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THE IMPERATIVE OF SUSTAINABILITY IN THE BUSINESS MODELS OF THE XXI[ST] CENTURY / Adriana Almășan

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Abstract: *Sustainability has become a mandatory requirement in the business models of this century, with the aim to reverse the recent trends in economy. In the era of disruptive economies, the optics of what constitutes added value has significantly shifted towards a more inclusive approach. The waste effect, the greed in conducting business, the ignorance of the impact of business development's impact over the environment, the use of certain technologies, despite the insufficient knowledge of how they work, and bureaucracy threaten the very existence of humanity. Yet, none of these perils are properly addressed from the legal perspective, nor are they prone to be mitigated in a blurred legislative system. The paper discusses the necessity of a broader understanding of sustainability, with a view to business models, as well as integrated legal solutions, at the level of European Union legislation.*

Key words: *Sustainability; Business Model; European Union; Disruptive Economies; Markets; Environment Protection; Unfair Trading Practices; New Technologies*

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1. INTRODUCTION

We are living in the era of disruptive technologies based on inventions that aim to "recycle" the existing relevant markets into new ones, changing the economy itself. These new technologies generate not only a significant impact on the economy sectors (in transportation,[1] communication[2] etc.), but they also impact social relations (social media being a by-product of digital technologies), art (NFT, the art created using blockchain technology), education (LUE, 2014, pp. 183-184) (the products developed by Open AI using bots for the assistance in various fields, including research), banking (digital banking or the so-called neobanks (AU, 2024)).

Entrepreneurs use innovation to shift consumption towards markets that develop new technological solutions. The added value of the products generated by the

[1] The online platforms and mobile applications of transportation services enabled prosumerism, the autonomous vehicles enabled new personal transportation services, such as shared car rides.
[2] Enhanced audio-video mobile communication technologies enabled mobile TV broadcasting and streaming, as well as online education services, including remote learning.

new technologies is based on the supply and demand mechanisms, with the intrinsic value remaining without support in a free economy.

We are also living in an economy of greed, where social and human values are merely used as a means to the end of gaining profit. Still, society is abundantly influenced by swift channels of communication that expose individuals and companies to a level of vulnerability to pressure that has never been observed in the history of mankind.

Temporary extraordinary circumstances, such as economic, sanitary, or political crises have added multiple challenges to the economic and social changes with permanent effect.

Worldwide, the efforts to achieve sustainability in the employment of new technologies have led to multidisciplinary research (Kristoufek, 2013) and effective actions on the part of leading companies worldwide (Microsoft, 2020). At the United Nations level, the endeavour is summarised in the United Nations Sustainable Development Goals (SDGs), a commitment plan aimed to harmonise the new technologies with humanity desiderates pertaining to the protection of our planet, as well as the creation and management of opportunities, and striking the balance of responsibility. The UN Secretary-General noticed in 2020 that the implications and potential of digital technology the SDG's are present in all the SDG's 17 goals and 169 targets (United Nations, 2019, p. 15).

1.1 The Fourth Industrial Wave

The fourth technological wave features new relevant markets and disruptive technologies enabling new definitions of the relevant markets. The new technologies, such as M2M (Machine-to-Machine communication), the IoT (Internet of Things) (Khalil, Malik, Hong, et al., 2023),[3] the shift from the digital era to metaverse and the great leaps in AI (Artificial Intelligence) and augmented social reality and others created new markets and laid a powerful emphasis on the potential competition.

The necessity to adapt to the new economic realities has been acknowledged by the new Commission Notice on the definition of the relevant market for the purposes of Union competition law, which is pending to replace the Notice published by the Commission in 1997. The draft document does not yet solve the definition problems arising from the new technologies that alter the configuration of the markets. For instance, the draft Notice acknowledges rather the difficulties of applying the SSNIP test (Small Significant Non-transitory Increase in Price) in situations such as for zero monetary price products and highly innovative industries.[4] The draft document also indicates as a solution the empirical application of the SSNIP test,[5] in an approach that has already been used in past practice by the European Commission.

In this context of economic development, considering the free evolution of markets, disruptors of the new economies do not entertain sustainability studies, nor are they required to perform such analysis. Also, there is no sustainability test for disruptive economies, with most of them operating successfully after they had already proven they could not sustain a competitive and environmentally friendly economy. The trial-and-error

[3] The applications of technologies enabling IoT include urbanistic development, as shown by Khalil, Malik, Hong, et al. (2023).
[4] Paragraph (32) of the draft Commission Notice on the definition of the relevant market for the purposes of Union competition law.
[5] Paragraph (33) of the draft Commission Notice on the definition of the relevant market for the purposes of Union competition law.

system is prone to generate, however, a severe impact on the real economy, without the undertakings assuming accountability.

Expanding business comes with a sustainability risk, such a peril varying according to the business model. Some business development is fuelled by greed, hence jeopardising the world economies. Regardless of the cause, whether it might be overrating a company or acquiring capital in excess, a large-scale expansion is prone to trigger economic bubbles, as it is fictitiously grounded.

Another source of sustainability risk comes from erratic company management. The wasteful management implies a considerable sustainability risk, even though public awareness increased pressure against all sorts of perks, such as the use of company jets, real estate facilities, and improper asset management. However, the radicalised public opinion, in the form of cancel culture, which worked with certain success, has yet to tackle this sort of inconsiderate and greedy behaviour. Additionally, the inequalities resulting from digital poverty increase the gap between the sustainability goals and the existing global inequalities (O'Sullivan, Clark, Marshall, et al., 2021).

1.2 Added Value in Economy

The rule of thumb is that the economy must create value capable of satisfying the needs of individuals and companies on the planet. The free market basic principles enable only products and services in demand to be offered, the products and services not having an economic use naturally remaining outside the market.

But beauty is in the eye of the beholder, as the old proverb says. The on-line economies generated all sorts of nonmaterial creations. Not surprisingly, the cost of production for most of these immaterial goods is not neglectable, such being the case, in a couple of examples, of NFTs[6] - crypto art as a form of art produced by using blockchain technology - and cryptocurrencies – financial commodities having fluctuant value generated in an immutable digital ledger that records transactions between agents interacting in a peer-to-peer network - that consume significant quantities of electric energy for being generated. It is therefore difficult to strike a balance between the cost of production and the human need that the products aim to fulfil.

These are business models that feature economic value with no real presence and are as speculative as the financial instruments directly linked to the financial crises, the economic crisis in 2008 being triggered by the speculative transactions and abuse of derivatives. The capital in digital markets became speculated and manipulated by investment banking to the extent that the economy in this century is like a casino fuelled by a giant debt bubble and computer-driven derivatives.

1.3 Welcome to the Economy of Greed

The investment either seeks long-term, moderate profitability in safer conditions, or short-term, high-risk, higher profits. The investors' choice between greed and security in setting their motivation has never been under legal censorship. Preventing erratic, greedy behaviour is a difficult task, incompatible with the principles of the free market.

However, so is attempting to remedy and sanction the manipulation prowess and taking measures to hinder the natural lure so many people have for greediness. For

[6] The value of digital art includes the costs sustained with production, but also the creative value inherent to any artistic endeavour. The sustainability challenges add to the ethical and technical ones, as the conveying of health risks. See, for a detailed analysis, Calvo (2024).

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instance, the victims of Ponzi schemes are never compensated, a tax on gullibility being self-implied. As consumer preferences welcome this type of <opportunities>, apparently there seems to be a crime without victims, as they gather no sympathy. This is not true. The economy is a victim, as people and companies that were not even indirectly involved in such schemes become the ultimate victim, as the bubble breaks.

Greed in the economy embraces so many other forms (Dignam, 2008). For instance, hostile takeovers imply a waste effect, in addition to harming the relevant market, especially in the case of the so-called "garage sales" of assets, when the acquired company discontinues the production of goods or the supply of services. Sold assets are not likely to generate the same added value as they did when aggregated in the goodwill of the former company.

In addition, innovation – the largest source of added value in an economy – does not contribute to market competitiveness. Often, big businesses keep startups out of the markets, preventing competition on the markets either by way of a buyout or by disrupting their supply or distribution channels.

However, predatory behaviour in the markets appears to be condoned. For instance, the EC Merger Regulation enables the European Commission the prerogative of control over the economic concentrations provided that the operation has a community dimension transposed in structural conditions.[7] Should the concentration operation concern undertakings of sizes that do not meet the thresholds provided in the EC Merger Regulation, competition law only takes interest in predatory behaviour falling under the conditions of abuse of dominant position in the relevant market. The legal systems, including the competition legislation at the European Union level, are still far from granting protection for an <offer that cannot be refused>.

1.4 Transient Challenges

In addition to the challenges pertaining to the way the markets based on new technologies function, challenges that imply an irreversible impact, there are some other trials for the legislation designed to regulate the economy.

Among the tests having a non-permanent effect, the most relevant are the recent crises and emergencies generated by the COVID-19 pandemic and economic crises, the most relevant being the supply shortages in production (cooling fans supply shortages led to chain production delays in 2022, microchip shortages led to action on the part of European Parliament creating a plan to overcome semiconductor shortage)[8] and transportation (for instance, the obstruction of Suez Canal for six days in March 2021 led to multiple negative consequences, including 9 bn USD per day, that being 12% of the global trade, according to Lloyds).[9] Also, the energy crisis triggered by the armed conflict in Ukraine, and the related economic sanctions applied to the aggressor caught the attention of authorities worldwide.

Consequently, the relevant markets had a specific dynamicity and shifted to fit the new political, social, and economic circumstances. For instance, the pandemic increased the tendency of hoarding in consumers, enabling scalping from the traders who profited from slight market fluctuations. In another example, the pandemic also

[7] Art. 1, Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.
[8] Proposal for a Regulation of the European Parliament and of the Council establishing a framework of measures for strengthening Europe's semiconductor ecosystem (Chips Act).
[9] Lloyd's List (2021).

stimulated single-use products, as well as sanitary protection products (such as face masks and gloves) that generated additional waste.

The crises and emergencies negatively affect consumer behaviour, making it difficult to predict whether the tendency is reversible or not, when the cause ends (Crane, 2020, p. 54; De Moncuit, 2020, p. 58).

To this end, consumer environmental awareness is essential. The negligent, unaware consumer, who does not act diligently, may easily establish behavioural patterns leading to increased consumption and waste.[10]

Also, as the business models generally do not aim to increase customers' consciousness/mindfulness, the entire responsibility for purchasing behaviours lies with the customer. The legislation does not prevent any excess or abuse in the consumption of goods or services. In case transient causes embed permanent shifts in consumer behaviour, there is no legal correction mechanism in place to prevent them.

2. BUSINESS MODELS IN THE XXI CENTURY

Business models are diversified, as they adjust to the types of technologies they employ. The fast-changing markets are prompted by technologies in the making (Lavin, Gilligan-Lee, Visnjic, et al., 2022).

The e-commerce is conducted increasingly in marketplaces, with this type of platform attracting most of the clients. Only the most dedicated customers elect to shop on the producer's website shopping page. This trend greatly enhanced the market power of the marketplace owners, now seen as gatekeepers in the position to influence the customers' behaviour, including by self-favouritism. Despite this conduct being prohibited by the competition regulations pertaining to abuse of dominant position (Said, Somasuntharam, Yaakub, et al., 2023), the practice is still a source of abundant jurisprudence both in the United States of America, where the legislation is applied in the spirit of economic effectiveness,[11] and in the European Union.[12]

Undertakings operating on demand build their business model on prosumer-based activities in the market, developing direct interaction between supply and demand, hence the operators on the market not being compelled to create legal vehicles to register to the system.

Some of the operators in the markets of on-demand services are conducting their business using the peer-to-peer system, generating a sort of two-sided marketplace, the offer, and the request for services being hosted by the online application.

The subscription-based business model is the most traditional one. Nonetheless, the services provided online are readily available worldwide and they force the operation to comply not only with legal requirements in the home country but also in the countries of the consumers.

Seeking fast expansion, some online services have replaced the trial-based business model with the free-premium model. This type of business model offers a base-level service, in principle, unsatisfactory for most users as well as an upgrade to a paid level full service.

This business model is compatible with peer-to-peer operations.

[10] This effect also being a consequence of the market for lemons theory explained behaviour, as explained in 4.2 below.
[11] U.S. v Google LLC, Case A:20, 2020, U.S. v Microsoft Corp., Civil Action No 98-1232, 1998.
[12] EC, Case AT.39740, Google Search (Shopping), 27.6.2016.

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The ad-supported models of businesses host advertisements on the platform they operate. As the revenue is controllable, this type of business model raises moderate competition concerns, in terms of business valuation. Nonetheless, the distortion effect is significantly enhanced by the interplay between hosting of ads on platforms and placement of ads on social media. Due to the swift communication used by the advertisement models, this business model gained unpredicted importance, to the extent such online platforms are highly competitive in the news and media markets. The importance of social media has reached a peak, where influencers are deemed as an important factor in marketing in most of the markets, especially in Fast Moving Consumer Goods (FMCG).

The most difficult to assess and complex business models are the hidden revenue generation of business. They exploit social media's impact in the world and gain market power by collecting data from their clients who subscribe for free. The sustainability and competition problems raised by this model of business cannot be accurately assessed.

The open-source business model is based on the contribution of the users, even though the model does not eliminate the use of human resources and other operational costs that may be significant. This business model triggers similar concerns from the perspective of development and competition as the ones in the hidden revenue model.

2.1 AI Based Business Sustainability

In addition to the general requirement of digital consumption's sustainability, considering that Internet access has reached 60% of the global population, with the average user spending over 40% of their waking life on the Internet (Istrate, Tulus, Grass, et al., 2024), the digital usage that employs AI entails distinct consideration.

The most unpredictable business model is the AI-based one. As the research has not yet reached the stage of complete comprehension of how the Artificial Intelligence works and its applications are in ongoing development, the world economy still encounters high risks from the usage of AI-powered products and services. The liability system resulting from the activities led by the AI is yet to be determined (Vial, 2022, p. 70).

AI technologies enhance the development of multi-robot systems, enabling hosting of blockchains by the robots with the assistance of smart contracts as well as the synchronised data storage capabilities (Dorigo, Pacheco, Reina et al., 2024). The implementation of smart contracts worldwide is closely linked to the national legal systems, and the discussion about generating a global regulation for the contract in the form of this technology is impractical.

AI technologies enable bot-assisted services in various customer care areas, including health services, e-commerce, education, communications, multimedia etc. Many multinational companies have already embedded such services on their digital platforms, in an endeavour to automatise the most repetitive activities and replace human operators.

The AI race is hyped by the leading high-tech companies to the maximum, without anybody knowing where it would lead humanity. The viral sheer enthusiasm shared by the hi-tech business environment in the capability of AI has already led to distortions. The epitome in this regard might be the chatbots used in online sales platforms, deemed to eliminate human assistance and, hence, a considerable cost, but futile for the purpose of adequate customer assistance, most of them being designed poorly in the form of a several entries question and answer online window.

Most of the services that are AI-assisted continuously provide anecdotal errors (Walters and Wilder, 2023) ("hallucinations") as, in fact, AI is merely a collection of information, analysed and synthetised, acting similarly to an oracle. Computer scientists advise caution in using the AI-powered tools in research (Castelvecchi, 2016). Eventually, where there is no natural intelligence, artificial intelligence cannot be generated.

2.2 Digital Currency Sustainability

Digital currencies do not represent alternatives to fiat currencies, as the exchange fluctuations to the USD and the extended market behaviour as a commodity led to the failure to meet the basic requirements for such an analogy (Baldwin, 2018).[13] Even the most popular cryptocurrencies failed to prove sustainability, despite several great vantage points in their favour, including security, transparency, autonomy, and accessibility.

Nonetheless, in digital communities, especially during the recent COVID-19 pandemic, these exchange means revealed tremendous possibilities, despite the lack of consistency to enable predictions of stability (Mattsson, Criscione and Takes, 2023).[14]

The digital markets imply other sustainability risks. The most important ones pertain to cryptocurrency, generated by using electric energy. Comparing the cost of production of crypto coins and fiat coins, the result is that cryptocurrency is not a gain in sustainability as its mining consumes huge quantities of electric energy. Furthermore, virtual currency that is not generated on the blockchain may be more efficient, and therefore safer for the environment. Without attempting in any way to tackle the comparison between the two types of currency from an exhaustive perspective, the outcome is that there is a sustainability challenge stemming from the growing cryptocurrency markets.

Also, by having no correspondent and guarantee in actual goods, this type of currency represents false value, and not added value in an economy that is prone to generate bubbles and disturb the economy (LI, 2023).

Cryptocurrency has already proved a certain value in enabling payments that cannot be performed by using fiat coins, however, this is not a category of achievements that ensure sustainability. The legislation still needs to decipher the technical means to apply legislation to some technology-based businesses, such as taxation and securitisation of commercial operations using this type of collateral.

2.3 Prosumerism

There are some aspects of the new technologies-based markets that still shine a beacon of hope on the sustainability requirement of the business models. Prosumerism, as an efficient business model, is the epitome regarding the relationship-transforming nature of some of the new technologies and the substantial change in legal status of the law subjects. Featuring prosumers, as individuals or entities, that can consume and produce simultaneously, prosumerism encompasses numerous applications.

[13] The author took bitcoin as reference, analysing its alternative soaring and plummeting describes this cryptocurrency as a cautionary tale in the development of new financial markets.
[14] The authors analysed the Sarafu users in Kenya during the COVID-19 outbreak, reaching the conclusion that the model could not be compared to empirical account balances.

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In one of the most relevant economy applications, the energy sector (Jacobs, 2016; Jakimowicz, 2022; Korotko, Rosin and Ahmadiahangar, 2019), prosumerism pertains to future smart grids, which help to integrate distributed energy resources (DER) into existing electric power systems (EPS). Other applications include communication services, such as transmedia audio-visual production (Lastra, 2016; Park, Cho and Choi, 2017), personal transportation services, hospitality services etc. The challenges in striking a balance between enhancing the application of prosumerism in the energy sector and enabling sustainability are difficult to regulate, in the effort to reach the climate neutrality goal in 2050. As the prosumer energy market is expanding, this represents the focus in regulation at the European Union level.[15]

Blockchain technology, which is based on the prosumer connection on dedicated platforms (Pop et al., 2020) is also subject to sustainability risks. Sustainability discusses risks beyond the basic carbon footprint, the concept that has multiple implications derived from the preservation of the planet and maintaining the carbon footprint low. A recent study explains that the current emissions from mining devices supporting NFTs transactions are expected to have an extinguishing effect on the lives of people sometime in the future. For instance, in the United States, it is expected that the average lifetime carbon emissions of 3.5 persons - 4434 metric tonnes or 4,434,000 kgCO2 – will lead to the death of one person between 2020 and 2100 who would not otherwise have died. Death rates from blockchain transactions can then be estimated based on Bressler's calculations, considering the estimated emissions caused by a blockchain network and dividing the number of transactions to calculate an estimated emissions transaction cost (Truby, Jon, Dahdal and Ibrahim, 2022).

One of the most relevant applications of prosumerism is e-commerce (Weitzenboeck, 2015). The personalised production of goods involves the customer in the design of the product, simultaneously tailoring the product to their own needs. This triggers certain sustainability advantages and disadvantages. On the one hand, this prolongs the usual use of the product, the emotional attachment to fit products being one of the main reasons. Also, the more fitted to the needs of the customer, the more likely it is to score high in efficiency. On the other hand, the tailored products are less likely to be resold to other customers, and the ones that do not meet expectations would become waste.

The technologies transfer to the customer some of the service and peer-to-peer platforms increase economic efficiency. The economic efficiency is further increased by the assessment and feedback systems that enable control over the quality of the product or the service, by using the reception by the public. The platforms that host such services, such as Yelp, TripAdvisor, as well as social media used in marketing, such as influencers' channels, function in concurrence with the service-providing platforms, adapting in real time to their positioning in the market. This model is both applicable for undertakings but also for prosumers, the peers registered in the platform to perform the services directly in contact with their clients.

Some business models, such as airbnb.com, thrived due to its enabling prosumerism and challenging the competitors, hence inducing significant shifts in the market. Such was the case of its competitor Booking.com, who was forced to reshape its business model, welcoming private hosts to register in the platform, due to the massive change in social perception that enabled the transfer of customers. For this reason, booking.com added, for instance, environmental sustainability information

[15] Commission Recommendation of 14 March 2023 on Energy Storage – Underpinning a decarbonised and secure EU energy system 2023/C 103/01.

among the platform's search criteria, for the convenience of the customers who are now more sensitive to environmental protection, than they were in the past.

As these technologies are based on a significant boost in creativeness, the prosumer-oriented ecosystems being driven by innovation (Seran and Izvercian, 2014), it becomes difficult to predict their future development to apply adequate corrective legislative measures to the inequalities resulting from the asymmetric power between the platform operators and prosumers, as well as to achieve the goal of sustainable operational governance.

Currently, the status of the prosumers represents a legislative concern from the perspective of establishing and protecting essential rights,[16] especially in the context of the increased role of robots in the operation of digital markets (Nevejans, 2017).

3. SUSTAINABILITY CHALLENGES IN THE CURRENT BUSINESS MODELS

Sustainability may be analysed from the triple perspective of ecologism, economic efficiency, and socio-cultural absorption of the business model.

The challenges in sustainability come from waste generation and management, production efficiency, and ensuring the perfect fit between the demand and offer on the markets. Some of the new technologies gain efficiency, failing however to create sustainable environment safety. In this context, pursuant to article 191 TFEU, EU legislation aims to strike a balance between the liberties inherent to the free market and the protection of competition and the environment. The scope of the EU environmental policy includes boosting the efficient use of resources, leading to a clean, circular economy, and reducing pollution.[17]

3.1 Waste in Food Industry

Among the sources of waste, fast food industry is one of the largest. The production of ready-to-eat meals in a short time for frugal consumption requires continuity in production and triggers the risk of wasting the food not consumed in due time.

Another source of waste is the self-service food industry. Extended from the economic buffet style serving in cafeterias and self-service establishments to luxury restaurants, the version <all you can eat> is the epitome of wasteful management of serving food.

The food in supermarkets is discarded at the expiration rather than being donated while still fit for consumption. The distribution by networks of food banks is a scarce phenomenon, therefore legislation should step in and set redirection of products towards distribution points, in a similar manner to the electric and electronic products manufacturers' obligations to recycle.

The waste effect in food purchase has been increased by nutrition habits (Shang, Li, Xu, et al., 2020; Yudkin, 1963), hoarding habits during the pandemic and the food distribution led to overeating and obesity, in some parts of the world, and starvation, in some others.

[16] The European Council has adopted in June 2023 a position on the Draft Directive Proposal of the Commission establishing the status of the digital platform workers and the use of Artificial Intelligence in the workplace.

[17] The European Green Deal, adopted by the European Commission in December 2019. The act sets the roadmap to address climate change and environmental degradation.

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Not lastly, the production of subpar goods, especially in the food industry, is a significant source of waste, with most of the unfit products being discarded.

The most efficient nutrition solutions do not reside in legislative measures, education being paramount in this regard. The new technologies (Papastratis, Konstantinidis, Daras, et al., 2024) also enable solutions to the waste tendency.

3.2 Packaging

Packaging became important especially in recent years, in the pandemic context, setting a trend of individual wrapping for categories of goods that did not have traditionally distinct packages. The most important source of excessive packaging is the e-commerce (Guo, Wu, Tan, et al., 2023), most of the products are sold in resistant and sometimes even unnecessary boxes, or plastic covers. The e-commerce business model has not yet resolved the challenge of sustainability, considering how delivery works. Packaging, delivery to the door, and client assistance make sales easier, however, they simultaneously increase the volume of sales and the quantity of waste, increasing the volume of non-recyclable garbage.

The legislative solutions applied in the EU are inadequate for solving the challenge. For instance, the mandatory tax for plastic containers (such as bags, whether biodegradable or not) limits only in a small proportion of the waste. In fact, the measure is aimed to merely increase the cost, not to urge restraint in the use of packaging.

3.3 Sustainable Agriculture

The planet functions synergically, therefore all the endeavours aiming to ensure sustainability should be applied in a harmonised endeavour. This is not, however, the reality. In stark contrast with support legislation at the European Union level for the development of sustainable agriculture, including by special funding,[18] the lack of concern for sustainability in rural development, especially in developing countries, adversely affects the climate in other parts of the planet.

The actions taken under the United Nations auspices, signatory countries to the Paris Agreement (to which the European Union is a signatory member) attempt to substantially reduce global greenhouse gas emissions to enable the long-term global average surface temperature, by committing to increase it by 1.5-2°C, at most, above pre-industrial levels.[19]

Sustainable agriculture is the practice consisting of a system of farming that allows conserving resources for future generations. This should be the aim of agricultural production designed to provide for an increasingly populated planet. However, sustainable agriculture is not mandatory worldwide, the legislation only prohibits the production of food that raises health concerns.

Even though healthy food enables the reduction of health services costs and increases the well-being of the population, no worldwide legislative measures are boosting the observance of sustainability principles.

One example is the slow development of Fair Trade, a concept aimed at protecting farmers in developing countries from the predatory behaviour of the large companies acting as the purchasers of their products. While this should be the

[18] EU funding of 95.5 bn euros budget for the 2021-2027, available by means of 7-year rural development programmes from the European Agricultural Fund for Rural Development (EAFRD) includes an injection of 8.1 bn euros deemed to aid farming, by addressing the challenges raised by the COVID-19 pandemic.
[19] The Paris Agreement, adopted by United Nations in 2015.

commercial and environmental standard, it remains organised merely at the level of associations[20] which practice it to enhance their public image, comparable to an act of philanthropy.

3.4 Sustainable Forest Management

Sustainable forestry is the practice of managing forests to meet the current needs and desires of society for forest resources while preserving the forests. Despite the growing population of the world, waste in forest management still occurs, with the present technologies being able to replace some of the lumber and cellulose used in production, but not in their entirety.

Even though the legislation in the European Union,[21] as well as Member States level is strict in preserving the forests, regulating conditions of timber production,[22] as the cornerstone of ecologism, the challenges in the enforcement of said laws are symptomatic of the inadequacy of the solutions. The challenges in the application of the legislation emphasise the importance of the implementing action plan, such as the European Green Deal,[23] according to which an estimated 3 bn trees should be planted in the EU Member States by 2030.

