situation may include cases where a shareholder in a company is missing, while his real absence may have a negative impact on the operation of the company in the sense that it will not be able to perceive fundamental decisions within the scope of competences defined in the articles of association. Another alternative is if the missing person is the managing director of the company. This in itself, provided that the managing director is not at the same time the sole or one of the shareholders, does not prevent the company from functioning. However, if the acting for the company is set up in such a way that both managing directors act exclusively jointly for the company, the absence / disappearance of the other managing director may cause complications until the company decides to remove the managing director who is missing for one of the legal reasons. In the case of a sole trader's (entrepreneur's) disappearance, the most significant impact is the occurrence of default in the fulfilment of his/her obligations, which may manifest itself primarily, for example, in the creation of default interest or, secondarily, in the termination of existing contractual relationships.

3.2 The Suspension or Termination of Business Activity

It seems that in the circumstances of the disappearance of a sole proprietorship, it is highly desirable to suspend or even terminate its business activity. Therefore, it is worth referring to these issues more extensively.

The suspension of business activity according to polish law is a legal event, the occurrence of which depends on the entry in the CEIDG[22]. The rules for suspending a business activity are specified in the Entrepreneurs 'Law (Art. 22-25 Entrepreneurs' Law; see Powałowski, 2010). The legislator does not specify the reasons after which the suspension is possible, so such an action may be considered in the event of the entrepreneur's disappearance. The condition to the suspension is the lack of employment of employees. This means that employing at least one individual makes it impossible to suspend business activity. From the point of view of an entrepreneur-employer, employment contracts should be terminated before being able to take advantage of the possibility of suspending business activity (Kidyba, 2021).

In the case of a sole proprietor, the suspension may be made for an indefinite period, but not shorter than 30 days (an exception is February, see Art. 23 of the Entrepreneurs' Law) (Hauser, Niewiadomski and Wróbel, 2018). The beginning of the period of suspension of business activity begins from the date indicated in the application for the entry of information on the suspension of business activity and lasts until the date specified in the application or in the application for the resumption of business activity, if this date has not been specified in the application for suspension of business activity.

Suspension of business activity in the event of the entrepreneur's disappearance is a desirable action, because the effect is, above all, the release of the entrepreneur from public law obligations, e.g., social security obligations (for the period of suspension of business activity, an entrepreneur who is a contribution payer only for himself is not required to submit a declaration settlement and payment of social security contributions).[23] The effects of the suspension of business activity extend from the day

[22] Judgment of the Supreme Administrative Court of April 18, 2013, II GSK 192/12, lex database no. 1337109.
[23] Judgment of the Administrative Court in Poznań of May 25, 2017, III SA/Po 150/17, lex database no. 2306735.

on which the suspension begins to the day preceding the day of resumption of business activity. However, during the period of suspension of business activity, the entrepreneur is still obliged to settle obligations arising before the date of suspension of business activity, including private law (Lubeńczuk, 2019; Kozieł, 2019).

It is worth pointing out that during the period of suspension of business activity, the entrepreneur cannot perform business activity and generate current income from non-agricultural business activity. However, during the suspension of business activity, pursuant to Art. 25 sec. 2 of the Entrepreneurs' Law, the entrepreneur may undertake many activities, e.g., he or she may perform all activities necessary to maintain or secure the source of income, including termination of previously concluded contracts, he or she may accept receivables and is obliged to settle liabilities arising before the date of suspension of business activity, it may sell its own fixed assets and equipment, and it may generate financial income, also from activities carried out before the date of suspension of business activities (Kruszewski, 2019).

On the basis of the abovementioned *de lege ferenda* considerations, it can be considered the introduction of a provision providing for the suspension of the business activity of a missing sole proprietorship, as if automatically (*ipso iure*), without the participation of other entities. Such a solution would seem justified.

On the other hand, as for the termination of business activity, the legislator does not provide for the conditions that must occur in order to take such action. It is generally a right resulting from the freedom of economic activity (Art. 22 of the Constitution of the Republic of Poland of April 2, 1997[24], Art. 2 Entrepreneurs' Law) (Sieradzka, 2018). Due to the fact that the termination of a business activity is the most strongly interfering with the existence of business activity, as it definitively ends the functioning of the enterprise, as well as due to the uncertainty as to the fate of the missing person (sole proprietorship), the termination of his/her activity should be approached with a certain distance, i.e., such a solution as a last resort.

On the other hand, Slovak legislation provides for the suspension or revocation of a trade licence under the conditions prescribed by law. The Trading Licence Act provides for the possibility of revocation of a trade licence, including *ex officio* in accordance with Article 58 Sect 2 a, b, if he is in serious breach of his obligations or if he has not carried on business for a period of 4 years. As we have indicated, this may occur *ex officio* or at the initiative of a third party. It can be said in principle that a serious breach of duty need not occur as a result of mere missing persons. This would seem to be justified only in the case of the specific nature of trades, where there is a requirement to fulfil and at the same time to prove fulfilment of specific statutory conditions. In the case of long-term disappearance (where the death of the individual cannot be anticipated with the proof of death), the revocation of the trade would also come into consideration, unless the business ceases to operate without suspension for at least 4 years. In this respect, the close relatives may also notify the fact, which, on the other hand, does not change the fact that, until the trade is closed, the relevant legal relationships may legitimately arise.

3.3 Entities Authorised to Act on behalf of the Missing Sole Proprietor

As can be seen from the above considerations, the rights and obligations of the entrepreneur under the concluded contracts, despite the disappearance, continue to exist and are charged/legitimised by the missing entrepreneur. The entrepreneur is liable with all his assets for obligations arising as a result of running the business. Everyone is

[24] The Constitution of the Republic of Poland of April 2, 1997, Journal of Law 1997, no. 78, item 483.

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responsible for their own actions and omissions, therefore, until the missing person is deemed deceased, neither family members (e.g., children, spouse, parents, siblings) or other relatives (e.g., son- or daughter-in-law) are responsible for a missing person who is a sole proprietor, but also cannot – for the mere fact of being a close person – act on behalf of the missing entrepreneur in order to pursue his debts.

Similarly, when it comes to taking actions on behalf of a missing person – a sole proprietor, actual and legal acts should be distinguished. Actual acts, e.g., the release of goods under a sales contract concluded by the entrepreneur before their disappearance, can be performed by anyone (the actual act cannot be invalid). In turn, a legal act (e.g., creating a sales contract) to be valid (fully effective) must be performed by an authorised entity (authorised to act on behalf of the entrepreneur).

Therefore, it can be indicated that in the event of the disappearance of a natural person who is a sole proprietor, legal actions in certain circumstances may be performed by the following entities: attorney-in-fact; proxy[25]; custodian established pursuant to Art. 184 of the Act of February 25, 1964, the Family and Guardianship Code[26]; a custodian established pursuant to Art. 144 of the Act of November 17, 1964, Code of Civil Procedure[27] (the so-called procedural custodian for an unknown from the place of stay); or prosecutor.

An attorney-in-fact is an entity authorised to act on behalf of a missing entrepreneur if the latter has granted him an appropriate power of attorney prior to his or her disappearance. It should be emphasised that the disappearance of an entrepreneur does not terminate the power of attorney (cf. Strugała, 2021). The power of attorney expires with the death of the principal or the death of the attorney-in-fact, unless the parties have stipulated otherwise in the power of attorney itself. It is possible to grant general, specific, and for a particular act power of attorney. The general power of attorney confers authorisation for all acts of ordinary management. For acts that are beyond the scope of ordinary management, a power of attorney specifying their type is required (specific power of attorney), unless the law requires a power of attorney for a particular activity (Wolter, Ignatowicz and Stefaniuk, 2018).

As indicated, the entity authorised to act on behalf of the missing entrepreneur may also be a proxy appointed by this entrepreneur (Powałowski, 2012; Stadnik–Jędruch, 2013). A proxy is a special type of power of attorney (see Krauss, 2012, pp. 125-134) authorised to perform court and out-of-court actions related to running the enterprise (Szwaja, 2005). The scope of the proxy is wide as it does not cover only legal actions for which it is necessary to have a specific power of attorney, i.e., legal actions leading to the sale of the enterprise, commissioning the enterprise for temporary use, as well as selling and encumbering real estate. The proxy expires upon the death of the holder of a proxy. It is possible to establish a joint commercial proxy in which the commercial proxy must act jointly with the entrepreneur. Also in this case, the joint proxy expires upon the death of the holder of a proxy. On the other hand, the death of the entrepreneur, as well as his or her disappearance, does not terminate the proxy (Doliwa, 2016).

The next entity authorised to act on behalf of a missing entrepreneur is a custodian appointed pursuant to Art. 184 of Family Code (see Panasiuk, 2015, pp. 115-127), which is about situations where the missing person has not previously appointed an attorney-in-fact, or the granted power of attorney does not adequately guarantee the

[25] Known as well as commercial proxy.
[26] The Act of February 25, 1964, Family and Guardianship Code, Journal of Law 2020, item 1359, consolidated text from August 20, 2020, hereinafter: **the Family Code**.
[27] The Act of November 17, 1964, Code of Civil Procedure, Journal of Law 2021, Item 1805, consolidated text from October 4, 2021, hereinafter: **the Code of Civil Procedure**.

protection of the missing person's rights. An application for the appointment of a custodian may be submitted by any interested party, including third parties who exercise or intend to exercise their rights arising from legal relations with the missing person. In application it is reasonable to indicate the person who may be a custodian. Best is if the function of custodian is performed by a relative who cares about securing the property of missing person. The role of the custodian is to protect all rights of the missing person, both property and non-property (Moszyńska, 2021). The custodian has the same rights as the person he or she replaces (the missing one), i.e., he or she can perform an action that could be performed by the party if he or she could personally represent its interests. Above all, however, its task is to search for a missing (absent) person, as well as to exercise ordinary management of their property, and thus to perform the necessary factual and legal actions aimed at preserving the property. Carrying out these activities is subject to control by the guardianship court, which may issue the necessary orders and, in the event of defaults on the part of the custodian, deprive him or her of his function. The custodian is obliged to exercise due diligence in the interests of the missing person (according to Art. 154 of the Family Code in connection with Art. 178 § 2 of the Family Code). The custodian acts on behalf of the missing person, representing his or her interest, therefore the actions taken by the custodian have consequences for the replaced person. The custodian is a legal representative of the missing person acting on behalf and in the interest of the missing person, and therefore he or she is not entitled to bring an action in his or her own name and on his or her own account. Establishing a custodian pursuant to art. 184 of the Family Code makes it unnecessary to appoint a custodian established pursuant to Art. 144 of the Code of Civil Procedure. What is important from the point of view of the missing person is that the custodian's power over the elements of the property of the missing person only takes the form of 'an actual holder'[28], who exercises vicarious power on someone else's behalf. Social perception may be similar to the state of possession, but the holder has no will to possess or rule over things for himself, but will to act for the sake of the subject on behalf of whom he rules.

Another entity authorised in the analysed circumstances is a custodian established pursuant to Art. 144 of the Code of Civil Procedure, i.e., a procedural custodian for a person unknown from the place of stay. The powers of the procedural custodian are limited only to taking procedural steps or other actions in civil proceedings necessary to defend the rights of the absentee. These activities and actions include: taking a position on the opponent's demands (the applicant, other participants), submitting motions and statements, participating in hearings during which evidence is taken and the results discussed, raising material and procedural allegations, and taking other actions appropriate due to the state of the case, including bringing, if necessary, means of appeal (see also Kotłowski, Piaskowska and Sadowski, 2010, p. 701 et seq.; Jurzec-Jasiecka and Jasiecki, 2014, pp. 64-71). The custodian may not make or accept substantive statements on behalf of the person for whom he has been established.[29] A prerequisite for the appointment of a custodian is substantiation that the party's whereabouts (place) are unknown.[30] The party's claim that it does not know the current place of residence (stay) of the opposing party cannot be regarded as substantiating. In judicial practice, grounds for appointing a custodian are proven by documents such as written information from address offices or population registration authorities. In view of

[28] According to art. 338 of the PCC – anyone who has actual control of a thing on behalf of another person is the actual holder of the thing.
[29] Judgment of the Administrative Court in Szczecin of June 18, 2014, I ACa 236/14, Legalis 1241503.
[30] Decision of the Supreme Court of July 10, 2020, III CZ 16/20, lex database no. 3054429.

the practically unlimited use of trips and periodic stays abroad, the criteria for assessing whether it is substantiated should be tightened accordingly.

Finally, an entity that may undertake procedural activity in the field of the rights and procedural obligations of the missing entrepreneur is the public prosecutor, who, pursuant to Art. 7 of the Code of Contentious Civil Procedure may request the initiation of proceedings in any case, as well as take part in any pending proceedings, if, in his opinion, it is required to protect the rule of law, citizens' rights, or social interest. The prosecutor independently assesses the premises justifying the request to initiate civil proceedings or to report their participation in them. Although it seems that the fact of the disappearance of a person and the possible negative consequences thereof should prompt him to initiate proceedings, the protection of individual, most just, interests is not always the protection of, e.g., social interest (Grzegorczyk and Jędrzejewska, 2016). This means that the prosecutor may, but does not have to, initiate (or join) proceedings on behalf of the missing person or against the missing person (Pogonowski, 2021), as there is no provision that would impose an obligation on the prosecutor to act in such circumstances. The prosecutor's power extends to all stages of the proceedings, i.e., examination (e.g., a claim for payment for failure to pay for the service provided), enforcement, or security proceedings. The prosecutor may undertake procedural activities on his own initiative, communicating with the person concerned, instructing him or her about his or her rights. Thus, the prosecutor may initiate proceedings as a result of an application (application) submitted to the prosecutor's office by, for example, a relative of a missing person, especially when the deadline for submitting the request is approaching or when the limitation period for the claim is close.

It is worth noting that the closest persons (in the sense of the circle of heirs of the sole proprietorship) may continue the business activity of the missing person only in the event of establishing (in any way) the death of the missing entrepreneur (including declaring him or her deceased), which takes place on the basis of the inheritance provisions (Art. 922, 924 and 925 of the Civil Code; see also, e.g., Kawałko, 2019), as well as regulations with a succession management.[31] As a side note, it is worth pointing out that the death of a natural person (including declaring him or her deceased) does not make the enterprise lose its ability to operate, i.e., concessions, licenses, consents, permits relating to the business activity of the deceased sole proprietorship, etc., do not automatically expire.

To analyse the above on the basis of Slovak law, it should be noted that the term "disappearance" is not specifically defined in Slovak law. Disappearance is perceived as a situation associated with uncertainty about the life of a person (Lavický, 2014). The disappearance of a person can be caused by a variety of factors. The material legislation does not specify the period during which this situation remains, or when the procedure for declaring a person dead may be initiated. The adequacy of the period will be assessed by the court, but information relating to the last appearance of the person, or when and where he or she was seen, may affect the determination of the estimated date of death. It should be noted that the concept of disappearance also occurs in the context of defining the scope of the police force's jurisdiction.[32] If a search for a missing person is unsuccessful, such a search shall be automatically revoked 20 years after its declaration. Notwithstanding the foregoing, it is possible for a person who has a legal interest in the

[31] See: The Act of July 5, 2018, about succession management of a natural person's enterprise and other facilities related to the succession of enterprises, Journal of Law 2021, item 170; also, e.g., Wrzecionek (2020, p. 23 et seq.).

[32] Zákon č. 171/1993 Z. z. o Policajnom zbore v platnom znení, Nariadenie MV SR č. 53/ 2007 o postupe pátraní po osobách a veciach.

matter, and if the conditions in section 7(2) of the Civil Code are fulfilled, where it is assumed that the person is not alive, to bring an application for a declaration of death. In proceedings for a declaration of death, a procedural guardian shall be appointed to represent the person to be declared dead in the proceedings. The question therefore arises as to how the interests of a natural person who is missing can be protected.

An entrepreneur may, in the course of his/her business, grant various powers of attorney for representation, whether to specific natural or legal persons, as well as to attorneys in the scope of the provision of legal advice and legal services. These powers of attorney shall continue until the person is declared dead, unless otherwise terminated, e.g., by resignation by the attorney.

If no power of attorney has been granted by the missing natural person, the possibility of appointing a guardian pursuant to Section 29 of the Civil Code may be considered. Pursuant to Art. 29 of the Civil Code, a guardian may also be appointed for a natural person whose residence is unknown, and by applying the rules of interpretation, although these concepts cannot be compared, a missing person may also be considered as such a subject. In addition to the primary condition, i.e., that the person is a person whose residence is unknown, there must also be a second condition, which is that the appointment of a guardian is required by the public interest. The Civil Code, in the intentions stated, uses the term public interest, which is abstract in nature, and should be interpreted in the context of the facts of the case, where the appointment of a guardian is at the issue. However, the term public interest cannot be interpreted as it must be the common interest of all persons concerned. However, what appears to be in the public interest of the majority does not necessarily must be considered to be in the public interest from the point of view of the persons whose rights (including property rights) are being limited. In this view, the public interest is variable and must therefore always be considered in the context of a particular decision-making process. The authors further state that it has a preferential status over other partial or individual interests (Baricová et al., 2018).

With reference to the above definitions, we could therefore consider the public interest, as a condition for the appointment of a guardian for a missing person justified where enters into a wide range of legal relationships from which rights and obligations arise and, in the context of his or her missing status, there is therefore a risk of default. In the same way, emphasis can be laid not only on the protection of the missing person, but also primarily on the protection of third persons who interact with the missing person, as well as on the close relatives of the missing person, whose disappearance may have a legal impact on them.

It cannot also be omitted to refer to the person who comes into consideration as a guardian under material law. Where the missing person is married, the spouse will normally be appointed as guardian. If he or she is not married, it will normally be someone close to him or her, but it remains a condition that that person agrees to his or her appointment as guardian.

4. RESPONSIBILITY FOR OBLIGATIONS AND THE MATRIMONIAL PROPERTY REGIME

It is a rule that the debtor is personally responsible for the obligations incurred. However, depending on the marital status and the matrimonial property regime, it is also possible to claim liability against his or her spouse. When discussing the situation of a sole proprietor (a missing natural person), it is also worth referring to his or her personal situation, i.e., in terms of marriage.

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According to Polish law, if the missing sole proprietor was not married, family members are not responsible for the obligations incurred by him or her. It is a similar situation to when a person is missing while married, but the spouses remain separated in their property (see, e.g., Jędrejek, 2011, pp. 261-264). On the other hand, in a situation of joint property between spouses, liability depends on whether the contract constituting the source of liability of the missing sole proprietorship was concluded with the consent of the other spouse or without such consent (see also Pokora, 2014; Łukasiewicz, 2014, pp. 119-120). If the other spouse has consented to the conclusion of the contract, the creditor may also claim satisfaction from the joint property of the spouses. However, when the contract was concluded without the consent of the other spouse, the creditor may demand satisfaction from the debtor's personal property, remuneration for work or income obtained by the debtor from other gainful activity, as well as from the benefits obtained from his copyrights and related rights and property rights, and industrial and other rights of the creator, and if the claim arose in connection with running the enterprise, also from the property belonging to the enterprise (art. 41 § 2 of the Family Code). In a situation where a final judgment was passed against the missing sole proprietor, and the creditor proves by means of a document (e.g., an invoice) that the obligation arose in connection with running the enterprise, the court may issue an enforcement clause against the debtor's spouse. In this case, enforcement will be limited to the enterprise forming part of the joint property, and when the creditor shows that the debtor's spouse has consented to incurring the obligation, the enforcement will cover all items included in the property of the joint enterprise and his spouse (cf. Lipińska, 2017).

It is worth noting that due to the possibility of being liable for the obligations of sole proprietorship whose place of residence is unknown, the spouse may request the separation of property. Pursuant to Art. 52 § 1 of the Family Code, each of the spouses may, for important reasons, request that the court establish property separation. The prerequisite for the ruling on the separation of property between spouses was not formulated in a specific manner. It is indicated that it is a situation involving a violation or a serious threat to the property interests of one of the spouses (the one who remained), and thus the good of the family (Kubica and Twardoch, 2021). This condition does not have to be the fault of either spouse. Therefore, it should be assumed that the occurrence of these premises as a result of the disappearance of a person fulfils the disposition of Art. 52 § 1 of the Family Code.

5. SUMMARY

The disappearance of a natural person and uncertainty as to his fate can cause a lot of worry for relatives. Apart from the emotions associated with this fact, there are also numerous legal problems, including those indicated in this study. The disappearance of a natural person engaged in business activity has an impact on this activity, both the situation existing until the disappearance and at the time of the disappearance of the sole proprietorship. People closest to the missing person will certainly be interested in security, in the sense of taking care of "interests" or avoiding harm to such a sole proprietorship. Since statutory regulations (not only in Poland and Slovakia) only decide when and under what circumstances a missing person may be considered dead, which equates the situation of a missing person with their death, solutions to specific issues related to the disappearance, such as in the case when the missing person is a sole proprietorship, should be resolved by reviewing and interpreting all applicable legal provisions. As it turns out, both under Polish and Slovak law, until the missing person is recognised as dead, family members or other relatives do not have any competence to

take any action on behalf of the missing sole proprietorship. In such circumstances, other entities may operate, i.e., as indicated in the work – attorney-in-fact, proxy, custodian prosecutor. Whether the actions taken by the indicated persons will be effective can be assessed in specific circumstances.

Similarly to the Polish law, the Slovak legal regulation also sufficiently doesn't regulate the situations arising in cases where the entrepreneur is missing until recognised as dead. Mainly the possible length of the proceedings, as well as the absence of a clear legal solution in the situation requiring the appointment of a guardian raise the need for legislative changes.

The provided analysis and comparison proved that both jurisdictions require *de lege ferenda* the appropriate regulation providing for the suspension of the business activity of a missing sole proprietorship by operation of law, without the participation of other entities.

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THE EMERGENCE OF LESBIAN THEORY OF LAW – WHY AND HOW THE LESBIAN THEORY OF LAW HAS BEEN DEVELOPED / Dominik Šoltys

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Abstract: *In the late eighties of the 20th century, the methodological reflection of lesbian identity arose within the framework of feminist jurisprudence. Although the original intention was to include lesbian identity in a woman's identity, in a relatively short period there was a sudden break. Lesbian identity became a distinct identity considered to be the central position of lesbian jurisprudence. This study presents the peculiar features of lesbian legal theory. It tries to point out the historical and ideological determinants that led lesbianism to enter (legal) feminism. Lesbian separatism also took part in this development. It turned out to be the main reason for the separation of lesbian legal scholars from the feminist jurisprudence. The study presents the core ideological assumptions that constitute the theoretical nature of the lesbian theory of law, which is based on lesbian (legal) experiences.*

Key words: *Lesbianism; Lesbian Jurisprudence; Heterosexism; Lesbian Theory of Law*

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1. INTRODUCTION

We, as lawyers, have been trained to understand and use all those abstract, objective, universal concepts that are logically connected to create one single system. An analytical way of thinking is still the tool for examining the law to find the solutions to legal problems. The epistemological boundaries of such thoughts have been eroded by critical legal studies (see, e.g., Solum, 1997, p. 45). Since then, jurisprudence and legal theory have faced their inside defragmentation. The radical theories of law, which formed the outsider jurisprudence together, have brought their attention to the role of diverse identities in law and *vice versa* (Šoltys, 2022). The lesbian theory of law is part of this movement. It examines in different ways how law has treated lesbians as a non-existing legal subject.

This study aims to clarify the causes of the emergence and ideological assumptions of lesbian jurisprudence. This cannot be fulfilled without considering the ideological background and ongoing discourse since the early seventies of the 20th century. Since then, the idea of forming a specific branch of legal theory for lesbians has arisen. For this reason, the first part of the study is devoted to the explanations of the

early role that lesbianism played in feminism. The connection between lesbianism and feminism resulted in the creation of lesbian feminism as a very peculiar form of feminism.

The second part of the study is already devoted to historical and ideological sources at the end of the eighties of the 20th century, which enabled lesbianism to enter jurisprudence in the framework of feminist jurisprudence. Following this, it focusses on the failed integration of lesbian identity into a gynocentric position of feminist jurisprudence. In addition, the study also deals with the strategic departure of lesbian theory of law from feminist jurisprudence.

The third part of this study presents the theoretical features of the lesbian legal theory. It describes seven theoretical features. These features create a basis for the future formation of the proper methodological position suitable for the lesbian theory of law. The lesbian theory of law, in this sense, is a jurisprudence whose main goal is to theoretically express the lesbian identity in jurisprudence and law.

The intention of the fourth part, in turn, is to present the concept of lesbian identity as the central position of lesbian jurisprudence. The lesbian identity creates a space for critical and normative thoughts in lesbian jurisprudence. The lesbian identity shows its complexity, which cannot be reduced to sexuality alone. Further, it emphasises that lesbianism is a different vision of relationships, society, politics, culture, law, and indeed everything that makes up the outside world. In this sense, it shows how anti-essentialism was decisive in capturing the diversity of lesbians and the lives they lead. Lesbian identity thus becomes a portal for jurisprudence through which a new epistemological reality opens.

In particular, the study focusses on the historical and ideological assumptions that contributed to the emergence of lesbian jurisprudence as a distinctive and peculiar theory of law. In this context, another objective of this study is to define the nature of the lesbian theory of law as a representation of identity politics in jurisprudence. The lesbian legal theory represents the legal reflection of the lesbian identity and therefore constitutes its own theoretical and methodological position. Such a position puts lesbians - their lives, experiences, desires, needs, problems, etc. - in the centre of all inquiries into law.

2. LESBIANISM – ITS ENTRY INTO FEMINISM AND ITS DEPARTURE FROM FEMINISM

Lesbianism can automatically, but often incorrectly, be associated with feminism. Within feminism, lesbian feminism came to the fore during the seventies of the 20th century. Lesbian feminism, as one of many forms of feminism, did not suddenly arise. It is the result of intricate discussions and activities between feminism and lesbianism. They have not taken place without several controversies (see Echols, 2019, pp. 210-215).[1] The initial milestone in the emergence of lesbian feminism was the publication of the Woman-Identified Woman manifesto, written in 1970 by the members of the New York radical lesbian organisation Radicalesbians. However, it should also be

[1] The dispute between lesbianism and heterosexual feminism within feminism itself culminated in the sixties and seventies of the 20th century. Mainly, it was a dispute between Betty Friedan - former president of the most important feminist organisation in the United States the National Organisation for Women also known as "NOW" - and lesbians within feminism. Friedan worried that the topic of homosexuality and lesbianism might ultimately discredit the entire feminist movement. She accused the lesbian movement of collaborating with the CIA and pejoratively referred to them as the "lavender menace." Officially, the topic of women's sexual orientation came within the scope of the feminist organisation's goals only in 1971, i.e., after Friedan left the post of president of NOW.

added that lesbian political activism began to take shape earlier, i.e., in the USA during the sixties.

The lesbian form of feminism was based on the theoretical premise and hypothesis that women's subjugation is derived from patriarchal oppression and the imposition of heterosexuality on women. Patriarchy then classifies other sexual orientations (i.e., different from heterosexuality) as deviant, abnormal, and unnatural. This thesis is very close to the view expressed by writer and lesbian feminist Adrienne Rich under the term "compulsory heterosexuality" (Rich, 1980, 2003). Quite simply, patriarchal heterosexuality becomes a universally socially valid norm, in the sense that the only, desirable, healthy, or natural expression of emotional and sexual desires takes place in a binary male-female relationship.

Lesbian feminists referred to the normative and coercive nature of heterosexuality by the term "heterosexism." Heterosexism is a specific form of oppression that grows out of society's preferred sexual relations between a man and a woman as a fulcrum of the existence, functioning, and future preservation of society. For these purposes, homosexual relationships, either between men or between women, are seen as obsolete because they are not, by their very nature, socially reproductive (see Finnis, 2011, pp. 124, 447 et seq.; George, 2004, pp. 147-151). In this context, however, criticism of heterosexism must not be a criticism of - and consequently a rejection of - personal sexual preference and erotic sensitivity towards persons of the opposite sex. Proponents of lesbianism and lesbian feminism express criticism of heterosexuality as a social construct and a normative social system with a coercive institutional background that leads to the enforcement of heterosexuality.

Lesbian feminism has turned attention to the politicisation of sexual orientation and thus the fact that heterosexuality is nothing more than an ideology. The process of politicisation of sexual orientation transforms heterosexism into a political ideology that is against lesbian and male gay people. By elevating heterosexuality to the political level, it has built mechanisms designed to ensure women's sexual availability to men. However, this mechanism would not be fully effective if there were no dominant male positions of power in society *vis-à-vis* submissive women.

It is the concept of "woman-identified woman", which was originally introduced by the lesbian-feminist movement Radicalesbians (Radicalesbians, 1970).[2] It appeared later in the works of the lesbian feminist theorist Charlotte Bunch. Bunch presents it in a theoretically more sophisticated form with an appeal to the purity of femininity unspoiled by heterosexuality (Bunch, 1975, p. 30).[3] She writes about lesbians as the ideal of an authentic woman untouched by men and heterosexual patriarchal oppression. Bunch's concept of a woman-identified woman has called for authentic self-identification and self-determination of women, which only women can do on their own. As a woman-

[2] The original manifesto captures the socially established and derogatory meaning of the term "lesbian". This meaning referred to troubled women. "Lesbian" describes a woman who challenged the dominance of men: "Lesbian is a label invented by the Man to throw at any woman who dares to be his equal, who dares to challenge his prerogatives (including that of all women as part of the exchange medium among men), who dares to assert the primacy of her own needs. To have the label applied to people active in women's liberation is just the most recent instance of a long history; [...] For a lesbian is not considered a 'real woman'" (Radicalesbians, 1970, p. 2).

[3] Bunch highlights the importance of reciprocating love between women. That is, a woman's love for a woman accomplishes a liberating potential, while a woman's expressions of affection and love for a man significantly weaken this potential. Bunch writes about it in the following words: "If women do not make a commitment to each other, which includes sexual love we deny ourselves the love and value traditionally given to men. We accept our second-class status. When women do give primary energies to other women, then it is possible to concentrate fully on building a movement for our liberation" (Bunch, 1975, p. 30).

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identified woman, a lesbian is a role model for other women. It is a woman whose consciousness, actions, and life are not a demonstration of heterosexual male colonisation of the female body and mind. In other words, a lesbian is a woman who has formed herself independently and authentically and is therefore pure proof that women's existence is possible without an otherwise artificial need or desire for men.

More importantly, the concept of a woman-identified woman also has political potential. In its meaning, it has very quickly tended to lesbian messianism within the feminist movement. This is very evident in Bunch's ideas and her concept of woman-identified lesbianism. Lesbians become the political quintessence of feminism (Carter and Noble, 1996, p. 25). Bunch points out that only lesbianism "puts women first while the society declares the male supreme. Lesbianism threatens male supremacy at its core" (Bunch, 1975, p. 29).

Another radical and lesbian feminist, Ti-Grace Atkinson, affirms the strategic importance of lesbians and lesbianism in the struggle for women's equality with the phrase "Feminism is the theory, lesbianism is the practice." The authorship of this phrase often goes to Ti-Grace Atkinson. However, other sources dispute Atkinson's original authorship of it (King, 1994, pp. 125 et seq.).

Although the meaning and actual relevance of this phrase are questioned in contemporary feminism and lesbianism, it does not change the fact that, according to Atkinson, lesbianism was originally considered a politically effective practice for feminism. Therefore, according to her, all feminist women need to become political lesbians. Nevertheless, not become lesbians in an erotic-sexual sense, but rather women who reject their bodies and minds to men, relationships with men, as well as they reject any other institutional expressions of masculinity. Women's conviction to become lesbians was not about a mere change in personal erotic desire and sexual orientation - Atkinson herself preferred celibacy over actively engaging in lesbian sexual practices - but, above all, it was intended to be a political act aimed at the political goal of women's equality (Hesford, 2013; McBean, 2021).[4] Atkinson confirms this in the following words: "There are other women who have never had sexual relations with other women but who have made, and live, a total commitment to this movement. These women are 'lesbians' in the political sense" (Atkinson, 1974a, p. 132). Lesbianism, she says, is more a conscious political act than a sexual movement of women. Its task is to bring women together and unite them in the struggle against patriarchy. Therefore, lesbianism is a good opportunity to develop effective feminist strategies and tactics (Atkinson, 1974b).

Lesbianism does not need to have a purely political source and a political nature. Radical and lesbian feminist and writer Adrienne Rich writes about "lesbian existence" and the "lesbian continuum". Rich, unlike Atkinson, presents lesbianism as an inherent essence present in all women. Lesbianism is therefore the natural moral imperative of women (Radner, 2008, p. 96). Lesbian existence is a "source of energy, a potential springhead of female power 'aimed' to change the social relations of the sexes, to liberate ourselves and each other" (Rich, 2003, p. 34). Lesbianism, according to Rich, leads women to a specific bond and union between them. It helps them to defy the pervasive and imposing heterosexuality. This invisible, moral, and spiritual companionship among women - referred to as the lesbian continuum - helps them overcome historical

[4] For example, Victoria Hesford also points out that the political form of lesbianism in Atkinson does not say anything about the women's ontological reality: "Women who choose to become lesbians within the context of the women's movement are now women who most clearly and visibly choose to define themselves politically as a body of people separate from men. The practice of lesbianism becomes a revolutionary act and identifying as a lesbian becomes a way of organizing and enacting class solidarity" (Hesford, 2013, p. 142).

disadvantages against women. Although its source is not political, it can also have political implications. It aims to historically free women from the burden of patriarchal heterosexuality.[5]

However, those forms of political lesbianism and lesbian separatism, although in the original sense intended to strengthen the achievement of feminist goals, eventually led the later lesbian authors to draw attention to the differences between sexism and heterosexism. They recognised the duality and separability of sexism and heterosexism as two distinct forms of oppression. Later lesbian authors have increasingly begun to realise that the fall of patriarchy does not necessarily lead to the elimination of heterosexism. Following this, Cheshire Calhoun points out that in the case of the elimination of patriarchal oppression, "[h]eterosexual society may simply adapt to new social conditions. Thus, it is a mistake for feminists to assume that work to end gender subordination will have as much payoff for lesbians as it would for heterosexual women" (Calhoun, 1994, p. 562). Thus, the duality and separability of heterosexual and patriarchal structures resonated increasingly within the feminist and lesbian theories. In this way, later lesbian theorists corrected the thesis of early lesbian feminists such as Charlotte Bunch, Adrienne Rich, Gayle Rubin, and Monique Wittig. The early lesbian feminists argued that heterosexism is as much an oppressive system for women as it is for lesbians. They stressed out that the main function of patriarchal heterosexism is to make women dependent on men and to encourage women's sexual availability to men (Calhoun, 2002, p. 29).

The duality and separability of heterosexism and sexism state that heterosexist oppression against lesbians and gays differs from sexism, racism, classism, ableism, and ageism, as well as other forms of oppression. Above all, heterosexism as a distinct form of oppression places lesbians and gays outside the framework of society, both in the public and private spheres. In the public sphere, this oppression manifests itself mainly in the fact that at least a semblance of a heterosexual identity is imposed on the individual, which he must choose for himself. It denies the full identification and realisation of lesbian or gay identity. In the private sphere, heterosexism excludes lesbians and gays by denying them full access to marriage and family life, of which child rearing is an essential part (Calhoun, 2002, p. 76).

3. FROM LESBIAN LEGAL FEMINISM TO LESBIAN THEORY OF LAW

The emergence of lesbian jurisprudence or lesbian theory of law is associated with the entry of lesbianism into feminist legal philosophy. This entry was as controversial and problematic as lesbianism's entry into feminism. It tested, in the same way, the possibilities of feminist legal theory. However, the entry of lesbians into feminist jurisprudence occurred relatively late - namely, it falls either in the late eighties, or at the turn of the eighties and nineties of the 20th century.

Patricia A. Cain raised the issue of lesbianism and feminist jurisprudence in 1989 at the twentieth National Conference on Women and the Law. It all started with a critical question: "Why is the lesbian so invisible in feminist legal theory? Why is 'my reality' so

[5] According to Rich, heterosexuality forces itself on women both in violent and less violent ways. She writes about it as follows: "Heterosexuality has been both forcibly and subliminally imposed on women. Yet everywhere women have resisted it, often at the cost of physical torture, imprisonment, psychosurgery, social ostracism, and extreme poverty" (Rich, 2003, p. 30). Another example can be the non-violent imposition of heterosexuality, which romanticises it with beauty, tenderness, and other idealizations of heterosexual relationships.

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different from 'their reality'? And what reality is true? For the postmodernist, the last question is meaningless. But the first two are not" (Cain, 1989-1990, p. 214). Cain pointed out that feminist jurisprudence of the time had not sufficiently developed an authentic lesbian experience within itself. At that time, to avoid an "assimilation/essentialist trap", she pointed out that it is by no means possible to reduce the experiences of lesbian women to those of heterosexual women (Cain, 1989-1990, p. 207). Although Cain challenged the methodological layout of the lesbian perspective of feminist jurisprudence, she later came to believe that 'lesbian' and 'woman,' that 'lesbian' and 'feminist,' are not overlapping categories. We do not, as lesbians and nonlesbians, have the same experiences or perspectives" (Cain, 1994, p. 70).

As can be seen, Cain's original intention was to create an anti-essentialist form of lesbian legal feminism within feminist jurisprudence. Cain argued that essentialism carries the threat of the universalisation of women and the uncompromising validity of biological determinism for women. According to her, all feminist claims express some sort of universalism because they "often reify the concept of woman in a way that ignores the varying experiences of different women" (Cain, 1994, p. 47). She made similar claims about the dangers of biological determinism: "Female biology determined that women would become mothers and caregivers and, that women, as the weaker sex, would be dependent on man. Patriarchal theories about the roles of the two sexes used arguments from biology to keep women in their subordinate roles" (Cain, 1994, p. 48).

Thus, an appropriate theoretical prerequisite for the inclusion of lesbians in the framework of feminist jurisprudence is anti-essentialism. Anti-essentialism brings an assumption about the socio-structural nature of the concept of "women". Cain justified it this way: "We must also bear in mind that the meaning of 'woman' is constantly changing, and that feminist theorizing should continuously work to destabilize the category woman so that it never becomes too fixed, while at the same time allowing individual women to "assume" a meaningful female identity" (Cain, 1994, p. 52). However, she later realised that feminist jurisprudence, with its political focus and topics based on the experience of heterosexual women, was incompatible with the incorporation of lesbian experience and perspective into feminist legal thoughts. Thus, feminist jurisprudence could not become a politically and thematically productive theoretical basis for the development of lesbianism.

This leads to the conclusion that the methodological set-up, goals, and strategies of lesbians may differ from those of legal (heterosexual) feminists. In other words, critique and possible rejection of marriage and family life as a form of patriarchal oppression against heterosexual women may be a strategic goal for feminists and feminist legal theorists, but for lesbians, marriage, and family life, on the contrary, represent an extension of their rights and freedoms (Robson, 1994). To put it simply, Cain points out differences between feminist and lesbian assessments of social institutions, which can result in different methodologies, goal settings, legal strategies, and tactics. Above all, Cain finally argues that feminist jurisprudence is an unsuitable theoretical approach for integrating lesbian existence and lesbian perspective. The subsequent theoretical elaboration of the lesbian identity in the framework of feminist legal theory, is impossible.

The idea behind Patricia A. Cain is that although she initially had high hopes for feminist jurisprudence and believed that lesbian experience would be clarified as another form of female experience, she later decided to turn to the possibilities of creating a separate - i.e., developed outside of feminist jurisprudence - lesbian jurisprudence. Her reason for moving away from feminist jurisprudence was the persistent essentialism and biological determinism in feminist jurisprudence.

In the early nineties of the 20th century, Ruthann Robson was already thinking about the emergence of independent lesbian jurisprudence trying to delineate the first features of its conceptual form. Lesbian theory of law is, in her eyes, a question of lesbian representation in the law and legal theory. Robson stressed out that the current concept of the rule of law did not provide a guarantee of lesbian equality (Robson, 1992, p. 19). The main purpose of lesbian jurisprudence is to create legal concepts, categories, and meanings that relate to lesbian experiences, lives, and perspectives.

The emergence of lesbian jurisprudence and lesbian theory of law has prompted the recognition that other approaches to law, i.e., traditional jurisprudence, feminist jurisprudence, queer theory of law, as well as other gay studies of law, cannot sufficiently perceive lesbians' increased vulnerability to law (Arriola, 1994, p. 106). Cain agrees with this when she orientates lesbian jurisprudence towards a specifically existing lesbian experience and perspective. Its purpose, according to Cain, is to realise "those [lesbian] ideals in the real world we live in" (Cain, 1994, p. 73). Similarly, Robson accused the feminist jurisprudence of its heterosexual character. Moreover, lesbian jurisprudence confirms heterosexuality by the fact that it did not include lesbians in the scope of its examinations (Robson, 1990, p. 448). In doing so, she emphasises the different methodologies and purposes of lesbian jurisprudence (Robson, 1990, pp. 451 et seq.). In summary, Robson formulates the character of lesbian jurisprudence as "jurisprudence which takes as its subject lesbians, lesbian issues, and problems that affect lesbians, and lesbian jurisprudence is set within an organic context, coexisting with other jurisprudences" (Robson, 1990, p. 453). The purpose of the lesbian theory of law itself is not to prove and then challenge the patriarchy of law, as feminist jurisprudence does, but to make lesbians visible. Lesbian jurisprudence aims to prevent ignorance or even assimilation of lesbians by law, or, as Robson puts it, to ensure the very "survival" of lesbians in the current rule of law. Therefore, Robson claims: "Lesbian theory of law is grounded in the lesbian existence" (Robson, 1992, p. 21). It examines the law and individual laws and, in particular, how the law negatively affects lesbian lives, either through an individual lesbian position or a collective lesbian position (Eaton, 1994, p. 194).

In summary, therefore, the lesbian legal theory arose from the thesis that eliminating sexism does not necessarily lead to the elimination of heterosexism. Feminist jurisprudence, as a direction of legal reasoning, is not aware of this fact and is unable to provide a framework of legal theory for solving lesbian problems. The feminist emphasis on comparing women with men, according to lesbian legal theorists, is a manifestation of heterosexist prejudices that lesbian theory of law can overcome by relativising the theoretical meaning of the categories of sex and gender (Zimmerman, 2000, pp. 451-452).

4. RUTHANN ROBSON ON LESBIAN LEGAL NON-EXISTENCE

Robson explores the relationship between the historical and contemporary forms of the legal regulations of lesbianism. She claims that the law has always pushed lesbianism, including lesbian sexual practices, outside its scope. Using examples from history, she showcases implicit punishment and other sanctioning of lesbians through the law. Robson thus demolishes the misconception that the law overwhelmingly criminalised only male homosexuality or otherwise aimed to combat it (Elliott and Robson, 1993, p. 10). Further, she points out that the law was actively or passively used to suppress lesbians and lesbian romantic/sexual relationships, although it did not do so explicitly and directly, i.e., using specific prohibitive rules as in the case of male gay sexuality.

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In addition to cases where the law indirectly restrained lesbian practices with punishments ranging from exile to torture or death, Robson also notes efforts to censor lesbian expressions in judicial decision-making. The censorship of lesbian and lesbian sexual practices manifested itself in law, for example, by the fact that court decisions did not identify them directly, but rather tried to obscure them with other concepts. Judges used obscure words such as "moral insanity" or "vagrancy" in their convictions against lesbians. A typical example of such judicial practice of past centuries is the court decision of 1568, which sentenced to death a woman caught having lesbian sex with another woman. It is apparent from the content of that decision that a woman was sentenced to death for committing a "heinous and unnatural crime which is so ugly that, out of horror, there is no name for it" (cited in Robson, 1992, p. 37). Other examples of censorship in judicial practice illustrate the use of terms such as "crime against chastity" and "lewd and lascivious behaviour" which, although they do not directly refer to lesbian practices, despite the fact that the description of the reality in judgments has repeatedly shown this. Robson further argues that prostitutes were usually convicted of these crimes for engaging in heterosexual intercourse for money. A similar practice of condemning and punishing lesbians, this time for treason, was also present in the Third Reich. Moreover, in Nazi Germany, lesbians were not publicly referred to by the pink triangle as gay men. Lesbians shared the black triangle label with prostitutes and others "asocials" (Robson, 1992, pp. 41-42).

Such facts from history only confirm that lesbians, like prostitutes, were put on the very margins of society (Robson, 1992, pp. 30 et seq.). Robson therefore argues that throughout history, several lesbians may have been convicted, punished, or even executed in various states for engaging in lesbian sexual acts, but their crimes are not directly or otherwise appropriately named in court decisions (Robson, 1992, p. 37). Robson also analyses other cases where lesbian behaviour of women has only been shown to be a concomitant phenomenon to other crimes, e.g., in the form of *femina cum femininus* within witchcraft.

Quite simply, the law seems to disregard the presence of lesbians and the real existence of sexual expressions and love between women. Compared to male homosexuality and the performance of male homosexual acts, which were punished by law under the term "sodomy", lesbianism has not gained such - albeit negative but at the same time explicitly direct - recognition in the law. Robson notes: "As we make legal history today, we continue to perpetuate the mythology of lesbianism as irrelevant in legal discourse" (Robson, 1992, p. 42).

According to Robson, this leads to the general conclusion that the theoretical and practical development of law is constructed without considering lesbians. Active or passive oppression against lesbianism has never been and is not direct. Rather, it tended to cover up, neglect, or marginalise lesbians in such a way as to make it impossible to recognise the existence of lesbianism as a distinctive phenomenon in society or the lives of individuals. According to Robson, this is also the current approach of the law to lesbianism. The law refuses to acknowledge the importance of the ethical and metaphysical aspects of lesbianism through the active and passive suppression of lesbians (Franklin and Chinn, 1999, p. 314). The law continues to present lesbian sexual practices as "deviant," "perverse," and "unnatural." The previous statement may sound strange to someone. This is especially true if one considers the legislation in some Western liberal democracies. Some of those states legally allow same-sex marriage or same-sex adoption. Moreover, the legal systems of most Western liberal democracies no longer criminalise sexual orientation or homosexual acts. What is then Robson talking about when she refers to the propaganda of violence in law as "propaganda of non-

lesbianism"? Are her ideas still relevant, and thus could lesbian legal theory still be a relevant scientific enterprise? Before I try to answer that question, I will briefly explain the concept of "propaganda of non-lesbianism."

Robson's concept of "propaganda of non-lesbianism" has a much broader meaning than overtly discriminatory laws that prohibit lesbian sexual practices. The propagation of anti-lesbian sentiments in the law enables and even encourages violence and discrimination against lesbians. Robson thus speaks of laws that "negatively affect our daily survival as support for legal determinations that tolerate discrimination against us [as lesbians], that remove our children from us, as threats that regulate our choices about being open with our sexuality" (Robson, 1992, p. 57). This aspect of the law leads to the repression of the lesbian individual's will to live an authentic life. Instead, that law forces lesbians to live according to socially conforming conditions and expectations. Thus, the law does not consider the possibility of an authentic lesbian existence, and it does not create a social space for the development of lesbian perspectives. This propaganda affects the lesbian consciousness and seeks to achieve their "domestication." By the domestication of lesbians, Robson refers to any attempt to assert the dominant culture by internalising it by lesbians themselves, in such a way that the views of the dominant culture appear to lesbians as universally valid and common sense (Robson, 1992, p. 18). The purpose of laws designed to domesticate lesbians is to make lesbians realise that "our [lesbian] sexuality is not worthy of inclusion within any legal text; our sexuality is worthy only of being criminalized" (Robson, 1992, p. 56). Therefore, the main aim for proponents of lesbian jurisprudence is to build lesbian legal theory constructed on postdomesticated lesbian consciousness (Robson, 1992, p. 18). This is very similar to the approach present in feminist jurisprudence under the label "women were absent" (see, e.g., West, 1988, p. 60; Finley, 1989, pp. 892-895). Lesbian theory of law adapts this idea for its purposes and modifies it in a way that "lesbians were absent." Thus, if we accept that the construction of jurisprudence may have been – concerning lesbians as well as women – made in a way "about them, but without them" so far, then it is hard to resist the idea that gender-biased and sexual-biased distortion of jurisprudence does not remain to present days. The absence of women and lesbians will still be manifested in jurisprudence until women and lesbians become an authentic part of legal scholarship. That is why Robson also says: "When we appeal to the law as lesbians, we appeal to a legal text that has historically criminalized us and continues to do so" (Robson, 1992, p. 57). Therefore, the lesbian theory of law is largely intended to highlight the question "[w]hen can we use the law [as lesbians] and when are we being used by it [as lesbians]?" in lesbian consciousness (Robson, 1992, p. 68).

Enumerating the range of topics in which lesbian consciousness should be engaged through a lesbian theory of law is neither possible nor expedient. In the works of lesbian legal scholars, one can find topics related to lesbian sexuality, marriage, family life, child-rearing, violence against lesbians and violence in lesbian relationships, military service, the increased rate of rape in the case of lesbians and bisexual women, etc. In any case, this is very important. But at the same time, lesbian jurisprudence should provide knowledge about lesbians in the broadest sense. Therefore, the emergence of lesbian legal theory was not limited by the construction of another form of critical legal scholarship. Its main aim was to develop a normative legal theory that would bring knowledge of the law to fit the lesbian perspective and the daily experiences of the lesbian. In this sense, the lesbian legal theory should be topically unrestricted. Every issue of daily lesbian lives can become a matter of the critical or normative construction of lesbian legal theory.

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5. MAIN ASSERTIONS OF THE LESBIAN THEORY OF LAW

Regarding the emergence and further development of the lesbian theory of law, attention can be especially drawn to its main assertions. All these assertions interact and overlap each other. They are mainly justified by the specific developmental tendencies of the lesbian theory of law as jurisprudence, as well as by the historical circumstances that accompanied lesbianism's entry into jurisprudence. Finally, these assertions are theoretical expressions of lesbian identity in jurisprudence. Therefore, it can be argued that the lesbian theory of law is characterised by the following features:

- Lesbian jurisprudence is the result of lesbian separatism,
- declared inclination towards the anti-essentialist understanding of lesbian identity,
- lesbian intersectionality and diversity among lesbians,
- relativisation of sex and gender in favour of sexual orientation,
- partial jurisprudence derived from the lesbian experience,
- the primary meaning of lesbians and the secondary meaning of the law,
- Lesbian jurisprudence is not a ready-made, closed, or holistic theory of law.

In the following text of this study, I will try to explain the theoretical features of the lesbian theory of law. I would like to focus on the ideas of the most important proponents who participated in shaping the foundations since its emergence.

5.1 Lesbian Jurisprudence Is the Result of Lesbian Separatism

Lesbian jurisprudence is the result of lesbian separatism because lesbianism's entry into feminism, like lesbianism's entry into feminist jurisprudence, ended with the realisation that lesbianism is not a subbranch of feminism (Robson, 1990, p. 448). In general, lesbian separatism was lesbian feminist frustration with the leadership and influence of heterosexual women in the feminist movement (Davis, 1991, pp. 259-271). Lesbian legal theorists have come to a similar conclusion when it comes to feminist jurisprudence. In both cases, it was a recognition based on the idea that categories such as "women" and "lesbians" do not have to be or are not overlapping. Due to lesbian sexual orientation and erotic attraction to other women, lesbians have a different perception of the world around them than heterosexual women. For example, Cheshire Calhoun says that the category of "lesbian" is outside the general understanding of the term "women". Lesbians generally have different life experiences than women represented by feminism. Lesbian sexual orientation becomes a decisive element, placing lesbians in non-heterosexual environments. Lesbians, in this concept, are "ungendered, unsexed, neither woman nor man" (Calhoun, 1994, p. 566). The experience of being a lesbian, according to Calhoun and Monique Wittig, is an experience of "not-woman" (Calhoun, 1994, pp. 563 et seq.; Wittig, 1992, p. 32). To put it simply, lesbian identity is not a subdivision of a woman's identity. Lesbian experiences shape lesbian identity according to different perceptions of social and individual relationships.

5.2 Declared Inclination towards the Anti-Essentialist Understanding of Lesbian Identity

The declared inclination towards the anti-essentialist understanding of lesbian identity is because most representatives of the lesbian theory of law reject the monolithic understanding of the category "lesbian". Cain highlights the diversity of experiences in the lesbian community when she claims: "Just as women are different from one another (and significantly so based on such life-differentiating experiences as race, class, and sexual

orientation), so are lesbians different from one another" (Cain, 1994, p. 54). She recalls that the main cause of the lesbian departure from the feminist theory of law was "the essentialist trap" (Cain, 1994, p. 43).

Robson appeals for the openness of the term "lesbian", which cannot be defined (Franklin and Chinn, 1999, p. 301). Calhoun says that in general, different lesbian identities as "not-women" are the main subject of lesbianism (Calhoun, 1994, p. 567).[6] Earlier, Cain had refused to define the category of "lesbian," but then she talked about the basic experience of all lesbians that naturally unites them. Such an experience is the moment of self-identification as a lesbian, i.e., awareness and knowledge of one's erotic attraction to other women (Cain, 1994, p. 65).

In general, the lesbian position and the resulting lesbian experiences turn out to be mutually diverse, and the category of "lesbian" is not as monolithic as it might seem. In other words, the lesbian theory of law denies the possibility of an "essential lesbian" as a basic starting position for its methodological elaboration. Thus, the category "lesbian" should not have a clearly defined semantic core with certain features. Otherwise, it could be a false universalisation of lesbians (Cain, 1994, pp. 46-47).

In general, it can be concluded that the lesbian theory of law understands all concepts as socially constructed with fluid meaning. The category of "lesbian" is not an exception in this case. However, there are also opposing views about the declared anti-essentialist nature of lesbian theory of law and criticism of the anti-essentialist understanding of lesbianism. Elvia R. Arriola draws attention to this dangerous trend in lesbian jurisprudence and its pursuit of particularity and ultimately the exclusivity of intersectionality within lesbianism. She sees it as particularly harmful to the development of progressive movements in legal thought. Such a setting of lesbian legal theory excludes the topic of transgenderism from the range of applied intersectionality and manifests itself in an exclusive form of "real lesbian legal theory" about "real lesbians" (Arriola, 2005, pp. 530 et seq.).

5.3 Lesbian Intersectionality and Diversity across Lesbians

Lesbian intersectionality and diversity across lesbians consider those who may actually come from different backgrounds and thus live different lives from each other. Lesbian jurisprudence tries to be inclusive in this regard. It also refers to its anti-essentialist setting, which was formulated in the early days by Patricia A. Cain as one of the basic prerequisites for the lesbian theory of law.

The intersectionality of lesbian theories and the diversity of lesbian experience is articulated indirectly, but in a very broad sense, by the black lesbian poet and essayist Cheryl Clarke when she says that a lesbian is a woman who claims this about herself and struggles with the social risks associated with it (Clarke, 1983, pp. 130 or 134). Theresa Raffaele Jefferson draws attention to the fact that there is no monolithic lesbian identity or lesbian community. She accentuates the invisibility of black lesbians and claims that there is no unified black lesbian existence. According to her, the lesbian theory of law has the potential to reveal what was previously invisible. It is a timely theoretical opportunity to elaborate on the intersection between sex, gender, race, and sexual orientation by exposing the oppression obscuring the presence of black lesbian women (Jefferson, 1998, p. 266).

[6] Calhoun claims that "[t]o be a not-woman is to be incapable of being a woman within heterosexual society" (Calhoun, 1994, p. 566).

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In addition to the black version of lesbian legal theory, an attempt has emerged to constitute a Latina lesbian legal theory. Its initiator, Elvia R. Arriola, characterises the purpose of this theory regarding the contradictory cultural and socially dominant attitudes enshrined in the legal order of Anglo-American society. Latina lesbian legal theory points out those elements of Anglo-American culture and law that are opposed to Latina lesbian identity or Latina lesbianism (Arriola, 2005, pp. 530 et seq.).

This development is very similar to a claim that has also appeared in feminist jurisprudence, critical race theory, or LatCrit theory. In any case, it is significant. But if we are going to talk about differences between lesbians, we cannot entirely rely on just the "non-lesbian" parts of identity that relate to e.g,. race, ethnicity, class, and disabilities across lesbians. These are not even lesbian characteristics in the strict sense of the word. It would be much more interesting to examine the impact of different expressions of lesbian identities on the law. As far as expressions of lesbian identity are concerned, it can be found that it is not so much monolithic. Lesbians are not the same – they even do not manifest themselves in the same way. The latter classification within lesbian identity started with the butch-femme dynamics (see, e.g., Crawley, 2001, p. 177). Today a wider range of lesbian identities is emerging, e.g., Dyke, AG, Stud, Stem, Lipstick, Boi, Bull Dyke, etc. Important is the current recognition that there is a sharpened form of discrimination against some lesbian identities based on gender performance. For example, femme or lipstick lesbians present themselves as stereotypically feminine. Therefore, they are often able to pass as heterosexuals. On the contrary, a butch or boi lesbian openly presents some stereotypically lesbian attributes (preferring short haircuts, wearing men's/boy's clothing, performing masculine/boyish verbal and non-verbal presentation, etc.). Studies show that these lesbian identities may face different manifestations of discrimination based on their sexuality. For example, femme or lipstick lesbians may face the same manifestations of sexual harassment from heterosexual men as women. However, if their lesbian sexual orientation is known, sexual harassment by heterosexual men (presented as a joke or even meant seriously) can escalate and take the form of "Just give me one night and I can change your mind" or "Let me introduce you to the 'joys' of heterosexuality" (Giuffre, Dellinger and Williams, 2008, pp. 264-265). For butch or boi lesbians, this form of sexual harassment in the workplace is relatively rare. Heterosexual men approach them in a "one of the guys" manner (Denissen and Saguy, 2013, pp. 389-390). This is not to say that their male colleagues do not display other acts of homophobia or taunts that butch lesbians are unfeminine.

Of course, in the previous context, I was not concerned with coming to a certain conclusion on how this issue could be incorporated into law. I just want to point out that the experiences of individual lesbians can indeed be very different depending on the place they currently occupy in the spectrum of lesbian identities. If lesbian legal theory is about to develop its critical and normative potential by considering different lesbian identities, then it is necessary to say that lesbian critiques of law and lesbian normative thoughts on law may be very different or unrelated to each other. The lesbian experience of heterosexism in law might not be as monolithic as it might seem. This could be affected not only by race, ethnicity, class, etc., but also by the different lesbian identities (e.g., gender performance).

5.4 Relativisation of Sex and Gender in Favour of Sexual Orientation

Monique Wittig aptly characterised the relativisation of the meaning of sex and gender in lesbian theory by the assertion that "[l]esbians are not women" (Wittig, 1992, p. 32). However, lesbians are also not men. Rather, lesbians stand outside the framework

of the socially constructed genders of a heterosexual society or the binary understanding of genders that heterosexuality presupposes. Calhoun, for his part, points out that lesbianism is by no means a specific field of feminism (Calhoun, 2002, pp. 28-29). Robson puts it down the same way when she writes: "Lesbianism is not a 'branch' of feminism; likewise, lesbian jurisprudence cannot be subsumed into feminist jurisprudence" (Robson, 1990, p. 448). She also points out that feminist legal theory is oriented towards relationships between sexes or genders. This does not apply to lesbian jurisprudence, which focusses solely on lesbian relationships - comparing oneself to men and criticising masculine rules is somewhat irrelevant to it (Robson, 1990, p. 449).

However, at this point, it should be remembered that the definition of "lesbian" is by no means limited to sexual orientation. Proponents of lesbian theory of law disagree with such a reduction in lesbian theory as too simplistic. Lesbian romantic and sexual attraction to the same gender or sex might seem important, but lesbian consciousness is more versatile and complex (Robson, 1990, p. 445). In this regard, it covers the entire lives of lesbians and does not only concern one aspect of an individual's life, i.e. sexuality. Although this approach may raise many questions, it also becomes understandable. It aims to combat the potential threat of essentialism, but also to prevent the redacted meaning of "lesbian." The reduced meaning of "lesbian" may contribute to misjudging lesbians as exclusively sexual beings. Alternatively, in the context of social, i.e., political, and legal reforms, it may make the impression that lesbianism is only concerned with a well-specified calculation of topics such as sexual practices, marriage, child-rearing, etc. Those topics need to be identified and then reformed in some way. The non-definition of the term "lesbian" was not only meant to convey the diversity of the currently existing spectrum of lesbian identities but also to develop the different ways lesbians talk about the law and the variety of ideas they wish to express about the law.

5.5 Partial Jurisprudence Derived from the Lesbian Experience

The lesbian theory of law presents a partial, critical, and normative survey derived from the position of the lesbian experience. It confirms lesbian, i.e., minority experience of law. The traditional methods of modern jurisprudence ignored those kinds of legal experience. Lesbian understanding of legal concepts does not have to correspond to the judicial understanding of concepts such as equality, justice, discrimination, etc. (Arriola, 1994, p. 132). First, lesbian jurisprudence constructs the meaning of those legal concepts by putting lesbians at the centre. The lesbian meaning of legal concepts is determined by the lesbian experience by law, i.e., the consequences of lesbian legal non-existence and the harms that the law causes to them. For example, Robson and Valentine point out that emotional relationships between lesbians remain outside the law, while heterosexual relationships are officially institutionalised in and through the law (Robson and Valentine, 1990, p. 512).

Those ideas should incorporate all the peculiarities of the lesbian identity. But they are also reflecting the emphasis on an anti-assimilationist approach. Regarding this, Robson both questions and warns against arguing that "I as a lesbian am just like everyone else", which on the one hand declares lesbian identity and in turn denies the possibilities of its peculiarities (Elliott and Robson, 1993, p. 13).

Moreover, the lesbian legal theory tries to reflect the existence of various lesbians. In this context, Elsewhere, Robson points out that while feminist jurisprudence is based on a gynocentric position, lesbian jurisprudence puts "all lesbians at its centre, a lesbian legal theory seeks to apply to all lesbians" (Robson, 1992, p. 23). At the same time, the concept of "lesbian" - although highly dependent on the self-determination and social,

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ethnic, racial, etc. background of the lesbians is a sufficient starting point for the development of a theoretical approach to lesbian jurisprudence. Lesbian jurisprudence seems to catch diverse lesbian experiences within its framework. Different lesbians live different lives and therefore have different experiences with the law. However, the lesbian theory of law tries to be as inclusive of all lesbian legal experiences as possible.

5.6 Primary Meaning of Lesbians and Secondary Meaning of Law

Ruthann Robson explains that the lesbian theory of law does not attempt to explain law as a whole. It is a partial view of the law with a primary focus on lesbians and a secondary focus on the law. Lesbian jurisprudence presents only a partial analysis of the law. The lesbian position constructs it. Robson confirms this when she says that lesbian theory of law is a theory that is inclusive and lesbian in particular (Robson, 1992, pp. 19 et seq.). The lesbian theory of law, as envisioned by Robson, is not even supposed to unmask the law as a generally oppressive system. Such generalisations should be avoided. The lesbian critique of law forms only one section of critical jurisprudence. Above all, the lesbian theory of law should focus on lesbians themselves. Robson claims that lesbian jurisprudence "puts lesbians rather than law at its centre" (Robson, 1992, p. 23).

This attitude reflects an emphasis on the minority's experience of the law. It is also a reminder that previous mainstream analyses of the law have not paid sufficient attention to the lesbian experience of the law (Arriola, 1994, p. 132). In this respect, lesbian legal theory questions the existing knowledge of the law – and related categories such as the wellbeing, freedom, justice, and morality – by pointing out that it reflects an exclusively 'masculine' and 'heterosexual' point of view. This creates space for lesbian critique of masculine and heterosexist law. However, at the same time, it should be pointed out that the lesbian legal theory was by no means intended to be exclusively developed as a critique of the law in the form of a rigorous analysis of the "grand narrative" of masculine and heterosexist law. Lesbian legal theory was not meant to be exclusively a critical reflection on feminist jurisprudence. Instead, the construction of a lesbian theory of law focusses on "the way [how] the law denies that we [as lesbians] are separate from the rule of men. We must avoid a tendency to think in the dominant legal terms so that our lesbianism becomes colonised, watered-down, and domesticated by legal thinking" (Robson, 1992, p. 12). This is to provide lesbian legal theory with some distance from the existing, i.e., masculine and heterosexual construction of legal scholarship and legislation, which has been contaminated by masculinity and heterosexism. This, however, represents a certain challenge for lesbians, because they are not bound by traditional legal methodology, previously established legal concepts, or traditional structures of arguments. The call to "put lesbians at the centre" is a call for the creation of a new theoretical construct, which is nothing other than a theorised lesbian perspective on law (Elliott and Robson, 1993, p. 12). This approach not only rethinks the current form of legal language, interpretation, and argumentation but creates a new (lesbian) form of them. In this respect, the lesbian theory of law assumes that lesbian legal thoughts will result in distinctly different conclusions about law, which may evolve into a new (lesbian) form of law. One of the specific features of constructing a lesbian theory of law is the application of contextual legal thinking (Robson, 1990, p. 464). The application of narratives in this regard is also of unquestionable importance in illuminating the experiences of oppressed, discriminated, and marginalised (sexual) minorities with the law in general (Eskridge, Jr., 1994, p. 608).

In summary, however, it can be argued that lesbian separatism and particularism give room for a postmodern construction of law. The lesbian theory of law, together with the thesis on the peculiarities of lesbian identity and perspectives on law, tends to deny law as a means of providing universal criteria for all. In this regard, Robson speaks not only of the decentralisation of law concerning lesbians but of "de-centred law" in general (Robson, 1990, pp. 461-462). The law thus becomes merely a connective matter for mutually disparate areas of social life regulation. The law is more an aggregate of divergent ideas about the regulation of the lives of individuals and groups. Part of it includes lesbian ideas of law and the law applicable to lesbians.

5.7 Lesbian Jurisprudence Is Not a Ready-Made, Closed, or Holistic Theory of Law

The first reason for the unfinished, open, and dynamic nature of lesbian jurisprudence can be justified by the time since its emergence. The second reason- and perhaps more important - follows from the nature of lesbian theory of law as jurisprudence about indeterminate lesbian identity. Robson emphasises that it is a theory of law that is a process of its continuous formation from its nature (Robson, 1998, p. 64). Of course, this problematises lesbian theory of law, but only to the extent that lesbian identity itself is problematic. Lesbian identity is diverse and therefore a subject of infinite examination. That means that lesbian identity is neither stable nor definite ready to be discovered and then defined in the list of definite theoretical assumptions. The theory of lesbian law is dependent on the indeterminate nature of lesbian identity. Therefore, it is more like an open, continuous, and never-ending enterprise to construct critical and normative legal thoughts - it is a process of building lesbian legal consciousness.