3.5 Recycling

Recycling has developed into a distinct industry, generating products or components for various sectors, from packaging to electric and electronic products.[24] This economic activity is a sensible measure to increase economic efficiency while promoting ecology.

The European Union legislation emphasises the 'polluter-pays principle' the waste management resting with the original waste producer, which is responsible for this category of costs.[25]

Representing one of the main waste measures regulated at the EU level, in addition to prevention and preparing products for reuse, recycling is deemed as a better alternative to other solutions, such as recovery (whenever possible, such is the case of energy) and (even effective) disposal.

However, recycling does not get proper legislative incentives for the private sector to comply or enter the business. For example, the collection of waste, separated by categories, necessary to produce recycled materials, is not controlled by the recycling

[20] World Fair Trade Organisation is an NGO operating worldwide. For further details, please see https://wfto.com.

[21] Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010, Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU.

[22] Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market.

[23] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Sustainable Europe Investment Plan European Green Deal Investment Plan.

[24] Directive 2012/19/EU on waste electrical and electronic equipment (WEEE), replacing the original WEEE directive (Directive 2002/96/EC).

[25] Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives.

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producers. The volume of supply is controlled by the market functioning, the interplay between demand and supply not being subject to control, in a free market, as well under the principle of free movement of goods.[26] However, notable efforts have been made in the EU legislation to enhance the cooperation between recycling and the production of EEE goods.[27]

In some other examples, the recycling (green) tax, prescribed by the national legislations according to the EU Energy Taxation Directive (ETD),[28] does not cover the process, nor the single-use plastics tax, a contribution to EU collected from the Member States since July 3rd, 2021, can reduce pollution, according to its scope. While the recycling of electronic and electric products exceeding the value of the tax and the recycling is mandatory for the producers, the legislation incentivises association with the scope of recycling and enables collusion between producers. These competition risks are confirmed by the case law of the competition authorities.[29]

4. CONSUMER BEHAVIOUR AND SUSTAINABILITY

Demand holds a great role in developing sustainability in the markets. Consumer behaviour has been integrated in market research and it has been developed into an entire field of research in behavioural economics (Thaler and Sunstein, p.7).[30] The research in this field seeks solutions that enable manipulation of the consumer choices for the benefit of the consumer. Listening to the consumer's needs and conduct in the market has an essential role with this end in mind.

4.1 Consumer Behaviour

In past business models, consumer behaviour was predicted by forecasts grounded on the *ex-post* analysis of the choices made by the consumers, whereas in current business models, consumer behaviour is manipulated.

Consumerism enabled the growth of markets and had favourable effects in the second half of the past century. In this century, this trend has greatly enhanced and led to waste and overconsumption.

4.2 Market for Lemons

There may be other circumstances added to the erratic consumer behaviour, such as the market for lemons effect (Bercea, 2015, p. 69). The undertakings compete in the markets to gain larger market shares, including by means of continuously lowering the prices of their products and the tariffs of their services. The direct result is a dramatic decrease in the quality of products and services, to match the prices or tariffs. The phenomenon also impacts the diversity of products and services by eliminating from the

[26] Provided in the articles 34 and 35 TFEU, according to which fiscal and non-fiscal barriers are prohibited in the trade at EU level.

[27] The stimuli include incentives for the recovery and reusage of the products, as is provided in the eco-design directive (Directive 2009/125/EC).

[28] Energy Taxation Directive (ETD) - Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity is the European Union's framework for the taxation of energy products including electricity, motor, and most heating fuels.

[29] Romanian Competition Council, Decision no 8/2014, Decision no 10/2014 applying fines to undertakings, members of recycling associations for infringing art. 101(1) TFEU.

[30] The promoters of behavioural economics are the academics including professor Barry Schwartz and the Nobel prize laureates in economics from the University of Chicago, Daniel Kahneman, Richard Thaler, as well as law professor Cass Sunstein.

market the competitors that refuse or are not able to alter production to produce the same goods for cheaper costs. The markets become monopolistic, with the impact of offering <lemons> hindering competition.

The paradox of Akerlof's theory market for lemons consists in the negative effect of encouraging the practice of lower prices for the benefit of consumers, while getting an anticompetitive effect and adversely affecting the consumers.

Market for lemons is however encouraged by the consumers, seeking avidly or even obsessively the lowest price/tariff. Dedicated on-line platforms assist consumers in identifying the lower price, by comparing product prices and advertising the lowest price. Also, marketplaces favour the vendors offering the lower price, by not revealing essential information pertaining to the product characteristics, thereby leading to the false conclusion that the products are similar. In certain cases, the competition regulators act counterintuitively to accelerate the market for lemons effect. For instance, the Romanian Competition Council, which hosts on its website Monitorul Preturilor (Price Monitor[31]), a service that compares prices from several supermarkets, featuring the lowest price in the market for certain essential food products.

4.3 Vendors Influencing Consumption

One significant criterion in decision-making is information, the vendors being legally obliged to provide it. As the means of communication and technologies enabling the conveyance of information diversify, distortions become a recurring occurrence due to data misinformation and translation bots (Editorial Nature, 2024).

Undertakings contribute to challenges to sustainability by manipulating the choices available to the consumer, with the scope to increase consumption and waste. Such choices vary greatly from companies offering one product choice (as is the case for Aldi which offers one product of each kind/category) to tens of products (another large operator of supermarkets, Walmart, exposing the consumers to the largest possible range of goods), with both business models being successful. However, the wider the choice selection, the more difficult it is for consumers to decide which product fits best their needs. To enable this task, most of the online marketplaces provide search engines featuring selection filters, according to various criteria.

The linked sales represent another important source for overconsumption. Although they increase consumption and have adverse effects on the principle of a sustainable economy, they are only prohibited by competition law as abuse of dominant position[32], if they meet the conditions, including holding a dominant position, conditions difficult to be met in most of the relevant markets, due to the dynamicity of economy and the relatively high market share thresholds. This condition significantly narrows the application of sanctions and lowers the dissuasive effect on illicit behaviour.

Cognitive traps (Dobelli, 2013) also prevent consumers from making wise choices, however consumer awareness is of interest to the legislator only if distorted by the trader. In fact, the consumer is protected by the specific legislation only for the manifest abuse of the traders.

[31] See https://monitorulpreturilor.info.

[32] According to art. 102(d) TFEU, it constitutes abuse of dominant position making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

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4.4 Artificial Intelligence and Consumer Behaviour

Algorithms "pick-up" consumers' preferences, enabling the process of identifying the most suitable product for the customer's needs. However, the next step used by the traders in tailoring their offers is profiling the customers. For this scope, the AI collects and analyses personal data to establish the customer's profile. The new technologies enable the employment of complex information to design targeted ads, whereas companies on some occasions fund online misinformation, algorithmically distributing advertising across the web (Ahmad, Sen, Eesley, et al., 2024).

The targeted ads cross the threshold and, instead of assisting the consumer to pursue more suitable purchasing choices, they enable waste and erratic consumer behaviour by enticing buying products or services that the consumer initially did not desire. Still, the AI-based business models ignore the threats to the environment and incite overconsumption (Stuart, Gunderson and Petersen, 2020), most likely accentuating the trend in the foreseeable future.

4.5 Solutions to Excess Consumption

The non-legislative solutions to avert consumerism as a behaviour pattern include the <all-in-one> products. The development of such goods could be a market solution to excessive consumption. For instance, from cellular phones to smartphones, the market has changed so that one product would replace a phone, a miniature TV set and radio, a high-performance camera, an e-reader, and a small computer. In this sense, consumer education on social and economic responsibility is far more effective than legislation imposing obligations for the producers and indirectly influencing consumer behaviour.

Not only multi-use products, but also conversion of products could be a solution to recycling, which is less cost efficient and difficult to enforce by legal provisions. The legislation at the European Union level emphasises the importance of reusing products, by mandating the repair of certain categories of products enabling the prolongment of their use.[33]

A sector that has been heavily impacted by the consumers' waste habit trends is the fast fashion sector. The fashion in garment products (clothing and footwear) encourages the seasonal change of wardrobe, while the fashion industry renders it affordable for customers (Drew and Yehounme, 2017). Fast fashion is forecasted to triple the resource consumption by 2050, by reference to 2000, currently amounting to 5% of the global carbon emissions (considering the transportation carbon footprint) (Editorial Nature, 2018). As 60% of the garments are disposed of by incineration within a year of their production (Remy, Speelman and Swartz, 2016) and the increasing number of customers of fast fashion worldwide, the trends are likely to maintain.

The market for lemons phenomenon also leads to waste and disregard for environmental preservation. The epitome of the adverse effect of lowering the prices and the quality of products is the so called <fast fashion> industry, a concept invented by companies such as SheIn, a producer of clothing products, which places on the market thousands of new products every day, at very low prices. The predatory behaviour of this company enabled its leadership in the market.

[33] Commission Implementing Decision (EU) 2021/19 of 18 December 2020 laying down a common methodology and a format for reporting on reuse in accordance with Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives.

5. LEGISLATIVE SUPPORT IN SHAPING THE BUSINESS MODELS

As ecologic, economic, and socio-cultural sustainability represent prerequisites of desirable business models, to achieve this goal, complex and coordinated measures are to be adopted.

The legislative actions at the EU level aim to prevent and mitigate pollution, and enable workable competition in the relevant markets while protecting the customers' legitimate interests. However, the legislation has yet to resolve the issues arising from the employment of new technologies, such as the ones based on Artificial Intelligence, with these technologies remaining difficult to control.

5.1 Regulation and Application

The law is powerless without appropriate application. Therefore, there are two categories of challenges attached to legislation: both the legislators, on the one hand, and the European Commission and the national regulatory authorities, on the other hand, have a duty to ensure that technology may not harm humanity and to guarantee the sustainability of the markets.

The first tier of challenges pertains to the legislative process. The examples above indicate that the concern focuses at the EU level on the legislation that imposes certain obligations to the undertakings operating in the relevant markets which are challenged from the perspective of sustainability. Although this process is democratic, transparent, and subject to verification by preliminary feasibility and impact studies, there is still the risk that the legislation is inadequate for real life, with respect to new technologies. For instance, it is difficult to strike a balance between the benefits of using drones, especially from the economic perspective, and the jeopardies ensued from their circulation, especially from the public safety perspective. The advantages and the risks render difficult the regulation of the use of autonomous drones.[34]

The second-tier of challenges is arises from the application process. Most of the technologies produce immaterial products and services, with some being recorded in independent ledgers that cannot be controlled by the state to verify the observance of laws (Pałka, 2017, p. 205). The difficulties in the application of the law prevent the deterrent effect sought by the law when prescribing certain conduct. Even though important steps have been taken to regulate the use of AI in administration.[35] The standard of conduct in using AI in services availed to the population by the public administration (Bignami, 2022) should be matched by the private services, in order to achieve consistency and ethical behaviour towards the population.

On the one hand, there is difficulty in drafting legislation effectively, on the other hand, there is also difficulty in properly implementing it. To the two categories of challenges, a third tier of challenges is added to the judicial process. The power of justice lies in its enforcement capabilities. The legislative, administrative, and judiciary bodies lack the technological knowledge to ensure the proper understanding of digital businesses. The problem is endemic, as, for instance, how the technology works is at the

[34] The base legislation includes the Commission Delegated Regulation (EU) 2019/945 of 12 March 2019 on unmanned aircraft systems and on third-country operators of unmanned aircraft systems, and the Commission Implementing Regulation (EU) 2019/947 of 24 May 2019 on the rules and procedures for the operation of unmanned aircraft.

[35] Such being the case of AI in Government Act passed by the US Congress in 2020, which established an AI Center of Excellence, that is a program in General services Administration.

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core of the case, and the opinion of one or several legal experts would not be a specific, individual matter, hence transferring to the expert the power of judging the case.

Also, at the rate the technology is developed, it is unlikely that the law and its application will keep up the pace. For instance, when the pandemic started, in early 2020, emergency legislative measures had been taken at the member states and EU level, to contain the surge of contamination, and many undertakings had been adversely affected, consequently, by such measures.

The State aid measures granted by the Commission, having as grounds the State aid Temporary Framework adopted on 19th March 2020,[36] enabled Member States broad flexibility foreseen under State aid rules to support the economy in the context of the coronavirus outbreak.

The Commission issued 408 decisions for State aid measures, approving 497 national measures notified by 27 Member States and the United Kingdom, amounting in 2020 to 332 State aid decisions adopted under the Temporary Framework, and 76 State aid decisions adopted directly under the Treaty, and 16 Decisions adopted by the Commission Banking State aid cases, availing approximately 3.08 bn euros to distressed undertakings, as results from the Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (European Commission, 2021).

In the context of the severe health threat to which the EU population has been exposed, and considering that many undertakings were in distress or even on the verge of exiting the market due to the restrictions, the Commission's prompt reaction should be analysed in the context and welcomed, as it certainly prevented the possibility that more undertakings exited the markets (Derenne, 2020, p. 63). However, considering that the State aid measures were granted within a short timeframe and in urgent conditions, and, most of all, that the economy has suffered radical changes, the relief might not have been adequate support during the pandemic restrictions.

The pandemic permanently changed certain market trends and conditions. Especially, the many adjustments of the services markets had permanent effects (for instance, the airlines changed their business model during the circulation restrictions and never reverted some of the deviations in their service supply, after the restrictions were lifted).

5.2 Climate Protection Legislation

The legislation aimed to map the transition to climate neutrality in the European Union is set in place,[37] however, climate protection does not occur in a bubble at the level of one small continent, but in the worldwide context, the harmonious blend of adequate measures in urban and rural areas leading to integrative results (Kaklauskas, Abraham, Kaklauskiene, et al., 2023).

Aiming to stimulate the use of renewable energy, decrease carbon emissions, and antipollution, legal measures often imply restrictions without offering viable alternatives. For instance, the Commission sets calendars[38] for the undertakings in the

[36] Communication from the Commission Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak 2020/C 91 I/01.

[37] Proposal for a Regulation of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law).

[38] Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No

relevant markets to implement efficiency standards in heating, ventilation, and air conditioning systems (HVAC) that are based on technologies not yet invented. The high level of emissions requires this to be addressed instantly, even though the economic activities that are not energy efficient are deemed to meet the basic needs of the consumers. Among the consequences of such requirements, an increase in competition and innovation may be noticed.

In another example, the <rush> for electric vehicles replacing the more polluting ones has not yet considered long-term impact on the environment, such as the discharge and the recycling of their batteries. In achieving climate neutrality goals, a shift from the use of fossil fuels in vehicles to electromobility is one of the prerequisites, incremental steps being taken in enabling sustainability by means of legislation.[39] From another perspective, the autonomy of electric vehicles has significantly improved, compared with the initial commercial models available on the market, however, the battery charging infrastructure is not yet developed in all the Member States to the level that the purchase of such vehicles would be desirable for all customers.

Pursuing the creation of pollution-free urban areas, some cities adopted legislation to create green zones in their centre. Such measures, even though noble in scope are difficult to implement on their own. When aiming to render pedestrian a central zone, simultaneously surrounding roads having the capacity to prevent traffic jams should be created, as well as parking lots in their vicinity, to enable access to the restricted area. In another example, some cities are planning to incentivise living within the work area, to mitigate the work-related commuting of the population. In the context of freedom of movement for workers, a fundamental principle of the European Union,[40] a legislation solely based on incentives might decrease, if not eliminate, the commute.

5.3 Gatekeepers' Control and Compliance

The legislative efforts to regulate new technologies include the unification of legislation. In this sense, an important step has been taken by the adoption of the Digital Markets Act (DMA)[41] and the Digital Services Act (DSA).[42] The considerable power of the undertaking controlling the access to the markets led to the solution of designating such undertakings as <gatekeepers>, the Digital Markets Act setting the following criteria for including undertakings in this category: their significant impact on the internal market, providing a core platform service necessary for business users to contact end users, as well as enjoying that durable position for the foreseeable future. The European Commission has designated six gatekeepers: Alphabet, Amazon, Apple, ByteDance, Meta, Microsoft. Also, 22 core platform services provided by gatekeepers have been designated to comply within 6 months with the Digital Markets Act (DMA).

715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council.

[39] For instance, the increase of storage by embedding batteries to the Regulation of the European Parliament and of the Council concerning batteries and waste batteries, amending Directive 2008/98/EC and Regulation (EU) 2019/1020 and repealing Directive 2006/66/EC.

[40] Enshrined in article 45 TFEU.

[41] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

[42] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act).

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Notwithstanding the objectivity of the criteria and the threats imposed by holding the position of gatekeeper, it is unclear how the DMA prevents the expansion of the number of undertakings to be considered as gatekeepers, as well as providing assurances that the undertakings that are not yet qualified as such would not pose competition risks.

This legislation is not however deemed to address directly sustainability concerns, but only in an indirect manner, by protecting the relevant markets – it preserves workable competition in the digitalised markets, and by protecting the consumer – it safeguards the legitimate aspirations of the population in the European Union to benefit from well-being and safety.

5.4 Sustainability Measures for Disruptive Economies

Yet the new technologies-based businesses that have broader applications than e-commerce and develop Artificial Intelligence are to receive integrated, harmonious legislation. The need for tough regulation for sensitive sectors is imperative, considering that products manufactured outside the European Union are present on the internal markets, and such products may not be under sustainability scrutiny in the countries they originate from.

This effort should be coordinated at the European Union level, though national legislations must complement the EU legal provisions with legislation not falling under the prerogative of the European Union. For instance, theft of energy, causing electric energy supply shortages or malfunctions, and manipulating the energy market require dedicated legislation at the Member States level, due to the criminal nature of such rules.

In another example, considering the extensive use of cryptocurrency as a means of payment and the accounting schemes enabling payment via off-shore companies or non-profits, more efficient fiscal legislation and its enforcement should be sought.

5.5 Sustainability Education

The limits of the legislation in achieving the sustainability goals are evident. In addition to the legislation regulating the new technologies to enable sustainability, other measures may be taken, such as public awareness of the impact of consumer behaviour.

Individual consciousness has a paramount role in ensuring a sensible life on the Planet. Every individual on the planet has a sustainability duty and a role to foster the environment. For instance, disposing of the waste separately cannot be ensured solely by legislation. The human consciousness is still at peril, considering the role of Artificial Intelligence is not yet determined (Falque-Perrotin, 2017), even though the new research comes at tremendous speed (Mantello, Ho, Nguyen, et al., 2023). However, more steps are required for education with this scope of the population of the European Union. Many of the national legislations do not organise education in public schools to prevent waste or to better manage personal finances. Sustainability may only be achieved through increasing awareness about the challenges.

6. CONCLUSION

Humanity may be in peril, in the current conditions of exploiting the Earth, considering the enormous risks of catastrophic climate events and the ecology risks entailed by the increased carbon footprint. Certain signs of these predictions result from the recent dramatic climate changes and events.

The sustainability requirement from the perspectives of ecologism, economic efficiency, and socio-cultural imperatives requires legal solutions having stronger compliance and enforcement. The European Union legislators and regulators are the first lines of action with this scope, though each member State should concentrate on harmonising their legislation with this goal.

In a century where technological progress profoundly changes the social, political, and economic environment, ignoring the trend is not a valid solution. The role of research in identifying the best legal solutions is paramount because it enables a better understanding of the challenges and supports efficient solutions to the problems.

Failure to regulate sustainability solutions adequately has as a consequence alternative solution. To this end, more education should be ensured, at least in the Member States of the European Union. Ignorance is not bliss.

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THE ECCLESIASTICAL JUSTICE SYSTEM IN THE KINGDOM OF BOHEMIA IN THE MIDDLE AGES / Pavel Krafl

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Abstract: *The study concentrates on the ecclesiastical courts that operated within the Prague ecclesiastical province. The episcopal judiciary in the Czech lands comprised the officialis, the vicar general, the corrector cleri, and the bishop's inquisitor. The officialis appears for the first time in the Diocese of Olomouc under Bishop Bruno of Schaumburg (1245–1281). The judicial office of the corrector cleri was a unique office that emerged only in Prague. The papal courts in the territory of the ecclesiastical province comprised the papal inquisitors and the conservators of rights. During the Hussite and post-Hussite era, the archbishopric of Prague was left unoccupied, and the judicial agenda was conducted to a limited extent by the administrators of the archbishopric. One of the criticisms made by pre-Hussite reform theorists was levelled at the negative features of the judiciary, particularly the corruption of judges and the absence of impartiality.*

Key words: *Ecclesiastical Justice; Episcopal Judiciary; Papal Judiciary; Kingdom of Bohemia; Middle Ages*

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1. INTRODUCTION

The 13th century and the first half of the 14th century were marked in the life of the church in the Kingdom of Bohemia by the enforcement of canon law (Krafl, 2023a, 66–69; 2021, 35–38; 2023b, 7–9; 2023c, 34–35; 2023d, 450–451; 2023e, 69, 71; 2023f). The aim of the study is to present the development of the ecclesiastical justice system in the Kingdom of Bohemia. The Diocese of Prague and the Diocese of Olomouc were both situated within its territory. The Prague ecclesiastical province was founded in 1344 and consisted of the Archdiocese of Prague, the Diocese of Litomyšl, and the Diocese of Olomouc. We focus our attention on the archdeacon, the officialis, the vicar general, the corrector cleri, the inquisitor, and the conservator of rights, and their activities in the above-mentioned Czech dioceses.

Most sources on the history of the ecclesiastical justice system have been published. Ferdinand Tadra edited the judicial documents of the Prague vicars general (Tadra, 1893–1901). The same editor issued excerpts from the protocol records of the papal court deposited in the library of the Prague Metropolitan Chapter (concerning eight cases) (Tadra, 1893). The record books of the corrector cleri of the Prague archdiocese from the years 1407–1410 were edited by Jan Adámek (Adámek, 2018). Alexander Patschovsky published the text of the Bohemian inquisition manual (Patschovsky, 1975),

as well as fragments from the Inquisition Protocols of Havel of Kosořice, sources on the trial of Brno goldsmith Hejnuš Lugner, and other sources on the history of the Inquisition in Bohemia in the 14th century (Patschovsky, 1979). Dominik Budský submitted a critical edition of the procedural handbook of the Prague officialis and vicar general Mikuláš Puchník (Budský, 2016, pp. 114–201).

2. ARCHDEACON

According to canon law, the archdeacon (*archidiaconus*) had jurisdiction in defined areas, these relating to his powers of visitation (X 1.23; Friedberg, 1959, col. 149–163). The Bishop of Olomouc Jindřich Zdík (1126–1150) introduced archdeacons in the Diocese of Olomouc. This happened after the seat of the bishopric was moved from the original Cathedral of St. Peter to the newly built Cathedral of St. Wenceslas (1141). Archbishop Jindřich Zdík made the archbishops canons of the cathedral chapter. The nominal seats of the archdeaconries, and thus the centres of the archdeaconry district, were in Přerov, Olomouc, Spytihněv, Břeclav, Brno, and Znojmo. Bishop Jindřich Zdík received castle churches from the Bohemian duke Soběslav I, these becoming the assets of the new archdeaconries. In this way, the archdeaconries follow on from the seats of the former archpriesthoods from the period when the castle system of administration operated in the Duchy of Bohemia. Archdeaconries were established in the Diocese of Prague in the 1160s under Bishop Daniel I. (1148–1167). A total of ten archdeaconries were created there, these seated in Prague, Bechyně, Hradec Králové, Žatec, Kouřim, Stará Boleslav (Žeržice), Litoměřice (Roudnice), and Plzeň. An archdeaconry in Horšovský Týn is documented in the years 1184–1192, an archdeaconry in Bílina in 1216. The archdeaconries in Bohemia evidently evolved outside the archpriesthood system and in connection with the episcopal estates, whose assets the archdeacons secured (Polc, 1999, pp. 48–51; Kadlec, 1991, pp. 118–119; Hledíková, Janák and Dobeš, 2005, pp. 174–175).

In Bohemia and Moravia, there was no independent institutionalised court of the archdeacon, the send (the synodal court).[1] The archdeacon alone exercised his authority. The Moravian synodal statutes of 1318 mention authority in matrimonial matters in connection with the archdeacons (Krafl, 2014a, p. 269, No. A.III/13). The provincial statutes of the Prague archbishop Arnošt of Pardubice from 1349 attribute jurisdiction to the archdeacons in matrimonial and usurious matters (Polc and Hledíková, 2002, p. 123, No. 10; cf. Kubíčková, 1932, p. 416). Later, in the synodal statutes of the Olomouc diocese from 1413, matrimonalia are, as can be expected, reserved for the officialis alone (Krafl, 2014a, pp. 347–348, No. A.VI/35).[2]

According to the Prague synodal protocol of 1366, parish priests were to hand over to the archdeacon (and officialis) for canonical punishment "hereticos aut suspectos in fide, usurarios, divinatores, carminatores, fictores, adulteros, concubinarios manifestos, contemptores sententiarum et blasphemos ceterosque publice criminosos". A text of almost identical wording is thereafter found in the Prague synodal protocol from 1374–1378, which additionally mentions falsarios and criminatores (Polc and Hledíková, 2002, p. 193, No. 2; p. 207, No. 9).

[1] Evidence of synodal courts under Bishop Jindřich Zdík was found in manuscript CO 202 of the Olomouc Chapter Library, this containing a compilation of the collections of Burchard of Worms (with a provision on sends, synodal courts). The manuscript cannot serve as a proof of the application of the legal institute, see Krafl (1996, pp. 740–741, footnote 13).

[2] For archdeacons in Olomouc diocese statutes from 1461 see Krafl (2016, pp. 95–96).

The filling of archdeaconries by means of reservations by the Holy See during the 14th century resulted in persons entering this office who were not connected to the bishop and often had no interest in official activities relating to the prebend. Eight of the nine archdeaconries of the Prague archdiocese whose appointments were in the hands of the archbishop were newly occupied on the basis of papal intervention. Around the middle of the 14th century, the relationship between the bishop and the archdeacon was loosened and important archdeaconries escaped the bishop's influence. This resulted in the decline of the importance of the office of archdeacon in the administration of the diocese (Eršil, 1959, pp. 66–71; Hledíková, 1990, pp. 22–24; 1976, pp. 257–258; 2010, pp. 27, 416–419).

3. EPISCOPAL JUDICIARY

The importance of the diocese's previously established central courts grew parallel to the decline of the role of archdeacon. The bishop of the diocese was the sole holder of jurisdiction over the clergy of the diocese. This was regulated in *De officio ordinarii* of the first book of Liber extra (X 1.31). Exceptions in the main were monastic orders, which had their own organisation, were exempt, and were accountable directly to the Pope. The Benedictines and the Canons Regular of St. Augustine were mainly subject to the jurisdiction of the bishop. The episcopal judiciary in the Czech lands was represented by the officialis, the vicar general, the corrector cleri, and the episcopal inquisitor.[3]

The offices of officialis and vicar general were mandatory under canon law, and the bishop determined their juridical powers. Of the two, only the office of officialis was of a purely judicial nature; the vicar general was a typically administrative authority, unless the bishop decided otherwise, as was the case, for example, in the Prague archbishopric, where he also received a judicial remit. The corrector cleri was found only in Prague. The form of the judiciary and the powers of the individual courts might therefore have differed from one diocese to another, and within the dioceses of one ecclesiastical province; this was part of the tradition of a particular bishopric. The bishop appointed and dismissed the judge and the ordinary power of a particular judge ended with the discontinuance or termination of the juridical powers of a particular bishop (resignation from office, death, excommunication, suspension). The phraseology used in the episcopal charter of the 13th century with judicial content illustrates the penetration of Roman law (Boháček, 1967, pp. 273–304).

An appeal from the episcopal court (namely from the court of the officialis) was referred to the court of the metropolitan. An appeal from the Prague officialis passed to the metropolitan of Mainz until 1341, and, from 1341 to 1344, to the papal court of Roman Rota, because in that time the Prague diocese was exempt. An appeal from the court of the Olomouc officialis was referred to the court of the metropolitan of Mainz until 1344, and from 1344, to the competent court of the metropolitan of Prague. Similarly, after the establishment of the bishopric in Litomyšl, an appeal from the local episcopal court was referred to the competent court of the Prague metropolitan. Appeals from the archbishop's courts were referred to the papal court of *Audientia Sacri Palatii causarum,* otherwise known as *Rota Romana,* which progressively came into being in the second half of the 13th century (Hartmann and Pennington, 2016, pp. 217–218; Brundage, 1995, pp. 125–126; Flaiani, 2013, pp. 379–381, 388–390).

[3] On the Episcopal Inquisition briefly within the context of an interpretation of the Papal Inquisition; see below.

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3.1 Officialis

The origins of the officialis are found in the delegation of powers by the ordinary to deal with specific cases or for a certain period of time; only later was a permanent office established. An officialis appears for the first time in the Diocese of Olomouc under Bishop Bruno of Schaumburg (1245–1281). The first proven officialis is the German knight Gottfried, documented in the year 1258. Further evidence comes from the years 1267–1269, when German knight and doctor of decrees Heidenreich acted as officialis (Kouřil, 1967, pp. 146–147). Synodal statutes from 1282 mention an ordinary or delegated judge, but the term officialis is not used. The Kroměříž synodal statutes of Bishop Konrad I (1316–1326) of 1318 delegates matrimonial matters exclusively to the officialis and to the archdeacon already mentioned (Krafl, 2014a, p. 253, No. A.II/15; p. 269, No. A.III/13; 2003, p. 103).

Bartholomew, officialis of the Bishop of Olomouc Hynek Žák of Dubá (1326–1333), is proven to have been active in the period prior to July 1330 and in July 1330. Another officialis of the same bishop, doctor Jan Paduánský, is mentioned in 1332, remaining in office until 1333, when Bishop Hynek died. Jan Paduánský was simultaneously the Vicar General. Other documents about the activities of the officialis come from the years 1335, 1340, 1357, 1363, 1366-1368, 1373, and 1375, then regularly from the 1380s. Under Bishop Jan Volek (1334–1351), the office of the officialis was separated from the vicarage general in terms of personnel, but from 1387 until the early modern age, the two offices were connected by personnel, with a few exceptions (Kubíčková, 1932, pp. 396–398; Krafl, 2023a, p. 112).

The Olomouc officiales had broad, almost exclusive powers. The Olomouc consistory met in various locations, moving according to wherever the main residence of the Olomouc officialis might have been. The officialis and the consistory therefore travelled around the bishops' castles of Mírov, Modřice, Kroměříž, and Vyškov; they also judged in other localities. If they were working in Olomouc, the consistory moved around the houses of the individual cathedral canons in office at that time. The consistory in Olomouc therefore did not have its own building, as was the case in Prague (Krafl, 2023a, p. 112–113).

We are informed, from a questionable document, of a Prague officialis in the year 1266. A fragment of a formulary from the unpreserved manuscript MS 14 of the Plock Cathedral Chapter provides the name "Magister A., canonicus et officialis Pragensis", with the given date. The manuscript was destroyed during World War II (Vetulani, 1963, pp. 387–388; Boháček, 1967, pp. 288). We subsequently come across the officialis in the Prague diocese under Bishop Řehoř of Valdek (1296–1301). The oldest undisputed evidence comes from the years 1298–1299, when Master Hostislav figures as the officialis of the Prague bishop. He, at the bishop's order, negotiated a dispute between the Knights of the Cross with the Red Star in Prague and the Waldsassen monastery about the occupancy of the parish in Kynšperk. In 1299, Hostislav used his personal seal, bearing the title of officialis; the seal of the officialis as an office was still not used, as it was when a permanent office was in effect. The officialis operated as a permanent office in Prague from at least the time of the officialis Nicolaus (1319–1326). Instructions regarding the composition and activity of the court of the officialis, as well as the course of action before the court, were issued by Arnošt of Pardubice in 1356, these defining both the tradition and practice up to that time. The activities of the Prague officialis lay in questioning and settling disputes, conducting court proceedings, appointing representatives of the parties, and dealing with other matters relating to judicial proceedings. Matrimonalia fell within his exclusive scope, and, until 1379, disputes over the parish benefice (Kubíčková, 1932, pp. 398–403, 411, 414–415; Hledíková, 1971a, pp.

54–55, 65; Vyskočil, 1947, pp. 327–330; Hledíková, 2008a, pp. 132–134; edition of the instruction from 1356, see Menčík, 1882, pp. 6–11, No. 2). The office of officialis was in place in the Diocese of Litomyšl from 1354, if not earlier. The consistory in Litomyšl ended with the demise of the Litomyšl bishopric in 1421 (Hledíková, 1994, pp. 40–41, 47; Hledíková, 1971a, p. 13).[4]

The instructions of the Prague archbishop from 1356 stipulate that notaries would record all dealings in *manuals* and subsequently in a register. *Manuals* had the character of an official book for internal use, and did not have public validity. They were auxiliary books, protocols. Entries did not concentrate on one dispute, but continuously recorded judicial proceedings. As a whole, these books have disappeared, but a number of fragments have been preserved. They were kept on paper. They do not contain copies of documents relevant to the dispute, but instead record the procedural stages of all individual disputes and the actions of persons who appeared before the court on a particular day. The dates of individual proceedings were written above the entries, together with the name of the person who was presiding over the court, often in minuscule or other prominent script. Records are concise notes of judicial hearings held in the past or planned thereafter. Matrimonialia are not found in manuals, because a summary trial was used for them (Hledíková, 2003–2004, pp. 26–27; 1961, p. 50; 2004, p. 506; Kubíčková, 1932, pp. 443–444).

Registers had the character of a book of files (of the same nature). They were kept in parallel by two sworn notaries on four-leaf-folded pieces of parchment known as "kvatern". All documents submitted in relation to the dispute were copied there. Assistant scribes could be employed when copying. At the end of the dispute, the register was handed over to the officialis. The registers were permanently valid and were to have been kept in a separate cabinet *(scrinium seu conservatorium actorum*). They were kept on parchment and for this reason a number of fragments have been preserved, scattered throughout various archives and libraries.[5]

Unquestionable matters discussed before the officialis were entered separately in the volumes referred to as *acta obligatoria*. The book of unquestionable matters considered by the Prague officialis from 1393–1400 has been preserved to this day. In addition, it contains a partial copy of the previous book from the years 1387–1393. Entries represent the current records of proceedings; sometimes a copy of a document appears. The date of the hearing is not written at the top, as is the case in judicial acts of the questionable agenda. Most frequent are entries on the admission of debts. In the case of payment, the entry is crossed out or the word "solvit" ascribed to it; in exceptional cases a separate letter of acquittance appears. The second group of entries comprises records regarding the appointment of arbitrators, records of their awards, and entries regarding the submission of litigants to the arbitrator. In addition, there are records regarding the purchase of a prebend´s annual revenue. Occasionally, there is a contract of lease, a promise to keep the Peace of the Lord, and a pledge to pay an heir´s share. The book has a carefully elaborated period register, which was evidently created over time. Moreover, a paper fragment from 1384 containing six records still remains. The scribe of that fragment was identified as one of the writers of the abovementioned book of unquestionable agenda (Hledíková, 1961, pp. 50–59; Hledíková, 2004, pp. 506–507).

[4] As far as official books are concerned, none on the activities of the Litomyšl consistory remain.
[5] Several fragments were described by Hledíková (2003–2004, pp. 27–43, on pp. 44–52), she submits a series of three fragments from the Moravian Library in Brno and from the Archives of the National Museum in Prague; cf. Hledíková (2004, pp. 504–505); Kubíčková (1932, pp. 444–446).

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In the case of matrimonialia, the investigation was carried out by parish priests from the locality from where the parties to the dispute originated, or from the neighbourhood. The mandates ordering an investigation were delivered to the parish priest by a court messenger. The parish priests investigated the circumstances and, if necessary, interviewed witnesses. They forwarded the results of their inquiry, in writing, to administrators, who, on the basis of the findings, made an entry in the dispute files in the required form. Such written records made by the parish priests sporadically remain to this day (Hledíková, 2003, pp. 34–35).

Formularies were created for the needs of the office of officialis. A formulary was evidently created in Prague in 1266, although this has not been preserved. A fragment of the form from the mid-13th century was preserved until the middle of the 20th century in manuscript MS 14 of the Płock Cathedral Chapter, where it was discovered by Polish legal historian Adam Vetulani (Vetulani, 1963, pp. 387–388; Boháček, 1967, p. 288). The formulary of Prague officialis Bohuta of Kladno has been preserved in a manuscript from the Austrian monastery in Wilhering. It contains fourteen documents relating to the proceedings which occurred during his term of office, i.e. in the years 1329–1335 (Kubíčková, 1932, pp. 460–463). The needs of the developed office were served by the formulary created under Prague officialis Jenec Závišův of Újezd (1363–1380) in his office. It is found in two manuscripts of the archives of the Prague Metropolitan Chapter and in a manuscript of the Prague Chapter Library (the so-called Přimda´s formulary), all from the 14th and 15th centuries. The formulary contains simple specimens of the most common types of documents (citations) and copies of actual documents in slightly abbreviated form. The documents which are dated or dateable come from the years 1362–1380, with those from the 1360s predominating. The creation of the set is dateable to the years 1377–1379, when the most-recent texts were created, which we can date. None of the manuscripts represent the original writing of the formulary: they are copies. The person who compiled the set is unknown. It is, however, possible to identify the considered arrangement of individual specimen texts, which follow a procedural course of action. Particular account is taken of documents issued by a judge and of other specific documents and unquestionable matters (Hledíková, 1972, pp. 136, 138, 142, 143, 150; cf. Kubíčková, 1932, pp. 463–470).

3.2 The Vicar General

The office of vicar general (*vicarius in spiritualibus)* appears for the first time in the Diocese of Olomouc, specifically in the years 1258–1269, and again in 1332, but the judiciary of the vicars general did not evolve in Moravia (Kouřil, 1967, p. 147; Bistřický, 1971, p. 41). In Prague, the vicar general is documented for the first time in 1311 (Hledíková, 1971a, pp. 10, 12–13). The vicarage general was constituted as a permanent office in Prague under Arnošt of Pardubice (1343–1364). Until 1358 it was proxy in character, from the years 1344 to 1358 its vicars general having their powers defined on a case-by-case basis and for a limited time. From 1358, the appointed vicars general sat in permanent office and were given a wide range of authority. Arnošt decided that the vicars general, in the absence of the archbishop, would be entrusted, inter alia, with the power to cite, suspend all clergy and laymen of the church province subject to the authority of the archbishop, pronounce an interdict on the territory of the church province, and arrest and lock up clergy in jail. The authority to change the person of the officialis was subsequently removed from the remit of the vicar general (Hledíková, 1971a, pp. 27–28; 2008b, p. 522; Kubíčková, 1932, pp. 414–415).

However, not a single court decision of the vicars general is documented until the episcopate of Prague Archbishop Jan Očko of Vlašim (1364–1378). The situation changed in 1373, when the vicars general began to keep court records and began to take decisions "in more minor, shorter, and simpler" disputes. Court records document the solutions of questionable matters, a small number of matrimonial matters (which ceased to be decided before the vicars general under Jan Očko), and the resolutions of unquestionable matters (debt records, quittance records, records of donations, sales, and contracts), as well as supervision of the observance of canonical regulations. After 1379, they took on from the officiales disputes regarding the benefice and law of patronage, which became the most common subject of their questionable agenda. From the 1390s, we encounter matters of faith in court records. When the vicar general was appointed in 1395, he was given additional powers when compared to those specified in the stylistically similar document of Arnošt of Pardubice: the right to grant dispensation in cases reserved for the bishop, the right to mitigate or cancel the punishments laid down by provincial or synodal statutes, the right to hear and adjudicate all disputes directly before the archbishop's court, and the right to hear appeals too, including disputes about the benefices (Hledíková, 1971a, pp. 52, 54, 68, 70, 73–74, 81). The court of the vicar general sat on all days of the week, i.e. from Monday to Saturday, in the years 1373–1383, while for the years 1384–1398 it is documented that it mostly acted on Monday, Wednesday, and Friday (Hledíková, 1966, pp. 161–162).[6]

The court records of the vicars general have been preserved for the years 1373–1387, 1392–1393, 1394, 1396–1398, 1401–1404, 1406–1408, and 1420–1424 (Tadra, 1893–1901; Hledíková, 2004, pp. 509–513). The court records of the vicars general have the character of *manuals* (1373–1408). Exceptions here are the fragments edited by Ferdinand Tadra in volume VII of his edition of court records, and which come from the registers (1420–1424) (Tadra, 1893–1901, vol. VII, pp. 217–246; cf. Hledíková, 2003–2004, p. 26, footnote 7). The manner in which the manuals were kept, and in turn their functions, changed significantly between 1373 and 1408. Three successive time periods can be traced. The first runs from 1373 to 1383. Manuals from this period (two books) were written and kept by one writer, namely the notary public Jan of Pomuk. He alone maintained the court books of the vicar general and his books take the typical form of a manual. Entries were made on all days of the week. The second stage is the period from 1384 to 1398, when two more books were created. There were multiple scribes during this period, in charge of entries in judicial documents and in Libri erectionum and Libri confirmationum. The agenda was not divided between them. Entries in the vicar general's court books were made on Mondays, Wednesdays, and Fridays. The third stage covers the period from 1401 to 1408. Two official books were again created. Here, there was the separation of questionable and unquestionable agendas. The questionable agenda was always entered by one designated scribe, who devoted himself exclusively to this. The unquestionable agenda was still kept by scribes who were also in charge of entries in Libri erectionum (Hledíková, 1966, pp. 161–162). From the organisational perspective, the manuals from the first period also contain records of the appointment of a deputy vicar general for a particular matter, or random records of the beginning of the term of office of a new vicar general. Such records subsequently became rare and completely disappeared during the third period (Hledíková, 1966, pp. 161, 163).

The main content of the manuals comprises records of legal acts that occurred in the course of proceedings before the court of the vicar general (questionable

[6] For the years 1407 and 1408, Jan Adámek summarised paperwork on individual days in a table based on judicial books, see Adámek (2003, pp. 150–167).

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jurisdiction). In the first stage, there are frequent entries about the appointment of the procurator (in particular) for the party that intends to initiate the action. Formulaically, entries draw on relevant documents of this kind. Far rarer are entries in which a party requests citatio or the issuance of a citatio document. There are records of citatio for failure by the summoned party to appear in court. There are actions against the litigant, brought if they had not fulfilled their obligations at one of the stages of the litigation, and more commonly the responses given by the vicar general together with a record of the punishment imposed. There are also some records of testimony given by parties or witnesses, often in the form of information about the produced witnesses (names or only numbers). Most of the entries in questionable entries are notes about the date of the next judicial hearing, without specifying the subject-matter of the dispute (both parties to the dispute and the date are given). Records regarding the pledges of the parties to submit to the decision of the vicar general are rarely recorded. The wording of the judgments does not appear here. Records of the appointment of arbitrators and their testimonies can also be found, these as segments in textual compliance with the usual documents of this kind. One specific group consists of criminal justice records that were created when canonical regulations were violated and the judge acted ex officio. Then, there is a record of the substance of the charge. The process is of an inquisitive nature. The vicar general's orders, the parties' pledges of redress, and the judgments are also present (Hledíková, 1966, pp. 158–160).

The structure of the records regarding questionable juridical procedures changes in the second stage. There are fewer entries on the appointment of the procurator. Emphasis is placed on recording the individual stages of the litigation. Summonses or responses to *libellus* become more common. Records about courts of arbitration also disappear. The decrease in the number of criminal matter records stems from minor changes to the competence of the vicars general and the transfer of criminal competence to the corrector cleri, which occurs at the beginning of the 15th century. What was originally a diverse agenda of private law disputes in the second period resulted in the emergence of disputes over the prebend and disputes regarding law of patronage. These trends continued in the third period (Hledíková, 1966, p. 162). The requirement to record all court proceedings in writing is not fulfilled in the court books remaining to this day. It is therefore likely that detailed records recording the course of court proceedings were kept in addition to the judicial books. These unpreserved, extensive protocols were the starting point for the final verdict in the dispute (Hledíková, 1966, p. 164).

Unquestionable entries in judicial books form an important part of such records. There are file entries and entries of a deed nature. The questionable agenda is significant in the vicar general's court books only in the first period, appearing less and less in subsequent stages. Moreover, the number of file entries gradually decreases, to be replaced by more extensive entries of a deed nature. The influence of Libri erectionum is evident here. This is the most significant change in the court books of the unquestionable judiciary (Hledíková, 1966, pp. 160, 162–163, 169–170).

Concise file entries contain details of the appointment of the procurator, with the aim of exchanging the parish benefice. These are typical for the first period, while in the second period the number of entries on the appointment of procurators for the changes of prebends decreases, in much the same way as in the case of entries regarding procurators in the questionable judiciary. This relates to the fact that the parties ensure the appointment independently of the court. As far as the remaining records are concerned, there is an increase in the quantity of information on church and parish matters. Entries regarding the simple resignation from a parish benefice or resignation in exchange for another parish benefice are common. The consent of the vicar general is

appended. Two witnesses are stated. A smaller number of records provide information about applicants for the benefice, largely on the basis of papal expectance. There are also presentation records and entries in which the patron expresses agreement or disagreement with a change of parish priest (Hledíková, 1966, pp. 160, 162).

Records of financial matters constitute an entirely separate group of records. These are records of debts when one of the parties is a cleric, mostly in the role of debtor. In addition to simple entries, there are also entries with information about the guarantor or a guarantee on property. Records about debts are crossed out after payment. In the absence of a record regarding a debt, there is a separate record of acquittance, whether about gradual payment or full payment of the due amount. One distinct situation is the repayment of a debt through the vicar general himself or through the court scribe, who passed the money on to the creditor. Debt records and acquittances may in some cases be in deed form. The number of debt and acquittance records decreases during the second and third periods of keeping court books, with debt records predominating among them (Hledíková, 1966, pp. 160, 162–163).

Collection of the papal tithe is also recorded, which evidently relates to the personal connection between the vicarage general and the office of the collector of the papal tithe under Jan, Dean of St. Apollinaris. There are various entries on the payment of the tithe by institutions, the extension of the payment date, the appointment of collectors in other dioceses of the ecclesiastical province, and other disposal of the amounts collected. There are also entries about the payment of chimney tax, which went to the archbishop's treasury (Hledíková, 1966, pp. 160–161, 163).

The books also contain records of changes in the ownership of immovable property and various salaries, and changes in the holding of the law of patronage. In exceptional cases, wills and their execution were entered in the books; in such cases, an exception was made for a person close to the keeping of judicial books. Records of the Peace of the Lord between clergy and laymen are ceremonial in nature. They are accompanied by high financial sanctions. Finally, various donations and various contracts may be registered in document form or as a file record. Random records on the verification of documents of other church representatives are also present, containing the name of the issuer and the type of document, without any further specification (Hledíková, 1966, p. 161).

3.3 Corrector Cleri

In the Prague archdiocese, there was also established the specific office of *corrector cleri,* a criminal judge for the clergy, who was charged with supervising the life and morals of the clergy. The office, unparalleled in the neighbouring dioceses of Central Europe, was created at the decision of Arnošt of Pardubice. The oldest evidence of the corrector dates back to the period before 1357, when the archbishop appointed a corrector (only) for the archdeaconry of Bechyně. In the beginning, we can see that correctors visited churches to look for transgressors, though later this practice ceased. From the powers originally delegated, the corrector was transformed into a permanent office for the entire diocese ("for the city and diocese") in the 1380s. Only clerics came under his authority; he administered the archbishop's jail (Hledíková, 1971b, pp. 73–77, 79).

The record books of the corrector cleri (*acta correctoris cleri*) remain only for the years 1407–1410. During that time, twenty-four people were convicted, including seven priests, sixteen clerics, and one lay person. Twenty-seven judgments were handed down. Three of those convicted came from the Olomouc diocese, the others from the Prague

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archdiocese. The court sat on the premises of the Prague archbishop's jail, either in the cell itself or in the room in front of the cell. Some convicts served their punishment in the archbishop's jail in Roudnice nad Labem. The punishment imposed by the court of the corrector consisted of three parts: standing on a pillory for two hours or one hour, imprisonment in the bishop's prison with a term of imprisonment of one to ten years and with posts on Wednesday and Friday, and lifetime expulsion from the diocese, or expulsion from the diocese for a limited period. The severity of the punishment was determined by the degree of consecration, a priest, as the bearer of higher holy order, being judged more severely. Sometimes the term of imprisonment was reduced (Adámek, 2008, pp. 348–350; Hledíková, 2004, p. 514).[7]

3.4 The Episcopal Inquisitor

The beginnings of the episcopal inquisition are tied to a decretal issued by Pope Lucius III, *Ad abolendam*, in 1184, the provision of which is subsequently elaborated in the *Excommunicamus* decree of the 4th Lateran Council (X 5.7.9; X 5.7.13. Prudlo, 2019, pp. 75–76; Kras, 2006, pp. 126–130, 136–138; Schwerhoff, 2004, pp. 21, 24). Otherwise, heresy and the inquisition are considered in the title *De haereticis* of the fifth book of Liber extra and the title of the fifth book of Liber sextus of the same name (X 5.7; VI° 5.2).

Bishop of Prague Jan IV. of Dražice (1301–1343) had already appointed episcopal inquisitors in 1315: Minorite and titular Bishop of Sura, Walter, and dean of the collegiate chapter in Stará Boleslav, Master Tomáš Blažej´s of Prague. The episcopal inquisitor worked as an independent authority in the Prague diocese from the end of the 1420s. He was appointed by an ordinary, to whom he was responsible for his activities. The episcopal inquisitor acted without special instructions and without any specific delimitation of powers by the diocesan bishop. On several occasions, inquisitors were appointed by Archbishop of Prague Arnošt of Pardubice, specifically Siegfried, a Minorite from Görlitz; Lev, prior of the Prague Dominicans; and Svatobor, a Minorite from Jihlava (Soukup, 2010, pp. 148, 153; Hledíková, 2008a, p. 132; Kras, 2015, pp. 394–396).

Under the Prague archbishops of Jan Očko of Vlašim (1364–1378) and Jan of Jenštejn (1378–1395/1396), the prosecution of heretics was taken on to a greater extent by episcopal inquisitors. Auxiliary bishops were appointed episcopal inquisitors as of the 1390s. The interconnection of inquisitors and diocesan apparatus was evident. In the years before Hus' death, the episcopal inquisition shifted from mainly seeking out Waldensian heresy to proceeding against the followers of Hus (Soukup, 2010, pp. 169–170).

In general, in the Prague provincial statutes of 1349 and in the Prague provincial statutes of 1353 (Polc and Hledíková, 2002, p. 153, art. 69; p. 165, art. 1), both provisions valid within the entire ecclesiastical province, including the dioceses of Olomouc and Litomyšl, the inquisitor (whether episcopal or papal) is stated as the person to whom information was to be directed. The episcopal inquisitor is explicitly mentioned only once in the Prague synodal provisions, in 1355. In the synodal protocol recording the provisions of the October Prague diocesan synod of that year, it is emphasised that heretics and those who are influenced by them in the faith, their protectors, and their supporters should be reported to the bishop or his inquisitors (Polc and Hledíková, 2002, p. 175, art. 7). The Olomouc diocesan statutes do not mention the inquisitor at all (cf. Krafl, 2014a). The inventory of the library at Collegium Nationis Bohemicae of Prague University records

[7] For edition, see Adámek, 2018; cf. Adámek, 2011. – On cases considered on the basis of preserved record books see Podlaha, 1921; Adámek, 2008, pp. 343–348; 2005, pp. 97–102; 2006, pp. 44–54.

the presence of the inquisition manual *Forma inquisicionis heretice pravitatis* (Kejř, 1985, p. 51).

3.5 The Judiciary in Bohemia in the Hussite and Post-Hussite Era

The Prague chapter left Prague for Stará Boleslav in June 1420, then came to the archbishop´s town Roudnice nad Labem, after the decision of the Prague archbishop to convert to the Utraquists. In April 1421, the chapter moved to Litoměřice, and, in the end, to the then northern Bohemian town of Žitava (Zittau in Germany today). The dignitaries of the chapter in the position of vicars general assumed all administrative and judicial powers over the archdiocese. Their actions were recorded in books that followed the judicial books of the vicars general, Libri erectionum and Libri confirmationum, and the judicial books of the officialis. Proceedings of the court of administrators from the years 1422–1425 are documented in the Žitava/Zittau Minorite monastery, in some cases in the local parish church. Beginning in the 1430s, proceedings took place in the house where the vicars general lived. The agenda was always managed by two vicars general. The return to Prague enabled them to announce the Compacts of Basel in Jihlava in July 1436 and in Prague in April 1437 (Hledíková, 2015, pp. 63–66; Vodička, 2017, pp. 156–157). With respect to the Žitava/Zittau period, a record book of the judicial activities of the administrators has been preserved, this including records from the years 1427–1433. It contains procedural questionable records, debt obligations, pledges, the repayment of debts, arbitration awards, the appointment of procurators, and records regarding marital disputes. The subsequent book includes entries from the years 1434–1439, matrimonialia until 1440, and, after a break of eight years, further records until 1452. It also served as Liber erectionum. The third preserved book contains entries regarding the action of the court in 1437 and from 1439 to 1440. The proceedings recorded here concerned local Žitava/Zittau affairs and were also held in the house of the local Celestines convent (Hledíková, 2010, pp. 355–356).