An appropriate means to understand lesbian identity, that is, its expression and ultimately the lesbian legal experience, is using narratives. Narratives can thus help individuals reflect on the meaning of past experiences and then decide if and how they want to integrate these meanings into their current self-perceptions (Hinojosa and Medina, 2016, p. 24). Narrative enhances the knowledge of how individuals create a sense of self – in this case, the lesbian self (see, e.g., Sala and De la Mata Benítez, 2016). Narratives can either be used for critical lesbian analysis of the law using past cases or they can also illuminate present social and legal issues in lesbian lives (Jefferson, 1998, pp. 273 et seq.). Regarding this, it is possible to recognise a critical perspective on the historical and current form of lesbian social and legal experience and the social and psychological burdens that result from it. Narratives emphasise forms of biases and identify their impact. However, the full effect of narratives depends on the narrative empathy, i.e., sharing of feelings and perspective-taking induced by reading, viewing, hearing, or imagining narratives of another's situation and condition (see, e.g., Taylor, Hodges, Kohányi, 2002).

However, the narrative method is not the only method by which knowledge of law can be developed in lesbian legal theory. Robson discusses the importance of ideas about a law that go far beyond knowledge gained through narrative methods. So, the important thing is not to provide knowledge of what the law is, what the law ought to be, but what the law might be. Imagining is in this sense a lesbian transcendence of the limits of the law. It is a theoretical effort to struggle for progressive change in the law, in favour of social justice, with an appeal to the discriminated, oppressed, and marginalised lesbian community (Robson, 2000). At the same time, lesbian imaginative thoughts on law are part of the scholarly framework. Imagination presents potential for the knowledge and development of law in the form of how lesbians see it without any historical limits and restrictions. Such a vision of law is the law of lesbians, for lesbians, and by lesbians. Thus,

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the realisation of the lesbian imagination in legal scholarship is meant to be in a way that aspires to the normative possibilities of law according to the lesbian legal theory.

5.8 Lesbian Identity as the Indeterminate Identity and the Basis of Lesbian Theory of Law

At first glance, the lesbian theory of law may seem very close to the queer theory of law. However, this is only an appearance, because the category "lesbian" seems to strictly frame the construction of lesbian jurisprudence. Since the emergence of lesbian legal theory, the basic concepts such as "lesbian perspective", "lesbian existence" or "lesbian experience" have been used to construct a methodological layout of lesbian jurisprudence. At least, this was its methodological position according to Patricia A. Cain and Ruthann Robson (Cain, 1994; Robson, 1990, 1992, 1993). This can also be explained by the separatist tendencies that lesbianism has always displayed. Lesbian separatism puts the lesbian identity aside from feminism or even queer theory.

Although the category "lesbian" does not have a firm core of meaning, since it is not a monolithic category, at the same time it seems to have certain meaning contours. This means that lesbian identity, which lesbian theory of law prioritises because it is derived from it - is distinct from other identities, especially other sexualities. Thinking within the limits of identity usually leads the (critically and normatively) knowing subject to the question "Who am I?" Ideally even before he or she begins to draw critical or normative conclusions about the law. In the case of lesbian legal theory, this response seems certain and oriented towards the category of "lesbian". It is a commitment to a stable conviction about one's own sexual identity. Therefore, the lesbian theory of law is different from the queer theory of law, which – due to the fluidity and diversity of gender and sexual identities – operates more as an anti-identity position (see Gauntlett, 2008, p. 147).

The lesbian theory of law seeks the answer to the question in the spectrum of lesbian identities. This is a strange situation because the lesbian theory of law seems to affirm a lesbian identity, but it immediately refuses to define and specify it. In this context, Robson speaks of "claiming and disclaiming of lesbian identity" as a conflict between the theoretical application of the meaning of identity and identity politics in proportion to the consistent application of postmodern reasoning, which relativises the validity of subjectivity (Robson, 1993 pp. 448 et seq., 1998, pp. 8-11;). There is no doubt that lesbian identity exists, but at the same time, it is fluidly volatile, especially when Robson claims: "Lesbian identity is something I have known, have felt, have recognized across a room and years. It is the river lesbian theorist and poet Gloria Anzaldúa utilizes to describe identities: changing yet perceptible, flowing [...] along with the meaning of lesbian bodies, bodies in relationships, desires, and sex" (Robson, 1998, p. 13). In this sense, the lesbian identity is an indeterminate identity that does not have a given elementary structure (Schulman, 1993, p. 3).[7]

However, the emphasis on the peculiarity of lesbian identity has led the lesbian theory of law to the position of lesbian separatism and particularism. This is self-evident because each identity brings its identity politics in a more or less defined form. In other words, the lesbian theory of law presents the critique and clear demarcation against queer theories of law, where lesbian sexuality risks losing its specificity. The claim "Make lesbians visible in the jurisprudence and the law" was the original purpose of the lesbian legal theory emergence. This is another reason why the lesbian theory of law sought to

[7] This setting of lesbian identity closely resembles the version of lesbian identity promoted by the Lesbian Avengers - an activist movement that originated in 1992 in New York City. This movement referred to the inclusion of diverse lesbian women, but at the same time "fights for lesbian survival and visibility."

separate itself from feminist jurisprudence and the queer theory of law. It is concerned about the potential threat to lesbian position in coalitional legal theories. Lesbians may be perceived not as partners, but as "shadows."(Robson, 1992, p. 22). So to speak, it is also self-evident because of the risk that lesbian identity will lose its peculiarity. It could melt away among other sexualities – e.g., male gay sexuality, bisexuality, etc. This would risk giving lesbians the opportunity to combat heterosexism in and through law in an authentic way. It could also lose its authenticity when it was regarded as only a partial manifestation of a woman's identity. As has been said, lesbian legal theorists realised that it is not in the best interests of lesbians to defy the patriarchy in law.

Ruthann Robson seems to think the same way when she singled out lesbian jurisprudence outside the scope of feminist jurisprudence and queer theory of law. While acknowledging that these are critical and therefore related approaches to law, she also stressed that they are fully separable (Robson, 1992, p. 21).[8] The emergence of the lesbian theory of law can therefore also be understood as a trend in a certain period and in a certain field of jurisprudence, which followed the growing importance of lesbian movements in the struggle for legal rights, and also as a trend that was accompanied by the inclusion of lesbian activists and legal theorists in the academic environment. But at the same time, it can also be seen as an ongoing effort to construct lesbian legal thoughts that demonstrate the ongoing creation of a "sovereign" theoretical framework for lesbian legal scholarship. Robson was pursuing this longer-term goal of permanently developing a lesbian theory of law, replacing terms such as "separatism" and "particularity" with the inherent notion of sovereignty. The sovereignty of the "Lesbian Nation" is meant to be constructive and defensive against possible assimilation (Robson, 1990, pp. 464-465). Regarding the problem of the "survival of lesbians", any assimilation of lesbians has particularly sensitive overtones.

6. CONCLUSION

Lesbian jurisprudence (or lesbian theory of law) is a methodological way to examine the ways the law has impacted the lesbian identity (the critical element) and how the lesbian identity could be fulfilled by law (the normative element). The significance of the lesbian theory of law lies mainly in the fact that it presents a scientific legal way to redefine categories such as sexuality, gender, marriage, family, etc. However, the redefinition is not meant to be an extension of existing social institutions such as marriage or family to lesbians. Rather, it is a broad redefinition that reshapes the content of hitherto traditionally heterosexual social institutes according to the lesbian model of relationships. Within this idea, it is important to realise that lesbian theory of law does not seek to confirm current heterosexist and heteronormative discourse. The lesbian theory of law, with its epistemological setting, seeks to defy the power structure of discourse that ignores or discriminates against lesbians.

In this context, the lesbian theory of law shows how lesbian concepts of individually and socially significant relationships have long been regarded problematic. The lesbian concept of relationship has been excluded from the law. The lesbian theory

[8] Feminist legal theorist Ann C. Scales and queer legal theorist Francisco Valdes approached the relationship between lesbian jurisprudence, feminist jurisprudence, and queer theory of law quite differently. Scales understood all poststructuralist approaches in law as converging towards each other. She wrote: "I believe the short answer is that poststructuralist work and feminist jurisprudence are converging. We are allies in the relentless pushing of each other" (Scales, 2009, p. 395) Similarly, Valdes sees a correlation and interconnectedness between queer theories of law and lesbian jurisprudence (Valdes, 2000).

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of law thus provides an opportunity to think about those things differently. It brings authentic knowledge through the lens of lesbian identity. Thus, the (legal) visibility and (legal) existence of lesbians become central to the lesbian theory of law. The justification for such an aim is accompanied by the previous (legal) invisibility and (legal) non-existence of lesbians (Jefferson, 1998, p. 269).

Although the lesbian theory of law is a very fascinating approach, it is also worth recalling that its current viability is questionable. This is by no means to say that lesbian analyses of law are no longer beneficial or not necessary. I believe the opposite is true. I would rather emphasise the fact that the lesbian theory of law has seen its greatest development since the early nineties of the 20th century. However, with the arrival of the new millennium, interest in its development began to decline. A very limited number of authors participating in its development may also be a factor - mainly in a few Anglo-American law faculties. The development of lesbian jurisprudence was mainly centred around its most important representative, which was and still is Ruthann Robson. The second factor may be that the next generation of legal scholars interested in the topic of law and sexual orientation have been interested in the queer theory of law. A certain proximity between lesbian theory of law and queer theory of law is beyond doubt. However, its subsumption within the framework of queer theory of law may be problematic given the separatist positions of the original lesbian authors.

However, above all, the application of lesbian discourse in jurisprudence cannot be considered exhausted. This is evidenced not only by the continuing trend of lesbian studies appearing outside the jurisprudence, but also by the society and legal system in the Slovak Republic. A 2017 national LGBTQIA+ survey found that 81.1% of LGBTQIA+ members perceived biases as the biggest problem (Celoslovenský LGBT Prieskum, 2017). According to it, 39.7% of lesbians had experienced some form of discrimination in their lives. 46.9% of lesbians had to face some form of unpleasant experience (harassment, violence, and verbal attacks). Such a percentage is by no means negligible. Of course, these findings do not indicate how the law can counter individual discriminatory practices and unwanted expressions; we also cannot say whether there have been violations of the law. At the same time, however, these percentages tell us that the law does not act preventively against possible biases. Lesbian jurisprudence is here to capture the experiences of the full spectrum of lesbian identities. Topics such as the legality of lesbian marriage, lesbian family life, or the raising of children by lesbian couples are, in any case, important. They are important because these are human rights issues. At the same time, as it turns out also by the national survey, these are not the only issues that will solve the oppression, discrimination, and marginalisation of lesbians. It seems that they are expressions of widespread biases. Thus, an examination of the everyday experience of the lives of different lesbians may reveal unwanted manifestations of biases that the law tacitly tolerates, or the legal practice is toothless to the face-off. I believe that further development of lesbian jurisprudence can describe those biases and accent lesbian perspectives on law with further radical legal change or legal reform. The critical element of the lesbian theory of law could serve this purpose very well. However, the elaboration of the normative element of lesbian legal theory would be more interesting because it informs us about the theoretical features of lesbian law more specifically.

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COLLEGIALITY AND DISSENT IN POLISH ADMINISTRATIVE COURTS: EXPLORING JUDICIAL INTERACTIONS / Maciej Wojciechowski

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Abstract: *This article addresses a gap in existing research by focusing on the often-neglected realm of judicial interactions and internal dynamics within specific courts concerning the phenomenon of votum separatum. We examine the forms and practices of collegiality within Polish administrative courts and their influence on judges' decisions to file dissenting opinions. Additionally, we investigate the reactions of fellow judges when a dissent is announced.*

Our qualitative research methodology relies on in-depth interviews to prevent the imposition of predefined categories. Participants were encouraged to recount their experiences related to composing or participating in decisions involving dissenting opinions. This approach led to the emergence of categories related to collegiality, its functions, and inherent tensions.

Our findings reveal that collegiality manifests in various forms beyond panel deliberations. Notably, our research uncovers the existence of departmental meetings in provincial administrative courts where issues addressed in dissenting opinions are discussed. Furthermore, judges' perspectives indicate that the most common scenario leading to dissenting opinions arises when judges from different panels reach opposing decisions. This dilemma prompts judges to choose between adhering to the initial panel's decision or voting for a divergent position proposed by the second panel.

Finally, our observations within courtrooms highlight that the ideal of the dispassionate judge does not exclude subtle expressions of surprise or disappointment. These findings enrich our understanding of judicial interactions, shedding light on the complexities of collegiality and dissent within the context of Polish administrative courts.

Key words: *Dissent; Dissenting Opinion; Collegiality; Judges; Judicial Independence; Law and Emotions*

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1. INTRODUCTION

Dissent is omnipresent in society and is a fundamental component of human interaction (Kissent, 2011 p. 17). Indeed, the history of the world is a collective story of dissent against the existing social order (slave uprisings and peasant revolts) or legal

authority (e.g., national uprisings). Individual dissent may take tragic forms, such as the self-immolation of Ryszard Siwiec in 1968 in protest against the intervention of the Warsaw Treaty's armies in Czechoslovakia, or it may occur in form of organisational settings (Kissent, 2011, p. 22), as in 1976, when the Polish Parliament passed the amendment of the Constitution of 1952 on the leading role of the Polish United Communist Party and only one member of Parliament (Stanisław Stomma) abstained from the vote. Judicial dissent is an example of an objection taken in organisational settings allowed by legal rules against decisions made by the collegial body by one of its members.

Judicial dissent constitutes a theoretical challenge for legal scholars based on the assumption that the law is predictable, determined, and objective. It is also a challenge for the lawmaker to deal with undermining official authority (Mistry, 2023, p. 6). There are legal systems in which dissenting opinions are not allowed (e.g., France) or concealed (e.g., Spain) (Nadelmann, 1959, p. 420). The prohibition of the judges' right to dissent is associated with civil law countries (Ginsburg, 2010, p. 2). Judicial dissents are allowed in countries like Denmark, Germany, Estonia, and Poland, to name only a few (Laffranque, 2003, p. 165). Generally, judicial dissent is a feature of the common law culture, with its British origin of opinions separately announced by each judge (Ginsburg, 1990, p. 133; Henderson, 2007, p. 294). This diversity is reflected by discussions of the legitimacy of judges' rights to dissent (Lynch, 2016). On the one hand, dissenting opinions impair the credibility of the court (Donald, 2019, p. 323) and its judgments, endanger its authority and reduce its persuasiveness (Laffranque, 2003, p. 170). On the other hand, dissent guarantees that the case is fully considered (Fuld, 1962, p. 927). It also protects judicial independence and helps point out errors made by the court (Ginsburg, 1990, p. 4). Dissenting opinions can help disclose inconsistencies in the legal system (Hettinger, Lindquist and Martinek, 2003, p. 217) and thus "make the law better" (Henderson, 2007, p. 217).

Judicial dissent is a legal phenomenon also of interest to political science. These studies primarily focus on explaining judges' decisions to dissent, assuming that legal doctrines do not fully explain judicial votes (Brace and Hall, 1993, p. 914). Different factors have been hypothesised to explain judges' decision to dissent: political and ideological preferences (attitudinal model) and structural factors such as the presence of an intermediate appellate court, opinion assignment, workload, or the number of judges sitting on the panel (institutional model). The attitudinal model was identified with reference to the U.S. Supreme Court (Segal and Spaeth, 2002) and U.S. Courts of Appeal, where the cautious conclusions of one study stated that female judges were more likely to support victims of discrimination (Songer, Davis and Haire, 1994, p. 435). For some time, integrated approaches have been tested, such as the neo-institutional perspective, which assumes that judges' decisions are the result of the interaction of preferences, legal rules, and structures (Brace and Hall, 1993, p. 915). As an integral approach, we might consider the "collegial political model of dissent" that views dissent as a function of political, institutional, and legal (in the form of ambiguity and complexity of issues) factors, but also of the style of leadership of chief justices (Songer, 2011, p. 394). This model was tested in relation to cases decided by the Supreme Court of Canada, showing that factors such as political and legal salience, both reversal and complexity of the issue, and panel size (i.e., dissent is more likely to appear in larger panels) had an impact on the likelihood of dissent (Songer 2011, p. 404). Another approach that could be labelled integral is based on the assumption that judges' decision to dissent mirrors their policy goals within an institutional environment and within legal constraints in the form of legal doctrine.

The above studies, based mostly on quantitative methodologies, do not include factors described as "interpersonal environment" (Donald, 2019, p. 328) or the "internal dynamics of the court" (Kelemen, 2013, p. 1346). These labels refer to all types of interactions between judges before delivering a decision. Interactions among judges within organisational settings have rarely been investigated (MacFarlane, 2010, p. 394). Disagreements during deliberation do not always lead to dissenting opinions. One of the reasons is a dissent aversion, "which sometimes causes a judge not to dissent even when he disagrees with the decision" (Posner, 2010; Epstein, Landes and Posner, 2011, p. 102). Therefore, one can distinguish between the reasons for disagreement between judges on the panel and the reasons that lead a particular judge to dissent. The former are usually laid out in the court's and dissenting opinions, and the latter may lie, at least in part, in some factors in the interactive space (Donald, 2019, p. 328). This space includes behaviour prescribed by legal norms, such as judicial conferences but also informal conversations among judges, which are merely a consequence of proximity in the workplace. Insofar as these engagements are directed towards the collective determination of a course of action, the formulation of a stance, or the examination of a legal problem, they align with the principle of collegiality. I draw a distinction between two facets of collegiality: the formal and the functional. In the formal sense, collegiality merely signifies that a particular decision is rendered through the involvement of multiple individuals. Besides the formal meaning of collegiality, this term can also be understood functionally as constituting a set of expectations that a decision, within certain limits, will be reached jointly by members of a given body, meaning that points of view of all members of the panel will be taken into account. As Judge Edwards has put it (Edwards, 2003, p. 1643), collegiality is a "process that helps to create the conditions for principled agreement". This meaning of collegiality focuses on interactions among members of a group (Cross, 2008, p. 257). It is the willingness to listen to and consider the views of other members (Tacha, 1995, p. 587).

The act of judicial dissent challenges the foundational tenets of collegiality, both in its formal and functional dimensions. In the formal sense, dissent manifests as a member of the panel distancing themselves from the majority's decision. However, the correlation between judicial dissent and collegiality in the functional sense is nuanced and contingent upon the nature of interactions during deliberations. If not, every argument advanced by each member of the panel receives equitable consideration from their peers, and if certain judges fail to demonstrate openness to alternative viewpoints and the potential fallibility of their own positions, then a dissenting opinion may emerge as a consequence, potentially undermining the functionally understood principle of collegiality. Nevertheless, this form of collegiality remains uncompromised when the discourse adheres to the criteria of what J. Habermas famously coined as an "ideal speech situation" (Habermas, 1984), even in instances where the judges fail to converge on a shared stance. This article seeks to elucidate the dynamics of collegiality within the context of the institution of dissenting opinions. Specifically, it endeavours to explore the extent to which aversion to dissent can be elucidated by these collegial practices.

The article also aims at exploring the reactions of other judges to the announcement of the dissent. Judge Brennan famously stated, "Very real tensions sometimes emerge when one confronts a colleague with a dissent. Therefore, collegiality is an important factor. (...) Feelings must be respected" (Brennan, 1985, p. 429). One of the objectives of this study was to analyse whether and what kind of tensions arise when a judge announces their dissent. The claim that judges sometimes display feelings as a result of dissent announcements may seem to undermine the traditional ideal of a dispassionate judge. According to this ideal, a judge makes decisions free from emotional

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factors that may influence his judgment (Hobbes, 1997, p. 147). This idea mainly concerns the relationship between the judge and the case. One can argue that, in relation to other judges, the attitude of professional indifference regarding judicial dissent is required as the derivative of the ideal of a dispassionate judge. This attitude is a set of relatively constant dispositions toward another judge's dissent, expecting such a decision to be respected. As we shall show, respect does not exclude displaying discreet and subtle reactions, which we claim to be consistent with the attitudes of professional indifference.

The first section of this paper examines the functions and various manifestations of collegiality, as it represents an essential prerequisite for submitting a dissenting opinion. It illustrates why collegiality is a crucial value for judges while also addressing the tensions that may arise regarding judicial independence. The second part of the paper attempts to outline the reasons for dissent, utilizing the distinction from the philosophy of action between normative and motivational reasons. The third section of this paper outlines the reasons contributing to judges' dissent aversion. In the final part, the article examines the internal workings of judicial deliberations by providing a glimpse into situations where judges' reactions to the announcement of a dissenting opinion were observed. The article concludes with a depiction of a situation challenging the prevalent agonistic understanding of dissent, in which the adjudicating panel adopted a separate opinion as a joint agreement.

2. METHODOLOGICAL NOTE

As the research objective was to learn about judges' deliberations, decision-making dilemmas, feelings, and interactions with other judges, qualitative research methods in the form of in-depth interviews were used. Sixteen interviews were conducted with 17 administrative court judges. Of these, 12 interviews were conducted with judges of the Provincial Administrative Courts (PAC) and 4 with judges of the Supreme Administrative Court (SAC). Interviewees were selected based on their accessibility, and judges constitute the professional elite and are part of a hard-to-reach research environment (Jaremba and Mak, 2014, p. 7; Pierce, 2002, p. 133). There were requirements to be fulfilled to have an opportunity to ask the judges for their consent to converse. Requesting the judges' consent was preceded by obtaining approval from the Chief Judge. In the case of PAC, letters were directed to the Chief Judges of the courts that had the highest number of dissenting opinions. Together with the "formal" path, the judges' consent to the interview was sought using personal recommendations, which was the most effective method. In some cases, the interviewed judges offered help reaching another judge. In a few cases in which a formal path was sufficient, the information that the judge agreed to hold the interview came from the relevant court registry. Requests were directed to judges who had submitted a dissenting opinion or sat in a panel, one of whose members dissented at least once. All the judges interviewed submitted at least one dissent in their careers. The interviews were conducted in person by the author between 2015 and 2017 and lasted between one and two hours. Conversations were recorded and transcribed by a third party. The interviews were mostly conducted at the judge's workplace. Skype was used twice. The interviews were transcribed verbatim to depict the judges' statements better. The interviews were analysed using the QDA Miner program, which encoded the content of the statements. Coding was performed through manual word selection after a careful analysis of the transcripts and by listening to the recordings (Kaufmann, 2007, p. 122). Based on the interviews, a questionnaire was developed and sent to all judges of the administrative

courts. A total of 600 questionnaires were sent, and 140 were returned. Most came from PAC judges (over 80%).

3. COLLEGIALITY - MODES OF DELIBERATION

There are different modes of deliberating legal matters in Polish administrative courts. The first and most fundamental are meetings of adjudicating panels. Both PACs and SAC rely on three-judge panels. Polish law provides for two types of conferences for adjudicating panels: The first takes place before the hearing (pre-session meeting) and the second after the hearing. Three-person adjudication panels operate in the "session mode." The term "session" means the date on which the panel hears matters. The judges call the preliminary conferences "session conferences," "pre-session conferences," and "the eve of the conference." The cases to be heard are discussed at these conferences. Usually, a pre-session conference takes place the day before the session. A session day is a day on which several or even a dozen cases are heard. This group of cases is divided so that each panel member acts as a rapporteur in some cases. For example, if a session comprised 12 cases, there were 4 cases for each of the three bench members. Thus, the pre-session conference consisted of each rapporteur presenting his cases.

Of the two types of meetings of the adjudicating panel, the one that takes place after the hearing is crucial in public perception. It is commonly believed that the decision on the verdict is made during this meeting. The pre-session meeting is not commonly known. Its significance is the subject of legal knowledge of representatives appearing in administrative courts, but rather not of those without legal training. In practice, pre-session meeting is at least equally critical for the judges themselves as the meeting after the hearing. One of the judges (PAC) compared the role of the pre-session meeting to address rehearsal and presentation: "The hearing is just a presentation. Everything should already be prepared." This preparation also includes the draft judgment. Moreover, one of the judges considered the lack of such a proposal "unimaginable" and a crucial element of substantive preparation for the trial. A crucial role of a pre-session meeting does not mean that the panel session after the hearing cannot change the findings from the pre-session meeting. Judges admit that such situations do occur, for example, due to an attorney's argumentation, but they do not seem to be expected. In a situation where the hearing did not bring anything new to the case, the meeting afterward may often be reduced to a brief exchange of views or confirmation that the pre-session meeting agreements are still valid.

"*(...) After the closed hearing, there is a final discussion where we summarize everything that has been said so far and ensure everyone agrees. That is how it technically works. I remember that is when I changed my mind, which led to a separate opinion.*" (PAC)

The statement pertains to a situation in which a judge decided to dissent only during the final meeting. In the presented situation, the change of opinion was probably a surprise for the other two judges. We do not know the reasons for this change (the judge stated that even if he remembered, he could not say), but this is an example of a situation in which collegiality did not prevent a judge from dissenting. More often, collegiality plays a role as a factor in improving the quality of decisions by triggering the reflexivity of a judge.

"*You open the files, you look at these files and think: Yes, I've had a similar case before. Well, I can go in that direction. That is why there is a three-person panel that will*

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say, (...), listen, but have you thought about this and that. I think to myself, thank God that someone has brought it to my attention. That is what is valuable in this job. Very valuable." (PAC)

For this judge, work experience had produced specific patterns of reasoning and behaviour that made it easier to deal with many cases. Nevertheless, the established patterns developed thus far may foster a tendency towards oversimplification, potentially blinding us to the intricacies of individual cases. Within the judge's statement, there is a discernible sense of gratitude for the involvement of fellow judges in drawing attention to these specifics. However, it is worth noting that this collaboration does not always transpire, partly due to the sheer volume of cases under consideration.

From the vantage point of an external observer, it becomes challenging to distinguish between scenarios in which judges on the panel actively voices their perspective and instances where other judges passively endorse the proposed resolution set forth by the rapporteur judge. One possible indicator that this has occurred may be a divergence in case law.

"*Here, someone has already issued a judgment sloppily because he did not notice the problem. It also happens. (...) I have already experienced something like this, for example, as a rapporteur. I have done something like this on the panel. As I did not notice the problem, it ended poorly.*" (PAC)

The problem referred to by the PAC judge, whether in terms of the applied legal rules or facts of the case, is the possibility that a different panel of the same court could decide a similar case in a different way. The said neglect is merely a matter of failing to notice additional possibilities for interpretation. For a rapporteur, this oversight can be compared to a move in chess, which is not the best choice in the eyes of a colleague observing the game. Sometime later, the judge from the same or another PAC can decide on a similar case and see other possibilities for interpretation. Such a situation is a symptom of imaginable divergence in the case law. Such oversight is therefore a failure to recognise the "potential for disagreement" among panels of the court.

The phenomenon of legal disagreement is an integral part of legal practice. It can be explained by a characteristic of legal systems, which is the indeterminacy of their legal systems. The sources of indeterminacy are general (the presence of vague predicates and family resemblance concepts) and specific to the law, i.e., the inconsistency and contradiction of legal sources or the fact that the sets of legal reasons are "too impoverished or too rich" (Coleman and Leiter, 1993). The sources of legal indeterminacy are related to the sources of legal disagreement but are not limited to them. The legal disagreement may be caused by more subjective factors, such as divergent views on the fundamentally correct mode of legal interpretation. In the situation to which the judge refers, it is not clear whether the issue is one of legal interpretation, evaluation of evidence, or something else. However, the failure to see another way of looking at the case may be due to the fact that "sets of legal reasons are (...) too rich".

A manifestation of disagreement, which is an undesirable phenomenon in an administrative court, is the divergence of the case law. This divergence can appear on various levels:

- between panels of the same PAC or panels of the SAC,
- between panels of different PACs, and
- within a panel itself.

Dissenting opinions result from the last type of argument.

Disagreement within a panel does not concern judges as much as disparity among the panels of a given PAC. One interviewee stated that the critical issue was to avoid them.

"*The whole point is that there should be uniformity among the panels of a court. The judges (on a panel) may differ.*" (PAC)

The distinction between disparity among panels of the same PAC (SAC) and disagreement within a panel became the content of one of the questions in the survey. Most judges (59%) supported the preferences mentioned above. These results suggest that, for judges of administrative courts, the image of the judiciary as the uniform has a greater value than uniformity within panels. The importance of consistency is also evident in responses to one of the questions in the questionnaire, what caused their resignation not to dissent when they were outvoted. Most judges (63%) reported that they had experienced this situation. Among the factors identified in the interviews and indicated in previous studies like a feeling of futility (Bratoszewski, 1973) that led to the relinquishment of the right to dissent (time taken to write an opinion, discomfort related to undermining collegiality), the presence of two or more lines of precedent regarding the same type of legal problem that a dissenting judge had in hand was also noted. The data show that this last factor was the most important for 76% of the respondents. In comparison, the factor of lack of time was important for only 22% of the judges in the survey, the feeling of pointlessness of the act for 15% of the judges, while discomfort was indicated by 14% of the judges. The data indicating that the factor of divergent jurisprudence possibly prevents judges from dissenting may indicate the responsibility of judges and their concern for the value of uniformity in the judiciary. Not submitting a dissenting opinion in such a situation is a decision not to worsen an already undesirable state of affairs. One of the informal methods employed to establish consistency within a specific court involves judicial deliberations conducted at the departmental level.

3.1 Departmental Conferences as a Deliberative Effort to Maintain Uniformity of Case Law

In the Polish administrative courts, formal collegiality is manifested not only in the work of the adjudicating panels but also in judicial discussions, in which judges of the entire department or, in case of smaller courts, judges from the entire court participate. The internal administrative court rules provide for the possibility of arranging such conferences by either the chairperson of the department or the chief justice. The rules remain silent, however, on the criteria for their organisation. During one of the interviews, an interviewee declared that it is his responsibility as chief justice to promote uniformity among the decisions of adjudicating panels. Thus, the interviewee referred to a crucial value at the system-wide level. The uniformity of courts judgments is an instrumental value enabling the realization of the value of predictability of judicial decisions. The uniformity of courts decisions is referred to "as the paramount of blind justice." The general problem with realizing this postulate is that in civil law countries, including Poland, the principle of stare decisis is not formally binding. In practice, uniformity is ensured, among other things, by following precedents of high courts. This goal is essential for judges in managerial positions. Thus, the organisation of department-wide judge conferences can be seen from their perspective as an attempt to ensure this uniformity. They are organised, for example, when it is known that there will be more complicated cases of a particular type, which means that different panels may decide differently on cases of a similar type. In practice, judges themselves initiate such deliberations.

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"In the practice of the department I head, if the rapporteur sees that a case may have a broader dimension, which means that we expect similar cases to arise, for example, in connection with a change in the law, the judge rapporteur comes to me and asks me to arrange a meeting. We sit informally. This does not exempt the adjudicating panel from holding a conference because it is a set of specific judges who decide. We can express our opinion as judges of the department." (PAC)

Judges who initiate those meetings aim to reduce decision-making uncertainty by discussing the issue at hand and establishing, if possible, the best interpretation of the legal provisions. In judges' statements regarding these meetings, defensive reservations can be noticed ("*we sit informally*"; "*no one here forces anyone to... we are just saying: Tell me what opinion you have*"), in which concern for the image of judicial independence is resonating. Interviewees seem to feel anxious that the meetings of judges of a given department may be perceived as gatherings where approaches to types of legal cases later heard by the panels are predetermined. The description of the judges' meetings of a given department assumes a distinction between the predetermination of the legal decision and the presentation of possible approaches to the legal problem. Thus, if the above distinction is neglected, one can observe some tension between collegiality and independence. In this situation, the benefits of collegiality transform judicial independence into a constraint that necessitates the judge's formulation of such a statement.

3.2 Departmental Conferences as a Result of Judicial Dissent

The present research has identified another purpose and cause for holding departmental meetings within the PAC. Instances of dissent within the PAC resulted in letters from the Office of Case Law in the SAC to Chief Justices of relevant PACs. These letters contained requests or proposals to arrange a departmental discussion about a legal problem that gave rise to a dissenting opinion submitted by a PAC judge. Some judges have raised concerns regarding the merit of such letters and their potential to threaten their independence.

"At the beginning, when I got this type of letter, I took it as a bit of pressure (...). After all, a judge is independent. Later, it was explained that discussing the legal matter in a larger forum was just a suggestion." (PAC)

The same judge hesitated on how to describe the objective of the Office request.

"(Then) such a letter (from the Office) comes asking to re-examine such a case and not to allow such a... (pause) I don't mean "not to allow", only to re-examine whether it (disparity) actually takes place." (PAC)

A characteristic feature of this judge's statement is the hesitation in describing the purpose of such additional departmental meetings: "Re-examining and not allowing" or merely "re-examining" discrepancies. Finally, the judge opted for a non-controversial description from the perspective of judicial independence.

In the survey, one question focused on judges' attitudes toward the practice of organising departmental conferences in court to discuss legal problems and review dissenting opinions. Judges were asked to provide feedback on the statement: 'I consider

the organisation of faculty meetings, during which the dissenting opinion of a member of one of the panels is discussed, as (1) justified; (2) redundant; or (3) doubtful.' The survey results revealed that the majority of participating judges (73%) had no reservations about the relevance of such conferences. In contrast, 10% of respondents found them definitively or somewhat unnecessary, while 40% considered them entirely unnecessary. A smaller portion (23%) viewed these meetings as potential threats to judicial independence, while the majority (60%) believed that these deliberations did not raise any concerns about judicial independence.

The actions undertaken by the Office aim to achieve uniformity in case law, also understood as unanimity among adjudicating panels. The judge's statement ends with a possible goal of the potential discussion: "Whether there is a divergence (...)." The underlying assumption is the possibility of distinguishing between two types of situations. In the first case, the difference of opinions among judges can be avoided, and any dissents result from a failure to exhaust all possibilities of seeking a compromise and finding apparent or insignificant differences. Oliver Holmes had this very situation in mind when he wrote, "*The judge was not doing his sums right, and, if he had taken more trouble, agreement would inevitably come*" (Holmes, 1897, p. 465). The second situation involves a difference of opinions, which can be labelled as deep interpretative disagreements. The judge's concern about their independence would be justified if the Office's efforts related to the latter kind of disagreement. At the same time, attention should be drawn to the different roles of the value of independence in this situation. It is no longer a factor that triggers the judge's additional reservations. It traditionally appears to protect the judge against "extraneous influences and as immune to outside pressure" (Lubet, 1998, p. 61).

4. NORMATIVE AND MOTIVATIONAL REASONS FOR DISSENTING

Despite the benefits and functions of collegiality, judges do dissent. It is assumed that the written dissenting opinion does not fully explain the act but instead provides reasons for the judge's disagreement with the decision made by the panel. Other factors, besides the disagreement with the content of the decision, may influence the decision to dissent. An explanation of why judges dissent requires differentiating between the question of "What caused them to do it?" and "With what aim did they do it?" (Rescher 1966, p. 217). The contemporary causal theory of action distinguishes between normative reasons ("reasons that rationally or morally justify a particular course of action) and motivating reasons (the agent's reasons for doing something). (Davis, 2010, p. 34; O'Connor, 2010, p. 129)

It can be challenging to distinguish between those types of reasons for specific actions, such as judicial dissent. The organisational specificity of administrative courts' work associated with the panel variability can be considered a normative reason for dissent. The scenario described pertains to a situation in which a judge who had previously served as a rapporteur on a panel that rendered a decision on a particular case type (Ct) finds himself on a subsequent panel where two other judges take a different stance on the same case type, ultimately outvoting him. In schematic terms, the original decision can be denoted as D1[Ct(a, b, c)], where Ct represents a case of type t, and the letters from "a" to "c" correspond to the judges who rendered the decision. The subsequent decision can be represented as D2[Ct(a, e, f)], and if these two decisions are considered to be incompatible, the judge who initially supported D1 in the same case type (Ct) may feel compelled to issue a dissenting opinion concerning D2.

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"If someone was on the panel that decided differently, and then the same thing [the same type of case] happens… Now, in order to avoid confusion, he or she submits a dissenting opinion (...)." (SAC)

The fact that a judge adjudicates in panels with different judges and that other members may adopt different interpretive positions can be regarded as normative reasons. The desire to avoid confusion is already a motivation-based reason. Other reasons of this type pointed out by judges include the need to signal a legal problem. The addressee of this type of communication may be judges of a higher court, but they can also be judges from the same court.

"If the regular panel is not convinced that there is a need to ask a formal legal question to the enlarged panel of the Supreme Administrative Court in this case because the regular panel believes that the existing line of case law should be upheld, and one of the members of the panel disagrees, then by submitting a dissenting opinion, the member is essentially preparing material or signaling to colleagues that this case is not as straightforward as it may seem. He/she says: There are other issues besides the arguments that have been raised so far that are also important. I am dissent. If you agree with me, we could either change the line of case law, since other panels would follow our understanding, or some panel will apply for an en banc review." (SAC)

In this case, submitting a separate opinion in the Supreme Administrative Court is an action motivated not only by the desire to signal a problem but also by the desire to make a particular legal issue "visible," whether due to a firm conviction of the inadequacy of previous case law, constitutional concerns or merely doubts as to whether all reasons have been considered. As we have seen above, the legal problem on which the separate opinion is based is often discussed in the broader forum of the court, so the judge making this decision may hope that other judges will adopt their reasoning and arguments in their judgments. This adoption may take the form of a direct change, where the panel of judges in certain types of cases takes a slightly different position than before due to the arguments presented, or it may take an indirect form through the issuance of *en banc* resolutions by the SAC. In this case, the signal through the separate opinion was directed at other judges of the Supreme Administrative Court.

There are also judicial dissents in which judges intent to signal constitutional doubts regarding statutory provisions the judge was forced to apply. In such a case, the dissent is, of course, directed against the decision of the majority of the panel, but in substantive terms, it challenges the content of the applicable provisions by raising doubts as to their compatibility with the Constitution.

Judges may dissent for normative and motivational reasons together. A statement containing normative and motivational reasons is from a PAC judge delegated to the Supreme Administrative Court at the time of adjudication.

"So, I was delegated, which put me in a sort of worse position. That's how the judges from the PAC who go on delegations are perceived, even to this day. They're not always treated equally. (...). I had two judges from the SAC on my panel. They believed that the view... was well-established and grounded. But I thought that was a wrong view. I wanted to change it. I tried to persuade them, but they were closed-minded. They thought it had been rehearsed enough. So, I hit a wall there. (...) That's when I wrote my separate opinion and I thought it was the right thing to do because it just can't be that the party is deprived of the opportunity to defend her rights in an administrative procedure." (PAC)

The closure to the discussion by the remaining members of the adjudicating panel has been compared to hitting a wall. The situation described above is an example of a situation where disagreement on substantive issues did not have a chance to be discussed. This highlights the importance of the interactive aspect of deliberation as a framework for a decision to dissent. The normative reasons for this judge were based on the fact of disagreement on substantive issues, the belief in the significance of the contentious issue, as well as situational factors related to the status of judges delegated from the PAC to the SAC, confirmed by the argumentative stance of the panel members who were SAC judges. As a motivational reason, the rights of the party, which justify a particular interpretation of the law, can be identified here.

5. COLLEGIALITY - A DISSENT RESTRAINING FACTOR?

Identifying why judges file dissenting opinions does not necessarily indicate the psychological difficulty involved in making this decision. How difficult it is for a judge to make such a decision is a personal characteristic beyond this article's scope. Nevertheless, it is possible to identify some structural determinants of such a decision. These determinants can be classified according to who they affect. One factor that affects judges when deciding to dissent is the time they must allocate to drafting their dissenting reasons. At the same time, if the dissenting judge is the reporting judge, the duty to prepare the court's opinion shifts to the presiding judge. Thus, this is a consideration for the other judges on the panel. As one judge said:

"*More work is added to colleagues who need to draft court's opinion. Thus, dissent is not met with enthusiasm.*" (SAC)

This raises a question of how other panel members might react to a decision to dissent. Submitting a dissenting opinion is a relatively uncommon occurrence in Polish courts. Of the judges who participated in the survey, 88% found the concept of the *votum separatum* to be useful. However, there is a conceptual distinction between affirming a judge's right to dissent and evaluating its legitimacy in specific cases. Turning to the survey results, judges were asked about their feelings when a colleague dissented, and their responses tended to align with a normative pattern of legal discourse.

„A dissenting opinion is a sacred right of a judge; therefore, if I am on the bench where someone submits a dissenting opinion, I do not feel any discomfort about it. That is, it does not cause any adverse reaction or discomfort in me toward the person, as far as it concerns such a judge." (PAC)

This statement concerned judge's feelings in response to dissent by another judge. It is impossible to imagine how a judge submitting such a dissenting opinion would describe this declared lack of adverse reactions. One may wonder about the function of such a declaration in situations where dissent is the statutory right of a judge. In legal discourse, utterances on someone's rights serve as a technique to answer questions about assessing a given behaviour. They may be interpreted merely as a reminder of the normative framework of the assessed behaviour and covertly exclude the possibility of assessing it in terms of approval or disapproval or as a means of hiding the judge's value judgments. Both strategies fit into the mold of an ideal dispassionate judge.

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It can be said that dissenting in an administrative court, which typically does not decide high-profile cases with socio-political overtones (unlike constitutional courts), and where judges liken their work to standing at a conveyor belt in a factory, is not a trivial matter. Although the style of dissenting opinions in Polish administrative courts does not include the rhetorical apologies common in common law culture, some judges admit that making such a decision is not always straightforward.

„And sometimes it is difficult to dissent so as not to expose yourself to ... maybe ostracism is too big a word but to some anger from colleagues. In this respect, it was difficult for me." (PAC)

Another judge acknowledged the concern that dissenting could affect the existing relationship between judges.

„It (dissenting) costs a lot. Because it is well, such a scratch on the monolith (…). At first, I thought that the first, maybe the second, dissent would influence our good relations here in this court. (...) It turned out that this was not the case at all. (...). After this dissent, we still talk to each other, and there is a very nice atmosphere. It (dissenting opinion) stays somewhere, I don't know, as an element or a judicial element, but does not transfer to other spheres." (PAC)

Even if such cases are considered to be rare, it is worth asking about the reactions of the members of the composition to the announcement of a dissenting opinion. Descriptions of these reactions can only be subjective in the sense that they contain a representation of the situation as they remember it. One may doubt whether their depictions would have been more objective if the researcher had been present during deliberations, which is undoubtedly legally impossible given the prevalence of statutory secrecy.

6. PANEL REACTIONS TO DISSENT ANNOUNCEMENTS DURING POST-HEARING DELIBERATIONS

An expectation that a judge will refrain from behaviour considered an expression of emotions constituting an ideal of a dispassionate judge (Maroney and Gross, 2014, p. 62) is imprecise because what is referred to as an "environment of an emotion" (Anleu and Mack, 2021) includes, among other things, attitudes toward various subjects such as trial participants, witnesses, legal representatives, and other judges. The ideal of a dispassionate judge mainly concerns actors other than judges and the case itself. During interactions between judges, particularly during conferences, emotional reactions seem more acceptable, and judges described them by using hyperbole.

"We'd better argue with each other to the blood here and convince ourselves of arguments before expressing a view outside. This is what our departmental meetings are for." (PAC)

Despite the declaration of the judge's right to dissent, other interviewees admitted that emotions may arise when another panel member questions one's position. Nevertheless, they did not state this outright.

"(...) There are certainly some emotions: Are there? There's definitely a feeling...(...) I think each of us feels like he's a little bit right. So when the other judge says: I disagree with you to such extent that I would write something different, one certainly involuntary may think, hmm. You know what I mean. Nevertheless, I think these emotions become increasingly small over time. I think that they decrease with experience. Professionals should separate emotions from their professional work. Ideally, there should be no emotions." (PAC)

The judge spoke about the experience of being a rapporteur whose standpoint was challenged. He depicted his involuntary reaction to the single word "hmm" and eventually took a normative approach, affirming the rule of "separating emotions from one's professional work." Descriptions of the judges' reactions show that the latter is subtle but present.

(1) "*Well, unless we are already coming to a point where you can already see that... That there is no common ground here. There (...) falls a sacramental saying: "Well... do what you want."* (PAC)

(2) "*Well, most often from what I met, it was <<okay>>."* (PAC)

(3) "*In most cases, there were no special signs of embarrassment or surprise from other judges in the panel (...). In those (...) cases it was expected that I would submit a dissent. I think twice there could have been a surprise, especially on the rapporteur's face, that there is a dissent: "Really?" I say: "Yes, I dissent." It was such a surprise. It could have happened twice. And in other cases, it was peaceful."* (PAC)

(4) "*I have not encountered a situation where someone felt offended because I had dissented."* (PAC)

(5) "*Among others…there were various reactions, like, a colleague gave me this look and I don't know… was surprised or sad… But this is only my interpretation."* (PAC)

(6) *"Some people treat it so emotionally that... (...) In one case, I encountered reactions that my opinion was colloquially speaking: Yucky. (...) It happened to me that my dissent was treated as a defeat by the rest of my colleagues. Yes, as a failure, in the sense that I was not persuaded. Once, it was even… I felt treated like my opinion was given on a whim, a quirky caprice. Although these are individual cases."* (PAC)

The use of the word "sacramental" (1) may suggest the patterns of repetitiveness in the verbal reactions of the form of "well, do what you want?" It is also an admission that the judge simply exercises his right. Nevertheless, it can be interpreted as an expression of disappointment, either because a colleague decided to dissent or because of a feeling of the ineffectiveness of the judge's efforts to persuade the other members to take up their position. The use of the word "okay" (2) does not indicate its attitude. This seems to be the most neutral reaction, as it can express absolute indifference to the dissent of other judges. In this case, however, direct observation would have been necessary to recognise feelings that possibly appeared at the time. There are, also examples of reactions like the surprise of another judge in the panel, expressed through a short question, "Really?" (3) when the decision on dissent is communicated. This confirms the restraining features of these reactions. Statement (4) can be interpreted as a belief that what the judge considers an adverse reaction would have amounted to some kind of behaviour related to feeling offended. In the interlocutor's experience, however, the responses of other members on the panel to the announcement of dissent remain within the limits of the attitude of professional indifference, or at least that is how the judge perceives them. It cannot be ruled out that this judge's experience included

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"weaker" reactions than being offended, such as those referred to in statements (1)–(3). A stronger reaction, as being offended, would mean crossing the line of an attitude of professional indifference. In (5), the judge mentioned reactions "among those others" that could be described as emotional, even though the word did not appear in the statement. The emotional feature is implied by the interpretation ("surprise or sadness") given by the judge himself to the gaze of a colleague against whose opinion he dissented. An utterance (6) is an exception. The dissenting judge experienced irritation from another member of the panel. Perceiving the dissent as given on a "whim, quirky caprice" implies the conviction that such objections are redundant. One may interpret this as an invalidation of legal reasons that lead the dissenting judge to his conclusion.

The reactions portrayed here differ from the behaviours described in Justice Brennan's quote at the beginning of the article ("Very real tensions sometimes emerge (...)"). Nor do they resemble the behaviours depicted in (Maroney, 2012) with the telling title "Angry Judges," which depicts judges' feelings of anger, sadness, embarrassment, or sympathy. In (Maroney, 2012), these feelings were triggered by legal evidence and sometimes by the actions of plaintiffs and defendants. In case of our interviewees, the source of their discrete reactions is another judge's decision to dissent. The collected data reveals subtleties such as surprise, sadness, and disappointment. The degree of disappointment can be attributed to the expectation that a judge's dissent is unlikely to evoke strong emotions. Nevertheless, we can also consider that these reactions may be influenced by the internalisation of the ideal of the dispassionate judge, which emphasises emotional control. The content of this ideal is cultural, not prescribed by legal provisions. This results in less precise requirements. It explicitly prohibits judges from making decisions under the influence of emotion or making individual decisions during the trial, such as accepting or rejecting requests for evidence. However, it is not entirely clear whether these requirements also extend to conduct towards other judges in the deliberation room. Nevertheless, it would be challenging to argue that the reactions described above pose a threat to this ideal. On the contrary, they reveal judges in their human dimension, which encompasses emotions like disappointment. This disappointment may stem from a judges' sense that they were unable to persuade their colleagues of their reasoning or regret that the decision is not unanimous, driven by a concern for the Court's reputation.

7. A CURIOUS CASE OF "COLLEGIAL" DISSENT

In the preceding section, descriptions were provided of judges' reactions upon receiving announcement of the dissent. Such situations indicate dissent as an individual objection to the majority's decision, which is typically considered an inherently personal act (Donald, 2019, p. 323). Confirmation that the practice of collegiality does not constrain the judge in his or her decision to dissent may be provided by cases in which the entire panel decides that one of its members should file a dissenting opinion. In such a case, the dissenting opinion is not an expression of the lack of consensus originating from one member of an adjudication panel, but rather the manifestation of their responsibility toward maintaining the quality of the legal system.

"We had arguments on the pros and cons, and it was difficult for us to decide with certainty that this position was wrong and the other was correct. The panel, for example, agreed upon a judgment, but only if one of us submitted a dissent, to show outside that we see such a problem." (PAC)

A situation in which a judge encourages his colleague to dissent during a panel conference can also be recognised as a type of cooperation.

"*I submitted this dissenting opinion to my colleague, whom I respect extremely (...). There was a moment when I considered giving up the idea of dissent. He said, then, submitted it because it was interesting.*" (SAC)

What is characteristic in this utterance is a designation as the addressee of a dissent one of the judges in the panel—most probably a judge-rapporteur. The rapporteur's encouragement is an example of an attitude in which the decision of the side judge to deliver a dissent does not cause any discomfort to the judge whose standpoint is being questioned. The statement "submit because it is interesting" can be read as the professional distance from the case and intellectual curiosity, possibly due to the belief that his position is not the only one possible in light of the rules of legal interpretation. In such cases, suggesting that dissenting opinions have agonistic origins is difficult (Mendenhall, 2017, p. xviii).

8. CONCLUDING REMARKS

The article explores the forms and practice of collegiality in Polish administrative courts. The interviews conducted revealed the existing tensions within this practice. On the one hand, the opportunity to discuss a case with other panel members is valued by judges because it reduces their decision-making uncertainty, takes them out of their routine way of thinking, and thus enhances judicial reflexivity. On the other hand, the collegial approach can pose challenges, particularly for rapporteur judges who strongly believe in their proposed decisions, as they may encounter resistance without understanding its rationale. In such situations, collegiality can become an obstacle, requiring judges to consider the perspectives of other panel members.

A related aspect of collegiality that extends beyond the panel of judges involves departmental deliberations to discuss the legal issues raised in dissenting opinions. Within this context, the article introduces a distinction between two types of dissents: avoidable dissents and deep interpretative disagreements. From a perspective of judicial independence, there are no concerns with the practice when it comes to avoidable disagreements. However, in cases of deep interpretative disagreements, assuming they are irreconcilable, the meetings of all department judges should focus on identifying this type of disagreement rather than attempting to reach a common position.

The judges who participated in the study described as a classic dissent the situation being the result of the organisation of the work of the panels. This factor is the variability of the panels and its consequences in the form of a judge's dilemma of whether to remain faithful to his decision made in the first panel or to vote for a decision that is not consistent with the first one, proposed by the members of the second panel. It also means that to the extent that a particular judge's position on a particular type of case is known to his or her colleagues, the judge's dissent can be expected. This may be a factor in explaining the institutional nature of the judges' emotions: mostly disappointment and sadness.

The chosen method of in-depth interviews also attempted to examine judicial reactions during post-trial deliberations in which a judge announces to his colleagues that he will file a dissent. The descriptions provided by the interviewees do not support the hypothesis of a link between their possible occurrence and the decision to file a dissent. In other words, collegial practices are unlikely to be associated with the decision not to

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dissent. This aligns with the results of the survey, in which the majority of the participating judges indicated that such a factor is divergence in jurisprudence rather than psychological or interactional factors.

Nevertheless, the reactions observed in the courtroom enrich our understanding of judicial interactions by demonstrating that the ideal of the dispassionate judge does not preclude subtle expressions of surprise or disappointment. Classical philosophical and legal depictions of judges often portray them as mere mouthpieces of the law (Montesquieu) or as Judge Hercules (Dworkin, 1975). In these descriptions, it is challenging to discern elements that reveal the 'human side' of judges. The reactions mentioned in response to a judge's dissent on the bench, along with decision-making uncertainty, contribute to this portrayal.

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ARTICLES

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THE INTERACTION BETWEEN ROMAN IUS CIVILE AND LOCAL PROVINCIAL LEGAL TRADITION: PAPYRI P. YADIN 21 AND P. YADIN 22 AS ROMAN STIPULATIO / Valéria Terézia Dančiaková

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Abstract: *When Babatha, a Jewish woman living in Maoza, conducted her legal affairs in the early second century CE, her homeland was already under the rule of the Romans as the province of Arabia Petraea. Although people were granted the right to use their original legal system, the situation with respect to legal disputes was not that straightforward. The nearest judiciary authority was the appointed Roman governor. Since Babatha was not a Roman citizen, in case of litigation, the governor would apply ius gentium, which was, in fact, more of an idea than a specific legal system. The Greek documents in the Archive are a precious testimony not only for the life of Babatha herself but also for how Roman dominion over various regions influenced how local legal affairs were conducted. The discussion continues relating the archive, whether traces of the Roman ius civile can be found in the papyri, and if so, what it means considering the law that was used in the provinces. The papyri P. Yadin 21 and P. Yadin 22 are presented as purchase and sale, which, however, poses a question as to what tradition lies behind the contract. In this article, we want to present how the Roman ius civile could possibly interact with local provincial legal tradition on the example of the papyri P. Yadin 21 and P. Yadin 22, comparing them to the Roman contracts, treating the possible use of stipulatio.*

Key words: *Ius Civile; Babatha Archive; Stipulation; P. Yadin 21; P. Yadin 22; Roman law*

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1. INTRODUCTION

The discovery of the Babatha Archive (along with the Salome Komais Archive) can undoubtedly be compared to (and in fact was) to finding an extremely valuable treasure. It is not a treasure of gold and precious stones, but a treasure made up of documents relating to the everyday life of a Jewish woman and her family in Arabia Petraea, one of the Roman provinces added to the empire in 106 AD, former Nabatean Kingdom. It has even greater value for us, Roman law researchers, as it contains various documents of a legal nature, such as contracts or documents relating to legal procedure (summons, petitions). We would argue that all the documents of legal character included

in the archive are influenced by the legal procedure available to the inhabitants of the province once it was under Roman jurisdiction.

What we have in the form of the archive is a material source not for one legal system, but for a mixture of legal systems that needed to find a way to blend together to function effectively in the changed situation, and so what we have in the archive is a "legal cocktail" made of local traditions influenced by place and affinity of the parties (they are described as Jewish), with a portion of Roman law brought to the area by the governor and his apparatus. Such an interaction of legal traditions was a necessary result of Rome's expansion into territories with different cultures along with the personality principle of ancient citizenship and reluctance to bestow it *en bloc* on subjugated people until 212 AD. The result of the clash of various legal systems existing within one empire is the concept of *ius gentium* as described by Gaius (Gai. Inst. 1.1.1):

….. and what natural reason establishes among all men and is observed by all peoples alike, is called the Law of Nations, as being the law which all nations employ. Therefore, the Roman people partly make use of their own law, and partly avail themselves of that common to all men, which matters we shall explain separately in their proper place.

One of the best examples of this clash of legal systems brought by Roman territorial expansion is the Babatha Archive. Of course, We will not treat all the documents from the Archive here, but rather we want to focus on a few contracts in the Greek language, namely papyri P. Yadin 17 (in relation to 5), 21, and 22, including deposit, sale, and purchase. Concerning these documents all scholars address the question of the legal tradition preserved in the documents. Some roots for Roman origin, others for oriental, whether Egyptian or Jewish, which was the cultural background of the parties. The question that has followed me everywhere for the past few months is: Do we have to look for one legal tradition to which to subsume the content of the contracts? No matter how much we elaborate on the idea of the local tradition at hand, we always must admit that there is at least one little piece of evidence of the Roman law present in the mentioned papyri captured in a few words, a sentence, at the end of each, *stipulatio*.

2. THE CHARACTER AND CONTENT OF P. YADIN 21 AND 22

The papyri designated as P. Yadin 21 and P. Yadin 22 contain a legal act that is identified by many scholars as a sale-purchase even though, as we will present below, the character of the documents is not so straightforward. Both papyri are dated very specifically, to September 11 of the year 130 CE as the text includes information about the date stating that it was composed three days before the ides of September (*πρὸ τριῶν εἰδῶν Σεπτεμβρίων*) and the year is stated as the fourteenth year of the rule of the emperor Hadrian, during the consulship of Marcus Flavius Apro and Quintus Fabius Catulinus. [1] The legal act was created in the city of Maoza, Zooron region (*ἐν Μαωζᾳ περιμέτρῳ Ζοορων*), and its parties are identified as Simon son of Jesus, son of Annas (*Σίμων Ἰησούου Ἀνανίου*) and Babatha, the daughter of Simon (*Βαβαθᾳ Σίμωνος*), both residing in the already mentioned city of Maoza.[2]

An important element to consider when thinking about the character of the legal act is the object of the contract specified as dates, which, however, are not yet ripe, meaning that according to Roman *ius civile* these would be still unseparated fruits and as a result, these are not yet *re*, a thing that can be an object of commercial activities.

[1] ***ἔτους τεσσαρεσκαιδεκάτου*** *Αὐτοκράτορος Τραιανοῦ* ***Ἁδριανοῦ*** *Καίσαρος Σεβαστοῦ,* ***ἐπὶ ὑπάτων*** *Μάρκου Φλαουίου Ἄπρου καὶ Κοεί̈ντου Φαβίου Κατυλλίνου.*

[2] The word used is *οἰκοῦντες*, a participle present active, nominative plural masculine from the word *οἰκέω*, with the meaning „to reside, to have residence" or „to live" (Panczová, 2012, p. 876).

Another aspect creating a lot of discussion about the documents, whether it is indeed a contract of sale-purchase, is the provision, according to which Simon is to pick the dates himself, and the price is set as a portion of the dates that are to be delivered to Babatha.

Another significant fact is that the legal act, identified by the parties as sale-purchase, is not captured in one document, but two separate papyri, one including only the obligations of Babatha towards Simon and the other including solely the obligations of Simon towards Babatha (Oudshoorn, 2007, p. 168). The designation of the documents as sale-purchase comes from the papyri themselves, where in P. Yadin 21 we find a phrase *ὁμολογῶ ἠγορακέναι*, and in P. Yadin 22 a phrase *ὁμολογῶ πεπρακέναι*. The words *ἠγορακέναι* and *πεπρακέναι* are both infinitives of perfect active and are related to the already mentioned *ὁμολογῶ* in indicative present active, first-person singular meaning "I confirm". Concerning the meaning of the words *ἠγορακέναι* and *πεπρακέναι*, the word *ἠγορακέναι* comes from *ἀγοράζω*, which means to walk around a square (*ἀγορά*) that, however, in the period concerned, was also connected with selling and purchasing goods in local markets that were situated at city squares. That is why the word is also translated as "to buy", or "to acquire by purchase" (Panczová, 2012, p. 69). The other used term, *πεπρακέναι*, is derived from the word *πέρνημι*, whose meaning the attic Greek was "to sell".[3] In sum, P Yadin 21 then contains the purchase and the obligation of Simon towards Babatha, while P. Yadin 22 contains sale and the obligations of Babatha towards Simon.

3. OBJECT AND PRICE – SALE AND PURCHASE?

According to Roman *ius civile*, the contract of *emptio-venditio* (sale and purchase) required that the goods will be exchanged for money, not for other goods. However, this requirement was still the object of discussion among the Roman jurists, especially the two significant Roman legal schools, the Proculians and the Sabinians. The discussion can be seen in the fragments of the Digest *D. 18.1.1* and *D. 19.4.1.1*. The Proculians supported the opinion that if a legal act is to be characterised as a purchase, it is necessary that goods would be exchanged for money. On the other hand, the Sabinians reasoned that the will of the parties is more important, and the barter was the oldest type of purchase (Brtko, 2020, pp. 62-63). The controversy itself is mentioned in the Institutes of Gaius, namely *Gai Inst. 3, 140 – 141*, which dates to the second half of the second century (Ibbetson, 2015, p. 29). It is then possible, that the character of the contract of purchase as a legal act that involves exclusively the exchange of goods was not yet firmly established in the time when the papyri P. Yadin 21 and 22 were written.[4] Since both documents are dated to the year 130 CE, we cannot exclude the possibility that it was indeed *emptio-venditio*, if we consider the element of exchange it involves, the missing price expressed in terms of money.

The real problem emerges in relation to picking the dates, since as it seems, Simon seems to pay for the dates from Babatha's orchards with his own work, which led some scholars to the conclusion that the contract is, in fact, a hire (*locatio conductio operarum*), not sale-purchase. Their argumentation is based on the provision in the papyri according to which Simon is supposed to keep the rest of the harvest as a counter-value

[3] Epic poets used the word to designate activities connected with the trade with slaves (export, transport, or selling someone to slavery), however, the word was also used to refer to commercial activities connected with bribe, and even in the meaning of betrayal (Panczová, 2012, p. 992).

[4] According to duPlessis the definitive solution to the controversy came in the late classical period (duPlessis, 2020, p. 269).

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for his labour (or effort) and expenses[5] (Radzyner, 2005; Katzoff, 2007; Broshi, 1992, pp. 230–240; Oudshoorn, 2007, p. 5; Isaac, 1992).

The content of the agreement can be summarised as follows: Simon as the purchaser will acquire from Babatha dates from three of her orchards identified as Perora, Nicarchos, and Molchaios, for which he is obliged to deliver to Babatha a specific amount and kind of dates at the time of drying as a counter-value.[6] This is the reason why some scholars suggest that the contract could be letting (*locatio conductio rei*) as letting of the said orchards instead of sale-purchase (Radzyner, 2005; Isaac, 1992, pp. 62–75). This conclusion, however, is not plausible as well, since the contract was created right before the time of harvest, while the *locatio conductio rei* presupposed all-year care. Besides, the work itself is not mentioned in the papyri, and the mention of transferring possession for a set period of time is missing as well along with the mention of rent (Chiusi, 2020, pp. 107–108; Lewis, 1994). Nicholas identifies the contract with *locatio* cases when the "seller" offers either his service or the use of a thing (Nicholas and Metzger, 2008, p. 172). Although, according to the content of the documents, Simon does not offer anything and identifies himself as a purchaser. Against the *locatio* (in this case, it would be tenancy), also speaks the fact that Babatha is obliged to secure the object of the purchase against any claims of third parties. The provision aiming at the protection of the possession of the acquirer was specifically used in the contracts of purchase and sale since it did not require the transfer of ownership and as a result, the seller did not need to be an owner of the thing sold. The seller was, however, obliged to protect the purchaser from eviction. The stipulation was used for this purpose and the sixth table of the Law of the Twelve Tables dated to the 5th century BCE mentions the sanction of double the value of the original if the seller denied any defects of the thing sold, which was later called *stipulatio duplae*. These stipulations later became the usual practice (duPlessis, 2020, p. 273).

The contract of sale-purchase (*emptio-venditio*) was in Roman *ius civile* a consensual (*Gai. Inst. III. 135*), bilateral (*Gai. Inst. III. 137*) agreement, that became perfect at the moment when the parties agreed on the object of purchase and price for it (*Gai. Inst III. 139*), while the price needed to be certain and expressed in terms of money[7] (*Gai. Inst. III. 140 – 141*).[8]

The object of the contract is not specified precisely, but it can be determined to be certain enough as it is presented as the harvest from the three orchards in Babatha's possession (Perora, Nikarchos a Molchaios), while in the time when the contract was created, the fruits forming on the date palms, as fruit-bearing things, would already be visible. The parties could estimate what would be the approximate value of the harvest. Since the object of the purchase would be the future harvest, we could consider the

[5] *λήψομαι εἰς ἐμαυτὸν ἀντὶ τῶν ἐμῶν κόπων καὶ ἀναλωμάτων – ἀναλωμάτων* – explicitly „I will take for myself against my labour and expenses ".

[6] Specifically, he is obliged to deliver to Babatha 42 talents of dates called patétés (*πατητής*), as well as another two kinds, namely, two cors (*κόρους δύο*) of dates called *συροῦ*, and 5 satas (*σάτα πέντε*) of dates called *νααρου*. The weighting of the dates is supposed to be done according to the measures and customs valid in the area that both reside in. This is especially important since the measure called talent did not have a standardised value in the whole Empire but differed according to the custom in specific areas and its value could be anywhere between 26 – 38 kg (Sherwood, 2020, p. 8). In biblical texts, we can also find mentions of a heavy and light talent (in our case the talent mentioned would be the light one since the heavy talent was around 60 kg). In the areas inhabited by Jewish people, just like *Arabia Petraea*, the value of the light talent would be approximately 30 kg, more precisely 28,53 kg as is mentioned in 1 Kor 18:14 (Scott, 1959). According to Broshi, however, in this case, it would be the Nabatean talent weighting 24 kg, which was closer to the attic one (25,86 kg) (BROSHI, 1992, p. 235).

[7] We have already addressed the controversy above.

[8] For *emptio-venditio* see the work of Zimmermann (Zimmermann, 1992, p. 230ff).

purchase of a future thing (*emptio rei speratae*) as a possible solution. In this case, should the situation occur, that the fruits would not come into existence (or would be destroyed), the purchaser is not obliged to pay the price (Nicholas and Metzger, 2008, pp. 173–174; Chiusi, 2020, pp. 103–104). The problem is that a provision like this cannot be found in the papyri and would result solely from the identification of the contract as *emptio rei speratae*. On the other hand, it is possible that being so close to the harvest, the parties did not anticipate an event that would destroy the fruits. The number of dates, unfortunately, is not specified and was known only to the parties involved.[9]

Concerning the price, it is stated as a specific amount of dates that Babatha is to receive from Simon as a counter-value.[10] The problem is that the contract seems to imply that the price for the dates should be Simon's work in the form of picking the fruits. In this relation, we need to mention fragment *D. 19.1.6.1*, according to which, it was possible to specify the price in case of purchase in a way that part of it was paid in money and part of it was paid in work done.[11] If we agreed with the Sabinian point of view, this could be the case of purchase with the price paid in money (or produce) and work as well in the form of harvest.

The agreement on the content of the legal act, the will of the parties, is expressed clearly and explicitly, in the written form even. Besides the content of the legal relationship, their will to identify it as sale-purchase is expressed as well, by identifying Simon as the purchaser in P. Yadin 21 (*ὁμολογῶ ἠγορακέναι*), and Babatha as the seller in P. Yadin 22 (*ὁμολογῶ πεπρακέναι*), which disqualifies the objection of the Proculians that in case of barter, it is not clear which party is the purchaser and which is the seller[12] since the parties themselves defined the position in both papyri.