The unaligned situation towards the end of the Hussite Revolution led moderate Utraquists to attempt to follow pre-Hussite church organisation. Václav of Dráchov was designated in 1429 as administrator of the Prague archbishopric and officialis, although this information comes from a later tract; he was evidently appointed by Konrad of Vechta, the last archbishop of Prague (+1431), who joined the Hussites. A smaller formulary is preserved in the manuscript of the Municipal Library in Bautzen, containing a set of documents of a judicial nature from 1432, these documents relating to the examination of witnesses. Václav of Dráchov acts here as *administrator in spiritualibus sede vacante*. Judicial hearings were held at the Parish Church of St. Giles in the Prague Old Town. Judgments in matrimonial disputes were read at the Old Town Hall in the presence of two priests and four lay people, burghers, and the officials of the dispute (Marek, 2019, pp. 100, 102–103, 107–108, 114–120).

During the post-Hussite era, the powers of administrators having residence in the Upper Consistory began to apply to Catholics in Bohemia. There was no restitution of the pre-revolutionary state. The overall position of the church in Bohemia in relation to secular power and the unstable situation in the office of administrators did not allow for the growth of the ecclesiastical justice system. The Catholic administrators and their officials began dealing with marital disputes and disputes between priests, and also involved themselves in disputes between monasteries regarding servitude payments, taxes, and fees. At the same time, of course, certain disputes were resolved by secular courts, especially in towns (Macek, 2001, p. 178). During King Jiří of Poděbrady's reign, the scope of Catholic church administration, and thus the territorial competence of the

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administrator's court, was determined by Antonín Mařík in his list of Catholic parishes compiled on the basis of the record books of the administrators (Mařík, 2003, table on pp. 216–238).

The application of criminal justice over the clergy is documented from the Poděbrady era. Disputes over debts, numerous disputes over tithes, and disputes over the award of office or over inheritances were all resolved. Marital disputes were numerous (Mařík, 1984, pp. 139–147; Mařík, 1988, pp. 188–197). Three record books of administrators are available in the Archive of the Prague Metropolitan Chapter, namely No. VI 5, VI 6, and VI 7 from 1454–1464, 1461–1468, and 1467–1471, respectively, and, separately, the record books of administrative commissioners for the Plzeň region, Prokop of Plzeň and Stanislav of Velvary (Mařík, 2001, p. 350, footnote 1; and pp. 336–345).

Entries made in the years 1454–1460 by one administrator, Václav of Krumlov, include in the introductory section the name of the suitor, the name of the defendant, the complaint, and the reply to it. A note of taking the oath might be appended. In more complex cases, the complaint is broken down into individual points (*positiones*). The defendant responded to every point. The reply was recorded either separately or added to the list of *positiones*, with information on an affirmative reply or rejection of the plea. Witness statements are recorded thereafter. The entry includes the name of the witness, the estimated age, and property. The witness was asked which party in the dispute he or she wished would win. Furthermore, the witness was asked whether he or she had amicable relationships with any of the parties and whether he or she had been instructed how to testify. The witness first gave his or her testimony of his/her own accord, then was questioned. The entry is closed with a judgment. As indicated, records in court disputes were made by the administrator himself. Only in unquestionable disputes were documents copied for him in the record book by Jan of Krumlov (Mařík, 2001, p. 339).

A record book of administrator No. VI 11 remains in Prague from the Jagiellonian era, documenting the exercise of jurisdiction in disputes, in particular matrimonial disputes. There are also records of disputes concerning the law of patronage, the usurpation of a parish benefice, complaints against a person owing money, and incomes belonging to the parish benefices. The book is mixed in nature; besides questionable juridical procedures it contains lists of confirmations, lists of ordainees, and in a few cases records of donations. According to records regarding the disputes conducted, the parties to the dispute often had themselves represented by a procurator (Macháčková, 1985, pp. 242, 246–250).

4. CONSERVATOR OF RIGHTS

The Pope could appoint a delegated judge; his position was regulated in *De officio et potestate iudicis delegati* of the first book of Liber extra (X 1.29). The institution of a specific delegated judge, referred to as the conservator of rights, was broadened from the 14th century (X 1.29. Pavloff, 1963, pp. 8–18, here p. 13; Schmutz, 1972, pp. 460–463; Hartmann and Pennington, 2016, pp. 229–243; see also Coureas, 2008, pp. 313–323). The number of conservators of rights set by the Pope rose during the 13th century. Conservators of rights (*iudex et conservator iurium et privilegiorum et libertatum*) were appointed to protect individual ecclesiastical persons and institutions, whether a bishop, an order, a monastery, a clergyman, or a member of the university. Three were always appointed, acting together or one of them alone in agreement with the others. As a rule, these were prominent prelates from the wider region in which the affected institution was

located, including neighbouring dioceses. Sometimes they delegated their powers to deputies, known as *sub-conservators*.

The first appointments of conservators of institutions from Czech dioceses appear in 1312 (for Prague Bishop Jan IV of Dražice), 1322 (for the Cistercian monasteries in Zbraslav, Sedlec, and Osek), 1323 (for the Knights of the Cross with the Red Star), and 1324 (for the Benedictine monastery in Třebíč) (Hledíková, 2013, pp. 219–221).[8] Conservators appointed to protect the rights of the university were to shield its members from outside entities and intervene against those from outside the university who did not respect its privileges. In relation to the university, the institution of conservators of rights was used for the first time in Prague in 1383. The frequency of disputes resolved by conservators of rights appointed to protect a member of the university was highest in the years 1397–1415. Most disputes concerned students, most of them studying at the Faculty of Arts (Stočes, 2005, pp. 30–31, 37–65; Kejř, 1995, pp. 27, 39; Stočes, 2004, pp. 395–411).

5. THE PAPAL INQUISITION

The oldest evidence of the papal inquisition in the Czech lands dates back to 1257. It was in that year that Lambert and Brno Minorite Bartholomew were appointed inquisitors. The beginnings of a permanent papal inquisition date back to 1318, when the Dominican Kolda of Koldice and the Minorite Hartman were appointed inquisitors for the Prague and Olomouc dioceses, meaning two inquisitors for both dioceses. There is evidence of initial opposition to a new authority having jurisdiction. An inquisition manual from Bohemia from the first half of the 14th century is preserved in a manuscript in Wolfenbüttel. Seven inquisitors are documented for the period to which the manual relates. Pope Benedict XII organised a new judiciary over heretics in 1335, when he separated the inquisition in Bohemia and in Moravia. That year, the Dominican Havel *de Novo Castro*, also referred to as Havel of Kosořice, was appointed for the Diocese of Prague, and Petr of Načeradec for the Diocese of Olomouc. A number of protocols have been preserved from Havel's activities, making it possible to reconstruct his work. Papal inquisitors were probably not appointed for the Czech lands from the mid-fourteen-fifties onwards (Soukup, 2010, pp.148–152, 168; Hlaváček, 1957, pp. 526–538; Patschovsky, 1975, pp. 15, 20, 22–23, 93–231; 1979; 1981, pp. 261–272; 2018, pp. 33–46; Kras, 2010, pp. 229–231).

6. UNIVERSITY JUDICIARY

The evolution of the judiciary of Prague University was marked by a gradual transformation from disciplinary proceedings to proper ecclesiastical jurisdiction. The formulation of university autonomy in the founding acts of both the Pope and the King meant recognition of the Rector's jurisdiction, as was customary in general studies. The statutes of 1368 provide for proper jurisdiction "in causis civilibus et iniuriarum". Fully-fledged membership of the university, and therefore protection by the right of the university, was based on matriculation. In the early days of the university, however, the Rector's jurisdiction was not exclusive; his authority was exercised in disciplinary matters and in matters of academic honour. Sanctions only concerned university land and included fines, suspensions from scholastic acts, and expulsion. The option of referral to other courts in other matters was not restricted. The jurisdiction of the rectors of both

[8] For examples from a later period see Krafl (2006, pp. 125–126, 128–130).

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Prague universities (the Three-Faculty University and the Law University) was strengthened in 1374 by an agreement with representatives of the Old City of Prague, according to which those perpetrating violations in the city were handed over to the rector. The appellate court from the rector's court was the court of the archbishop of Prague. By virtue of the privilege of King Wenceslas IV of 1392, masters, doctors, students, and their servants were excluded from the jurisdiction of any courts in the Kingdom of Bohemia. The development of the university justice system was completed by Boniface IX, when, in 1397, he exempted all members of the university from the jurisdiction of the courts of the Prague diocese; they were consequently subordinated only to the rector in civil and criminal matters. The rector had the right to put people in public or private jails (Kejř, 1995, pp. 38–41).

7. PROCEDURAL LAW AND PROCEDURAL MANUALS

In 1306, Clement V defined the *summary process* as a simplified form of the proper Roman-Canonical process. In 1316, the use of the summary process was defined for benefice disputes and disputes over unfair interest, tithes, and marital disputes. In the classical canonical process, the theory of formal proof applied (Hartmann and Pennington, 2016, pp. 74–159; Wetzstein, 2004, pp. 25–202).

Inquisitive proceedings have older roots. The decretal issued by Innocence III., *Qualiter et quando,* proclaimed at the Fourth Council of the Lateran and subsequently adopted in Liber extra, is fundamental here (X 5.1.24). The judge proceeded *ex officio* – that is, on the authority of his office – without waiting for a formal charge to be brought. Proceedings were initiated on the basis of a person's bad reputation (*diffamatio*), the condition here being repeated accusation (Kras, 2006, pp. 89–191; McAuley, 2006, pp. 489–493; Prudlo, 2019, p. 79. Briefly also Lambert, 2000, pp. 146–150, 259–261; Schwerhoff, 2004, pp. 22–25).

Medieval inventories of libraries in the Czech lands provide information on the presence of manuscripts with works on the Roman-Canonical process. *Ordo iudiciarius Tancredi* is known from three manuscripts once belonging to the libraries of the Dominicans in Jablonné and the College of the Bohemian Nation and Reček College (Collegium sanctissimae virginis Mariae) at Prague University; the Augustinians of St. Thomas in Prague owned a summary. The procedural guide *Ordinarius parvus* is found in the manuscripts of the Cistercians in Zlatá Koruna and the College of the Bohemian Nation. The procedural handbook by Bonaguido Arentino was located with the Dominicans in Jablonné. Five manuscripts have been preserved with the *Ordo iudiciarius* of Aegidius de Fuscarariis. *Speculum iuridicale* by Guillaume Durand (The Speculator) ascribes the medieval library catalogues to the Olomouc chapter; Collegium Carolinum; the College of the Bohemian Nation; the monastery in Zlatá Koruna; Přibyslav Janův of Újezdec; the archdeacon of Horšovský Týn; Thomas, parish priest of St. Michael's in Prague; Adam of Nežetice; and Pavel from Prague. Adam of Nežetice and the College of the Bohemian Nation had *Additiones* to the work of The Speculator (written by Ioannes Andreae). Numerous occurrences can be noted in the handbook *Processus Luciferi contra Iesum* by Jacobus de Teramo; medieval inventories register it as being at the library of the College of the Bohemian Nation and College of All Saints, with Adam of Nežetice, and at the monastery in Přední Výtoň, where, in addition to the Latin text, there was also a Czech translation. A number of other references to procedural manuals from medieval catalogues have not been identified (Boháček, 1971, pp. 31–37, 44–46; Kejř, 1985, pp. 50–51; Hlaváček, 2005, p. 299).

Two procedural guides known to us were created in the environment of the Prague Law University, namely *Processus iudiciarius secundum stilum Pragensem* and *Circa processum iudiciarium* (Kejř, 1995, p. 64). The procedural manual *Processus iudiciarius secundum stilum Pragensem* dates back to the years 1386-1389 and was written by Prague officialis and vicar general Mikuláš Puchník (Budský, 2016, pp. 29–42, 114–201; 2010; 2012; 2013). Mikuláš Puchník's procedural manual reflects certain legal customs common in the Prague Consistory, given in the formulations *de more consistorii Pragensis* and *secundum consuetudinem.* Manuscripts from the period stretching from 1390 to the period after 1467 remain to this day, and are now found in libraries in Olomouc, Berlin, Eisleben, Leipzig, Munich (2), Rostock, Graz (2), Wrocław (2), and Gdańsk (2). The manuscript from today's Kaliningrad is known of, but no longer in existence (Budský, 2016, pp. 43, 48–49, 63–77).

A little more recent is the file *Circa processum iudiciarium*, whose author has yet to be identified. This is preserved in nine manuscripts, which are located in Leipzig (3), St. Florian, Prague, Kaliningrad, Kassel, Rajhrad, and Frankfurt am Main, either a procedural manual or a procedural textbook. It was compiled to a fine standard and draws on particular judicial proceedings. The appended documents, created in connection with the dispute, serve as specimens for the compilation of similar documents – they have the character of a formulary (Zelený, 1972, pp. 67–86; Švábenský, 1977, pp. 7–15; Kejř, 1995, pp. 123–129). The Library of the Prague Metropolitan Chapter owns a manuscript that contains *Processus iudiciarius palatii apostolici*, written between 1410 and 1423 (Pořízka, 2000, pp. 42–43).

The influence of canon law on Bohemian secular law was also applied through procedural law, namely in the field of mining law. Italian lawyer Gozzo of Orvieto, educated in Roman and canon law, came to Bohemia at the invitation of Wenceslas II, king of Bohemia, and is probably the author of *Ius regale montanorum* (Krafl, 2014b, p. 238; Bulín, 1956, pp. 91–92). The fourth book of this code is generally characterised as the first attempt to codify the Roman-Canonical process for secular courts in Central Europe (Bulín, 1956, pp. 95, 97, 101–103, 106, 111, 114–116, 119, 124–125; Boháček, 1975, pp. 120–127).

8. OUT-OF-COURT SETTLEMENTS

An out-of-court settlement was a common way of resolving disputes between clerics or church institutions. The main role in this was played by an arbitrator or arbitrators (*arbitri, arbitratores et amicabiles compositores) chosen* by the parties to the dispute. Out-of-court settlements were sometimes preceded by the dispute being heard before one of the ordinary or delegated courts (cf. Kubíčková, 1932, pp. 419–421, Bader 1960, pp. 239–276).[9] The issue of arbiters was normatively regulated in *De arbitris* of the first book of Liber extra (X 1.43).

9. CRITICISM OF THE JUDICIARY BY HUSSITE REFORMERS

One of the criticisms made by pre-Hussite reform theorists was levelled at the negative features of the judiciary, in particular the corruption of judges and the absence of impartiality. Czech reformists, headed by Jan Hus, also dealt with purely theoretical issues, such as the theory of evidence in the canonical process. The first attacks against

[9] Random examples of disputes resolved in this way: Podlaha (1921, p. 49); Krafl (2006, pp. 126–127; 2015, pp. 143–145; 2018, pp. 58–60).

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the theory of judicial evidence had already appeared by the early years of the 15th century. Representatives of the reformist movement were confronted by accusations of heresy. As they had personally experienced during trials at that time, restriction of the open evaluation of evidence by the strict formalism of canonical evidentiary proceedings did not mean suppressing the judges' arbitrariness. On the contrary, it often led to deliberate wrongful convictions, with the use of witness evidence and shielding by procedural laws. The judge did not have the opportunity to step in against a witness when the testimony was formally flawless even though he was not internally convinced of its truthfulness. Jan Hus denounced the rules on the evaluation of witness evidence in a letter to M. Johannes Hübner of January 1404; unjust conviction carried out in accordance with the procedural order is in conflict with the law of Christ. Hus embodied the principle of objective truth and completely rejected the theory of formal evidence. Only a judge who obeyed the law of God guaranteed a fair decision. He also presented a critical assessment of procedural regulations in his lectures at the Faculty of Theology. He regarded false testimony as a grave sin (Kejř, 1964, pp. 36–37; 1955, pp. 92–95; 1965, pp. 9–15; 2009, pp. 104–105).

Of considerable importance is the quaestio *Utrum iudex sciens testes false deponere et accusatum esse innocentem, debit ipsum condempnare,* whose essential parts and much of the argumentation come from John Wycliffe's work *De civili dominio*. The author, whom Jiří Kejř identified as M. Jan of Jesenice, here expresses his opinion that "every judge is to judge according to the command of clear reason". He refers to natural law, which is based on the Holy Scriptures. He also declared that there was no need to respect an unfair judgment and no need to fear one (Kejř, 1954, pp. 19–20, 23–41; 1963, pp. 78, 81; 2006, pp. 212–216). Jan of Jesenice also drew attention to the problem of corruption in the quaestio *Utrum iudex corruptus ferens sentenciam pro parte corrumpente gravius peccat quam pars corrumpens.*[10] The attempt to reject the binding of the court by formal evidence and to emphasise the principle of free discretion according to the conscience of the judge is also evident from the commissioning of a quaestio for an unknown participant in M. Šimon's quodlibet (Kejř, 1964, pp. 37–38).

Jan Hus himself was accused of heresy and was tried before the court of the archbishop of Prague, before the papal court of Roman Rota, and then before the Council Rota of the Council of Constance (cf. Kejř, 2000; 2005). In his work *De sufficiencia legis Christi*, he appealed against the judgment of the Pope to the judgment of Christ, thereby denying the Pope's sovereignty over the Church. The stance which Hus took at the same time negated canon law, which did not recognise such an institution; an appeal against a papal decision was not possible (Kejř, 1999; 2000, pp. 97–101; 2005).

10. CONCLUSION

The law permeating the life of the Roman Catholic Church in varying degrees, particularly in the Middle Ages, from the lowest organisational units to the highest bodies, is a feature that no other religion knows. The development of society from the 13th century was a step forward in civilisation which truly laid the foundations for the later emergence of modern society. During the 14th century, this progress was amplified by the advent of paper as a cheaper material on which to write, which led to the intensive development of officiation and bureaucracy. The church evolved too. Thanks to paper,

[10] The conclusion of the quaestio leads into defence of the Decree of Kutná Hora; Kejř (1954, pp. 1–18; 1964, p. 36). Jesenice's preoccupation with procedural law is also evidenced by no extant writing "Summaria de iustitia et nullitate sententiarum contra Hus"; Kejř (1963, pp. 81–83; 2006, pp. 216–217).

each parish could have its own copy of valid provincial statutes and diocesan statutes, whereas in the period before that, when only parchment was available, the texts of these statutes were available only in the cathedral church and possibly in several leading churches of the diocese. Dissemination of the statutes resulted in better knowledge of these legal norms and the possibility of the stronger application of their provisions. Compliance with such a standard could also be better enforced. This goes hand in hand with the evolution of the ecclesiastical judiciary in the Czech lands, namely the court of the officialis, the court of the vicar general, and the specific court of the corrector cleri, unique in Europe. At the judicial and administrative level, specific agendas were profiled at the central episcopal offices and specialised official books were kept, including court books.

The operation of proper courts in the Archdiocese of Prague was disrupted by the advent of the Hussite Revolution (1420–1434). Judicial powers were thrust into the hands of the administrators of the archbishopric, who kept them all even after the end of the revolution, because the archbishopric was not appointed by the archbishop until 1561 and the proper functioning of the ecclesiastical courts in their original form was not restored.

A specific chapter in the Czech history of ecclesiastical law is the relationship between the Hussite movement and canon law. Hussite theologians criticised the theory of court evidence, which, despite strict formalism, did not prevent unfair convictions. Jan Hus himself had years of experience of the court of the archbishop of Prague and the papal court. In *De sufficiencia legis Christi*, he appeals against the judgment of the Pope to the judgment of Christ, thereby refusing the jurisdiction of the head of the church.

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PLAYING WITH FIRE AT THE ZAPORIZHZHIA NUCLEAR POWER PLANT AND THE CHALLENGES FOR INTERNATIONAL NUCLEAR LAW IN CENTRAL EUROPE / Marianna Novotná, Jakub Handrlica

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Abstract: *Since the start of the military aggression of the Russian Federation against Ukraine in February 2022, the Zaporizhzhia Nuclear Power Station has been at the centre of heavy combat. The Zaporizhzhia Nuclear Power Station, which is both the largest nuclear power plant in Europe and the tenth largest nuclear power plant in the world, has been targeted by various weapons, including rocket-propelled grenades and drones. The fact is that a potential nuclear accident in this installation may have tremendous transboundary impacts on the whole region of Central Europe. In this respect, the question arises of whether international law provides an appropriate reaction to these realities. Having outlined this question, one must bear in mind that since March 2022, the Ukrainian executive has lost effective control over the nuclear power plant, which has been controlled since then – in strict contradiction with the rules of international law - by the Russian Federation since then. This article analyses the potential applicability of three international agreements - the Convention on Early Notification of a Nuclear Accident, the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency and the Vienna Convention on Civil Liability for Nuclear Damage - and will respond to a potential accident in this nuclear power plant. This article is written from the perspective of the states of Central Europe, whose territories are most likely to be affected by a nuclear incident that occurred at the Zaporizhzhia Nuclear Power Station.*

Key words: *Nuclear Accident; Armed Conflict; Early Notification of a Nuclear Accident; Assistance in a Case of a Nuclear Accident; Nuclear Liability; International Nuclear Law*

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1. INTRODUCTION

The Zaporizhzhia Nuclear Power Plant[1] in southeastern Ukraine is the largest nuclear power plant in Europe and among the ten largest in the world. The Zaporizhzhia

[1] Ukrainian: *Запорізька атомна електростанція*, romanised: *Zaporiz'ka atomna elektrostantsiia*.

Nuclear Power Plant is situated near the city of Enerhodar, on the southern shore of the Kakhovka Reservoir on the Dnieper River. It is composed of six nuclear reactors of Soviet design, each generating 950 MWe for a total power output of 5,700 MWe. The first five were successively brought online between 1985 and 1989, and the sixth was added in 1995. In 2020, the plant generated nearly half of Ukraine's electricity derived from nuclear power and more than a fifth of the total electricity generated in the country (Wendland, 2022).

Since the commencement of the aggression of the Russian Federation against the sovereign territory of Ukraine in February 2022, the safety situation of the Zaporizhzhia Nuclear Power Plant has been the focus of the international community of States.[2] For the very first time in history, a nuclear power plant has become a military objective in the front line of a war (Zurita, 2024). After the Russian invasion of Ukraine began, the *Energoatom*[3] shut down Units 5 and 6 to reduce risk, keeping Units 1 to 4 in operation to produce electricity for the concerned region. During the military conflict, the Zaporizhzhia Nuclear Power Plant became several times the target of military attacks from both sides of the conflict. In March 2022, heavy fights between Ukrainian and Russian military forces ended with the military occupation of the Zaporizhzhia Nuclear Power Plant by the forces of the Russian Federation. In September 2022, a delegation of officials from the International Atomic Energy Agency (IAEA) visited the nuclear power plant. Subsequently, a report was published by the IAEA documenting damage and potential threats to plant security caused by external shelling and the presence of occupying troops in the plant.[4] This report has stated that:

> "The situation in Ukraine is unprecedented. It is the first time an armed conflict has occurred amid the facilities of a large, established nuclear power program. A nuclear accident can have a serious impact within a country and beyond its borders, and the international community is relying

[2] See United Nations, Briefing Security Council, International Atomic Energy Agency Director Outlines Five Principles to Prevent Nuclear Accident at Zaporizhzhia Power Plant in Ukraine, 9334th meeting (PM), SC/15300, 30 May 2023. At this meeting, the IAEA presented five indispensable principles to prevent any nuclear accident at the Zaporizhzhia Nuclear Power Plant, which are as follows: (i) no attack of any kind from or against the plant, targeting in particular the reactors, spent fuel storage, other critical infrastructure or personnel; (ii) no use of the plant as storage nor as a base for heavy weapons or military personnel that could be used for an attack; (iii) no placement of off-site power — which must be available and secure at all times — at risk; (iv) the protection of all structures, systems and components essential to the plant's safe and secure operation from attacks or acts of sabotage; and (v) no action which undermines these principles. In this respect, the representative of Switzerland at the 9334th meeting reiterated his call on the Russian Federation to withdraw its troops from Ukrainian territory and condemned any attack against civilian infrastructure. At the same time, the representative of Switzerland stressed that the Russian Federation and Ukraine must fully implement these five principles and commit to protecting the Zaporizhzhia Nuclear Power Plant. The representative of France at the 9334th meeting urged the Russian Federation to return full control of all nuclear facilities to Ukraine and cease all threats on their personnel, she said the nuclear plant must not be used as a military base. Also, the representative of France stressed that the five principles presented by the IAEA are there to protect the whole international community. Finally, the representative of Ukraine at the 9334th meeting argued that the Russian Federation's actions — its mining of the plant's perimeter and shelling of its site and adjacent areas — have led to the violation of its physical integrity, serious damage to the station and a direct threat to the life and health of its operating personnel. In this respect, he added that "the threat of dangerous accident as a result of these irresponsible and criminal actions hangs over us."

[3] State Enterprise National Nuclear Energy Generating Company "Energoatom", commonly known as just *Energoatom*, is an Ukrainian State enterprise, operating all four nuclear power plants in Ukraine (Zaporizhzhia Nuclear Power Plant, Rivne Nuclear Power Plant, South Ukraine Nuclear Power Plant and Khmelnytskyi Nuclear Power Plant). It is the largest power producer in Ukraine.

[4] See IAEA, Nuclear Safety, Security and Safeguards in Ukraine IAEA, Nuclear Safety, Security and Safeguards in Ukraine, Report by the Director General, GOV/2022/52, 9 September 2022.