The documents also include other obligations, such as compensation in the case one of the parties would not fulfil their part of the agreement. P. Yadin 21 as a document including the obligations of Simon states that in the case he does not deliver the agreed amount of the dates at the time of drying, he will be obliged to pay a "contractual fine", either himself (*ἔκ τε ἐμοῦ καὶ ἐκ τῶν ὑπαρχόντων μου* – from his own property) or through a guarantor (*ἢ παρὰ τοῦ ἐγγύου μου*).[13] Then, P. Yadin 22, as a document including the obligations of Babatha states that she is to ensure acquisition and uninterrupted possession of the fruits(and the orchards) for Simon (*ἐμοῦ καθαροποιούσης σοι τοὺς προγεγραμμένους κήπους ἀπὸ παντὸς ἀντιποιουμένου* – I will clear the prescribed orchards from anyone with counter-claim) and in the case, she fails to fulfil her obligation, she will be obliged to pay a fine of 20 silver denarii for Simon's labour and expenses (*ἔσομαί σοι ὀφείλουσα ἀντὶ τῶν σῶν κόπων καὶ ἀναλωμάτων ἀργυρίου δηνάρια εἴκοσι* – I will owe you for your labour and expenses 20 silver denarii). According to Chiusi, the fines (or their value) point to the fact that in the case of the papyri, we indeed witness the contract of Roman *emptio-venditio* (Chiusi, 2020, p. 109). Also, the mention of uninterrupted possession would point to this conclusion, since as we have already mentioned, the contract of sale did not require the transfer of ownership, only possession and surety against eviction (both are mentioned in the documents).

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[9] Katzoff is trying to estimate Babatha's share of the dates which however is impossible to know since we do not have the acreage of the orchards or information on the number of palm trees or yearly yield. (Katzoff, 2007, p. 553).

[10] It is not mentioned whether they have to be from the same orchards, but it can be presupposed.

[11] *"Si* ***vendidi*** *tibi insulam* ***certa pecunia*** *et ut* ***aliam insulam meam reficeres****, agam ex vendito, ut reficias: si autem hoc solum, ut reficeres eam convenisset, non intelllegitur emptio et venditio facta, ut et neratius scripsit."*

[12] *D.18.1.1.1*

[13] The fine is specified as 2 denarii for each talent of patétés and one "black one" (currency designated as *μέλαναν*) for the rest.

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To consider the texts of P. Yadin 21 a 22 as a form of *locatio conductio*, it is also necessary to consider the question of the influence of various local traditions on the legal relationship. One of the possible solutions is the so-called *καρπωνεία* known from the Hellenistic environment as a contract combining elements of purchase and letting that used to be contracted right before the picking of fruits (Radzyner, 2005, pp. 148–152; Oudshoorn, 2007, pp. 173–174; Pringsheim, 1950; Czajkowski, 2017, p. 53). This theory would also be supported by the content of P. Oxy IV 728 dated to the year 142 CE, which combines the elements of purchase-sale and letting with the difference that although the purchaser picked the fruits himself, the price was supposed to be paid in money and not a portion of the fruits, as is the case of Babatha (Taubenschlag, 1944, p. 340). Similar arrangements can be found in Aramaic and Hebrew texts from the same period such as P. Yadin 42 – 46 and P. Mur. 24, or P. Yadin 6 (Radzyner, 2005, pp. 152–160.; Katzoff, 2007, p. 552; for P. Yadin 6 see Oudshoorn, 2007, pp. 171–172). According to Cohen, what we encounter here is the solution to a situation, where there was no suitable contract available in the region that would enable the parties to transfer ownership of not yet separated fruits, and thus these were sold through the hire of services, *locatio conductio operarum* (Cohen, 2018, p. 573).

As can be seen from the scholarly debate presented so far, the problem of the legal act captured in P. Yadin 21 a 22 is that it cannot be subsumed under *emptio-venditio* nor *locatio conductio* without raising doubts. The most plausible solution seems to be that what we have here is a very specific kind of a legal act arising from local traditions. This does not, however, mean that it cannot contain elements of Roman *ius civile*. Katzoff finds its origin in rabbinic jurisprudence on one hand, as well as in the historical context of Babatha. He proposes a reverse order that in fact, *locatio conductio* for the picking of the dates is masked with a sale-purchase contract the reason being that although both parties were Jewish, there were no Jewish judicial authorities available near their area to resolve any subsequent legal disputes. As a result, they would need to approach Roman officials in such cases. Also, what Babatha is trying to do, is to go around the Jewish legal tradition according to which, she could hold only immovable against the claim for her dowry, but not movables (the dates).[14] To be able to dispose of the fruits, she sells those to Simon, and he offers them a portion of the produce as a counter-value (Katzoff, 2007, p. 565). According to Katzoff what we have here is a case of simulation (*fraus legis facta)* that would not hold in Roman law the result being the summons that we find in P. Yadin 23, which is aimed at the question of the validity of the legal act contained in P. Yadin 21 a 22 (Katzoff, 2007, pp. 566–573). A reference to simulation, *fraus legis facta,* can be found in *Gai Inst. I.46*,[15] *D. 1.3.29*,[16] or in Ulpianus *D. 1.3.30*[17] referring to evasion of legislation in a sense if someone does something that the laws do not forbid, but the behaviour is clearly contrary to the aim of the law (fraud committed on a provision of law). However, this was not yet an elaborated and generally accepted rule (Berger, 1980, s. 477). The fragment in Gaius refers to a specific law, the *lex Fufia Caninia*, while fragments contained in the Digest of Justinian are attributed to lawyers who lived either at the time

[14] According to both papyri, Babatha is a widow, and she is entitled to the estates as a dowry and payment of a debt that existed towards her.

[15] *„... nam et si testamento scriptis in orbem seruis libertas data sit, quia nullus ordo manumissionis inuenitur, nulli liberi erunt, quia lex Fufia Caninia, quae* ***in fraudem eius facta sint****, rescindit. sunt etiam specialia senatus consulta, quibus rescissa sunt ea, quae in fraudem eius legis excogitata sunt."*

[16] *„****Contra legem facit****, qui id facit quod lex prohibet,* ***in fraudem*** *vero, qui salvis verbis legis sententiam eius circumvenit."*

[17] *„****Fraus enim legi fit****, ubi quod fieri noluit, fieri autem non vetuit, id fit: et quod distat hryton apo dianoias, hoc distat fraus ab eo, quod contra legem fit."*

or later than Babatha, which is why we cannot be certain, that *fraus legis facta* would be taken into account when judging legal acts by Roman administration in the first half of the 2nd century in the province of *Arabia Petraea*.

4. STIPULATIO AS A SOLUTION?

Concerning the reservations about subsuming the content of the papyri under either of the Roman law type of contract (*locatio conductio* or *emptio-venditio*), we agree with the proposal that what we have in front of us is indeed a legal act based on the local tradition. However, it does not exclude the presence of elements of Roman *ius civile*.

In our opinion, the answer to the question of what type of a legal act according to Roman *ius civile* is presented in the papyri does not lie in hire or sale, but in Roman *stipulatio*. Here, we want to support our view with Katzoff's argumentation that the parties did not have Jewish judicial institutions at their disposal to resolve any legal disputes that might arise, and that is why they had to rely on the authority of the Roman officials in the province. Concerning the issue of law that would be applied in such a situation, it would be either local law or *ius gentium*. However, the content of *ius gentium*, as a law common to all nations, is a problem for a separate study.[18] We dare to state that the Roman officials would rely on the legal system they knew the best (*ius civile*) when dealing with legal disputes of foreigners, perhaps looking for institutes similar and acceptable to parties involved. It is then entirely possible that Babatha and Simon purposely formed their contract to resemble a legal act that Roman officials would easily identify and make a decision about. Stipulation itself as a form of arranging legal relations between the parties preceded the emergence of a contract of sale and it cannot be excluded that it would be used for these purposes even later on (Johnston, 1999, pp. 80–81; duPlessis, 2020, p. 261).

Stipulation was the most flexible, unilateral type of a legal act that could be used for any kind of legal relationship, although it was a contract *stricti iuris* and at the beginning required a strict form to be kept. Later, however, only a simple exchange of a question and an answer that agreed in the content would suffice to create the contract. The unilateral character never changed (Zimmermann, 1992, p. 68ff; Smith, 1859, pp. 817–818). The stipulation would only create an obligation pertaining to one of the parties, and should the other party have any obligation towards the first party, another stipulation was needed, in sum, two stipulations were required to create mutual obligations of two parties of a legal relationship. This agrees with the character of the legal act we have in Papyri P. Yadin 21 and 22.

There is no doubt that the documents do include stipulation. This can be found at their very end, where we encounter the word *πίστις* that could lead us to interpret the term in the sense of Roman *bona fide*, which would, in fact, be in favour of *emptio-venditio* as bona fide excluded stipulation as a contract *stricti iusris* (Chiusi, 2020, p. 101). But just like in Latin, the Greek equivalent of the phrase was constituted of two words, *καλῇ πίστις* meaning "good faith" (Liddell and Scott, 1996, p. 1408). We can find the phrase *καλῇ πίστις* with the same meaning in the Babatha archive comprised of the two words as the equivalent of the Latin *bona fide* in P. Yadin 16, 28, 29 and 30.[19] Both words can be found in other documents as well, in P. Yadin 17, 18 and 20, however, not in next to each other and we cannot interpret them in terms of *bona fide*, since the grammatical analysis shows that the words do not relate to each other. The word *πίστις* is a noun and the other one

[18] The definitions of *ius gentium* from the Roman legal sources can be found in *Gai Inst. 1.1.1.*
[19] *καλῇ πίστει* in P. Yadin 16; *ἐκ καλῆς πίστεως* in P. Yadin 28, 29 and 30.

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is in the form of an adverb, *καλῶς* (well) and relates to the previous adverb *οὕτως* (like that).

The grammatical analysis of the sentence, where we can find the word *πίστις* used in P. Yadin 21 and 22 shows as well that it is not used in the sense of *bona fide*. The word is related to two verbs participle perfect medium in genitive singular feminine, *ἐπηρωτημένης καὶ ἀνθωμολογημένης*,[20] while *πίστις* itself is genitive singular feminine as well, which means that what we encounter here is a grammatical phenomenon called absolute genitive when the noun in genitive will be translated as nominative. The meaning of the word *πίστις* is important as well since it can be translated and most commonly is translated as "faith", but another meaning is "a solemn promise" (Panczová, 2012, p. 1001). The sentence featuring *πίστις* can be translated as: "*The question about a solemn promise has been asked an answer has been given*". The promise itself in form of a question and answer is the crucial element of *stipulatio* according to Roman *ius civile*.[21]

We argue, however, that the papyri not only contain stipulation somewhere in the text of the contract but that the whole contract was created in a form of stipulation precisely because the parties involved anticipated the legal dispute and the circumstances along with the legal tradition at hand did not offer other ways to arrange their legal relations. There are more features that would point to a stipulation in P. Yadin 21 a 22. The first hint lies in how the documents are composed as they seem to be one contract captured in two separate papyri each containing only the obligations of one party towards the other, Simon towards Babatha (P. Yadin 21) and Babatha towards Simon (P. Yadin 22). Chiusi sees this as the proof for *emptio-venditio*, with which we cannot agree since what we have here are not simply two copies of the same contract but two documents with separate obligations addressed only to one of the parties. (Chiusi, 2020, p. 105). Then there is the stipulation included at the end of the document that related to the cases of the breach of the contract, which could be part of the sale contract. The absolute genitive at the end of each papyrus, however, could be seen as a stipulation that is related to the whole content of the documents, not just the provision concerning breach of obligations.

In our opinion, however, the most important proof of the use of stipulation for the whole legal relationship between Babatha and Simon lies at the very beginning of the papyri in the sentence, where they describe the contract using the words purchase (*ἠγορακέναι*) and sell (*πεπρακέναι*). Both sentences start using the word *ὁμολογῶ* (*ὁμολογῶ ἠγορακέναι* and *ὁμολογῶ πεπρακέναι*), which is commonly translated as "*I confirm to buy*" and "*I confirm to sell*". However, the word also has a meaning parallel with the meaning of the Latin *spondeo*, which was used precisely to create stipulation.[22] Simon then does not confirm that he is buying the dates from Babatha, but he promises to buy them. The reference to the question and answer along with the mention of a promise (*πίστις*) at the end of each text, could then indeed be explained as pertaining to the whole legal relationship captured in P. Yadin 21 and 21.

Here we would also like to mention other papyri from the archive that share the structure of P. Yadin 21 and 22, namely P. Yadin 17, and compare the purchase-sale documents with the structure and terminology in P. Yadin 18, 20 and 57 (P. Hever 65).

The same problem as in P. Yadin 21 and 22, subsuming the contract under *ius civile*, is with P. Yadin 17 which is designated as a deposit and uses the Greek term for deposit several times in its text (*λόγον παραθήκης, ὀφείλειν ἐν παραθήκῃ, τῆς*

[20] Meaning to "ask" (*ἐπηρωτημένης*), and to "answer" (*ἀνθωμολογημένης*).
[21] Oudshoorn argues as well that the documents contain stipulations in this part (Oudshoorn, 2007, p. 151).
[22] The word in its basic form *ὁμολογέω* also has meanings such as "to promise, to bind, to make a contract".

παραθήκης, τὴν παραθήκην διπλῆν). The problem with the deposit here is twofold, as Oudshoorn explains (Oudshoorn, 2007, pp. 127–155). First, it seems that money in the deposit is allowed to be used, which could be explained by *depositum irregulare*, however, another problem arises, which is the transfer of ownership, which as it seems does not occur in this case but is necessary for Roman law (Bělovský, 2002, pp. 190–191). Again, what we have in P. Yadin 17 is a local tradition where the deposit of fungibles is possible allowing the depositee to use the object of the deposit while leaving the ownership with the depositor. All in all, it seems we would leave the *ius civile* at the boundary of the province Arabia Petrea. Is that so?

In P. Yadin 17, 21, and 22, as well as, 18 and 57 (marriage contracts), and 20 (concession of rights), we can notice certain features that these papyri have in common, the most prominent being that they include the stipulation clause at the end of the text and we would argue that the papyri not only include elements of the Roman *ius civile* contract in form of stipulation but that its composition refers to the character of *ius gentium* in the everyday praxis of the provincials.

The stipulation is most clearly presented at the end of each document:

1. P. Yadin 17: ...***πίστει ἐπηρωτήθη καὶ ἀνθωμολογήθη*** *ταῦτα οὕτως καλῶς γείνεσθαι.*
2. P. Yadin 18: ...***πίστει ἐπηρωτήθη καὶ ἀνθωμολογήθη*** *ταῦτα οὕτως καλῶς γείνεσθαι.*
3. P. Yadin 20: ...***πίστεως ἐπηρωτημένης καὶ ἀνθωμολογημένης***.
4. P. Yadin 21: ...***πίστεως ἐπηρωτημένης καὶ ἀνθωμολογημένης***.
5. P. Yadin 22: ...***πίστεως ἐπηρωτημένης καὶ ἀνθωμολογημένης***.
6. P. Yadin 57 (P. Hever 65): ...*οὕτως καλῶς γείνεσθαι* ***πίστεως ἐπηρωτημένης καὶ ἀνθωμολογημένης***·

The question I would like to pose is: Where does the stipulation begin? Is it for the final provision concerning any fines at the end of documents or does it protect the whole contract based on the local tradition?

We want to focus on three features included in the chosen documents, as something they all have in common: 1) stipulatio at the end; 2) the use of the Greek word *ὁμολογῶ* at the beginning; 3) and the mention of scribe under the text. We have already treated the issue of *πίστις* as bona fide earlier, so here we want to focus on other features.

Here, I would like to point to the word *ὁμολογῶ* that is used at the beginning of each of the mentioned contracts:

1. P. Yadin 17: ...*ἐπὶ τῆς θελήσεως καὶ συνευδοκήσεως* ***ὡμολογήσατο***....
2. P. Yadin 18: ...*ἣν τιμογραφίαν* ***ὡμολόγησεν***...
3. P. Yadin 20: ...***ὁμολογοῦμεν*** *συνκεχωρηκέναι*....
4. P. Yadin 21: ...***ὁμολογῶ*** *ἠγορακέναι*....
5. P. Yadin 22: ...***ὁμολογῶ*** *πεπρακέναι*....
6. P. Yadin 57 (P. Hever 65): [....] ***ὡμολογήσατο*** *Ιησους Μαναημου τῶν ἀπὸ κώμης*...

In P. Yadin 21 and 22, Katzoff translates the word as "*I acknowledge*" (to buy/to sell), which is one of the possible translations. As was already mentioned, the word can also be used in the meaning of "*to promise, to buy*," or "*to make a contract*," which are meanings parallel to Latin *spondeo*. What is even more important, the term ὁμολογῶ is used as a Greek substitute for Latin *sponedo* by Gaius in Gai. Inst. III. 93:

"Sed haec quidem uerborum obligatio DARI SPONDES? SPONDEO propria ciuium Romanorum est; ceterae uero iuris gentium sunt, itaque inter omnes homines, siue ciues Romanos siue peregrinos, ualent. et quamuis ad Graecam uocem expressae fuerint, uelut hoc modo δώσεις ; δώσω· ***ὁμολογεῖς ; ὁμολογῶ·*** *πίστει κελεύεις ; πίστει κελεύω·*

ποιήσεις ; ποιήσω, etiam hae tamen inter ciues Romanos ualent, si modo Graeci sermonis intellectum habeant; et e contrario quamuis Latine enuntientur, tamen etiam inter peregrinos ualent, si modo Latini sermonis intellectum habeant."

If we look at the *ὁμολογῶ* as a statement of promise then the stipulation at the end of the papyri could be, in fact, a statement confirming that the whole contract is actually a stipulation that was used to embrace a local legal tradition (perhaps the *καρπωνεία* in case of P. Yadin 21 and 22) into a legal scheme that would be known to the Roman judicial authorities in case of a legal dispute (which was anticipated as the summons in P. Yadin 23 show). Since the institutes are dated to the year 160 CE, and the contracts of the Archive were created some 40 to 30 years earlier, it is possible that the stipulation was indeed known to the parties involved and used in such a manner.

In the case of P. Yadin 21 and 22 also the composition of the contract being written on two separate papyri, one including the obligations of Babatha towards Simon and the other including the obligations of Simon towards Babatha would support such an explanation. Also, the identical content of the first part of the document concerning the sale/purchase would meet the necessity of the identical content of the question and answer in *stipulatio*. This is not the case in P. Yadin 17 since the deposit did not impose duties on both parties, where however we have two identical texts preserved.

Oudshoorn argues that the *stipulatio* was used as a confirmation that the contract in fact was created (Oudshoorn, 2007, p. 151). The decision to include the stipulation clause is meaningless unless it was expected to be used as a proof in front of Roman judicial authorities. *Stipulatio* was the most universal contract, and very simple to make. Besides making a promise is perhaps the simplest way to bind a person to certain actions and promises have been part of every society. Another opportune feature is that it was a contract *sricti iuris* meaning that only the form would be considered at the court. Since the form was met in the documents, the use of the equivalent term *ὁμολογῶ* for *spondeo*, the clause at the end confirming that the question had been asked and answered, the obligation created would stand.

If we look back to P. Yadin 21 and 22 we must again refer to Katzoff arguing that the parties did not have Jewish judicial bodies available, which would try their disputes according to local legal traditions. As countless other documents from the archive show (various summons and petitions), it was the Roman official who indeed tried legal disputes concerning Babatha.

That is why we want to argue that the stipulation included in the document is not really an example of Roman *ius civile* as such but in fact an example of how Roman *ius civile* was used in the sense of *ius gentium* to allow the Roman judicial authorities decide the cases that would be based on the local legal tradition and as such perhaps unknown to them. We do not want to say that such cases never occurred, but perhaps to simplify certain processes *stipulatio* could be introduced in the governor's edict as a form of a universal contract of *ius gentium*. I would like to support this notion also with another feature that these contracts have in common, except for P. Yadin 57, which, however, is missing the last few lines. The feature is the mention of *λιβράριος*. The term has no origin in Greek but is rather a Greek transcription of the Latin term *librarius* used for a scribe or secretary.

1. P. Yadin 17: ... *Θεενας Σίμωνος* **λιβράριος** *ἔγραψα*...
2. P. Yadin 18: ... *Θεενας Σίμωνος* **λιβράριος** *ἔγραψα*...
3. P. Yadin 20: ... *ἐγράφη διὰ Γερμανοῦ* **λιβραρίου**...
4. P. Yadin 21: ... *ἐγράφη διὰ Γερμανοῦ* **λιβραρίου**...
5. P. Yadin 22: ... *ἐγράφη διὰ Γερμανοῦ* **λιβραρίου**...
6. P. Yadin 57 (P. Hever 65): last few lines missing.

The Greek equivalent would be *ὁ γραφεύς*. To use Greek transcription of a Latin term does not really make sense since the documents are written in Greek and other instances use proper Greek terminology (e.g., *παραθήκη* for the deposit). Possibly, the scribe was a part of the Roman administration and helped Babatha with the composition of the contracts advising her to use the stipulation to ensure the validity of documents in front of Roman courts in case there was a legal dispute.

5. CONCLUSION

Based on the reasoning presented above, what we have in front of us in the form of papyri P. Yadin 21 and 22 is a unique example of how the provincials dealt with the reality of Roman rule in their everyday life. The Roman system of administration was complicated in the sense, that although the Romans did rule a vast area that they conquered, they left the inhabitants of the provinces a certain level of freedom in relation. They were allowed to live according to their own laws. This arrangement was necessary since they were reluctant to make the conquered people Roman citizens, but in reality, the people either did not have their own judicial instances available (as it seems was the case of *Arabia Petraea*) or for some reason, they preferred the Roman system (Czajkowski, 2020, pp. 84–100).

This is probably what we have here. Babatha with Simon wanted to contract a business together, perhaps to allow Babatha to make use of the dates from the orchards she held, but because of Babatha's circumstances (she was a widow with a claim to dowry and inheritance), they perhaps anticipated a legal dispute with other heirs of her late husband and the guardians of her son. The reason she expected a dispute was connected to rabbinic law according to which she could hold and dispose of the orchards, but she did not have the right to dispose of the movables (the already collected dates). If she sold from the orchards, she could be left without means in the future. That is why she decided to sell the dates, while not yet separated from the palm trees, and thus still connected to the orchards she could dispose of (Katzoff, 2007, pp. 556–575).

Since the only available authority would be the Roman administration present in the province, they decided to contract their legal relationship in a form that would be known to the Romans to make the process of litigation easier. This is where the question of *fraus legis facta* comes to attention, whether the court trying the case (which happened as P. Yadin 23 shows) would take it into consideration. The stipulation being a contract *stricti iuris* did not allow to consider any circumstance making the decision quite straightforward. Even if the Roman judicial ignored the *ius civile* features and tried the case according to rabbinic law, it did not work with the concept such as *fraus legis facta*, and the contract would stand (Katzoff, 2007, pp. 572–573). Perhaps they did not have sufficient knowledge of Roman *ius civile*, but they were acquainted with the form of *stipulatio*. This anticipation is then confirmed by the summons in P. Yadin 23 concerning the very legal act that we find in P. Yadin 21 and 22.

If we compare the P. Yadin 21 and 22 with other presented documents, we can clearly see a structure consisting of the word *ὁμολογῶ* at the beginning, the text of the contract, stipulation clause at the end and the mention of *λιβράριος* in the subscription part. Here we want to mention P. Yadin 5, quite an early document, which is also a deposit, however, it does not include any of the features. Given the fact that it was attempting to resolve property issues after the dissolution of the *societas* following the death of one of the partners, it is odd that the parties would not have sought to ensure its validity. On the other hand, what is also different is that it does not mention the scribe as the other documents do. Perhaps, Babatha decided to use the help of the scribe only later to ensure

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that all her dealings would be clear and stand in Roman courts should they become the object of a legal dispute. And we believe this was the case. As we would argue, again, what we have in front of us is not only an example, of Roman *ius civile*, but an example of how it could work in the sense of *ius gentium*, and the documents presented could be, in fact, sources for *ius gentium*.

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INTERSEXUALITY AND TRANSGENDER IDENTITY AS A "PROBLEM" OF PARTICIPATION IN SPORTS COMPETITIONS (MEDICAL AND LEGAL ASPECTS OF DECISION-MAKING PRACTICE)

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Abstract: *Amidst a global landscape where transgender individuals face unprecedented challenges in accessing equitable sexual health care, our review breaks new ground by exploring the intricacies of sexual health within the transgender community. Unveiling the critical gaps in current health care practices, our research not only amplifies the voices of those often marginalised in health narratives but also pioneers a comprehensive, culturally sensitive approach to transgender sexual health. The literature review tries to find medical and subsequent legal justifications for PRO and CONS of participation of transgender and intersex athletes in the category of the opposite sex. It tries to analyse which differences in life can be relevant in defining competitive advantages, which nowadays lead to very controversial, often politically motivated conclusions. The opinions of the professional and sports public do not go along with some decisions of sports associations and authorities. It therefore also deals with the recent decision of the European Court of Human Rights in the case of Caster Semenya, as well as the participation of athletes across different sports disciplines and categories. It does not ignore the question of the adequacy of anti-discrimination measures. Furthermore, it evaluates the impact of such participation on the integrity and fairness of competitive sports, highlighting the need for a balanced approach that respects the rights of all athletes. This study stands at the forefront of transforming sexual health care for transgender individuals worldwide.*

Key words: *Transgender Person; Intersexuality; Sex Determination Processes; Hyperandrogenism; Testosterone; Discrimination; „Very Weighty Reasons"; Arbitration; European Court of Human Rights*

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1. THE QUESTION OF COMPETITIVE ADVANTAGE AND DIFFERENCE WHEN IT COMES TO GENDER

The WHO has a decent definition: "Gender refers to the characteristics of women, men, girls, and boys that are socially constructed". When society talks about "gender norms", it refers to behaviours and roles associated with men, women, girls, and boys.[1] While not inaccurate, the WHO's definition is incomplete because it implies a kind of binary. There are more genders beyond men, women, girls, and boys. The Canadian Institutes of Health Research (further as **CIHR**) provides a fuller definition: "Gender refers to the socially constructed roles, behaviours, expressions and identities of girls, women, boys, men, and gender diverse people".[2] In short, gender is a social construct that varies over time and across societies.

How is gender different from sex? The CIHR defines sex as "a set of biological attributes in humans and animals." These attributes include chromosomes, gene expression, hormone levels and function, and reproductive/sexual anatomy. Sex is typically categorised as "male" or "female," but even within sex, categories are more complex than a binary.[3]

The question of competitive advantage finds its extensive justifications in the jurisprudence that concerns illegal doping. When examining the circumstances, it is important that "(...) it is not a matter of responsibility for the culpable use of a prohibited substance, but of a super-objective responsibility "for the body", i.e. for the fact that the substance was found in the athlete's body after the competition and that he/she competed in situations, when he/she was favoured over others due to his/her health dispositions." (David, 2012, p. 157). There is no doubt that it was this substance that favoured the athlete. But Ludvík David (2012, p. 157) gives an example from decision-making practice, when it seems particularly difficult to balance the degree of responsibility, if it is, for example, a long-term endurance load, during a several-hour cycling stage, which can increase the level of testosterone in some competitors due to a non-specific reaction of the body to such an extent that it exceeds the permitted limit.

Nowadays, there is increasing pressure on athletes from the outside, which motivates them in the pursuit of records and leads to the team production of a "champion factory". In the light of this ambivalent view, athletes appear in the eyes of the public not only as cheaters, but also as victims (Lipovietsky, 1999, cited by Dávid, 2012, p. 160).

Cultural awareness and social recognition of many forms of gender identity, gender expression and gender roles are developing worldwide (Wipfler, 2016, p. 494).

Currently, we are witnessing the tension of arguments on both sides. Some organisations defend the rights of transgender (the problem mainly focuses on women transitioning to a man, i.e. "**FtM**" for short) and hyperandrogynous women and their ability to compete without discrimination in women's sports disciplines compete with the opposite ones.[4] At the opposite pole of the discourse, the arbitrators of the rights of other participants in sports competitions operate, arguing for equality of conditions and fair play rules for all. The question is whether this is the result of a modern-day ideological

[1] World Health Organization (WHO). Gender and health. Available at: https://www.who.int/health-topics/gender#tab=tab_1 (accessed on 12.02.2024).
[2] Canadian Institutes of Health Research (CIHR). What is gender? What is sex?. Available at: https://cihr-irsc.gc.ca/e/48642.html (accessed on 12.02.2024).
[3] *Ibid.*
[4] UN Expert warns Biden Administration: Rule changes in women & girls' sports would breach "human rights obligations". In: *ADF International*, published on 28.12.2023. Available at: https://adfinternational.org/news/un-expert-warns-against-us-rule-changes-in-womens-sports (accessed on 21.01.2024).

struggle, or the problem is still so scientifically unexplained that the uncertainty and contradiction in the rules across the whole world and in different types of sports fit right into that vacuum.

"*One high jumper could be taller and have longer legs than another, but the other could have perfect form and then do better. One sprinter could have parents who spend so much money on personal training for their child, which in turn, would cause that child to run faster*" (Medley and Sherwin, 2019).

We should keep in mind that success and performance in sports is more or less a multifactorial matter, which is a combination of not only biological factors, but also psychological and physical preparation, sports conditions, but also finances, a good trainer, coach, physiotherapist, discipline, character features and health condition. Each of these factors can work both for and against an athlete. However, if we move the discourse to the scientific level, which solves the issue of biological and anatomical prerequisites in sports, as well as to the legal level, which should create a fair sports environment in which there is no discrimination, it is necessary to look at the biological criteria for determining gender and establish clear demarcation differences in the sexes.

2. BIOLOGICAL CRITERIA OF SEX DETERMINATION AND GENDER DIFFERENCES

According to the criteria of Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development) (hereafter referred to as "**DSD**"), it is i. a. stated that "since puberty, males are generally at a considerable advantage compared to females in terms of size and strength, mainly due to a significantly higher level of circulating testosterone and from the point of view of the potential impact of these differences on sports performance, it is generally accepted that mutual competition between male and female athletes would not be fair and relevant and could discourage women from participating in sports competition" (IAAF Athletics, 2018, p. 1).

A certain disadvantage can be described in the case of a FtM transgender person, *nota bene*, if we are talking about a skeletal and muscular predisposition, because they will generally be lower and thinner. If, on the other hand, we are describing MtF and the person has gone through male puberty, then it will not only be a prerequisite for a larger and taller body structure, but also a higher level of testosterone in the body before these persons start taking oestrogen.

As a result from the IAAF Eligibility Regulation for DSD, to be eligible to compete in the female classification in a Restricted Event at an international competition, or to set a world record in a competition that is not an international competition, a relevant athlete must meet each of the following conditions (the eligibility conditions). A relevant athlete who does not meet the eligibility conditions (and any athlete who is asked by the IAAF Medical Manager to submit to assessment under these regulations and fails or refuses to do so) will not be eligible to compete in the female classification. However, that athlete will be eligible to compete: in the female classification at competitions that are not international competitions: in all track events, field events, and combined events, including the restricted events; or at the male classification or any applicable intersex or similar classification that may be offered (IAAF Athletics, 2018).

While referring to participation in sports competitions at the primary and secondary school level, bringing up the topic of gender differences could do more harm than good. However, the situation is different if we are talking about the professional level of sport. This does not only refer to a selective approach to the gender identity, but also to the overall view of sport as such, which should also be a form of entertainment, physical benefit and socialisation.

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However, the situation is different if we are talking about professional sports, not only athletics, swimming, or strength sports.

The results clearly show that gender plays a big role in winning. Female athletes—meaning athletes with ovaries instead of testicles and testosterone (T) levels that a woman's unandrogenised body can produce—are not competitive against men—by which we mean athletes with male-scale testicles and male T levels. The lower end of the male range of hormone levels is three times higher than the upper end of the female range. Consistent with the much lower T levels in women, the range in women is also very narrow, while the range in men is wide (Coleman and Shreve, n.d.).

3. THE IMPACT OF BIOLOGICAL GENDER DIFFERENCES ON SPORTS PERFORMANCE

The influence of inherent biological distinctions on athletic performance is nuanced and becomes pronounced with age. During early childhood, organised sports typically emphasise the cultivation of fundamental motor and social competencies, with little to no separation based on gender. At this stage, the performance gap in sports between boys and girls is usually minimal or considered to be of little significance (Hilton and Lundberg, 2021).

As children approach puberty, notable differences in body composition and size begin to manifest, driven by gender-specific hormonal fluctuations, including variations in testosterone, oestrogen, progesterone, luteinising hormone, follicle-stimulating hormone and growth hormone (Sandbakk, Solli and Holmberg, 2018). During this phase, boys experience a significant surge in testosterone production, which can be up to 20 times higher than pre-puberty levels, resulting in testosterone concentrations vastly exceeding (15 times higher) those in females at any age stage (Hilton and Lundberg, 2021).

Testosterone, a key endogenous hormone and primary androgenic steroid synthesised by the testicles, plays a crucial role in promoting the development and maintenance of male characteristics. While it also acts as a precursor for oestrogen in females, its anabolic properties significantly enhance muscle mass growth (Wood and Stanton, 2012). The presence of testosterone leads to marked differences in muscle mass, strength, body measurements, and haemoglobin levels among males, contributing to distinct sexually dimorphic traits (Hilton and Lundberg, 2021).

This hormonal influence results in males developing a higher proportion of muscle mass relative to body fat during growth, enhancing muscle strength and both anaerobic and aerobic energy capacities (Sandbakk, Solli and Holmberg, 2018). Notably, males tend to have a greater concentration of muscle mass in the upper body, which contributes to a higher upper-to-lower body strength ratio, particularly in the arms, impacting not only strength and energy production capabilities but also technique (Hegge et al., 2016).

Differences in endurance capabilities between genders are also evident, attributed to factors such as higher testosterone levels, increased haemoglobin, and a physique characterised by greater muscle mass and less fat in males, facilitating enhanced aerobic and anaerobic energy delivery and production (Hegge et al., 2016).

In the context of transmasculine athletes (those transitioning from female to male) undergoing hormone therapy with testosterone, there appears to be no significant competitive advantage over cisgender males in male sports categories. However, the discussion often centres around transfeminine athletes (those transitioning from male to female), who may retain certain physiological performance characteristics associated

with male physiology, primarily due to testosterone, potentially offering them an advantage in competition (Tidmas, Halsted, Cohen and Bottoms, 2023).

Roberts et al. (2020) reviewed athletic performance and medical records of 29 transmen and 46 transwomen who started gender affirming hormones while in the United States Air Force. Results indicated that oestrogen treatment in transwomen led to an increase in weight and a decrease in athletic performance, while testosterone treatment in transmen was associated with improved athletic performance, without significant changes in body composition. Before undergoing hormone therapy, transwomen had a 15–31% athletic advantage over cisgender women, which decreased after receiving feminising treatments. Despite this reduction, transwomen maintained a 9% higher average running speed even after a year of testosterone suppression, as per World Athletics' guidelines for women's event participation. These findings offer valuable insights for sports organisations and policy-makers regarding the inclusion of transgender athletes in competitive sports (for more see Roberts, Smalley and Ahrendt, 2020).

4. SPORT AND PARTICIPATION CRITERIA IN WOMEN'S DISCIPLINES

In April 2015, decathlete Caitlyn Jenner, formerly known as Bruce Jenner, revealed her transgender identity. It was a turning point moment at a time when transgender issues were constantly making headlines. Now, Jenner is considered one of the most famous come out transgender people in the world.[5] Obviously, even at this point, the transgender community has a mixed reaction to her Vanity Fair reveal and beautiful photos, as some activists blamed her for the lack of compassion and appalling conditions in which many transgender women and men live and cannot experience this transition and coming out, especially of colour.

Although Jenner only transitioned after her athletic career ended, there are countless athletes who demand the opportunity to compete in elite sports while transitioning. At the same time as these requirements, others are demanding more. I. a. a South Dakota lawmaker proposed visual examination of athletes' genitalia; a Californian initiative banned trans people from sharing opposite-sex locker rooms; the State of Ohio has ruled that transgender female high school athletes must be screened to see if they show a physical advantage in terms of bone structure and muscle mass. Besides, the law of Ohio, combined with a pending set of administrative rules, can make Ohio one of the most restrictive states for transition-related medical care for minors and adults (Yurcaba, 2024).

Even for those who are generally active in supporting the rights of LGBTQI+ people (lesbian, gay, bisexual, transgender, queer or questioning, intersex, and more, hereafter referred to as „LGBTQI"), there is currently a major dilemma of how to find a "fair" way to allow someone to play for a team of the opposite gender to the athlete's natal sex. This is especially true for trans women, who identify as female but likely have (and retain) the strength, agility, body mass, and stamina of a man.

Supporters of transgender athletes argue that medically prescribed puberty blockers and oestrogen suppress testosterone levels and reduce muscle mass in transgender women, reducing potential competitive advantages. Supporters also argue

[5] Jenner came out as transgender in April 2015: see ABC news. *Bruce Jenner: 'I'm a Woman'*, published on 25 April 2015. Available at: https://abcnews.go.com/Entertainment/bruce-jenner-im-woman/story?id=30570350 (accessed on 12.06.2024); the legal transition in the Jenner case was publicly known as official in September 2015, see for more details Toomey and Machado (2015).

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that sport, especially youth sport, is also about belonging, well-being and socialising young people. The American Medical Association says legislation banning trans women from playing sports on women's teams harms transgender mental health (O'Reilly, 2021).

However, the requirement to verify gender in sports is probably the most controversial. Since the mid-twentieth century, sports institutions have responded to the participation of transgender women and women suspected of being transgender, male, or intersex by adding conditions that are variously determined by physical examination, sex chromosomes, and sex hormones.[6]

As of April 2023, there is no uniform international framework for the participation of transgender people in competitive sports. Traditionally, the criteria for the inclusion of women's sports were decided by individual sports bodies at the national and international level (Hilton and Lundberg, 2021).

In the United States, the anti-LGBTQI+ movement that emerged in the early 1920s led to some US states passing legislation restricting the participation of transgender youth in high school sports or trans women and girls in women's sports. Several international governing bodies, including World Athletics, World Aquatics and World Rugby, have restricted transwomen who have gone through male puberty from participating in the women's category (Middleton, 2023; Strashin, 2023).

5. CONTROVERSIAL DARTS AND CHESS

Undoubtedly, it remains questionable whether such sports as i. a. arrows, are among those where a different physical predisposition is manifested in the comparison between men and women. What we see in other power sports, such as swimming or athletics, as a complex issue of physical strength and body structure, in darts can be reduced to the duality of a functional hand and good eyesight (Liew, 2023).

Victoria Monaghan is a nerd who made history as the first transgender woman to compete in the World Darts Championships and has been playing since she was 12 years old. While she is supported by the New Zealand Darts Council, there has been a wave of backlash from anti-LGBTIQ+ people after qualifying for the international tournament. They backed up their claims by arguing that female darts should be banned from MtF, claiming that her participation was unfair due to alleged "biological advantages" (Reed, 2023).

One of the arguments is also the physical advantage consisting in the ability to throw harder and more accurately, which can also be given by the width of the shoulders.

Even Martina Navrátilová, a former tennis player who has not hidden her lesbian orientation for years, is one of those athletes who fight against the participation of transgender athletes in women's categories. She similarly rejected Monaghan's participation in the international tournament (Reed, 2023).

From August 2023, whether it is rugby, swimming, or athletics — transgender women are prohibited from participating in international events in women's categories. The number of sports where these rules are established is growing, most recently chess was on this list.

On the other hand, even though it may seem like a battle of opinions and subjective attitudes, the extent to which testosterone levels affect cognitive abilities and the overall structure of the brain is not yet sufficiently researched. Of course, this is also

[6] Sexuality and Gender Perspectives on Sports Ethics. In: *Clearinghouse for Sports*, updated on 02 February 2022. Available at: https://www.clearinghouseforsport.gov.au/kb/sexuality-and-gender-perspectives-on-sports-ethics#competitive_sport (accessed on 10.01.2024).

a question that can move the issue to the territory of games, not exclusively sports, for example chess. And again, it will not be possible to exclude arguments that speak in favour of overall mental abilities, which are broader than just cognitive and speak in favour of exceptional female chess players, even if it is a predominantly male representation.

The International Chess Federation, known as FIDE, will effectively stop allowing transgender women to participate in women's competitions.

The organisation will also take away some titles won by players in the women's categories and later transferred to the men's due to the transition. It will also remove some titles won by transgender men. Under the new guidelines, transgender people will still be allowed to compete in the "open" section of tournaments, where men and women typically compete against each other. Titles could be reinstated if the player undergoes detransition and can prove that he holds the appropriate FIDE ID under which he obtained the title. Cancelled degrees can also be converted to a "general degree of the equal or lower level".

Many elite events that are exclusively for women will be banned for those who have changed their gender from male to female until FIDE carries out a "further analysis" of the differences, which will take about two years (Kim, 2023).

FIDE also ruled that it has the right to "appropriately mark" the change of gender in a player's profile, as well as to inform tournaments organisers about all transgender competitors.[7]

When it comes to transgender people, the argument that is based on the full acceptance of their gender difference, intersexuality or transition process comes to the fore, and therefore a complete stop or complete exclusion from sports, which are often sources of livelihood, can be perceived as discriminatory. In addition, an athlete is an entrepreneur like everyone else, he is professionally engaged in an age-limited period of life, sports success itself brings him not only immediate profits, but above all, often "selling one's own person" within the framework of a brand or advertisement. Therefore, if we want to understand discrimination in a broader context, we cannot neglect this aspect, where a professional athlete, mostly exclusively focused on sports, can find himself without a job, discriminated against in the field of employment law, which often leads athletes to initiate lawsuits.

As we mentioned above, sometimes the physical structure and endurance or endocrinological factors are not in themselves the only criteria for success in sports. You also need a dose of endurance, discipline and hard training, as well as mental preparation. As a compromise solution, if possible, the introduction of a special category appears. This happened for the first time in the European Swimming Cup in Germany, where a special category for transgender swimmers was introduced for the first time in 2023.

6. THE CASE OF SEMENYA AND THE EUROPEAN COURT OF HUMAN RIGHTS (ECtHR)

The case of the South African athlete Mokgadi Caster Semenya,[8] who won gold medals at the Olympic Games in London (2012) and Rio de Janeiro (2016) on running tracks ranging from 800 meters to 3,000 meters and is a three-time world champion in

[7] FIDE Regulations on Transgender Chess Players' Registration on FIDE Directory. Available at: https://doc.fide.com/docs/DOC/2FC2023/CM2_2023_45.pdf (accessed on 10.01.2024).

[8] ECtHR, Semenya v. Switzerland, app. no. 10934/21, 11 July 2023; referred to the Grand Chamber on 6 November 2023, judgment expected.

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athletics (sometimes referred to as "light") recently resonated not only among the sports public sometimes referred to as "light".

With the increasing popularity and number of sports trophies, the resistance of not only competing female athletes who objected to unequal competition conditions, but also specific measures that made it difficult for Semenya to participate in competitions, grew. Such was, for example, the decision of the World Athletics Federation (hereinafter referred to as "IAAF", currently also World Athletics). The athlete was advised that she would need to reduce her testosterone levels in the following races in order to compete in running events from 800 meters to 3,000 meters. Caster Semenya refused to respect these rules, because part of them was the requirement to undergo the hormone therapy aimed at reducing the level of testosterone.

However, it is not fully proven with this therapy what different side effects it can cause. As for the suspicions, which consisted in the impossibility of determining what her gender identity is, these were refuted not only administratively, because she is a natal woman (in the registry, her gender has been indicated since birth), subjective gender identity (she openly declares her gender) but also by verifying her gender after winning the 800 meters at the World Championships in Berlin in 2009.

In addition, the IAAF also changed the rules of some athletic competitions preventing the participation of hyperandrogenic female athletes in the race. Its actions challenging the regulations in question before the Court of Arbitration for Sport (hereinafter referred to as "CAS") and the Federal Court were dismissed. However, these conflicted with the decision of the Court of Arbitration for Sport (CAS) seated in Lausanne, ruling in *Dutee Chand* (an Indian athlete, specialising in running 200 and 400 meters, who took part in the Junior Asian Championships, where her body's testosterone levels were measured to be high) v *Athletics Federation of India*.[9]

In a preliminary ruling, the CAS suspended for two years the validity of the then valid rules allowing persons with the upper limit of testosterone to compete in the women's category, on the grounds that there is not enough scientifically proven connection between sports performance and the level of testosterone in the athlete's body. During these two years, the IAAF had an obligation to credibly demonstrate a real advantage for women with hyperandrogenism over other women with the normal testosterone levels. Pursuant to this CAS decision, the IAAF issued (April 23, 2018) new rules for determining the conditions for the inclusion of athletes in the DSD female category, in which they reiterated that the level of testosterone circulating in the athletes' bodies is a key criterion for the inclusion in the male or female category (IAAF Athletics, 2018).

According to DSD, biological sex is an umbrella term that includes chromosomal, gonadal, hormonal, and phenotypic sex, and each of these categories usually points toward the binary designation of a male or female. However, there are individuals in whom congenital conditions cause atypical development in either chromosomes, gonads, or sex anatomy, referred to as DSD or intersex individuals. As stated in the 2018 rules, high levels of endogenous testosterone circulating in the bodies of athletes with various DSDs are scientifically proven to affect their athletic performance. At the same time, it should be noted that these rules do not constitute national or local law but have universal validity and all disputes that arise on the basis of them are the responsibility of the IAAF, the Department of Health and Science (IAAF Athletics, 2018).

[9] CAS, Dutee Chand v. Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF), 2014/A/3759, 24 July 2015.

This was followed by an arbitration award by the CAS in Claimants Caster Semenya and Athletics South Africa v IAAF Monaco challenging the November 2018 DSD measure as unfairly discriminating against athletes based on sex, gender or certain psychological traits.[10]

The plaintiffs argued that these measures had no scientific basis and could cause irreparable harm based on unequal treatment.

Finally, on 19 April 2019, the Court of Arbitration for Sport dismissed the claim by Caster Semenya and Athletics South Africa on the basis that it was not its role to examine the validity of the DSD regulations, but whether the DSD regulations, which had been characterised as discriminatory, were also necessary, reasonable and proportionate. The arbitration court came to the conclusion that although it is possible to talk about discrimination in the case of DSD, it is based on the integrity of female athletes and the need to protect a "protected group" of athletes at individual sports events. At the same time, it stated in the justification that the regulations are a "living instrument", therefore their proportionality can be reassessed and they can be subject to changes if a new evidence is presented.

However, Caster Semenya's case was not closed by this because it was followed by a decision of a court of regional supranational jurisdiction. The European Court of Human Rights in the judgment of the ECtHR Chamber of 23.07.2023 in the case of Semenya v. Switzerland (complaint no. 10934/21) held by a narrow majority (4 votes to 3) that there had been: a violation of Article 14 (prohibition of discrimination) together with Article 8 (right to respect for private life) of the European Convention on Human Rights (hereafter "**ECHR**" or "**Convention**") and a violation of Article 13 (right for an effective remedy) in relation to Article 14 together with Article 8 of the ECHR. In particular, the Court considered that it had been established that the applicant had not been provided with sufficient institutional and procedural safeguards in Switzerland to enable her to effectively investigate her complaints, particularly as her complaints related to well-founded and credible claims of discrimination due to increased levels of testosterone causing developmental differences gender (DSD).

It follows, particularly with regard to the applicant's important personal interests – ergo participation in athletics competitions at international level and thus the exercise of her profession – that Switzerland exceeded the narrow margin of discretion granted to it in this case. Discrimination based on gender and gender characteristics requires very weighty reasons to constitute a legitimate interference with fundamental rights and freedoms. What was at stake for the applicant, as well as the narrow margin of discretion afforded to the respondent State, should together have led to a thorough institutional and procedural review, but the applicant failed to obtain such a review. The Court also found that the domestic remedies available to the applicant could not be considered effective in the circumstances of this case.

This decision thus confirmed that "sex characteristics" are a protected ground against discrimination under Article 14 of the ECHR. Collaterally, the ECtHR found a violation of the applicant's rights, but the DSD regulations, which exclude hyperandrogynous and transgender athletes from women's disciplines, remain in force. However, it would not be correct to interpret the decision so broadly that we read from it a clear message about the violation of the rights of every athlete in DSD, if he is subject to the rules of competitions that do not accept him unconditionally.

[10] CAS, Mokgadi Caster Semenya v. International Association of Athletics Federations, 2018/O/5794, and Athletics South Africa v. International Association of Athletics Federations, 2018/O/5798, 30 April 2019.

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Indeed, the decision recognises in a sense that the case of Semenya is different from the case of transathletes.

The ECtHR noted that the participation of trans athletes in international competitions is governed by various regulations – World Athletics' "Rules Governing the Eligibility of Transgender Athletes 2019". It imposes a similar requirement that female athletes competing in international women's sports must maintain testosterone levels below 5 nmol/l for at least 12 continuous months prior to a competition. They have to maintain this level of testosterone for as long as they want to participate in international women's competitions.

The ECtHR clarified that this is the same requirement imposed by the DSD regulations. However, the rationale for equal treatment of trans and intersex athletes is not self-evident, as in the case of trans women, any athletic advantage is due to their biological constitution, as they were born male. Indeed, the ECtHR admits that without wishing to prejudge any future cases brought before it, it simply notes at this stage that in the case of transgender athletes, the advantage they enjoy is due to the inequality inherent in their gender as well as men...and furthermore, the treatment they have to undergo to reduce their testosterone levels corresponds to the adaptation of the treatment they have already been prescribed.[11]

It is clear to the Court that its statements will not affect any future results in this matter. However, the focus of this case, as well as cases against the inclusion of trans women in women's sports, remains on testosterone. This persists even though studies show that there is no clear correlation between testosterone levels and physical ability.

However, Judge Pavli's concurring opinion contains important comments on the role of the Court in such cases. The opinion reiterates that athletes are entitled to fundamental rights. It continues that it is the Court's responsibility to examine whether the solutions implemented to include (or exclude) athletes from certain categories respect their fundamental rights and freedoms. The opinion emphasises that it is within the competence of the Court to review measures taken by sports authorities and how these measures affect the rights of athletes.

The ECtHR recalls the new regulations from 2023 from World Athletics,[12] which address the rules for all transgender athletes. These replaced the 2019 regulations referred to by the ECtHR.

Under the new regulations, trans male athletes who wish to compete in the male category must provide a written declaration that their gender identity is male. After its review, they can participate on the basis of a written certificate.[13]

However, the regulations are much stricter for trans women. All trans women who have gone through male puberty are excluded from women's world ranking competitions. Every trans woman who wants to participate in the women's category must meet three conditions:

1. Provide a written and signed statement that their gender identity is female.

[11] ECtHR, Semenya v. Switzerland, app. no. 10934/21, 11 July 2023.
[12] World Athletics Council decides on Russia, Belarus and female eligibility. In: *World Athletics*, published on 23 March 2023. Available at: https://worldathletics.org/news/press-releases/council-meeting-march-2023-russia-belarus-female-eligibility (accessed on 02.02.2024).
[13] *Ibid.*

2. Have not experienced male puberty after Tanner stage 2 or age 12, whichever comes first.[14]
3. From puberty, they must constantly maintain a testosterone concentration below 2.5 nmol/l.

World Athletics also acknowledged that it had no specific evidence of any advantage for trans athletes that would affect the fairness of competitions. Regardless, they "decided to prioritise the fairness and integrity of the women's competition over inclusion."[15]

The Court referred to recent reports by the Parliamentary Assembly of the Council of Europe and the Office of the High Commissioner for Human Rights, which expressed concern about the exclusion of women from the sports sphere under similar regulations. These provide a good overview of human rights issues.[16]

Together with other LGBTI networks, TGEU[17] wrote a report on the experiences of LBTI women in sport. This provides a summary of key concerns from the perspective of activists and civil society.[18]

7. SOME NOTES ON THE PHILOSOPHY OF DISCRIMINATION, ART. 14 ECHR IN CONJUNCTION WITH GENDER DISCRIMINATION

Not all differences in treatment are relevant for the purposes of Article of the Convention. The examination for discrimination is only meaningful if the applicant is seeking to compare himself to others in comparable positions, or analogous situations or, in another formulation, is in a „relevantly similar" situation to those others.[19]

The Court has emphasised that, advancement of equality of the sexes being a major goal in Contracting States, it would require very weighty reasons for a difference in treatment on grounds of sex to be compatible with the Convention. Such reasons have been lacking in a number of cases, which, interestingly, tend more to concern discrimination against men then against women (Reid, 2008, p. 276).

Transgenderism and the development of jurisprudence in this area belong to examples of evolutionary development, because it is such an area of medical progress that has undergone turbulent development. The individual's right to self-determination,

[14] Explanation of the authors: Professor James M. Tanner, a child development expert, was the first to identify the visible stages of puberty. Today, these stages are known as the Tanner stages or, more appropriately, sexual maturity ratings (SMRs). They serve as a general guide to physical development, although each person has a different puberty timetable. Here's what you can expect to see based on the Tanner stages in males and females during puberty. Stage 2 is around the age, when hormones begin to send signals throughout the body (for more see Marshall and Tanner, 1969, 1970).

[15] World Athletics Council decides on Russia, Belarus and female eligibility. In: *World Athletics*, published on 23 March 2023. Available at: https://worldathletics.org/news/press-releases/council-meeting-march-2023-russia-belarus-female-eligibility (accessed on 02.02.2024).

[16] Reports by the Parliamentary Assembly of the Council of Europe and the Office of the High Commissioner for Human Rights included in the judgment of Semenya v. Switzerland.

[17] TGEU (Transgender Europe) is a trans-led nonprofit for the rights and wellbeing of trans people in Europe and Central Asia; hereafter "TGEU".

[18] LBTI women in sport: violence, discrimination, and lived experiences August 2021. Prepared by ILGA-Europe, a EuroCentralAsian Lesbian* Community (EL*C), TGEU, Organisation Intersex International Europe (OII Europe), and European Gay & Lesbian Sport Federation (EGLSF), published on 16 August 2021. Available at: https://www.ilga-europe.org/report/lbti-women-in-sport-violence-discrimination-and-lived-experiences/ (accessed on 28.05.2024).

[19] ECtHR, Marckx v. Belgium, app. no. 6833/74, 13 June 1979, para. 32; ECtHR, Van der Mussele v. Belgium, app. no. 8919/80, 23 November 1983, para 46; ECtHR, Larkos v. Cyprus, app. no. 29515/95, 18 February 1999, etc.

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personal development, as well as moral and physical security must be perceived with understanding. *"(...) State governments can no longer claim in these questions that the matter falls within their area of discretion, if we do not mean the choice of means to achieve protection under the Convention. However, there are no significant public interest factors that may outweigh the applicant's interests in obtaining legal recognition of gender reassignment (...)"*[20] this shows that the concept of gender discrimination is sufficiently plastic to include persons who face unequal treatment, laws and policies because of their sexual characteristics. Similarly, the jurisprudence of the Court of Justice of the EU is a proof that guarantees of gender equality are able to protect a wide category of transgender participants. Additionally, exploring the boundaries of gender stereotyping jurisprudence that prohibits discriminatory treatment that holds trans and intersex people within historical stereotypes of masculinity and femininity may be of substantive benefit.[21]

On the other hand, however, many individuals, especially those who defend the rights of transgender and intersex people in Europe, object to the adequacy of purely gender-oriented guarantees. From a practical point of view, it is important to understand that in certain circumstances, transgender and intersex people do not experience discrimination that exactly matches the accepted understanding of gender discrimination.

We think, that while in some cases a trans woman may face inequality because of her female gender, in other cases she will face discriminatory behaviour because of her self-identification, her self-expression, and how both of these personal characteristics are perceived by other subjects. Reducing a woman's experience to terms of gender inequality not only mischaracterises wrongful conduct, but also threatens to stifle the ability of law to respond appropriately and meaningfully to the harm caused. Indeed, given the binary nature in which gender has historically been interpreted as a matter of human rights and EU law, considerable doubt remains whether current EU gender equality legislation embraces non-binary identities. The same argument applies to cases of discrimination motivated by intersex difference.

United States Supreme Court Justice Ruth Bader Ginsburg, who as a lawyer and later a US Supreme Court Justice was the chief architect, in her majority opinion in United States v. Virginia, where she explains that *"[i]nherent differences between men and women … they remain a cause for celebration, but not for denigrating members of both sexes or for artificially limiting opportunities for the individual."*[22] Classifying gender as "male only" or "female only" categories is unacceptable if it serves to cause where a woman needs to be subjugated and where inherent differences are not demonstrated, which are acceptable if they do not aim to relegate women to a subordinate position (Coleman, 2017).

The revised European Sports Charter, adopted by the Committee of Ministers of the Council of Europe on October 13, 2021, under Article 6, paragraph 2 states: *"A due diligence approach to human rights in sport requires respect for the human rights of those*

[20] ECtHR, Christine Goodwin v. United Kingdom, no. 28957/95, 11 July 2002, para. 93.
[21] The 1996 decision in P. v. S. and Cornwall County Council is the starting point of this evolution. It concerns the dismissal of a post-operative trans woman for no reason other than her 'gender reassignment'. Also worth mentioning is decision in K.B. v National Health Service Pensions Agency and Secretary of State for Health, where the female partner of an FtM postoperative trans man went to court to secure her right to marry him so that she could leave him her pension at death. For more details see CJEU, judgment of 30 April 1996, P v S and Cornwall County Council, C-13/94, ECLI:EU:C:1996:170; and CJEU, judgment of 7 January 2004, K.B. v National Health Service Pensions Agency and Secretary of State for Health, C-117/01, ECLI:EU:C:2004:7.
[22] Supreme Court of United States, United States v. Virginia et al., 518 U.S. 515 (1996).

involved in or exposed to sport-related activities and should therefore: a. ensure that the human rights of athletes and everyone involved in sport are respected, protected and promoted; b. combat arbitrariness and other abuses in sport to ensure full respect for the rule of law in sporting activities, including access to remedies, justice and fair trial in accordance with applicable human rights standards; c. to work on gender equality in and through sport, especially by implementing a gender mainstreaming strategy in sport."[23] At the same time, the revised European Sports Charter aims to implement such a policy of zero tolerance of violence and all forms of discrimination.[24]

It is necessary to balance very sensitively and carefully the rights of women in sports, as well as the rights of transgender people. It will not always be possible to follow the criteria of gender identities and at the same time not bring into disrepute an approach that, based on the essence of competitive advantages, will create an environment with the absence of fair play and clear predictable criteria and equal access to all.

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[23] Revision of the European Sports Charter. Available at: https://www.coe.int/en/web/sport/revision-esc (accessed on 10.02.2024).
[24] *Ibid.*

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INTERNATIONAL LEGAL ASPECTS OF THE ASSESSMENT OF ENVIRONMENTAL DAMAGE CAUSED BY MILITARY ACTIONS/ Liudmyla Golovko

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Abstract: *Military actions not only cause massive human casualties and extensive destruction of homes, infrastructure, and other property, but also a significant environmental damage. It raises the issue of the importance of assessment of environmental damage as a necessary prerequisite for obtaining reparations. The paper analyses international legal documents which relate to the issue of assessment of the amount of environmental damage, as well as relevant decisions of international bodies in this sphere. A conclusion was made about the lack of a uniform approach to the assessment of amount of environmental damage, both in international documents and in international judicial practice. The necessity of the adoption of an international document that would establish the methodology which should be used during environmental damage assessment was proved. This paper should determine components of the environment deterioration of which should be compensated.*

Key words: *Environmental Harm; Assessment of Environmental Damage; Environmental Responsibility; Military Actions; International Environmental Law*

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1. INTRODUCTION

Military actions always cause significant damage to the environment especially when norms of humanitarian law are violated. Damage is caused to various components of the environment. Leaks of toxic chemicals due to damage to industrial enterprises, destruction of infrastructure related to water supply and drainage, burned oil depots, fuel storage facilities at airfields, agrochemical storage facilities cause pollution of air, soil, and water resources. Active hostilities at sea cause man-made disasters and seriously affect its ecosystem. Soil pollution has long-term consequences for several generations. For holding the states accountable for causing environmental damage and the collection of reparations it is necessary to assess environmental damage correctly and reasonably.

Scientists did not pay much attention to the issue of studying the international legal regulation of environmental damage assessment caused during military conflicts. Considering the unprecedented scale of the damage caused to the environment of Ukraine during the aggression of the Russian Federation, as well as the constant military conflicts that arise in different corners of the globe and, as a result, the need to establish

the extent of environmental damage as a necessary condition for holding states accountable, in our research we aim to explore the international aspects of this issue. Our hypothesis when writing the paper was the existence of gaps in international legal regulation of assessment of environmental damage in general and as a result of military actions in particular, and correspondingly the need of adoption of international legal document which would regulate this issue. When conducting the research, general theoretical methods were mainly used. Analysis and synthesis, systematic interpretation, theoretical generalisation helped to generalise international approaches to the assessment of environmental harm, which exist in international law. The first part of our scholarly work is focused on international legal documents which relate to the right to reparation for deterioration of the environment caused by military actions and issue of determining the amount of environmental damage. In the second part analysis of relevant decisions of international bodies in this sphere was made. The last part of the paper is devoted to the environmental damage assessment methods developed by Ukraine.

2. RIGHT TO REPARATION FOR ENVIRONMENTAL DAMAGE AND ITS ASSESSMENT IN INTERNATIONAL LAW

In international law, the principle is applied that violation of norms of international law results in legal responsibility. The international legal regulation of state responsibility was codified in the Draft Articles on Responsibility of States for Internationally Wrongful Acts of 2001. As specified by experts in the field of international law (e.g., Greenwood, 1996, p. 398; Mareček, 2023, p. 30), the principle of responsibility of states for an international illegal act applies also in case of environmental damage caused by one state to another. In compliance with the Article 31 of the Draft Articles, the state due to violation of international law must pay reparations.

Provisions of the Hague Convention (IV) are also devoted to the question of the responsibility of states during the war. According to Article 3 of the Convention, if the state violates its provisions, it must compensate for the damage caused. Moreover, the article constitutes that the state is „responsible for all acts committed by persons forming part of its armed forces".[1]

The Protocol Additional I to the Geneva Conventions also provides a legal basis for compensation. Article 91 of the Protocol contains a similar provision to the Hague Convention (IV), confirming the rule that the state „which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation".[2]

The PERAC Principles developed by the International Law Commission in 2022 confirmed the obligation of the state to fully pay reparations.[3] In Principle 9 of the Draft Principles, it is separately emphasised that the responsibility of states arises during armed conflict for causing environmental damage and that the state must pay full reparations for deterioration of the environment. As for the reparations, we can find in the

[1] Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907. Available at: https://www.refworld.org/docid/4374cae64.html (accessed on 30.01.2024).
[2] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 609. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-additional-geneva-conventions-12-august-1949-and (accessed on 30.01.2024).
[3] Draft Principles on the Protection of the Environment in Relation to Armed Conflict. Available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/8_7_2022.pdf (accessed on 30.01.2024).

PERAC principles only general provisions. The document does not contain any recommendations that would establish an algorithm for establishing of their amount. The explanation may be that the PERAC principles belong to the principles of general application.

Thus, as we can see, the principle of full reparation for damage caused by military activities, including deterioration of environment is enshrined in provisions of different international legal documents. However, unfortunately, the international documents regulating this issue do not contain a definition of what should be understood by damage to the environment. The issue of assessing the extent of environmental damage is particularly difficult because the consequences of this damage can last for a long time, or even appear in the future. In addition, it is often impossible to return the environment to its previous state. Therefore, an urgent question arises as to how to correctly assess the amount of environmental damage, on which the amount of reparations depends.

Although international humanitarian law contains norms that are indirectly aimed at preventing environmental damage (articles 36, 54 and 56 of the Additional Protocol I), it does not define the term environment as an object of protection. The Rome Statute also does not contain this definition.

There is no international document that would determine which indicators should be taken into consideration when assessing the amount of environmental damage caused during military actions. That is why it is necessary to analyse the definition of environment and environmental damage which are contained in international documents in order to determine whether international law regulates the issue of determining the extent of environmental damage at all.

Definitions of environment and environmental damage we can find in a number of multilateral environmental agreements. Draft Articles on the Effects of Armed Conflicts on Treaties of 2011 indicate, that international treaties, the purpose of which is to prevent damage and protect the environment, continue to be in force even during military operations in part or in whole (article 7 and annex to the Draft Articles).[4] After the adoption of the Draft Articles scholars refer extensively to them to support the ongoing applicability of multilateral environmental treaties during military actions (e.g. Dam-de Jong and Sjöstedt, 2021; van Steenberghe, 2023, pp.1568-1599). Therefore, it is potentially possible to use the definitions of the amount of environmental damage given in these agreements to calculate the amount of reparations. Let's turn to these definitions.

According to Article 2(2)(c) of the Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal to the Basel Convention of 1999, when assessing the amount of damage to the environment the following factors should be taken into account: death of people and bodily injury; property damage; loss of income caused by the deterioration of the environment; costs of actual measures aimed at restoring the environment; costs of preventive measures that have arisen due to the hazardous properties of the waste.[5] In the Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities of 2006, damage caused to cultural heritage is singled out as

[4] Draft Articles on the Effects of Armed Conflicts on Treaties. Available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/1_10_2011.pdf (accessed on 30.01.2024).
[5] Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal. Available at: https://www.ecolex.org/details/treaty/basel-protocol-on-liability-and-compensation-for-damage-resulting-from-transboundary-movements-of-hazardous-wastes-and-their-disposal-tre-001341/ (accessed on 30.01.2024).

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a separate element of compensation for environmental damage (article 2(a)).[6] Lugano Convention of 1993 includes similar definition of environment.[7]

UNEP Guidelines Decision IG 17/4 defines "environmental damage" as measurable adverse change in a natural or biological resource service which may occur directly or indirectly.[8] According to the document, among the basic elements of environmental damage are expenses incurred in connection with its assessment. The document also recognises the possibility of cases where the state of the environment will deteriorate to such an extent that restoration to the original state will be impossible. In this case, "compensation by equivalent" is provided. Unfortunately, the normative legal act does not disclose in more detail the method of determining the amount of compensation according to this method.

According to article 2 (1) of the 1992 Helsinki Transboundary Watercourses Convention, when determining the transboundary impact, the socio-economic impact of environmental damage is also taken into account.[9] Having analysed the above-mentioned definitions, one can agree with Marie-Louise Larsson that broad general formulations were used in their development (Larsson, 1999, p. 172). They do not have specific, clearer recommendations, and significant attention was not paid to the reduction of environmental services. At the same time, as Khalatbari and Poorhasehemi claim, the concept of harm to the environment is too general (Khalatbari and Poorhasehemi, 2019, pp. 21-28).

As we can see definitions of environmental damage given in individual conventions are diverse and vary in different areas. There is no universal definition of environmental damage in international law. In the next part of the paper, we will refer to the decisions of international bodies in order to identify the approaches used in practice in assessing of the amount of environmental damage.