> on the Agency to perform a rigorous assessment of the situation and to keep it informed with accurate and timely information (...)."[5]

The fact is that despite this warning, military operations haven't ceased around the Zaporizhzhia Nuclear Power Plant. On 30 September 2022, the Russian Federation declared unilateral annexation of four Ukrainian regions (oblasts) – Donetsk, Cherson, Luhansk and Zaporizhzhia. At the same time, the operation of the Zaporizhzhia Nuclear Power Plant was taken over by Rosatom, Russia's state nuclear power company. The destruction of the nearby Kakhovka Dam in June 2023 was reported to have no immediate risk to the plant. In April 2024, the IAEA reported that the Zaporizhzhia Nuclear Power Plant was attacked by drones, apparently targeting surveillance and communication equipment. Russian troops tried to shoot down the drones without success (Roecker, 2023).

A potential nuclear incident in the largest nuclear power plant in Europe will most probably cause a profound impact not only in Ukraine but also beyond its borders (Tsagkaris, Matiashova and Isayeva, 2022). The potential risks of a nuclear accident, which may occur in the Zaporizhzhia Nuclear Power Plant, have been recently addressed by authors dealing with international relations, non-proliferation of nuclear weapons and disarmament (Alkiş, 2023; Bennet, 2023; Davis, 2023; Kurando, 2023; Wendland, 2023). At the same time, the situation in Ukraine has attracted considerable attention from scholars of international public law, international humanitarian law and international energy law (Burke, 2022; Boron, Gouin and Sauvourel, 2023; Smith, 2022; Smith, 2023, Morgandi and Betin, 2022). The fact is, however, that the authors have addressed so far mainly the issues of prohibition of military attacks on nuclear installations (Lamm, 2007; Mais, 2023) and challenges of the current situation for the existing global framework (Duliba, 2023; Hood and Cormier, 2024; Semenko, Remez, Nazarenko et al., 2024; Vasileva, 2023).

The fact is that while most of the so far existing literature on the potential impacts of a nuclear accident in the Zaporizhzhia Nuclear Power Plant has addressed prospective consequences from a global viewpoint, the main harmful implications of such an accident will occur in the region of Central Europe. Having said this, one may refer to the simulation as developed by the Ukrainian Hydrometeorological Institute of the State Emergency Service of Ukraine and the National Academy of Sciences of Ukraine. This simulation was published in the *Ukrainska Pravda* on 18 August 2022 and indicates that a potential nuclear accident in the Zaporizhzhia Nuclear Power Plant will have impacts both for Kyiv and for the regions of Ukraine currently under the military occupation by the Russian Federation (Roshchina, 2022). Furthermore, radioactivity as the product of such a nuclear accident may reach the territory of several states of Central Europe, particularly Poland, the Czech Republic, Slovakia, Hungary, Romania, and the Republic of Moldova.

In this respect, this article aims to address the gap existing in the legal scholarship of Central Europe on the potential impacts of a nuclear accident in the Zaporizhzhia Nuclear Power Plant. This article will address the issue from neither the Ukrainian viewpoint nor the viewpoint of the global community. This article aims to address the question of how the existing instruments of international nuclear law can provide a suitable reaction to a nuclear accident, which will correspond to the interest of the States of Central Europe to protect the health and life of their citizens and their environment.

[5] *Ibid.*, p. 11.

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This article aims to address the potential impacts of a nuclear accident in the Zaporizhzhia Nuclear Power Plant from the viewpoint of Central Europe. In this respect, the authors seek to address the applicability of three regimes of international nuclear law, which will be crucial in the case of a nuclear accident in Central Europe. Having said this, one must bear in mind that the Russian occupation of the nuclear power plant represents an act without any historical parallels to the past, a kind of *black swan* (Handrlica, 2021b). Consequently, it is crystal clear that the existing instruments do not provide any provisions that would explicitly react to the newly emerged situation. This represents a considerable challenge, which the legal scholarship must address. In this respect, the topic will be analysed as follows:

Firstly (chapter II.), attention will be paid to the applicability of the Convention on Early Notification of a Nuclear Accident to the potential nuclear accident which may occur in the Zaporizhzhia Nuclear Power Plant. Secondly (chapter III.), the authors will analyse the applicability of the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency to the same potential incident. By reviewing the prospective applicability of both these instruments of international nuclear law, one must bear in mind that while Ukraine represents one of the Contracting Parties to both these Conventions, it has lost any effective control over the concerned territory since March 2022. This fact makes the current situation even more challenging. Lastly (chapter IV.), this article will also address the capability of the Vienna Convention on Civil Liability for Nuclear Damage to address the issues of liability and compensation for damage that may potentially occur in the aftermath of a nuclear accident in the Zaporizhzhia Nuclear Power Plant.

2. THE CONVENTION ON EARLY NOTIFICATION OF A NUCLEAR ACCIDENT

2.1 Scope of the Convention

The regime for early notification of a nuclear accident in the territory of Ukraine will be in Central Europe, governed by the Convention on Early Notification of a Nuclear Accident (from now on, "**the Convention on Early Notification**").[6] The regime, as established by the Convention on Early Notification, recently covers the whole territory of Central Europe. Both Ukraine and the neighbouring States, such as Poland, the Czech Republic, Slovakia, Hungary, Romania and the Republic of Moldova, are Contracting Parties to the Convention on Early Notification.[7] At the same time, the Russian Federation is participating in this international regime of early notification of a nuclear accident as well.

The scope of the application of the Convention on Early Notification is rather broadly designed (Moser, 1989). The international regime for early notification of a nuclear accident will be applicable if the following three preconditions are fulfilled:

a) nuclear accident will be involving facilities or activities of a Contracting Party, which are explicitly referred to;[8]
b) release of radioactive material occurs or is likely to occur;[9]

[6] The Convention on Early Notification of a Nuclear Accident (adopted 26 September 1986, entered into force 27 October 1985), INFCIRC/335.
[7] The Convention itself refers about the „State Parties".
[8] The Convention on Early Notification provides in its Article 1.2 that following facilities and activities are covered: (a) any nuclear reactor wherever located; (b) any nuclear fuel cycle facility; (c) any radioactive waste management facility; (d) the transport and storage of nuclear fuels or radioactive wastes; (e) the manufacture, use, storage, disposal and transport of radioisotopes for agricultural, industrial, medical and related scientific and research purposes; and (f) the use of radioisotopes for power generation in space objects.
[9] See Convention on Early Notification, Article 1.

c) which has resulted or may result in an international transboundary release that could be of radiological safety significance for another State.[10]

In this respect, it is essential to note that the scope of application of the Convention on Early Notification does not distinguish between nuclear accidents occurring in peaceful operations and those arising because of an armed conflict (McBrayer, 1987). A nuclear accident that may arise because of a military attack on a nuclear installation will undeniably fall under the regime as established by the Convention on Early Notification.

Consequently, the applicability of the Convention on Early Notification to a nuclear accident at the Zaporizhzhia Nuclear Power Plant will be triggered in the case of a transboundary release with a radiological safety significance for at least one other country will be given.

2.2 International Regime for Early Notification of a Nuclear Accident

The Convention on Early Notification aims to establish an international regime for early notification of a nuclear accident. At the same time, it is presumed that this regime will be further developed through bilateral and regional agreements, as adopted by the respective Contracting Parties.[11] Therefore, some scholars rank the Convention on Early Notification as the "incentive" convention, which primarily aims to trigger further development of international nuclear law in the respective area of governance (De Wright, 2007).

The international regime of early notification of a nuclear accident, as established by the Convention, has been built upon the obligation of the Contracting Party to provide for a notification to those States which may be affected by an international transboundary release. The Contracting Party is being obliged[12] to:

a) notify, directly or through the IAEA, those States which are or may be physically affected by the nuclear accident, its nature, the time of its occurrence and its exact location where appropriate; and
b) promptly provide the states referred to in subparagraph (a), directly or through the IAEA, with information that is relevant to minimising the radiological consequences in those states.

The practical exchange of information under the international regime, as established by the Convention on Early Notification, is to be realised *via* the competent authorities of the Contracting Parties. In this respect, the Convention provides[13] that each Contracting Party shall make known to the IAEA and to other Contracting Parties its competent authorities and point of contact responsible for issuing and receiving the notification on the transboundary release. The IAEA maintains an up-to-date list of all competent authorities.[14]

At the same time, the Convention on Early Notification provides[15] for certain obligations of the IAEA in the notification regime. The IAEA shall immediately inform both Contracting Parties to the Convention and other States that are or may be physically

[10] *Ibid*.
[11] See Convention on Early Notification, Article 9 ("in furtherance of their mutual interests, States Parties may consider, where deemed appropriate, the conclusion of bilateral or multilateral arrangements relating to the subject matter of this Convention").
[12] *Ibid*., Article 2.
[13] *Ibid*., Article 7.1.
[14] *Ibid*., Article 7.3.
[15] *Ibid*., Article 4.

affected by the transboundary release of a notification received pursuant to the Convention. Also, the IAEA shall promptly provide any Contracting Party, any Member State or relevant international organisation, upon request, with any information received under the international regime discussed here.

Lastly, the Convention on Early Notification also calls[16] for voluntary notification of any other nuclear accidents than those specified above, with a view to minimising the radiological consequences. This call hasn't been adopted as an obligation but merely as an incentive for the Contracting Parties to strengthen their cooperation through an intensive exchange of information in this field.

2.3 Applicability to a Potential Accident at the Zaporizhzhia Nuclear Power Plant

The applicability of the Convention on Early Notification to a potential accident at the Zaporizhzhia Nuclear Power Plant implies several questions. The fact is that the Convention does not contain any explicit provision reflecting the situation when another Contracting Party is militarily occupying a nuclear installation to this Convention. Under such a situation, the question arises: which State is being obliged to fulfil the notification obligation under the Convention?[17]

The fact is that the Convention provides[18] that it shall apply in the event of any accident involving facilities or activities of a Contracting Party or of *persons or legal entities under its jurisdiction or control* (highlighted by the authors). In this respect, the Convention on Early Notification provides for an exhausting list of information, which is to be supplied to the affected State or States[19] and which reads as follows:

a) the time, exact location where appropriate, and the nature of the nuclear accident,
b) the facility or activity involved,
c) the assumed or established cause and the foreseeable development of the nuclear accident relevant to the transboundary release of the radioactive materials,
d) the general characteristics of the radioactive release, including, as far as is practicable and appropriate, the nature, probable physical and chemical form and the quantity, composition and effective height of the radioactive release,
e) information on current and forecast meteorological and hydrological conditions necessary for predicting the transboundary release of the radioactive materials,
f) the results of environmental monitoring relevant to the transboundary release of the radioactive materials,
g) the off-site protective measures taken or planned,
h) the predicted behaviour over time of the radioactive release.

Consequently, the Convention on Early Notification clearly presumes that the Contracting Party possessing jurisdiction over the legal entity operating the nuclear installation will notify transboundary release. The reason for this regulation is crystal clear. The Convention presumes that the Contracting Party has complete control over its territory and, therefore, can obtain information about any nuclear accidents that may have transboundary impacts (Stuckey, 1988).

[16] *Ibid*., Article 3.
[17] *Ibid*., Article 2.
[18] *Ibid*., Article 1.
[19] *Ibid*., Article 5.1.

Having said this, however, the Convention also refers to a situation when a Contracting Party merely controls a person or a legal entity operating the respective nuclear installation. Consequently, one may argue that the international regime of early notification clearly links the notification obligations primarily to those states that execute factual control over the respective installation or activity. The ratio behind this concept is that the State that is in factual control will most efficiently gather information on potential transboundary release and notify them abroad.

Having said this, it is undeniable that the Zaporizhzhia Nuclear Power Plant belongs to the Ukrainian jurisdiction. The unilateral annexation of Donetsk, Cherson, Luhansk and Zaporizhzhia, which the Russian Federation announced on 30 September 2022, has been considered an act contrary to the principles of international public law (Ali, 2023). At the same time, imposing the notification obligation under the Convention on Early Notification primary to Ukraine would not be appropriate, as Ukraine does not possess any effective control over the installation. Therefore, one may argue that it will be the Russian Federation, as the Contracting Party possessing the actual control over the respective installation, which will be obliged to provide for notification of any transboundary release in the first place.

The fact is that the outlined way of interpretation has much broader implications. It is also relevant for interpreting the obligations arising from bilateral agreements that have been adopted to further specify the Convention on Early Notification. The bilateral regime, as established between Slovakia and Ukraine, may serve as an example.[20] Pursuant to this regime, Ukraine would be obliged to notify the competent authorities of Slovakia of any nuclear accident occurring in its territory.[21] Consequently, under a peaceful situation, this obligation would clearly concern any nuclear accident occurring at the Zaporizhzhia Nuclear Power Plant as well. However, applying the above-outlined interpretation to this obligation, one may argue that Ukraine cannot be required to deliver information about nuclear accidents occurring in a territory that is beyond its control. In this respect, the notification obligation of the Contracting Party to the Convention on Early Notification, which is in factual control of the nuclear installation, will replace the obligation arising from the bilateral agreement.

3. THE CONVENTION ON ASSISTANCE IN THE CASE OF A NUCLEAR ACCIDENT OR RADIOLOGICAL EMERGENCY

3.1 Scope of the Convention

Together with the Convention on Early Notification, the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (from now on "**the Assistance Convention**") represents another major convention, adopted right in the aftermath of the nuclear accident at the Chornobyl Nuclear Power Plant in 1986. The Assistance Convention differentiates between nuclear accidents originating from peaceful operations and those caused by an armed conflict. Also, in the same fashion as the Convention on Early Notification, the Assistance Convention is very broadly designed. It applies[22] to any case of a nuclear accident or a radiological emergency. In this respect,

[20] See Agreement between the Government of the Slovak Republic and the Government of Ukraine on Early Notification of a Nuclear Accident, on Information Exchange and Co-Operation in the Field of Nuclear Safety and Radiological Protection (adopted 24 September 1998, entered into force 1 March 1999), published in Collection of Laws of the Slovak Republic, under 323/1999 Coll.
[21] *Ibid*., Article 2.1.
[22] See Assistance Convention, Article 2.1.

one must stress that both Ukraine and the Russian Federation are Contracting Parties to the Assistance Convention. At the same time, all states in Central Europe participate in the international regime, as established by the Assistance Convention. Having said this, one must bear in mind that similar to the Convention on Early Notification, the Assistance Convention has also been designed as an "incentive" instrument of international nuclear law (De Wright, 2007). It urges[23] its Contracting Parties to enter into bilateral and regional agreements to strengthen the global regime of assistance further.

Consequently, the assistance regime, as established by the Assistance Convention, will also undeniably apply to a nuclear accident potentially occurring at the Zaporizhzhia Nuclear Power Plant. At the same time, the existing bilateral agreements that have been adopted to develop the Assistance Convention further will also apply to the concerned Contracting Parties.

3.2 International Regime on Assistance in the Case of a Nuclear Accident

The Assistance Convention provides[24] for the right of any Contracting Party affected by a nuclear accident or a radiological emergency to address other Contracting Party, or Parties, or the IAEA directly for assistance. A Contracting Party requesting assistance[25] shall specify the scope and type of assistance required and, where practicable, provide such information as may be necessary for other Contracting Parties[26] to determine the extent to which it is able to meet the request. The Assistance Convention itself does not provide for any obligation to provide for any specific assistance. It merely provides[27] that each Contracting Party to which a request for assistance is directed shall promptly decide and notify the requesting Contracting Party whether it is able to render the assistance requested, as well as the scope and terms of the aid that might be rendered. In this respect, the Assistance Convention also provides that Contracting Parties shall, within the limits of their capabilities, identify and notify the Agency experts, equipment and materials which could be made available for the provision of assistance to other Contracting parties in the event of a nuclear accident or radiological emergency as well as the terms, primarily financial, under which such aid could be provided.[28]

3.3 Applicability to a Potential Accident at the Zaporizhzhia Nuclear Power Plant

The Assistance Convention has established an international regime that aims to facilitate the provision of assistance to the Contracting Party that will be affected by a nuclear accident or by a radiological emergency. With respect to a potential nuclear accident at the Zaporizhzhia Nuclear Power Plant, it is necessary to clarify which State will be entitled to require assistance under the Assistance Convention (Cook, 2022). Having posed this question, it must be stressed in the first place that the Assistance Convention does not qualify for assistance; only those states that have provided for a notification under the Convention on Early Notification do. Further, the Assistance Convention specifies[29] that a Contracting Party is entitled to require assistance in the event of a nuclear accident or radiological emergency *whether or not such accident or emergency originates within its territory, jurisdiction or control*. Consequently, the right to

[23] *Ibid*., Article 1.2.
[24] *Ibid*., Article 2.1.
[25] The Assistance Convention uses the term „requesting State".
[26] The Assistance Convention uses the term „assisting Party".
[27] See Assistance Convention, Article 2.3.
[28] *Ibid*., Article 2.4.
[29] *Ibid*.

require assistance from other Contracting Parties to the Convention, from the IAEA, or from different international organisations is being defined very broadly. In principle, the Convention does not require that the nuclear accident occur in the territory under the control of the Contracting Party, needing assistance.

Consequently, in the case of a nuclear accident at the Zaporizhzhia Nuclear Power Plant, Ukraine will be entitled to require assistance from other Contracting Parties to the Assistance Convention. The reason behind this is crystal clear: it will be the territory under the control of Ukraine which will be affected by the transboundary release in the first place. Therefore, even if Ukraine is not in a position to notify other states of the accident under the Convention on Early Notification, one must argue for its right to require assistance under the Assistance Convention.

In this respect, the Assistance Convention provides for basic principles governing any assistance provided by other Contracting Parties. These principles, applicable also in a potential case of a nuclear accident at the Zaporizhzhia Nuclear Power Plant, are as follows:

a) the overall direction, control, coordination and supervision of the assistance shall be the responsibility of Ukraine within its territory,[30]
b) Ukraine shall provide, to the extent of its capabilities, local facilities and services for the proper and effective administration of the assistance,[31]
c) Ukraine shall also ensure the protection of personnel, equipment and materials brought into its territory by or on behalf of the assisting State for such purpose,[32]
d) Ukraine shall afford to personnel of the assisting State and personnel acting on its behalf the necessary privileges, immunities and facilities for the performance of their assistance functions,[33]
e) without prejudice to the privileges and immunities, all beneficiaries enjoying privileges and immunities (see above sub d) will have a duty to respect the laws and regulations of Ukraine. They shall also have the duty not to interfere in Ukraine's domestic affairs.[34]

The principle of overall direction, control, and supervision of assistance by the Contracting Party in its territory may imply severe problems with respect to the current situation in Ukraine. In particular, the question may arise of to what extent Ukraine will be able to execute this principle in those territories that have been annexed by the Russian Federation—contrary to the principles of international public law—. In this respect, the Assistance Convention provides[35] for a regime of dispute settlement between the Contracting Parties, which will need to be activated.

4. THE VIENNA CONVENTION ON CIVIL LIABILITY FOR NUCLEAR DAMAGE

4.1 Scope of the Convention

The regime for liability and compensation of damage occurring as a consequence of a nuclear accident in the territory of Ukraine will be governed in Central Europe by the Vienna Convention on Civil Liability for Nuclear Damage (from now on, "the

[30] *Ibid*., Article 3.a.
[31] *Ibid*., Article 3.b.
[32] *Ibid*.
[33] *Ibid*., Article 8.1.
[34] *Ibid*., Article 8.7.
[35] *Ibid*., Article 13.

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Vienna Convention").[36] This Convention aims to establish a regime of liability and compensation in case of transboundary damage. The Vienna Convention will be applicable to damage that occurs as a consequence of the radioactive properties or a combination of radioactive properties with toxic, explosive, *or other hazardous properties of nuclear fuel or radioactive products or waste*.[37] Consequently, any nuclear accident occurring in the Zaporizhzhia Nuclear Power Plant and causing damage beyond the territory of Ukraine will be governed by this Convention – under the precondition that the State where the damage occurred is also participating in the regime of the Vienna Convention.

Having said this, one has to note that while several States of Central Europe (Poland, Romania) currently belong to the international regime, as established by the Revised Vienna Convention on Civil Liability for Nuclear Damage, Ukraine belongs together with Slovakia, the Czech Republic and Hungary to the international regime, as established by the Vienna Convention (Handrlica, 2021a). Both of these existing international regimes of nuclear liability have been interconnected (Handrlica and Novotná, 2018; IAEA, 2017). In practical terms, this means that in the case of a nuclear accident in the Zaporizhzhia Nuclear Power Plant, both the victims from the territories of the Contracting Parties to the Vienna Convention and the victims from the territories of the Contracting Parties to the Revised Vienna Convention on Civil Liability for Nuclear Damage will be entitled to compensation.

Having said this, one must also note that the Russian Federation is one of the Contracting Parties to the Vienna Convention.

4.2 Regime of International Liability for Nuclear Damage

In contrast to the international regimes established by the Convention on Early Notification and the Assistance Convention, which were outlined above, the Vienna Convention establishes a global regime of civil liability rather than a regime of international responsibility of the States (Novotná and Trojčáková, 2020). In this respect, the Vienna Convention links the liability for nuclear damage to the operator of the nuclear installation, which means the entity of civil law.[38]

In the legal framework of the Vienna Convention, the operator is *the person designated or recognised as the operator of a nuclear installation by the State*.[39] The operator of a nuclear installation is exclusively liable for nuclear damage which occur in his installation.[40] The Convention provides that the operator has a right of recourse only if this is expressly provided for by a contract in writing or – in the case a nuclear incident results from an act or omission done with intent to cause damage – against the individual who has acted or omitted to act with such purpose.[41] No other person than the operator[42] may be held liable, and the operator cannot be held liable under different legal provisions.

[36] The Vienna Convention on Civil Liability for Nuclear Damage (adopted 21 May 1963, entered into force 12 November 1972), INFCIRC/500.
[37] See Vienna Convention, Article I.1.k.i.
[38] In this respect, it is important to note, that also the Installation State, or its constituent sub-division, can be also considered as operator under the Vienna Convention (see Vienna Convention, Article VII.2).
[39] *Ibid*., Article I.1.c.
[40] *Ibid*., Article II.5.
[41] *Ibid*., Article X.
[42] This is in particular the issue of the constructor, the subject delivering the nuclear technologies or nuclear fuel. Although being participating in the nuclear industry, these persons do not bear any liability in the framework of the Convention.

In relation to this, the Vienna Convention provides for minimal liability relief. The operator will be exonerated from liability only if he proves that the nuclear incident was directly due to armed conflict, hostilities, civil war, insurrection, or a grave natural disaster or that it resulted wholly or partly either from the gross negligence of the victim or from an act or omission of the victim with intent to cause harm.[43] Further, strict preconditions concerning potential liability relief are provided.[44]

In general, loss of life, any personal injury or any loss of, or damage to, a property which arises out of or results from the *radioactive properties or a combination of radioactive properties with toxic, explosive or other hazardous properties of nuclear fuel or radioactive products or waste in, or of nuclear material coming from, originating in, or sent to a nuclear installation* are to be covered by the liability framework, created by the Vienna Convention.[45]

As a quid pro quo for the stringent conditions of the operator's liability, each Contracting Party[46] may limit the operator's liability by the corresponding national legislation. However, the Vienna Convention provides for a minimum possible liability limit: the Installation State may limit the liability of the operator to not less than US $ 5 million for any one nuclear incident. The US $ referred to in this Convention is a unit of account equivalent to the value of the United States dollar in terms of gold on 29 April 1963, that is to say, US $ 35 per one troy ounce of fine gold.[47] Consequently, the Vienna Convention provides for a "floating" limit of operator's liability when fixing the minimal limit to the price of one troy ounce of fine gold. This constitutes a particular challenge for national legislation, which must avoid providing for a minimal limit that may become too low due to the diversions of the price of gold. Consequently, the limitation of the operator's liability is to be considered as a right of the Contracting Party, which is guaranteed under international law. It is a matter of fact that, from the very early beginning, the Contracting Parties to the Vienna Convention have been allowed to introduce an unlimited liability. The provisions of the Convention do not contain any obligatory maximum limit of liability. Therefore, the limitation of the operator's liability is a right of an Installation State rather than an obligation. In this respect, it must be mentioned that the national legislation of Ukraine[48] has limited the liability of the operator to the equivalent of 150 million Special Drawing Rights in the currency of Ukraine for each nuclear incident (Hamankov, 2000).

Furthermore, the Vienna Convention requires the operator to maintain mandatory insurance or to provide other financial securities covering its liability for nuclear damage in such amounts, of such types and in such terms as the Contracting Party specifies. This renvoi to national legislation makes the amounts to be insured by the operator dependent on the Installation State rather than on a binding provision of the Vienna Convention. However, the Convention requires the Contracting Party to *ensure the payment of any claims which have been established against the operator by providing the necessary funds to the extent that the yield of insurance or other financial security is inadequate to satisfy such claims, but not in excess of the limit, if any, established in national legislation*.[49] Having

[43] Vienna Convention, Article IV.2.
[44] Pursuant to the Article X, the operator shall have a right of recourse only if this is expressly provided for by a contract in writing; or if the nuclear incident results from an act or omission done with intent to cause damage, against the individual who has acted or omitted to act with such intent.
[45] Vienna Convention, Article I.1.k.
[46] The Convention uses the term „Installation State" to refer about Contracting Parties.
[47] Vienna Convention, Article V.1 and 3.
[48] See Act of Ukraine "On Civil Liability for Nuclear Damage and its Financial Security", Article 6.1.
[49] Vienna Convention, Article VII.1.

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said this, it is important to stress that the national legislation of Ukraine provides that the operator may secure his liability for nuclear damage either by means of insurance or by another type of financial security.[50]

Finally, the operator's liability under the Vienna Convention is also limited in time. In view of the fact that physical injury from radioactive contamination may not manifest itself for some time after the nuclear incident, the adoption of too short a period of limitation would clearly be inequitable. Consequently, the Vienna Convention provides that rights of compensation will be extinguished if an action is not brought within ten years from the date of the nuclear incident.

At the same time, the Vienna Convention provides that the courts of the Contracting Party where the nuclear incident occurred will have exclusive jurisdiction over all actions brought for damage caused by a nuclear incident occurring in their territory.[51] Consequently, in the scenario of a nuclear incident at the Zaporozhzhia Nuclear Power Plant, the application of the Vienna Convention would imply the competence of Ukrainian courts to decide on the compensation for damage arising.

4.3 Applicability to a Potential Accident at the Zaporizhzhia Nuclear Power Plant

The applicability of the Vienna Convention to a potential accident at the Zaporizhzhia Nuclear Power Plant ranks among the most sensitive questions of the current situation in Ukraine (Morgandi and Betin, 2022; Sancin, 2023). The fact is that a nuclear incident in this installation will inevitably imply transboundary damage that will occur in the territory of other Contracting Parties to either the Vienna Convention or the Revised Vienna Convention. Consequently, the question arises whether the regime of the Vienna Convention will also be applicable to the current situation under which the Zaporizhzhia Nuclear Power Plant is under military occupation, and the nuclear accident will most probably result in an army attack.

One must bear in mind that the Vienna Convention was originally not drafted to apply to situations like those arising in Ukraine recently. Consequently, the provisions of the Vienna Convention do not provide for any explicit answer to the question arising. At the same time, due to the magnitude of the potential harm, the clarification of the applicability of the Vienna Convention is essential. Having said this, we must stress that two main issues are crucial for clarifying the applicable regime. Firstly, the issue of operator liable under the Vienna Convention must be clarified. Secondly, the consequences of the liberation, as provided by the Vienna Convention, must be evaluated.

4.3.1 Operator Liable for Nuclear Damage

The Vienna Convention channels the liability for nuclear damage to the operator of the concerned nuclear installation.[52] In this respect, the liability regime established by the Vienna Convention is interconnected with the national public law regulating nuclear safety, with the license issued by the competent authority to operate the installation. Consequently, Energoatom, as the operator holding the license under Ukrainian legislation (Hamankov, 2000), will be exclusively liable for nuclear damage in a peaceful situation. The fact is, however, that the *Energoatom* has not been able to control the

[50] See Act of Ukraine "On Civil Liability for Nuclear Damage and its Financial Security", Article 7.2. Also, the Article provides (*in fine*) that "the Cabinet of Ministers of Ukraine may grant the operator of a nuclear installation a State guarantee of financial security for civil liability for nuclear damage."
[51] Vienna Convention, Article XI.1.
[52] *Ibid.*, Article II.5.

operation of the concerned nuclear installation since March 2022. In this respect, the question arises of how to reconcile the international regime, as established by the Vienna Convention, with the current situation in Ukraine.

Having said this, one must bear in mind that the Vienna Convention aims to channel liability for nuclear damage to that entity which is in *factual* control of the nuclear installation (Kissich, 2004). Therefore, the Vienna Convention provides that the operator is *the person designated or recognised as the operator of a nuclear installation by the State.*[53] If referring to a person designated, the Vienna Convention refers to a person holding the license pursuant to the national legislation of the Contracting Party. The fact is, however, that the Vienna Convention also aimed to govern those cases when nuclear installations are being operated in the territory of the Contracting Party without a duly issued license. For these reasons, the Vienna Convention has defined the person liable for damage as the person designated or *recognised as the operator of a nuclear installation by the State* (highlighted by the authors). The reason behind this definition was that the fathers of the Conventions felt the necessity to cover also those situations where nuclear installations are being operated illegally. Thus, the liability regime of the Vienna Convention clearly stands upon channelling liability for nuclear damage to that person who is factually in control of the nuclear power plant (Kissich, 2004).

The text of the Vienna Convention does not contain any explicit provision addressing the military occupation of a nuclear power plant by another Contracting Party to this Convention. Consequently, the application of the Vienna Convention to the current situation in Ukraine is a matter of interpretation. Within this context, it is crucial to determine, *among other things,* to what extent the regulatory authority and the nuclear power plant's staff continue to be able to safely and securely regulate and operate the Ukrainian nuclear facilities without being obstructed in any manner or placed under *undue pressures* that would jeopardise the exercise of de facto control (Horbach and Brown, 2024). In this respect, one may argue that the concept of liability channelling to the person who is de facto in charge of nuclear installation implies liability of the *Rosatom* for any nuclear damage occurring with respect to a nuclear accident at the Zaporizhzhia Nuclear Power Plant. In this respect, identifying Russia's state nuclear power company as the *person recognised as the operator of a nuclear installation* only serves the purpose of identifying the person liable for nuclear damage. Thus, this interpretation does not intend to provide any legitimation for the military occupation of the Zaporizhzhia Nuclear Power Plant by the forces of the Russian Federation.

The application of the Vienna Convention to the potential nuclear accident occurring at the Zaporizhzhia Nuclear Power Plant has several consequences. Russia's state nuclear power company Rosatom, which has been in effective control of the Zaporizhzhia Nuclear Power Plant, will be exclusively liable for any nuclear damage arising because of a nuclear incident during this nuclear installation. Due to the fact that Rosatom is operating the Zaporizhzhia Nuclear Power Plant in the territory which belongs to Ukraine, it will be subject to the jurisdiction of Ukrainian courts and Ukrainian nuclear liability legislation for a case of judicial proceedings.

4.3.2 The Scope of Operator's Liability under an Armed Conflict

Having said this, the scope of the operator's liability under the Vienna Convention must be clarified. As explained in detail above, neither the Convention on Early Notification nor the Assistance Convention excludes cases of nuclear accidents due to

[53] See Vienna Convention, Article I.1.c.

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their origin in an armed conflict. On the contrary, the Vienna Convention provides[54] that *no liability under this Convention shall attach to an operator for nuclear damage caused by a nuclear incident directly due to an act of armed conflict, hostilities, civil war or insurrection*. The reason behind this dismissal is the conception of the Vienna Convention, which is very different in substance to the international regimes (Gioia, 2012; Handrlica and Novotná, 2018), as established by the Convention on Early Notification and by the Assistance Convention. While both mentioned instruments are based upon obligations of the States, the Vienna Convention stands upon the civil liability of the operator. Thus, the reason for the exoneration is to liberate the operator in those cases which cannot be avoided by the operator by any means (Demougin, Nieto-Cerezo and Wenzelburger, 2024; Handrlica and Sancin, 2021). In this respect, it is essential to mention that under modern international humanitarian law, the term *armed conflict* includes both international and non-international armed conflicts. Consequently, the concept of an act of *civil war* or *insurrection* may be deemed to be equivalent to the modern concept of an act of (non-international) *armed conflict* (IAEA, 2017).

As Tibisay Morgandi and Batuhan Betin stressed in their contribution at the *EJIL Talk!* (Morgandi and Betin, 2022), the wording *directly due to an act of armed conflict, hostilities, civil war or insurrection* suggests that there must be a causal link between the act of armed conflict (or hostilities) and the nuclear accident. Thus, the exoneration from the operator's liability will clearly cover accidents that will be directly caused by acts of violence on or near a nuclear power plant, such as an artillery strike (Morgandi and Betin, 2022). However, the question arises whether the exoneration will also cover accidents caused by other acts, for example, if Russian forces will interfere with the safe monitoring of the nuclear power plants or will be simply negligent in this regard. In this respect, Nathalie L. J. T. Horbach and Omer F. Brown have very recently argued that the war-like exoneration was intended to cover only such exceptional circumstances under which "*law and order might break down*" (Horbach and Brown, 2024). Furthermore, they argued that from the *travaux préparatoires* of the Vienna Convention, it can be discerned that the exoneration of liability of the operator applies only in *exceptional* situations in which a war-like act directly causes nuclear damage, e.g. in situations that are entirely beyond human control and thus will become the responsibility of the nation as a whole. This would include bombing or other military attacks directed against nuclear power plants within international conflict that are beyond the control of the operator and state. It would not include situations in which operational control of the nuclear power plant has been compromised through military occupation, but the safe and secure operation is not otherwise jeopardised (Horbach and Brown, 2024).

At this point, it can be concluded that the operator's liability would be exonerated when an artillery strike directly causes a nuclear incident. On the other hand, exoneration will not apply if a nuclear incident is caused by Russian forces interfering with the safe monitoring of nuclear power plants.

In either case, the question of dismissal must be determined before the competent Ukrainian court.

5. CONCLUSIONS

The unprovoked military aggression of the Russian Federation against the territory of Ukraine has implied a myriad of new challenges for both society and law. Among others, for the very first time in history, a nuclear power plant has become a

[54] *Ibid.*, Article IV.3.a.

military objective in the front line of a war. In the States of Central Europe, which will most likely be affected by a nuclear accident at the Zaporizhzhia Nuclear Power Plant, the current situation implies a need to clarify whether the instruments of international nuclear law provide for an adequate reaction.

This article aimed to analyse the applicability of international conventions adopted in the field of early notification, assistance in the case of a nuclear accident and nuclear liability and compensation for a potential nuclear accident at the Zaporizhzhia Nuclear Power Plant. In this respect, the authors argue that while the existing instruments of international nuclear law do not provide for any explicit provisions governing the current situation, they are, in principle, able to address potential challenges arising nowadays in Central Europe. Having said this, it must be stressed that this presumes, in principle, that all Contracting Parties to the analysed instruments of international nuclear law will fully fulfil their obligations.

Having said this, the authors must stress at this place that the only and ultimate mitigation of any nuclear accident at the Zaporizhzhia Nuclear Power Plant lies in the immediate end of the occupation of this nuclear installation by the military forces of the Russian Federation.

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COMPARATIVE LAW AND DIALOGUES BETWEEN LEGAL CULTURES: INTERCULTURALITY AS A THEORETICAL AND PRACTICAL METHODOLOGICAL TOOL / Thiago Burckhart

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Abstract: *Given the academic and political relevance that comparative law has assumed in recent decades, alongside the ongoing debates over comparative legal methods, this article aims to critically analyse interculturality as a methodological tool for comparative law, through the lenses of "intercultural dialogues between legal cultures". The hypothesis to be analysed suggests that interculturality can serve as a tool that drives the revision of classical methods of comparative law. In this regard, it seeks to evidence that the approach of interculturality and intercultural dialogues between legal cultures can be conceived as a remarkable instrument for: 1) mutual understanding between different legal cultures and legal systems; 2) the suitability of the circulation and movements of legal sources; and, 3) to foster dialogues that can effectively enrich two or more legal systems and legal cultures. The article is methodologically inscribed in the field of legal theory, precisely on the theory of comparative law, in a fruitful and critical dialogue with cultural studies. It adopts a hypothetical-deductive methodological perspective combined with an analytical-critical approach, aiming to explore the intersections between law and culture in a nuanced and interdisciplinary manner. The research is conducted through a bibliographical and analytical approach, and is divided into three topics: I – Globalisation and comparative law methods; II – The circular movement of law; III – Intercultural dialogues between legal cultures.*

Key words: *Comparative Law; Legal Cultures; Interculturality; Methodology*

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1. INTRODUCTION

Comparative law has assumed a significant political and scientific relevance in recent decades. Economic, political, cultural and legal globalisation, in parallel with the broadening of legal sources in the most diverse "formants", has triggered the recognition of comparative law not only as a "method", or mere "academic" discipline, but also as an available instrument to be used by policymakers and legal professionals in everyday practice. In this scenario, a revision of the classical methods of comparative law –

functionalism and structuralism – is taking place due to the increasing interaction between diverse legal systems, driving the circulation, diffusion, and legal borrowings.

The academic debate over comparative law methods still lays down, to a large extent, the dichotomy "*functionalism*" vs. "*structuralism*", which can be currently understood as "*methodological fatigue*". In this regard, new methods, and new methodological perspectives – including approaches that reciprocally integrate functionalism and structuralism within "mixed" or "complex" methods – have received special attention from comparatist scholars – such as Jaakko Husa (2015), for instance. This cognitive "openness" towards methodological pluralism is a response to the increasing complexity that comparative law currently faces, integrating the understanding of comparative law with new themes.

In this context, "culture" becomes increasingly important due to its influence on legal formation and function and is viewed as a new legal "formant" (Bagni, 2014, pp. 95-96). It also highlights the mutual influences that diverse legal cultures exert on each other, serving as a key factor in analysing the current stage of comparative law. Unlike multiculturalism, which advocates for "living side-by-side", "*interculturality*" seeks deeper engagement with and immersion in diverse cultures, by learning through this experience. It emerges as a theoretical and practical method for various fields, enriching the understanding of interactions between legal systems and the role of culture in shaping legal reasoning and interpretation. This approach offers a framework to address complex legal challenges and reshape legal relations.

Taking this into consideration, this article aims to critically analyse interculturality as a methodological tool for comparative lawyers through "intercultural dialogues between legal cultures." This approach facilitates the application of common legal elements and mechanisms in entirely new systems, particularly within emerging frontier areas. The hypothesis to be analysed suggests that interculturality can serve as a tool that drives the revision of classical methods of comparative law. In this regard, it seeks to evidence that the approach of interculturality and intercultural dialogues between legal cultures can be conceived as a remarkable instrument for: 1) mutual understanding between different legal cultures and legal systems; 2) the suitability of the circulation and movements of legal sources; and 3) to foster dialogues that can effectively enrich two or more legal systems and legal cultures.

The article is methodologically inscribed in the field of legal theory, precisely on the theory of comparative law, in a critical dialogue with cultural studies. It adopts a hypothetical-deductive methodological perspective combined with an analytical-critical approach, aiming to explore the intersections between law and culture in a nuanced and interdisciplinary manner. The research is conducted through a bibliographical and analytical approach and is divided into three topics: II – Globalisation and comparative law methods; III – The circular movement of law; and IV – Intercultural dialogues between legal cultures.

2. GLOBALISATION AND COMPARATIVE LAW METHODS

In the last decades, economic, political, cultural, and legal globalisation have prompted significant shifts in legal theory. New rights and new subjects of rights, new legal and political-institutional arrangements, as well as the increasing legal relations between the most diverse nations worldwide, have driven the fertile development of comparative law (Örücü and Nelken, 2007; Glenn, 2010). This development occurs in two complementary areas: 1) the *academic field of comparative law*, marked by renewed

interest in research and studies; and 2) *political and legal practice* across the three branches of government – judiciary, executive, and legislative.

Regarding the *science of comparative law*, the last three decades have seen a true *boom* in literature, in various fields: *comparative private law* (Gordley, Jiang and Von Mehren, 2021; Portale, 2007; Gambaro and Sacco, 2018), *comparative public law* (Rosenfeld and Sajò, 2012; Pegoraro et al. 2012; Masterman and Schütze, 2019; Tushnet, 2018; Heringa, 2023), and even in new areas such as "*comparative international law*" (Roberts et al., 2018), focusing on different themes, issues, and approaches., as well as *comparative legal history* (Halász, 2022). In *political and legal practice*, the establishment of new international jurisdictions and the growth of constitutional courts globally have fostered legal exchanges, transfers, borrowings, and the migration of legal ideas. Additionally, national, and regional parliaments are progressively exploring innovative responses to legal problems through dialogue with foreign and international experiences. Similarly, several countries' executive branches have advanced comparative law studies to formulate new public policies in various areas (Tiede, 2021).

This renewed interest in comparative law, both as an academic discipline and as a practical tool for lawyers and governments, brings the classic issue of "methods" back into focus. As comparative law moves beyond its Euro-Atlantic roots – an axis to which it has historically been linked (Menski, 2007, p. 193; Twining, 2000, p. 174) –, it begins to explore new national realities, continents, and topics (Doleček and Smolík, 2022). Consequently, the discussion surrounding the classical methods of comparative law and their potential "inadequacy" re-emerges in academic and political debates (Örücü, 2007, p. 48).

In this regard, two classical methods that have shaped the development of comparative law throughout the 20th century are *functionalism* and *structuralism*.

Functionalism was originally influenced by sociological-functionalist theory (Husa, 2003, p. 431; Somma, 2015, p. 19), and emerged in the early 20th century. It states that the primary objects of comparison in different legal orders and institutions are their functional similarities. Comparatists should identify "similar functions" to inform their research (Husa, 2003, p. 431), focusing on the effects of specific norms that address common problems across legal systems. These "functions" are considered "abstract," extending beyond written norms to include jurisprudential decisions and legal literature in the research process (Zweigert and Kötz, 1996, p. 33). Due to its broad applicability, Konrad Zweigert and Hein Kötz (1996, p. 33) regard functionalism as the "only" adequate method of comparative law, emphasising that legal comparison is viable only when legal norms or sources serve the same functions across different systems.

Starting in the 1980s, criticism of this methodological approach arose, particularly concerning its presumption of similarity. This criticism includes: 1) hindering in-depth studies in comparative law (De Coninck, 2010, pp. 323-324); 2) encouraging comparatists to overlook differences between analysed legal systems (De Coninck, 2010, p. 332); and 3) posing challenges for comparing legal systems considered extremely different, such as a study between China and Panama. Consequently, several scholars have sought to rework the functional method to better fit the current context of legal globalisation (Michaels, 2002, p. 104).

Structuralism, or more broadly "contextualism," draws influence from legal positivism, particularly "legal normativism". It emphasises the comparison of the formal elements that constitute law, focusing on the architecture of modern legal structures and their possible associations and dissociations. As a method in the Human Sciences, structuralism views each object of study as a "structure" and investigates the relationships among these structures. Within comparative law, Roberto Sacco's dynamic

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legal theory (1991, pp. 21-34) significantly influenced structuralism by introducing the concept of "formant," based on phonetics theory[1] Sacco identifies three primary formants: legislative, jurisprudential, and doctrinal.[2]

Despite its contributions, this methodological perspective has faced criticism for viewing law in an "apolitical" and "non-evaluative" manner (Somma, 2015, p. 155), thus rendering it impermeable to the contextual factors influencing its analysis. Sacco's dynamic legal theory offers a fresh perspective on the legal structure by acknowledging that extra-legal formants can also affect the effectiveness of law. Nevertheless, a "closed" structural approach may overlook essential extra-legal elements crucial for understanding the formation and structure of modern legal systems.

These two methods are often regarded as paradigmatic in comparative law studies. In this context, the "irresistible pedagogical charm" of this dichotomy may signal a "*methodological fatigue*", as both approaches have been considered doctrinal "canons" and quality assurance elements for research in the field – something Amico di Meane (2019, p. 169) has termed "methodological precarity". The brief criticisms of each method above highlight their theoretical and empirical inadequacies, emphasising the need to rethink new methodological arrangements that can engage with elements of these two "classic" methods to better address the research needs of the 21st century.

As Roberto Scarciglia (2017, pp. 69-73) notes, these methods represent only two options for comparative research.[3] Comparatists seeking to deepen their understanding of the relationship between text and context will likely blend these methodological perspectives or develop new ones informed by emerging theories in social science, such as complexity, cultural theories, and decoloniality (see Zimmermann and Reimann, 2019, p. 777). Furthermore, as Werner Menski (2006) emphasises, the renewed interest in comparative law coincides with a growing focus on the cultural aspects of different societies, which has sparked the curiosity of jurists worldwide.

This shift necessitates moving beyond the methodological dichotomy towards a methodological *kaleidoscope* that can support the development of comparative law in the context of globalisation and intensified international and intercultural relations. This approach addresses the need to: 1) recognise that there is no "standard" methodology; rather than a methodological "monotheism", there's the need to embrace a methodological "polytheism" (Husa, 2015, p. 134; Ponthoreau, 2017, pp. 53-68), which could manifest as a functional-structural and/or structural-functional "mixed" method; and 2) propose new methodologies and perspectives for comparative law that can have significant practical implications, particularly for improving dialogues with Global South

[1] "The term "formant" comes from acoustic phonetics, the study of the physical consistency of vowel sounds and their diffusion through a medium such as air. In this area, the formant indicates the resonance frequency of the sounds that take place in the oral cavity and that characterise its timbre: it allows these sounds to be broken down and, above all, to reveal and identify their different components. Similarly, among iuscomparatists, the formant indicates the components of the law, potentially incoherent to the extent that they do not refer to a system devoid of gaps and antinomies, which is why their dissociation is spoken of. In this sense, they identify, among others, a legal formant, to refer to the rules produced by the legislator, a doctrinal formant, composed of the precepts formulated by scholars, and a jurisprudential formant, which coincides with the indications from the courts", my translation (Sacco and Rossi, 2015, p. 44).

[2] The formants can assume, however, several forms, insofar as internal and external elements influence the configuration of the structure of law. One can therefore speak of a "cultural", "economic", "political", and "ecological" formant, among others.

[3] It is worth noting that other methods were developed by comparatists, relating comparative law to other sciences and methodological perspectives, such as: Van Hoecke (2015); Creutzfeldt, Kubal and Pirie (2016); Moustafa and Ginbsurg (2008).

countries – those nations often excluded from modern discussions on comparative law and general interest in legal comparisons.

Criticism of comparative legal studies has increasingly emerged from post-Eurocentric and postmodern perspectives. Contemporary comparative law theory and the studies established throughout the 20th century were heavily influenced by European perspectives. Historically, few manuals and academic research extended their focus beyond the Euro-Atlantic axis. However, in the last three decades, there has been a significant increase in interest among comparatists towards the "Global South", particularly in underexplored regions such as Africa and Asia (Baxi, 2003; Amirante, 2015; Menski, 2007). This shift has led to the development of comparative methodologies grounded in postmodern and post-Eurocentric perspectives, facilitating comparisons across diverse geographic contexts, and sometimes diametrically opposed legal cultures (Menski, 2006, pp. 3-23; 2007, pp. 189-216).

In this context, it becomes evident that comparative law requires a "*flexible*" methodological approach to navigate the complexities of legal foundations. As Tommaso Amico di Meane (2016, p. 21; 2019, p. 191) emphasises, this approach is characterised by several key elements: *dynamism* (Menski, 2006, p. 184; Frankenberg, 2010, p. 570 et seq.), *tolerance*, *uncertainty, ambiguity, and hybridity* (Menski, 2006, p. 25; Frankenberg, 2010, p. 570 et seq.; Schiff Berman, 2013, pp. 11-29), *multidisciplinary collaboration* (Husa, 2006, p. 1116; Van Hoecke, 2015, p. 165 et seq.), and *inclusivity* (Van Hoecke, 2015, p. 165 et seq.). Amico di Meane (2016, p. 22) also describes "flexibility" as manifesting in two aspects: a) *between*: viewing methodology as a collection of tools available to the comparatist; and b) *within*: moving away from a "purist" perspective to embrace experimentation with mixed and new methodologies.

In this light, Amico di Meane (2016, p. 23) provides a "roadmap" for employing this flexible approach in comparative legal studies, divided into three phases. The first phase involves a critical reflection on the available methodological landscape, helping comparatists recognise the oversimplified "black and white" mindset. The second phase entails selecting a methodological approach that acknowledges the diverse shades of grey it encompasses. Finally, in the third phase, the comparatist embarks on their research journey, engaging with "legal alterity". This process can challenge not only the comparatist's own legal culture but also the methodological assumptions underlying their research. Methodology is a practice-driven activity where theory influences practice, and practice continuously reformulates theory.

This flexible approach, along with emerging methodologies in contemporary discussions on comparative law, is particularly well-suited to the current context of legal globalisation. As Amico di Meane (2016, p. 7) points out, these new perspectives facilitate a slow, deep, and progressive – layered – comparative legal path, leading to a more nuanced understanding of its subject and implications, while fostering fruitful dialogue among diverse legal cultures.

3. THE CIRCULAR MOVEMENT OF LAW

The history of law can be read through the dialogues established between different legal cultures, which have facilitated "loans", "(re)appropriations", and the "circulation" of legal models.

These dialogues arise because law *circulates* through space and time, driven by ideas, ideologies, interests, needs, techniques, and technologies. Law spreads due to various factors, including *imposition* – such as military occupations or colonisation; *prestige* – like the legal codification process influenced by Napoleon's Code; *ideological*

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choices – seen in socialist countries that adopted specific legal forms; and the *influence of religious values*, as with Islamic law, Hindu law, and the Shinto and Confucian traditions in Japan and China. Additionally, law circulates through territorial, political, or economic *integration*, exemplified by the European Union and, to a lesser extent, Mercosur and other economic blocs. Economic interests also play a role, particularly with the imposition of the common law model through international trade (Sacco and Gambaro, 2008, pp. 23-25).

The so-called circulation of models can occur either "from above", through external imposition, or "from below", via assimilation, where social and individual behaviours transform within a national context (Monateri, 2013, p. 66). The notion of legal "circulation" has emerged as a key concept encompassing fat least our distinct phenomena: circulation, transfer, diffusion, and migration of legal ideas. This classification draws from political science literature, particularly concerning the circulation of public policies (Oliveira and Faria, 2017, p. 13; Melo, 2016, p. 12). Research in this area has significantly intensified in recent years (Oliveira and Faria, 2017, p. 15). In this context, "circulation" refers to a broader process involving exchanges and dialogues between legal models, fostering mutual learning from different experiences. It represents the journey of legal elements from a starting point A to others (B, C, and D) and back to A, incorporating new elements along the way.

In contrast, "transfer" denotes a more straightforward process, involving the specific movement of a legal model from one point A to another point B, such as from one country or international organisation to another. "Diffusion", on the other hand, involves the spread of model A to multiple points (B, C, D, and others), representing the dissemination of national or international models across various countries.[4] Recently, greater attention has also been given to the concept of the "migration of legal ideas", which occurs primarily through institutional dialogues between countries, particularly in the area of judicial review, though it is not limited to this field. In this context, legal arguments concerning fundamental rights, human rights, and specific institutions relevant across multiple legal systems are particularly significant (Silva, 2010, p. 522; Choudhry, 2006, p. 9).

These movements are central to the broader process known as "legal transferability" or "legal transplants", as articulated by Alan Watson (1974). From Watson's perspective, a legal transplant refers to a legal system's ability to "receive" or adopt a foreign norm. This transfer is influenced by various legal and extra-legal factors, including the linguistic and cultural characteristics of the receiving state, its political and ideological context, and the technical and professional acceptance of the transplant by jurisprudence, legal doctrine, and the academic community (Watson, 1974). Consequently, a legal transplant interacts with multiple factors influencing legal change,

[4] "When we refer to a transfer, we are dealing with the punctual displacement of a public policy from one place to another, from "A" to "B". The policy originates in a government, non-governmental organisation, or international body and moves to another actor of a similar or different nature. This is the case, for example, in the case of the adoption in the Philippines of conditional cash transfer technologies from Brazil. A set of more or less simultaneous adoptions of a public policy can be called diffusion. Diffusion can occur across clusters or regions. For example, when Latin American countries carried out actions aimed at implementing state reforms. Or else on a global scale, such as the dissemination of the Sustainable Development Goals. Circulation, on the other hand, is an even broader movement, as it can involve the comings and goings of public policies and mutual learning processes. We can consider as an example a policy that originated in Brazil, was adopted in South Africa, where it was improved, and then adopted in its new format in Kenya, or whose new elements were incorporated in Brazil. It is a broader movement that can involve mutual learning in different temporalities", my translation (Oliveira, 2020, pp. 20-21).

such as legal sources, pressure or opposition groups, lawyers and judges, and social, economic, and political interests (Watson, 1974, p. 9).