3. INTERNATIONAL CASE LAW

In the practice of the ICJ there are two cases where environmental reparations were considered in the context of military operations. The first case in which the ICJ dealt with the issue of compensation for damage caused to the environment is the case of the San Juan River. The case arose out of a territorial dispute between Costa Rica and Nicaragua concerning three-kilometre zone, on the territory of which wetlands of international importance were located next to the North Branch of the San Juan River. In 2010, Costa Rica commenced a trial at the ICJ against Nicaragua for the illegal entry, occupation, and use of its territory. Costa Rica also demanded compensation for the damage caused to wetlands and rainforests due to the dredging of the canal for the purpose of navigation, the construction of which was carried out with the removal of trees and destruction of vegetation „in violation of several international obligations and with grave environmental consequences".[10] Nicaragua responded by initiating the trial against Costa Rica in 2011 for alleged infringement of sovereignty and significant environmental

[6] Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities of 2006. Available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_10_2006.pdf (accessed on 30.01.2024).
[7] Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment of 1993.
[8] Decision IG 17/4: Guidelines for the Determination of Liability and Compensation for Damage resulting from Pollution of the Marine Environment in the Mediterranean Sea Area. UNEP(DEPI)/MED IG.17/10 Annex V.
[9] Convention on the Protection and Use of Transboundary Watercourses and International Lakes of 1992. Available at: https://unece.org/fileadmin/DAM/env/water/pdf/watercon.pdf (accessed on 30.01.2024).
[10] ICJ, Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment, I.C.J. Reports 2018, par. 9.

damage caused by Costa Rica's construction work on a road along the border area. In 2013, the ICJ combined both proceedings into one. The court found that Nicaragua had an obligation to pay compensation to Costa Rica for the material damages caused by Nicaragua's illegal activities on the territory of Costa Rica and gave the parties the opportunity to agree on the amount of compensation. The parties could not come to an agreement and in January 2017 Costa Rica turned to the ICJ with a request to determine the amount of damages.

The parties' position differed significantly on the methodology which should be used in assessing the environmental damage caused by Nicaragua's illegal actions. Nicaragua argued that Costa Rica had the right to reparation for pecuniary damages, the amount of which was limited to property damage or other interests of Costa Rica that were financially significant. Costa Rica identified 22 categories of ecosystem products and services that may have been degraded or lost due to violation of international law and sought reparation for only six of them: timber stands; other raw materials (fibre and energy); gas regulation and air quality; mitigation of natural threats; soil formation and erosion control and biodiversity.[11]

The ICJ noted that environmental harm and the subsequent deterioration or loss of the environment's ability to render environmental services and products must be compensated according to international law. This compensation includes compensation for the deterioration or loss of environmental products and services in the pre-remedial period and compensation for the restoration of the environment to its original state. Importantly, the ICJ admitted ecosystem services as basic element of compensable environmental damages. The court also stated that the absence of adequate evidence of the amount of material damage generally does not prevent the award of compensation.[12] When determining compensation for environmental damage, the ICJ assessed the amount of costs necessary to restore the state of the environment and the loss of environmental products and services in the period before remediation.

The court also stated that when determining environmental damage, it is necessary to proceed from "overall valuation" of damage to the entire ecosystem as a whole unit before its state is restored, rather than evaluating individual categories of environmental products and services and estimating the period of their recovery for each of them.[13] Such reasoning was presented without a clear explanation of what this "overall valuation" meant and whether it was based on sound scientific knowledge in assessing short-term and long-term damage to environment.[14]

The amount of compensation determined by the ICJ to Costa Rica was set at $ 120,000 for the deterioration and loss of environmental goods and services and $ 2,708.39 for the restoration costs of the internationally protected wetland. The total amount of compensation of $ 378,890.59 (including default interest) was set at only approximately 5 % of the amount demanded by Costa Rica.[15]

The case is important considering several considerations. It is the first case in which the ICJ dealt with the issue of compensation for environmental damage. The court confirmed that environmental damage includes ecosystem services. Unfortunately, the ICJ did not provide details on how it calculated the amount of compensation.

[11] *Ibid*., par. 55.
[12] *Ibid*., par. 35.
[13] *Ibid*., par. 78.
[14] *Ibid*., par. 80-88.
[15] *Ibid*., par. 157.

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In the case Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), the ICJ considered compensation for damage caused to the environment because of exploitation of the DRC's natural resources by Uganda People's Defence Forces (UPDF). The ICJ established that Uganda was responsible for conduct of its military forces as a whole and for activity of all its members. The ICJ awarded $ 325 million in reparations, of which $ 60 million for damage caused to natural resources. Expert say that this is a very small amount.[16] For example, according to Dismas Kitenge, Honorary Vice President of the International Federation for Human Rights, if to consider the exploitation of natural resources - gold, diamonds, all the minerals and timber that Uganda sold on the international market - it was no less than $ 3 billion (Kitenge, 2022). Manuel J. Ventura (2023) has the same point of view. Congo's mistake was that it did not prepare the evidence base in time. After the end of the war in 2003, after gaining access to the occupied territory, no evidence was collected, no documentation of the damage caused was made, and no interviews of witnesses were conducted. The evidence was taken from secondary sources and was not verified by witnesses present at the crime scene or independent experts. As a result, the ICJ concluded, that the DRC failed to provide the necessary evidence to establish the extent of environmental damage. Therefore, the ICJ had no opportunity to even approximately determine its size.[17] Consequently, the ICJ given the special circumstances, awarded reparation in the form of a "global sum", taking into account as far as possible the existing evidence and applying an equity,[18] because otherwise, it would have to admit that the weakness of the evidence does not allow to make a decision on the amount of compensation at all, which would contradict the 2005 ICJ's decision on Uganda's responsibility. This case shows the need for timely documentation of damage done by the aggressor state and environmental damage in particular.

Another example is the compensation for environmental damage by Iraq as a result of its aggression against Kuwait in 1990. According to the Decision of the UN Compensation Commission (UNCC) created by the Resolution 687 of the UN Security Council[19] $ 5.26 billion were compensated for environmental damage (Sand, 2005, pp. 244-249).

All claims submitted to the UNCC by states, international organizations, legal and natural persons were qualified according to six categories (from A to F). Some categories had subcategories. Sub-category "F4" dealt with environment damage.

According to the Decision 7 "Criteria for additional categories of claims" taken by the Governing Council of the UNCC during its 3rd session on 28 November 1991, the powers of the UNCC included consideration of claims for direct environmental damage, which included expenses for mitigation of environmental damage, restoration of the environment, monitoring and assessment of damage caused and health damage.[20]

Temporary loss of services provided by natural resources was also compensated. The claimants proposed the Habitat Equivalency Analysis (HEA) to determine the amount of the damage caused and it was approved by the UNCC. In order

[16] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations, Judgment, I.C.J. Reports 2022, p. 13.
[17] *Ibid.*, par. 350.
[18] *Ibid.*, par. 365.
[19] Security Council Resolution 687(1991) of 3 April 1991: Iraq-Kuwait Resolution. Available at: https://peacemaker.un.org/iraqkoweit-resolution687 (accessed on 30.01.2024).
[20] Decision 7. Criteria for additional categories of claims. Decision taken by the Governing Council of the United Nations Compensation Commission during its third session, at the 18th meeting, held on 28 November 1991, as revised at the 24th meeting held on 16 March 1992 S/AC.26/1991/7/Rev.1; 17 March 1992).

to compensate for the loss of ecosystem services that could not be evaluated in a financial equivalent, Saudi Arabia proposed to create 10 marine and coastal reserves, but the UNCC recognised that the creation of two reserves would be sufficient to compensate for irreparable damage in addition to financial compensation.[21] The use of this analysis was approved by the UNCC due to the lack of international legal regulation in this sphere.

4. ENVIRONMENTAL DAMAGE ASSESSMENT METHODS DEVELOPED BY UKRAINE

Russian aggression against Ukraine led to significant environmental damage. According to the data of the Ministry of Environmental Protection and Natural Resources of Ukraine (Ministry) since the beginning of the large-scale aggression against Ukraine, Russian Federation has committed more than 2,500 environmental crimes and 265 war crimes against the environment. About a third of Ukraine's territory (174,000 square kilometres of Ukrainian land) is mined and contaminated with explosives.[22] The pollution of these lands will have long-term consequences; they cannot be cultivated for a long time and will need to be returned to their natural state. Unfortunately, these numbers will continue to increase as long as the war continues. By blowing up the Kakhovskaya HPP, Russia caused the biggest environmental disaster since Chernobyl. The entire European continent will feel the irreversible consequences of these actions. And many such examples can be given.

In order to hold the Russian Federation accountable and determine the amount of reparations for the damage caused to the environment, it is necessary to carry out an assessment of its damage. The damage done to the environment is unprecedented. Therefore, the experience of Ukraine in determining the extent of environmental damage that occurred due to the aggression of the Russian Federation will be unique and deserves attention.

To calculate the amount of damage caused, experts of the State Environmental Inspection of Ukraine have developed new special methodologies, which have been approved by the Ministry. Let's consider the main indicators that are taken into account when assessing environmental damage.

The amount of damage to soil is calculated according to the exact formulas given in the methodology specially developed for this purpose.[23] Different formulas are used for the calculation. For example, damage from soil pollution is calculated on the basis of the regulatory monetary assessment of the land plot, the soil of which was contaminated. Normative monetary assessment data are taken from any sources. If the monetary valuation of the plots has not been carried out before, the average monetary valuation of agricultural land in this region is used.[24]

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[21] The UN Compensation Commission – a prospect of financing the environmental remediation in Ukraine after the war against the rf. NGO "Ecology-Law-Human" (May 2022). Available at: https://epl.org.ua/en/eco-analytics/kompensatsijna-komisiya-oon-perspektyva-finansuvannya-vidnovlennya-dovkillya-v-ukrayini-pislya-vijny-iz-rf-oglyad-diyalnosti-kompensatsijnoyi-komisiyi-oon/# (accessed on 30.01.2024).

[22] See: Ministry of the Environment (2024). More than 2,500 crimes against the environment committed by Russian Federation were recorded in Ukraine. Available at: https://www.ukrinform.ua/rubric-economy/3776555-v-ukraini-zafiksuvali-ponad-25-tisaci-zlociniv-proti-dovkilla-aki-vcinila-rosia.html (accessed on 27.01.2024).

[23] Order of the Ministry of Environment Protection and Natural Resources of Ukraine of 04.04.2022 No. 167 "On the approval of the Methodology for determining the amount of damage caused to land and soil as a result of emergency situations and/or armed aggression and hostilities during martial law". Available at: https://zakon.rada.gov.ua/laws/show/z0406-22#Text (accessed on 27.01.2024).

[24] *Ibid.*

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Soil pollution is recognised when negative quality changes were determined in its composition, which consist in the appearance of pollutants that were not there before. Soil pollution is recognised as well when there is an increase in the content of hazardous substances that exceeds the maximum permissible concentration. Littering of land is defined as the entry of polluters due to emergency or military actions without appropriate permits. The amount of damage is determined by authorised officials of the State Environmental Inspection. For this purpose, any sources can be taken into account including evidence collected by experts, witness statements, reports, etc.

The main indicators that are considered when assessing damage caused to land resources are as follows:

- area of the contamination/clogged area;
- expenses for elimination of the consequences of damage/clogging;
- regulatory monetary assessment of the land plot;
- hazard ratio of the pollutant;
- environmental value of the land plot;
- cost of land reclamation;
- volume of waste;
- environmental and economic significance of lands.[25]

On September 2, 2022, the Methodology for determining damages caused to water resources was adopted by the Order of the Ministry of 21.07.2022.[26] The methodology establishes the procedure for determining water pollution as a result of the armed aggression of the Russian Federation. Indicators taken into account to determine the extent of damage caused to water resources are as follows: coefficient that takes into account the increase in damage to the aquatic ecosystem during martial law; coefficient that takes into account the category of the water body; regional coefficient of scarcity of water resources of surface waters; the amount of released harmful substances.[27]

Indicators taken into account to determine the extent of damage caused to atmospheric air are as follows: the amount of released harmful substances and their mixtures, as well as their specifics; the coefficient taking into account the average density of pollutants; coefficient taking into account the danger class of polluting substances or a mixture of such substances; coefficient taking into account the area of contamination, for example the area of fire; coefficient that depends on the origin of the harmful substances.[28]

The adoption of a national methodology for the assessment of environmental damage was a necessary step, caused by the need to quickly document the infliction of environmental damage and to carry out its assessment, since uniform international standards do not exist. At the same time, it should be noted that no methodology was developed for determining the amount of damage caused to ecosystems (disruption of ecosystem connections, loss of biodiversity). There are no international standards for calculating these types of damages. All this indicates the need of their development.

[25] *Ibid.*
[26] Order of the Ministry of Environment Protection and Natural Resources of Ukraine of 21.07.2022 No. 252 "On the approval of the Methodology for determining damages caused by pollution and/or clogging of waters, arbitrary use of water resources". Available at: 252https://zakon.rada.gov.ua/laws/show/z0900-22#n14 (accessed on 27.01.2024).
[27] *Ibid.*
[28] *Ibid.*

The criteria for determining environmental damage already developed by Ukraine can be used in the development of international standards in this field as an example used in practice.

5. CONCLUSION

As a result of the conducted research, a conclusion can be drawn that there is a clear basis in international law for the payment of reparations for environmental damage caused by military actions based on violation of *jus in bello*. At the same time, an important issue is the correct and reasonable assessment of the amount of damage caused to the environment. There is no international document that would determine which indicators should be considered when assessing the amount of damage caused during military actions. There is not even a definition of what minimum amount of damage should be caused to the environment for the country to be entitled to compensation.

Also, there is no universal definition of environmental damage in international environmental law. The definitions given in individual multilateral environmental agreements are different. This is undoubtedly a gap in international legal regulation. The practice of the ICJ also does not provide answers as to which methodology should be used when determining the amount of environmental damage. The significance of the ICJ settlement on the San Juan River is that the court found that the overall damage to the entire ecosystem (including ecosystem services) should be compensated. However, the disadvantage is that the ICJ did not give an explanation concerning what methodology it used to determine the amount of damage. The UNCC in its decision approved the lack of international legal regulation of the assessment of the loss of ecosystem services. Therefore, it had to use the Habitat Equivalency Analysis proposed by the claimants. The case Armed Activities on the Territory of the Congo is a good proof of importance of timely preparation of the evidence base to establish the extent of environmental damage. Due to the fact that even approximately it was not possible to establish the extent of environmental damage the ICJ awarded reparation in the form of a "global sum" applying an equity. Considering all the above, we came to the conclusion about the necessity of the adoption of an international document that would establish the methodology which should be used during environmental damage assessment. This document should determine components of the environment deterioration of which should be compensated and indicators that should be considered.

A comprehensive methodology for assessing environmental damage began to be developed in Ukraine in 2014 and was approved in 2022. The start of development was caused by the beginning of hostilities and the lack of international standards in this field. A significant number of experts were involved in the development, as the task was to develop a methodology that would be recognised by international community. As a result, a clear approach, and specific formulas for calculating damage caused to basic components of the environment were formed. Due to full-scale aggression and unprecedented damage to the environment, this methodology is actively used in practice. All this experience can be used in the development of international standards for the assessment of damage caused to the environment at least as a sample worth analysing.

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IN SEARCH OF SUSTAINABLE FINANCE: A STUDY OF PRACTICES ON THE SLOVAK CORPORATE BOND MARKET / Ján Mazúr, Sabina Petrovičová

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Abstract: *Financial market is expected to play an important role in transition towards more sustainable setup of the business environment. The European Commission published the EU's Strategy for Financing the Transition to a Sustainable Economy in 2021, requiring the inclusion of environmental, social and governance considerations into investment decision making. Yet, small, open EU economies, such as Slovakia, are in a specific position when implementing this legal framework. For instance, Slovakia does not have any meaningful stock market to speak of, although its bond and collective investment markets perform better. To assess the adoption of sustainable finance elements and to assess the convergence on the Slovak bond market towards standard practice, we investigated current practices on the corporate bond market of nonfinancial corporations. We conducted our research through a review of corporate bonds prospectuses published during 2020-22, in which, to assess current market practices, we examined and evaluated selected criteria and indicators related to issuers and bonds and compared them. These criteria include for example issuer´s business and purpose of finance, form, yield, security, or transferability of bonds. We find that relevant variable criteria and indicators related to reviewed bonds, compared in our research, are similar, indicating that the market converged into a standard practice. Finally, we find almost no evidence of adoption of the sustainable finance elements although there are hints of market uptake of sustainable practices.*

Key words: *Sustainable Finance; EU Sustainable Finance Strategy; EU Taxonomy; ESG Considerations; Financial Market; Corporate Bonds; Green Bonds; Slovak Capital Market*

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1. INTRODUCTION

The EU's objective to reorient capital flows towards financing sustainability, as established by the European Commission's 2018 Action Plan on Financing Sustainable

Growth, included 10 key actions.[1] Among these actions rested a crucial requirement for common taxonomy for a number of environmental objectives, including climate change mitigation and adaptation, which took form in the so-called EU Taxonomy Regulation, entered into force on 12 July 2020 (hereinafter "**Taxonomy Regulation**").[2] The regulation enables market participants to recognise the activities enabling sustainable growth and therefore assess their contribution to sustainable growth through investments. The regulation's objective is to provide "[a] *clear guidance on activities that qualify as contributing to environmental objectives* [which] *would help inform investors about the investments that fund environmentally sustainable economic activities.*"[3]

The EU Taxonomy Regulation operationalises the environmental objectives through the following elements. First, it establishes the criteria for determining whether an economic activity qualifies as environmentally sustainable to evaluate an investment towards such activity as environmentally sustainable. The criteria for environmental sustainability of economic activities include:[4] (i) a contribution to environmental objectives as laid out in the Art. 9 and subsequent of the regulation, including climate change mitigation and adaptation, but also objectives beyond climate action, such as the sustainable use and protection of water and marine resources or the transition to a circular economy and pollution prevention and control; (ii) an economic activity does not significantly harm any of these environmental objectives as based on an objective-specific qualification under the Art. 17 of the regulation; (iii) an economic activity is carried out in compliance with the minimum safeguards established by international documents and guidelines, as laid down in Art. 18; and (iv) an economic activity must comply with technical screening criteria established by the European Commission under Art. 19 of the regulation.

Building on the EU Taxonomy Regulation, the EU Green Bond Standard tackles the challenge of no uniform green bond standard within the EU.[5] However, the EU Green Bond Standard, a voluntary, taxonomy-aligned standard that includes transparent reporting and review, is in force only since the beginning of 2024.[6] The European Green Bonds (hereinafter "**EuGB**") are thus a novel, although optional, addition to the regulatory landscape of European sustainable finance, allowing an exclusive use of the designation "European Green Bond" or "EuGB" for bonds that comply with the requirements set out in the EuGB Regulation. The EuGB Regulation mandates that the proceeds of the EuGB must be used fully in alignment with the taxonomy requirements, as set forth in the Art. 3 of the Taxonomy Regulation.[7] The verification of the allocation of the bond proceeds takes place through a regular allocation report verified by third-party independent reviewers.[8] Additionally, issuers of EuGB are obligated to draw up and publish a European

[1] European Commission. (2018). Action Plan: Financing Sustainable Growth. COM(2018) 97 final. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0097 (accessed on 22.06.2024).
[2] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment and amending Regulation (EU) 2019/2088 (Text with EEA relevance). Official Journal of the European Union, L 198, 22.6.2020, p. 13–43.
[3] Rec. 6 of the Taxonomy Regulation.
[4] Art. 3 of the Taxonomy Regulation.
[5] For more see: The European green bond standard – Supporting the transition. Available at: https://finance.ec.europa.eu/sustainable-finance/tools-and-standards/european-green-bond-standard-supporting-transition_en (accessed on: 26.09.2023).
[6] Regulation (EU) 2023/2631 of the European Parliament and of the Council of 22 November 2023 on European Green Bonds and optional disclosures for bonds marketed as environmentally sustainable and for sustainability-linked bonds (hereinafter „**EuGB Regulation**").
[7] Art. 4 (1) of the EuGB Regulation.
[8] Art. 11 of the EuGB Regulation.

EuGB impact report on the environmental impact of the bond, after the full allocation of the proceeds.[9]

Next, sustainability should be built into the fabric of the financial system through key market actors who make investment decisions on behalf of investors or are in a position to influence investors' decision-making, such as financial advisors and asset managers. As a result, changes to MiFID II[10] and Insurance Distribution Directive[11] regimes have been introduced, leading investment firms and insurance distributors to inquire and consider their clients' sustainability preferences (such as environmental, social and governance factors, hereinafter "**ESG factors**") when assessing the range of financial instruments and insurance products to be recommended.[12] Another piece of European legislation in the sustainability arena is the so-called Sustainable Finance Disclosures Regulation (hereinafter "**SFDR**"), which regulates the transparency of financial market participants and financial advisers with regard to the integration of sustainability risks and the consideration of negative sustainability impacts in their processes and the provision of sustainability-related information specific to individual financial products.[13] During the first years of the EU's strengthened approach to financing sustainability, it may be useful to review how these changes, but also the non-legal, market tendencies towards sustainability, affect the Slovak financial market, especially the growing corporate bond market. However, we hypothesise that the impact of these policies will be limited during the observed period (2020-2022) due to the limited time frame during which these policies have been in force.

The Slovak financial market is based on a large banking sector, which holds around 70% of the assets of financial markets in Slovakia (2019) (National Bank of Slovakia, 2020, p. 17). The banking sector is thus also the primary source of funding for the Slovak corporate sector, besides intra-group funding of the Slovak subsidiaries of multinational corporations. The Slovak regulated market, the Bratislava Stock Exchange, shows close-to-zero viability for equity finance, yet the bond market has grown rapidly in the past two decades, from 2,7 billion EUR in 2000 to over 73 billion EUR in 2023 (Bratislava Stock Exchange, 2024, p. 6). This considerate growth, however, still relates to bonds being mere 3,5% of the total corporate liabilities (by the end of 2021) (Lintner, 2022) and bonds representing only 317 million EUR worth of trades on the stock exchange in 2023 (Bratislava Stock Exchange, 2024, p. 6).

[9] Art. 12 of the EuGB Regulation.

[10] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast) (Text with EEA relevance) (hereinafter „**MiFID II**").

[11] Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast) (Text with EEA relevance) (hereinafter „**IDD**").

[12] Changes occurred to the following delegated regulations: (i) Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (Text with EEA relevance) for MiFID II; (ii) Commission Delegated Regulation (EU) 2017/2359 of 21 September 2017 supplementing Directive (EU) 2016/97 of the European Parliament and of the Council with regard to information requirements and conduct of business rules applicable to the distribution of insurance-based investment products (Text with EEA relevance.) for IDD.

[13] Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector (Text with EEA relevance).

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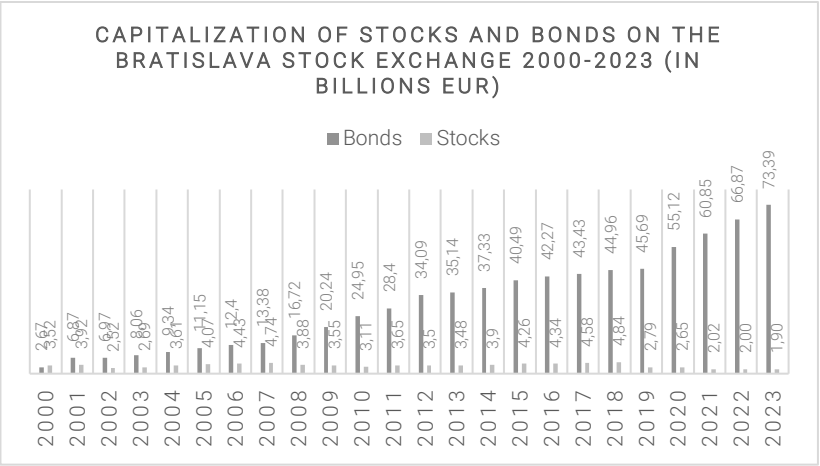

Graph no. 1: Capitalization of stocks and bonds on the Bratislava Stock exchange during 2000-2023 (in billions EUR)
(Source: Bratislava Stock Exchange, 'Annual Report 2023' (2024), 6)

Bonds are a solid source of long-term funding for corporations, such as real estate developers, or established non-financial corporations. In comparison with bank loans, the terms of bonds offerings are to a larger extent under control of the issuer, who has freedom to carefully manage bonds variables, such as the yield, security, or rights of the bond holders, typically in close cooperation with an investment firm arranging and placing the issue (book runner).[14]

Corporate bonds also represent an investment opportunity for households, but carry significant risks, mainly the risk of issuer's default and subsequent loss of investment. Honest and thorough description of risks to potential investors prior to subscription of the investment is thus a required practice, as based on Art. 7 and 16 of the Prospectus Regulation.[15] The risk assessment, among other criteria, consequently leads to marketability to respective classes of investors. The Prospectus Regulation distinguishes between qualified investors, i.e., clients according to the MiFID II classification[16], and non-qualified investors. The issuers are generally provided with more lenient requirements in their offerings when dealing with qualified investors, although additional criteria factor in, such as the number of persons whom the offer is addressed,

[14] See generally: Brealey, Myers, Allen, and Edmans (2023).
[15] Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC (Text with EEA relevance) (hereinafter „**Prospectus Regulation**").
[16] Art. 2(e) of the Prospectus Regulation, which makes a reference to Annex II and Art. 30 of the MiFID II. In connection with investor protection, the NBS issued its Opinion of Capital Market Supervision Department of the NBS, dated 28.04.2021, on distribution of corporate bonds unifying rules for sale procedure of corporate bonds focused on protection of retail (non-professional) clients. The opinion establishes principles of providing services by distributors (banks, dealers, agents) including fair trade principle or duty of care principle; information on high-risk bonds; requirements for knowledge and experience of salesmen of corporate bonds; and requirements for communication with clients. For more see: National Bank of Slovakia (2021).

denomination of security or minimum investment volumes per investor.[17] Furthermore, there are several variables of corporate bonds, such as the form of the issue, yield, existence of security, limitations to transferability, or early redeemability, which influence risk factors of bond issues. As finance is expected to play a significant part in transition towards sustainability, it is useful to review whether the corporate bond market adjusts to the expected role.

Given the actuality and importance of the topic of sustainability and environmental protection, we examined whether any of the issuers issued green bonds. As the term 'green' implies, by issuing this type of bonds, issuers raise funds to implement and support sustainable, environmentally friendly projects, e.g., projects related to "clean" transport (electromobility) or construction of low-energy buildings.[18] The criteria for the classification of a bond as a green bond are set out in respective regulatory standards, including the EuGB Regulation, Climate Bonds Initiative[19] or the Green Bond Principles (GBP), which are determined by the International Capital Market Association (ICMA); the Slovak legal regulation does not recognise green bonds as a separate type of bond.[20]

To prove compliance with the criteria for green bonds, one of the ESG certification is used. Generally, ESG criteria include the (i) environmental (e.g., use of resources and materials, emissions); (ii) social (e.g., assessment of working conditions, respect for human rights); and (iii) governance (e.g., emphasis on management or internal control procedures of the company). A list of environmentally sustainable economic activities is established by the Taxonomy Regulation.

2. METHODOLOGY

For the purposes of reviewing the practices of corporate financing through the issue of bonds, as well as of reviewing sustainable finance take-off in the Slovak Republic, we examined bond prospectuses of corporate bond issues during 2020-2022. The issuers were drawn from among the entities listed in the list of issuers for the regulated market available on the website of the Slovak regulator, the National Bank of Slovakia ("NBS").[21] The Slovak bond market is notoriously small; therefore, the reviewed batch of published bonds issued over three years represents de facto the whole market.

Most issuers are various non-financial companies that, in our opinion, have a long-term and relatively stable market position. Moreover, some of the issuers are special purpose vehicles ("SPV"), so-called project companies, of well-known investment groups or real estate developers. Project companies are companies created for specific purpose – to raise funds for a specific project (such as a property development project), or to provide intra-company financing for a group or their parent company. Project companies

[17] See for instance Art. 1 of the Prospectus Regulation.

[18] Although bonds may be classified as green, there are still some risks that financed outcomes will not continuously meet investors' expectations in relation to sustainability or environmentally friendly requirements as it is possible that sustainability or environmental impact will change during the implementation of a project for which raised funds would be used, or that projects would have some (even minimal or indirect) negative impact on environment.

[19] For more see: Climate Bonds Initiative. Available at: https://www.climatebonds.net (accessed on 04.05.2023).

[20] International Capital Market Association (ICMA). Green Bond Principles (GBP). Available at: https://www.icmagroup.org/sustainable-finance/the-principles-guidelines-and-handbooks/green-bond-principles-gbp/ (accessed on 11.09.2022).

[21] For more see: Centrálna evidencia regulovaných informácií [Central Register of Regulated Information]. Available at: https://ceri.nbs.sk/ (accessed on 04.05.2023).

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usually do not carry out other significant business activities. These types of companies dominated the list of issuers held by the NBS.

For the purposes of our research, we undertook a qualitative review of individual bond prospectuses for selected legal and economic criteria. We worked with the information available in NBS database of the published prospectuses, including an export of summary spreadsheet with certain metadata on prospectuses and links on prospectuses and supplements published during 2020-2022. Certain prospectuses were missing even on the webpages of the issuers. In our qualitative review, we considered and coded the text of key words in individual prospectuses for the following legal and economic criteria:

- the purpose of bond issue: expansion of activities, operating credit or refinancing and restructuring; whether the funds are used by the issuer solely or by the group;
- the presence of any ESG criteria or reference;
- type and form of bonds: certificate or book-entry, registered ownership or bearer-bonds;
- yield: fixed-rate, floating rate or set as the difference between the face value and the issue price;
- security: whether an issuer provides any security and the form of security provided;
- transferability: limitations to transferability;
- early redeemability: issuer or holder-triggered;
- convertibility: whether bondholders can trigger automatic conversion to stocks;
- target group of investors: what type of investors can invest in corporate prospectuses (MiFID II classification).

Subsequently, we compared the results of individual prospectuses to assess the prevailing market practices. As a result of the research conducted, we summarise the information and describe the market practice of corporate financing through bond issues in the Slovak Republic, which we present in the text below.

3. FINDINGS

There were altogether 177 prospectuses or supplements approved by the Slovak regulator, the National bank of Slovakia, in 2020-2022 (see chart no. 1). 38 or 21 % of these were supplements to existing published prospectuses, therefore 139 prospectuses represent the basis (100%) for further presentation of findings. Almost one-quarter of published prospectuses were in the form of *base prospectus* as stipulated by art. 8 of the Prospectus Regulation, leaving a possibility of skewing the results of the study by final terms having changed the base prospectuses.

	2020	2021	2022	**Total**
Prospectus	33	39	33	**105 (59 %)**
Base prospectus (art. 8 Prospectus Regulation)	10	9	14	**33 (19 %)**
Supplement to Base prospectus	8	3	16	**27 (15 %)**
Supplement to Prospectus	1	6	4	**11 (6 %)**
Registration document	1	0	0	**1 (0,5 %)**

Total no. of offerings	**53**	**57**	**67**	**177**

Chart no. 1: Breakdown of prospectuses or supplements approved by the National bank of Slovakia, in 2020-2022 (Source: NBS, 2023)

As shown below, issuers typically offer their securities to the public directly through securities dealers (Slovak variant of an investment firm under MiFID) or through the regulated market. Prospectuses and their supplements are thus mostly approved by the NBS to allow issuers to offer securities to the public and/or trading on a regulated market. Use of multilateral trading facilities in Slovakia is negligible.

	2020	2021	2022	**Total**
Offer of securities to the public	24	27	25	**76 (43%)**
Offer of securities to the public + Admission to trading on a regulated market	20	20	31	**71 (40%)**
Admission to trading on a regulated market	9	10	9	**28 (16%)**
Secondary offer of securities to the public	0	0	1	**1 (0,5%)**
Offer of securities to the public + Admission to trading on a multilateral trading facility (point (22) of Article 4(1) of Directive 2014/65/EU)	0	0	1	**1 (0,5%)**
Total no. offerings	**53**	**57**	**67**	**177**

Chart no. 2: Breakdown of prospectuses or supplements approved by the National Bank of Slovakia, in 2020-2022 (Source: NBS, 2023)

Great majority of prospectuses were issued by non-financial corporations (123 or 88 %), around 10% were issued by banks (14), the remainder were issued by other financial institutions (2).[22]

Non-financial corporation	123 (88%)
Bank	14 (10%)
Securities dealer	1 (0,7%)
Asset management company	1 (0,7%)
Total no. of offerings	**139**

Chart no. 3: Breakdown of categories of issuers of respective offerings of prospectuses or supplements to prospectuses approved by the NBS in 2020-2022 (Source: NBS, 2023)

Public offerings in Slovakia are a relevant source of finance for non-financial corporations, yet if we look at the composition of issuers from the corporate groups perspective, we see that there are only a handful of issuers who finance multiple projects or ventures by bonds issues. Nominally, there were 51 non-financial issuers, although once we cluster the issuers into groups of companies, based on publicly available

[22] To distinguish between non-financial corporations and financial institutions we use a formal criterium of having a relevant financial authorisation issued by the regulator. Consequently, non-financial corporations also include companies clearly belonging to groups of financial institutions although they are with no financial markets authorisation and therefore cannot be understood as financial institutions.

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information, we learn that 5 issuers, members of corporate groups, were responsible for majority of issues (67 % out of 123 offerings of non-financial corporations), i.e., 83 public offerings (see chart no. 4). These issuers are major Slovak private equity groups, mainly oriented on real estate development, pharmacies, or energy (Penta, J&T, HB Reavis) and smaller boutique financial institutions (Across, SAB).[23]

Penta[24]	49 bonds issues (40 % of 123 offerings of non-financial corporations)
SAB[25]	13 bonds issues (10,5 % of 123 offerings of non-financial corporations)
J&T[26]	10 bonds issues (8 % of 123 offerings of non-financial corporations)
Across[27]	7 bonds issues (6 % of 123 offerings of non-financial corporations)
HB Reavis[28]	4 bonds issues (3 % of 123 offerings of non-financial corporations)
Total	**83 bonds issues (67 % of 123 offerings of non-financial corporations)**

Chart no. 4: Most frequent issuers of prospectuses approved by the NBS in 2020-2022 (Source: NBS, 2023)

Over the years 2020-2022, the number of offerings remained stagnant, 44 in 2020, 48 in 2021 and 47 in 2022 (excluding supplements to prospectuses). Vast majority of the public offerings represent bonds (119; 86 %) and bonds or covered bonds issued by banks (8; 6 %). Shares, investment certificates, shares of collective investment undertaking, notes and bills of exchange represent only a small proportion of the total 139 public offerings, i.e. 12 (<9 %).

	2020	2021	2022	**Total**
Bonds	38	41	40	**119 (86 %)**
Shares	3	2	1	**6 (4 %)**
Covered bonds	1	1	2	**4 (3 %)**
Bonds / Covered bonds	0	2	2	**4 (3 %)**
Investment certificates	1	0	2	**3 (2 %)**
Shares of collective investment undertaking	0	1	0	**1 (0,7 %)**
Bills of exchange	1	0	0	**1 (0,7 %)**
Notes	0	1	0	**1 (0,7 %)**
Total	**44**	**48**	**47**	**139**

[23] The membership of individual issuers in corporate or financial groups was verified by the publicly available records and financial statements. In some instances, when publicly available record of ownership or self-declaration of the issuer or group was not available, we rely on the business name of the issuer including the group name as the common denominator of group membership.
[24] Domestic private equity group active in real estate. Issuers - group members are: Penta Funding Public II, s.r.o.. Penta RE Funding II, s.r.o., Dr. Max Funding, s.r.o.
[25] Domestic financial group. Issuers - group members are: SAB Financial Group a.s., SAB Holding a.s.
[26] Domestic private equity group in real estate. Issuers - group members are: J&T ENERGY FINANCING EUR X, a. s., J&T ENERGY FINANCING EUR XI, a.s., J&T ENERGY FINANCING EUR XII, a.s., J&T Global Finance XII., s.r.o., J&T Global Finance XIV., s.r.o., J&t SECURITIES MANAGEMENT PLC JTRE Financing 4, s.r.o.
[27] Domestic financial group. Issuers - group members are: Across Funding, a.s., Across Properties, a.s.
[28] Domestic real estate group. Issuers - group members are: HB REAVIS Finance SK IX s.r.o., HB REAVIS Finance SK VII s.r.o., HB REAVIS Finance SK VIII s.r.o., HB REAVIS Finance SK X s.r.o.

Chart no. 5: Breakdown of public offerings over years and type of financial instrument (Source: NBS, 2023)

Zooming in on non-financial corporations' public offerings of financial instruments, we see that vast majority of the offerings were for bonds, 116 (94 % out of total 123 public offerings of non-financial corporations during 2020-2022), 6 were offers of shares in joint-stock companies and one corporation offered bills of exchange as a means of financing. The dominance of bonds on the capital market is not surprising due to the overall structure of the Slovak capital market.[29]

Bonds	116 (94 %)
Shares	6 (5 %)
Bills of exchange	1 (1 %)
Total	**123**

Chart no. 6: Non-financial corporations issues breakdown of financial instruments 2020-2022 (Source: NBS, 2023)

In the next section, we focus on the narrower dataset of available prospectuses of bonds offerings by non-financial corporations issued during 2020-2022. Of 116 original bonds issues, 13 prospectuses were not publicly available in the database; therefore, the basis for further data review consists of 103 published prospectuses (116 total – 13 missing = 103 available). Moreover, we also added 14 available supplements as they may represent an amendment of existing prospectus and may change the reviewed criteria (15 total – 1 missing = 14 available). The total number of documents available that were reviewed for the following section is therefore 117, while additional 14 missing prospectuses (13 + 1) are considered as *not available* (N/A).

We see that a vast majority of issuers use proceeds raised by issuing bonds to expand existing or build new business ventures (94), whereas proceeds from 10 offerings are used as regular operating credit without any explicit mention of a new or specific business venture or expansion. Only seven issuers used money to refinance existing debt or restructuring the corporate structure and 12 supplements did not change the existing use of finance (see chart no. 7).

Expansion of existing or building new business venture	94 (80 % of the total 117)
Operating credit	10 (8,5 % of the total 117)
Refinancing / restructuring	7 (6 % of the total 117)
No change	12 (10 % of the total 117)

Chart no. 7: Purpose of the bond issue / use of finance (Source: NBS, 2023), note: some categories are not mutually exclusive, therefore the sum of % shown is larger than 100%

Furthermore, we examine whether corporations claim to use the finance raised by bonds issue for financing group activities or solely for their own respective purposes. Almost 54 % of prospectuses (63 of 117) claim to use the finance for group financing (or at least allow that option open). 35 (30 %) prospectuses or supplements do not provide for this option.

[29] See graph no. 1 above.

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Group	63 (54 % of the total 117)
Issuer	35 (30 % of the total 117)
Issuer and group	7 (6 % of the total 117)
No change	12 (10 % of the total 117)

Chart no. 8: Use of finance for financing intra-group activities (Source: NBS, 2023)

The list of issuers is generally dominated by project companies, as shown above by the prevalence of a few large financial groups using project companies. Although these companies do not carry out any significant business activities and are entities with no business history, these companies are usually part of a stable group or a subsidiary of a large, well-known company, which may make project companies bonds more attractive from an investor's perspective. However, not only the name of an issuer, but also the project for which funds are raised, its purpose and its potential in the future can have impact on the attractivity of corporate bonds from the perspective of investors.

We also investigate the form and type of securities as formal criteria stipulated by the law. The Slovak Securities Act[30] distinguishes *form* ("podoba") and *type* ("forma") of securities, including bonds. As for the form, a bond may be issued either as a *book-entry security* ("zaknihovaný cenný papier") or as a *certificate or paper security* ("listinný cenný papier"), as regulated by the section 10 of the Securities Act. The record of a book-entry security is kept in a register established under the Securities Act (at central securities depositary, a public entity regulated by law and supervised by the NBS). Book-entry securities are dematerialised. A certificate or paper security is issued in a material form. As for the type of a security, issuers may opt either for *registered securities* („cenný papier na meno"), *order securities* ("cenný papier na rad"), or *bearer securities* ("cenný papier na doručiteľa"), although bonds may be issued only as registered securities or bearer securities.[31]

Corporate bonds are normally issued as book-entry securities, which is primarily related to the issuer's intention to apply for admission to trading on the stock exchange market. This is evidenced by the fact that the vast majority of bonds issued publicly in Slovakia in 2020-2022 (99, i.e. 85 %) were issued as book-entry bearer bonds. Only a fraction (3, i.e. 2,5 %) was issued as certificate, registered securities. An issue was issued optionally in the base prospectus to be determined in the final terms in the future.

Book-entry / bearer bonds	99 (85 % of the total 117)
Certificate / registered ownership	3 (2,5 % of the total 117)
Certificate OR Book-entry / bearer or registered bonds in base prospectus (TBD)	1 (<1 % of the total 117)
No change	14 (12 % of the total 117)

Chart no. 9: Type and form of the bonds issued in 2020-2022 (Source: NBS, 2023)

[30] Zákon č. 566/2001 Z. z. o cenných papieroch a investičných službách a o zmene a doplnení niektorých zákonov (zákon o cenných papieroch). (Act No. 566/2001 Coll. on Securities and Investment Services). Collection of Laws of the Slovak Republic. (hereinafter „**Securities Act**").

[31] § 4 zákona č. 530/1990 Zb. o dlhopisoch. (Section 4 of the Act No. 530/1990 Coll. on Bonds). Collection of Laws of the Slovak Republic. (hereinafter „**Bonds Act**").

There are multiple ways in which bond issuers may calculate yield for bondholders.[32] A traditional way is a fixed-rate yield, which provides certainty to both the issuers and bondholders.[33] This option seems to be a preferred option for Slovak non-financial corporations, as during the reviewed time frame 83 issues opted for the fixed-rate (71 %). The second, although significantly less preferred option, is to structure the yield as a difference between the face value and the issue price of a bond. 14 bonds were structured this way (12 %). Handful of issues structured the yield as a floating-rate, or a combination of fixed-rate or floating rate, or some kind of alternative arrangement allowed under the Slovak Bonds Act.[34]

Fixed-rate	83 (71 % of the total 117)
Difference between the face value and the issue price	14 (12 % of the total 117)
Fixed-rate or floating-rate	3 (2,5 % of the total 117)
Alternatives	2 (<2 % of the total 117)
Floating-rate	1 (<1 % of the total 117)
Combined (fixed)	1 (<1 % of the total 117)
No change	13 (11 % of the total 117)

Chart 10: Yield of the bonds issued in 2020-2022 (Source: NBS, 2023)

The transferability of bonds may significantly influence the ability of bondholders to liquidate their bonds if needed. In general, the transferability of securities, including bonds, can be limited or even excluded; however, certain limitations apply under the Slovak law. For example, the transferability of bearer securities may not be limited (or excluded) in any way; in the reviewed issues, 100 bond issues were issued without any limitations as for transferability (85 %), while 2 issues (<2 %) required prior consent of the issuer's general assembly for transfer, and 1 issue provided for the right of first refusal of the issuer.

Without limitations	100 (85 % of the total 117)
Prior consent of the issuer's general assembly	2 (<2 % of the total 117)
Right of first refusal of the issuer	1 (<1 % of the total 117)
No change	14 (12 % of the total 117)

Chart no. 11: Transferability of the bonds issued in 2020-2022 (Source: NBS, 2023)

Next, we zoom in on the option of bondholders to initiate early redemption of a bond. Typically, an early redemption (or early repayment) may be in the interest of bondholders as it provides additional venue to get liquidity (besides secondary market). However, it naturally leads to uncertainty for issuers who may not have sufficient liquidity to satisfy early demand from bondholders. Therefore, we may assume that early redemptions/repayments initiated by bondholders would not be a typical feature of bond

[32] Section 10(2) of the Bonds Act.
[33] Fixed rates were typically up to 6 % p.a. Note that vast majority of issues date prior to recent raises of interest rates.
[34] Also note, that the bonds were issued mostly in the domestic currency euro although some issuers reserved the right to issue bonds in foreign currency.

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offerings. On the other hand, since it is issuers who set the policy of public offerings, they may reserve a right to early repayment initiated by issuers. In fact, 93 issues include a right to early repayment initiated by issuer (79,5 %), either unconditionally (88, i.e., 75 %) or subject to conditions (5, i.e., 4 %). 9 issues completely omit this right on behalf of both issuers or bondholders (8 %), while 1 issue allowed for two-way initiated early redemption/repayment of bonds.

No early redemptions	9 (8 % of the total 117)
Only issuer initiated	88 (75 % of the total 117)
Only issuer initiated subject to conditions	5 (4 % of the total 117)
Both issuer and bondholder initiated	1 (<1 % of the total 117)
No change	14 (12 % of the total 117)

Chart no. 12: Early redemptions of the bonds issued in 2020-2022 (Source: NBS, 2023)

Based on the conducted research, market practice shows that neither the transferability of corporate bonds nor the rights of the bondholders are restricted, provided that the transfer and exercise of rights is carried out in accordance with applicable law. Exceptions regarding limitations may result from specific legal regulations, such as Act No. 7/2005 Coll. on bankruptcy and restructuring, as amended.[35] Holders of corporate bonds are normally not entitled to request early redemption of the bonds; investors (bondholders) get this option, only if the issuer explicitly commits to early redemption at a request of bondholders.[36] Early redemption of bonds is only possible in predetermined cases; this possibility is usually linked to occurrence of a certain event, that includes particularly cases of breach of an issuer's obligations, as based on established market practice. In connection with early redemption of bonds, there is a risk for investors that their investment will not be as profitable as expected due to the loss of interest income and a risk that investors will not be able to invest an early redeemed amount under comparable conditions so that their investment will provide a better or at least comparable profitability.

Another right that may be attached to bonds is the right to convert bonds into stocks. This right may however not be typical in public offerings of bonds, which is confirmed by our review of bond issues in 2020-2022, as no bond issue provides for convertibility of bonds into stocks. We conclude that this venue of reaching out to new prospective shareholders in the public was not very typical in Slovakia during the observed period; corporations continue to be equity-financed through close networks and connections.

No right to convert into stock	103 (88 % of the total 117)
Right to convert into stock	0 (0 % of the total 117)
No change	14 (12 % of the total 117)

Chart no. 13: Convertibility of the bonds issued in 2020-2022 (Source: NBS, 2023)

Debtors may improve their creditworthiness by providing security (collateral) to their creditors, such as a lien on certain assets, a declaration of guarantee of another

[35] Zákon č. 7/2005 Z. z. o konkurze a reštrukturalizácii a o zmene a doplnení niektorých zákonov. (Act No. 7/2005 Coll. on Bankruptcy and Restructuring). Collection of Laws of the Slovak Republic.
[36] Section 12(2) of the Bonds Act.

entity (typically a parent company or other creditworthy entity in a group of companies), or a combination of these securities. After examination of the bonds issues, we see that 32 issues provide no collateral to the bondholders (27 %), while 62 % of issues provide some kind of collateral (73). The most prominent collateral is lien on receivable (42) or lien on other assets, such as shares, specific assets, or receivables, immovable or movable property or even cash. 22 issues provide for declaration of guarantee by other member of the group, typically a parent company or a sister company with strong standing, while 4 issues combined declaration of guarantee and various types of lien.

Lien on receivables	42 (36 % of the total 117)
Other type of lien (receivables and stocks, business share and specific receivables, assets, cash)	5 (4 % of the total 117)
No security	32 (27 % of the total 117)
Declaration of guarantee	22 (19 % of the total 117)
Declaration of guarantee and lien (assets, receivables, cash)	4 (3,5 % of the total 117)
No change	12 (10 % of the total 117)

Chart no. 14: Collateral of the bonds issued in 2020-2022 (Source: NBS, 2023)

Although a security (collateral) does not guarantee investors that they would not lose the invested money in case of default of the issuer, a collateral of corporate bonds may provide at least some mitigation of risks for investors. The risks are often connected with the fact that a collateral is provided by an issuers' parent company or entities within an issuer's group. Thus, if an issuer for which its parent company provides collateral in the form of declaration of guarantee was to default, it is likely that a negative business and economic situation would not only affect solely an issuer but also affect the position and stability of its parent company or a group as a whole.

As project-based bonds provide an alternative to classic bank finance of projects, there are some important benefits and disadvantages to bond project finance (see, e.g., Boudrias and Kotkin, 2012). The main advantages for project owners consist in greater control over conditions of the deal and an off-balance sheet treatment, which results in advantages in risk management and risk isolation through a project-specific company (i.e. special purpose vehicle) from a project sponsor's perspective. However, such isolation comes with the requirement of providing an additional layer of security (collateral) from investors. Some companies seek to increase safety of investment from the investors' perspective by other means, for example, by so-called *project support agreements* ("PSA") (Scherer, 2010, p. 384). Among the analysed prospectuses, this type of agreement was mentioned in prospectuses of a few issuers whose bonds had not been secured by any other form of security within the legal meaning. Under the PSA, the shareholder of an issuer (typically a parent company, so-called *sponsor*) undertakes upon a request of an issuer to provide an issuer with necessary support for an issuer's recovery from the crisis in case it occurs. The purpose of the PSA is to strengthen issuer's credit position and mitigate potential risks associated with crisis. Although this type of agreement is not considered a bond security within the legal meaning, such support may have impact on investors' decision regarding the assessment of safety of their investment. However, in connection with the PSA, it is necessary to point out that this agreement does not establish any special rights, benefits, or claims for bondholders. Bondholders are entitled to file their claims solely against the issuer and do not have any

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claims against the issuer's shareholder providing support for the issuer under the PSA or failing to do so. Bondholders are typically not parties to the PSA and do not receive any specific rights under the PSA.

We also investigated perspective clientele of the public offerings, as offerings to respective investor categories require varying levels of investor protection. The majority of issues (85, that is, 73 %) is orientated on the most general group of investors, that is, retail clients, professional clients, and eligible counterparty as defined by Annex II of MiFID II. 12 issues were offered to a maximum of 150 retail clients and 4 issues were offered solely to general retail clients. Another 4 issues were offered only to professional clients and counterparties.

Retail clients	4 (3,5 % of the total 117)
Retail clients (<150)	12 (10 % of the total 117)
Retail clients / Professional clients / Eligible counterparty	85 (73 % of the total 117)
Professional clients / Eligible counterparty	4 (3,5 % of the total 117)
No change	12 (10 % of the total 117)

Chart no. 15: Clients of the bonds issues issued in 2020-2022 (Source: NBS, 2023)

Finally, we reviewed the prevalence of environmental, social, and governance criteria (ESG) in bonds issues. We find that 97 issues include no information about ESG criteria in prospectuses at all, while 4 include an option to issue bonds as *green bonds* in their base prospectus and 2 include a reference to environmental protection without any measurable commitments.[37] Out of the 4 references to green bonds in base prospectuses, we verified that 2 issuers had not issued bonds as green bonds, 1 had indeed issued bonds as green bonds and we were not able to verify the remaining one.[38]

No ESG	97 (83 % of the total 117)
Option to issue as green bonds	4 (3,5 % of the total 117)
Reference to environmental protection without measurable commitments	2 (<2 % of the total 117)
No change	14 (12 % of the total 117)

Chart no. 16: Prevalence of ESG criteria in bonds issues issued in 2020-2022 (Source: NBS 2023)

[37] One of these two issuers mentions a vague reference to observing ESG criteria with a "focus on innovative and ecological solutions" without any reference to any specific law or standard, indicating a mild marketing hook. The second issuer mentions that the issuer "places high emphasis on the modernisation of technological equipment, thus contributing to the improvement of the quality of the delivered production and the environment". Again, there is no specific commitment to any law or standard.

[38] The green bond issuer is a member of the JTRE group. The group has continued to issue other green bonds since, e.g., for projects Klingerka or Downtown Yards. For more see: https://jtre.sk/dlhopisy (accessed on 04.05.2024). The group does not clearly indicate which green bonds standard it opts in, although it explicitly mentions that the green bonds are not EuGB as based on the EuGB Regulation. It also declares compliance with the Taxonomy Regulation.

4. CONCLUSION

Corporate bonds as an investment option are available basically to all interested parties. Due to the long-term low interest rates of banks' products, clients were looking for other ways to capitalise on their savings, which is why over time corporate bonds have also become a subject of interest for retail clients. Professional and retail clients can typically invest in corporate bonds. However, especially for retail clients, it is extremely important that they consider their investment decision carefully, considering all risks, their skills, experience, and capabilities, as well as consequences in case an investment does not bring expected outcomes. Although corporate bonds may appear to some clients as banking products, namely term deposits, the fundamental difference between corporate bonds and these banking products lies in the protection of the invested (deposited) funds, both economically and legally speaking. While, in the case of a term deposit, the protection of the deposited funds is strengthened by bank supervision and the Deposit Protection Fund, the funds invested in corporate bonds are not protected in such a way. Another difference may be credibility of subject to which deposited funds are entrusted. Compared to other industries, there is a strict legal regulation that states requirements and conditions for banks to carry out their business (particularly capital requirements or requirements for an internal control mechanism). On the other hand, there are no such specific and strict requirements for issuers of corporate bonds therefore there is higher credit risks, risk of default or insolvency. Although the bond prospectus offers detailed information about the issuer, it is possible that an investor gets exposed to unforeseen risks, even resulting in loss invested funds. The consideration of risks connected with an investment should be based on all information available to investors, which is why relevant information should be included within the prospectus.

We have reviewed all available prospectuses (and supplements) published and approved during 2020-2022 by the NBS to assess convergence on certain market practices. Although there are limitations to our research due to the unavailability of some of the prospectuses at the time of closing of the research, we have reviewed the large majority of them and maintain relevance of the research conclusions due to the relatively solid sample. As a conclusion of the review, we may say that the form of corporate financing through the issue of bonds in the Slovak republic, though dominant part of the Slovak bond market overall, is used mainly by large companies and project companies created particularly for raising funds. Number of prospectuses allowed for the use of raised funds intra-group (<60 %), not exclusively for the issuer.

This practice results from the complexity of the process of issuing corporate bonds, both in terms of time and finance. As far as small and medium companies are concerned, we assume that banking finance, such as bank loans, represents a less time and finance consuming, and possibly even more certain way of obtaining funds. Moreover, from a financial point of view, an unsuccessful attempt to raise funds through a bond issue could have a significantly negative impact on a small company's financial situation and stability. Another factor that may discourage small and less well-known companies from financing through bond issue is a risk of investor disinterest; a potential investor is more likely to be attracted by the name of a large, well-known company than by a small, unknown company with no significant business activities or projects.

We also observe specialisation of some private equity groups on financing through bonds issues as almost 2/3 of bonds issues were issued by issuers who are individually members of mere 5 groups. This also proves the point above that companies require a certain level of sophistication and financial health to be able to use bond finance regularly.

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The formal qualities and other requirements of bonds show a clear convergence of market practice: a typical Slovak bond is issued as a book entry bearer bond with fixed-rate yield, with unlimited transferability, allowing for early repayment initiated by the issuer (not by the bondholder), with no right to convert bond into stock. Such typical bond would likely also provide for certain security, likely a lien on receivables or declaration of guarantee by a parent company or other corporate group member. The bond would be offered publicly to all client categories, including retail clients.

Even though the topic of sustainability and environmental protection is one of the most current issues, the review confirms our assumptions that the topic of sustainability in the non-financial corporate bond market is still not relevant in Slovakia. Only a negligible number of issuers mentioned in their prospectuses a possibility of issuing green bonds but none of them committed to issuing them or to any measurable ESG-related KPI (Key Performance Indicators), while vast majority of issuers made no mention of ESG criteria in their prospectuses.[39]

Finally, it is clear from the review that the vast majority of issuers engaged with professional third-party advisors, such as investment banks and securities dealers. Draughting of bond prospectuses is typically entrusted to professional advisors, such as specialised law firms. Anecdotally, we note that majority of issuers appear to have the same structure of the prospectuses, including the same wording of parts of texts, going beyond structure of a prospectus as prescribed by the Prospectus Regulation, indicating that majority of prospectuses were draughted by a smaller group of lawyers, which may also be a driving force behind the market convergence.

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[39] This may however change soon due to the perspective amendment of the Prospectus Regulation, the so-called EU Listing Act Package, which comprises of legislative proposals for the EU regulation regarding capital markets including prominently the Prospectus Regulation. Following the amended EU regulation, issuers of the non-equity securities will need to publish non-financial information whether those non-equity securities are marketed as considering ESG factors or pursuing ESG objectives. In connection with these changes the European Securities and Markets Authority (ESMA) issued a statement on the sustainability disclosure expected to be included in prospectuses (hereinafter "**Public Statement**"). The Public Statement sets out expectations of relation to sustainability-related matters in equity and non-equity prospectuses and clarifies the disclosures required in relation to 'use of proceeds' bonds and 'sustainability-linked' bonds. For more see: European Securities and Markets Authority (2023).

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ELECTRONIC MONITORING IS NOT THE ONLY PROBLEM HERE: THE CHALLENGES OF HOUSE ARREST APPLICATION PRACTICE IN THE CZECH REPUBLIC / Ivo Polanský

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Abstract: *Over the past 25 years, few alternative sanctions have received as much attention as electronically monitored house arrest. In the view of relatively dynamic development of electronic surveillance technologies and related ethical and legal issues at stake, this interest continues to this day. In the Czech Republic, electronically monitored house arrest was introduced in 2010. Somewhat oddly, the electronic surveillance system had not been implemented at the time. Yet, legislators and sanctions policy makers placed high hopes in this form of punishment. In particular, it was expected to significantly help combat the relentless hypertrophy of the prison population. But the expectations of sanction policy makers were not met due to the reluctance of the courts to impose house arrest. This had remained unchanged over the years, and opinions had begun to emerge that the state's failure to introduce electronic monitoring was primarily to blame. In 2019, electronic monitoring was eventually implemented, but the number of sentences imposed still did not increase. If the legislature's sanctions policy is not translated into practice, its aims cannot be achieved. For this to happen, it is essential that house arrest becomes more prevalent in the structure of sentences imposed. Increased application rates will not happen spontaneously; certain steps need to be taken to address the reasons for the current state of affairs and to mitigate factors that negatively affect application practice. For this purpose, such causes and negative factors must first be identified. This paper therefore examines the importance of electronic monitoring in terms of the application practice of house arrest in the Czech Republic, and the main reasons for not imposing house arrest. Building on these findings, it offers suggestions that would contribute to more frequent imposition of house arrest in appropriate cases.*

Key words: *Sentencing; Alternative Sanctions; House Arrest; Electronic Monitoring; Application Practice; Criminal Law; Czech Jurisdiction*

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1. A BRIEF HISTORY OF THE ORIGIN AND DEVELOPMENT OF ELECTRONICALLY MONITORED HOUSE ARREST

In the 1980s, a modern type of punitive measure began to appear in sanctioning systems, referred to as house arrest in the Czech Republic, punishment under electronic monitoring in Belgium (Beyens and Roosen, 2013), home confinement in the USA (Austin, Dedel Johnson and Weitzer, 2005), home detention curfew in Scotland (Graham and McIvor, 2015), and intensive supervision with electronic monitoring in Sweden (Bishop, 1995). House arrest and electronic monitoring ('EM') appear across continents in a variety of concepts and forms, depending on the specific objectives of the sanction policy (Black and Smith, 2003; Maxfield and Baumer, 1990). They appear as a means of replacing custody, as a condition for the suspension or interruption of a prison sentence, as a form of execution of a prison sentence or part thereof, as a stand-alone measure, i.e. as an autonomous alternative/community sanction, or as a condition or one of the conditions of another alternative/community sanction (Gainey and Payne, 2000; Haiskanen, Aebi, Brugge and Jehle, 2014; Rodrigues et al., 2022). They therefore do not represent a single type of sanction or measure with a uniform concept and the same methods of application, although there are signs of harmonisation, which the Council of Europe in particular is seeking (Dünkel, Thiele and Treig, 2017).

Understandably, there is no uniform definition of house arrest, which is explained by the different conceptions of alternative sentence across countries, as well as the varying conceptions of electronic monitoring. In some places, it is considered as a kind of punishment itself, in others as a "mere monitoring tool" (DeMichele, 2014). Thus, various definitions of house arrest appear in the literature. Hurwitz (1987) defines house arrest as a form of intensive supervision characterised by an obligation to remain in the offender's residence for a significant number of hours with permission to leave the dwelling only for explicitly stated and pre-approved purposes, and this obligation is enforced by electronic monitoring through a device placed on the offender's ankle. Petersilia (1986) refers to court-imposed punishment in which the offender is legally ordered to remain confined to his or her own dwelling. Brown and Elrod (1995) describe house arrest as a type of imprisonment in which a person is confined by the court to his or her home or other designated location, such as a home or workplace, and the offender is required to wear an electronic monitoring device that tracks his or her location and reports it to a monitoring centre.

Cum grano salis it is possible to include house arrest under the term electronic monitoring, however "house arrest" and "electronic monitoring" cannot be considered the same. The most appropriate definition is that by Hofer and Meierhoefer (1987), who define house arrest as any judicially or administratively imposed condition that is part of a court-imposed sentence and that requires the offender to remain at his residence for a specified part of the day. Such a conception of punishment is one of the oldest ever. As far back as the Roman Empire, house arrest appears as *liberia custodia*, where high-ranking persons were placed under the supervision and guard of the senator's house. In the first century, the apostle Paul was placed under house arrest for two years, paying rent and earning income as a tentmaker while serving his punishment. Among other historically famous personalities, Galileo Galilei (for his for heretical heliocentric ideas) as well as Napoleon Bonaparte, Nikita Khrushchev, Rafael Videla, and August Pinochet were sentenced to house arrest (Strémy and Klátik, 2018). In the Czech Republic, house arrest also appeared in various historical stages, legally regulated in Act No. 117/1852 Coll., on Crimes, Offences and Misdemeanours, which was adopted on the basis of a reception norm after the establishment of the Czechoslovak Republic in 1918 and remained

effective until 1950 (Čádová, 2010). The problem of house arrest, however, has always been the inefficient control of its execution. Only the vast development of technology in the second half of the 20th century was able to address this problem, owing to the emergence of a new form of control – electronic (Krahl, 1998).

The emergence of the modern form of house arrest is associated with the USA and the last evolutionary stage of sentence. The low resocialisation effects of imprisonment, coupled with high costs, and the unsatisfactory outcomes of traditional alternatives in terms of recidivism, which traditional probation failed to deliver, drove the criminal justice community to seek more cost-effective alternatives to custody that combined elements of imprisonment and alternative punishments, but at the same time contributed to community protection in a manner similar to a prison sentence. These attributes were supposed to be met by house arrest through electronic monitoring. The practice of tagging offenders began in the 1980s almost simultaneously in Albuquerque, New Mexico, and Palm Beach, Florida (Ball, Huff and Lilly, 1988). In New Mexico, this happened in a rather novel way when judge J. Love was inspired by an episode of the Spider-Man comics[1] and began imposing criminal penalties controlled by electronic monitoring device (Burrell and Gable, 2008). Shortly thereafter, pilot programs began operating in 31 US states (Lilly and Nellis, 2012).

Given the positive experience in the USA, in the 1990s, electronically monitored house arrest began to expand to other countries as part of the so-called innovation phase. From 1986, pilot programs of this form of sentence were underway in several states of the Commonwealth of Australia, and by 2004 house arrest was already incorporated into the legislation of all Australian states and territories except Tasmania (Bartels and Martinovic, 2017; Smith and Gibbs, 2012). After several years of testing various house arrest programs which began in 1995 (Gibbs and King, 2003), New Zealand introduced electronically monitored house arrest with a maximum length of 12 months as a separate type of punishment in 2007. Latin American countries such as Argentina, Brazil, Chile, and Colombia also began to replicate the US programs in the late 1990s (Paterson, 2015).

In parallel, home detention with electronic monitoring was spreading throughout Europe. The first countries to introduce it were England and Wales, Sweden and the Netherlands (Nellis and Bungerfeldt, 2013; Strémy, 2014). In England and Wales, after several years of testing, house arrest was introduced as a separate sentence in 1991 as a judicial curfew with a maximum length of 6 months. In Sweden, a pilot programme was launched in 1994 and the project was rolled out nationwide three years later. The target group there included offenders sentenced of up to 6 months of imprisonment. Subsequently, Scotland also introduced house arrest as one of the conditions of the Restriction of Liberty Order in 1997 (Graham and McIvor, 2017; Nellis, 2006). During this period, electronically monitored house arrest continued to expand across the continent, and by the early 21st century it had been applied in many Western and Central European countries (Dünkel, 2018).

2. CZECH ELECTRONICALLY MONITORED HOUSE ARREST AMBITIONS AND FAILURES

On 1st January 2010, Act No. 40/2009 Coll. of 8 January 2009, Criminal Code ("**Criminal Code**") entered into force in the Czech Republic. This completed the first part

[1] In the episode, this comics character was fitted with a radio bracelet, through which the lead negative character could keep track of where the main character, Spider-Man, was in time and place.

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of a process of recodification of criminal law in the Czech Republic (Jelínek, 2018). In the explanatory memorandum to the Criminal Code, the legislator stressed the need to change the overall philosophy of punishment and to ensure the fulfilment of the principle that imprisonment would be seen as the last resort – *ultimum remmedium* (Kalvodová, 2007). Thus, the central motive behind the reform's changes to the penal system was the conception of a prison sentence as the means of *ultima ratio* and the related idea of alternative punishment (Kalvodová, 2022). The hierarchy of punishments was then arranged in favour of alternatives, the list of which was supplemented by a quite novel type of punishment, namely the punishment of house arrest in the "traditional" front-end form, which represented one of the most significant innovations of the recodification (Ščerba, 2014).

The adoption of house arrest was preceded by long discussions about its advantages and disadvantages, and the most accentuated argument for its introduction on the part of penal policy makers was not so much the universally acknowledged positives of alternative punishments, but rather the vision of budgetary savings.[2] The Czech Republic, like many other countries, has long struggled with the hypertrophy of the prison population, which not only complicated penitentiary procedures, but also, of course, placed an excessive burden on the state budget, and it was house arrest that was supposed to get the Czech overcrowded prisons "out of a tight spot" (Blanda, 2010). It was expected that 300-1500 sentences would be imposed in the first year and that over 1600 house arrest sentences could be imposed annually in the following years (Tlapák Navrátilová, 2019).

At the same time, the adoption of the Criminal Code created a legal framework for EM, which was intended to serve as a form of control over the application of house arrest. However, at that time, the supplier of the EM system had not even been tendered, let alone pilot tested or evaluated (Tlapák Navrátilová, 2022). The first experiment with electronic monitoring was conducted in the Czech Republic from 1st August 2012 to 30th November 2012 with the project management entrusted to the law office Dáňa, Pergl & Partners. During the four-month operation trial, the Probation and Mediation Service operates a total of 25 monitoring devices, 24 of which were evenly distributed throughout all 8 judicial regions. In his report, the project manager recommended putting the electronic monitoring into full operation, although this recommendation was not underpinned by any research during the pilot testing. A contract for electronic monitoring system supply was then not concluded until September 2017, seven years after the introduction of house arrest penalty and electronic monitoring into the legal system. It was contracted that the Czech Republic could draw up to 2,500 monitoring kits for CZK 93,000,000 within 6 years and so the activation of the monitoring system was finally carried out on September 21, 2018 (Diblíková, Špejra and Vlach, 2021). However, after the first year of operation, the Probation and Mediation Service reported problems with the supplier Supercom and on 22nd November 2021, after only 3 years, 2 months and 11 days, it finally discontinued the operation of electronic monitoring due to the non-delivery of another set of EM devices and technical problems[3] with the anklets (Probation and Mediation Service of the Czech Republic, 2021).