According to Watson, legal transplants are a primary source of law transformation and represent "the usual way of legal development" (Watson, 1974, p. 7). Although Watson's theory can be interpreted as an "apology" for legal transplants – highlighting their potential simplicity – it is essential for understanding contemporary legal flows, despite some methodological criticisms it has faced.[5] The main critiques of Watson's theory come from French jurist Pierre Legrand, who argues that legal transplants are "impossible". Legrand's argument is rooted in the "mirror theory of law", which suggests that law reflects the spirit of a particular community or society, a perspective that has influenced modern legal thought from Montesquieu to Hegel and Savigny (Legrand, 1997, pp. 111-124; 1999, p. 121).

By linking the existence of a norm to the contextual meaning it imparts to a community or society – its "intersubjective meaning" – Legrand argues that "the meaning of a rule is a function of the interpreter's epistemological assumptions, which are historically and culturally conditioned". Vlad Perju[6] supports this view, asserting that meaning is an essential component of legal norms, and since meaning cannot travel, norms cannot be transplanted to different contexts. He emphasises that a norm cannot retain the same meaning in both the country of origin and the country receiving the transplant. While Watson acknowledges that norms undergo change during the transplantation process,[7] Legrand critiques Watson's formalist stance, arguing that his rule-centred approach overlooks the transformation and adaptation that legal norms experience during transplants.

This debate has significantly influenced comparative law theory and continues to generate discussion among comparatists. There is a consensus, however, that law is a *circular* phenomenon, evolving through influences and dialogues with prior experiences. Although transplants are not the only – or necessarily the most important – forms of legal change, they do occur and play a vital role in shaping contemporary legal perspectives. It is essential to recognise that legal transplants: 1) are not always easy to execute, and 2) undergo significant transformations in contextual meaning when integrated into a different legal culture. Thus, this process requires an intercultural methodology that prevents the "acculturation" of the receiving legal culture while fostering dialogue with its traditions and legal framework.

[5] "In the closing chapters of his book Watson offers a list of general reflections on legal transplants that he combines with a few cautionary considerations. On the other hand, he argues that 'the transplanting of individual rules or of a large part of legal system is extremely common' and 'socially easy'. From this he infers that it is, 'in fact, the most fertile source of development' and accounts for the 'astounding degree' to which 'law is rooted in the past'. On the other hand, he introduces authority in law as an important variable intervening in any transplanting process, and, in the end, he finds 'the mixture' more fascinating than the very act of borrowing" (Frankenberg, 2010, p. 567).

[6] "Since meaning is an essential part of a legal rule and because meaning cannot travel, it follows in Legrand's view that rules—and legal norms more generally—do not travel. Meaning changes between the points of origin and destination on a scale of magnitude that radically transforms the so-called transplant. While Watson acknowledged that rules are altered in the process of transmission, Legrand argued that Watson's formalistic, rule-centred approach led him to downplay the scale of transformation. Law's rich 'nomos' makes convergence impossible" (Perju, 2012, p. 1317).

[7] As Vlad Perju accentuates: "Watson acknowledged that 'with transmission or the passing of time modifications may well occur, but frequently the alternations in the rules have only limited significance'. But by drawing attention to the direction of change, Legrand makes clear the political stakes of comparative method" (Perju, 2012, p. 13). In this light, see also: Kennedy (2003).

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4. INTERCULTURAL DIALOGUES BETWEEN LEGAL CULTURES

As Catherine Walsh (2008) notes, the term "interculturality" entered the lexicon of cultural theory in the 1980s, initially emerging in Mexico in relation to educational policy. At that time, the focus was on the concept of "intercultural bilingual education". In the 1990s, indigenous groups in Ecuador adopted the term, linking it to issues of law, language, and public health (Walsh, 2008, p. 139; Flores, 2015, p. 292). Since then, "interculturality" has evolved into a framework for managing cultural pluralism in several countries,[8] influencing public policies in Latin America and more recently in Europe.[9]

Walsh (2010, p. 5) points out that "interculturality" has always represented a struggle involving cultural identification, law, difference, autonomy, and nation.[10] She emphasises its strong political and legal implications, viewing it as a method for accommodating cultural differences. This approach fosters better understanding between diverse cultures or epistemologies, promoting the harmonious coexistence of cultural differences. Ultimately, it embodies the possibility of achieving equality within diversity.

It is important to differentiate between the notions of interculturality and multiculturalism, as they represent distinct approaches to managing cultural pluralism. Interculturality emphasises the need to genuinely "live together," interact, and learn from "the other" and diverse cultures, highlighting the process of cultural hybridisation (Bhabha, 2013, p. 94), learning with the other. In contrast, multiculturalism focuses on "coexistence" within the same geographic space (Lopes, 2012, p. 67). Thus, while multiculturalism is centred on "tolerance" as a means to foster a peaceful society, interculturality prioritises "dialogue" as a more proactive and engaging approach.[11]

Various models of multiculturalism have emerged since its inception in Canadian and U.S. public discourse during the 1980s.[12] However, the principle of tolerance remains a cornerstone of this framework for political and legal management of cultural pluralism. Interculturality, on the other hand, seeks to move beyond tolerance, arguing that it is often insufficient for promoting social cohesion and mutual understanding among culturally distinct individuals. In some instances, a reliance on tolerance can even exacerbate inequalities and tensions within societies or between groups.

In the 21st century, the concept of interculturality has emerged as a politically significant initiative, described by Peruvian jurist Fidel Tubino as an "[...] ethical-political project of transformative action and radical democracy" (2005, p. 122).[13] This concept invites a critical examination as both a political methodology – functioning as a procedural ideal – and a democratic paradigm – serving as a substantial ideal within contemporary constitutional states. Tubino further explains that when viewed as a normative project, interculturality fosters relationships among diverse cultures,

[8] Perhaps the most emblematic case for comparative analysis is that of Bolivia, in which the recent 2008 Constitution has constitutionalised the principle of interculturality, while its Plurinational Constitutional Court coined it as a specific method of constitutional interpretation. For details, see: Burckhart and Melo (2021).

[9] As it is the case of the "Baku Declaration for Promotion of Intercultural Dialogue" (2008), and "European Year of Intercultural Dialogue" (2008).

[10] Translation of the author.

[11] As Fidel Tubido underlines, "While in multiculturalism the key word is tolerance, in interculturality "the key word is dialogue. Interculturality partly resumes multiculturalism, in the sense that in order to dialogue it is necessary to presuppose mutual respect and conditions of equality between those who dialogue" (Tubino, 2002. p. 74). Translation of the author.

[12] Such as the "classical liberal-political model", the "multicultural liberal model", the "maximalist multicultural model" and the "combined multiculturalism", only to stick to the classification made by Andrea Semprini (1999, p. 87).

[13] Translation of the author.

establishing common bonds. It calls for both state and civil society to gradually promote environments that encourage positive interactions, intercultural dialogue, mutual recognition, cultural exchange, cooperation, and peaceful coexistence. This challenge is paramount for law and politics in the 21st century.

Achieving interculturality relies heavily on "intercultural dialogue". Boaventura de Sousa Santos (2009, pp. 17-18) states that this dialogue occurs through "diatopical hermeneutics", which seeks to mutually understand the perspectives and epistemologies of different interacting subjects. This approach requires individuals to position themselves in a "frontier zone", balancing their own cultural identity and heritage with that of others. For comparative law to be effective and avoid merely reproducing studies of "foreign" legislation, it must adopt this notion as a fundamental premise. Engaging deeply with the legal culture(s) under analysis necessitates exploring various elements and aspects, ultimately leading to a critical examination of one's own legal culture.

In this context, intercultural dialogue between different legal cultures emerges as an effective methodology for understanding the flows and circulations of legal models globally, aiming to develop an "intercultural translation" that supports these legal exchanges in various ways. However, it is important to note that such dialogue is not always feasible, particularly due to political and economic colonisation, which has historically imposed a uniform framework on law and politics and continues to do so in some cases. Nonetheless, this proposal seeks to enhance the understanding of the "journeys" that legal norms undertake around the world.

To be effective, the dialogue must be "intercultural," facilitating the "translation" of underlying assumptions and prompting necessary transformations, rejections, adaptations, or reformulations by the receiving state during the circulation of legal models. Furthermore, these dialogues should occur between "legal cultures," not just "legal systems". The concept of legal culture, as articulated by Jaakko Husa, emphasises the importance of legal context, suggesting that law should be understood within its broader cultural framework. This context encompasses various elements – traditions, ideological components, and conceptions – that significantly influence legal practice. Thus, referring to "legal culture" rather than merely "legal system" reflects a comparatist aim to attain a deeper understanding of law beyond its written texts (Husa, 2015, pp. 3-5).

This "intercultural dialogue" should adhere to the foundational assumptions necessary for any intercultural process within the social or political realms. Boaventura de Sousa Santos' principles can be adapted to this context, including acknowledging the incompleteness of "legal" cultures and systems; fostering an awareness of the diversity among "legal" cultures; respecting the varying openness or closure of a given "legal" culture to certain aspects; and upholding mutual agreements as the basis for dialogue between "legal" cultures (Santos, 2009, pp. 17-18). Ultimately, the intercultural dialogue among legal cultures is primarily facilitated by jurists, legal practitioners, judges, policymakers, and state officials responsible for drafting national and international laws, conventions, and other normative acts, along with various stakeholders who may also engage in this process.

As a "method," intercultural dialogues between legal cultures can be applied at different analytical levels or scales, depending on the goals of the comparison and the receptiveness of a particular legal culture to others. This approach can be employed in several ways: 1) *academically*, to enhance mutual understanding of various legal systems; 2) *practically*, to facilitate effective legal transplants, migration of legal ideas, processes of hybridisation, harmonisation and integration, and legal borrowings; and 3) in *both academic and practical terms*, to initiate dialogues that genuinely enrich and

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transform two or more legal systems or cultures. Achieving this last outcome is often challenging due to numerous contingent factors, but it represents a significant practical objective of this methodological framework.

Intercultural dialogue between legal cultures serves as a means to navigate the ongoing debate between Watson and Legrand. In the globalised world, characterised by the exchange of ideals, people, goods, and legal norms, it is misleading to claim that "legal transfers" are impossible, thereby supporting Watson's theory. However, it is equally important to recognise that these transfers are not straightforward and necessitate intercultural dialogue to ensure that such transfers do not devolve into impositions that lead to "legal acculturation" – the erosion of the foundational elements of a particular legal culture – thus reinforcing Legrand's critique. Consequently, a common ground is established where aspects of both theories can be integrated.

These intercultural dialogues demand cultural translation, primarily aimed at identifying "equivalent" elements across different legal systems, making various legal concepts and institutions comprehensible. Paul Ricoeur (2001, p. 135) emphasises that translation "respects differences while seeking equivalences",[14] thereby fostering fair and effective intercultural dialogue. Given this framework, intercultural dialogue can stimulate processes of "*créolization*" (Delmas-Marty, 2009, p. 5) within legal cultures, acting as a "*métissage*" mechanism that requires genuine reciprocity between the cultures involved. Although achieving this reciprocity is challenging, it can be facilitated through intercultural dialogue and translation processes in certain contexts.

In this length, interculturality can be understood as a valuable "tool" for comparatists, providing a methodological framework that prioritises "understanding" over "prejudice". This approach emphasises "opening" rather than "closing" and fosters "dialogues" aimed at translating meanings instead of engaging in a simple "monologue." Beyond seeking "clarity" and "mutual understanding" of legal elements from other cultures – resulting in "intercultural legal translation" – this method encourages productive exchanges between different legal cultures. The following elements characterise intercultural dialogues between legal cultures in the context of a comparatist's work:

a) Intercultural dialogues are essential for facilitating legal flows – a "condition" – as legal cultures exhibit varying levels of receptiveness shaped by each country's legal and political history. When legal flows are established, these dialogues promote legal transfers, borrowings, or the migration of legal ideas, enhancing legal *adaptation* and preventing legal acculturation;
b) Intercultural dialogues can be conducted at different analytical scales within comparative law. They may aim to: 1) improve understanding of various legal cultures through academic study; 2) enhance suitability for legal transplants, borrowings, and migration of legal ideas, particularly concerning the role of the receiving state; or 3) promote broader dialogues between two or more cultures that can enrich and transform aspects of a given legal system;
c) Dialogues can be categorised as *vertical* or *horizontal*. Vertical dialogues occur between national law and supranational or international law, or among national and regional laws within a state. Horizontal dialogues focus on comparisons that reveal similarities between different legal orders, such as constitutions or civil codes of various states. Occasionally, a subject might be regarded as "constitutional" in one legal system but viewed differently in another, necessitating a comparative approach;

[14] Translation of the author.

d) Intercultural dialogues are particularly important in states characterised by cultural plurality, where reconciling different perspectives and conceptions of law is essential. Bolivia exemplifies this, as its Plurinational Constitutional Court employs a legal methodology based on intercultural analysis to address the complexities of its diverse legal landscape.

Intercultural dialogues between different legal cultures can be instrumental as both an academic method and a practical approach in complex comparative studies. These dialogues foster new exchanges in an ongoing, flexible and open-ended process rather than being confined to fixed interactions. To effectively apply interculturality as a method in comparative law, a structured roadmap can be established, divided into three essential steps:

1) *Understanding the subject matter*: the first step involves a thorough examination of the theme to be compared. This entails studying the various formants that constitute the legal issue in two or more countries. A deep understanding of the selected countries is crucial, focusing on their cultural, social, political, and legal elements. This includes an analysis of their "legal culture" and the myriad elements that shape it.
2) *Assessing the intercultural variable*: The second step is to evaluate the intercultural "variable" or "condition." This involves determining whether there is receptiveness within the legal culture(s) towards engaging in intercultural dialogue. More importantly, it requires assessing the potential effectiveness of such dialogues for the comparatist, considering the specific research topic and objectives.
3) *Engaging in dialogue*: The third and final step consists of actively engaging in dialogues between the selected legal cultures, guided by the main aims established in the comparative research. Guided by different actors, this process of dialogue should facilitate mutual understanding and exploration of legal principles across different contexts.

Through this methodological approach, intercultural dialogues can address several challenges that arise from misunderstandings of foreign legal cultures or from the uncritical adoption of legal elements from different legal cultures without appropriate contextualisation by the receiving state. Interculturality, as a method within comparative law, emphasises the necessity of conducting this contextualisation in process, requiring comparatists to possess heightened theoretical and practical *sensitivity* regarding their research subjects and the countries under study. Furthermore, this methodological perspective complements traditional comparative law methods, such as *functionalism* and *structuralism*, adding depth and clarity to the complexities inherent in the analysis and intervention in the field of comparative law. By incorporating intercultural dialogues, scholars and practitioners can better navigate the nuances of legal cultures, leading to more informed and effective *legal adaptations*.

5. CONCLUSIONS

Interculturality plays a crucial role nowadays as a perspective that promotes fruitful dialogue, cultural interaction, and cultural understanding among groups, communities, and individuals, aiming for the mutual enhancement of analytical and cultural tools in response to pressing issues of globalisation.

Within the realms of comparative law, intercultural dialogue between legal cultures offers a new methodological perspective for comparatists, providing an effective and flexible approach for several legal research and practical interventions. This

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effectiveness, however, depends on the topic, countries involved, level of cognitive openness, and the variables and constraints related to each state's legal culture, which must be assessed by jurists, policymakers, and legal practitioners in practice. This approach remains adaptable to each circumstance, a responsibility shared by scholars, jurists, and policymakers.

These dialogues can take various forms and explore multiple levels of depth, yielding distinct academic and practical results. This dynamic and flexible methodology complements traditional approaches – functionalism, and structuralism – enhancing the understanding of legal phenomena and the connections among different legal cultures. Various forms of dialogue, such as interinstitutional, inter-legislative, and judicial dialogues, are gaining prominence in legal studies, addressing the challenges of legal science and law in the 21st century, particularly due to globalisation and the intensification of legal and political integration processes.

In this regard, Interculturality can drive the re-evaluation of classical comparative law methods, fostering new dialogues that enrich not only the legal culture of the receiving state but also those of multiple legal cultures through the exchange of best practices and potential solutions. Finally, intercultural dialogues between legal cultures facilitate processes such as legal *hybridisation*, *integration*, and *créolization*, preventing "legal acculturation" from becoming the dominant paradigm in comparative law theory and practice. This approach fosters international legal cooperation, values the diversity of legal cultures worldwide, and enriches legal experiences across various fields.

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PREVENTIVE DETENTION ON REMAND IN PRE-TRIAL PROCEEDINGS FROM THE POINT OF VIEW OF THEORY AND PRACTICE / Jozef Čentéš, Andrej Beleš

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Abstract: *In the article the authors pay attention to the detention on remand, which is the most serious procedural interference in the system of criminal law means to the personal liberty of an individual, accused of a crime. This institute is characterised in terms of national and international aspects of protection of the individual who has been taken into detention on remand. The authors pay special attention to the reasons for the so-called preventive detention on remand in pre-trial proceedings from the point of view of theory and application practice of courts.*

Key words: *Personal Liberty; Restriction; Detention on Remand; Reason for Detention; Preventive Detention; Nature of Crime*

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1. INTRODUCTION

Deprivation of liberty by detention on remand constitutes the most serious interference with an individual's personal liberty in criminal proceedings. The legislator is aware of this situation when it establishes in the legal order the constitutional framework and the framework of "basic laws" for the application of detention on remand based on it. The relevant legal framework is laid down in particular in the Criminal Procedure Code, which is an integral part of the constitutional framework of guaranteed personal liberty,

guaranteed in particular in Article 17 of the Constitution of the Slovak Republic (hereinafter referred to as "**the Constitution**").

The legal regulation also reflects the wording of Article 5(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "**the Convention**"), which requires that deprivation of liberty must be "in accordance with the *procedure laid down by law*" and that any deprivation of liberty (Article 5(1)(a) to (f)) permissible under the Convention must be "*lawful*". The guarantees of personal liberty at the constitutional level are identical in content to those under Article 5 of the Convention, which are further developed in the case-law of the European Court of Human Rights (ECtHR). The Convention is an international treaty with primacy over the law under Article 154c of the Constitution of the Slovak Republic with regard to the guarantee of a wider range of constitutional rights and freedoms. The Convention is part of the legal order of the Slovak Republic, thus forming a single entity, the Convention is thus "*domesticated*" (Drgonec, 2015, pp. 1589–1590).

Detention on remand as an exceptional criminal remedy may be applied only if the facts required by law are established, which justify the necessity of its use in the interests of timely and proper clarification of the offence and fair punishment of the offender. Since it is a temporary deprivation of an individual's liberty, there must be a necessity to impose detention on remand and to keep him in detention on remand only for a certain legitimate purpose and for the time for which he or she may be taken into detention on remand.[1] It is clear from the provisions of Article 17(5) of the Constitution that the phrase '*the time for which detention on remand may be taken*', together with the concepts of '*decision*' and '*grounds*', form a single entity.

Any deprivation of liberty by detention on remand must also comply with **Article 5 of the Convention, the purpose of which is to protect the individual against arbitrary** interference **by a public authority** with personal liberty. As noted above, the basis for the guarantee of personal liberty is the imperative of the lawfulness of deprivation of liberty in custodial prosecutions, which is even mentioned twice in Article 5(1)(c) of the Convention. The requirement of lawfulness and the protection against arbitrariness are mutually reinforcing: a deprivation of liberty based on arbitrariness can never be lawful.[2] This provision also explicitly lists the material conditions for the restriction of personal liberty (material conditions of detention on remand), which:

- there are reasonable grounds to suspect that a criminal offence has been committed,
- deprivation of liberty is reasonably considered necessary for the purpose of preventing the commission of the offence or escape after its commission.

Moreover, this provision, in conjunction with Article 5(3) of the Convention, includes the requirement of immediate and prompt judicial review of the restriction of personal liberty, i.e. the detained person must be brought promptly before a court which decides on the detention on remand.[3] At the same time, under Article 5(3) and (4), the Convention provides:

- protection of the right to a speedy trial (trial within a reasonable time) of a criminal case in which the accused is remanded in detention,

[1] Resolution of the Supreme Court of the Slovak Republic of 18 May 2023, Case No. 5 Tostš 9/2023.
[2] The ECtHR has long held that this circumstance is a matter of long-standing consistency, see in particular the judgment of 24 October 1979 in Winterwerp v. the Netherlands, no. 6301/73, paragraph 39, and the decisions cited therein. See also the interpretation on this point by Repík (2002, pp. 213 et seq.).
[3] See the interpretation of Article 5(1)(c) of the Convention under the judgment of the Grand Chamber of the ECtHR of 3.10.2006 in McKay v. the United Kingdom, no. 543/03, para. 30.

- the protection of the right that the court, when considering the necessity of detention on remand, should give primary consideration to the possibility of substituting a measure which is more lenient in relation to fundamental rights and freedoms, if the purpose of detention can be fulfilled in this way,
- protection of the individual's right to seek a periodic review of the lawfulness of detention on remand and to apply for release on bail, which must be decided promptly, or the right of the accused to be released on bail if it is found that the continued detention is unlawful (Orosz, Svák et al., 2021, p. 207).

The above-mentioned attributes of the right to personal liberty under the Convention are also fully reflected in the European Commission Recommendation 2023/681,[4] but they are not subject to harmonisation at the level of EU law, which the Member States would be obliged to implement. However, some aspects of deciding on detention - which relate to the presumption of innocence - are covered by Directive 2016/343[5] (López, 2021).

The Convention makes direct reference to domestic law and therefore respect for this right is an integral part of States Parties' obligations.[6]

The constitutional regulation of detention on remand, which reflects Article 5 of the Convention, is *lex specialis* in relation to the general constitutional norm on the grounds (substantive level) and the manner (procedural level) of deprivation of personal liberty to the extent:

i) grounds for deprivation of liberty (Article 5(1)(c), Article 5(2) and (3) of the Convention and Article 71 of the Code of Criminal Procedure),
ii) special safeguards in the decision to take a person into detention on remand (Article 17(2) and (3) of the Constitution),
iii) control of the lawfulness of deprivation of liberty in detention on remand (Article 17(5) of the Constitution, Article 5(4) of the Convention).

2. PREVENTIVE DETENTION ON REMAND IN CRIMINAL PROCEEDINGS

2.1 National Legislation

From the point of view of the established case law, we highlight the necessity of fulfilling the formal and material conditions of detention on remand. These conditions of detention on remand must be examined individually in each specific criminal case and thus avoid a blanket (inadmissible) assessment of them. For these reasons, the existence of specific facts justifying the fulfilment of these conditions is essential.

The **formal conditions of detention on remand** include in particular:

i) the filing of the charge and its proper service on the accused (defence counsel);

[4] Commission Recommendation (EU) 2023/681 of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions (OJ L 86, 24.3.2023, pp. 44–57).

[5] Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ L 65, 11.3.2016, pp. 1–11).

[6] See, e.g., ECtHR, de Wilde v. Belgium, app. nos. 2832/66; 2835/66; 2899/66, 18 June 1971, or ECtHR, Khudoyorov v. Russia, app. no. 6847/02, 8 November 2005.

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ii) detention on remand of the accused (suspect) within the period prescribed by law and his/her interrogation (Art.85(1) and (4), Art.86(1) of the Code of Criminal Procedure);
iii) filing a motion by the prosecutor to take the accused into detention on remand and handing it over to the court together with the case file within the legal time limit (Art.85(4), Art.86(1) *in fine of the Code of* Criminal Procedure):
    a. within 48 hours (general time limit) or
    b. up to 96 hours in the case of terrorism offences, the time limit always starting from the time of arrest, detention on remand under a special law or from the time of taking charge in the case of a so-called civil restraint of liberty,
iv) the hearing of the accused by the judge for preliminary proceedings and the decision on the motion to remand the accused in detention on remand within the legal time limit (Article 86(2) of the Code of Criminal Procedure).[7]

The material conditions of detention on remand relate to the grounds for prosecution and are laid down in Article 71(1) of the Code of Criminal Procedure, according to which „(...) The *accused may be taken into detention on remand only if the facts established so far indicate that the act for which the prosecution has been instituted has been committed, has the elements of a criminal offence, there are grounds for suspecting that the act has been committed by the accused, and that his conduct or other specific facts give rise to a well-founded apprehension"...*, of any of the grounds for detention on remand under Article 71(1) of the Code of Criminal Procedure. In the case of so-called preventive detention on remand, this ground is that "he / she ***will continue criminal activity, will complete the criminal offence which he has attempted or will carry out the criminal offence which he has prepared or threatened to carry out***, *and if, in view of the person of the accused, the nature or gravity of the offence for which he or she is prosecuted, it is not possible at the time of the decision on detention to substitute detention pursuant to section 80 or section 81*."

2.2 Requirements under Articles 5(1)(c) and 5(3) of the Convention

The essence of the protection under Article 5 of the Convention is to provide strong guarantees that act as a safeguard against arbitrary (capricious) restrictions on personal liberty (Schabas, 2015, p. 220). As mentioned above, the existence of material grounds for detention on remand is also part of the guarantees of personal liberty under Article 5(1)(c) of the Convention.

In addition to the fact that this provision explicitly enumerates the material conditions of detention on remand as circumstances *conditio sine qua non* for the restriction of personal liberty, the existence of material conditions *also* follows *per se* from the requirement of the lawfulness of the restriction of personal liberty. The procedure laid down by law is **not only a formal requirement** for legal regulation at the level of a statute (not a sub-legislative regulation), but also includes a **material requirement for the quality of the legal regulation of detention on remand**, as well as a requirement for the consistent application of that regulation. This also applies to the material conditions of detention on remand – the grounds for prosecution and the grounds for detention on remand.

[7] Resolution of the Supreme Court of the Slovak Republic of 15 December 2021, Case No. 4 Tost 55/2021.