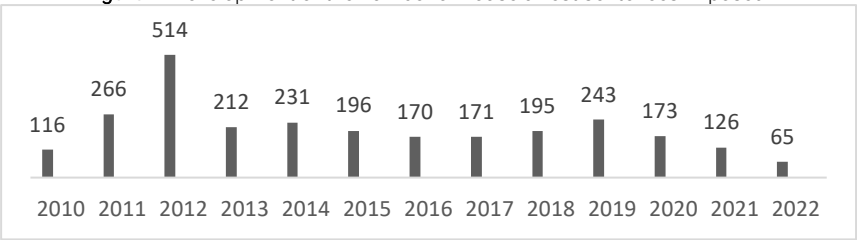
The available statistical data, as presented in Figure 1, show that the ambitions of sanction policy makers have been severely compromised by practice and the capacity

[2] Stenographic record of the 28th meeting of the Chamber of Deputies of the Parliament of the Czech Republic from the 14th March 2008. Available at: http://www.psp.cz/eknih/2006ps/stenprot/028schuz/s028101.htm#r4 (accessed on 20.04.2024).

[3] The anklets were to discharge prematurely, report false security incidents, but also fail to report real security incidents.

of the Probation and Mediation Service has not been met. In fact, the capacity failed to be met even when summing up all the sentences of house arrest imposed in the first five years since the introduction of the penalty in question into the legal framework. Over the years, it has been regularly suggested that the main reason for the low numbers of house arrest sentences imposed is the state's inability to implement a functioning EM system, as judges are reluctant to apply house arrest without the possibility of electronic monitoring (Scheinost et al., 2014; Ščerba, 2014a). However, the status quo has not changed even after the long-awaited launch of EM system in 2018. In the below chart, it can be observed that even during the period of electronic monitoring there was no statistically significant increase, but instead a decrease in the number of house arrest sentences imposed after 2019. In 2021, the number of house arrest sentences imposed was the lowest since 2010. At that time, house arrest was already being described as a 'missed opportunity' (Tlapák Navrátilová, 2019). The imaginary 'nail into the coffin' was the statistical data for 2022, according to which only 65 house arrest sentences were imposed in that year (Probation and Mediation Service of the Czech Republic, 2023).

Figure 1: Development of the number of house arrest sentences imposed[4]



At the end of 2022, the Probation and Mediation Service completed preparations for the next public tender for electronic monitoring system supplier and soon announced this tender with the proviso that candidates for this tender may submit their proposals until 20th March 2023 (Probation and Mediation Service of the Czech Republic, 2022). The tender was eventually "won" by Forsolution CZ, which was the only applicant. The Probation and Mediation Service contracted with this company for the supply of 700 pieces of equipment and the operation of EM system worth CZK 93.6 million. The subcontractor will be the Polish company Enigma Systemy Ochrony Informacji (Ministry for Regional Development of the Czech Republic, 2023). Electronic monitoring system should combine RF and GPS technology and serve to control various forms of house arrest, as well as to control restricted zones. Testing of the new system is expected to take place at an undetermined date in 2024 (Probation and Mediation Service of the Czech Republic, 2023).

[4] Note: Data from *Reports on finally processed individuals by court (convicted and otherwise disposed)* between 2010 and 2022 available from Portal InfoData by Ministry of Justice of the Czech Republic (https://cslav.justice.cz/InfoData/uvod.html, accessed on 20.06.2024).

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3. LEGAL REQUIREMENTS FOR THE IMPOSITION OF HOUSE ARREST AND ELECTRONIC MONITORING IN THE CZECH REPUBLIC

House arrest sentence is considered an independent form of punishment in the Czech Republic. It is second only to imprisonment in the penal system,[5] which means that the Czech legislator considers house arrest to be the relatively most severe alternative punishment in terms of the intensity of the infringement of the offender's fundamental rights (Ščerba, 2012). In the Czech Republic, the decision to place a person under house arrest is the sole responsibility of the courts. However, the public prosecutor plays an important role in the sentencing process, representing the prosecution, proposing the type and level of the sentence, but above all having the power to conclude a plea bargain with the offender, which then has to be approved by the court (Ščerba, 2023). In practice, this means that the prosecutor may also 'impose' the sentence of house arrest.

The conditions for imposing a sentence of house arrest are set out in Section 60(1)(2) of the Criminal Code. The Criminal Code presupposes the cumulative fulfilment of 3 substantive conditions. First, a misdemeanour must have been committed, i.e., any negligent or intentional offence, the upper limit of which does not exceed 5 years.[6] The Criminal Code provides the same condition for the imposition of a sentence of community service,[7] a separately imposed monetary penalty,[8] or for some diversions in criminal proceedings.[9] Misdemeanours in the Czech Republic are a category of less serious offences compared to the category called felonies – all intentional offences with a maximum penalty of more than 5 years – and are defined positively in the Criminal Code by an alternative combination of the intentional culpability or the upper limit of the penalty rate (Jelínek, 2009). The negligent nature of the offence and the upper limit of up to 5 years are sufficient to categorise a particular offence as a misdemeanour (Šámal, 2009). The Code therefore does not make house arrest conditional on the *in concreto* rate, but on the penal rate set for a particular offence. The Code does not place any restrictions on the nature of offence. Thus, the penalty of house arrest may be imposed, for example, for theft or fraud, but also for battery or rape. In this respect, the Criminal Code does not provide any limitation; the decisive factor is the penalty rate set for the offence in a particular part of the Criminal Code in conjunction with the specific nature and gravity of the offence, the evaluation of which is a subject of judicial individualisation.

The second condition is the assumption by the court that the imposition of this sentence will be sufficient in view of the nature and gravity of the offence committed and the offender's person and circumstances.[10] This is a prognosis of the sufficiency of the sentence, which should be assessed with regard to the purpose of the sentence and its various functions.[11] The specific nature and gravity of the criminal offence is assessed according to the demonstrative criteria defined in the Criminal Code, which explicitly establishes the criterion of the importance of the interest protected by law the manner in

[5] Section 52(1) of the Act No. 40/2009 Coll. of 8th January 2009, Criminal Code, as amended with effect from 1st April 2024 ('Criminal Code').
[6] Section 14(2) of the Criminal Code.
[7] Section 62(1) of the Criminal Code.
[8] Section 67(2b) of the Criminal Code.
[9] Committing a misdemeanour is a condition, for example, for conditional discontinuance of criminal prosecution, regulated in Section 307 of Act No. 141/1961 Coll. of 29th November 1961 on Criminal Proceedings, as amended by later regulations ("Criminal Procedure Code"), or the approval of a settlement, regulated in Section 309 of the Criminal Procedure Code.
[10] Section 60(1a) of the Criminal Code.
[11] Constitutional Court of the Czech Republic, decision No. II. CC 482/18, of 28th November 2018.

which the offence was committed, its consequences, the circumstances of the offence, the person of the offender, the degree of culpability of the offender and the motive, intent or objectives of the offender.[12] Other circumstances not explicitly mentioned in this provision may also be taken into account, but the criterion of the circumstances under which the act was committed is itself very broad, so that it is difficult to imagine a factor that could have an impact on determining the nature and gravity of the act and at the same time would not fall under one of the demonstrably enumerated criteria (Ščerba, 2020).

The final substantive condition for the imposition of house arrest is the offender's written pledge to remain at the address specified by the court and to co-operate as necessary in carrying out the inspection.[13] The written pledge requires the offender's tacit consent to the imposition of the type of sentence in question. Without such consent, the imposition of a sentence of house arrest is inadmissible. By giving this consent, the offender undertakes to submit to the conditions of the execution of the sentence and to allow the control of its execution. Thus, under current Czech law, house arrest is the only form of punishment whose imposition is conditional upon the offender's consent (Ščerba, 2013).

If the above conditions are met, the court may impose a sentence of house arrest for up to 2 years. There is no statutory minimum. The court shall determine the period during which the convicted person must present at the residence designated by the court on working days, days off work and holidays, in accordance with the criteria set out in Section 60(4) of the Criminal Code. Account is to be taken of working hours and the time required for commuting, as well as for the care of minor children and the necessary personal and family affairs. In this respect, the court is not limited in any way; it can theoretically impose either continuous house arrest – although this option would be contrary to the principle of proportionality of punishment, which is explicitly mentioned in the law – or light weekend house arrest of only a few hours a day (Válková and Půry, 2023).

The time regime is already set by the judge in the sentence and, except for important reasons which render the sentence in its original form unenforceable,[14] the time regime cannot be changed or modified according to the situation of the sentenced person. Under no circumstances can the time regime be made more restrictive for the offender, even if the convict, for example, loses his/her job or violates the conditions of the sentence.[15] This *ipso facto* implies that the judge should have objective information about the personal circumstances of the offender and his normal daily routine. Otherwise, there is a risk that the time regime will be impossible for the offender to comply with or, on the contrary, too lenient.

For the above reasons, a special condition is sometimes added, as provided for in Act No. 141/1961 Coll. of 29th November 1961 on Criminal Proceedings ("**the Criminal Procedure Code**"), which requires the court to obtain a probation officer's report on the possibility of imposing a sentence of house arrest before making decision. However, the report is mandatory only if the court decides by a criminal order, i.e., in a simplified

[12] Section 39(2) of the Criminal Code.
[13] Section 60(1b) of the Criminal Code.
[14] Such an important reason could be, for example, the end of a lease on an apartment, a move to another residence for work, or even a change in employment that requires a reduction in time regime due to commuting.
[15] According to Section 61(3) of the Criminal Code, in the event of violation of the conditions of the sentence, house arrest may be made more severe by extending the duration of the sentence, imposing supervision, or imposing various suitable restrictions and obligations.

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criminal procedure without a trial.[16] The court decides "at the table" on the basis of the file submitted by the public prosecutor without taking evidence in the main hearing, which entails the risk of information deficit (Novák, 2021). The preparation of the report inevitably involves consultation with the offender and a visit to his or her place of residence. The report serves to objectify the offender's circumstances and to carefully assess the risk of recidivism. It also seeks the opinion of co-residents, if any. Simply explained, the preliminary inquiry serves the purpose of verifying whether house arrest is enforceable for the convicted person, and to assess whether it is a sufficient punishment in the particular case given the offender's risks to society. Nevertheless, in practice, it is not uncommon for judges to fail to request the report and to decide on a sentence of house arrest without detailed knowledge of the offender's circumstances (Rozum et al., 2020).

As for electronic monitoring, it is not a condition for imposing a sentence of house arrest but is one of two alternative control methods, which can be utilised simultaneously. In the Criminal Code, it is expressly stated that the supervision of the house arrest sentence is carried out by the Probation and Mediation Service by means of random checks or by means of electronic monitoring system that allows the offender's movements to be detected, or by means of a random check by a probation officer.[17] The method of carrying out the control is therefore provided for by law in an alternative way. Random checks, of course, consist of a personal visit by a probation officer to the offender's place of residence, with a minimum of three controls per month.[18] For this purpose, the offender is obliged to allow the probation officer access to the dwelling and, if necessary, to provide him or her with biometric data.[19]

Further details are set out in Decree of the Ministry of Justice No. 456/2009 Coll. on supervision of the execution of a sentence of house arrest, which specifies the subject of supervision and certain rights and obligations of the offender and the probation officer. It explicitly states that electronic monitoring does not exclude random checks by the probation officer,[20] which suggests that electronic monitoring is preferred. Against this background, it is surprising that the legislation does not address in any manner who decides on the use of electronic monitoring. The legislation only addresses the activities EM consist of, but there is zero reference in the criminal regulations of who decides on the use of electronic monitoring. Thus, in theory, it is at the discretion of the probation officer to decide which monitoring method to use. Understandably, there is also no legal provision for suspending, limiting or, on the contrary, imposing electronic monitoring during the execution of a sentence. This is a serious shortcoming of Czech legislation, which contradicts the first basic principle of European standards on electronic monitoring.[21]

[16] Section 314e(4) of the Criminal Procedure Code.
[17] Section 334b(1) of the Criminal Procedure Code.
[18] Instruction of the Probation and Mediation Service director No. 4/2010, which regulates the methodical procedure of officials and assistants of the Probation and Mediation Service of the Czech Republic in the area of securing documents for the possibility of imposing and enforcing control of the sentence of house arrest.
[19] Section 334b(1) of the Criminal Procedure Code.
[20] Section 8 of the Decree of the Ministry of Justice No. 456/2009 Coll. of 11th December 2009 on supervision of the execution of a sentence of house arrest, as amended by later regulations.
[21] Section III of the Recommendation CM/Rec (2014)4 of the Committee of Ministers to Member States on electronic monitoring, adopted by the Committee of Ministers on 19th February 2014, at the 1192nd meeting of the Ministers' Deputies. Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c64a7 (accessed 20/4/2024).

4. LEGAL REQUIREMENTS AND PRACTICE OF HOUSE ARREST AND ELECTRONIC MONITORING IN SWEEDEN, BELGIUM AND SLOVAKIA

American writer S. Wright once said: "It's a small world, but I wouldn't want to have to paint it." This quote implicitly contains an understanding that cultural meanings, experiences and growth are influenced by the political, legal, social, technological and geographical context of a specific country or region (Payne, 2014). In the field of criminal law, this idea can be well demonstrated with electronically monitored house arrest, which appears in different concepts and forms across continents. Accordingly, the conditions of imposition and the conditions of serving of house arrest can vary greatly, while distinctions being made between punitive, rehabilitative and managerial models (Paterson, 2015). Naturally, the extent to which house arrest is used in practice also varies. These differences can be demonstrated by the legislation and practice in Sweden, Belgium and Slovakia.

In Sweden, the front-end form of house arrest is not considered a separate type of punishment but rather a method of serving a prison sentence, which inherently involves EM. A significant feature of Sweden's criminal justice system is the prominent role of the Prison and Mediation Service. In accordance with the concept of active involvement of this service in the process of punishing offenders, the Prison and Mediation Service makes decisions regarding house arrest (Haverkamp, 2002). They can permit the serving of a prison sentence in house arrest for those sentenced to imprisonment for up to 6 months, and they are required to properly inform the convict of this possibility. Decisions can be made either based on a request from the convict or on the initiative of the Prison and Mediation Service. If the convict's request is denied, they can appeal to the court for a review of the decision made by the Prison and Probation Service (Wennerberg, 2012).

The conditions for imposing Swedish house arrest are regulated by Act No. 1994:451 Coll. of 25th May 1994, on Intensive Supervision by Means of Electronic Monitoring. House arrest cannot be imposed if the offender is in custody or another correctional facility, or if there are special reasons indicating that the sentence should not be served outside of prison. Additionally, house arrest cannot be imposed to a convict who has served a sentence outside of prison in the form of intensive supervision within the last 3 years.[22] House arrest also cannot be imposed if the convict has already started serving a prison sentence, is uncooperative during investigations, the nature of the crime does not allow it (e.g. the crime was committed against a cohabitant), there is a high risk of recidivism, or the convict is in an advanced stage of addiction to substances, which makes them incapable of serving house arrest (Wennerberg and Holmberg, 2007).

Since the decision is made by the Prison and Mediation Service, they themselves verify the feasibility of house arrest. The preliminary investigation is therefore mandatory. A positive decision is based on the suitability of house arrest considering the convict's living conditions, age and health, personal circumstances and criminal history. The convict should also be employed or engaged in other forms of activity ranging from at least 20 to 40 hours per week. If the convict is not employed, the Prison and Mediation Service can arrange paid employment for them. If employment is not feasible, the Prison and Mediation Service will arrange other activities for the convict, such as community service or participation in established probation programs. The convict must also agree

[22] Section 2(2) of the Act No. 1994:451 Coll. of 25th May 1994, on Intensive Care with Electronic Control, as amended with effect from the 1st June 2023.

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to the conditions of intensive electronic monitoring. Additionally, any cohabitant over 18 years old must agree to house arrest.[23]

Sweden is relatively consistent in imposing house arrest, and from 2013 to 2021, the proportion of those sentenced to imprisonment for up to 6 months who served their sentence at home ranged between 24 % - 28 %. However, what stands out in statistical yearbooks is the recidivism rate of those sentenced to house arrest, which was only 14 % in 2018 (The Prison and Mediation Service, 2023). In comparison, the recidivism rate for those sentenced to home arrest in the Czech Republic is around 46 % (Scheinost et al., 2015). Thus, Swedish house arrest, at least in terms of recidivism, achieves significantly better results.

In Belgium, the traditional front-end form of house arrest was introduced in 2014, when electronic monitoring as an autonomous sentence was incorporated into the system of criminal sanctions through an amendment to the criminal regulations (Decaigny, 2014). Prior to that, the criminal code included a "penitentiary" form of house arrest, which was not regulated in the criminal code but rather in the ministerial circular ET/SE-2 of 17th July 2013, concerning electronic monitoring as a means of serving a prison sentence. According to this circular, the prison director could grant convicts sentenced to imprisonment of up to 1 year to serve their sentence in house arrest, and for those sentenced to imprisonment of up to 3 years, the Directorate for the Management of Detention Facilities could impose this allowance (Beyens and Roosen, 2013).

EM is also mandatory in Belgium, although after a certain period EM may be waived (Beyens and Roosen, 2017). The conditions for imposing house arrest are regulated in Belgium in Act No. 1867060850 Coll. of 9th June 1867 the Criminal Code. According to section 37ter of the Criminal Code, if the offense is of such a nature that it is punishable by sentenced to imprisonment of up 1 year, the court may impose, as a principal punishment, house arrest with electronic monitoring of the same length as imprisonment that would otherwise impose, and which may be applied if the sentence with EM is not executed. This condition is supplemented by a negative list of criminal offences for which house arrest cannot be imposed, e.g., hostage-taking, rape, extortion, indecency and prostitution committed against minors. Regarding the length of the sentence, it must not be shorter than 1 month and longer than 1 year.[24]

If the court is considering imposing a sentence of house arrest or if the prosecution proposes it or if the defendant requests it, the defendant must be provided with information and proper explanation regarding the sentence. After receiving all the information, the defendant is heard for their comments. The second important point, in addition to the obligation to inform the defendant, is that participation in the hearing is mandatory unless the defendant is represented by an attorney. This procedure arises from the condition that the offender must consent to the sentence, which is sufficient to be given orally into the record.[25] Furthermore, before issuing a decision, the court requests a report from the service responsible for the organisation of EM. The report is not always mandatory, however, in Belgian practice, it is required to verify the enforceability of the sentence. While the law does not stipulate social investigation as a condition, it explicitly emphasises its appropriateness, and both the court and the

[23] The Prison Service's regulations and general advice No. 2011:6 Coll. of 16th March, on Intensive Monitoring with Electronic Monitoring, as amended with effect from 2nd September 2022.
[24] Section 37ter(2) of the Act No. 1867060850 Coll. of 9th June 1867 Criminal Code, as amended with effect from 18st April 2024.
[25] Section 37ter(4) of the Act No. 1867060850 Coll. of 9th June 1867 Criminal Code, as amended with effect from 18st April 2024.

preliminary investigation authorities advocate for its implementation. As part of the social investigation, every adult cohabitant with whom the defendant lives in a shared household, must be interviewed. A brief informational report must be attached to the file within 1 month of the application.[26] If the statements of cohabitants are absent in the report, the court is obliged to hear these individuals during the court proceedings. The consent of cohabitants is a condition for imposing house arrest if the sentence is to be served at other dwelling than the convict's permanent address.[27]

Until 2015, house arrest and EM played a rather marginal role in Belgium. Judges criticised the steps taken by legislators and highlighted the dangers of the net-widening effect. Political tendencies eventually led to greater use of house arrest, but not as an autonomous sentence. Instead, it was more often used as an alternative method of serving a prison sentence. For example, in 2021, a total of 4,374 convicts were serving their sentences under house arrest, but only 26 of them were sentenced to house arrest as an independent punishment.[28]

In Slovakia, house arrest was introduced in 2005, and like the Czech Republic, EM was not available at that time (Rajnič, 2009). The implementation of the EM system took place on 1st January 2016, but even after that, house arrest was not widely used in Slovakia. In Slovakia, electronic monitoring is regulated by a separate law, Act No. 78/2015 Coll. on the Monitoring of the Execution of Certain Decisions by Technical Means and on the Amendment and Supplementation of Certain Laws, which regulates the use of electronic monitoring at various stages of the criminal process.

The Slovak legislation has evolved over time to achieve a higher rate of imposition of house arrest. Perhaps the most significant change was brought by the amendment Act No. 214/2019, which allowed the application of house arrest even for offenders of more serious crimes.[29] It should be noted that this step made by the legislator was not supported by criminological research and was met with criticism from the professional public (Tóthová, 2019). According to Section 53, paragraph 1 of the Criminal Code, the court may impose house arrest for up to 4 years on the offender of a crime if, given the nature of the crime and the person and circumstances of the offender, such a punishment can be considered sufficient, provided that the conditions for the execution of electronic monitoring by technical means are met and the offender gives a written promise to stay at the residence at the designated address during the specified time and to provide the necessary cooperation during the monitoring. According to Section 53, paragraph 2 of the Criminal Code, the court may impose a sentence of house arrest in duration of sentence mentioned in Section 53, paragraph 1 of the Criminal Code, for a crime with an upper limit of the punishment not exceeding 10 years, but at least the lower limit of the sentence of imprisonment provided for by the Criminal Code.[30]

[26] Section 37ter(3) of the Act No. 1867060850 Coll. of 9th June 1867 Criminal Code, as amended with effect from 18st April 2024.
[27] Section 37ter(4) of the Act No. 1867060850 Coll. of 9th June 1867 Criminal Code, as amended with effect from 18st April 2024.
[28] Justice and Enforcement Agency. (n.d.) *Numbers*. The Government of Flanders. Available at: https://www.vlaanderen.be/agentschap-justitie-en-handhaving/cijfers (accessed on 20.06.2024).
[29] It should be mentioned that on 8th January 2024, an amendment to the criminal regulations was adopted in Slovakia by Act No. 40/2024 Coll. which significantly modified, among other things, the conditions for imposing house arrest. However, this amendment has been criticised by the opposition, Slovak President Zuzana Čaputová, and even institutions of the European Union, including Commissioner Didier Reynders. The Slovak Constitutional Court, based on proposals from the Slovak President and a group of deputies, has suspended the effectiveness of the amendment.
[30] Act No. 300/2005 Coll. Criminal Code, section 53, paragraph 1 as amended by later regulations.

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Another condition for imposing house arrest is that the conditions for monitoring by technical means must be met, which refers to the material and technical conditions for monitoring house arrest through EM. The use of EM is therefore mandatory, implying the requirement of a preliminary investigation. During the preliminary investigation, a probation officer verifies the feasibility of executing house arrest and, importantly, the opinion of a cohabitant. If a cohabitant with the convict in the same household refuses to give consent, the condition for EM would not be met.[31] The monitoring of the execution of house arrest is carried out by a probation officer, who in some cases can temporarily changes the regime of house arrest or imposes exceptions, but only for 48 hours. In monitoring the execution of house arrest, a probation officer is supported by an operational center for monitoring by technical means, which ensures continuous operation and the central monitoring system, maintaining constant supervision over the activities of the technical means used.[32] To simplify the decision-making process regarding changes to house arrest, electronic forms for various types of requests are available on the Ministry of Justice's website. These forms are accessible to authenticated users and are submitted through an electronic service on the Ministry of Justice's website.[33]

Despite long-term efforts by the Slovak legislators, which clearly aim at more frequent imposition of house arrest, it is still not widely used in Slovakia. Even though Slovakia has EM available, practice continues to adhere to principles of retributive justice. There seems to be a sense of fear among prosecutors and courts about imposing alternative sentences, particularly house arrest (Daniška and Strémy, 2022).

When looking and the legislation and practices in Sweden, Belgium and Slovakia, it is evident that house arrest is inseparably connected with EM. Overall, the legislation of these countries, compared to the Czech Republic, pay more attention to EM. Notably, the Slovak legislation aligns well with European standards. The "digitalisation" of the execution of sentences in Slovakia is also inspiring, as it can simplify the execution procedure for the relevant authorities and convicts. However, the mere availability of EM itself does not necessarily lead to a higher application rate, as evidenced by Slovak practice. Despite the implementation of electronic monitoring system in Slovakia, there has not been a statistically significant increase in the number of house arrest sentences.

Furthermore, making house arrest available to a wide range of offenders does not guarantee higher application rates, as illustrated by the comparison between Sweden and Slovakia. In Sweden, house arrest can replace only prison sentences of up to 6 months. House arrest is consistently imposed to nearly a quarter of those convicts of eligible crimes. This high application rate suggests a well-integrated system that prioritises alternative sentencing for less serious crimes. The Swedish model involves a thorough preliminary investigation, the consent of the offender, cohabitant and the availability of EM. In Slovakia, house arrest can be imposed even on offenders of serious crimes. Despite this, house arrest is rarely imposed. Like Sweden, the conditions for imposing house arrest in Slovakia include the requirement that it must be a sufficient

[31] Act No. 78/2015 Coll. Act on the Monitoring of the Execution of Certain Decisions by Technical Means and on the Amendment and Supplementation of Certain Laws, section 12 paragraph 2, letter b) as amended by later regulations.

[32]Act No. 78/2015 Coll. Act on the Monitoring of the Execution of Certain Decisions by Technical Means and on the Amendment and Supplementation of Certain Laws, section 17 paragraph 2 as amended by later regulations.

[33] Ministry of Justice of the Slovak Republic. (4th November 2015). *Probation, mediation and electronic monitoring.* Available at: https://esmo.gov.sk/web/esmo/domov/-/journal_content/56/10454/11192 (accessed on 20.06.2024).

punishment given the gravity of crime, the consent of the offender and cohabitant, a preliminary investigation and the availability of EM. The difference in application rates between Sweden and Slovakia likely stems from the fundamental approach to house arrest and the delegation of decision-making authority to non-judicial bodies. Belgian data also suggest that prison sentence can sometimes be more frequently replaced by house arrest because decisions can also be made by prison or similar services or other specialised bodies. This administrative approach does not burden the criminal justice system as much as purely judicial models.

5. QUALITATIVE RESEARCH FINDINGS

Research was conducted with the aim of gaining specific insights into the use of house arrest in practice and its impact on convicts. Six judges, six prosecutors were interviewed in semi-standardised interviews between the 1st January 2022 and 1st January 2023. The sample consisted of representatives based in courts in Prague and Beroun, two cities in Central Bohemia. For the purposes of this paper, the findings from the interviews are summarised here, with an emphasis on the research questions outlined in the introduction of the paper. To achieve these specified objectives, respondents from among judges and prosecutors were asked about their views on the punishment of house arrest and electronic monitoring, and their opinion why house arrest sentence is being imposed so rarely in the Czech Republic. The respondents were also asked to identify the most common barriers to its imposition.

In terms of the statistical data, it was almost surprising that all respondents agreed that the main and most significant reason for not imposing house arrest was the lack of an established electronic monitoring system. Indeed, judges and prosecutors considered electronic monitoring a necessary condition for imposing this sentence, but not necessarily for the same reasons. Perceptions of the importance of electronic monitoring varied among criminal justice practitioners.

The most frequent comment was that, without electronic monitoring, probation and mediation officials can legitimately speak of "good luck" if they can detect violations of the sentence terms during a random check, which generally takes place once a week or less. Control facilitating factors and the economic aspect were also mentioned as benefits of the electronic monitoring presence. Respondents were unanimous in stating that the absence of electronic monitoring leads to an overburdening of probation officers, who, due to insufficient capacity of the Probation and Mediation Service, carry out random checks in overtime, for which they are justifiably granted high surcharges, thus considerably increasing the supervision costs. Judges and prosecutors are generally of the opinion that the control mechanism at present is ineffective.

An interesting finding that is worth noting was that some judges and prosecutors believed that the execution of house arrest without EM fails to fulfil the punitive and preventive function of the punishment. It was argued that without the anklet, the offender is not exposed to sufficient psychological invasion during the punishment, which shall deter him or her from committing future crimes. In other words, without electronic monitoring, house arrest is not punitive enough for some judges and does not fulfil the deterrent or prevent function of punishment.

None of the interviewees could imagine imposing a sentence of house arrest without electronic monitoring, apart from exceptional cases in which the offender does not deserve imprisonment, but for various reasons and obstacles on his/her side, no other alternative punishment can be imposed. Here, the judges referred particularly to insufficient financial circumstances to impose a financial penalty or to health incapacity

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that prevents the imposition of a community service sentence. It should be noted that some of the respondents had no experience of imposing house arrest, however, those who had opted for it in their careers spoke of how house arrest as an alternative to other alternative punishment, not imprisonment. In other words, in these cases, they did not consider imposing a custodial sentence in the first place. This phenomenon is sometimes pejoratively referred to in the literature as judicial net-widening

According to the research, there are more factors that negatively affect the imposition of house arrest sentences. In addition to the absence of electronic control, there are various deficiencies in the conditions on the part of the accused, such as full absence of employment, irregular work schedules, absence or instability of housing, or other deficiencies in the place of residence. In addition, judges are discouraged from imposing the sentence when the offender is frequently sent on business trips by his or her employer.

One of the prosecutors highlighted a case in which he had actually considered proposing a sentence of house arrest, and even requested a preliminary investigation from the Probation and Mediation Service, but the offender was prescribed a certain type of work shoes, the wearing of which was incompatible with the tracking anklet, and therefore house arrest could not be imposed. This offender was eventually to be sentenced to community service.

The judges surveyed also pointed out that the parties to the criminal proceedings – whether the prosecutor, the accused or his/her defence counsel – do not generally propose the imposition of house arrest, nor do they take the necessary measures to impose the sentence in question, e.g., prosecutors do not order preliminary inquiries and the accused do not seek to create suitable housing conditions or employment. This was particularly associated with convicted persons who are not represented by counsel in the proceedings.

Concerning the shortcomings on the part of the offenders, both judges and prosecutors pointed out that the Czech legislation is non-conceptual, as it allows for the imposition of house arrest only for misdemeanours. According to respondents, it is in this category that offenders from socially vulnerable groups are most often found, and such deficiencies are to be expected. The majority of the interviewed preferred the possibility of imposing house arrest also for more serious crimes, preferably with a positive listing of offences particularly of property and economic nature, or with a negative listing. It was often mentioned that for some offenders of more serious economic crime, house arrest accompanied by a substantial fine and an obligatory compensation measure would be more appropriate than imprisonment.

A significant finding was that judges and prosecutors find the punishment of house arrest more application-intensive compared to other alternative sanctions because it requires preliminary investigation and extensive proof of the offender's circumstances. This discourages judges, who are monitored and evaluated on, among other things, the number and speed of completed cases, from even considering imposing this sentence. The openness shown by the judges in discussing the issue of the judicial agenda control and the systemic preference for swiftness at the expense of the quality of criminal case processing demonstrates that the judges themselves consider this situation highly undesirable. Partly for these reasons, judges would rather simplify the imposition process as much as possible and delegate some responsibility for the enforcement process to probation officers.

It was also pointed out that the introduction of house arrest sentence and the introduction of electronic monitoring was not accompanied by sufficient education and training to provide a clear understanding of the effects of house arrest and electronic

surveillance, as when and for whom the punishment is appropriate, and therefore judges and prosecutors prefer to impose a different penalty for fear of misconduct. In addition, the training was only voluntary, inadequately focused and did not address practical issues that criminal justice agencies may commonly encounter.

It is clear from the aforesaid that the negative factors are interrelated and mutually influencing. The findings from the interviews with the respondents can then be summarised as showing that the application of the sentence of house arrest is mainly negatively influenced by:

i. **The absence of a functional electronic monitoring system**, which discourages judges and prosecutors from imposing house arrest sentence for two fundamental reasons: first, they do not believe that without EM probation officers will detect violations of the execution conditions, and second, they consider EM to be an essential element of house arrest that affects punitiveness.
ii. **Barriers on the part of the offender**, such as the absence of a permanent residence or employment, irregular working hours or frequent requirements to conduct work outside an approved location, but paradoxically it might also be a particular type of employment not compatible with wearing an electronic monitoring device.
iii. **The condition of committing misdemeanour**, which in practice excludes a significant number of offenders for whom the sentence of house arrest could be an appropriate punishment, given the specific nature and seriousness of their offence and the risks posed to society.
iv. **Greater application complexity and the system of judicial agenda supervision**, which forces judges to close cases at the expense of decision quality, which, in conjunction with increased requirements for proving the offender's circumstances, discourages judges from imposing house arrest.
v. **The absence of proposal from offenders**, who rarely seek to be sentenced to house arrest and thus do not act to meet the material and formal conditions of the sentence.
vi. **The absence of a proposal by prosecutors**, who do not propose the imposition of house arrest for the same reasons as judges, which is also negatively reflected in the amount of information about the offender's circumstances obtained during the pre-trial proceedings.
vii. **Lack of education within the judiciary**, which leaves judges and prosecutors unclear about EM opportunities and therefore reluctant to impose the sentence, respectively for prosecutors to propose house arrest or to enter a plea bargain with the offender.

It should be noted that the argument of the absence of EM, the requirement of swiftness of proceedings, as well as the objection of the lack of offenders suitable for house arrest, appear regularly in Czech criminological studies (Diblíková et al., 2017; Scheinost et al., 2015; Scheinost et al., 2020). In these publications, however, the absence of EM is primarily linked to control facilitating factors, but not directly to the punitiveness and "tightness"[34] of house arrest regime. The objection of judges and prosecutors regarding the inadequacy of the sanction continuum, which stems from the condition of the misdemeanour and is related to the lack of suitable offenders, appears to be crucial.

[34] According to Hucklesby, Beyens and Boone (2021), the tightness of house arrest sentence consists of four dimensions - length, breadth, depth, weight - which represent the overall level of psychological invasion of the sentence on the convict.

The demand for increased offender participation in the decision-making and sentencing process, the demand for simplification of the process of imposing and enforcing house arrest, and the demand for transferring some of the responsibility to probation officers are then a natural consequence of prioritising the speed of proceedings.

6. CONCLUSION AND RECOMMENDATION

We can best understand what we are currently experiencing in the mirror of history. The idea of punishing the offender by imprisoning him at home is not new; it has materialised under different motives in different historical stages of punishment. However, it is only in relatively recent times that house arrest has become an integral part of sanction systems, due to EM. The latter permeates virtually all components that occur within the typology of punishment and co-creates the content of punishment in the form of various restrictions and obligations, not to mention facilitating control factors. Judges and prosecutors are understandably aware of this, more precisely, they perceive EM as an integral part of house arrest that co-shapes the substance of the sentence, although they do not always have a clear idea of when and how to use EM in conjunction with house arrest. This is evidenced by the fact that they often prefer to impose house arrest on those who commit more serious offences, for which they have virtually only two options in terms of the main sanction - imprisonment or a suspended sentence.

This explains the general reluctance of judges and prosecutors to even consider imposing a house arrest sentence. For judges and prosecutors, without electronic monitoring it is as if the sentence of house arrest is incomplete. This is compounded by the higher application costs of house arrest without EM, by the practical consequences of the operation of the judicial supervision system, which favours speed over the quality of decisions, and by the misdemeanour offense condition, which excludes a significant number of offenders potentially eligible for house arrest sentences. It is also necessary to consider the fact that that even the offenders themselves do not ask for house arrest. It is therefore not surprising that in practice house arrest in the Czech Republic plays the role of some sort of supplementary punishment, to which some judges resort when they cannot impose any other alternative sanction. The reasons for not imposing house arrest and associated negative influencing factors are apparently complex and appear on the side of the sanction policy makers, the legislators, the judicial authorities and, last but not least, on the side of the convicted persons.

If we were to identify the root of the problems with the application of house arrest, however, it is its premature introduction without EM. The lengthy tenders for EM system supplier, combined with the unfortunate fate of the pioneer system, have contributed to the aura of scepticism and mistrust that now surrounds house arrest within the justice system. It is now becoming clear how unfortunate it was that house arrest was introduced without the necessary vision and planning, and without adequate planning, training of the judicial authorities and, above all, integration of EM programme. As a result, one cannot help but feel that the ambitions of the sanction policy makers were exaggerated and that the possibility of achieving the objectives set was essentially unrealistic. The new EM system includes 700 anklets, a number that may seem sufficient, given the current practice, but it should be understood that the anklets are not only used to control house arrest, but also to control accused persons when substituting custody, to control persons sentenced to suspended sentences, and to control persons on parole. In practice, the equipment purchased is distributed among all the institutions involved in electronic monitoring, which suggests that the original ambition has been quietly abandoned.

Nevertheless, it is undoubtedly essential to relaunch EM system as soon as possible, whatever its capacity. This is not to say that EM should always be used in conjunction with house arrest. On the contrary, sometimes it may not be effective at all. It is certainly not the case that it can be the sole deterrent to crime. Technology alone is not a safeguard against criminals, and this must be understood by society, but especially by the judges and prosecutors who sometimes have exaggerated expectations of electronic monitoring, are unaware of possibilities. Therefore, it is suggested that the reintroduction is accompanied by sufficient education and training within the judiciary. Consider the Californian case of Phillip Garrido, who kidnapped a young girl and held her captive for almost 18 years. During part of that time, he was under EM. Yet he was not found to be keeping the kidnapped girl and the two young children he fathered with her in tents in his backyard. After all, the anklet reported that he was exactly where he ought to be – his house and the surrounding neighbourhood. The probation officers did not carry out many random checks, and when they did, they did so inadequately, so that his crime was not detected in time. This example shows that electronic monitoring is only as effective as the agency utilising it. It is therefore appropriate to consider electronic monitoring primarily as a tool that can, in appropriate cases, complement other sanctioning measures and, in combination with house arrest particularly, replace imprisonment.

It is difficult to estimate what the current ambitions of sanctions policy makers are in this regard. It is probably not just the economic savings, because in the prison system of the Czech Republic – where the average annual prison occupancy rate has long been oscillating around 18 000 prisoners – 100, 200 or 500 house arrest sentences imposed per year cannot lead to significant economic savings, since a substantial part of the costs of the prison service is fixed and the only direct savings are the costs of food, laundry and other everyday items. It is not suggested that the main motive for the higher rate of house arrest should be the desire to save money at all costs. However, it cannot be overlooked that sentencing has also undergone a process of economisation and has become a high-quality product, with quality obviously linked to cost-effectiveness. This is one of the reasons why, in the coming years, the legislator should focus more on how to prevent the net-widening effect. If the offender "gets more" than he would have without house arrest, this will ultimately be more expensive for the state, because the cost of house arrest, while certainly lower than the cost of imprisonment, is higher than the cost of suspended sentences or ordinary probation.

Given the available data, it cannot be expected that the reintroduction of EM itself will lead to a higher rate of house arrest application. In this respect, electronic monitoring will not be self-sufficient. It is therefore important that house arrest returns to the policy agenda and becomes the subject of policy-relevant research which focuses not only on, for example, offender recidivism - even the common criminological tendency to evaluate a particular type of punitive intervention by recidivism rates is not flawless - but also on the net-widening effect, the broader psychosocial effects of house arrest, and the potential of EM to cognitively transform offenders. Any changes in legislation or practice should then be informed by experience- and evidence-based policy. The opposite approach would mean complacency when decisions are made on the basis of political whim. It is true that the relationship between research, sanction policy and practice is one of tension, uncertainty and exploitation rather than one based on mutual understanding, but ultimately an evidence-based approach is positive and desirable.

At this point, the following suggestions are offered to stimulate further discussion and are worthy of consideration:

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- **Extending the spectrum of sanctions** by allowing the imposition of house arrest on offenders of more severe crimes, particularly those of property and economic nature, e.g. by an enumerated list of such crimes, or by abolishing the condition of committing a misdemeanour and replacing it with a condition of the level of the penalty established by law in the special part of the Criminal Code (e.g. a maximum of 8 years), supplemented by a negative list of offences for which house arrest cannot be imposed.
- **Revision of the judicial reporting system**, ensuring judges do not make decisions on guilt and penalty under pressure based on the requirement to conclude a case as promptly as possible at the expense of the quality of the decision.
- **Preparation and implementation of a strategy to introduce general reports by probation officers** in pre-trial proceedings, which, in addition to assessing the risks of recidivism, would also include an assessment of the conditions and suitability of alternative sanctions in general rather than just in relation to one type of alternative sanction.
- **Simplification of the process of imposing and executing house arrest** by requiring the judge to specify only the number of hours of house arrest per week/month in the sentence. The setting of the specific time regime would already be a matter for the probation officer, who would calibrate EM in consultation with the convicted person, and which could be changed for important reasons during the course of the sentence.
- **The introduction of the obligation to instruct the police authority and the prosecutor in the preparatory proceedings**, especially in cases where there is no necessary defence, in order to allow offenders to "apply" for house arrest sentence, and to give them time to remedy the deficiencies in their circumstances before sentencing (offenders can get a job, secure permanent housing)
- **Mitigating the unequal nature of house arrest** by creating special accommodation and employment (not only) for "applicants" for house arrest.

The above proposals could contribute to a higher rate of imposition of house arrest, but as mentioned earlier, the aim here is not to achieve the imposition of house arrest at all costs and in as many cases as possible, but to achieve that it is imposed more often, but above all that it is imposed in appropriate cases. Alternative sentencing is often put in the context of restorative justice; after all, both schools have the same ideological basis, and so sentencing in recent years has increasingly emphasised costs and "customers". However, restorative justice and alternative punishment are not the same. Certainly, the aims of restorative justice are more easily achieved when the offender is at liberty, but the essence of alternative sentencing is the pursuit of justice and the assumption that the personal individual culpability that manifests itself in criminal activity can best be addressed through a variety of sentencing options tailored to the specific circumstances of the case. House arrest with electronic monitoring is one such option.

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ADMINISTRATIVE CONTRACT IN ADMINISTRATIVE MATTERS: SLOVENIAN LAW IN COMPARATIVE PERSPECTIVE / Katja Štemberger Brizani

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Abstract: *Administrative contracts are also known in Slovenian law, where they are mainly used as an instrument to regulate in more detail the (previously issued) administrative act, and generally cannot replace the issuance of an administrative act. Namely, the General Administrative Procedure Act only provides for settlement between parties with opposing (private law) interests. However, the elements of administrative contracts as an ADR mechanism can be found in other (sectoral) legislation, but are often very deficiently regulated, leading to the application of private law rules that govern contractual relations and which are not adapted to administrative law relations. Given all the advantages of alternative dispute resolution and shortcomings of the current legal framework, Slovenian law should also – while respecting all the specific features of administrative decision-making and following the example of selected comparative-law regimes – systematically regulate subordinate administrative contracts (replacing administrative acts), at least for some administrative matters. They should be limited only to those areas of administrative functioning where the administration has a certain margin of discretion in determining the content of the decision on the administrative matter. This means, on the other hand, that the possibility of a subordinate administrative contract should normally be excluded in the case of legally binding decision-making since the content of such a decision is predetermined and the administrative authority is bound by it (principle of legality). However, the administrative authority must have a specific power to conclude such a contract in a (sectoral) law – a general power to conclude subordinate administrative contracts is not sufficient due to the risk of infringing the principle of equality and legality.*

Key words: *ADR; Administrative Law; Administrative Contracts; Slovenian Law; Principle of Legality; Public Interest*

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1. INTRODUCTION

Traditionally, administrative relations have been governed by (unilateral) acts of administrative authorities in which the individual, as the addressee of such an act, has had no opportunity to participate. However, with the (still ongoing) process of

modernisation of the public administration, the focus of its functioning is increasingly shifting towards the consensual regulation of administrative law (Kovač, 2017, pp. 80–81), the so-called alternative administrative dispute resolution (ADS) in administrative matters, also through mechanisms (more) typical for the civil (especially commercial) law sphere – by contract. In the second half of the twentieth century, a special type of contract, the so-called public law contract, developed in comparative law regimes, particularly in German law,[1] by which an administrative authority may establish, modify, or terminate a legal relationship in the field of administrative law, and which may even replace the issuance of an administrative act (§ 54 of the VwVfG). This type of contract was later adopted by many other comparative law systems, following the example of German law (Athanasiadou, 2017, pp. 7–10). In Slovenian law, on the other hand, there are (still) many reservations about the introduction of this form of ADS in administrative matters, even though the administrative contract is theoretically already a (widely) accepted institution,[2] but it is not (generally) used as a substitute for authority regulation of administrative-law relations. These reservations are related to the specific characteristics of the administrative decision-making process, in which the administrative authority decides on the rights, obligations, or legal interests of the parties by the applicable rules while ensuring that the interests of the parties are not contrary to the public interest, all of which reduces the possibility of (free) negotiation (Kovač, 2016, p. 80). Other restrictions on the consensual resolution of administrative matters include the obligation of the administrative authority to establish the true facts of the matter, and the duty of equal treatment of the parties to the administrative procedure (Jerovšek, 2000, p. 172), which could be infringed if the administrative authority and the parties were free to settle the administrative matter by contract. It is therefore limited by constitutional and statutory principles, in particular by the principle of separation of powers (Article 3(2) of the Constitution of the Republic of Slovenia ("**RS**"), *Ustava Republike Slovenije*, hereinafter: **Constitution**[3]), the principle of legality (Article 120(2) of the Constitution and Article 6 of the General Administrative Procedure Act, *Zakon o splošnem upravnem postopku*, hereinafter: **GAPA**[4]), the principle of equality (Article 14(2) of the Constitution), the principle of substantive truth (Article 8 of the GAPA) and the principle of free assessment of evidence (Article 10 of the GAPA). Therefore, contractual regulation of administrative relations cannot be left (entirely) to the discretion of the administrative authority but must be defined and limited by law (Balthasar, 2018, p. 14).

The paper will present the possibilities of contractual regulation of administrative matters in Slovenian law, together with the deficiencies of the legal framework, and will also make some *de lege ferenda* proposals, supported by selected comparative law solutions. It aims to confirm or disprove the following hypothesis: The ADS of administrative matters in the form of an administrative contract should be limited to those areas of administrative functioning where the administrative authority has a certain margin of discretion.

To achieve this aim, established legal science methods were used, in particular dogmatic, comparative, axiological, and sociological methods. Dogmatic and axiological

[1] Public-law contracts were introduced into German legal system in 1976 when the General Administrative Procedure Act (Verwaltungsverfahrensgesetz, hereinafter: **VwVfG**) of 25 May 1978, in the version published on 23 January 2003 (BGBl. I, p. 102), as amended, was accepted. See also Hüther, Blänsdorf and Lepej (2022a, p. 304).

[2] See, for example, judgements of the Supreme Court of the RS, No. III Ips 37/2020-3 of 19 January 2021 and No. III Ips 80/2018 of 12 February 2019.

[3] Official Gazette of the RS, No. 33/91-I as amended.

[4] Official Gazette of the RS, No. 24/06 as amended.

methods were used to explore and identify the legal problems of the current legal framework and to formulate possible solutions, also using the comparative law method, both in terms of theoretical and legal framework. The paper examines foreign legal orders where the administrative contract as a mechanism for resolving administrative matters is already (widely) established (German, Czech, and Estonian law), but also French law, which is the basis for the theoretical construct of administrative contracts in Slovenian law. The research is closely linked to the question of the effectiveness of the current legal framework, and therefore the sociological method was also used, as it is the basis for distinguishing between norms and their implementation in (judicial) practice. The synthesis of the arguments allowed us to formulate the conclusions, confirm, or disprove the hypothesis, and possibly offer improvements for *de lege ferenda* regulation.

The paper uses the single term "administrative contract" for contracts (of a public law nature), replacing administrative acts irrespective of their designation in comparative law (where they may also be referred to as "public law contract", "contract under public law", or "public contract").

2. COMPARATIVE-LAW REVIEW

2.1 German Law

Administrative contracts (under the term "public law contracts") are governed by the VwVfG and supplemented by its other provisions (on administrative acts), sectoral laws, and provisions of the Civil Code. The latter provisions apply only if they are compatible with the public law nature of the administrative contract (Athanasiadou, 2017, p. 75). German law divides administrative contracts into subordinate and coordinate contracts. The former usually replace the issuance of an administrative act, while the latter are concluded in the relationship between the entities with equal position, in cases where the law does not provide for the issuance of an administrative act (e.g., between several administrative authorities) (Spannowsky, 1994, p. 203; Gurlit, 2000, p. 30). In the absence of any contrary legal provision, the administrative authority decides whether to resolve the administrative matter by an administrative act or by concluding a contract. Subordinate administrative contracts are usually concluded in the field of construction and environmental law (e.g., expropriation contract, urban planning contract) (Schulze-Fielitz, 2012) and in the field of public funding (Unger, 2016). Subordinate administrative contracts are further subdivided into settlement contracts (§ 55 of the VwVfG) and exchange contracts (§ 56 of the VwVfG). A settlement contract is concluded to eliminate factual and/or legal uncertainties in an administrative matter by mutual yielding (compromise) of the contracting parties, if the administrative authority, within the scope of the discretion conferred, decides that the conclusion of such a settlement is an appropriate way of eliminating the existing uncertainties (Faber, 1989, pp. 271–272). In an exchange contract, the administrative authority and the party agree on the performance of the agreed mutual obligation (Pudelka, 2017, p. 214).

Therefore, the administrative authority has a general power under the VwVfG to conclude a subordinate administrative contract insofar as no prohibition on the conclusion of such contracts is expressly or impliedly provided for in other legal provisions (Pudelka, 2017, p. 213). Such prohibitions are particularly common in tax and social law (Macedo Weiß, 1999, pp. 116–120). On the other hand, in certain administrative fields, the administrative authority must always act by a contract and, therefore, has no discretion in choosing between an administrative act or a contract, for example, when public services are provided by a private operator or when regulating relations between

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several administrative authorities. The scope of use of an administrative contract is therefore broader than that of an administrative act. Within these limits, the administrative authority has the discretion to decide which form of administrative action is more in the public interest in a particular case (administrative act or administrative contract). However, such a decision is not legally unbound since the administrative authority must comply with the formal and substantive rules laid down by the VwVfG and derived from the Civil code (Macedo Weiß, 1999, pp. 112 et seq).

If the legal requirements have not been complied with when concluding a subordinate administrative contract, such a contract is usually null and void, while an administrative act may be illegal (and still valid) or null and void. However, if the violation of the law does not fall under any of the cases referred to in § 59 VwVfG, the administrative contract is still illegal, but nevertheless valid, and cannot be challenged before a court. In other words, the contract is still binding and must be complied with (*pacta sunt servanda*) (Hüther, Blänsdorf and Lepej, 2022b, p. 553).

2.2 Czech Law

Code of Administrative Procedure (hereinafter: **CAP**[5]) defines administrative contracts ("public contracts") similarly to VwVfG. It is a bilateral or multilateral act that establishes, alters, or cancels rights and obligations in the sphere of public law and shall always be assessed according to its content (§ 159(1,4) of the CAP). Czech law distinguishes between three types of administrative contracts: coordinate contracts (§ 160 of the CAP), subordinate contracts (§ 161 of the CAP), and contracts between participants (§ 162 of the CAP). Coordinate contracts are concluded between several public law entities to perform their (public) tasks, while subordinate contracts have the same function as in German law: they replace an administrative act (Ondruš, 2005. p. 459 et seq). However, they can be concluded only between an administrative authority and a party to the administrative procedure, if a special act provides so (§ 161(1) of the CAP). This distinguishes Czech law from German law, where the status of the contracting parties is not relevant, and the administrative authority has a general power to conclude a subordinate contract. Subordinate administrative contracts can also be concluded after the administrative procedure has already been initiated – in such a case, the administrative authority, by a procedural decision, shall stay the administrative procedure (§ 161(2) of the CAP). Typical examples of such contracts are planning contracts (Hegenbart, Sakař et al, 2008, p. 189), and contracts replacing the building permit (§ 116 of the Building Act[6]). Contracts between participants are concluded between parties to an administrative procedure (or those who would be parties of such a procedure if it was held) concerning the transfer or the manner of exercise of their rights or obligations, meaning that it is an administrative contract in the broad sense (Hendrych et al, 2009. p. 253) since it does not concern the regulation of relations between an administrative authority and a private-law entity. However, it must be approved by the administrative authority that decides on an administrative matter. The CPA states that an administrative contract must not be contrary to legal regulations, must not bypass legal regulations, and must be consistent with the public interest (§ 159(2) of the CAP). If an administrative contract is contrary to legal regulations, it shall be revoked by the competent administrative authority (i.e., the administrative authority superior to the administrative authority that is a party to the administrative contract), either *ex officio* or on motion of a

[5] Act No. 500/2004 Coll. Act of 24 June 2004, Code of Administrative Procedure as amended (*Zákon správní řád*).
[6] Building Act No. 183/2006 Coll with further amendments (*Stavební zákon*).

party to the administrative contract, other than the administrative authority (§ 165(2) and § 167 of the CAP). For matters not regulated by the CPA and by sectoral laws, the rules of the law of obligations shall apply in so far as the nature and purpose of public-law contracts do not preclude it, apart from those provisions which are specifically excluded in the § 170 of the CPA.

2.3 Estonian Law

An administrative contract ("contract under public law") is an agreement that regulates administrative law relationships, whereby at least one of the parties to the contract must be a public law entity (§ 95 and § 96(1) of the Administrative Procedure Act, hereinafter: **APA**[7]). Administrative contracts can be divided into coordinate administrative contracts, concluded between public administrative bodies in a horizontal legal relationship, and subordinate administrative contracts, concluded between a representative of a public authority and a natural or private legal person (Aedmaa et al, 2004, pp. 434–436). The APA further distinguishes between administrative contracts governing an individual case (§ 98 of the APA) and administrative contracts for an unlimited number of cases (§ 97 of the APA). Only the former can replace the issuance of an administrative act unless a law or other regulation requires only the issue of an administrative act (Aedmaa et al, 2004, pp. 436–437). To administrative contracts that may replace the issuance of an administrative act, the provisions of the APA on administrative acts apply, insofar as this does not conflict with the legal nature of the administrative contract (§ 99(1) of the APA).

The procedure to conclude an administrative contract is an administrative procedure (§ 2(1) of the APA). It starts with the submission of a proposal for the conclusion of a contract (§ 35(3) of the APA), and ends with the conclusion of the contract, the agreement or decision of one of the parties not to conclude the contract, or the death or dissolution of a party to the administrative contract (§ 43(3) of the APA). The APA distinguishes between null and void and unlawful administrative contracts. However, an unlawful contract is still valid and shall be performed (as in German law) except in the cases provided for by law (§ 103 and § 104 of the APA). For matters not covered by the APA, the civil law rules contract conclusion shall apply, taking into account the specifications established by the APA (§ 105 of the APA).

2.4 French Law

In France, the scope of administrative acts and administrative contracts is more strictly limited, as they are not interchangeable forms of administrative functioning, but an administrative contract usually complements a previously issued administrative act, i.e., the administrative act selecting the future contractual partner. Furthermore, in the field of regulatory administration, a public entity may not use an administrative contract unless expressly provided for by law (Richer, 2012). The traditional field of use of the administrative contract is public procurement and concessions, as well as cooperation with other administrative authorities (contract, concluded between several public law entities), while in granting subsidies or social assistance, both forms, i.e. the administrative act and the administrative contract, are used. However, the public entity does not normally have discretion in choosing the form of action, but it is predetermined by law (Noguellou and Stelkens, 2010, pp. 675–676).

[7] Riigi Teataja, RT I 2001, 58, 354 of 6 June 2001 as amended (*Haldusmenetluse seadus*).

An administrative contract is classified according to two criteria: formal and substantive, which must be cumulative. The first relates to the subject of the legal relationship, i.e., the contracting parties (the "parties' criterion"), and the second relates to the object (the "object criterion") and/or the content (the "excessive clauses criterion") of the legal relationship. In addition, the legislator has expressly regulated the legal nature of certain contracts. French law therefore distinguishes between administrative contracts under the law itself (*les contrats administratifs par détermination de la loi*) and administrative contracts under the case law (*les critères jurisprudentiels*) of the Council of State (*Conseil d'État*). In some cases, these two categories also overlap (Waline, 2016, pp. 478–479).

3. ADMINISTRATIVE CONTRACTS IN SLOVENIAN LAW

3.1 Theoretical Framework

Slovenian law does not regulate administrative contracts as special nominative contracts, but they are accepted in theory and case law (Štemberger, 2021, p. 249).[8] These are contracts where at least one of the contracting parties is (as a rule) a public law body ("the parties' criterion") and are concluded in the public interest which prevails over other contractual interests ("the aim criterion"), or (alternatively) contain provisions that constitute supremacy of the public law person, and which would not normally be accepted by the other contracting party in a private law contract ("the content or special provisions criterion") (Pirnat, 2000, p. 151).[9] Slovenian law has followed French law (Štemberger, 2021, p. 249) in relation to the criteria for identifying administrative contracts. An administrative contract is defined both by the parties to the contract (formal criterion) and by the subject matter of the contract (material criterion), whereas in German law the status of the contracting parties is not relevant for the identification of a contract as an administrative contract (Maurer, 2011). The most typical administrative contracts are concession contracts (Štemberger, 2023b, p. 242),[10] public financing contracts[11] and public authority delegation contracts (cf. Kovač, 2016, p. 83). They are normally concluded after the administrative (tendering) procedure has been completed and the administrative act selecting the future co-contractor has been issued. Therefore, they are based on a previously issued administrative act and cannot be classified as ADS mechanisms in administrative matters in the strict sense (Kovač, 2016, p. 87). However, using the established criteria for identifying administrative contracts, it is possible to find (in sectoral laws) also (administrative) contracts that replace authority (administrative) acts, although they are not defined as such in the legislation. This means that Slovenian law contains features of both French and German law.

Because administrative contracts are not specially regulated in the Slovenian legal system (apart in certain sectoral laws which apply as *lex specialis*), they are subject to the general rules of the law of obligations "insofar as its public law elements do not exclude it", meaning that these rules apply *mutatis mutandis*.[12] In other words, the rules of the law of obligations apply only to the extent that they do not conflict with the specific nature of the (particular) administrative contract (it is an *in concreto* assessment),

[8] Decision of the Higher Court in Ljubljana, No. I Cpg 51/2018 of 17 May 2018.
[9] See also, the following judgements of the Supreme Court of the RS: No. III Ips 31/2012 of 15 October 2013; No. III Ips 80/2018 of 12 February 2019, and No. II Ips 21/2018 of 14 February 2019.
[10] Judgement of the Supreme Court of the RS, No. III Ips 64/2014 of 28. October 2015.
[11] For example, judgement of the Higher Court in Ljubljana, No. II Cp 1731/2020 of 25 February 2021.
[12] Judgement of the Supreme Court of the RS, No. III Ips 37/2020-3 of 19 January 2021.

whereas, in the case of private law contracts (of administration), they apply by analogy ("in full "), i.e. in the form laid down by law (without any adjustments), and subsidiarily (to the extent not otherwise regulated by specific laws, e.g. public procurement rules). The legal nature of the contract concluded by the administration (administrative contract or private law contract) therefore determines how the rules of the law of obligations shall apply.

This also means that disputes relating to the performance of such contracts are usually decided by courts of general jurisdiction, rather than administrative courts (as is typical in comparative law) (Pirnat, 2000).[13]

3.2 Administrative Contract as an Alternative to an Administrative Act – Legislative Overview

Replacing administrative acts with a contract is generally not permissible in the Slovenian administrative procedure. Namely, the GAPA only provides for settlement between parties with opposing interests, i.e., where several parties are involved in the procedure (Art. 137(1) of the GAPA), but not between the administrative authority that decides on an administrative matter and a party to the administrative procedure. Although a settlement between parties with opposing interests replaces (in whole or in part) an administrative act that would otherwise have been issued by an administrative authority on the parties' claims, it is accepted in theory that such a settlement is normally of a private-law nature (i.e. a private law contract) and consequently cannot be equated with a concrete administrative act (Kerševan and Androjna, 2017, p. 241). However, according to the position taken in this article, such a settlement can also have a public law nature, typical for an administrative contract, if one of the parties (with opposing interests) is a public-law entity representing the public interest. For example, according to the Spatial Management Act (*Zakon o urejanju prostora*, hereinafter: **SMA**[14]) the expropriating beneficiary (the state or municipality) and the expropriated person (the owner of the property subject to expropriation) may agree on damages or other compensation for the expropriated property after the expropriation decision has become final (Art. 217(1) of the SMA). The agreement shall be made on the record before the administrative authority in charge of the expropriation (the administrative unit according to the location of the property) and shall be included in the decision, which may be challenged on the grounds on which a settlement under the GAPA may be challenged (Art. 217(4) of the SMA), meaning that it is a special form of settlement between parties with opposing interests. However, in concluding this agreement, the expropriating beneficiary is not acting as a representative of a private interest, but as a representative of the public interest, since expropriation is permissible only if it is in the public interest (Art. 202(2) of the SMA). It is therefore an administrative contract, as it meets the parties' criterion and the aim criterion.

An expropriation contract also corresponds to an administrative contract in terms of its characteristics (Pirnat, 2000, pp. 152–153).[15] It may be concluded instead of an expropriation, i.e., instead of an expropriation decision, which is an administrative act. The SMA provides that the submission of an offer to purchase the property is a procedural prerequisite for the initiation of an expropriation procedure (Art. 207 of the

[13] For judicial protection in relation to concession contracts, see Štemberger (2023a, pp. 347–350).
[14] Official Gazette of the RS, No. 199/21 as amended.
[15] According to case law, it is a contract of a "compulsory " nature. See judgement of the Higer Court of Ljubljana, No. I Cp 1609/2018 of 30 January 2019.

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SMA). The expropriation procedure may be initiated only if an expropriation contract has not been concluded within 30 days after the expropriation offer has been served (Art. 209(1) of the SMA). Since such a contract is always concluded by a public law entity as a contracting party (in Slovenian law, only the State or a municipality can be an expropriation beneficiary, Art. 205(1) of the SMA) and is concluded in the public interest, it meets the defining criteria of an administrative contract. In addition, the contractual freedom of the property owner is *de facto* limited, as the "threat of expropriation" lingers over it. However, this contract differs from a typical subordinate administrative contract replacing an administrative act in that it is not concluded with the administrative authority that decides on the expropriation, but with the expropriation beneficiary, i.e., an entity that would have the position of a party with an opposing interest in the administrative (expropriation) procedure.

Moreover, the same Act regulates an urban planning contract (Art. 167 of the SMA), whereby the investor and the municipality agree that the investor will build (at his own expense) part, or all the communal facilities for the land on which it intends to build, and in return will not have to pay (part of) the communal contribution. Construction of communal facilities, which are normally provided by the municipality, is a financial cost that is partly passed on to investors through the payment of a communal contribution based on the valuation decision (Art. 166 of the SMA). However, if the investor builds the communal facilities instead of the municipality, it is considered to have paid (part of) the communal contribution in nature. Therefore, the construction of municipal facilities based on an urban planning contract constitutes a (legal) alternative to the monetary fulfilment of (part of) the public law levy, i.e., the municipal contribution, which is otherwise levied by the municipality by a decision. Due to the presence of many public law elements in the contractual relationship (Art. 167(6) of the SMA), an urban planning contract can be classified as an administrative contract.[16] Furthermore, it has similar features to an exchange contract, which is a type of subordinate administrative contract in German law.

On the other hand, decisions by the Competition Protection Agency accepting an undertaking's commitments in a restrictive practices' procedure (Art. 63(3) of the Prevention of Restriction of Competition Act, *Zakon o preprečevanju omejevanja konkurence*, hereinafter: **PRCA**[17]), or its corrective measures in a merger procedure (Art. 75(1) of the PRCA), are similar in substance to a settlement contract (as a subordinate administrative contract). With commitments, the undertaking in a restrictive practice's procedure commits to remedy the situation that gives rise to the likelihood of a breach of the prohibition of restrictive practices, while with the corrective measures the notifying party agrees to remove serious doubts about the compliance of the merger with the competition rules. If the Competition Protection Agency accepts these measures (proposed by the undertaking or the notifying party subject to the procedure), it decides (by administrative decision) that there are no longer grounds to continue the procedure (on the grounds of restrictive practices) or not to oppose the concentration and declaring that it is compatible with the competition rules /…/. It therefore replaces the issuance of a (unilateral) decision by which the Competition Protection Agency (as a holder of public authority) otherwise finds an infringement, orders appropriate measures, and imposes an administrative sanction (under the conditions laid down by law). As such a decision is *de facto* based on an agreement between the Competition Protection Agency and the

[16] Judgement of the Supreme Court of the RS, No. X Ips 283/2009 of 3 March 2011, and judgement of the Administrative Court of the RS, No. U 2282/2008 of 14 May 2009.
[17] Official Gazette of the RS, No. 130/22.

undertaking to remedy (potential) infringements by way of mutual indulgence, it shall be – notwithstanding its designation as a "decision" – considered as a settlement contract (as a type of subordinate administrative contract) (Lovšin, 2023).

A settlement between an administrative authority and a person who was a party or an accessory participant in the procedure for issuing an administrative act is admissible in an administrative dispute. According to the Art. 57 of the Administrative Dispute Act (*Zakon o upravnem sporu*, hereinafter: **ADA**[18]), such a settlement may be achieved at any time until the administrative court's decision is issued, and it replaces (in part or in full) the contested administrative act. The possibility of replacing an administrative act with a judicial settlement (as opposed to a settlement between the administrative authority deciding on an administrative case and a party to the administrative procedure) is justified by the fact that the administrative authority and the party to the administrative dispute are acting as procedurally equal parties and that a neutral third party (the judge) is involved in the procedure for concluding the settlement (Kerševan and Androjna, 2017). However, according to the view taken in this article, the position of the administrative authority when concluding a court settlement is not *de facto* substantially different from unilateral decision-making in administrative procedure (cf. Đerđa and Wegner, 2020, p. 56), as the administrative authority, when concluding a court settlement, is still acting as a holder of public authority as it must ensure that the settlement is in accordance with the public interest. In addition, it must also consider the costs and duration of the procedure if no settlement is achieved (Art. 57(3) of the ADA). Therefore, it can negotiate only within the limits of the law, meaning that it cannot reach a settlement with content that could not have been determined in the operative part of a lawful administrative act. Protection of the public interest is therefore still the responsibility of the administrative authority, not the courts (principle of separation of powers) (Kerševan and Androjna, 2017, p. 585). This means, on the other hand, that the administrative court does not have the power to assess whether a proposed settlement is in accordance with the public interest, but only whether it is in accordance with the law (Art. 57(2) of the ADA). Furthermore, the court settlement replaces (in part or in full) the contested administrative act (Art. 57(3) of the ADA) and not the judgment of the administrative court, since the court generally does not have the power to decide on the administrative matter itself, but to annul the unlawful decision of the administrative authority and refer it back to it for (re)decision. It is therefore an alternative to the administrative authority's decision-making in the administrative procedure, although it is (in terms of its procedural effects) equivalent to a judgment by which a court modifies an administrative act, i.e., it has the effect of an enforceable court decision (Smrekar, 2019, p. 326). It can be concluded that a court settlement in an administrative dispute corresponds to the characteristics of a subordinate administrative contract, since the administrative authority is still acting as a public authority when achieving it (despite the contractual form). It is therefore substantially similar to a settlement reached in an administrative procedure between the administrative authority deciding on an administrative matter and a party to the administrative procedure, although it is formally concluded before a judge.

3.3 Shortcomings of the Current Legal Framework

Slovenian law does not regulate administrative contracts systematically, but they are scattered in a number of (sectoral) laws, which often devote a single article to the

[18] Official Gazette of the RS, No. 105/06 as amended.

contract while leaving the essential issues unaddressed. For matters not covered by these laws, the general rules on contracts in the law of obligations apply, but they are not adapted to the specific nature of administrative contracts, as they regulate relations between equal subjects, whereas in administrative contracts the position of the public law entity is superior. In addition, private law is based on contractual autonomy and the dispositive nature of legal norms, while public law provisions are mandatory, and administrative authorities are bound by the principle of legality in their functioning, meaning that they need legal power to act ("reservation of the law") and that they must act within the framework of the law ("primacy of the law").[19]

Such an inadequate legal framework opens the door to the application of contractual provisions which are the result of the agreement of the contracting parties or their intention at the time of the conclusion of the contract and the power of the individual contracting party. This can lead to unequal treatment of parties in the same position and thus to a breach of the principle of equality before the law. Hence, even insufficient regulation can lead to a violation of the fundamental principles of administrative functioning, indicating that the possibility of (systemically) introducing subordinate administrative contracts into Slovenian legal order should be reconsidered in the future. This is also supported by the comparative law study, as administrative contracts are regulated separately and differently from private law contracts in all analysed foreign legal orders.

3.4 Other Reasons for Introducing Subordinate Administrative Contracts at the General Level

Subordinate administrative contracts have proven to be an effective way of regulating administrative law relations in comparative law (Hüther, Blänsdorf and Lepej, 2022a, p. 304) and their introduction into national legal systems is also encouraged by Recommendation Rec(2001)9 on Alternatives to Litigation between Administrative Authorities and Private Parties of 5 September 2001 of Council of Europe.[20]

Among the reasons in favour of the introduction of contractual regulation of administrative-law relations are, in particular, the more flexible alignment of the public interest with the interests of the party, which can lead to a more substantively correct and better accepted solution to a specific administrative matter, since the party has had the opportunity to participate in its formulation; an increase in the predictability of administrative action and thus in legal certainty (Kerševan, 2004); an increase in the efficiency of decision-making in the public administration and the administrative judiciary (more cases decided in less time, and consequently lower costs), greater satisfaction of the parties and, above all, a change in the perception of the nature of dispute resolution in administrative relations from a strictly formalistic to a more consensual procedure (Žuber and Marflak Trontelj, 2020), with a consequent development of the creative role of the administration (Kovač, 2016).

[19] For more on the principle of legality, see the decision of the Constitutional Court of the RS, No. U-I-79/20 of 13 May 2021.

[20] See also the CEPEJ Guidelines on better application of the Recommendations on alternatives to judicial settlement of disputes between administrative authorities and individuals (CEPEJ (2007) 15, of 7 December 2007).

4. POSSIBILITIES FOR INTRODUCING A SUBORDINATE ADMINISTRATIVE CONTRACT IN SLOVENIAN LAW

Contractual regulation of administrative law relations cannot fully replace the possibility of unilateral and authoritative functioning by the administrative authority. Some administrative areas do not allow for mutual negotiation of the content of rights and obligations (e.g., setting tax rates; cf. Kovač, 2016, p. 83). However, it can be an important complement to this form of administrative functioning. In any case, the administrative authority must be legally authorised to conclude the subordinate contract (principle of legality). Comparatively, there is a distinction between a general power, which is given to the administrative authority for an indefinite number of cases (for example, in a general legal act, such as the general administrative procedure act,[21] a characteristic of German and Estonian law), and a specific (special) legal power, which is given for each individual case (in sectoral laws, a characteristic of Czech law). Given the diversity of administrative matters, the administrative authority should have a specific power to conclude an administrative contract in those areas where (in the opinion of the legislator) contractual regulation of the relationship proves to be appropriate. The conclusion of an administrative contract cannot, therefore, be left to the discretion of the administrative authority (as to whether the specificities of a particular administrative area do (not) allow for contractual regulation), but must be a possibility provided for by law, and its implementation will depend on the circumstances of the individual case (and the consent of the co-contractor). A different regime could lead to a nonuniform application of the administrative contract in practice in factually and legally similar cases, especially due to the lack of a proactive administrative culture in Slovenia.[22] However, the fundamental characteristics of subordinate administrative contracts must also be regulated at a systemic level (in general law), following the models of German, Czech, and Estonian law, ensuring more legal transparency and, consequently, legal certainty. This can be achieved by extending the provisions on administrative settlement in the GAPA to the relationship between the administrative authority and the party to the administrative procedure, with the possibility of adopting additional specific or more detailed provisions in sectoral legislation. The GAPA would therefore (*mutatis mutandis*) apply to all those contracts concluded between an authority and a party instead of an administrative act, unless otherwise provided for in specific rules.

Such a settlement should be initiated by the party or the authority, and in some cases, an initiative for an amicable settlement of an administrative law relationship should also be a procedural prerequisite for the initiation of administrative procedure (e.g., in spatial planning matters). The settlement should be complete (and it would *de facto* replace the adoption of an administrative act) or partial (only on a specific disputed issue, while the administrative procedure would continue with respect of the issues not settled in the settlement).

However, contractual resolution of administrative matters should be limited only to those areas of administrative functioning where the administration has a certain margin of discretion in determining the content of the decision on the administrative matter.[23] This means, on the other hand, that the possibility of a subordinate administrative contract should (as a rule) be excluded in the case of legally binding

[21] Cf. § 54 of the VwVfG.
[22] For more details on the lack of a proactive administrative culture in Slovenia, see Kovač (2016).
[23] Cf. Kerševan and Androjna (2017, p. 585) and decision of the Higher Court of Ljubljana I Cpg 51/2018 of 17 May 2018.

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decision making since the content of such a decision is predetermined and the administrative authority is bound by it (principle of legality). In these cases, the administrative authority should therefore be obliged to issue an administrative (authoritative) act conferring a public right or imposing a prescribed obligation on a party. However, if the administrative authority is given the power by law to determine certain modalities of the decision [e.g., the extent to which a particular obligation is imposed (cf. Kerševan, 2004, p. 190), the duration of the right, the time limit for the fulfilment of the obligation (cf. Kovač, 2016, p. 83) or the enforcement method, if not prescribed (cf. Đerđa and Wegner, 2020, p. 56), a contract could be concluded regarding these aspects.

In view of the above, the contractual resolution of administrative matters (between the administrative authority deciding on the matter and the party) is possible (in particular) in the areas where cooperation is to the benefit of both, such as concessions, spatial planning, taxation (Rusch, 2014, p. 191; cf. Rogić Lugarić and Čičin-Šain, 2014), inspection matters,[24] obtaining public funds. In cases where the public and private interests are equally strong, there is no need to issue an administrative act (cf. Jerovšek, 2000, p. 171). Therefore, the initial hypothesis must be confirmed.

In addition, certain protective mechanisms must also be established to prevent abuse of the contractual form of functioning by the administration. In particular, the duty of the administrative authority to protect both the public and the private interest, regardless of the form of the administrative functioning, and to refuse to enter a contract (by issuing a decision refusing to conclude the contract) if it involves a disposition outside the law, should be maintained and explicitly stated by law. If a contract is nevertheless concluded, the effects of such a contract (unlawfulness, nullity, or other form of invalidity) must be determined. Namely, in the absence of specific substantive rules, the rules of civil law apply to administrative contracts, but they do not adequately (and fully) address all the substantive aspects of these contracts. Moreover, other (substantive) aspects of the administrative settlement, such as the conditions for its modification (e.g., due to changed circumstances, public interest) and termination, should also be specifically regulated in GAPA. The same approach has been adopted in German, Estonian, and Czech law.

It is also necessary to establish control over (the conclusion of) the administrative contract, for example by a hierarchically higher administrative authority (as in Czech law), or by an administrative court (as in German and Estonian law) - in the latter case, the provisions of the Administrative Disputes Act will also have to be adapted accordingly, as the Act does not currently provide for judicial protection against contracts, but only against unlawful administrative acts. This supervisory body should be empowered to interfere with the validity of such a contract, at the request of the parties (or of a third party affected by the contract), or *ex officio* (if the administrative, rather than the judicial, authority would be responsible for supervision).

In addition to the administrative settlement (as a form of subordinate administrative contract), Slovenian law should also regulate basic features of administrative contracts, supplementing an administrative act, following the French model. However, they should not be regulated in GAPA, but rather in a specific law. Namely, these contracts are concluded after the administrative act has been issued and the administrative procedure has been completed, and thus the GAPA is not the appropriate act to regulate this matter.

[24] Javna uprava 2020: Strategija razvoja javne uprave 2015–2020. Ljubljana: Ministrstvo za javno upravo, 2015, p. 123. Available at: https://www.gov.si/assets/ministrstva/MJU/Kakovost-in-inovativnost-v-javni-upravi/Strategija/Strategija-razvoja-javne-uprave-2015-2020.pdf (accessed on 18.08.2023).

5. CONCLUSION

With the modernisation of public administration, the functioning of administration is increasingly shifting towards the consensual regulation of administrative matters, which were traditionally regulated by authoritative acts. One of the mechanisms of the ADR is the administrative contract, which can be concluded from a comparative law perspective as an alternative to an administrative act and is an effective way of resolving administrative matters. In Slovenian law, however, administrative matters are typically resolved by administrative acts, since a settlement can generally only be achieved between parties with opposing interests. However, a number of other (sectoral) laws regulate contracts that correspond (in their substance) to the characteristics of subordinate administrative contracts but are (due to their non-comprehensive (sectoral) regulation) generally subject to the rules of (private) contract law. Given all the advantages of alternative dispute resolution and shortcomings of the current legal framework, Slovenian law should also – while respecting all the specific features of administrative decision-making – systematically regulate subordinate administrative contracts (replacing administrative acts), following the German, Czech and Estonian models, at least for some administrative matters.

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CULTURAL PROPERTY PROTECTION IN PRIVATE INTERNATIONAL LAW / Bogdan Kryvolapov

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This publication is an outcome of the 'VUIAS Fellowships in Ukraine' for the academic year 2023/2024".

Abstract: *The armed aggression of the Russian Federation against Ukraine has brought the issue of protecting cultural property to the forefront. Numerous documented cases of illegal exports of cultural property from Ukrainian museums located in territories occupied by the aggressor country have emerged. In addition, little is known about the number of stolen objects from private collections, which are considered cultural artifacts. There are no statistics available on this matter. This paper aims to explore the problem of applicable law during the consideration of disputes regarding the protection of cultural property. The author examines the concept of cultural property restitution in private international law and different approaches and concepts for defining "restitution" and "return" of cultural values. It has been argued that the term "return of cultural property" should encompass a wider scope, including both the restitution of illegally exported cultural property and the return of cultural property that was legally in the possession of another state but was later repatriated to the original state as a gesture of goodwill. The author offers his definitions of these terms based on theoretical research, as well as an analysis of the domestic legislation of Ukraine and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Property of June 24, 1995. The paper also delves into the issues of conflict regulation of disputes involving cultural values. Both the issues of determining the right of ownership to and the problems associated with the protection of the right of ownership of cultural property in private international law are considered. The point of view that the conflict of laws rule lex originis (the law of the country from whose territory the cultural property was exported) should be applied in disputes regarding the return of cultural property from someone else's illegal possession is supported. The author concludes, based on a comparative analysis of laws on private international law, about the most appropriate mechanism for protecting the property rights of a bona fide purchaser in disputes over cultural property.*

Key words: *Cultural Values; Private International Law; Restitution; Conflict of Law Rule; Law of the Property's Location; Good Faith Purchaser; Lex Originis*

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1. INTRODUCTION

The military aggression of the Russian Federation against Ukraine and the occupation of part of its territories have seriously raised concerns about the protection of cultural heritage. Ministry of Culture of Ukraine and UNESCO informed about the repeated illegal exports of cultural property. For example, the Mariupol City Council has reported that more than 2,000 unique exhibits, including original works by Arkhip Kuindzhi and Ivan Aivazovsky, ancient icons, a unique handwritten Torah scroll, the Gospel of 1811 made by the Venetian printing house for the Greeks of Mariupol, and more than 200 medals from the Museum of Medallion Art Harabet, were removed to Donetsk (Sauer, 2022). Furthermore, after the liberation of Kherson, it was discovered that many exhibits from the Oleksiy Shovkunenko Art Museum, including paintings by Ivan Aivazovsky, Oleksiy Shovkunenko, and Mykola Pymonenko, had been looted by Russian invaders (Lototska, 2022). The Ukrainian Prosecutor General's Office reported that invading Russian troops stole ancient Scythian gold stored in the Melitopol Museum of Local History (Barsukova, 2022).

Without a doubt, some objects illegally exported from Ukraine are certain to be found in museums across the Russian Federation. However, good faith purchasers may also acquire many cultural artifacts that were illicitly taken from Ukrainian museums and private collectors. Therefore, claims for the return of illegally exported cultural property are likely to arise in different countries, making the applicable laws on disputes regarding cultural property crucial.

Although a considerable body of research has been dedicated to the restitution of cultural property, little attention has been paid to the regulation of conflicts of law in the circulation of cultural values. Additionally, no conventions that currently contain rules on the law applicable to transactions involve cultural property.

2. RESTITUTION AS A TOOL FOR PROTECTING THE OWNERSHIP OF CULTURAL PROPERTY

One of the foremost Ukrainian scholars in this field, Professor V.I. Akulenko, defines restitution as a special form of returning property of historical, cultural, artistic, or other significance that was illegally seized and exported by a belligerent country from the territory of another belligerent state during an armed conflict or other international illegal act (Akulenko, 2013a). While it is possible to agree with Professor Akulenko's definition, it is worth noting that the concept of cultural property restitution should also extend to the return of any cultural property that has been unlawfully removed from the territory of a certain state.

In the context of discussions on cultural property restitution, Kamil Zeidler, a professor at the University of Gdansk, points out that some authors see restitution as an action leading to the return of cultural property located outside the country where the claim for restitution is being filed (Zeidler, 2016). A problem with this definition is that it is too broad and not specific.

According to D. Koval, restitution is a compensation for damage caused to the state, individuals, or legal entities of the state by an illegal act that crossed international borders, by returning cultural values seized from their rightful owners or replacing them with objects of equal value, in order to restore the situation that existed before the illegal act was committed (Koval, 2016). The concept may be original, but we believe that it is not necessary to conflate restitution as a form of liability in international public law with restitution as a means to protect the ownership of cultural property. Additionally, it is worth considering that restitution does not always involve the "removal of property from

rightful owners". For example, if an item was stolen and is still in the hands of the criminals, restitution can still be sought through legal means.

An important point to bear in mind is that there is a difference between the terms "restitution" and "return" of cultural values. While these terms share some similarities, they have different meanings, particularly about the legal status of cultural objects involved. Professor Akulenko points out that "restitution"' involves the legal right of a state to demand the return of illegally exported cultural values, while in the case of "return" of cultural values, the state has only a moral right to demand their return from other states (Akulenko, 2013b). This difference has implications for the legal treatment of these objects. When cultural values are "returned",' the owner state can demonstrate goodwill by returning the objects voluntarily or as part of an international agreement. In fact, one could also state that the term "return of cultural property" should encompass a wider scope, including both the restitution of illegally exported cultural property and the return of cultural property that was legally in the possession of another state but was later repatriated to the original state as a gesture of goodwill.

The UNIDROIT Convention on Stolen or Illegally Removed Cultural Property of 24 June 1995 uses both terms, but without any definitions. A logical interpretation of the convention suggests that "restitution" can be defined as the return of stolen cultural property, while "return" refers to a set of actions aimed at overcoming the negative consequences of illegal export of cultural property, such as smuggling.

It should be noted that the term "restitution of cultural values" is absent in Ukrainian legislation, but the term "return of cultural values" is provided. According to Article 1 of the Law of Ukraine "On Export, Import, and Return of Cultural Values", the term "return of cultural values" refers to a set of actions related to the import into or export from the territory of Ukraine to other states of cultural values in accordance with claims and appeals made by Ukraine, other states, or their authorised bodies, as well as decisions made by Ukrainian or foreign courts. The analysis of this term suggests that the Law in question combines doctrinal definitions of restitution with provisions for the return of cultural values. Notably, the phrase "return of cultural values" implies primarily the involvement of the state or its authorised bodies in these processes. However, we argue that this term should also include actions related to the import and export of cultural values upon appeals by legal entities and individuals.

3. ADVANTAGES AND DISADVANTAGES OF USING *LEX REI SITAE* IN DISPUTES REGARDING CULTURAL PROPERTY PROTECTION

In the modern private international law doctrine, there is no consensus regarding the law that applies to transactions involving cultural objects. Traditionally, ownership of cultural property has been determined on the basis of the law of the property's location (*lex rei sitae*). As noted by Alessandro Chechi, a researcher at the Faculty of Law at the University of Geneva, this approach is favoured for its simplicity, legal certainty, and ease of application (Chechi, 2018). Derek Fincham, a professor at the Southern College of Law (USA), has similar arguments (Fincham, 2009).

According to Professor of Union University (USA) Patricia Reyhan, the validity of transfer of ownership of movable cultural property is determined according to the law of the location of these things at the time of their transfer (Reyhan, 2001).

Ukrainian researcher B. Shuba argues that the laws governing the export and import of cultural property are public laws and should be determined by the law of the property's location (*lex rei sitae*). If cultural property is illegally moved to the territory of another state, the court of that state cannot apply the violated rules of the exporting state,

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as this would involve applying foreign public rules, which is unacceptable in modern private international law (Shuba, 2017).

T. Dudenko, a Ukrainian author, also supports the use of *lex rei sitae* and suggests that property rights for cultural objects listed in a national register of cultural heritage should be governed by the law of the state in which the object is registered (Dudenko, 2017). This proposal is relevant because the Law of Ukraine "On Private International Law" (UPIL) has no separate conflict-of-law rules on cultural values.

Although the use of *lex rei sitae* is simple and straightforward, many authors highlight the potential problems that may arise, particularly for owners of stolen cultural property, especially when it involves *bona fide* acquisition (Chechi, 2018).

One of the most well-known cases in the field of cultural property disputes is Winkworth v. Christie Manson & Woods, Ltd, which was described by the renowned researcher John Merryman (Merryman, 2007). The case involved the theft of Japanese works of art (netsuke) from a private collection in England, which were subsequently taken to Italy and purchased by an Italian collector in good faith. The purchaser later consigned the netsuke to Christie's in London for sale. The British collector from whom the netsuke had been stolen filed a claim for their return. The High Court of Justice in London applied the *lex situs* rule and determined the title under Italian law, which held that the *bona fide* purchaser became the owner. As a result, the British court ruled in favour of the Italian collector. There have been other judicial decisions on the applicable law issues in disputes over cultural property, such as the Winkworth case (Fincham, 2009).

Derek Fincham argues that a potential drawback of using *lex rei sitae* is the application of a law from a different country where the object is located, which may differ from the law of the original place. This can result in a substitute title being granted to a subsequent acquirer, even if it violates the primary title obtained earlier (Fincham, 2009).

4. *LEX ORIGINIS* AS A NEW APPROACH TO SOLVING THE PROBLEM OF APPLICABLE LAW

In 1991, the Institute of International Law adopted the "Resolution on the International Sale of Works of Art from the Angle of the Protection of the Cultural Heritage" (also known as the Basel resolution). According to Article 2 of this resolution, the transfer of ownership of works of art that belong to the cultural heritage of the country of origin is governed by the laws of that country. Article 3 of the Basel Resolution states that the export of works of art must be governed by the law of the country of origin. As per Article 1 of this resolution, the "country of origin" of a work of art is the country to which the property is most closely connected from a cultural point of view.

Since the adoption of the Basel resolution, new concepts have emerged on the issues of law applicable to stolen or illegally exported cultural property. A well-known private international law scholar, professor at Willamette University (USA) Symeon Symeonides, proposed a model called *Lex Rei Sitae Originis* (Symeonides, 2021). Symeonides's approach can be described as follows: a person who is the owner of a cultural property under the law of the state in which the thing was located at the time of its illegal movement to another state has the right to be protected by the law of the former state (State of origin). Symeonides argued that the abovementioned method is the most logical criterion for determining the applicable law (Symeonides, 2021). This author also claims that a person who, according to the law of "place of origin", is considered the owner of a cultural value should not lose the protection and remedies that national law provides him only because the object is currently in another country (Symeonides, 2021). The

model proposed by Simeonides provides exceptions in favour of the principle of the closest connection and when it is necessary to protect the *bona fide* purchaser of the cultural property after it has been transferred to another state (Symeonides, 2021). Although this approach seems reasonable, its disadvantage is that the original owner may lose all rights to the item due to the good faith of the foreign purchaser. Therefore, the problem of the *bona fide* foreign purchaser has yet to be resolved. Simeonides's idea was supported by Derek Fincham, who emphasises that "the *lex originis* must decide the outcome of any legal action arising from the theft or seizure" of cultural property (Fincham, 2009).

Professor Patricia Rayhan has suggested a similar concept, according to which the validity and consequences of the transfer of rights to the stolen property to a *bona fide* purchaser are determined by the law of the place of residence of the original owner at the time of the theft (Reyhan, 2001). Reyhan's idea is that the law of the original owner will regulate both the validity of the transfer of ownership of cultural property and the situation of a *bona fide* purchaser. While it is possible to agree with this proposition, considering that the original owner's law offers fair compensation for the *bona fide* purchaser, what happens if the *lex originis* does not have rules for compensating the good faith purchaser?

5. PROBLEM OF A GOOD FAITH PURCHASER AND POSSIBLE SOLUTIONS

So, on the face of the problem, which Professor Reyhan calls a "chaotic palette" (Reyhan, 2001), it is on the one hand, necessary to protect the original owner of the cultural property from depriving him of any rights to cultural property due to the application of the foreign law of *bona fide* purchaser. On the other hand, it is possible that the law of original owner will not consider the interests of a *bona fide* purchaser at all.

One of the ways to solve this problem is the unification of material and conflict rules on the restitution of cultural property. On June 24, 1995, at the UNIDROIT Diplomatic Conference, the Convention on Stolen or Illegally Exported Cultural Property (UNIDROIT Convention) was signed. This convention's primary purpose is to return stolen cultural objects to their owners. The UNIDROIT Convention seems to solve the so-called "chaotic palette". First, paragraph 1 of Art. 3 of the UNIDROIT Convention clearly states that the possessor of a cultural object which has been stolen should return it. Secondly, paragraph 1 of Art. 4 provides that a *bona fide* owner has the right to expect fair and reasonable compensation if he neither knew nor ought to have reasonably known that the object was stolen. Hence, it is possible to assume that the UNIDROIT Convention provides a protection mechanism for both, the original owner of the stolen cultural property and its *bona fide* purchaser. However, there are some problems with the application of this convention. Ukraine did not sign it, while the Russian Federation still needs to ratify it (States parties, 2022). The UNIDROIT Convention was not signed by the most important market states, such as the USA, Great Britain, Germany, and Austria (States parties, 2022). France and the Netherlands did not ratify this convention (States parties, 2022). Derek Fincham sees the problem of the unpopularity of this convention in the fact that according to Art. 18, no reservations are permitted except those expressly authorised in this convention. Furthermore, many countries reacted negatively to the provision of paragraph 2 of Art. 3 UNIDROIT Convention, which provides that a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained is considered to be stolen if this complies with the law of the state where the excavations took place (Fincham, 2009). Thus, Ukraine will not be able to use the mechanisms provided by the UNIDROIT Convention to return illegally exported and stolen cultural property.

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It appears clear that the presence of conflict-of-laws rules of the same type in domestic laws of states could be a possible solution to the "chaotic palette." Positive trends in this matter have been observed and some countries have included relevant provisions in their private international law statutes. For instance, Article 70 of the Code of Private International Law of Bulgaria contains a conflict-of-law rule stating that when a cultural object belonging to the heritage of a specific state has been illegally removed from that state's territory, the request for return of the object will be governed by the law of that state, except where the state has opted for the application of the law of the state in which the object is located at the time of making the return request. Article 90 of the Belgian Law of July 16, 2004, "On the Code of Private International Law," provides a more effective conflict-of-laws rule. It states that if an item, which a state considers as being included in its cultural heritage, has left the territory of that state in a way, which is considered to be illegitimate at the time of the exportation by the law of that state, the revindication by the state is governed by the law of that state, as it is applicable at that time, or at the choice of the latter, by the law of the state on the territory of which the item is located at the time of revindication. Paragraph two of this article provides that if the law of a state that considers a thing to be part of its cultural heritage does not give any protection to a *bona fide* purchaser, the latter may seek protection under the law of the state in whose territory the thing is located at the time of vindication. Article 33 of the Law on Private International Law of Montenegro of December 23, 2013 provides a similar provision. This approach, commonly known as the "*bonae fidei* emptor clause," is widely considered the best solution to the "chaotic palette" problem. It provides a practical and effective way to resolve the issue. On the one hand, the existence of conflict-of-law rules on cultural property in some legislative acts on private international law is a positive factor. However, on the other hand, it should be noted that only a few countries have implemented such rules. Therefore, it may be concluded that the adoption of a uniform conflict-of-laws rule, based on the legislation of Belgium and Montenegro, within the framework of a specialised convention for protecting cultural property in private international law, would be the most acceptable solution to this problem.

6. CONFLICT-OF-LAWS RULES CONCERNING CULTURAL PROPERTY IN UKRAINIAN LEGISLATION

As previously mentioned, the UPIL does not include a specific conflict-of-laws provision for cultural property. Instead, Article 38 of the law provides for the general principle of *lex rei sitae* to govern issues related to the right of ownership for such objects. Ownership of cultural property that is the subject of a transaction can be determined by the law of the place where the transaction occurred (*lex loci contractus*) or by the law chosen by the parties (*lex voluntatis*), as stated in part 1 and part 2 of Art. 39 of UPIL. However, there are no conflict-of-law rules regarding the status of a *bona fide* purchaser. Nonetheless, the Law of Ukraine "On Export, Import, and Return of Cultural Values" does include a specific provision related to *bona fide* beneficiaries. According to Article 32 of the law, individuals or legal entities who were unaware, and could not have known, that cultural values were illegally exported or stolen are considered *bona fide* beneficiaries. If such beneficiaries have purchased or received cultural values illegally, they must return the objects to the rightful owner. Nevertheless, beneficiaries are entitled to compensation, as outlined in the second part of the article. The fact that the *bona fide* beneficiary has the right to compensation under this law is positive. But the problem is that this rule is not a conflict-of-laws rule.

The need to change Ukraine's legislation is indisputable. Firstly, a separate conflict-of-laws rule (*lex originis*) needs to be provided in the Law of Ukraine "On Private International Law". Secondly, this law should be provided with a conflict rule, according to which, for a cultural property that is entered into the national register of cultural heritage, it is necessary to use a point of connection - the law of the state in which the cultural property is registered as an object of cultural heritage. Thirdly, to protect the rights of a *bona fide* purchaser, the UPIL should add the *bonae fidei* emptor clause as a conflict rule.

7. CONCLUSIONS

Ukraine has been facing an unprecedented scale of aggression from the Russian Federation, making it difficult to assess the damage done to its national cultural heritage. Despite the mechanisms provided by the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict and its protocols, as well as the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, these valuable artifacts have failed to be effectively safeguarded, especially during times of armed conflict. Given the current realities and emerging challenges, there is an urgent need to significantly improve the UNIDROIT Convention on Stolen or Illegally Exported Cultural Property. It is necessary to provide definitions for the terms "restitution of cultural property" and "return of cultural property" in the UNIDROIT Convention. The term "restitution of cultural values" refers to the return of movable cultural objects that have been stolen to their country of origin. The term "return of cultural values" currently encompasses a wider range of actions, including the import of cultural objects that have been illegally exported from a country's territory. However, to be more comprehensive, this term should include the concept of "restitution of cultural values". Furthermore, the term should not only be limited to claims made by state authorities but also extend to claims made by private individuals. Additionally, one could argue that the term "return of cultural property" should also encompass the repatriation of cultural property that was legally in possession of another state and was subsequently returned to the original state as a goodwill gesture.

There is no single approach to the law regarding which state's law should be applied to claims of illegally exported or stolen cultural values in modern private international law doctrine. The use of the *lex rei sitae* conflict rule is problematic because it can deprive the rightful owner of any rights to these objects due to foreign rules on good faith acquisition. Many scholars now hold the view that in disputes about the vindication of cultural property from someone else's illegal possession, the conflict-of-laws rule *lex rei sitae originis* (*lex originis*) should be applied. This rule provides that suits for the return of cultural objects that are illegally exported from the territory of a certain country and are its cultural heritage are governed by the legislation of that state. According to the author of this paper, this approach is the most appropriate to protect the ownership of cultural property.

The results of this study indicate that there is still considerable uncertainty with respect to the protection of the interests of a *bona fide* purchaser of cultural property that is a national treasure and was illegally exported. The problem is further complicated because the UNIDROIT Convention, which contains provisions on this matter, is not widely used. The most acceptable mechanism for protecting a *bona fide* purchaser may be the conflict-of-law construction *bonae fidei* emptor clause, provided by the private international law legislation of Belgium and Montenegro. This means that a good faith purchaser of cultural property can apply for protection under the law of the thing's

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location at the time of vindication if the law of the state, which considers the thing part of its cultural heritage, does not provide him with any protection.

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POLAND´S CLIMATE POLICY – SELECTED LEGAL ASPECTS / Ewa Radecka

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Abstract: *This paper aims to briefly present the climate policy in Poland, in selected critical areas from the author's perspective and that may accelerate or delay the just transformation. Climate policy should be a significant part of Poland's activities because Poland is one of the EU countries most dependent on fossil fuels, and the increase in carbon dioxide emissions is also disturbing. However, as the analyses show, the conclusions of various reports seem fully justified, and Poland is not correctly implementing its climate policy. This paper, the first in the series, first explains the basic concepts. Then it briefly presents the basics of the EU's climate policy. The last part concerns Poland's implementation of climate policy in selected areas. Renewable energy sources and air protection will be discussed first in the series. The final fragment contains unoptimistic conclusions with a simultaneous suggestion to undertake urgent work on the Climate Protection Act in Poland. The research was carried out using dogmatic, legal, and statistical methods to a narrow extent.*

Key words: *Climate Policy; Climate; Air; Renewable Energy Sources; Air Protection; Environmental Law; Polish Law.*

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1. INTRODUCTION

Climate change is undeniable, and its dimensions are multifaceted. Apart from the obvious, nature-related facet, one can distinguish at least the legal or social aspects. In the most general terms, it is pointed out that the effects of climate change are particularly threatening to the enjoyment of the right to life and the right to health (Machińska, 2013, p. 38).[1] On the other hand, representatives of social sciences also note the link between climate change and its social impacts (Leggewie and Welzer 2012, p. 45), highlighting, *inter alia*, the possibility of migration crises that could lead to wars over basic resources, consequently leading to threats to global peace and security (Szpak, 2019, pp. 150-160). The latest report from the Intergovernmental Panel on Climate Change (IPCC) highlights a number of alarming topics, emphasising that we have already managed to alter our planet's climate seriously and that greenhouse gas emissions

[1] The literature identifies three most important areas of threats to human rights: violations of the right to life, the right to health and the right to survival (providing access to water and food).

(primarily carbon dioxide) continue to rise.[2] Moving away from fossil fuels and seeking modern carbon sequestration technologies are suggested as solutions. Both of these aspects seem crucial for Poland as one of the European countries most dependent on solid fossil fuels[3] and one whose atmospheric carbon dioxide emissions[4] rank it as the 7th largest emitter in the EU,[5] with its emissions up almost 7 percentage points in 2021 compared to 2020 (Climate Action Progress Report, 2022).

In the context of the Republic of Poland, an important long-term goal should be the decarbonisation process, which may be prolonged due to the current geopolitical situation. The process of decarbonisation and diversification of energy sources, particularly for Upper Silesia (currently the largest mining centre in Europe), will mean intense energy, economic and social transformation, which must be based on a well-considered, comprehensive, and socially agreed "just transition" plan. This "just transition" is "the concept of a comprehensive restructuring and transformation of the coal regions – a socio-economic policy idea seen as a second (or even third) wave of transformation of the fuel and energy complex in the post-socialist economy, entailing not only adjustments in the labour market or changes in the production structure, but also identity transformations" (Proposed recommendations for the area of just transition, 2020). This complex process implies the need for effective legal norms to enable this transformation.

The aim of the paper is to briefly present the climate policy in Poland, in selected areas, which is crucial from the author's perspective and may accelerate or delay this transformation. The conclusions of the European Commission's recommendations show that progress towards the EU climate neutrality target seems to be largely insufficient for Poland.[6] This is also confirmed by the recently published Climate Change Performance Index (CCPI)[7] 2023, in the light of which Poland is performing increasingly poorly in

[2] IPCC (2023). *AR6 Synthesis Report: Climate Change 2023*. Available at: https://www.ipcc.ch/report/sixth-assessment-report-cycle/ (accessed on 03.01.2024).

[3] Supply, transformation, and consumption of solid fossil fuels, 21.12.2023. In: *Eurostat*. Available at: https://ec.europa.eu/eurostat/databrowser/view/nrg_cb_sff/default/bar?lang=en (accessed on 03.01.2024).

[4] By 2030, based on the GHG projections submitted by EU Member States in March 2023, six countries (Poland, Ireland, Estonia, Czechia, Luxembourg, and Latvia) expect emissions per capita to be significantly higher than 5 tonnes of CO_2-eq, which is the average EU GHG per capita broadly consistent with the EU-55% target. See: Directorate-General for Climate Action (2023). State of the Energy Union 2023: Further action needed to accelerate climate action. Progress Report 2023. Climate Action. Available at: https://climate.ec.europa.eu/news-your-voice/news/climate-action-progress-report-2023-2023-10-24_en (accessed on 03.01.2024).

[5] Air emissions accounts totals bridging to emission inventory totals, 20.12.2023. In: *Eurostat*. Available at: https://ec.europa.eu/eurostat/databrowser/view/env_ac_aibrid_r2__custom_9190133/default/bar?lang=en (accessed on 03.01.2024).

[6] It should be noted that this information is based only on general information, because as at the date of writing this paper, Poland has not submitted an update of the National Energy and Climate Plan referred to in Art. 14 of Regulation (EU) 2018/1999, in order to assess its compliance with the objective of climate neutrality. See: European Commission (2023). Commission recommendation of 18.12.2023 on the consistency of Poland's measures with the Union's climate-neutrality objective and with ensuring progress on adaptation. C(2023) 9626 final. Available at: https://climate.ec.europa.eu/system/files/2023-12/C_2023_9626_Poland.pdf (accessed on 03.01.2024).

[7] According to this report, Poland does not have a climate neutrality goal and lacks policy instruments that would effectively reduce greenhouse gas emissions in transport and buildings. Moreover, according to CCPI experts, the end of coal energy production in Poland must occur earlier than the declared year of 2049. Furthermore, it is emphasised that Poland is among nine countries responsible for 90% of global coal production. CCPI experts express concern about Poland's plans to increase dependence on fossil gas, often referred to in official documents as a low-emission fuel. See: Climate Change Performance Index (CCPI). *Poland*. Available at: https://ccpi.org/country/pol/ (accessed on 04.01.2024).

climate action.[8] This justifies undertaking research to check the effectiveness of measures in this area. This paper, the first in the series, first explains the basic concepts. Then, it briefly presents the basics of the EU's climate policy. The last part concerns Poland's implementation of climate policy in selected areas. Renewable energy sources and air protection will be discussed first in the series. The final fragment contains unoptimistic conclusions with a simultaneous suggestion to undertake urgent work on the Climate Protection Act in Poland.

2. THE TERMINOLOGY OF SELECTED CONCEPTS

It is necessary to start by establishing the terminological meaning of what is meant by climate, climate system, climate policy, climate neutrality. In EU law, the concept of "climate" appears in secondary legislation and documents setting out a framework for climate policy. The Treaty on the Functioning of the European Union introduces the concept of "climate change", stating in Article 191(1) that Union policy on the environment shall contribute, *inter alia*, to promoting measures at the international level to deal with regional or worldwide environmental problems, and in particular to combat climate change. As the climate system, the United Nations Framework Convention on Climate Change[9] defines "the totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions". As an aside, it is worth adding that Polish law lacks a legal definition of either the climate system or climate. Climate is included as one of the components of the environment. The contents of Article 3(39) of the Act of 27. April 2001 – Environmental Protection Law[10] stipulates that the term environment is understood as "all-natural elements, including those transformed as a result of human activity, in particular the earth surface, minerals, waters, air, landscape, climate and other elements of biodiversity, as well as interactions between these elements".

Another of the concepts mentioned, climate policy, is the set of actions, strategies and plans undertaken by governments, communities, and organisations to reduce the negative impacts of human activities on the climate and the environment.[11] This includes reducing greenhouse gas emissions by developing renewable energy sources and improving energy efficiency, creating sustainable city transport, protecting forests and biodiversity, and public education. By investing in new technologies, promoting green behaviour, and creating awareness and public engagement, an ambitious climate policy seeks to create a sustainable, ecological future in which climate and nature conservation are prioritised for the benefit of present and future generations.[12]

The last concept which already needs to be clarified is climate neutrality. Unfortunately, there is no legal definition of this concept. Generally, it is the balance between greenhouse gases emitted and their storage or uptake by water bodies, forests,

[8] This year, it dropped two places in the rankings, ranking 55th out of 63 (The Climate Change Performance Index, 2023).
[9] Journal of Laws 1996, No. 53, item 238.
[10] Journal of Laws 2022, item 2556 as amended, hereafter as: **Environmental Protection Law**.
[11] Fundacja Instytut na rzecz Ekorozwoju (2023). Podstawy Ambitnej Polityki Klimatycznej: działania dla przyszłości naszej planety. In: *ChronmyKlimat.pl*, published on 10.08.2023. Available at: https://www.chronmyklimat.pl/spoleczenstwo/2064-podstawy-ambitnej-polityki-klimatycznej-dzialania-dla-przyszlosci-naszej-planety (accessed on 01.01.2024).
[12] *Ibid.*

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or soils.[13] The objective of climate neutrality is set out, *inter alia*, in Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021[14] (hereinafter referred to as "**European Climate Law**"). Pursuant to Article 2(1) of this Regulation, emissions and removals of greenhouse gases throughout the Union, as regulated by Union law, are to be balanced in the Union by 2050 at the latest, thereby reducing emissions to net zero by that date, and the Union should thereafter aim to achieve negative emissions. Member States are to put in place the necessary measures to enable the collective achievement of the climate neutrality objective set out in Article 1(1), taking into account the importance of promoting both equity and solidarity between Member States and cost-effectiveness in the pursuit of that objective (Article 2(2) of the Regulation).

3. THE FOUNDATIONS OF EU CLIMATE POLICY[15]

In its broadest sense, the EU's competence in the area of climate policy derives primarily from its powers in the environmental field. Importantly, however, climate policy objectives are also pursued under other EU policies, particularly energy policy, and the common agricultural policy, transport policy and health policy. According to Article 4(2)(e) TFEU, environmental policy is a shared competence between the EU and the Member States, which means that both the EU and the Member States have the power to legislate and adopt legally binding acts in this field (Siwior, 2021). The basis for conducting environmental policy is also Articles 191-193 TFEU. Furthermore, Article 194 TFEU clearly distinguishes the principles of EU energy policy by stating, *inter alia*, the main objective of this policy, which is to ensure the energy security of the EU and its Member States.

It is impossible to discuss, even briefly, all pieces of legislation in this paper, hence reference will be made only to the most important ones, and the high dynamics of the issuing of legislation undertaken on this subject and of the amendments should also be emphasised.

Currently, the most crucial climate policy strategy is the European Green Deal (see more Borek, 2021, p. 30; Radecka and Nawrot, 2021), a new growth strategy that aims to transform the European Union into a fair and prosperous society living in a modern, resource-efficient, and competitive economy in which economic growth is decoupled from the use of natural resources. The European Green Deal is a strategy

[13] It is worth noting two concepts here: "net zero" and "carbon neutrality." "Net zero" focuses on reducing carbon emissions as much as possible first and only offsetting unavoidable, residual CO2 as a last resort. It is worth comparing this with the concept of "carbon neutrality," which is understood as action by a stakeholder (company, organization, subnational authority, individual) to reduce and avoid emissions and then compensate the remaining ones through carbon credits. Using carbon credits from projects that reduce, prevent and temporarily capture GHGs is possible. In short, with "carbon neutrality", you can compensate for your emissions. At the same time, the "net zero" concept is supposed to lead to their reduction - you must strive to eliminate them through efficiency, renewable energy sources and other means. See: What Does Net Zero Emissions Mean? In: *Climate Council,* published on 14.04.2023. Available at: https://www.climatecouncil.org.au/resources/what-does-net-zero-emissions-mean/ (accessed on 30.03.2024).

[14] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), OJ L 243, 9.7.2021, pp. 1–17, ELI: http://data.europa.eu/eli/reg/2021/1119/oj

[15] International obligations in the field of climate remain outside the considerations, such as the Kyoto Protocol (Act on the ratification of the Kyoto Protocol to the United Nations Framework Convention on Climate Change of July 26, 2002, Journal of Laws No. 144, item 1207), Paris Agreement to the United Nations Framework Convention on Climate Change, done at New York on 9 May 1992, adopted in Paris on 12 December 2015 (Journal of Laws 2017, item 36).

encompassing many EU policies. It applies to energy, but also to industry, construction, transport, biodiversity, agriculture and the elimination of air, water and soil pollution.

One of the pillars of the European Green Deal is the European climate law, which aims to ensure that the EU will be climate-neutral by 2050. The European climate law focuses on one element of EU climate policy, i.e., setting a long-term goal towards which the EU's climate protection strategy is to be aimed (Bukowska, 2021). It will determine actions to undertake changes in EU law, not only in the context of climate policy.

European climate law provides for an increase in the 2030 target to reduce greenhouse gas emissions to at least 55% compared to 1990 levels. These targets were then further detailed in, *inter alia*, the Effort Sharing Regulation[16] (approved in March 2023 as part of the "Fit for 55" package) increasing the EU's climate ambition. In particular, all sectors covered by the regulation must achieve a collective emission reduction of 40% by 2030 compared to 2005 levels. The updated Renewable Energy Directive proposes to increase the overall binding target for renewable energy in the EU energy mix to 42.5%.

4. THE IMPLEMENTATION OF CLIMATE POLICY BY POLAND – SEVERAL REMARKS

Due to the limited scope of the paper, it is worthwhile to focus on the instruments which play some of the most important roles in climate policy making.

In fulfilment of its obligations as a Member State, Poland submitted the National Energy and Climate Plan for 2021-2030 (hereinafter: **the National Plan**) to the European Commission. The Committee for European Affairs adopted the Plan at its meeting on 18 December 2019. It is strongly linked to Poland's energy policy until 2040 (hereinafter: **EPP**), which sets the framework for energy transformation in Poland.

The National Plan sets the following climate and energy targets for 2030:

- -7% reduction in greenhouse gas emissions in non-ETS sectors compared to 2005 levels;
- 21-23% share of RES in gross final energy consumption (the 23% target will be achievable if Poland is granted additional EU funds, including those earmarked for a fair transformation);
- 23% increase in energy efficiency compared to PRIMES2007 forecasts;
- reducing the share of coal in electricity generation to 56-60%.[17]

However, this document requires, in accordance with the obligations of European law, an update, which Poland did not make in due time.

In addition, Article 17 of the 2018 Regulation requires an integrated energy and climate progress report. Such has been submitted to the European Commission and covers the period 2020-2021.[18] It is worth looking at a few aspects arising from the above documents.

[16] Regulation (EU) 2023/857 of the European Parliament and of the Council of 19 April 2023 amending Regulation (EU) 2018/842 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement, and Regulation (EU) 2018/1999, OJ L 111, 26.04.2023, pp. 1–14. ELI: http://data.europa.eu/eli/reg/2023/857/oj

[17] Ministerstwo Klimatu i Środowiska. Krajowy plan na rzecz energii i klimatu na lata 2021-2030. Available at: https://www.gov.pl/web/klimat/krajowy-plan-na-rzecz-energii-i-klimatu (accessed on 04.01.2024).

[18] Ministerstwo Klimatu i Środowiska. Zintegrowane krajowe sprawozdanie z postępów w dziedzinie energii i klimatu. Available at: https://www.gov.pl/web/klimat/zintegrowane-krajowe-sprawozdanie-z-postepow-w-dziedzinie-energii-i-klimatu (accessed on 03.01.2024).

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It is quite common to juxtapose climate policy with energy security.[19] This juxtaposition in Poland is particularly not coincidental, as it is often alleged that energy security is more important than climate policy.[20]

When writing about energy security, it is necessary to refer to renewable energy sources, which are included in Pillar II of the EPP and are called zero-emission energy systems. However, what is essential and needs to be made clear is that the EPP strongly emphasises the importance of offshore wind energy.

According to Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources,[21] Member States were required to ensure a certain share of energy from renewable sources (hereinafter: **RES**) in gross final energy consumption in 2020. Mandatory overall targets for individual countries were mostly set at a 20% share of RES in gross final energy consumption. Poland was obliged to achieve at least a 15 per cent[22] share of RES in gross final energy consumption by 2020, with official statistics indicating that this ratio eventually reached 15.4 percent in 2020 and approximately 16.1 cent.[23] However, it is worth noting the change in the calculation of these values for recent years (2018, 2019 and 2020), by adding in the much higher use of wood in domestic boilers, fireplaces and cookers (Derski and Skłodowska, 2021). So far, fluctuations have been noted between 2012 and 2018, placing this ratio at around 12%. What is particularly important is that, since 2016, there has been a complete freeze on the placement of wind farms onshore in Poland as a result of the introduction of the so-called distance rule (also known as the 10H rule)[24] under the Act of 20 May 2016 on Investments in Wind Power Plants,[25] while shifting the centre of gravity and planning to deploy such projects exclusively offshore, which is a strategic project of the EPP. As an aside, it is worth mentioning that the first investments of this type will not be carried out offshore as late as in 2026.[26]

[19] Energy security is usually defined by the energy system's resilience to exceptional and unpredictable events that may threaten the physical integrity of energy flows or lead to unstoppable increases in energy prices regardless of economic fundamentals. More generally, energy security is a state of the economy that ensures that current and future demand for fuels and energy is technically and economically justified, with minimal negative impact of the energy sector on the environment and living conditions of society [Polski Atom. Bezpieczeństwo energetyczne podstawą rozwoju społeczeństwa. Available at: https://www.gov.pl/web/polski-atom/bezpieczenstwo-energetyczne-podstawa-rozwoju-spoleczenstwa (accessed on 04.01.2024)].

[20] Climate Change Performance Index (CCPI). *Poland*. Available at: https://ccpi.org/country/pol/ (accessed on 04.01.2024).

[21] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast) (Text with EEA relevance.). *OJ L 328, 21.12.2018, pp. 82–209. ELI: http://data.europa.eu/eli/dir/2018/2001/oj*

[22] As a side note, it is worth adding that initial calculations assumed that the 15% threshold would not be reached.

[23] According to data from the Central Statistical Office, in 2019, the share of energy from renewable energy sources in final gross energy consumption reached 12.18% (Report of the Central Statistical Office, 2019).

[24] In practice, the distance of the ban on the location of wind farms near residential development could extend to a circle with a radius of approximately 2 kilometres (Makowski, 2018). When comparing Polish regulations to those in other European countries, it should be noted that the 10H rule applied in Poland was one of the most restrictive in Europe. See: Dalla Longa et al. (2018).

[25] Journal of Laws 2021, item 724, as amended, hereinafter referred to as **Investment Act**.

[26] According to the integrated national report on progress in the field of energy and climate (hereinafter: **integrated report**), these installations will be built in the period 2026-2030. See: Ministerstwo Klimatu i Środowiska. Zintegrowane krajowe sprawozdanie z postępów w dziedzinie energii i klimatu. Available at: https://www.gov.pl/web/klimat/zintegrowane-krajowe-sprawozdanie-z-postepow-w-dziedzinie-energii-i-klimatu (accessed on 03.01.2024).

Furthermore, as can be seen from the above, it is declared that at least 23% of the share of RES in gross final energy consumption will be achieved in 2030.[27] However, it should be recalled that the legislation on these issues is not conducive to this type of onshore investment and is the subject of ongoing legislative work. In the author's opinion, achieving an increase of almost 7 percentage points (from about 16% to 23%) over the remaining 6 years (from 2024 to 2030) will be a difficult goal if the legal framework does not change and if offshore wind power plants of the assumed capacity are not built.[28] When considering the legal aspect, it is worth referring to Article 4 of the Investment Act, which introduces a minimum distance between a wind turbine and a residential building According to the wording of this provision: in the case of the placement, construction or reconstruction[29] of a wind power plant, the distance of this plant from a residential building or a building with a mixed function is equal to or greater than ten times the total height of the wind power plant, unless the local plan specifies a different distance, expressed in metres, but not less than 700 metres.[30] It follows that Rule 10H has not been eliminated from the Polish legal order, but only liberalised to a certain extent and does not solve the problems that arise in practice. Both in the previous wording of the act and the current one, in order to locate wind farms onshore it is necessary to do so on the basis of a local spatial development plan (hereinafter also referred to as **a local plan**). Although the legal regulations on spatial planning and development[31] have recently undergone major changes, but this lengthy and costly procedure for this type of investment has not been abolished. At the same time, the legislator explicitly stipulated that the simplified procedure for the adoption of a local plan (Article 27b of the Act on Spatial Planning and Development) cannot be applied to the placement of wind power plants in a municipality. In addition, new obligations have been imposed on the executive bodies of communes, which are open meetings as part of public consultations and the obligation to hold them for a period of at least 60 days, but not more than 90 days (Article 6e of the Wind Power Investment Act). These consultations are not limited only to the area of the commune where the investment will be located. As stipulated in Article 6c of the Investment Act, the executive body of the commune in which the wind power plant will be located is to communicate information on the adoption of a resolution to proceed with the preparation of a local plan on the subject to the executive body of the nearby

[27] It is worth noting the EU's ambitious goals in this area. The latest target is set: by 2030, the share of energy from renewable sources in energy consumption in the EU will be 42.5% (changed by: Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652, OJ L, 2023/2413, 31.10.2023, ELI: http://data.europa.eu/eli/dir/2023/2413/oj, hereinafter referred to as **Directive RED III**). Poland has 18 months to implement EU provisions into national law.

[28] As a side note, it should be noted that renewable energy sources do not only include wind energy; in Poland, this is the source of most renewable energy. Of course, further development of photovoltaics and an increase in the importance of biomass, biogas and geothermal energy are expected. Still, they should not be assigned such an advantage that it will be able to significantly influence the percentage of RES in the final gross energy consumption.

[29] Under the previously applicable law, reconstruction was not covered by the 10H rule. The change was introduced by the Act amending the Act on investments in wind farms and certain other acts of March 9, 2023 (Journal of Laws 2023, item 553).

[30] During legislative work, the minimum distance between the wind farm and residential buildings was increased from 500 meters to 700 meters. According to estimates, this seemingly small difference of 200 meters will reduce the area allowed for wind investments by 44% for the entire country. Available at: https://ambiens.pl/blog/onshore-wind-polish-regulatory-update-distance-act/ (accessed on 04.01.2024).

[31] Act of March 27, 2003, on spatial planning and development (Journal of Laws 2023, item 977, as amended, also known as the Act on Spatial Planning and Development).

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communes.[32] The latter, in turn, indicates the announced ways, place and deadline for submitting applications to the draft of this plan. This means that in the process of adopting a local plan on the basis of which a wind power plant is to be built, not only the inhabitants of the given commune where the investment is to be carried out will be involved, but also the nearby communes. In addition, the Act of 3 October 2008 on the Provision of Information on the Environment and its Protection, Public Participation in Environmental Protection and Environmental Impact Assessments[33] explicitly provides that there is no possibility to waive the strategic environmental impact assessment for the draft local plan based on which the wind power plant is to be located. Even without questioning the legitimacy of these solutions, there has been a prolongation of the investment procedure to locate wind farms on land, which in turn may contribute to a failure to achieve 23% of energy from RES within the assumed timeframe. It should also be realised that an increase in energy production from RES could effectively strengthen the country's energy security, hence the need to take action to amend the legislation (see more Sobieraj, 2021).

All this, in turn, can be juxtaposed with the provisions of the Directive RED III, which has been in force since 20 November 2023, the provisions that Poland should implement within the next 18 months. It emphasises that administrative procedures for issuing permits are one of the main barriers to investment in renewable energy projects and related infrastructure. Therefore, there are proposals for the adoption of rules that would simplify and shorten authorisation procedures, taking into account the broad social acceptance of the use of renewable energy.[34] When writing about this directive, it is worth bearing in mind that, according to its content, member countries are to designate renewables acceleration areas by 21 February, 2026, in which simplified and faster environmental procedures will apply. They are to be selected where the risk of negative impact on the environment is minimal, excluding Natura 2000 sites and areas designated under national protection schemes for nature and biodiversity conservation.[35] It is worth mentioning here that Poland's extensive coverage of nature protection forms was one of the factors blocking the creation of wind farms.[36] In turn, in Art. 15b of the Directive RED III Directive mentions Member States shall carry out a coordinated mapping for the deployment of renewable energy by 21 May, 2025, to determine the national potential. For this purpose, Member States may use or build upon their existing spatial planning documents or plans, including maritime spatial plans. As for spatial planning in naval areas, Poland has introduced the Spatial Development Plan for Polish Maritime Areas, which was adopted by the regulation of the Council of Ministers on 14 April, 2021.[37] It included areas dedicated to renewable energy, where it was possible to build offshore

[32] As stated in Art. 2 point 5 of the Investment Act, a nearby commune is a commune whose area, in whole or in part, is located at a distance less than ten times the maximum total height of a given wind farm situated in another commune.
[33] Journal of Laws 2023, item 1094, as amended.
[34] See more for instance in Art. 16 and 16a of Directive RED III.
[35] See Article 15c of the Directive RED III.
[36] There are 1,013 Natura 2000 sites in Poland (which constitutes approximately 20% of the country). The area of legally protected areas at the end of 2022 was over 10.1 million hectares, which was 32.3% of the country's area. This is the statistical yearbook of the Central Statistical Office. See: Główny Urząd Statystyczny (2023). *Ochrona środowiska 2023. Environment 2023.* Available at: https://stat.gov.pl/download/gfx/portalinformacyjny/pl/defaultaktualnosci/5484/1/24/1/ochrona_srodowiska_2023.pdf (accessed on 30.03.2024).
[37] Journal of Laws 2021, item 935.

wind farms (the area is 2,340 km2 and constitutes 10% of the exclusive economic zone).[38] In relation to land-based spatial planning, this task may be difficult because local plans are optional (except in a few cases when they are obligatory) and the country's area is only slightly over 30% (Swianiewicz and Łukomska, 2022). In the author's opinion, the abovementioned circumstances may lead to gaps and delays in implementing the Directive RED III.

In the context of Poland, a significant climate change theme is air protection, which is one of the three main pillars of the EPP. This good air quality will be possible, according to the EPP, thanks to "investments in the transformation of the heating sector (system and individual), electrification of transport and promotion of passive and zero-emission houses using local energy sources", and "a key result of the transformation that every citizen will feel will be the ensuring of clean air in Poland".[39] Of course, air pollution can come from various sources (e.g. transport), but in Poland, the main problem of exceptionally poor air quality compared to other European countries is fuel combustion processes in the municipal and domestic sector, associated with heating buildings using solid fuels.[40] However, it seems that the wide range of legal instruments provided in Poland in this regard, does not fulfil its role (Radecka, 2020, 2021). This conclusion can be drawn, for example, after tracing the results of measurements of particulate matter concentrations in the heating season 2022/2023. The report shows, *inter alia*, that there are towns and cities in Poland where the number of smog days[41] fluctuates around 100 per year (Michalak and Dworakowska, 2023) and, in addition, as many as 180 of the 211 Polish towns and cities monitored for air pollution did not meet the quality standards and recommendations of the World Health Organization (WHO) regarding the maximum number of days with exceedances of the 24-hour average PM10 level (Michalak and Dworakowska, 2023). Determining the reasons for this is multifaceted, as the problem is not just legal (e.g., terrain, lack of urban ventilation, or atmospheric conditions also have an impact here). As a side note, it is worth pointing out that the results of the analyses indicate that proper law enforcement may be important.

Pursuant to Article 334 of the Act of 27 April 2001 – Environmental Protection Law,[42] whoever fails to comply with restrictions, orders or prohibitions set out in a resolution of the voivodship assembly adopted pursuant to Article 96 [so-called anti-smog resolutions[43] – ER], is punishable by a fine. It should be noted that it is disputed,

[38] Morska Energetyka Wiatrowa. Plan zagospodarowania przestrzennego polskich obszarów morskich. Available at: https://www.gov.pl/web/morska-energetyka-wiatrowa/plan-zagospodarowania-przestrzennego-polskich-obszarow-morskich (accessed on 30.03.2024).

[39] EPP, p. 6.

[40] The most critical and dangerous source of air pollution throughout Poland is the so-called low emissions (emission of dust and harmful gases at a height of up to 40 m, mainly from home heating stoves and local boiler houses burning coal and wood). It causes significant releases of PM2.5 dust and the carcinogenic benzo(a)pyrene contained in the dust. In larger cities, road transport also contributes to air quality deterioration (report of the World Health Organization (hereinafter referred to as **WHO**), entitled: "Individual actions and risk communication in connection with air pollution", p. 10, available at: https://www.gov.pl/web/uw-mazowiecki/who-o-ryzyku-zwiazanym-z-zanieczyszczeniem-powietrza-w-polsce2 (accessed on 04.01.2024).

[41] According to WHO guidelines, these are days with concentrations above 45 ug/m3/ (WHO Global Air Quality Guidelines, 2021).

[42] Journal of Laws 2022, item 2556 as amended.

[43] As stated in art. 96 of the Environmental Protection Law, the voivodeship assembly may, by way of a resolution, to prevent a negative impact on human health or the environment, introduce restrictions or prohibitions on the operation of installations in which fuels are burned. In practice, it is possible, for example, to prohibit the burning of hard coal in furnaces of a specific category. See: Uchwała sejmiku nr V/36/1/2017. Available at: https://powietrze.slaskie.pl/content/uchwala-sejmiku-nr-v3612017 (accessed on 06.01.2024).

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otherwise rightly, that a misdemeanour liability model was used to enforce this violation (Kruczyński and Gerwatowska, 2023, pp. 77-91). That it is ineffective is also evidenced by the results of a study conducted for the Silesian Voivodeship, one of the most polluted voivodeships in Poland, next to the Lesser Poland Voivodeship. In 2022, out of 1561 interventions in relation to this provision's content, 1133 (almost 73% of cases) ended only with instruction and not with imposing a fine or sending a motion for punishment to court (Jędrzejek, 2023, p. 64).[44] This leads one to reflect on the failure to realise the hopes placed in this legal instrument as one that could make a real difference to air quality in Poland by performing a deterrent function.

Finally, it is worth mentioning that Poland does not have a framework law strictly related to climate.[45] Such a situation should be assessed negatively, as perhaps this systematic and coherent law would be one way of achieving an effective climate policy in Poland. Although a draft of 17 April 2023 was submitted,[46] it has not yet seen legislative work. The absence of such an act certainly does not contribute to improvements in this area, if only due to the lack of specialised, expert advisory bodies. Of course, it should not be an aim in itself to adopt a law with questionable, inconsistent, ill-conceived regulations. Evaluating various factors (e.g., the socio-economic situation or the obligations of a Member State), it would be appropriate to create such legal norms, which will, if only as a framework, set the correct, developmental direction in the pursuit of climate policy for Poland.

5. CONCLUSION

The analyses presented in this paper led to a conclusion on Poland's inadequate implementation of climate policy in the discussed areas. The problems arise from the complexity of the legal norms and lengthy administrative procedures (vide: RES) or inadequate enforcement of the legislation (vide air protection). The lack of a systematic act regulating these issues, which could make a real contribution to systematising standards in the fight against climate change by, for example, introducing instruments that would have a real impact on improving climate policy, is also significant. At the same time, when drafting such an act, it is crucial to be aware that policymaking is not only about introducing orders, prohibitions or restrictions, plans, programmes, objectives and targets, but also about the need to include effective tools for enforcing the standards contained therein, as well as the important financial aspect of the fight against climate

[44] Of the 48 municipal guard units in the Silesian Voivodeship, information was obtained from 35 guards. The period taken into account is the time range from 2019 to 2022.

[45] Climate protection laws are in force in the USA, Australia, 16 EU member states (Austria, Bulgaria, Croatia, Denmark, Finland, France, Greece, Spain, Ireland, Luxembourg, Malta, the Netherlands, Germany, Portugal, Sweden, Hungary) and in 5 other European countries (Iceland, Liechtenstein, Norway, Switzerland, Great Britain). Work on laws is underway in another 4 EU Member States (Estonia, Latvia, Slovakia, Slovenia) and in Turkey [early 2023; see: Dlaczego Polska potrzebuje własnej ustawy o ochronie klimatu? In: ClientEarth, Prawnicy dla Ziemi, available at: https://www.clientearth.pl/dlaczego-polska-potrzebuje-wlasnej-ustawy-o-ochronie-klimatu/ (accessed on 04.01.2024), as well as: CAN Europe (2023). Climate laws in Europe – essential for achieving climate neutrality (report), published on 06.12.2023, available at: https://caneurope.org/climate-laws-2023/ (accessed on 04.01.2024)].

[46] ClientEarth Prawnicy dla Ziemi (2023). Projekt ustawy o ochronie klimatu. Available at: https://www.clientearth.pl/najnowsze-dzialania/materialy-do-pobrania/projekt-ustawy-o-ochronie-klimatu/ (accessed on 04.01.2024). The main assumptions of this project include climate neutrality by 2050 at the latest, at least 1% of GDP annually for climate protection, the obligation to check whether significant investments do not harm the climate, preparation of plans to combat the effects of extreme weather phenomena, the establishment of the Climate Protection Council, as well as granting the inhabitants of Poland a new right – the right to a safe climate.

change. It is certain, however, that the act must include ambitious, multidirectional and comprehensive measures, which should be treated as a priority. After all, one should be aware that Poland, in comparison with other European countries, must undertake extensive measures, which will entail high transformation costs. This, however, will not be possible without correct and effective legal norms.

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INDEPENDENT FISCAL INSTITUTIONS AS A PART OF EUROPEAN TRADITIONS / Maciej Serowaniec

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Abstract: *Fiscal councils are independent public institutions aiming to promote the sustainability of public finances through various functions, such as assessing budgetary plans and their implementation or preparing budgetary and macroeconomic forecasts. Thus, synthesising the attempts made in the literature to define the concept of independent fiscal institutions, it should be emphasised that by providing an independent, impartial and objective assessment of fiscal policy and performance, they promote sound fiscal decisions and sustainable public finances. Independent fiscal institutions also reduce information asymmetries and promote transparency in public finances, thereby raising the reputation and electoral costs for governments that pursue imprudent policies or breach key commitments. As such, they can support contemporary states in addressing the tendency to increase spending and deficits. To better understand the contemporary factual and normative state of the analysed dissertation topic, it is worth tracing, even in some summary, the process of emergence and the directions of development and evolution of independent fiscal institutions. Although independent fiscal institutions are relatively new bodies in the political architecture of the vast majority of the EU Member States, a small group of countries pioneered the creation of these institutions. It is necessary to trace the systemic solutions that have determined the legal and constitutional status of fiscal institutions in recent decades in order to understand the factors that have led to their reassessment.*

Key words: *Fiscal Councils; Independent Fiscal Institutions; Fiscal Policy; Fiscal Deficit*

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1. INTRODUCTORY REMARKS

In the last decade, there has been a marked increase in interest in independent bodies monitoring medium-term fiscal sustainability (so-called watchdog institutions). This trend is confirmed by, among others, the Organisation for Economic Cooperation and Development (hereinafter: OECD), the International Monetary Fund (hereinafter: IMF) and the European Commission. The importance of this solution has increased, especially in recent years, in view of the deteriorating financial state and outlook of individual countries. The ongoing debt crisis has been compounded by phenomena already identified, such as the tendency of politicians to increase deficit bias, the unsustainability

of public debt despite good economic times (debt ratcheting), and the ageing population process. A consequence of the above is that the practical role of fiscal councils has increased. The intensity of their establishment has increased, especially in European countries, where supranational criteria are imposed to fulfil the annual general government deficit and debt-to-GDP ratio, but also the medium-term objective (Horvath, 2018).

There are competing definitions of fiscal councils in the literature, highlighting the different structural features of these institutions. In light of the definition proposed by X. Debrun, independent fiscal institutions monitor fiscal policy and evaluate public finance reforms, and their activities should be focused on promoting fiscal policy sustainability. Unlike the central bank and the parliament, Fiscal councils monitor and evaluate government actions independently and autonomously, in other words, 'depoliticising fiscal policy' (Debrun, 2010). The competences of the fiscal councils include, in particular, the preparation of macroeconomic forecasts for the state budget or advising the government on fiscal policy. The delegation of these functions to fiscal councils is primarily justified by the tendency of public authorities to make overly optimistic macroeconomic assumptions that form the basis of their budgets (Kopits, 2011). Therefore, fiscal councils aim to reduce the risks associated with decision-making in this area (Hagemann, 2011). In contrast, according to the broadest definition introduced by the European Commission, fiscal councils are non-partisan public bodies, other than the central bank, the government or the parliament, tasked with preparing macroeconomic forecasts for the budget, monitoring the progress of fiscal policy implementation and/or carrying out advisory tasks for public authorities. They are publicly funded bodies, but have an independent position, especially concerning the government. Fiscal councils are thus a kind of complement to EU fiscal rules, being an important element of sustainable fiscal policy. It is worth noting at this point that in its definition the European Commission also allows for the possibility of the above tasks being carried out by supreme state control bodies. According to the definition worked out by the OECD, fiscal councils are established based on public law, employing non-partisan professionals with a mandate to carry out continuous monitoring and/or advice on implementing fiscal policy. The mandate of such institutions is to increase pressure for fiscal discipline, raise the quality of the debate on public finances and promote fiscal transparency and accountability (OECD, 2014). On the other hand, as the IMF points out in its studies, fiscal councils are independent public institutions that support the sustainability of public finances through various functions, such as assessing fiscal plans and their implementation or preparing budgetary and macroeconomic forecasts. Thus, synthesising the attempts made in the literature to define the concept of independent fiscal institutions, it should be emphasised that by providing an independent, impartial and objective assessment of fiscal policy and performance, they promote sound fiscal decisions and sustainable public finances. Independent fiscal institutions also reduce information asymmetries and promote transparency in public finances, thereby raising the reputation and electoral costs for governments that pursue imprudent policies or breach key commitments. As such, they can support modern states in addressing the tendency to increase spending and deficits (IMF, 2013).

Independent fiscal institutions are relatively new bodies in the political architecture of the most EU Member States. However, there is a small group of countries that pioneered the creation of these institutions - Belgium (1936), the Netherlands (1945), Denmark (1962), Germany (1963) and Austria (1970). This paper aims to analyse the systemic solutions determining the legal and constitutional status of independent fiscal institutions in the countries mentioned above over the last few decades. Obviously, the

competences and mandates of these institutions have undergone significant changes over time, most notably those necessary to adapt to the requirements of the EU regulations. This analysis is essential for a better understanding of the contemporary systemic position of fiscal councils. The analysis will also allow an answer to the question of what factual and normative factors have contributed to the promotion of independent fiscal institutions as a specific element of the European systemic tradition. The analysis of EU regulations determining the development of fiscal councils is left out of the scope of consideration, as this issue is thoroughly analysed in the literature.

The thematic scope of the work made it necessary to use several scientific research methods, namely the legal-dogmatic method, the legal-comparative method and the historical method. The historical method was used primarily to show the formation process and the directions of development and evolution of independent fiscal institutions. In characterising the systemic position of fiscal councils, the legal-dogmatic method, on the other hand, played a fundamental role, while the legal-comparative method was used complementarily.

2. THE EMERGENCE AND DEVELOPMENT OF FISCAL COUNCILS IN EUROPEAN COUNTRIES

The current trend towards creating independent fiscal institutions has two main sources of inspiration. The first derives from the pre-existing institutions whose remit ensured they acted as independent observers of budgetary decisions. Such institutions include the Belgian Supreme Council of Finance (*Conseil Supérieur des Finances*), the Dutch Central Planning Office (*Centraal Planbureau*), the Danish Economic Council (*De Økonomiske Råd*) and the German Council of Economic Experts (*Sachverständigenrat zur Begutachtung der gesamtwirtschaftlichen Entwicklung*). An excellent example of the institutions mentioned above is the Belgian Supreme Council of Finance. It was created as an advisory institution of a technical nature, but it was not until the reforms of the 1980s that its fiscal policy position was strengthened. In parallel, it was decided in 1959 to set up a Federal Planning Bureau in Belgium to propose and develop economic plans. The Bureau was reformed in 1970, 1980 and 1994, abandoning some of its former tasks and focusing on preparing economic forecasts and impact analyses. Belgium is thus not only an example of a country with an old and well-functioning fiscal council, but also an example of the dual agency model. The Dutch Central Planning Bureau was set up in the Netherlands in 1945 to research public policy implementation by state bodies. This institution, taking action on its initiative or at the request of the government, parliament, trade unions and employers' federations, quickly became an important forum for opinion and advice to develop a common macroeconomic strategy to support the post-war economic recovery. This body had a broad range of powers to co-create the economic decision-making process of politicians and social partners. Within its remit, it was responsible for, among other things, the preparation of forecasts (also used by the government in the preparation of the annual budget) of short-, medium- and long-term macroeconomic analyses, conducting analyses of the dynamics of the state's finances, and carrying out research and evaluations in the field of public policies. The atypical task of the Central Planning Bureau to analyse, in a politically neutral manner, the economic stability and budgetary implications of the proposals contained in the programmes of the parties and coalitions participating in the elections became particularly important. Over time, such an instrument has proved useful for making political groupings more accountable (Bos and Teulings, 2012). In contrast, the Danish Economic Council (*Økonomiske Råd*) was established in 1962. One of its primary objectives was to monitor

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the country's economic situation and analyse its long-term development dynamics. The Economic Council comprised four experts, usually representing the academic community (the so-called 'wise men'), whom the government formally elected. The Council's activities mainly focused on the preparation of seminal reports on issues of an economic nature. The analyses concerned the main public policies (among which the budget gained the most prominence) and were always of great interest to the public. The executive often implemented the recommendations adopted. The term 'wise men' is also customarily used to refer to the Council of Economic Experts members, an 'academic body' established in Germany in 1963. The primary task of the Council of Experts was to assist all bodies responsible for economic policy and the general public in formulating sound opinions on economic issues. Appointed, by the Federal President at the government's request, the experts advised the Federal Government on economic policy issues and the assessment of national macroeconomic development. In addition to special reports, the Council of Experts still produces an annual report to this day, the content of which has already become an important reference point in the political debate on economic issues, directly influencing some important decisions of the federal government. Over the last sixty years, the Council of Experts has steadily strengthened its position, thanks to the independence, transparency and precision of its analyses of the national economic situation. In Austria, on the other hand, the Public Debt Committee (*Staatsschuldenausschuss*) was established in 1970. The appointment procedure for the fourteen members of the Committee involves not only the government, but also the Federal Chamber of Commerce and the Chamber of Labour. Initially, as part of its advisory activities, the Committee focused exclusively on public debt issues (Kopits, 2011, pp. 2–5). Since 2002, this institution has also conducted budgetary policy and public finance analyses. Thus, from the very beginning of the existence of these institutions, their primary objective has been to mitigate the risks associated with the pursuit of irresponsible fiscal policies and, above all, to monitor them, control the budget deficit and assess the long-term effects of the actions taken by public authorities in this area. It is worth noting, however, that some European countries have given up creating a new body tasked with monitoring fiscal policy and public debt dynamics, preferring to entrust this task to already existing institutions (e.g., France) (Viney and Poole, 2019).

A second source of inspiration for creating such institutions has come from proposals from the research community. In particular, the OECD and the IMF have published a significant number of policy papers, reports and reports on international financial institutions, providing an economically, fiscally and politically oriented assessment of the performance of these institutions, where they have been established, without taking into account the constitutional dimension of their existence: namely, the impact on constitutional principles and dynamics, including representative democracy, separation of powers, checks and balances and democratic accountability (Jankovics and Sherwood, 2017).

These documents point to two main reasons for creating independent fiscal institutions. The first relates to the objective of countering the trend towards deficits. Fiscal councils are meant to reduce the focus of most governments on short-term expansionary economic policies, particularly public spending, to increase electoral popularity through their decisions, instead of looking after the long-term interests of society to reduce the deficit and public debt. From this point of view, fiscal councils serve the purpose of 'intergenerational constitutional justice' against the 'pressure of time inconsistency'. In this context, it has even been argued that fiscal councils can be a 'weapon against populism', being able to foster more responsible and technically informed policy decisions. Independent fiscal institutions, at least in concept, can prevent

the risk of political manipulation of macroeconomic forecasts and fiscal policies by populist governments just looking to please voters (Tesche, 2019).

The second objective that fiscal councils can help to achieve is to respond to the problem of the information asymmetry faced by citizens and parliaments, especially the parliamentary opposition and minorities, in controlling the budgetary process. The 'financial hegemony of the executive' has affected parliaments for decades and is more or less evident depending on the system of government. Economic and fiscal governance in the eurozone has further complicated this picture and exacerbated the problem of information asymmetry, given how the European and national semesters develop, in constant interaction between the EU institutions and member state governments. Properly functioning democracies require that all parties are fully informed. However, this condition is often not fulfilled because there is an information asymmetry between the government on the one hand and the voters and opposition parties on the other.

Consequently, voters may be unable to observe the government's 'true' fiscal situation. In the absence of sufficient understanding of the intertemporal fiscal constraint - which assumes that future primary surpluses must be equal to or greater than the outstanding net public debt - voters may be inclined to succumb to excessive optimism about the 'true' state of the public finances ('fiscal illusion'). A government claiming that a fiscal policy measure will be budget neutral makes it difficult for the average voter to verify this information (Calmfors and Wren-Lewis, 2011). If governments exploit this information asymmetry for electoral gain, a well-known political virtuous cycle will ensue, leading to persistently high budget deficits. Therefore, the dissemination of non-partisan assessments of fiscal policy can foster a common understanding of the trade-offs underlying fiscal policy and even out the information asymmetry.

The need for fiscal councils stems primarily from developing, implementing and adhering to a fiscal framework that aims to achieve a sustainable fiscal policy based on fiscal balance and preserving the stability of the public financial system. The literature points to two main objectives of the fiscal policy pursued:

1) a short-term goal that primarily serves to achieve *fiscal sustainability* outcomes, and
2) the need to take long-term measures is primarily related to ensuring the solvency of the public finance sector and maintaining an appropriate relationship between public debt and the country's level of economic development.

The definition of these 'rules of the game' should help to reduce the discretionary nature of the fiscal policy implemented in favour of its accountability. With commitments to the sustainability of public finances coming under scrutiny since the crisis, policymakers are looking for new ways to maintain fiscal discipline and restore public confidence in their ability to manage public budgets prudently and transparently (Tesche, 2019). While budgetary decision-making is ultimately the responsibility of democratically elected constitutional organs of the state, Independent fiscal institutions, often in addition to credible fiscal rules, are seen as a mechanism to help combat tendencies to increase spending and deficits and, more generally, to enhance fiscal discipline, promote greater fiscal transparency and accountability, and improve the quality of public debate on fiscal policy. Therefore, the fundamental objective of constituting independent fiscal institutions is increasing control over budget formulation and implementation. However, several basic requirements must be met for a fiscal council to function efficiently and effectively. The first is properly identifying national needs from analysing the existing legal, organisational and political circumstances. The second requirement is to keep the fiscal council members apolitical and independent and to apply transparent rules for their

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selection. *Last, but not least,* fiscal councils must also be provided with access to up-to-date statistical data and an efficient analytical apparatus capable of preparing and presenting analyses illustrating economic and financial status and developments in national, European and global terms (Hagemann, 2011).

At this point, two opposing views on the democratic legitimacy of fiscal councils have emerged in the literature. The first one sees the emergence of fiscal councils as compatible with and even reinforcing the idea of democracy (Fasone, 2022; European Commission, 2014; Fasone and Fromage, 2017). Fiscal councils can function as 'accountability multipliers' and strengthen the role of national parliaments through increased fiscal control capacity (Fromage, 2017). Fiscal councils do not have direct policy instruments to correct the fiscal path, forcing a fiscally profligate government to act through their orchestrating capacity, i.e., disseminating non-partisan analyses of fiscal policy choices. Thus, fiscal councils can generate 'technocratic legitimacy' by improving the quality of fiscal policy debates by introducing 'impartial' information into the democratic process. The second argues that it underpins 'a growing technocratic tendency where experts no longer inform the decision-making process but become decision-makers' (Fasone, 2022, p. 265), depriving democratically elected representatives of their policy tools. The government (trustees) thus entrusts the politically independent fiscal council with direct fiscal policy instruments (such as setting the debt ceiling or spending) (European Commission, 2014).

3. SUMMARY

Summing up the findings so far, it is safe to say that independent fiscal institutions have become part of the European systemic tradition. Indeed, some European countries (Belgium, the Netherlands, Denmark, Germany and Austria) were established long before the adoption of EU regulations defining their role in national fiscal policies. The analysis shows that the role of fiscal councils initially focused on designing, implementing and adhering to a fiscal framework aimed at achieving sustainable fiscal policies based on fiscal balance and preserving the stability of the public financial system. Over time, their role began to grow steadily by monitoring the executive based on the financial implications of its policy options, by providing, validating or assessing macroeconomic forecasts and by making the results of their analyses publicly available, independent financial institutions are now able not only to enhance the credibility and transparency of fiscal decisions, but can also strengthen *ex ante* parliamentary scrutiny and *ex post* oversight in budgetary matters. It should be stressed, however, that the ability of fiscal councils to strengthen democratic accountability depends on several factors, such as the increased transparency of the budgetary procedures they can trigger and the extent to which they can force the executive to be publicly accountable for its budgetary choices and to justify to parliament deviations from the medium-term objective (Fasone, 2021).

As C. Fasone and E. Griglio point out in the inter-institutional struggle that tends to dominate budgetary and financial procedures, the creation of independent financial institutions may determine a change in the long-standing dominance of the executive in budgetary matters in most EU countries. In all EU Member States, parliaments have often been marginalised in fiscal decision-making and are less equipped to inform fiscal policy than governments. This evidence is further reinforced by the fact that European New Economic Governance measures, urging stricter fiscal discipline within a certain timeframe, essentially limit the room for manoeuvre of national parliaments in a context

such as the EU, where these legislative bodies have usually been considered 'losers' of the European integration process (Fasone and Griglio, 2013).

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MAIN CRITERIA FOR THE CLASSIFICATION OF DISINFORMATION AND ATTEMPTS TO CRIMINALISATION OF ITS SPREAD IN UKRAINE / Viktor Tyshchuk

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Abstract: *Based on the methodology of documentary review of scientific sources, available materials of public organisations, the judicial practices in investigating cases of disinformation spread, Ukrainian and foreign sources, the process of disinformation propagation has been researched. Using this approach, the main criteria for classifying disinformation by domains, objectives, methods, sources, forms, and channels were formulated. It was found that in Ukraine, there is still no unified legislative practice to counter disinformation, which leads to the uncontrolled application of manipulative processes and the dissemination of unreliable information by hostile intelligence services. Mass media and other channels of disinformation dissemination continue to evade the attention of law enforcement agencies, for instance, in the fields of economics, science, education, culture, and sports.*

Keywords: *Disinformation Classification; Active Measures; Special Services; Criminal Law; Criminalisation of Disinformation Dissemination; Ukrainian law*

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1. INTRODUCTION

The phenomenon of "disinformation" is becoming increasingly widespread and we have long known that it is an integral part of our information space. The number of countries using disinformation campaigns is constantly growing and the manipulation of information has become a weapon for some countries, which use it to support their regimes and influence other nations - undermining their resilience and even interfering in elections. For Ukraine, disinformation remains a serious threat, as it has become one of the main instruments of the aggressor state during the war. The impact of disinformation can be so powerful that the aggressor state not only manages to change the sentiments of Ukrainians, but also to influence the societies of many countries worldwide. At the same time, other countries such as China and Iran are quickly learning the harmful lessons of disinformation and making their own contribution to the rapid spread of manipulations (Prometheus, 2023).

The use of modern technologies and social media has helped disinformation campaigns to operate more quickly and effectively, creating threats to democratic processes and public trust in information.

A significant amount of material investigating the phenomenon of disinformation is available in open access, and there are also resources that inform the public about such examples. However, the resources that characterise the essence of disinformation and designed to establish centres to combat these destructive actions in practice remain unknown to the general population, which is the target of most disinformation efforts. Therefore, considering the reality of insufficient public awareness, a considerable amount of theoretical and practical data on disinformation encourages research in the following areas: to examine the evolution of disinformation using a synonym chain: deception - disinformation - active measures; to develop the main criteria for classifying disinformation and apply this classification against specific examples; to study attempts to criminalise the dissemination of disinformation in Ukraine.

2. THEORETICAL BASICS

The systemic-structural method of disinformation description is employed to create a classification based on domains, objectives, methods, sources, forms, and channels.

The formal legal method allowed the author to analyse the legal essence of the provisions of regulatory acts that regulate the organisation of countering disinformation in Ukraine and establish the grounds for liability for committing legal violations.

Of course, this paper also employs the comparative-legal method. This helped to obtain a better understanding of the process of disinformation spread.

3. ANALYSIS OF LATEST RESEARCH

The works of scholars such as Dakhno (2022), Chernysh (2019), and others are dedicated to the study of specific aspects of the investigated problem. In this direction, Malarenko (2021) worked on studying the best modern foreign practices to prevent the spread of fakes and disinformation in the face of large-scale hybrid threats. For example, legal experts Dvorovyi and Liudva (2021) prepared an analytical report with the support of the American Bar Association Rule of Law Initiative (ABA ROLI) in Ukraine, which addresses issues related to defining "disinformation", its impact on the world's internet, and compliance with international standards in the field of freedom of expression. Based on the research findings, the authors provided important recommendations for the regulation aimed at reducing the impact of disinformation (Dvorovyi and Liudva 2021). An interesting perspective is presented by Safarov (2020), who believes that there is already legislation and mechanisms to counter disinformation in Ukraine and divides the legislative response to disinformation spread into three levels: civil liability (within: Article 32, Part Four of the Constitution of Ukraine (1996); Article 278 of the Civil Code of Ukraine (2003)), administrative liability (within: Articles 7, 71, 72 of the Law of Ukraine "On Television and Radio Broadcasting" (1993)); Articles 3, 18 of the Law of Ukraine "On the Printed Media (the Press) in Ukraine" (1992); Article 173-1 of the Code of Ukraine on Administrative Offences (1984)), and criminal liability (within Articles 109, 250, 182, 168, 232 of the Criminal Code of Ukraine (2001)).

Despite the scholarly contributions of the above-mentioned researchers, it is necessary to acknowledge that many problematic issues regarding the investigation and prevention of crimes related to the dissemination of false information, as outlined in -

Articles 161 ("Violation of rules for disclosure or dissemination of information that contains state secrets"), 258-3 ("Dissemination of false information about a person holding an important state position") and 259 ("Dissemination of false information") of the Criminal Code of Ukraine (2001), continue to persist. Now, considering the manifestations of new methods of unlawful influence, the study of the specifics of disinformation measures is of paramount importance for rapid, comprehensive, and effective investigation of these crimes and their prevention.

The purpose of this paper is to explore the main criteria for classifying disinformation and attempts to criminalise its dissemination in Ukraine.

4. RESULTS AND THEIR DISCUSSION

4.1 Disinformation: from Deception to Active Measures

The evolutionary development of disinformation is demonstrated through a synonym chain of words: deception – disinformation – active measures, which allows us to assert that disinformation and deception are related but distinct concepts. Therefore, to better understand the term "disinformation", it is worth comparing it with the concept of "deception", which is evidently primary. When examining the synonymous relationship of the mentioned terms, it is crucial to note that the distinction between them manifests in increasing complexity, but the essence – deception – remains common to all.

The paper provides definitions of the terms deception, disinformation, and "active measures" based on Ukrainian linguistics. However, in the conclusions, the definitions are provided in English, and there is also a reference to the legislation of the European Union.

Starting with the concept of "deception", which has a negative connotation and reflects the use of false information for gain or advantage, it is also essential to consider the essence of "disinformation". Disinformation is a broader term that encompasses not only false information but also distorted, altered, concealed, or forged information.

Deception[1] is an attempt to mislead an opponent by presenting falsehood with the aim of gaining an advantage or achieving one's goals (a lack of truth; something that does not exist in reality) (Dictionary of the Ukrainian language, 1974).

Disinformation[2] is the deliberate dissemination of false information with the intention of influencing the thoughts, behaviour, or decision-making of the opponent. Disinformation is a more complex and differentiated method than simple deception. It may involve various techniques, such as creating forged documents, disseminating purchased materials through mass media, or abusing the trust of well-known sources of

[1] Meaning of deception in English: the act of hiding the truth, especially to get an advantage; meaning of deception in the American dictionary: a statement or action that hides the truth, or the act of hiding the truth; meaning of the word deception in business English: dishonest or illegal methods that are used to get something, or to make people believe that something is true when it is not. (Cambridge Dictionary, 2024, available at: https://dictionary.cambridge.org/dictionary/english/deception (accessed on 23.01.2024)).

[2] Meaning of disinformation in English: wrong information, or the fact that people are misinformed; information intended to deceive. (Cambridge Dictionary, 2024, available at: https://dictionary.cambridge.org/dictionary/english/disinformation (accessed on 23.01.2024)). Disinformation is false or misleading content that is spread with an intention to deceive or secure economic or political gain and which may cause public harm. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *On the European democracy action plan* (COM (2020) 790 final), 17-18, accessed July 24, 2021. Available at:
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0790&from=EN (accessed on 23.01.2024).

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information (misleading with false information) (Dictionary of the Ukrainian language, 1971).

The Great Ukrainian Encyclopaedia in the thematic index of "Legal sciences" provides the following definition of disinformation: disinformation is a consciously false message, distorted information disseminated with the aim of misleading the public, political opponents (Babka, Shumylo and Kyrydon, 2017).

Alongside "disinformation", the term "misinformation"[3] is often used, and although they are closely related, the main distinction between them lies in the fact that "misinformation" is disseminated without intentional deceptive intentions and often arises from innocent mistakes or a lack of verification. In contrast, "disinformation" involves deliberate deception and the spread of information with malicious intent to manipulate, deceive, or cause harm. Both terms can have negative consequences; however, disinformation poses a more serious threat due to its intentional nature.

The full seriousness of the threat of disinformation is revealed by the dictionary of one of the disseminators of disinformation - the soviet state security committee.

In this dictionary, the term "disinformation" is defined as specially prepared information used to "create false impressions in the enemy's consciousness, based on which the enemy may make decisions favourable to the disinformation party". This same dictionary suggests considering an attempt to mislead the enemy as a component of "active measures" (Datsenko, 2018).

The final element of the synonymous chain, "active measures"[4] reflects the increasing complexity and manipulativeness of disinformation campaigns. In the modern world, disinformation actively employs a wide range of methods and means to manipulate the thoughts and beliefs of the public. Specifically, active measures (the highest form of disinformation) include the creation of fake news and videos, forgery of documents, the use of bots and "paid" hackers, the spread of viruses on websites, organizing hacker attacks, and other methods and means that keep pace with technological progress and the social development of human civilisation.

[3] Meaning of misinformation in English: wrong information, or the fact that people are misinformed. (Cambridge Dictionary, 2024, available at: https://dictionary.cambridge.org/dictionary/english/misinformation (accessed on 23.01.2024)).
Misinformation is false or misleading content shared without harmful intent though the effects can still be harmful, e.g., when people share false information with friends and family in good faith. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *On the European democracy action plan* (COM (2020) 790 final), 17-18, accessed July 24, 2021. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0790&from=EN (accessed on 23.01.2024).

[4] Active measures: covert political operations ranging from disinformation campaigns to staging insurrections – have a long and inglorious tradition and reflect a permanent wartime mentality, something dating back to the soviet era (Galeotti, 2019).
The concept of "active measures" covers offensive measures aimed at disinformation, deception, sabotage, destabilization and espionage arising from the premises and priorities of the foreign policy of the soviet authorities, the purpose of which was to force the enemy to act in the desired way. The term unites various methods used in operations aimed at influencing the international environment of the soviet territory and supporting the foreign policy of this authoritarian regime (Darczewska and Zochowski, 2017).
The definitions of active measures in their counterintelligence and intelligence aspects include common elements. These are: to build up espionage positions in the camp of the enemy and his surroundings, conducting operational games with the enemy, his disinformation, discretization, compromise and demoralization, as well as operational actions of espionage aimed at influencing the foreign policy and the domestic political situation of those countries that are the targets of these actions (Darczewska and Zochowski, 2017).

The Law of Ukraine "On Intelligence" (2020) defines special (active) measures as intelligence activities aimed at advancing national interests and countering intentions, plans, and actions that pose external threats to national security.

It is interesting that in 1972, the purpose and essence of the "active measures" of the practice of the soviet special services were defined in a slightly different way: "the actions of counterintelligence that allow penetrating the enemy's plans, preventing its undesirable actions, deceiving the enemy, seizing the initiative, and thwarting subversive activities". Despite these measures being described here as part of counterintelligence activities, this definition clearly outlines them as "offensive" actions that "enable the early detection and prevention of enemy activity, compelling the enemy to reveal itself, imposing one's will on them, and making them to operate in adverse conditions and in the desired direction for counterintelligence". The methods proposed for use in modern "counterintelligence" activities align with the understanding of "active measures" by Western intelligence services: "creating espionage networks within the enemy environment, conducting operational games with the enemy involving disinformation, compromise, and demoralization" (Dubov, Barovska, Isakova, Koval, and Horbulin, 2017).

So, "active measures" are a broad term encompassing intelligence and counterintelligence activities in addition to disinformation operations. State institutions in various countries and individual authors provide similar explanations of the term "active measures", some of which are presented in the footnotes to this paper. According to the author, a common characteristic of all attempts to define "active measures" is the use of disinformation as the primary tool for their implementation in related areas of activity within intelligence and counterintelligence services. Furthermore, to grasp the true essence of "active measures", it is always relevant to consider their initial definition by the Soviet security committee.

In the legislation of the European Union, we do not find a definition for the term "active measures". However, in the author's opinion, related terms such as "information influence operation"[5] and "foreign interference in the information space" can be highlighted.[6]

Thus, the evolution of the synonymous series "deception - disinformation - active measures" reflects the increasing complexity and penetration of disinformation in the modern world. Consistent with Samchynska (2022), it can be stated that in the era of digital technologies, disinformation has reached a "new level" and has undoubtedly become one of the main challenges for individual states and the entire international community. This requires the development of legal mechanisms to counteract this phenomenon more than ever.

[5] Information influence operation refers to coordinated efforts by either domestic or foreign actors to influence a target audience using a range of deceptive means, including suppressing independent information sources in combination with disinformation. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *On the European democracy action plan* (COM (2020) 790 final), 17-18, accessed July 24, 2021. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0790&from=EN (accessed on 23.01.2024).

[6] Foreign interference in the information space, often carried out as part of a broader hybrid operation, can be understood as coercive and deceptive efforts to disrupt the free formation and expression of individuals' political will by a foreign state actor or its agents. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *On the European democracy action plan* (COM (2020) 790 final), 17-18, accessed July 24, 2021. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0790&from=EN (accessed on 23.01.2024).

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4.2 Classification of Disinformation

From the essence of the impact of disinformation on the contemporary information environment, several aspects can be discerned. The first aspect centres on shifts in the nature of disinformation through online communication, pointing to an increased scale and speed of dissemination facilitated by social networks and emerging technological possibilities. The second aspect examines the relationship between disinformation and institutions created to shape and uphold trust in public information, emphasising that disinformation tends to be more successful in situations marked by low trust in these institutions. The third aspect explores various motives that trigger or exacerbate the phenomenon of disinformation, drawing attention to economic, socio-cultural, and technological factors that contribute to its prevalence. Overall, these aspects highlight the complexity and multifaceted nature of the disinformation problem, defining it as a significant challenge for contemporary information society with substantial potential impact on democratic processes and civil society (Hillebrandt, 2021).

A significant number of disinformation types require the definition of primary classification criteria. Therefore, it is worthwhile to conduct research by identifying the interconnections of relevant criteria that will help consider this phenomenon as a comprehensive process of intelligence-subversive activity.

Taking into account the approaches of Vovk (2022), Rai, Kumar, Kaushik, Raj, and Ali (2022) for defining types of disinformation, we have developed the main criteria for classifying disinformation into specific groups of types, namely their systematisation with the inclusion of relevant examples (Table 1):

Groups of Types	Types of Disinformation			
Spheres	Military	Political	Economic	Social
Forms	Text (article, report)	Photographs and maps	Audio and video content	Ideas, narratives, and rumours
Methods	Biased presentation of facts	Reverse disinformation	Semantic substitution	Evidence tampering
Sources	Intelligence agencies	Terrorist organisations	Business corporations	Natural persons
Channels	Periodical Publications	Television channels	Computer games	Social networks
Objectives	Incitement of hostility	Panic Incitement	Public opinion change	Trust Erosion

Table 1: Types of Disinformation

Such a classification of disinformation underscores the importance of paying attention to its objectives and methods, allowing for a more precise characterisation of its other components and a better understanding of the overall structure of this type of intelligence and subversive activity. This can contribute to greater societal resilience, as specific knowledge of the context and motives can help identify false information (Hameleers, 2023).

The primary goal of disinformation is to influence public opinion and change it in favour of the initiator. As a result, the authors of disinformation seek to sow chaos and undermine the reputation of the government or other authorities. Typically, disinformation is targeted at the political sphere (Gwara Media, 2023).

The method of disinformation is a technique used to convey false or distorted information. It can involve a particular way of distorting facts or using clever arguments to persuade the audience that their views do not correspond to reality (Innes, 2020).

Disinformation methods refer to the ways in which false information attempts to achieve its goals. A structural division of the relationship between the goal and methods of disinformation into individual elements, such as the main goal/partial goal of the method/method, allows the creation of search matrices. These matrices can help law enforcement agencies and even ordinary citizens more quickly identify the conduct of an information-psychological operation by the adversary and detect individuals engaging in unlawful activities. To do this, we used materials accumulated on the official government website (Center for Countering Disinformation of the National Security and Defense Council of Ukraine, 2023), and we constructed the main matrices of disinformation methods as shown below (Table 2):

The name of the type of disinformation	Criteria	
	Elements	Examples
1. Prejudiced presentation of facts (or "flanking manoeuvre")	Main objective	Obtaining the opportunity to convey false information
	Partial goal of the method	Creating and maintaining a tense state of the audience
	Method	Selection and measured dissemination of distorted true information (using factual data) under conditions of information scarcity
2. Fabrication of evidence	Main objective	Creation of Negotiating Positions
	Partial goal of the method	Provoking tension in the audience
	Method	Dissemination of false texts, photos, and videos
3. Disinformation through coupling	Main objective	Persuading the audience of the truthfulness of information that is actually false
	Partial goal of the method	Creating distrust in the audience
	Method	Presenting truthful information as deception
4. Terminological substitution or concept substitution	Main objective	Distortion of the primary, correct essence of fundamental,

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		worldview concepts and definitions
	Partial goal of the method	Presenting to the audience a certain term, object, or phenomenon as something that it is not in reality
	Method	Providing an incorrect but beneficial explanation (interpretation) that, over time, becomes established and starts functioning in society as the only correct one
5. Primacy effect	Main objective	Gaining an advantage over truthful information
	Partial goal of the method	Getting false information to the audience before the truth
	Method	Rapid dissemination of false information
6. Discrediting	Main objective	To reduce relevance and generate a negative reaction to a particular event
	Partial goal of the method	To fatigue the audience
	Method	To create a flow of false information messages
7. Banal Narrative	Main objective	To create loyalty towards violence within the audience
	Partial goal of the method	To reduce the level of empathy in the audience
	Method	Frequent and apathetic presentation of distorted information about committed crimes
8. Pre-emptive strike	Main objective	Using the reaction of the opponent in a favourable context
	Partial goal of the method	Creating a provocation
	Method	Escalating the conflict

Table 2: Disinformation Methods

1. Prejudiced presentation of facts (or "flanking manoeuvre") - obtaining the opportunity to convey false information / creating and maintaining a tense state of the audience / selection and measured dissemination of distorted true information (using factual data) under conditions of information scarcity. Example: In public statements, the

opponent indicates the location of military units near civilian objects, which does not correspond to reality.

2. Fabrication of evidence - creating negotiating positions / provoking tension in the audience / disseminating false texts, photos, and videos. Example: spreading photos or videos depicting an event that never happened or an event that took place but was distorted in a deceptive way. A recent example of evidence fabrication is "deepfake" videos, which have been altered using artificial intelligence, distorting human bodies and faces (Paris and Donovan, 2020).

3. Disinformation through coupling - persuading the audience of the truthfulness of information that is actually false / creating distrust in the audience / presenting truthful information as deception. An example could be the dissemination of false messages about the intentions or actions of other countries, including military presence or provocative actions, to persuade the audience that this is untrue and that those reporting it are trying to deceive or harm the country.

4. Terminological substitution (or concept substitution) - distorting the primary correct essence of fundamentally important, basic terms and definitions of a worldview nature / presenting a certain term, object, or phenomenon to the audience as something it is not in reality / providing an incorrect but advantageous explanation (interpretation) that over time becomes entrenched and begins to function in society as the only correct one. An illustrative example of terminological substitution is the equating of the terms "Nazism - German fascism" (Dictionary.ua, 2023) and "nationalism - national consciousness, love and pride for one's nation and homeland, or the ideology and policy in the national question based on the interpretation of the nation as the highest value and form of social unity, as well as the primacy of the nation in the state-building process, or a movement aimed at fighting for the nation's independence against foreign oppressors, as well as a movement for the preservation and development of national traditions, culture, language, literature, art, etc.; patriotism" (Dictionary.ua, 2023).

5. Primacy effect - to gain an advantage over true information / to get false information to the audience before the truth / rapid dissemination of false information. For example, a video is spread about the negative condition of military units seeking help; the refutation of this false information on official state resources is perceived by the audience as an attempt to justify. The primacy effect, or the law of priority, which is the tendency for a person to consider the information received first as the most accurate, was discovered by the American psychologist Lund (Stone, 1969) and proven by the Polish psychologist Asch (McKelvie, 1990). Therefore, Goebbels (Demianenko, 2010) believed that the one who speaks first will always be right compared to the next speaker.

6. Discreditation - to reduce the relevance and create a negative reaction to a specific event / tire the audience / create a stream of false information messages (Demianenko, 2010). For example, without the ability to conceal a certain event based on distorted information, a flow of secondary messages is created, which go through and are repeated multiple times, thereby reducing interest in the news and causing irritation when the event is mentioned.

7. Banal Narrative - to foster audience loyalty to violence / reduce the audience's level of empathy / frequently and apathetically present distorted information about committed crimes. For example, reports were made about precise strikes on military targets, when in reality, as a result of the shelling, civilians were killed (Putsyata, 2021).

8. Preventive Strike - to use the opponent's reaction in a favourable context / create provocation / escalate a conflict. For example, multiple reports about tension in a specific region that do not reflect reality are created. Afterward, a fake story emerges

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about the outbreak of a conflict, while in reality, the local authorities sought international assistance (Putsyata, 2021).

These are just a few examples of disinformation methods, and the list can be expanded depending on specific circumstances and situations.

Therefore, understanding the main criteria for classifying disinformation allows the development of methods to combat this phenomenon. These methods include promoting media literacy among the population, fostering critical thinking, advancing fact checking, expanding international cooperation, granting appropriate powers to specialised agencies, and other tools to combat disinformation.

4.3 Attempts to Criminalise Dissemination of Disinformation in Ukraine

In Ukraine, disinformation can be qualified as a crime under the Criminal Code of Ukraine (2001). Specifically, within the framework of the following articles: 161, 258-3, 259, 436-2 of the Criminal Code of Ukraine (2001). However, these articles do not explicitly establish penalties for the dissemination of disinformation that could harm the state, government officials, or other individuals.

In the context of war, when the adversary conducts information-psychological operations (or "active measures"), it is evident that deliberate disinformation should be treated as a separate crime so that those involved in its dissemination can bear criminal responsibility. This was emphasized during a briefing on "Information-Psychological Operations: How to Live and Work in the Era of Information Attacks" in Ukraine by Andriy Shapovalov, the Acting Head of the Center for Countering Disinformation under the National Security and Defense Council of Ukraine. – Ukrinform Media Center (2023).

Indeed, the issue of creating and spreading disinformation poses a threat to Ukraine's national security and the interests of individuals and legal entities, including their right to receive accurate and objective information. However, based on the provisions of current Ukrainian legislation, holding individuals accountable for disseminating false information that could influence public opinion, anti-state views, and more is quite problematic (Chernysh, 2020). Therefore, the development of an appropriate legislative proposal will allow for the improvement of Ukrainian legislation in establishing real accountability for individuals who harm societal interests by misleading the public (Electronic Petitions, 2021).

The Ministry of Culture and Information Policy of Ukraine proposed criminalizing the spread of disinformation as early as 2020 (Alexiyuk, 2020). However, it's only recently, during a meeting between the head of the ministry, Alexander Tkachenko, and the Secretary of State for Culture, Media, and Sport of the United Kingdom and Northern Ireland, Lucy Frazer, that discussions about criminalising the dissemination of disinformation, among other matters related to the "Information Rammstein", were held (Government portal, 2023).

Such Ukrainian initiatives align with international practices. For instance, the Czech government-initiated discussions about including intentional dissemination of disinformation in the criminal code (European truth, 2023).

The French Republic and the Kingdom of Sweden have established separate government agencies to counter the spread of disinformation with the aim of protecting open and democratic societies, promoting the free dissemination of ideas, and detecting, analysing, and responding to undue influence and other false information directed against the state or its interests (Pavliuk, 2022).

In the Slovak Republic, the issue of criminal responsibility for the spread of disinformation is a topic of debate. Insufficient legislative support for such initiatives

arises due to the unclear definition of false information and concerns about potential violations of freedom of expression. Existing legal measures regarding the dissemination of alarming messages are beneficial, but their implementation is primarily focused on secondary threats. The proposed legislation in this area, aimed at enhancing the security of online platforms, although emphasising penalties for disseminating disinformation, unfortunately, suffers from vague definitions. As a result, criminal legal practice may encounter complications related to defining disinformation and proving its complexity. Moreover, it is evident that effective control and regulation of content are challenging and financially burdensome tasks. Additionally, there are concerns that state repression may face resistance from the population and lead to the emergence of uncontrolled platforms. Thus, combating disinformation requires comprehensive and balanced solutions that consider legal, financial, technological, and ethical aspects to avoid abuses of power and violations of freedom of expression (Onacilla, 2023).

The current legislation in the United Kingdom of Great Britain and Northern Ireland aimed at combating disinformation includes several key acts. The Online Safety Act 2023 ensures and regulates specific internet services to prevent communication-related legal violations.[7] The Defamation[8] Act 2013 provides protection against statements that harm a third party's reputation.[9] The Communications Act 2003 regulates the telecommunications sector, and the Malicious Communications Act 1988, particularly Section 1(1), prohibits the sending of messages that are indecent, grossly offensive, or false, or believed to be false. Additionally, Bouhlarski (2022) highlights that, according to section 127 of the UK Communications Act, we are protected only from offensive misinformation. Therefore, if there is a post containing misinformation that is not offensive but simply untrue, the Communications Act will have no impact on it. Similarly, the Malicious Communications Act only safeguards against misinformation intended to cause 'distress' to the recipient. Since not all misinformation is offensive or defamatory, the existing legislation is insufficient to protect against untrue statements that can later harm an individual if they rely on them. While these legal frameworks contribute to addressing and mitigating the impact of disinformation in the digital and communicative environment, they are directly aimed at addressing other unlawful actions such as defamation, offensive misinformation, or the transmission of indecent messages (Bouhlarski, 2022).

The Counter-Disinformation Unit in the United Kingdom of Great Britain and Northern Ireland is actively countering disinformation.[10] Currently, as part of the initiative

[7] This Act provides for a new regulatory framework which has the general purpose of making the use of internet services regulated by this Act safer for individuals in the United Kingdom. To achieve that purpose, this Act (among other things) – imposes duties which, in broad terms, require providers of services regulated by this Act to identify, mitigate, and manage the risks of harm. Online Safety Act 2023. Available at: https://www.legislation.gov.uk/ukpga/2023/50/enacted (accessed on 23.01.2024).

[8] Defamation is the publication to a 3rd party of a statement which has caused or is likely to cause serious harm to another's reputation. Defamation Act 2013. Available at: https://lexlaw.co.uk/defamation-libel-slander-publication-take-down-letter-notice-solicitors-london-legal-advice/ (accessed on 23.01.2024).

[9] The problem with the Defamation Act is that it only protects against misinformation which is defamatory in nature. A defamatory statement is a false statement of fact about a person which is intended to cause harm to a person's social image. Stories that contain no defamation, even though they contain false information can go unpunished (Bouhlarski, 2022).

[10] The CDU leads the UK government's operational response to disinformation threats online, and ensures the government takes necessary steps to identify and respond to acute misinformation (i.e., incorrect or misleading information) and disinformation (i.e., information which is deliberately created to cause harm) in areas of public interest. Counter-Disinformation Unit – open source information collection and analysis:

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led by specific legislators, it is undergoing reforms that involve changing its name and restructuring its affiliation with another government institution. These changes are in response to specific societal concerns, emphasising the importance of preserving freedom of expression.[11]

Disinformation has become a global phenomenon and poses a significant international challenge. In the context of the current war, online dissemination of disinformation is actively observed, particularly through state media and affiliated accounts on social media, attempting to spread false information. The German Federal Government is implementing strategic measures to counter disinformation, including the detection and analysis of disinformation, coordination of actions among relevant agencies and organisations, combating the spread of disinformation on social media, researching the phenomenon, and educating citizens to discern information. Transparent and fact-based communication is a crucial component of these efforts (The Federal Government, 2023).

For instance, in Japan, there are no specific laws regulating fake news and disinformation, and the dissemination of false information is not automatically considered a legal offence. However, if this information leads to economic losses for others, it may be recognised as a crime of defamation under Article 233, the first sentence of the Criminal Code. Moreover, interference in another person's business may be classified as a crime of obstructing business through fraudulent means, according to the second half of Article 233 of the Criminal Code. If the spread of fake news or disinformation causes harm to the public reputation of another person, it could result in charges of slander under Article 230 of the Criminal Code, even if it does not immediately impact economic trust (Criminal Code, 2020).

In general, at its own level, the European Union is also implementing specific measures to counter disinformation, including action plans[12] and a code of practice.[13] These initiatives are aimed at improving the detection of disinformation, raising public awareness, coordinating responses, and mobilising online platforms. The European Union recognises the critical need to address challenges arising from disinformation and actively works on multiple fronts to safeguard information integrity, enhance citizen awareness, and foster collaboration among various stakeholders. These efforts reflect a comprehensive approach to counteracting the multifaceted threat of disinformation and underscore the commitment to preserving democratic values in the digital age.

Furthermore, the European Union's practice includes the EUvsDisinfo project, launched in 2015 as the flagship initiative of the European External Action Service's East StratCom Task Force. This project aims to proactively anticipate, counter and eliminate

privacy notice. Available at: https://www.gov.uk/government/publications/counter-disinformation-unit-open-source-information-collection-and-analysis-privacy-notice/counter-disinformation-unit-open-source-information-collection-and-analysis-privacy-notice (accessed on 23.01.2024).

[11] In September, a cross-party group of MPs, including David Davis and Caroline Lucas, called for the immediate suspension of the CDU, urging an independent review. Concerns are raised that the unit, initially established to combat foreign interference in the European elections, has expanded to monitor online dissent, collecting information on critics of government policies. UK government renames Counter-Disinformation Unit amid free speech concerns. Available at: https://dig.watch/updates/uk-government-renames-counter-disinformation-unit-amid-free-speech-concerns (accessed on 23.01.2024).

[12] Action Plan against Disinformation. Shaping Europe's digital future. *POLICY AND LEGISLATION*. Publication 11 December 2018. Available at: https://digital-strategy.ec.europa.eu/en/library/action-plan-against-disinformation (accessed on 23.01.2024).

[13] 2022 Strengthened Code of Practice on Disinformation. Shaping Europe's digital future. *POLICY AND LEGISLATION*. Publication 16 June 2022. Available at: https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation(accessed on 23.01.2024).

persistent disinformation campaigns, particularly those that affect the European Union, its member states, and neighbouring countries. A project that arose in response to a hybrid war in 2014 and a subsequent full-scale convention war against Ukraine in 2022. The main goal of this project is to increase public awareness and understanding of disinformation operations. By promoting media literacy and resilience to digital manipulation, EUvsDisinfo seeks to provide citizens in Europe and beyond with tools to resist the influence of deceptive information and media tactics.[14]

The resolution of the European Parliament dated June 1, 2023, identifies threats of foreign interference and disinformation in the democratic processes of the European Union. The document emphasises information warfare, energy dependence, technological development, the fight against corruption, and disinformation campaigns. The resolution supports the establishment of necessary institutions to undertake cybersecurity measures and underscores the importance of protecting elections, independent journalism, and citizen education. Additionally, the resolution highlights the importance of historical memory and digital literacy. It calls for the swift adoption of a Code of Conduct, stringent control over social media, protection of critical infrastructure, and global cooperation to counter foreign interference and disinformation. The document expresses concerns about interference from Qatar, Morocco, China, and Iran, emphasising the need for the development of mechanisms to guard against misinformation (EUR-Lex, 2023).

It appears that democratic countries have recognised the need to establish legal frameworks to counter the destructive influence of an aggressor state in the information sphere and have already begun to create relevant institutions and implement legislative initiatives. Unfortunately, uncovering disinformation takes much more time than its dissemination. Witnessing how quickly false information spreads worldwide is astounding. The development of the Internet only contributes to its rapid dissemination (Malyarenko, 2021).

Therefore, taking into account domestic and international trends towards criminalising disinformation, as well as the common legal practice of administrative prevention, a draft law of Ukraine titled "On Amendments to Some Legislative Acts of Ukraine Regarding Countering Disinformation" (2021) is being considered in Ukraine. It suggests including a separate article in the Code of Ukraine on Administrative Offences. The hypothesis for the relevant article in the Code of Ukraine on Administrative Offences is proposed in the following wording: "Dissemination of Disinformation"; the provision of the first part is formulated as follows: "Creation, dissemination, or use of information related to disinformation that may and/or induces panic among the population and/or misleads"; the provision of the second part is formulated as follows: "Creation, dissemination, or use of information by an economic entity (legal entity) related to disinformation that may and/or induces panic among the population and/or misleads". Penalties for both parts of this article in the draft law provide for fines and corrective labour.

The draft law mentioned, "On Amendments to Some Legislative Acts of Ukraine Regarding Countering Disinformation" (2021), does not propose to introduce criminal liability for the dissemination of disinformation (or false information). Nevertheless, it is worth considering the components of such a legal norm in the Criminal Code of Ukraine, such as the "actus reus" (the objective side of the crime) and the mental state of the subject (whether the crime was committed intentionally or through negligence).

[14] EU vs. Disinfo. Learn. The tools to understand and respond to disinformation. Available at: https://euvsdisinfo.eu/ua/learn-ua/ (accessed 23.01.2024).

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The introduction of criminal liability for spreading disinformation would require a comprehensive review of the legal framework, careful consideration of freedom of speech, and ensuring that the legislation complies with international standards and human rights. It is a complex legal issue that would involve balancing the need to combat disinformation with the protection of fundamental rights and freedoms. Therefore, such changes should be approached with caution, and a detailed legal analysis and public discussion are necessary before enacting such provisions into the criminal law.

The argument regarding the practical aspect of the offence "Spreading Disinformation" (or "Disseminating False Information") is well-founded. In order to efficiently counter disinformation, it is crucial that the legal description of the factual aspect of this offence covers the generation of disinformation and its various means of distribution, without confining it solely to public distribution.

It is important to ensure that the legal framework addresses the various ways disinformation can be spread, whether through traditional media, social media, or other means, and that it covers both domestic and foreign actors. The legal language should be comprehensive and precise to avoid any potential loopholes that might allow foreign agents or intelligence operatives to evade responsibility by operating covertly.

The development of this legal framework should involve legal experts, policymakers, and relevant stakeholders to create a robust and balanced approach to tackling disinformation while upholding principles of freedom of speech and human rights.

When it comes to the culpability aspect, it may seem unlikely that false information could be created inadvertently. However, scenarios can be envisioned that suggest otherwise. For instance, when an inexperienced analyst is surrounded by hostile agents who provide him with false data, it is possible that an analytical report with distorted conclusions and recommendations may be formulated based on that information. This could lead to the adoption of fatal decisions at the highest state level. Therefore, the relevant article in the criminal code should account for both intentional and negligent conduct. Additionally, distinguishing between these two forms of culpability may be considered in separate provisions of the criminal code.

Taking into consideration the aforementioned points regarding administrative or criminal liability for disseminating disinformation, it is prudent to distinguish them based on established legal principles. For example, in line with the legal principle "ultima ratio", criminal punishment should be the last resort, utilised when administrative penalties have already been imposed and the violation is repeated. Furthermore, according to another legal principle, "sine qua non", a condition for criminal liability may be a prior similar administrative offence. In other words, criminal penalties can be applied in the case of a repeated administrative offence within a certain time frame (twelve/twenty-four months, etc.).

5. CONCLUSION

5.1 Generalisation

Disinformation is a very serious problem that can potentially have negative consequences for individuals, groups, and society as a whole, and it requires serious attention from the government. It is used to influence public opinion and alter perspectives on various issues, which creates destructive consequences for the country's political, economic, and social life. For example, disinformation can be employed to influence elections, discredit political opponents, or divert attention from real issues within the country.

The Internet and social media play a crucial role in the dissemination of disinformation in the modern world. Therefore, more effective measures are needed to combat this problem, as dangerous and false information spread through these channels can have serious consequences, especially for the youth (a favoured audience for authoritarian quasi-communist regimes seeking strategic influence and global dominance). One of the possible ways to combat such disinformation is to increase the number of control mechanisms on the Internet that can regulate the spread of false information. Technologies such as artificial intelligence can be employed to detect and filter out fake news and disinformation. Additionally, it is essential to raise the level of media literacy among the population. This can be achieved through specialised educational courses that uncover the mechanisms of disinformation and teach critical thinking. Therefore, a comprehensive approach is necessary to combat online disinformation and disinformation, which includes both technical and educational solutions.

Understanding and recognising disinformation are essential skills in today's society. To be truly well informed, not just informed, it is necessary to evaluate the information that comes our way. This requires verifying sources, ensuring the accuracy of information, employing critical thinking, and analysing information from various sources. Developing these skills can help prevent the spread of disinformation and ensure a more objective perception of the world. Therefore, the main criteria for classifying disinformation and the examples of search matrices provided in this paper can become valuable tools in combating this negative phenomenon.

Disinformation is a global problem, and, therefore, effective measures to combat it require international cooperation and coordination. Governments and international organisations should pay more attention to developing strategies and policies aimed at preventing the spread of disinformation and ensuring citizens' access to truthful and reliable information. To achieve this, a balance must be struck between safeguarding freedom of speech and holding those responsible for disseminating disinformation criminally accountable. This will help preserve the independence of media so that they can carry out their professional activities without hindrance or pressure from authorities or corporations.

Legislative bodies should develop laws and articles in the Criminal Code of Ukraine (2001) that establish liability for the dissemination of disinformation that can harm the state, public officials, or other individuals. These laws should be developed with consideration for the right to freedom of speech and information, while also ensuring protection for society against the harmful effects of disinformation.

5.2 Specific Dialectical Comparison

In conclusion, it can be noted that attempts to introduce criminal liability for the dissemination of disinformation lead to controversies due to the potential threat to freedom of speech and the possibility of criminal prosecution of journalists. These concerns are expressed by both media organisations and the National Union of Journalists of Ukraine. The initiative faces criticism over fears of violating the free exchange of information and potential influence on the independence of journalism. Indeed, in the context of a democratic society, it is crucial to consider the principles of freedom of speech and media independence when addressing issues related to the control of disinformation (Stogrin, 2019).

On the other hand, such a stance leads to a minimisation of efforts to counter the spread of disinformation and fosters a distorted idea of permanent restrictions on the

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freedom of mass media. This concept has already permeated even the United Nations and creates a favourable environment for the activities of wrongdoers in the information sphere (Radio Svoboda, 2020). This demonstrates the vulnerability and lack of protection of international structures against the methods of disinformation used by the aggressor state and other authoritarian regimes. Similar issues are addressed in an article by Avdieieva (2022), who notes that disinformation campaigns can distort legal concepts, undermine the perception and importance of democratic institutions, and destabilise even the most stable and influential states, as well as have harmful consequences for the supremacy of international law as a whole. Furthermore, according to the mentioned scholar, disinformation is incredibly influential and complex in terms of detection and providing evidence. Kettemann (2022) points out that the situation is complicated by the competition between fundamental doctrinal civil liberties, as the state has a passive obligation not to violate human rights on the one hand and an active obligation to protect human rights by taking law enforcement measures against others. Thus, each intervention is an act of balance that always needs to be evaluated in a specific context. The state seeks to fulfil this duty by creating a legally safe environment through appropriate laws.

In summarising our position on the criminalisation of disinformation, it is important to emphasise that no one has the right to disguise falsehood under the mask of freedom of speech; a democratic society should have the tools to unmask wrongdoers. Uncontrolled dissemination of disinformation is a primary tool of authoritarian regimes, which exploit this phenomenon for self-promotion and to extend their influence over the democratic world.

This position is not without criticism, as restrictions on freedom of speech are only possible in an authoritarian state, and in a democratic society, law enforcement, and the judicial system are independent. The manipulative nature of claims about limiting freedom of speech through the criminalisation of disinformation can be highlighted by an analogy, by substituting the legally protected object: freedom of speech with the right to property, and the criminal act of spreading disinformation with the right to property. As a result of this dialectical comparison, one arrives at the absurd assertion that criminalising theft restricts property rights. Indeed, such a comparison is more appropriate for crimes in the field of information activity, but theft, although related to property rights, more accurately points to the hypocrisy of claims about limiting freedom of speech through the criminalisation of spreading false information because the dissemination of disinformation is essentially the theft of truth, which pertains to nonproperty rights.

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COMMENTARIES

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ECtHR: VEREIN KLIMASENIORINNEN SCHWEIZ AND OTHERS v. SWITZERLAND (Application No. 53600/20, 9 April 2024): Insufficient Measures to Combat Climate Change Resulting in Violation of Human Rights / Sandra Žatková, Petra Paľuchová

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Abstract: *The present paper focuses on the analysis of the landmark decision of the European Court of Human Rights in which the Court has, for the first time, ruled on human rights violation due to climate change. It begins with the description of the convention as a so-called living instrument that aims at the interpretation of the European Convention on Human Rights taking into account the current social circumstances and challenges, such as the growing need for environmental protection and addressing climate change. In the judgment in question, the Court held that Switzerland had violated the applicant's rights due to insufficient legislative measures to protect individuals from the adverse effects of climate change. As a result of the long-awaited but unconventional conclusion, the judgment has become the target of much criticism. The paper thus concentrates on the main seemingly innovative or rather surprising pillars of the judgment, such as the court's determination of locus standi, the scope of a state's positive obligations in the context of climate change and its related margin of appreciation, as well as the unprecedented consideration of scientific evidence. The paper concludes by summarising the possible implications of the court's arguments for similar future cases, which will undoubtedly increase in number.*

Key words: *Climate Change; ECtHR; Human Rights; Living Instrument; Positive Obligation; Actio Popularis; Climate Litigation*

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1. INTRODUCTION

The core of the relationship between the environment and human rights is the dependence of people on their relationship with the non-human world and human vulnerability to environmental change. A safe, clean, healthy, and sustainable environment is essential for the full enjoyment of a wide range of human rights, including

the right to life, health, safe drinking water and sanitation, housing, self-determination, culture and work.

However, for some years now, Human Rights Council has explicitly expressed concern that climate change has contributed and continues to contribute to an increase in the occurrence and intensity of sudden-onset natural disasters, as well as slow-onset negative events, and that these events have an adverse impact on the full enjoyment of all human rights.[1] The abovementioned position is brought into focus also by The Office of the High Commissioner for Human Rights,[2] as well as by the Intergovernmental Panel on Climate Change (IPCC).[3]

The European Court of Human Rights has held that the exercise of human rights recognised by the European Convention on Human Rights (hereinafter referred to as „**the Convention**") can be impaired by environmental harm and risks indeed. However, it should be pointed out that, being a key instrument in the protection of individual rights in Europe, it does not contain an article or provision directly dealing with the human right to the environment or any kind of protection against climate change.

However, the case law of the European Court of Human Rights (hereinafter referred to as „**ECtHR**" or „**the Court**"), established that the content of the Convention must be interpreted in the light of the current social circumstances. The ECtHR gives weight to the so-called *living tree interpretation* and stresses that the Convention must be interpreted as a „*living instrument*" so as not to neglect the constant evolution of international law. According to some judges, this doctrine is in principle a *conditio sine qua non* for the application of the Convention to cases that arise in practice (Sicilianos, 2020).

The case law of the European Court of Human Rights thus guarantees the protection of the right to a healthy environment mainly through the right to life enshrined in Art. 2 and through the protection provided by Art. 8 of the Convention, enshrining the right to respect for private and family life, home and correspondence. With regard to the procedural dimension of this right, protection is provided primarily through the right to a fair trial (Art. 6), the freedom of expression and the right to information (Art. 10), the right to freedom of assembly and association (Art. 11) and the right to an effective remedy (Art. 13).[4] Thus, by now, the ECtHR has developed a fairly extensive environmental jurisprudence.

Recently, however, the ECtHR has gone even further, with the Grand Chamber of the ECtHR delivering judgments on three climate change complaints that both, the public and professionals have been eagerly awaiting. This marked a significant milestone in the environmental protection provided by the ECtHR as a human rights body, but also a

[1] United Nations General Assembly. 41/21. Resolution adopted by the Human Rights Council on 12 July 2019. A/HRC/RES/41/21, 2019.

[2] United Nations General Assembly. 10/61. Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights. A/HRC/10/61, 2009.

[3] See e.g., Intergovernmental Panel on Climate Change (2022). Climate Change 2022: Impacts, Adaptation and Vulnerability. Cambridge: Intergovernmental Panel on Climate Change. Available at: https://report.ipcc.ch/ar6/wg2/IPCC_AR6_WGII_FullReport.pdf (accessed on 19.05.2024).

[4] See, e.g., ECtHR, López Ostra v. Spain, app. no. 16798/90, 9 December 1994; ECtHR, Taşkin and Others v. Turkey, app. no. 46117/99, 10 November 2004; ECtHR, Fadeyeva v. Russia, app. no. 55723/00, 9 June 2005; or ECtHR, Di Sarno and Others v. Italy, app. no. 30765/08, 10 January 2012. For further information see: United Nations Environment Programme (2019). Environmental Rule of Law: First Global Report. Nairobi: United Nations Environment Programme, pp. 146-147. Available at: https://wedocs.unep.org/bitstream/handle/20.500.11822/27279/Environmental_rule_of_law.pdf?sequence=1&isAllowed=y (accessed on 19.05.2024).

milestone in the growing field of climate litigation.[5] Two of them were declared inadmissible[6] and alongside them, there was a notable judgment issued that distinguishes itself from the others for various reasons. Based on that, this paper thus focuses on an analysis of this particular judgement.

2. DEVELOPMENT OF THE CASE AT NATIONAL LEVEL AND THE ECtHR'S TURNING OF THE TIDE

On 9 April 2024, the Grand Chamber of the ECtHR issued its long-awaited judgment (De Spiegeleir and Brucher, 2023; Jorio, 2023) Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, (GC), app. no. 53600/20, 9 April 2024. (hereinafter referred to as "***KlimaSeniorinnen***" or "***the judgement***"). For the first time, the ECtHR recognised a right to climate protection. By 16 votes to 1 (Judge Eicke expressed disagreement with the majority), it set forth new standards regarding climate change cases and climate litigation, with its perspectives on how Art. 2 as well as 8 of the Convention would substantively apply to such cases. It found that the mitigation of climate change represents a duty falling under the umbrella concept of the right to private life under Art. 8 of the Convention. The duty which Switzerland failed to fulfil. This is the first time the Court has ruled on climate change issues, although such case law already exists at the national level.[7]

2.1 Proceedings at the National Level

The case concerned an application lodged by four women and the Swiss association *Verein KlimaSeniorinnen Schweiz* („Senior Women for Climate Protection"), whose members are elderly women complaining about the effects of global warming on their living conditions and health.

In 2016, this group of senior women together with the association (*Verein KlimaSeniorinnen Schweiz)* filed a lawsuit against the Federal Council, the Federal Department of the Environment Transport, Energy and Communications, The Federal Office for the Environment, and the Federal Office for Energy claiming that these Swiss

[5] According to UN Environment Programme (UNEP) and the Sabin Center for Climate Change Law at Columbia University that, among other tasks, provides databases of climate change caselaw, the total number of climate change court cases has more than doubled since 2017 and is growing worldwide showing that climate litigation is becoming an integral part of securing climate action and justice. See: United Nations Environment Programme (2023). Global Climate Litigation Report: 2023 Status Review. Nairobi: United Nations Environment Programme, p. 12. Available at: https://wedocs.unep.org/bitstream/handle/20.500.11822/43008/global_climate_litigation_report_2023.pdf?sequence=3 (accessed on 19.05.2024).

[6] ECtHR, Carême v. France, (GC), app. no. 7189/21, 9 April 2024; ECtHR, Duarte Agostinho and Others v. Portugal and 32 Others, (GC), app. no. 39371/20, 9 April 2024.

[7] For example, the following cases: PSB et al. v. Brazil (on Climate Fund), Federal Supreme Court of Brazil, ADPF 708, 1 July 2022 (Brazil) (In this case of 2022, the Brazilian Supreme Court held in that the Paris Agreement is a human rights treaty, which enjoys "supranational" status.); Milieudefensie et al. v. Royal Dutch Shell plc., The Hague District Court, C/09/571932 / HA ZA 19-379, 25 April 2022 (Netherlands) (It is the case in which a Dutch court ordered oil and gas company Shell to comply with the Paris Agreement and reduce its carbon dioxide emissions by 45 per cent from 2019 levels by 2030. The case is pretty significant indeed as it was the first time a court found a private company to have a duty under the Paris Agreement.) or even a well-known case of Neubauer (Neubauer, et al. v. Germany, Federal Constitutional Court of Germany, 29 April 2021 (Germany)), in which German court struck down Parts of Germany's Federal Climate Protection Act were declared to be incompatible with constitutional rights to life and health, among others, because the legislation did not include sufficient provisions for emissions cuts beyond 2030.

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authorities had failed to comply with their obligations under the Swiss Constitution and the Convention. The applicants expressed their concern that the Swiss authorities, despite their obligations under the Convention, are not taking sufficient measures to mitigate the effects of climate change, which are contained in international legal obligations, particularly the Paris Agreement on climate change.[8] *In concreto*, they claimed that the Government had violated the Swiss Constitution as regards Article 10 (right to life), Article 73 (principle of sustainability) and Article 74 (protection of the environment), as well as Articles 2 and 8 of the Convention. Furthermore, they stated that their demographic group is particularly susceptible and vulnerable to the heat waves that are expected as a result of climate change. Heat waves caused by climate change have caused, are causing and will continue to cause further deaths and illnesses among older women such as the applicants. According to recent studies, 30 % of the heat-related deaths in Switzerland can be attributed to the anthropogenic climate change (Vicedo-Cabrera et al., 2021).

In addition, studies conducted in 2021 also confirm that in Switzerland, women over the age of 75 are a demographic group with the highest risk of heat-related health impairment (Saucy et al., 2021). According to the applicants, the medical certificates and personal statements can also be seen as evidence of the physical and mental suffering inflicted on them by the heat waves. According to the Federal Office for Meteorology and Climatology, the average temperature rise in Switzerland between 2013 and 2022 was 2.5 °C, which is almost twice the global average. Staying within the 1.5 °C limit, which Switzerland already exceeded at the turn of the new millennium, would significantly reduce the risk of excess mortality and morbidity due to heat (Jorio, 2024).

As a result, the applicants called on the Swiss Parliament and the relevant federal agencies to develop a regulatory approach for a number of sectors that would achieve greenhouse gas emission reductions of at least 25% below 1990 levels by 2020 and at least 50% below 1990 levels by 2050. Thereby they were critically responding to the objectives that were being debated in Parliament at the time. These provided for a 20% reduction in emissions by 2020 and a 30% reduction by 2030. They referred to studies which confirmed that the Swiss Government's climate ambitions were not in line with the stated limit of no more than 1.5 °C of warming. Measures by which the government would pursue these targets were also perceived by the applicants as not being in place at all or not sufficiently in place.

Federal Department of the Environment Transport, Energy and Communications dismissed the applicants´ request on 25 April 2017. It found that the applicants lacked standing because their rights were not affected as required by Article 25a (1) APA (Swiss Administrative Procedure Act). It further determined that instead of seeking a remedy for an infringement of their specific legal rights, they sought regulation of global CO_2 emissions through general regulations. They were also further found not to have victim status under the Convention because they sought an injunction to serve the wider public interest of adoption of legislative reform to reduce CO_2 emissions. Hence, they appealed the dismissal on 26 May 2017.

[8] The Paris Agreement on climate change was adopted on 12 December 2015 at the Paris Climate Conference. It entered into force on 4 November 2016, following ratification by 55 Parties to the UN Framework Convention on Climate Change, which account for more than 55% of global greenhouse gas emissions. Its main objective is to keep the increase in global average temperature well below 2°C above pre-industrial levels and to make efforts to limit the temperature increase to 1.5°C above pre-industrial levels. These targets have the potential to significantly reduce the risks and impacts of climate change. Under the Agreement, participants commit to reducing their greenhouse gas emissions relative to the 1990 baseline through nationally determined contributions (NDCs).

On 27 November 2018, the appeal was rejected by the Swiss Federal Administrative Court which essentially upheld the position of Federal Department of the Environment Transport, Energy and Communications stating that the applicants were not affected by Switzerland's climate protection measures in a way that goes beyond that of the general public. It therefore reiterated that Swiss women over 75 years of age were not exclusively affected by climate change impacts.

Thus, in January of 2019, the judgement was followed by another appeal lodged with the Swiss Supreme Court. In May 2020, it repeatedly rejected the appeal, pointing out the insufficient intensity by which the applicants´ rights were affected. What is more, the Supreme Court suggested to seek the remedy through political rather than legal means. It specified that Swiss constitutional law provides citizens with various means of democratic participation for shaping current policy areas such as the election of the Parliament, the right to take a popular initiative for a total or partial revision of the Federal Constitution and the right of petition, as well as some other more.[9]

Subsequently, on 26 November 2020, having exhausted all domestic remedies,[10] the applicants applied to the ECtHR arguing there was a violation of their rights under the Arts. 2, 8, 6 and 13 of the Convention.

The applicants claimed that the Swiss legislative and executive authorities failed to implement international conventions, above all the Paris Agreement on climate change, which aim to mitigate the effects of global warming.

2.2 ECtHR´s Approach towards the Protection of Rights Threatened by Climate Change

After several unsuccessful attempts at the national level, the applicants finally succeeded with the ECtHR. The Court gave the entire case a new dimension offering an interesting perspective on resolving the case and the impact of the climate crisis on the (not only) applicants' human rights. The judgment thus constituted a reason to rejoice not only for the applicants or the public involved, but also for legal scholars.

The Court found a violation of the right to respect for private and family life (Art. 8) and the right to a fair trial (Art. 6(1)). It determined, although taking into account a margin of appreciation of every state in regards to commitment to the necessity of combating climate change and its adverse effects, the Art. 8 must be seen as encompassing a right for individuals to effective protection by the State authorities. Such protection must shield individuals from serious adverse effects of climate change on their life, health, well-being and quality of life.[11] In relation to Art. 6, the Court emphasised the domestic courts' key role in climate-change litigation and of access to justice in this field,[12] even though, in principle, complaints concerning political decisions that are the product of democratic processes do not fall within the scope of Art. 6 of the Convention. In the present case, however, the applicants complained that the Swiss authorities did not comply properly with their international legal obligations in the field of climate change. At the same time, the Court pointed out the domestic courts' failure to *i)* engage seriously or at all with applicant association's action, *ii)* provide convincing reasons for non-examination of merits of the case, *iii)* consider compelling scientific evidence concerning

[9] Federal Supreme Court [of Switzerland], Public Law Division I, Judgment 1C_37/2019 of 5 May 2020, par. 4.3.
[10] In accordance with Art. 35 of the Convention.
[11] *KlimaSeniorinnen*, par. 519.
[12] *Ibid.*, par. 639.

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climate change and to *iv)* examine applicant association's legal standing leading to impairment of the very essence of its right to access to court.

The present judgment examines a wide range of arguments in great detail and shows the Court´s conviction in its role in protecting the environment and mitigating the effects of climate change under the umbrella of protecting the fundamental human rights that are affected. It has to be said that the reference to the alleged violation of Art. 8 of the Convention and the finding that States are obliged to participate in mitigating the effects of climate change is not so surprising, given the "Convention as a living instrument" concept established in the field of environmental protection. More surprising or innovative (which makes it prone to a wave of criticism) appear to be certain parts of the Court's reasoning (relating to e.g., standing to invoke the right to climate protection), as well as the sources referred to by the Court, which will be further discussed in more detail.

3. OVERCOMING THE INADMISSIBILITY OF *ACTIO POPULARIS*

The ECtHR's approach to the admissibility of claims has basically remained unchanged since its inception (Ahmadov, 2018). Throughout the years, the Court has consistently held that its task is not to review the relevant law and practice *in abstracto,* as the Convention does not provide for the institution of an *actio popularis.*[13] Individuals or groups of individuals are therefore not permitted to complain about a provision of national law simply because it may contravene the Convention without having been directly affected by it.[14]

The court did not depart from this approach in deciding the admissibility of another climate case on the same day, April 9, either. In the case of *Carême v. France*,[15] where the applicant was a former resident and mayor of the municipality of Grande-Synthe. That municipality was alleged to be exposed to the risks associated with climate change leading to increased heavy rainfall and rising sea levels which might lead to flooding and submergence of the municipality below the sea level. Because of this, he argued that he could not contemplate living in his home village (at the time he was a MEP living in Brussels). However, the Grand Chamber declared the complaint inadmissible in that case: „*Holding otherwise, and given the fact that almost anyone could have a legitimate reason to feel some form of anxiety linked to the risks of the adverse effects of climate change in the future, would make it difficult to delineate the actio popularis protection – not permitted in the Convention system – from situations where there is a pressing need to ensure an applicant's individual protection from the harm which the effects of climate change may have on the enjoyment of their human rights."*[16]

In the *KlimaSeniorinnen* case, however, the ECtHR no longer upheld the inadmissibility of *actio popularis* in the climate case and the „*victim status*"[17] became one of the salient issues of the Court´s judgement.

[13] The term referring to actions taken to obtain a remedy by a person or a group in the name of the general public while the persons or groups concerned are neither themselves victims of a violation nor have they been authorised to represent any victims or potential victims. See e. g., ECtHR, Zakharov v. Russia, (GC), app. no. 47143/06, 4 December 2015, par. 164.

[14] *KlimaSeniorinnen*, par. 460. See also: ECtHR, Aksu v. Turkey, (GC), app. no. 4149/04 and 41029/04, 15 March 2012, par. 50, 51.

[15] ECtHR, Carême v. France, (GC), app. no. 7189/21, 9 April 2024.

[16] *Ibid.*, par. *84.*

[17] As set out in the Art. 34 of the Convention.

In accordance with the Art. 34 of the Convention, the Court may receive applications from any person, NGO or group of individuals who claim to be the victim of a violation under one or more provisions of the Convention.

It is required by the Court's well-established case law that there exists an established causation between the alleged violation and the harm allegedly suffered. The Court stated that, in general, the word „*victim*" under Art. 34 denotes the following categories of persons: *the direct victims* (those directly affected by the alleged violation of the Convention), *the indirect victims* (those indirectly affected by the alleged violation of the Convention), and *the potential victims* (those potentially affected by the alleged violation of the Convention).[18] However, in any event, the link between the applicant and the harm, which he or she claims to have sustained as a result of the alleged violation, is a prerequisite.[19]

In spite of the abovementioned, in the present case, the Court has stressed that the victim-status criterion is not to be applied in a rigid, mechanical and inflexible way.[20] As all of the other provisions, it is to be interpreted in an evolutive fashion in the light of conditions in contemporary society[21] in order not to make the protection of the rights guaranteed by the Convention ineffectual and illusory.[22] By that, the Court simply held that in the context of the climate change, a special approach to the victim status appeared to be a necessity. In this case, the Court held that there was undoubtedly *nexus causalis* between the State's acts or omissions and the harm caused to the individual.

Naturally, the Court differentiated among victim status of individuals and *locus standi* (representation) of association. The Court found that the four individual applicants did not meet the criteria for victim status under Art. 34 of the Convention. On that basis, it declared their application inadmissible. Accordingly, it noted that in order to claim victim status under the Convention in the context of harm or risk of harm arising from alleged failures of the states to combat climate change, the following circumstances concerning the applicant's situation must be met:

(a) the applicant must be subject to a high intensity of exposure to the adverse effects of climate change, that is, the level and severity of (the risk of) adverse consequences of governmental action or inaction affecting the applicant must be significant, and

(b) there must be a pressing need to ensure the applicant's individual protection, owing to the absence or inadequacy of any reasonable measures to reduce harm.[23]

According to the Court, the threshold for fulfilling these criteria is especially high. Due to the exclusion of *actio popularis*, the Court must have taken into account e. g., the actuality/remoteness and/or probability of the adverse effects of climate change over time. It has also considered the specific impact on the applicant's life, health, or well-being, the magnitude and duration of the harmful effects, the scope of the risk (whether localised or general), and the nature of the applicant's vulnerability.[24] In this case, the

[18] ECtHR, Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania, (GC), app. no. 47848/08, 17 July 2014, par. 96 - 101.
[19] ECtHR, Mansur Yalçın and Others v. Turkey, app. no. 21163/11, 16 September 2014, par. 40.
[20] ECtHR, Albert and Others v. Hungary, (GC), app. no. 5294/14, 7 July 2020, par. 121.
[21] ECtHR, Gorraiz Lizarraga and Others v. Spain, app. no. 62543/00, 27 April 2004, par. 38 and ECtHR, Yusufeli İlçesini Güzelleştirme Yaşatma Kültür Varlıklarını Koruma Derneği v. Turkey, app. no. 37857/14, 7 December 2021, par. 39.
[22] Gorraiz Lizarraga and Others, cited above, par. 38.
[23] *KlimaSeniorinnen*, par. 486, 487.
[24] *Ibid.*, par. 488.

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individual applicants did not meet the victim-status criteria under the Convention. Therefore, their complaints were declared inadmissible as being incompatible *ratione personae*.[25] The Court found that they were not exposed to a health risk that could not be alleviated by the adaptation measures available in Switzerland, nor were they subject to the adverse effects of climate change with a degree of intensity that would necessitate ensuring their individual protection. Such conclusion is particularly relevant given the high threshold which necessarily applies to the fulfilment of the criteria designated by the Court.[26]

On the contrary, the applicant association (*Verein Klimaseniorinnen*) was found to have a standing (*locus standi*) on behalf of those individuals whose Convention rights may arguably be subject to specific threats or adverse effects due to the climate change. The ECtHR reiterated that in modern-day societies, recourse to collective non-profit bodies such as associations is sometimes the only means available to citizens whereby they can defend their particular interests effectively.[27] This is especially true in the context of climate change as a global and complex phenomenon having multiple causes and its adverse effects that are *„a common concern of humankind"*.[28]

In the context of climate change, intergenerational burden-sharing assumes particular importance for the currently living generation as well as the future one that is likely to bear an increasingly severe burden of the consequences of present failures and omissions to combat climate change while, at the same time, has no possibility of participating in the current decision-making processes (Schröder, 2021; Weiss, 2008).[29] Hence, associations or other interest groups may be one of the sole way by which the voice of those at a distinct representational disadvantage can be heard. In this sense, this argument thus enhances the justification for the possibility of judicial review in climate change cases.

Similarly, in this case, the Court set out specific criteria that an association must meet.[30] In this regard, it must be: *(a)* lawfully established in the jurisdiction concerned or have standing to act there; *(b)* able to demonstrate that it pursues a dedicated purpose in accordance with its statutory objectives in the defence of the human rights of its members or other affected individuals within the jurisdiction concerned, whether limited to or including collective action for the protection of those rights against the threats arising from climate change; and *(c)* able to demonstrate that it can be regarded as genuinely qualified and representative to act on behalf of members or other affected individuals within the jurisdiction who are subject to specific threats or adverse effects of climate change on their lives, health or well-being as protected under the Convention.

The Court then went even further and added that the standing of an association to act on behalf of its members or other affected individuals would not be subject to a separate requirement of showing that those on whose behalf the case has been brought

[25] Within the meaning of Art. 35 § 3 of the Convention.
[26] *KlimaSeniorinnen*, par. 533.
[27] See e. g., in Gorraiz Lizarraga and Others v. Spain, cited above, par. 38.
[28] With reference to preamble of the United Nations Framework Convention on Climate Change (1992).
[29] *KlimaSeniorinnen*, par. 420. The rights of the next generation were also the basis of another climate case of 9 April 2024, in which, however, as in *Carême v. France*, the complaint was declared inadmissible. In the present case, *Duarte Agostinho and Others v. Portugal and 32 Others* (cited above), the complaint was brought by six young Portuguese nationals against Portugal and 32 other Convention States for the breach of Art. 2, 8 and 14 of the Convention. The applicants´ argument laid in their exposure to a risk of harm from climate change which would probably augment in the years to come and therefore affect their children in the future, indeed.
[30] *KlimaSeniorinnen*, par. 502.

would themselves have met the victim-status requirements for individuals in the climate-change context.[31]

Moreover, the special feature of climate change as a common concern of humankind is said to speak in favour of recognising the standing of associations before the Court in climate-change cases.[32]

In its decision, the court appealed several times to the exclusion of *actio popularis*. Yet, this fact alone did not prevent[33] it from giving a different, more modern, perhaps even more necessary view of the complaint brought in the name of the general public.

Such interpretation of *actio popularis* by the Grand Chamber of the Strasbourg Court has sent a rather clear signal, which may provide an incentive not only for international climate litigation, but also for authorities at the national level not to reject climate complaints (following strict formalism) at first hand.

4. POSITIVE OBLIGATIONS OF A STATE THROUGH THE PRISM OF CLIMATE AND SCIENCE

As outlined above, the „greening" of the Convention is based, on its evolutionary as well as dynamic interpretation, that is, on the interpretation of its provisions as a „living instrument" and on the doctrine of positive obligations (Braig and Panov, 2020). The argument lies in the fact that the Convention predates most environmentally related international or regional treaties (Dupuy and Viñuales, 2015).

So far, in the environmental field, the ECtHR had elaborated on the doctrine of positive obligations, including procedural as well as substantive duties, by requiring States to actively protect human rights through the prism of e.g., an obligation to grant access to courts regarding environmental matters,[34] an obligation to grant access to environmental information,[35] a duty to meet adequate safety precautions,[36] an obligation to guarantee public participation in environmental decision-making processes,[37] an obligation to enact environmental legislation[38] or also a duty to deal with omissions by the States and inefficient measures[39] (Braig and Panov, 2020).

In *KlimaSeniorinnen*, the Court relied heavily on its general environmental jurisprudence emphasising the obligation of states to put in place a relevant framework designed to provide an effective protection of human health and life, in particular, regulations geared to the specific features of the activity in question, particularly with regard to the level of risk potentially involved.[40] What appears to be interesting however

[31] *Ibid.*. See also: ECtHR, Asselbourg and Others v. Luxembourg, app. no. 29121/95, 29 June 1999 and Yusufeli İlçesini Güzelleştirme Yaşatma Kültür Varlıklarını Koruma Derneği v. Turkey, cited above, par. 41, where the Court had previously stated that it may be possible for an association to have standing before the Court despite the fact that it cannot itself claim to be the victim of a violation of the Convention.
[32] *KlimaSeniorinnen*, par. 499.
[33] Partly Concurring Partly Dissenting Opinion of Judge Eicke. In: ECtHR, Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, (GC), app. no. 53600/20, 9 April 2024.
[34] ECtHR, Howald Moor v. Switzerland, app. no. 52067/10 and 41072/11, 11 March 2014.
[35] ECtHR, Guerra and Others v. Italy, (GC), app. no. 14967/89, 19 February 1998, par. 60.
[36] ECtHR, Budayeva v. Russia, app. no. 15339/02, 11673/02, 15343/02, 20058/02 and 21166/02, 20 March 2008, par. 156.
[37] ECtHR, Hatton v. United Kingdom, (GC), app. no. 36022/97, 8 July 2003, par. 189, 227.
[38] ECtHR, Öneryildiz v. Turkey, (GC), app. no. 48939/99, 30 November 2004, par. 79.
[39] ECtHR, Oluic v. Croatia, app. no. 61260/08, 20 May 2010, par. 66.
[40] *KlimaSeniorinnen*, par. 538

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is, in fact, the extent to which the Court proceeded regarding the obligation a state is required to comply with so as to fulfil its duties under Art. 8.

4.1 Positive Obligation in the Climate Context

In ensuring the implementation of Art. 8 of the Convention, the margin of appreciation of a state plays a crucial role since the burden borne by the state must not be inadequate. In this respect, the Court pointed out that in cases concerning climate change, it is necessary to balance between the states' commitment to the necessity of combating climate change and its adverse effects (setting of the requisite aims and objectives in this respect) and the choice of means designed to achieve the set objectives. The ECtHR has established that the nature and gravity of the threat of climate change, the general consensus in relation to this issue and the overall GHG reduction targets leading to carbon neutrality, require a reduced margin of appreciation for states in setting targets to combat climate change. With regard to the choice of means, including operational decisions and policies adopted to meet international commitments, states should be granted a wide margin of appreciation.[41]

In the course of assessment whether Switzerland remained within its margin of appreciation, the ECtHR examined whether the relevant domestic authorities, at the legislative, executive or judicial level:

(a) adopted general measures specifying a target timeline for achieving carbon neutrality and the overall remaining carbon budget for the same time frame, or another equivalent method of quantification of future GHG emissions, in line with the overarching goal for national and/or global climate-change mitigation commitments,

(b) set out intermediate GHG emissions reduction targets and pathways (by sector or other relevant methodologies) that are deemed capable, in principle, of meeting the overall national GHG reduction goals within the relevant time frames undertaken in national policies,

(c) provided evidence showing whether they had duly complied, or were in the process of complying, with the relevant GHG reduction targets,

(d) kept the relevant GHG reduction targets updated with due diligence, and based on the best available evidence, and

(e) acted in good time and in an appropriate and consistent manner when devising and implementing the relevant legislation and measures.[42]

Even before the judgment itself, it was partly assumed that the Grand Chamber would produce in some respect a landmark decision on climate change. That is what happened, but with the difference that the Court, perhaps surprisingly, went further than expected. In addition to linking climate change to human rights, the Court stated that measures taken at the national level by states should achieve net neutrality over the next three decades.[43] This statement is consistent with the objectives set out in the EU climate legislation as well as in the domestic legal order of many states. Measures should avoid, *inter alia*, a disproportionate burden on future generations.[44] In this respect, the Court essentially followed the decision in the case of *Neubauer,* concerning the decision of the

[41] *Ibid.*, par. 543.
[42] *Ibid.*, par. 550
[43] *Ibid.*, par. 548.
[44] *Ibid.*, par. 549.

German Federal Constitutional Court on the review of the constitutionality of the Federal Climate Law through the prism of Article 20a of the German Basic Law (Nolan, 2024).[45]

It is fair to say that the Court's requirements for determining whether a state departed from its permitted margin of appreciation in ensuring the implementation of Art. 8 of the Convention are not as detailed as would be desirable or expected. However, it gives the Court (and not only) greater scope of Convention interpretation, allowing for more nuanced and adaptable future decision-making. The foregoing can also mean that, in order to avoid a rash of similar climate actions in the future, the Court has stated that it would generally look at the big picture when deciding if a state has met the requirements above. Thus, a shortcoming in one particular respect alone will not necessarily mean that a state overstepped its margin of appreciation.[46] The fact that the requirements are not unqualifiedly strict does not make them too burdensome for states.

In respect to Switzerland, the ECtHR noted that the currently existing Swiss 2011 CO_2 Act (in force since 2013) required that by 2020 GHG emissions should be reduced overall by 20% compared with 1990 levels. Yet, the applicants pointed out that the industrialised countries such as Switzerland had to reduce their emissions by 25-40% by 2020 compared to 1990 levels.[47] According to the Swiss government, even the GHG reduction target for 2020 had been missed. On average over the period between 2013 and 2020, the reduction of Swiss GHG emissions was around 11% compared with 1990 levels. The clearly indicates an insufficiency of the authorities to combat climate change by adopting necessary measures.

In line with the targets of the Paris Agreement, the Swiss government proposed an amendment to the climate law in 2017 to ensure a domestic reduction of 30% in emissions by 2030 compared to 1990 as part of an overall reduction of 50% of GHG emissions. However, the amendment in question was rejected in a referendum in June 2021 due to concerns about potential increases in gasoline prices and other cost-of-living increases. The Federal Council sought to respond with further action and so an amendment to the Act was enacted in late 2021, setting the emissions reduction target for 2021 to 2024 at 1.5% *per annum* compared to 1990 levels. What is more, the Climate Act was subsequently passed on 30 September 2022 and confirmed in a popular vote on 18 June 2023. This piece of legislation set a target of achieving 'zero' emissions by 2050, but it is rather vague and contains only targets and intentions. There is no mention of any concrete measures.[48] Such a lack of detailed measures creates significant uncertainty in their implementation. This subsequently hinders timely and effective progress towards the set goal. In such cases, it is also problematic to hold the state and its competent authorities accountable for insufficient protection of the individual rights of its citizens, which are threatened by the impacts of climate change.

It was therefore the absent regulatory measures that led the Grand Chamber to state: *„By failing to act in good time and in an appropriate and consistent manner regarding the devising, development and implementation of the relevant legislative and administrative framework, the respondent State exceeded its margin of appreciation and failed to comply with its positive obligations in the present context*."[49] Hence, Switzerland

[45] See also ref. 8 above.
[46] *KlimaSeniorinnen*, par. 551.
[47] *Ibid.*, par. 558. In an assessment of August 2009, the Swiss Federal Council found that at that time there was an existing scientific evidence relating to the limitation of global warming to 2 to 2.4°C above pre-industrial levels (thus above the currently required 1.5°C limit) which required a reduction in global emissions of at least 50-85% by 2050 compared with 1990 levels.
[48] *KlimaSeniorinnen*, par. 560-564.
[49] *Ibid.*, par. 573.

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has failed to try to reverse future effects of climate change. This obligation of a state to do so was said to flow from the causal relationship between climate change and the enjoyment of Convention rights and the sole fact that the purpose of the Convention requires its provisions to be interpreted and applied such as to guarantee rights that are practical and effective, not theoretical and illusory.[50] Given that, the Court thus found a violation of the right to privacy protected by Art. 8 of the Convention.

4.2 Reliance on Complex Scientific Evidence

The Court's approach to examining the evidence that resulted in finding a violation of the Convention by Switzerland is also quite interesting. On the one hand, the Court pointed out that each individual state shall be able to define its own proportionate pathway for reaching carbon neutrality based on all the relevant factors within its jurisdiction. The basis for this must also be the global targets set out in the Paris Agreement. These targets should not, however, be the sole criterion for assessing compliance with the Convention by individual parties.[51] On the other hand, it is notable to what extent the Court then refers to findings from natural sciences.

Building its judgment largely upon complex scientific evidence is, on one hand, interesting and perhaps unconventional. However, the Grand Chamber of the ECtHR is not such a pioneer in this regard. Rather, it can be said that by its willingness to „grapple with" scientific evidence, the ECtHR has joined a growing number of national and international[52] legal bodies that attribute significant weight to the findings of the IPCC.[53]

The judgment was largely based on natural science also in relation to the violation of the right to a fair trial protected by Art. 6 of the Convention, where the Court stated that the biggest flaw in the domestic process was that the decisions were not based on sufficient examination of the scientific evidence concerning climate change, which was already available at the relevant time.[54]

Cogent scientific evidence were also able to surpass the well-established causation test (as the Court states the „*but for*" test[55]), which the Court relaxed and determined that it did not need to be applied so strictly in climate change cases since, in this particular case there was a „legally relevant relationship of causation" whereupon climate change had led to increased morbidity among certain vulnerable groups.

5. CONCLUSION

The Grand Chamber judgement presented above is, indeed, the first of its kind where the Court found a violation of the Convention provisions in a climate change context. It can be seen, *inter alia*, as a prime example of the way in which an individual can, through legal proceedings, enforce compliance with an international convention (in this case, in particular, the Paris Agreement on climate change, which, it could be said,

[50] *Ibid.*, par. 545.
[51] *Ibid.*, par. 547.
[52] International court actions focused on climate change have been relatively few in number probably due to the procedural hurdles, as in many international courts and tribunals (outside of the area of human rights or investor–state arbitration) litigation can only be brought by states (Peel and Lin, 2019; Bruce, 2017).
[53] See *inter alia* also the recent decision in case of *Held v. Montana, No. CDV-2020-307 (Mont. 1st Dist. Ct.) (14 Aug. 2023)*. Mention may also be made e.g., of the International Tribunal for the Law of the Sea which delivered a long-awaited Advisory Opinion on climate change and international law on May 21, 2024 (Silverman-Roati and Bönnemann, 2024).
[54] *KlimaSeniorinnen*, par. 635.
[55] *Ibid.*, par. 315.

has acquired a normative binding character for the states of the Council of Europe, from which individual rights arise that individuals can claim against the states).

The ECtHR was thus confronted with a challenging task, trying to strike a balance between a pressing societal challenge and avoiding an uncontrolled expansion of the interpretation of the Convention. The judgment thus represents a significant legal development naturally raising questions about its future implications and possible consequences.

First and foremost, it is necessary to mention the fact that the provisions of the Convention are part of the legal systems of 46 Council of Europe member states. Legal systems of individual states are influenced by the findings of the ECtHR as a judicial body that oversees the application of the Convention and interprets its provisions. Consequently, it is thus not inconceivable that, given the extension of victim status in cases concerning climate change, states may be prompted to adopt stricter domestic legislation to achieve net neutrality, as defined by the court, over the next 30 years. Such measure would be taken to meet their positive climate protection obligations, which are designed to ensure the protection of the fundamental rights of individuals. The gradual reduction of GHG emissions may therefore have a significant impact on investors in states and the private sector operating there.

The biggest wave of controversy surrounding the *KlimaSeniorinnen* judgment has arisen in relation to its potential to affect other pending climate change cases, particularly those where applicants allege a violation of their fundamental rights.

An example of a pending case before the Court such as *Greenpeace Nordic and Others v. Norway*, application no. 34068/21 concerning the issuance of new licenses for oil and gas exploration in the Barents Sea. Additionally, mention may also be made of a pending case before the International Court of Justice which is about to give an advisory opinion relating to international law obligations of states aimed at ensuring protection from climate change for present as well as future generations that has been requested by UN General Assembly and is expected to be delivered in 2025.

Last but not least, it is also necessary to mention the judgment´s possible impact on ongoing or future proceedings before national judicial authorities initiated in the context of climate actions, where, at least in our Central European legal environment, it appears to be fair to mention the cases initiated in the Czech Republic.[56] The judgment naturally applies only to states, yet nothing prevents it from being used as a supporting argument in future cases by NGOs or individuals.

On the other hand, according to opinions of some legal scholars, the judgment is not so fundamentally transformative in terms of its impact on future decision-making or legislative practice. The reason for this can be found in the legal vacuum on climate change that was specific to Switzerland, where the lack of regulation was reflected in failed domestic referendum rejecting ambitious emission reduction commitments (Pedersen, 2024). Many other countries, especially EU countries, are bound by the European Climate Law[57] creating binding emission reduction obligations upon the state.

[56] See also: Klimatická žaloba ČR. Skupinová žaloba na českou vládu (2021). Klimatická žaloba ČR, https://www.klimazaloba.cz/soudni-dokumenty/ (accessed on 19.05.2024).

[57] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').

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Development in climate change cases has also been largely influenced by environmental decision-making, and both national and supranational courts have been able to extend the application of environmental obligations to climate change.[58]

Either way, the significance of a state's positive obligation to enact environmental legislation should not be underestimated. In this context, it seems crucial to acknowledge that the state's positive obligation to take necessary measures to mitigate the impacts of climate change at all levels has extensive implications for various aspects of its international legal responsibilities, indeed. There is a broad scientific consensus that climate change significantly exacerbates displacement and migration (Wentz and Burger, 2015). Projections estimate that by 2050, there could be up to 1.2 billion climate refugees.[59] Existing evidence[60] demonstrates a causal relationship between climate change and regional social and political instability (Tiryaki, 2023), underscoring that climate change poses not only immediate threats to individuals but also long-term risks capable of gradually destabilising societies and economies. Although climate migration predominantly remains a domestic issue,[61] the rising frequency of global environmental disasters and associated security challenges amplify the importance of the state's positive obligation to enact environmental legislation.

Nevertheless, some significance of the decision is undoubtedly clear: its compelling symbolism for the development of the Convention's interpretation progressing alongside the challenges society faces, as well as a significant human rights achievement in the sphere of booming climate litigation. In the years to come, it thus remains to be seen whether steps will be taken in the direction advocated by the Swiss authorities, namely that legal means will replace political ones in each sensitive case, where both domestic and international judicial bodies will be used as a means of how to take an urgent action. At the end of the day, they are the ones that interpret and enforce, among others, climate-related legislation within their jurisdictions, holding governments and competent authorities accountable for climate actions.

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[58] This was also the case, for example, in the Dutch case of *Urgenda* (State of the Netherlands v Urgenda Foundation, ECLI:NL:HR:2019:2007, 20 December 2019).

[59] Institute for Economics & Peace (2020). Over one billion people at threat of being displaced by 2050 due to environmental change, conflict and civil unrest. London: Institute for Economics & Peace. Available at: https://www.economicsandpeace.org/wp-content/uploads/2020/09/Ecological-Threat-Register-Press-Release-27.08-FINAL.pdf (accessed on 28.06.2024).

[60] For example, the civil war in Syria, which broke out in 2011 and was preceded by the worst drought in the country's history (between 2006 and 2011).

[61] Human rights league (2024). Klimatickí migranti – fakty a pojmy. Available at: https://www.hrl.sk/sk/o-nas/aktuality/klimaticki-migranti-%E2%80%93-fakty-a-pojmy (accessed on 28.06.2024).

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REVIEWS

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SCHMIEGELT, CHRISTIAN: DIE HISTORISCHE ENTWICKLUNG DER EHEVERBOTE WEGEN VERWANDTSCHAFT UND SCHWÄGERSCHAFT VOM REICHSPERSONENSTANDSGESETZ BIS ZUM EHESCHLIEßUNGSRECHTSGESETZ (1875 BIS 1998). DUNCKER & HUMBLOT, 2023 / Martin Gregor, Valéria Terézia Dančiaková

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Present Slovak Family Act No. 36/2005 Coll. governs the issue of marriage impediments in the clause §§ 9 and following relatively vaguely. Within this scope also falls the prohibition to contract a marriage between ancestors and descendants, including also the cases of kinship established by adoption. In the Czech Republic the marriage impediment of kinship is in relation to its content governed identically in § 675 of the Czech Civil Code No. 89/2012 Coll. In the Czecho-Slovak region, however, scholarly

literature that would analyse this issue in more detail is rather lacking.[1] Therefore, we would like to draw attention to a new German monograph that presents an extensive historical-theoretical probe of the problem of marriage impediment bound to kinship, affines, and sexual communion. Although it deals primarily with the development of German lawmaking since the promulgation of the Law on personal status (*Reichspersonenstandsgesetz*) from the year 1875 up to present reform opinions *de lege ferenda,* its theoretical scope could be extremely beneficial for all persons interested in marital law solely considering the comparative aspect.

Author Christian Schmiegelt analyses the discussed issue in the scope of six chapters. The first chapter is a general excursus that points out the origins and basic tendencies of the development of marriage impediments from antiquity to the nineteenth century. The second chapter analyses the already-mentioned law on personal status from 1875 and subsequently the regulation in the German Civil Code (*BGB*) from the year 1896/1900. The third chapter pays attention to the legislative ambit after the fall of the German Empire, while from the turbulent period of years 1919 – 1949, the biggest space is dedicated to the Nazi reform of family law from the year 1938. The fourth chapter includes an analysis of marriage impediments in the law of the German Democratic Republic (*DDR*). The fifth chapter can be understood as the conclusion of the current legal state in Western Germany and later all of united Germany, which is then directly followed by the sixth chapter with a philosophical analysis of the issue of marriage impediments and their relevance in legal practice.

Considering the broad period, especially the first chapter suffers from a certain level of academic curtness, which is reflected in insufficient citation of historic legal sources, as well as secondary literature. Despite this, the chapter is not only captivating with its content, but also necessary to explain further development of the analysed marriage impediments, and it serves its purpose. The author correctly deduces the significance of marriage impediments in Roman law relating to the fact that marriage was a state of fact.

Resulting from the teaching of the church, the approach to marriage differed in the Middle Ages compared to antiquity. Marriage was considered a sacrament, and the marriage impediment of blood-relation extended as far as the seventh grade. Moreover, based on the interpretation of the Bible, a theory was created, according to which a man and a woman constitute one body (*una caro*) resulting in the creation of the impediment of affines and gradually also the impediment of sexual cohabitation (*affinitas illegitima* or clearly *affinitas ex copula illicita*) – in case of kin of the person that had intercourse with the concerned. In this way, a complicated tangle of relationships was created that excluded marriage up to the seventh grade.[2] Significant expansion of marriage impediments in favour of the prohibition of incest aimed, according to the author, at strengthening the status of the Catholic church and breaking the social structures of the pagans (Schmiegelt, 2023, p. 28). The monograph further correctly points out the change in the understanding of the marriage due to reformation. In protestant countries the tendency dominated to minimise the scope of marriage impediments according to biblical law.[3] In the next pages of the book, a rationalist atmosphere of the Age of Enlightenment is described. The attention of the reader is focused on the process of

[1] From literature see: Kříženecký (1918, p. 361); Klabouch (1963, pp. 180–181); Bělovský (2003, p. 78). Concerning foreign literature independent from reviewed monograph see also: Lindner (1920); Weigand (1994).

[2] 1 Cor 6: 16: *„What? know ye not that he which is joined to an harlot is one body? for two, saith he, shall be one flesh."*.

[3] Luther originally refused them completely, later he sided with the accuracy of command in Lev. 18.

emancipation of the institute of marriage from the frame of ecclesiastical legislation and its transition under the egis of state and secular legal order.

The second chapter analyses two elemental legislative regulations of contracting a marriage in the nineteenth century that influenced Hungarian law as well. The first one is the "Imperial" law on personal status from 6th February 1875 (*RPStG*), which, as the result of *Kulturkampf*, was much more liberal than the later passed Civil Code (*BGB*) accompanied by the effort to achieve a political compromise with the German catholic party *Zentrum*. Although both regulations inclined to obligatory civil marriage, in contrast to *RPStG,* the *BGB* introduced marriage impediment of sexual cohabitation between ancestors and descendants (in Catholic areas of Germany again, in Lutheran for the first time). Considering the Slovak legal development, it is shocking that this marriage impediment was effective in West Germany until 1973 when it was abolished as unconstitutional by the Federal Constitutional Court. *BGB* is thus considered retrograde by the author of the book, although the lawgiver aimed to achieve a consensus about the new code of private law.

This bearing chapter, however, is not restricted only to the analysis of marriage impediments but is rather extensively concerned with related issues as well. It points to the question of whether the regulation of marriage fell under the competence of the Empire or separate states according to the Constitution from 1871, it describes in detail the motive of *Kulturkampf* in Germany and even refers to the development of marriage law in Austria as the result of creating a concordat with the Catholic Church.[4] The greatest space is dedicated to the historical analysis of the process of passing both regulations, especially the preparation of *BGB* in individual codification committees. In this regard – although the author works with stenographic minutes and published protocols from the proceedings of the Imperial Diet, as well as published materials from the preparation of *BGB* – it would still be an enrichment if the author would undertake broader archive research of this issue.

In the third chapter, the book analyses not only the legal state that occurred in Germany after the Weimar Constitution but, respectively, specialises in the analysis of a law from 12th April 1938 that changed the regulation of family law. Based on this law, the legal regulation of marriage impediments was softened. However, this legal state did not last long and Germany returned to its original regulation based on law n. 16 of The Allied Control Council from 20th February 1946. The author then again dealt extensively with the motivations of the Nazis for the new regulation of marriage impediments, where the relationship of the Nazi regime towards the Catholic Church and evangelical churches stands out the most.

The fourth and fifth chapters describe the same period of the second half of the 20th century, but both focus on different legal developments in East Germany and West Germany. In German Democratic Republic the reform of family law progresses in the spirit of Marxist ideals in a more revolutionary way. Radical abolition of the marriage impediment based on affines and sexual communion occurs already based on the Decree on Marriage and Divorce from 29th November 1955, while West Germany modernised its legal order much more carefully in the years 1976, or 1998. Resulting from the reception of West-German law after the unification of Germany, the East Germans were confronted with a much stricter regulation concerning the contracting of marriage.

[4] The relaxation based on the legislation of Joseph II. Was replaced by strict church authority in the matter of matrimony after the revolution of 1848 and the creation of concordat in 1855. For more see: Gregor et al. (2023, p. 149).

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The reviewed monograph represents an important contribution to the development of affine-based marriage impediments in the Middle European region. Concerning the topic, it can be considered an extremely original scientific endeavour. It is written in a light and captivating style not only concerning the formal view but also relating to the content that analyses attractive themes concerning a reader. We recommend the book in question to all interested in family law. Despite its legal-historical background, we are convinced that it will find full use and a positive response in legal practice as well.

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VRABKO, MARIÁN ET AL.: PRÁVO V ENERGETIKE [LAW IN ENERGY SECTORS]. WOLTERS KLUWER, 2023 / Jakub Handrlica

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There has been an increasing tendency to offer energy law courses in legal education at the law schools in Central Europe. This tendency clearly reflects the discussion on the energy transition towards a low carbon economy, the struggle for energy security, and also challenges arising from the phaenomenon of energy poverty. A course in energy law is being offered by the Institute of Law and Technology at the Masaryk University in Brno. At the University of Olomouc, a course on energy and mining law is available. In Prague, a course on nuclear law is being offered to the students by myself for several years now. Very recently, a course in energy law was introduced at the Faculty of Law, Comenius University Bratislava. In this respect, a handbook entitled *Právo v energetike* [Law in the Energy Sectors] was published by Wolters Kluwer publishing house in 2023. This handbook, authored by *Bronislava Krištof, Roman Oleksik, Tomáš Šipoš* and *Marián Vrabko,* represents another contribution to the development of energy law as a teaching subject as well as a subject of legal research. The authors are both academicians and lawyers, practising energy law in their professions.

The text of the handbook is written in an understandable language and will undeniably serve the students as a good source for their study. The questions to check the understanding of basic issues are added at the end of each chapter. Also, the handbook contains several graphs and maps, which serve to illustrate selected issues.

In the introduction, the handbook provides a basic overview of the energy industry. This introduction is indispensable in a handbook of this sort, as it will provide the necessary knowledge on basic technical issues for students. In the second chapter, the handbook outlines certain basic economic methods of energy regulation which are important for the subsequent understanding of the content of energy law. Both these chapter were authored by *Tomáš Šipoš*.

Further, a chapter is dedicated to the sources of energy law. While the authors (*Tomáš Šipoš* and *Marián Vrabko*) pay attention both to sources of EU law and international public law, they do not reflect various instruments of soft law, produced by the states and by the operators of networks. The fact is, however, that these sources of law may play quite an important role in the practical application of energy law.

One chapter of the handbook focuses on the relation of energy law to other fields of law. This chapter, authored by *Roman Oleksik* underlines the fact that energy law is composed both by the norms, traditionally belonging to public, or private law. In the same vein as aviation law, mining law, medical law, and space law, also energy law is a result of technological and societal developments of the last decades. In this chapter, the author appropriately points out to relations of energy law towards the regulations of urban planning, state subsidies, competition etc. Only a minor part (pp. 76-79) has been dedicated to the mutual relations between energy law and environmental law, which can be understood as a result of the limited space available. However, this field is certainly worth of further elaboration in the future, in particular the process of energy transition towards a low carbon economy.

Several chapters of the book are devoted to stakeholders active in the field of energy law. In this respect, the role of the Ministry of Economy, the Regulatory Office for Network Industries, and the Nuclear Regulatory Authority are being analysed. Also, the author (*Tomáš Šipoš*) here pays attention to the role of municipalities in energy law.

Two other chapters deserve further attention. Firstly, *Bronislava Krištof* authored the chapter dealing with data protection in energy law. Here, the author pays special attention to data protection with respect to the consumer protection in the energy sector. Secondly, *Tomáš Šipoš* and *Marián Vrabko* contributed a chapter addressing digitalisation in energy industries. This chapter is very novel and is in line with the recent shift of interest in public law towards the digitalisation of public administration.

Having briefly outlined the major parts of the handbook, one may argue that other topical issues in energy law currently exist which would deserve attention – final disposal of spent nuclear fuel in a deep-geological repository, facilitating of energy security and price regulation represent just few of these issues. However, it is understandable that the reviewed handbook primarily reflects the content of the course, which is part of the instruction at the Law Faculty of the Comenius University in Bratislava.

Reflecting on the dynamic nature of this field, I would also like to use this opportunity to mention three issues, which in my view could enrich the prospective 2nd edition of this handbook:

Firstly, right in the introduction, the authors refer to the crucial discussion on the conceptualisation of energy law as a distinctive discipline in legal education and research. The reviewed handbook may serve as a perfect demonstration of the fact that this conceptualisation has also been adopted in Central Europe. Having said this, however, any future edition of the handbook will benefit from the chapter outlining the basic principles of energy law. The benefit of this approach would be twofold. On one hand, distinctive principles will clearly further support the argument on energy law as a distinctive field of education and research and, at the same time, they will distinguish energy law from other disciplines of education – in particular from environmental law, mining law and climate change law. At the same time, outlining of basic principles would be beneficial face to face to the very dynamic changes in the energy sector, the process of energy transition and the overall emergence of new technologies.

Secondly, several parts of the handbook address the gas infrastructure and its legal framework. In this respect, it would be worth to reflect the turbulent changes in the gas industry and in particular the emerging plans for a massive hydrogen deployment. In

2020, the European Commission adopted a *Hydrogen Strategy* setting out a vision for the creation of a European hydrogen ecosystem from research and innovation to production and infrastructure, and development of international standards and markets. Hydrogen is expected to play a major role in the decarbonisation of industry and heavy-duty transport in Europe and globally. As part of the 'Fit for 55' package, the Commission has introduced several incentives for its uptake, including mandatory targets for the industry and transport sectors. Hydrogen is also a key pillar of the REPowerEU Plan to get rid of Russian fossil fuels. Consequently, it would be worth to strengthen the attention to legal implications of hydrogen deployment in the next edition of the handbook.

Lastly, any forthcoming edition of this handbook would benefit from a chapter, addressing legal issues arising from the newly emerging energy technologies. Energy accumulation and batteries are just few of the very topical examples, which are currently widely discussed and have broad legal consequences.

At this place, I would like to stress that this was said purely to suggest the authors further ideas for any of the forthcoming editions of the handbook, which will certainly come very soon.

Having said this, I believe the newly published handbook *Právo v energetike* [Law in the Energy Sectors] will become a useful companion for those students, who intend to gain basic knowledge in the very topical field of energy law. It is also a good contribution to the energy law branch, which has been currently emerging as a distinctive subject of legal education in Central Europe.

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GARCÍA GARCÍA, MARÍA JESÚS (ED.): DEMOCRACIA EUROPEA Y MERCADO ÚNICO: 30 AÑOS DEL TRATADO DE MAASTRICHT, FONDO EDITORIAL ARANZADI, 2024 / Sára Kiššová

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The reviewed book *"Democracia europea y mercado único: 30 años del Tratado De Maastricht"* consist of two parts. The book is an enriching experience for the reader who, in the first part, reads about the impact of the Maastricht Treaty on the strengthening of democracy in the European Union (the EU) and, at the same time, moves into the area of the single market from an environmental and social perspective. The reader will thus explore the impact of the Maastricht Treaty throughout EU law.

In the first part of the book there are 7 chapters, all dealing with democracy, from different perspectives. The reader has thus the opportunity to explore the authors' views on democracy and sovereignty, democracy and values, democracy and EU citizenship, or democracy and the European Parliament. Second part of the book is focused on single market from different points of views from environmental issues to business human rights.

In the first chapter, Ennio Triggiani addresses the evolving concept of sovereignty within the EU, advocating for deeper integration and stronger democratic legitimacy in response to global challenges. The chapter highlights the EU's achievements and shortcomings, particularly during the COVID-19 pandemic, the war in Ukraine, and environmental issues, calling for more ambitious and cohesive policies in defence and energy to enhance the Union's effectiveness and autonomy. Triggiani further discusses the EU's need to decide whether to remain a secondary player in international affairs or assert a stronger role through significant reforms, potentially including a new treaty. He highlights the Conference on the Future of Europe as a step towards participatory democracy, identifies criticisms of the current institutional setup, particularly the unanimity requirement, and emphasises the importance of simplifying the

EU's institutional architecture, enhancing transparency and accountability, and reassessing the distribution of powers between the EU and Member States. However, as a political obstacle to achieving wider sovereign cooperation, Triggiani sees the fact that sovereignty is closely tied to the unified identity of the people who determine it and are subject to it (Triggiani, 2023).

In **the second chapter**, Ondrej Blažo explores the evolution of the EU's "founding values", noting their formal establishment in the Treaty of Lisbon in 2007, despite the EU being founded earlier by the Maastricht Treaty in 1992. It highlights how these values became a critical focus amid political tensions in Hungary, leading to legal measures under Article 7 of the Treaty on European Union. The article explores the legislative and constitutional significance of defining these values, their integration into EU law, and their implications for European identity and legal coherence across member states. Despite terminology changes from "principles" to "values," he argues that these fundamental ideals have consistently shaped the EU's identity. The author concludes that the EU has always been a union of values since its founding, and these principles remain central to its existence and identity (Blažo, 2023).

In **the third chapter**, María Jesús García García discusses and points out how is the EU's governance system a unique democracy combining citizens and states, ensuring democratic values, political organisation, and citizen participation the EU electoral system, however the lack of a uniform electoral procedure complicates this system. She argues that strengthening EU democracy is crucial for the union's future, demanding both institutional reforms and greater citizen-public authority interaction (García García, 2023a).

María Torres Pérez picks up the previous chapter and in **the fourth chapter** examines the evolution of the European Parliament and current reform proposals to ensure that democratic values remain central to its functions. For this purpose, she analyses the proposal for a Council Regulation on the direct universal suffrage for the election of the Members of the European Parliament in 2022 (Torres Pérez, 2023).

In the fifth chapter, Ángela María Romito focuses on the development and significance of European citizenship, introduced by the Maastricht Treaty in 1992, and elaborates on the various participatory tools and initiatives (ECI and CoFoE) aimed at enhancing citizen involvement in the EU's democratic processes. She argues that active citizenship is essential for deepening European integration and strengthening the democratic legitimacy of the EU, however despite various participatory tools and initiatives, citizen involvement remains limited and often ineffective. The development of a European identity is seen by her as a gradual cultural process that relies heavily on civic engagement and participatory practices. She proposes new mechanisms, such as citizen assemblies and more accessible and impactful consultations to improve citizen participation (Romito, 2023).

In **the sixth chapter,** the protection of human right in the EU is discussed by Estrella del Valle Calzada. This chapter delves into the complex journey of integrating human rights into the framework of the EU. Initially, the EU's foundational treaties, focused on economic and commercial cooperation, lacked explicit human rights provisions. However, the chapter highlights the gradual shift towards a more robust human rights agenda, catalysed by judicial interpretations and the influence of the European Convention on Human Rights. In this chapter, the authors examine the EU's current efforts to regulate business activities concerning human rights and sustainability, following years of regulatory stagnation. The author thus provides thoughts on a proposed Directive that imposes corporate due diligence obligations in sustainability for companies operating within the EU's territory. The author concludes by stressing the

need for the EU to strengthen its leadership in human rights, invoking the spirit of Maastricht, amidst ongoing criticisms of its policies (del Valle Calzada, 2023).

With **the seventh chapter** Muriel Rouyer concludes the first part of book. He explores Europe's move towards political union, notably during the Maastricht negotiations in the early 1990s, driven by economic needs post-Cold War. He discusses how leaders, inspired by economic imperatives and the need for stability post-Cold War, moved towards deeper integration, notably through the Economic and Monetary Union (EMU) but also, he critiques the imposition of Western liberal values on Eastern Europe, leading to socio-economic challenges and the rise of populism (Rouyer, 2023).

Second part of the book is introduced with **the eight chapter** written by Kaloyan Simeonov who discusses the status of the euro as the single currency within the EU, thirty years after the Maastricht Treaty came into force. He highlights that despite advancements, seven EU member states remain outside the Euro Area, representing a significant portion of the EU's population and GDP. The article explores the implications of Brexit and Croatia's adoption of the euro on the Euro Area's consolidation. Additionally, it reviews current economic and financial reforms, emphasising their focus on the Euro Area and the remaining steps needed for the euro to become the unified currency of the entire EU-27 Single Market (Simeonov, 2023).

In the **ninth chapter**, Gabriel Moreno González discusses the development of the social state in post-World War II Europe within the framework of constitutional democracy thought fragmented political model and a competitive economic model. The author discusses the concept of a fragmented political model, particularly through the lens of James Buchanan's Constitutional Economics and Public Choice theory and illustrates how this theory applies to the European integration project, where member states have ceded sovereign powers to create a single market, reducing barriers but also limiting strong political interventions. He also points to the competitive economic model which found a strong foothold in the European integration process, shaping the EU's market and competition laws, state aid prohibitions, and principles like mutual recognition (González, 2023).

Chapter ten is written once again by María Jesús García García. She discusses the EU's efforts to integrate social objectives into its policies, highlighting both achievements and limitations. The EU has made gradual progress in this area, mainly through the regulation of Services of General Economic Interest (SGEIs), such as electricity and telecommunications, which allow member states to ensure public access to essential services. However, the EU's impact is constrained by its limited direct competencies in social matters, relying heavily on supportive roles and non-binding recommendations like the European Pillar of Social Rights (García García, 2023b).

Chapter eleven is written by Francisco Gabriel Villalba Clemente. This chapter focuses on the evolution of environmental policies within the EU, starting from the signing of the Maastricht Treaty, which recognised environmental activity as a genuine "environmental policy," up to the approval of the European Green Deal. It traces how environmental concerns shifted from community action in the 1970s to becoming integral EU policies, influenced by the transition towards a circular economy. The chapter also discusses the Cardiff Process and a 1998 Commission communication on integrating environmental considerations into all EU policies and also examines the EU's path towards sustainable development and climate neutrality by 2050 (Villalba Clemente, 2023).

In **the chapter twelve**, María Jesús García García focused on environmental competences after the Maastricht Treaty. She concludes that while international environmental law establishes crucial principles and standards, their enforcement and

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effectiveness heavily rely on regional and national legal systems, with the EU serving as a pivotal bridge between global environmental goals and local enforcement (García García, 2023c).

Chapter thirteen is about the principle of proportionality in restricting European economic freedoms and is written by Clàudia Gimeno Fernández. She analysis of how the principle of proportionality operates within the EU 's legal framework, particularly concerning restrictions on the freedoms of the internal market, and its significance in safeguarding both European integration and national interests (Gimeno Fernández, 2023).

The book is enclosed with **the chapter fourteen** written by Clara Portela who explores the EU's international influence derived from its economic might, focusing on the conditionality it imposes on its trade relations. Specifically, it examines the EU's Generalized System of Preferences (GSP), a unilateral tool that integrates trade and development goals with the promotion of human rights, labour standards, and sustainable development. The chapter traces the evolution of political conditionality attached to EU trade preferences from inception to the present, highlighting current controversies and transformations within European institutions (Portela, 2023).

The book under review is a very enriching reading that does not strictly stick solely to the EU constitutional law or solely to the single market in the two separate parts of the book but provides the reader with a cross-section of the themes that the authors explore in relation to the Maastricht Treaty. As the book is published to mark the 30th anniversary of the signing of this landmark treaty, I have to say that the book is an interesting celebration of this milestone. The book offers a wide range of topics that address not only the strictly legal aspects of what has happened since the Maastricht Treaty but also offer the reader other sociological and politological perspectives. By including 14 contributions that analyse the topics in depth, using recent literature and jurisprudence, the reader is enriched with up-to-date perspectives and ideas on EU values, sovereignty EU citizenship. Second part provides the same interesting perspectives and ideas on the single market, however not only from a social and economic point of view, but also, for example, with regard to issues of proportionality and national identity.

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DÉMUTH, ANDREJ - DÉMUTHOVÁ, SLÁVKA (EDS.): A CONCEPTUAL AND SEMANTIC ANALYSIS OF THE QUALITATIVE DOMAINS OF AESTHETIC AND MORAL EMOTIONS: AN INTRODUCTION. PETER LANG, 2023 / Marián Ruňanin

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"A Conceptual and Semantic Analysis of the Qualitative Domains of Aesthetic and Moral Emotions" by Andrej Demuth and Slávka Demuthová explores the crucial intersection of aesthetic and moral emotions. Understanding these emotions is vital for grasping human psychology and social behaviour, as they shape personal experiences and influence societal norms and ethics. Scholars like Immanuel Kant and Martha Nussbaum have emphasised the role of aesthetics in moral judgement, highlighting how sensory experiences inform our sense of right and wrong. This book's exploration of the semantics and etymology of terms related to aesthetics and moral emotions enhances our understanding of how language shapes emotional experiences and provides historical insights into evolving perceptions of beauty and disgust. This study has significant implications for legal research, where morality, ethics, and justice are influenced by emotional and aesthetic judgements. By examining these judgements, legal scholars can better understand biases, interpret laws more fairly, and develop frameworks that resonate with the complexities of human psychology, enriching both legal theory and practice.

In the introduction of the book, Andrej Demuth and Slávka Demuthová aim to define emotions and explore moral and aesthetic emotions, highlighting their importance in human perception (2023, p. 9). They present emotions as internal states modulated by neuromodulators and expressed through stereotypical behaviours, akin to instincts. Moral emotions are affective states linked to ethical evaluations, while aesthetic

emotions accompany the perception and evaluation of objects or phenomena, focusing on feelings of interest or pleasure. Although the authors provide high-quality definitions, they do not explain why these specific definitions were chosen. Nevertheless, these definitions represent an important contribution to the investigation of this scientific area, which is a significant positive of this study. They emphasise the need to analyse emotions through various methods, including etymological studies, natural language usage, statistical analysis of connotations, semantic differentials, and conceptual analysis within theology and philosophy (Demuth and Demuthová, 2023). These methods are applied by the individual authors in the subsequent chapters of the book.

In the second chapter, Slávka Demuthová, Yasin Keceli, and Andrej Demuth analyse the concept of beauty from an etymological, grammatical, and contextual point of view, pointing out the vagueness of this concept and its different understandings depending on time, religious, or cultural aspects (2023, p. 41). The authors draw attention to the need for a more nuanced analysis of the concept of beauty, considering the aesthetic concepts and dimensions that saturate this concept in different cultural and linguistic contexts (Demuthová, Keceli and Demuth, 2023). In the chapter "The Possibilities of Studying Connotations of the Term 'Beauty' in a Natural Language," Slávka Demuthová continues the analysis of beauty by examining its connotations in natural language (2023, p. 59). The chapter highlights the complexity, subjectivity, and multidimensional nature of the term "beauty", emphasising the importance of studying it within natural language to capture its meanings effectively. Demuthová reviews various methods, from single-dimensional approaches like frequency and content analysis to sophisticated multidimensional techniques that provide comprehensive views by incorporating multiple features. The text explores computational approaches such as latent semantic analysis and computational semantic models, which aid in visualising and mapping the semantic space of "beauty", analysing large textual corpora, and identifying language patterns. These advanced techniques offer deeper insights and facilitate accurate semantic representations. The chapter underscores the challenges and opportunities in studying abstract concepts like beauty, advocating for combining various analytical methods to capture their full complexity. Using real data and examples, the author demonstrates the practical applicability of these methods, enriching the analysis and providing a holistic view of how beauty is perceived and understood in natural language (Demuthová, 2023). Overall, the chapter presents a high-quality analysis of beauty's connotations, exemplifying high-quality scholarly work in this field.

The chapter "Considering the Emotion of Disgust in the Context of Terminology" by Renáta Kišoňová examines the multifaceted nature of disgust, including its evolutionary, biological, and social contexts (2023, p. 83). It highlights disgust's role as a protective mechanism against disease and its influence on social and moral behaviour. Through literary works like Sartre's "Nausea" and Han Kang's "The Vegetarian," the text illustrates how disgust relates to existential and societal issues. Research on visual and sensory triggers of disgust is discussed, along with its impact on perception, behaviour, and moral judgements. The chapter offers a comprehensive view of disgust's relevance to human psychology and social interactions (Kišoňová, 2023). This chapter presents a less extensive etymological and semantic analysis than the previous chapters, which is not necessarily a drawback, as it allows for a concise analysis of this concept. However, while the selection of three works for analysis is good, it would be more appropriate to explain why these particular works were chosen.

The chapter "Spiritual and Theological Discernment of Good and Evil" by Ľubomír Batka provides an in-depth analysis of discerning between good and evil, highlighting its importance in spirituality, morality, legality, and theology (2023, p. 103). It associates

good with attributes like wholeness and progress, and evil with negativity and destruction, emphasising discernment's role in making moral and healthy choices. The chapter explores discernment in legal, moral, and metaphysical realms, each with its own standards, such as the Bible in Protestant theology. It delves into Biblical teachings on true and false prophets, stressing spiritual experiences and referencing historical figures like Augustine and Martin Luther, who shaped spiritual discernment practices. The text discusses Augustine's analyses of sin and evil and Luther's emphasis on faith and the priesthood of all believers, highlighting the necessity of grace and faith in theological discernment. It examines discernment in daily Christian life, focusing on inner reflection, prayer, and aligning one's will with divine guidance, underscoring the process of metanoia (change of thinking). The chapter integrates historical, theological, and practical perspectives on discernment, emphasising continuous spiritual growth and its practical implications for individual and communal Christian living (Batka, 2023). However, the text may be dense and complex for readers without a strong theological background, and the focus on historical figures might overshadow contemporary perspectives. Despite lacking a conclusion, the chapter provides a comprehensive overview of the spiritual and theological understanding of good and evil, fitting well into the book as a whole.

The last chapter, "The Relevance of Legal Intuitionism and Selected Moral Emotions in Legal Thinking and Decision-Making Processes," by Olexij M. Meteňkanyč represents the most interesting part for lawyers. In this chapter, the author explores legal intuitionism, explaining its development in legal philosophy and characterising the works of important legal philosophers such as Posner and Hutcheson (2023, p. 121). The concluding chapter highlights the significance of intuitive and emotional decision-making in law, challenging the traditional focus on rationality. It shows how intuition influences judges' decisions and suggests that legal education should integrate insights from psychology and sociology. The author emphasises the need for a balance between rational and emotional aspects of legal thinking and the role of moral emotions like anger in shaping justice (Meteňkanyč, 2023, p. 156-157). This chapter successfully combines insights from psychology, sociology, and law, providing a comprehensive perspective on legal decision-making. It challenges the traditional overemphasis on rationality, advocating for a balanced view that includes intuition and emotions (Meteňkanyč, 2023). The practical implications for judges and legal education are relevant and forward-thinking, aiming to develop well-rounded legal professionals. The discussion on moral emotions like anger adds depth, recognising their impact on legal processes.

In general, the book contains extensive and innovative studies on the issue of emotions, which need more attention from legal theorists as well. One of the standout features of this work is its interdisciplinary approach. By integrating insights from psychology, philosophy, linguistics, and legal theory, the authors provide a holistic view that is essential for the multifaceted nature of legal practice. For instance, the exploration of disgust in both literary and contemporary contexts offers a profound understanding of how emotions influence moral judgments and social interactions, which are crucial in cases involving, for example, moral turpitude or social deviance. Overall, "A Conceptual and Semantic Analysis of the Qualitative Domains of Aesthetic and Moral Emotions" is a significant contribution to the legal field. Its interdisciplinary approach, detailed semantic analysis, and practical implications make it an indispensable resource for legal scholars, practitioners, and anyone interested in the intersection of law, emotion, and ethics. The insights provided by Demuth and Demuthová and other authors not only enhance our understanding of human emotions but also pave the way for a more empathetic, nuanced, and effective legal system. It is also necessary to highlight the fact that the team of the Department of Theory of Law and Philosophy of Law of the Faculty of Law

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of Comenius University Bratislava participated in the book, which is unique for Slovak law faculties. Legal scholars from departments devoted to legal theory, jurisprudence, and philosophy of law should also place more emphasis on an external, scholarly view of law.

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REPORTS

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REPORT FROM THE ECCL (EUROPEAN COMPANY CASE LAW) SYMPOSIUM ON CORPORATE SUSTAINABILITY DUE DILIGENCE – SUSTAINABILITY AND LAW (GHENT, 31 MAY 2024) / Mária Patakyová, Barbora Grambličková

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The European Company Case Law (ECCL) Symposium took place on May 31, 2024, at the Faculty of Law, Ghent University in Belgium. The organising committee consisted of Professor Hans De Wulf (Ghent University), Professor Joti Roest (University of Amsterdam), and Professor Diederik Bruloot (Ghent University). The ECCL comprises a pan-European board of experts representing each EU member state and publishes the ECCL journal, which offers readers a comprehensive overview of laws and legislation in the EU.

The theme of the ECCL Symposium was sustainability in corporate law, with a particular focus on corporate sustainability due diligence. Just a few days before the symposium, on May 24, 2024, the Council of the European Union approved the political agreement on the Corporate Sustainability Due Diligence Directive. This directive aims to

foster sustainable and responsible corporate behaviour in companies' operations and across their global value chains. The final wording of the directive shall be available in the summer.

Professors Hans De Wulf and Joti Roest jointly opened the symposium. Following the welcome address, Professor Christopher M. Bruner from the University of Georgia School of Law (USA) delivered the keynote speech on developments and debates surrounding corporate sustainability in the USA, providing a complex perspective on the challenges faced in the USA.

Next, Professor Karsten Engsig Sørensen from Aarhus University presented his insights on the role of stakeholders in sustainability due diligence processes. This was followed by Professor Deirdre Ahern from Trinity College Dublin, who focused on the Corporate Sustainability Reporting Directive, examining its direct impacts on regulated actors and indirect impacts on value chain actors.

Professor Alain Pietrancosta from the University of Paris I Panthéon-Sorbonne shared insights and experiences from France on the law of vigilance (Loi de vigilance). Professor Eva-Maria Kieninger from Julius Maximilians Universität Würzburg discussed private enforcement of human rights due diligence from a German and private international law perspective.

In addressing corporate social responsibility, Professor Giovanni Strampelli from Bocconi University Milan elaborated on the role of institutional investors in promoting ESG goals in Europe.

The final panel featured Professor Marleen van Uchelen from the University of Amsterdam and Professor Hans De Wulf from Ghent University. Professor van Uchelen discussed social enterprises and steward ownership, while Professor De Wulf addressed climate litigation against companies, highlighting the main challenges.

The symposium concluded with remarks by Professor Alexander Schall from the Leuphana University Lüneburg.

On behalf of the Faculty of Law of Comenius University Bratislava, which is represented on the editorial board of the ECCL journal by Professor Ondrej Blažo, the symposium was attended by Professor Mária Patakyová and Dr. Barbora Gramblička. The symposium was valuable for them as it provided in-depth insights into the latest developments in corporate sustainability law and allowed them to engage with leading experts and peers in the field. Professor Patakyová and Dr. Gramblička have participated in the ECCL Symposium on four occasions. Each iteration of the symposium addresses a distinct topic, such as dual class share structures and EU companies' access to capital, corporate governance and information (in companies and financial firms), and groups of companies. The forthcoming symposium will delve into issues of corporate restructuring.

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PROTECTION AND GUARANTEE OF RIGHTS AND LEGITIMATE INTERESTS IN THE HISTORY OF LAW; MILESTONES OF LAW IN CENTRAL EUROPE (ČASTÁ, 22 – 23 MARCH 2024) / Frederika Vešelényiová

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This year, the Faculty of Law at Comenius University Bratislava proudly organised the 18th International Scholarly Conference for PhD. students and young researchers, entitled "The Milestones of Law in Central Europe 2024." Under the auspices of the Dean of the Faculty of Law, Assoc. Prof. JUDr. Eduard Burda, PhD., the conference took place on March 22-23, 2024, at the picturesque, purpose-built facility of the National Council of the Slovak Republic in Častá - Papiernička.

The conference program featured over one hundred studies presented by both national and international speakers from the Czech Republic, Slovakia, and Poland. Participants were divided into eleven thematic sections, each focusing on a specific area of law. One notable session centred on Legal History, Comparative Law, Roman Law, Ecclesiastical Law, and Canon Law, with the main theme: "Protection and Guarantee of Rights and Legitimate Interests in the History of Law." This session included five speakers who presented their research on challenging topics, both in person and online. The session was chaired by Assoc. Prof. Mgr. et Mgr. Ondrej Podolec, PhD., from the Department of Legal History and Legal Comparative Studies, and Prof. JUDr. Matúš Nemec, PhD., Head of the Department of Roman Law and Ecclesiastical Law, both from the Faculty of Law at Comenius University Bratislava.

The main theme of the section revolved around the protection and guarantee of human rights in the history of law, offering participants a broad and insightful exploration of this critical topic. The diverse presentations included discussions on Roman law, the

establishment of rights in the 20th century, and current findings in the protection of victim rights.

Mgr. Valéria Terézia Dančiaková PhD., was the first speaker of the section. In her study on Roman law and its context in relation to he Acts 16:16 - 40 - episode in Philippi, she demonstrated how human rights were anchored in Roman law. Notably, JUDr. Veronika Pétiová, PhD., presented on the consequences of sexual abuse on victims, highlighting the lasting neurological impacts and integrating legal perspectives with neuroscience. This interdisciplinary approach sparked constructive discussions during and after the session, emphasising the need for a multifaceted understanding of legal issues. Mgr. Jakub Jankovič analysed the legal tools used in the interwar Czechoslovak Republic to combat Hungarian anti-Trianon tendencies, focusing on the extensive interpretation of irredentism and measures like censorship, bans on Hungarian national colours, and interference with the right to assemble. His presentation, supported by extensive archival material, was a highlight and provided deep insights into the historical context and its legal implications. Human rights and their guarantee in the 20th century were also the theme of another presentation held by Mgr. Frederika Vešelényiová, which discussed the evolution of legislation concerning institutional care for minors in Slovakia. The section was concluded with a presentation by ICDr. Peter Sýkora PhD. with his presentation on the principle of participation and co-responsibility in governance in the Church and in civil society.

The day's program also included a presentation for all conference participants by Prof. JUDr. Juraj Vačok, PhD., President of the Senate of the Supreme Administrative Court of the Slovak Republic since 2022. Prof. Vačok discussed the history and establishment of the conference, shared his concerns about the current state of legal education, and emphasised the positive opportunities for students to study abroad and undertake internships. His address highlighted the importance of continued support and development for young legal scholars.

In summary, the conference section centred around the protection and guarantee of rights and legitimate interests in the history of law. The diverse presentations provided unique insights through historical analysis, comparative studies, and theoretical exploration, enriching the overall discourse on legal protections and guarantees. The discussions inspired and motivated participants for future research, emphasizing the importance of understanding historical contexts to inform contemporary legal practices.

The significance of this event extends beyond the immediate academic presentations. It serves as a crucial forum for the exchange of knowledge and ideas, fostering collaboration across national and disciplinary boundaries. By bringing together scholars from various fields and regions, the conference highlights the collective effort to advance legal scholarship and address contemporary challenges in law. Moreover, it provides an exceptional opportunity for networking, allowing participants to build professional relationships that can support their academic and career development. The interactions during the conference sessions, informal discussions, and networking events create a dynamic environment for learning and growth, reinforcing the importance of community in academic pursuits.

In conclusion, the protection and guarantee of rights remains a crucial topic, relevant not only historically but also in contemporary legal contexts, providing important insights for future developments in these legal spheres. The 18th International Scholarly Conference for PhD. students and young researchers showcased a remarkable array of academic contributions, demonstrating the vibrant scholarly community's dedication to advancing legal knowledge. Participants engaged in meaningful dialogue, explored new

research methodologies, and fostered collaborative relationships that will undoubtedly benefit their future careers. The conference reaffirmed the importance of interdisciplinary approaches in legal studies, highlighting how integrating various fields can lead to a more comprehensive understanding of complex legal issues. As we look forward to the next instalment of this prestigious conference, it is evident that the exchange of ideas and the commitment to academic excellence will continue to drive progress in the study and practice of law.

The importance of this event cannot be overstated. It not only highlights the critical themes of legal history and contemporary issues but also creates a platform for young scholars to present their work, receive feedback, and engage with peers and experts. The diversity of topics and interdisciplinary approaches enriches the academic community, fostering a culture of rigorous scholarship and innovation. This conference serves as a beacon for emerging legal minds, encouraging them to delve deeper into their research, challenge existing paradigms, and contribute to the evolving landscape of law. The robust participation from various countries underscores the global relevance of the themes discussed and the universal quest for justice and legal integrity.

Furthermore, the networking opportunities provided by this conference are invaluable. Young researchers have the chance to connect with seasoned academics, potential mentors, and future collaborators. These interactions can lead to joint research projects, publications, and career advancements. The conference also highlights the importance of international cooperation in addressing legal challenges, encouraging participants to think beyond their national contexts and consider global perspectives.

As the legal profession continues to evolve, events like "The Milestones of Law in Central Europe" play a pivotal role in shaping the future of legal education and practice. They provide a space for critical reflection, knowledge exchange, and professional growth. The conference's success is a testament to the dedication and hard work of the organizers, speakers, and participants, all of whom contribute to the ongoing dialogue and development of law. Looking ahead, it is clear that such gatherings will remain essential in fostering a vibrant, informed, and collaborative legal community committed to the pursuit of justice and the protection of rights.

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