Qualitative requirements in legislative terms mean that legislation should be precise, accurate, clear, predictable (Kmec et al., 2012, p. 476). On the application level, this means that the court shall carefully weigh the public interest in clarifying the crime, the fulfilment of the right of victims to an effective investigation on the one hand, and the proportionality of the interference with the fundamental rights and freedoms of the accused, while interpreting the grounds for detention **reasonably (not extensively)** and duly justifying the existence of grounds for prosecution and grounds for detention **in the light of the specific factual circumstances**. Such qualitative requirements of legality form part of the principle of legal certainty under the rule of law.

The existence of reasonable suspicion of the commission of a crime is a necessary condition for the duration of detention on remand. **Reasonable suspicion** of the commission of a criminal offence means that there is information that the person concerned has committed a criminal offence and that the information is of such quality as to satisfy an objective and impartial observer; the reasonableness of the suspicion shall be based on all the circumstances of the case. However, this information may not be of the extent and quality necessary to bring an indictment or convict the offender.[8] In assessing the existence of reasonable suspicion under Article 5 of the Convention, it is necessary to take a holistic approach and to interpret this Article in the context of other fundamental rights: e.g. political speech exercising freedom of expression under Article 10 of the Convention cannot give rise to reasonable suspicion of the commission of a criminal offence (Çali, 2020). Accordingly, if no indictment is subsequently brought in the case (or no conviction of the accused is obtained), that fact does not *per se* give rise to a violation of Article 5 of the Convention (Schabas, 2015, p. 238).

For a long time, the case law of the ECtHR has initially accepted that this condition is initially sufficient for detention on remand in view of the guarantees under Article 5(1)(c) in conjunction with Article 5(3) of the Convention, without examining the other material conditions, i.e. the grounds for detention on remand. This case law – in line with the doctrine of aggravated grounds of detention on remand – has further held that after a certain period of time, this condition is not sufficient (nor is the high societal gravity of the offence) and the court must examine the existence of grounds for detention on remand.[9]

However, the ECtHR's jurisprudence has been subject to a certain evolutionary development, with the Court gradually raising the standards of protection of fundamental rights and freedoms, including the right to personal liberty in custodial decision-making as the Convention is a "living instrument" (Mowbray, 2009). This is because the Convention is interpreted and applied in terms of societal developments and increasing societal expectations for the protection of fundamental rights and on the part of states may create room for tightening the conditions for the protection of personal liberty and the possibilities for limiting it. However, this evolution must be proportionate, reflecting the rising standards in the States Parties (as the Convention sets only a minimum standard which national legislation may exceed), or, in the context of detention on remand, must not unduly restrict the fulfilment of the public interest, i.e. the State's ability to clarify criminal activity or the right of victims to an effective investigation.

The Grand Chamber of the ECtHR, in the Buzadji judgment, proceeded to such an evolution, stating that the doctrine that the existence of reasonable suspicion of the

[8] ECtHR, Selahattin Demirtaş v. Turkey [GC] (No. 2), app. no. 14305/17, 22 December 2020, paras. 314-315.
[9] ECtHR, Letellier v. France, app. no. 12369/86, 26 June 1991, para. 34 (according to this judgment, the case-law refers to the so-called Letellier-standards). See also ECtHR, Tomasi v. France, app. no. 12850/87, 27 August 1992, paras. 82 and 89, and other judgments.

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commission of an offence is the sole decisive material criterion for taking a detainee into detention on remand in the initial decision to detain him or her, and **that the existence of a ground for detention (as a second material criterion) should only be examined after a certain *lapse* of time, needs to be reconsidered**.[10] The Court derived this fact from the right of the accused to have a custodial criminal case heard within a reasonable time under Article 5(3) of the Convention.

Related to this is the fact that the legitimacy and proportionality of the continued detention on remand must be supported by other sufficient and relevant circumstances, and the national authorities (law enforcement authorities and courts) are obliged to make special efforts to ensure that the custodial criminal case is decided on the merits as soon as possible, or that the accused is released on bail. The ECtHR has not defined (in years, months, weeks, days) in its case-law exactly what is meant by the phrase "*after a certain period of time*". However, in a number of judgments[11] the Court has held that after a relatively short period of time (counted in the order of days), the mere existence of reasonable suspicion of the commission of a crime is not sufficient to justify detention on remand (in pre-trial proceedings) *per se*.

In Buzadji,[12] the Court "*shifted" the* above guarantees of protection against unjustified detention on remand, i.e., it proceeded to develop its previous constant jurisprudence. In the present case, the Grand Chamber of the ECtHR concluded that in the initial decision of the court to remand a detainee in detention on remand, it is not sufficient only to have a reasonable suspicion that a crime has been committed, but it is also necessary from the outset to examine the existence of one of the grounds for detention on remand. In the Court's view, it was necessary to develop the case law to the effect that it was not necessary to distinguish, in terms of the examination of the material conditions of detention on remand, between:

- the obligation to bring the detainee "*promptly*" before a judge whose task it is to examine the merits of the criminal charge,
- and the duty of the judge to examine other material conditions - the grounds for detention on remand "*after a certain lapse of time*" since the arrest ("*after a certain lapse of time*").

The examination of all the material conditions – the grounds for the charge as well as the grounds for detention on remand – are thus brought together in a single point, in a single moment, when the detainee is brought immediately ("*promptly*") before the judge who decides whether to take the detainee into detention or release him or her.

The ECtHR's jurisprudence on the second material condition of detention, i.e. the specific grounds for detention on remand, has long been settled. The Grand Chamber of the ECtHR has repeatedly confirmed that the grounds for detention on remand must be relevant and sufficient. The existence of grounds for detention on remand reflects the **real existence of a public interest** in restricting the personal liberty of the accused. Against this background, the ECtHR's jurisprudence has in principle established four grounds for detention on remand, although Article 5(1)(c) of the Convention directly lists only two grounds: prevention of the commission of the offence and escape after the

[10] E.g. ECtHR, Kudla v. Poland [GC], app. no. 30210/96, 26 October 2000, para. 111; or ECtHR, McKay v. the United Kingdom, app. no. 543/03, 3 October 2006, para. 44.
[11] E.g. ECtHR, Zayidov v. Azerbaijan, app. no. 11948/08, 20 February 2014, para. 62.
[12] ECtHR, Buzadji v. Moldova [GC], app. no. 23755/07, 5 July 2016, para. 100 et seq.

commission of the offence.[13] The four grounds of detention on remand arising from the ECtHR's case-law are as follows: [14]

a) **the risk that the accused will be unavailable for the purposes of the criminal proceedings**, namely that he or she will be unavailable or fail to appear at the main hearing (i.e. the risk of absconding) – the high seriousness of the offence and the threat of a heavy sentence may be aspects that support or increase the risk of the accused absconding, but other circumstances, in particular those relating to the person of the accused, must also be examined;[15] these circumstances may relate to the nature of the accused, his or her property, possession of travel documents, or contacts abroad. If the risk of absconding is the only reason for detention and the presence of the accused for the purposes of criminal proceedings can be secured by means other than detention (substitution of detention on remand by a monetary guarantee, supervision by a probation officer together with electronic monitoring means), the accused must be released from detention on bail;[16]
b) **risk of obstruction of justice** by the accused (i.e. in particular the risk of collusion with witnesses) – the need to carry out further acts *per se* is not an independent ground for detention on remand,[17] but there must be a risk that the accused will, by his or her conduct, obstruct the proper performance of the proceedings, in particular by influencing witnesses;
c) **the risk of continued criminal activity** (preventive detention on remand ground) – as this detention on remand ground forms the subject of our examination, it will be further discussed in the following text – and
d) **breach of public order** (e.g. risk of social disorder after the release of the accused due to the extreme seriousness of the offence[18]), including the protection of the life and health of the accused himself.

The distinction between the four grounds for detention has also been adopted by the European Commission in its Recommendation 2023/681.[19]

The condition of the existence of a ground or reason for detention on remand reflects the principle of the legitimacy of the interference with the right to personal liberty. Consequently, the assessment of the existence of a reason for detention on remand must reflect the principle of proportionality (Schabas, 2015, p. 239). The assessment of the existence of grounds for detention on remand (other than reasonable suspicion of the commission of a criminal offence) must be strict precisely with regard to the attributes

[13] On the one hand, such an interpretation should be considered controversial, as the case law of the ECtHR often reminds that the grounds for restricting the right to personal liberty are to be interpreted restrictively, not extensively. This is countered by the counter-argument that a limitation to only two grounds of detention on remand could paralyse the criminal justice system. On the other hand, that provision does not mention reasonable suspicion and two grounds for detention on remand as cumulative conditions, so it could also be seen as a restrictive interpretation of the requirement that reasonable suspicion and grounds for detention on remand must be met cumulatively (Kmec et al., 2012, p. 515).

[14] ECtHR, Buzadji v. Moldova [GC], app. no. 23755/07, 5 July 2016, para. 88 and other judgments cited therein. See also ECtHR, Merabishvili v. Georgia [GC], app. no. 72508/13, 28 November 2017, para. 222.

[15] Among the earlier decisions, see, for example, the judgment of 27 June 1968 in Neumeister v. Austria, no. 1936/63, paragraph 10.

[16] ECtHR, Merabishvili v. Georgia [GC], app. no. 72508/13, 28 November 2017, para 223.

[17] ECtHR, Azizov and Novruzlu v. Azerbaijan, app. nos. 65583/13, 70106/13, 18 February 2021, para. 59, and other decisions cited therein.

[18] ECtHR, Letellier v. France, app. no. 12369/86, 26 June 1991, para. 51.

[19] See point 19 of the European Commission's Recommendation, cited above.

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of *relevance* and *sufficiency*. In principle, these circumstances are assessed by the court as a whole, but it is also possible to conclude in a particular case that the grounds are relevant but not sufficient.

The existence of relevant and sufficient grounds for detention on remand must be adequately explained in the reasoning of the detention on remand decision, i.e. the reasoning must not be merely abstract, general or schematic.[20] Schematic or stereotyped reasoning may be manifested, for example, by the use of formulaic models for judicial decisions on detention on remand.[21] Beyond the examination of these material conditions, the national court is – in line with the ECtHR's jurisprudence[22] – also obliged to consider, when deciding on detention on remand, whether the law enforcement authorities, and subsequently the court, have taken '*special care*' to ensure that the proceedings are conducted in a particularly expeditious manner [in accordance with Article 5(3) of the Convention].

As regards the special **ground of preventive detention on remand**, which is based on the risk of continuing to commit criminal offences, it is true in this context that detention must not be exclusively preventive in nature in order to prevent the commission of criminal offences in general. This is true from the point of view of general prevention, i.e. preventing the commission of criminal offences in general, but also from the point of view of individual prevention in relation to a specific person – detention cannot be based solely on the general assumption that he or she could potentially commit a criminal offence in the future (because of certain characteristics, previous life, membership of a particular social group).

On the contrary, two aspects must be met in order for the ground of preventive detention on remand to be satisfied: there is a reasonable suspicion that the accused has committed a criminal offence and there is a serious risk that he or she will go on to commit a particular and specific criminal offence, i.e. that he or she will continue to commit criminal offences. The purpose of preventive detention on remand is to prevent the commission of that specific offence which is imminent. The threat to commit the offence must be given in the near term, on the order of hours.[23]

Thus, the risk of committing a crime is not just in the abstract but is a concrete danger that may arise from various aspects of the case. In accordance with the judgment of the Grand Chamber of the ECtHR in Kurt v. Austria – cited above – this danger may relate to previous statements and threats made by the accused or by witnesses, the established preparation for the commission of the offence, the **seriousness or sophistication of the offence charged (reasonable suspicion), as well as to the person of the accused**. The European Commission also recommends (2023/681) taking such aspects into account.[24]

As regards the person of the accused, the reason for preventive detention on remand may also be based on his or her "*personal history*", namely the previous criminal offences for which he or she has been convicted (the nature and seriousness of which

[20] ECtHR, Merabishvili v. Georgia [GC], app. no. 72508/13, 28 November 2017, para. 222.
[21] ECtHR, Sardar Babayev v. Azerbaijan, app. nos. 34015/17, 26896/18, 1 February 2024, para. 50.
[22] ECtHR, Buzadji v. Moldova [GC], app. no. 23755/07, 5 July 2016, para. 87.
[23] See ECtHR, Kurt v. Austria [GC], app. no. 62903/15, 15 June 2021, para. 188.
[24] Point 20 of the European Commission's Recommendation *„(a) the nature and seriousness of the alleged offence; (b) the penalty likely to be incurred in the event of conviction; (c) the age, health, character, previous convictions and personal and social circumstances of the suspect, and in particular their community ties […]"*

must be assessed accordingly).[25] On the other hand, the absence of employment or family background *per se* is not an indicator of a direct threat of further criminal activity.[26]

The circumstances of the commission of the offence as well as the characteristics of the person of the accused may give rise to any of the four grounds for detention on remand (and conversely may justify the necessity of the release of the accused in the absence of a ground for detention on remand[27]), and it is therefore not possible to disregard these circumstances precisely when assessing the risk of continued criminal activity. Although the reason for preventive detention on remand may be based on the defendant's previous threats or attempts or preparation, the preparation or attempt of a crime (i.e. the threat that the offender will complete a crime which he has attempted or prepared) are not the only cases where preventive detention on remand may be applied.

2.3 Fulfilment of the Above Conditions in National Court Decisions

The theses on the interpretation of the material conditions of detention on remand, namely the grounds for detention on remand, which we have analysed in the previous text on the basis of the ECtHR's jurisprudence, have been reflected in the jurisprudence of the Slovak and Czech national courts since the 1990s until the present day. As regards the very nature of preventive detention on remand, from the point of view of constitutional law, detention on remand is not predominantly preventive in nature (and certainly not punitive or satisfactory in nature), but is characterised as a precautionary measure designed to enable proper and fair criminal proceedings to take place.[28]

On the question of establishing the existence of detentional grounds, the Czech Constitutional Court ruled in 1996 that the fear that gives rise to one of the three grounds for detention on remand (escape, collusion or preventive detention) may arise from essentially two sources:

- from the particular conduct of the accused (i.e. the accused himself gives cause for concern that he or she will continue to commit a crime or influence witnesses, etc.); or
- from an objective constellation of circumstances which includes not only the person of the offender but also all the elements of the offence and the stage of the criminal proceedings (i.e. it is an objective constellation of circumstances which arise from the characteristics of the accused but also the type of criminal activity).[29]

Thus, the facts that establish the reason for the link may come from a variety of sources, but they must never be too abstract or "vague". The Slovak Constitutional Court has pointed out that an indication of insufficient examination of concrete facts may be

[25] ECtHR, Clooth v. Belgium, app. no. 12718/87, 12 December 1991, para. 40; see also ECtHR, Selçuk v. Turkey, app. no. 21768/02, 10 January 2006, para. 34, as well as Schabas (2015, p. 252).
[26] ECtHR, Sulaoja v. Estonia, app. no. 55939/00, 15 February 2005, para. 64.
[27] In the context of the substitution of detention on remand (with a cash bond), the ECtHR has held that even in pre-trial proceedings there must be such a possibility of release from detention on remand if the nature of the offence or the personal circumstances of the accused are such that detention on remand is disproportionate or not supported by relevant or sufficient reasons. ECtHR, McKay v. the United Kingdom, app. no. 543/03, 3 October 2006, para. 46.
[28] Ruling of the Constitutional Court of the Czech Republic of 11 April 2007, Case No. I. ÚS 695/06, Collection of findings and resolutions of the Constitutional Court, 63/2007.
[29] Ruling of the Constitutional Court of the Czech Republic (1st Senate) of 12 September 1996, Case No. I. ÚS 62/96, Collection of findings and resolutions of the Constitutional Court, 74/1996.

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merely formal justifications using stereotypical formulations.[30] However, it is not possible to require that, when proving the existence of a ground for detention on remand, it must be shown that the foreseen consequence (the accused will continue criminal activity) will certainly occur.[31]

According to the Czech Constitutional Court, there are no objective and immutable criteria for the interpretation of specific facts, but they must be derived from the nature of the specific and individualised criminal case, including the person of the accused, his personal circumstances, the scope of the necessary evidence, etc.[32] If the reason for detention on remand is based on the defendant's conduct, the Czech Constitutional Court considers that this may be not only current conduct, but also past (especially recent) conduct.[33] In the present case, the court based the reason for preventive detention on the fact that the accused was unemployed, his previous criminal activity had enabled him to earn a living and the previous sentences had not achieved correction, which the Constitutional Court considered to be constitutionally consistent. In another case, however, the Constitutional Court emphasised that it was not sufficient as a relevant reason for preventive detention on remand *per se* that the accused had significant debts.[34] Nor is it sufficient as a ground for preventive detention on remand that the accused has been prosecuted in the past for the same criminal activity (but without a final conviction).[35]

From the selected decisions (resolutions) of the Supreme Court of the Slovak Republic (hereinafter referred to as "**the Supreme Court**") in the framework of the second instance (complaint) proceedings, we note that they included an examination of the fulfilment of formal and material conditions in criminal cases in which only (or even) grounds for so-called preventive detention on remand were given. In particular, these decisions concerned the review of the decisions of the Specialised Criminal Court (hereinafter referred to as the "**SCC**") to remand (or not to remand) the accused in detention, or to extend (or not to extend) the period of remand in detention in the pre-trial proceedings.

2.3.1 Investigation of Reasonable Suspicion of a Criminal Offence

In terms of the substantive conditions of detention on remand, they included circumstances relating to the merits of the prosecution in relation to the evidentiary situation and the facts set out in the charging order, focusing on whether the acts which were the subject of the prosecution had been committed, had the elements of a criminal offence and there were grounds for suspecting that they had been committed by the accused.

[30] Ruling of the Constitutional Court of the Slovak Republic of 24 September 2014, Case No. I. ÚS 250/2014, 23/2014 Coll.
[31] Resolution of the Constitutional Court of the Czech Republic of 21 June 2001, Case No. III ÚS 185/01, Collection of findings and resolutions of the Constitutional Court, 23/2001.
[32] Ruling of the Constitutional Court of the Czech Republic (III. senate) of 26 September 1996, Case No. III. ÚS 18/96, Collection of findings and resolutions of the Constitutional Court, 88/1996. Also the ruling of the Constitutional Court of the Czech Republic of 7 April 2005, Case No I. ÚS 585/02, Collection of findings and resolutions of the Constitutional Court, 77/2005.
[33] Resolution of the Constitutional Court of the Czech Republic of 18 November 2004, Case No. III ÚS 605/04, Collection of findings and resolutions of the Constitutional Court, 55/2004.
[34] Ruling of the Constitutional Court of the Czech Republic of 16 September 2014, Case No. II ÚS 2086/14, Collection of findings and resolutions of the Constitutional Court, 170/2014.
[35] Ruling of the Constitutional Court of the Czech Republic of 25 October 2017, Case No. III ÚS 1876/17, Collection of findings and resolutions of the Constitutional Court, 17/2017.

We note that what is relevant to the **existence of reasonable suspicion is not the** number of incriminating pieces of evidence, but their nature and significance, as well as the circumstances of the whole case, including the nature of the criminal activity itself and the position of the particular accused in it.[36] We add that, according to the decision-making of the Constitutional Court of the Slovak Republic (hereinafter referred to as "**the Constitutional Court**") – in line with the case law of the ECtHR, as we have examined it in the preceding text – the reasonableness of suspicion presupposes the existence of factors or information which would enable an objective observer (the "**objective observer test**") to make a judgment that a particular person could have committed a criminal offence, and such reasonableness always depends on the totality of the circumstances of the case.[37]

The examination of these conditions is practically carried out in the pre-trial proceedings by the court (the judge for the preparatory proceedings) and the prosecutor as follows:

i) the court when deciding on detention on remand, and failure to fulfil them results in its decision not to take the accused into detention or to release him from detention (even though the grounds for detention on remand may be fulfilled);
ii) prosecutor within the framework of supervision over the observance of legality (Section 230 of the Code of Criminal Procedure) and their non-fulfilment is a reason for the cancellation of the order on bringing charges on the basis of Section 230(2)(e) of the Code of Criminal Procedure;[38] in case of their fulfilment, the prosecutor further examines the specific grounds for filing a motion for taking the accused into detention on remand, which is decided by the court.

The courts have the primary responsibility for deciding whether an accused person will be prosecuted in detention on remand or at liberty. Given that the personal liberty of the accused is a principle enjoying constitutional and international guarantees, and that the detention on remand of a person in **detention on remand is an exception** to it, the court's consideration of the existence of legal grounds and the time of detention on remand in a particular case must always correspond to this relationship between principle and exception. The Constitution thus clearly ensures that detention on remand, as a measure depriving a person of liberty, is carried out in a manner which provides the accused with basic procedural safeguards against its abuse by arbitrary actions and decisions of the courts.[39] In deciding on detention on remand, the court's attention is focused exclusively on the establishment of suspicion – more or less well-founded – resulting from a comprehensive assessment of the current evidentiary situation and the state of the case.

The decision on detention itself is always directed to the level of probability, not absolute certainty, as to the consequences which might arise in the event of release, and it is from that perspective that the reasonable apprehension of the defendant's particular conduct must then be assessed.

[36] Resolution of the Supreme Court of the Slovak Republic of 15 December 2021, Case No. 4 Tost 55/2021.
[37] Resolution of the Constitutional Court of 28 June 2016, Case No. III. ÚS 447/2016. See also ECtHR, Fox, Campbell and Hartley v. the United Kingdom, app. nos. 12244/86, 12245/86, 12383/86, 30 August 1990.
[38] Or for cancellation within the framework of the secondary proceedings under Section 194(1)(a) or (b) of the Code of Criminal Procedure by the so-called supervising prosecutor or Section 363(1) of the Code of Criminal Procedure by the Prosecutor General of the Slovak Republic.
[39] Resolution of the Supreme Court of the Slovak Republic of 18 May 2023, Case No. 5 Tostš 9/2023.

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The material conditions for the continued detention on remand must be continuously strengthened by the grounds for suspecting the accused of having committed a crime (the so-called ***doctrine of strengthened grounds for detention on remand***), especially in the case of a court deciding to extend the period of detention on remand, e.g. by questioning witnesses, or by the prosecutor filing an indictment, or by the existence of an conviction which is not final.

A weakening of reasonable suspicion may occur, for example, if the opinion of the second instance (appellate) court substantially undermines the credibility of the evidence proving guilt, or indicates future acquittal of the defendants as a "*result*" of the proceedings after reversal and remand of the case to the trial court.[40]

The situation is different when the second instance court annuls the judgment of the court of first instance also in the entire acquittal part, finding in principle that the established factual situation and legal reasoning are incorrect, *inter alia*, with regard to the (initially expressed) conclusion that the act legally qualified as the crime of formation and support of a criminal group under Section 296 of the Criminal Code has not been proven. In such a case, the criminal prosecution may be found to be justified (as a material ground for detention).[41]

A decision on detention on remand is not a decision on the guilt or innocence of the accused. When deciding on detention on remand, the court does not focus on issues related to the assessment of guilt or the final evaluation of evidence – in accordance with the principle of free evaluation of evidence under Article 2(12) of the Code of Criminal Procedure, but instead limits itself to examining whether the material and formal conditions for detention on remand are met, or whether the existence of a reasonable suspicion of the commission of an offence is not only sufficient, but also directly determining and limiting when deciding on detention.[42]

We note that the court, in the course of proceedings and decision-making on detention on remand, does not conduct evidence and evaluation of evidence to the extent that it is conducted, for example, by the public prosecutor when deciding on the complaint of the accused against the order on bringing charges, after the investigation (summary investigation) when deciding on the further procedural procedure, or after the filing of the indictment by the court at the main hearing on the merits but examines the case in accordance with the dictum of Article 71 of the Code of Criminal Procedure.[43] By carrying out such an examination of reasonable suspicion, the content of the guarantees under Article 5 of the Convention is also fulfilled.

2.3.2 Examining the Grounds for Preventive Detention on Remand

It follows from the wording of Section 71(1) of the Code of Criminal Procedure that when deciding on detention on remand, it is not required to be absolutely certain that the accused will act in one of the ways set out in that provision. A reasonable risk, i.e. a real threat that the accused will act in the manner envisaged by the specific reason for detention (here, the so-called preventive detention on remand) if he or she is not taken into detention on remand is sufficient. Thus, the Criminal Procedure Code does not

[40] See the resolution of the Constitutional Court of the Slovak Republic of 3 February 2016, Case No. I. ÚS 35/2016, or the ruling of the Constitutional Court of the Slovak Republic of 18 February 2015, Case No. III. ÚS 29/2015.
[41] Resolution of the Supreme Court of the Slovak Republic of 21 November 2023, Case No. 1 Tost-sh/17/2023.
[42] Resolution of the Constitutional Court of the Slovak Republic of 4 February 2016, Case No II. ÚS 115/2016, Resolution of 10 August 2016, Case No II ÚS 626/2016, Ruling of 30 October 2019, Case No I. ÚS 417/2018.
[43] Cf. the Resolution of the Supreme Court of the Slovak Republic of 3 August 2021, Case No. 1 Tost 23/2021.

require absolute certainty of the fulfilment of the reason for so-called preventive detention on remand. [44]

On the problem of whether detention can ensure the preventive effect of criminal law, some authors have raised questions (Stevenson and Mayson, 2022, p. 712): "*If we incarcerate people who have a 20% chance of otherwise committing an assault during the period of detention, for instance, we can expect to prevent one assault for every five detentions. Is such detention justified? How much liberty should we sacrifice to prevent one crime?*" The purpose of **preventive detention on remand** is to prevent the continuation of criminal activity, which means not only the repetition of the same offence, but also the commission of an offence of the same nature. The fear of the commission of the offence then refers to the same offence which the accused has attempted, and the fear of the commission of the offence refers to the offence which the accused has prepared or threatened to commit.

We conclude from the foregoing that this detentional ground is based on the premise that the purpose of the prosecution is also to prevent crime. On what facts can the risk of committing an offence be based in order for preventive detention on remand to apply?

The stable case law of the Constitutional Court (reflecting the established jurisprudence of the general courts) consists (consisted) in the opinion that the facts justifying custodial prosecution may also consist in the **nature, extent and seriousness of the criminal activity.**[45]

Alternatively, it was also necessary to examine and evaluate those circumstances, which, with regard to the person of the accused, his overall life circumstances (in particular social and family circumstances), the environment in which he works or moves, create or increase the risk of further commission of a particular criminal activity.[46] This category of inquiry also includes the 'question' whether the alleged conduct of the accused may have been the principal means of securing their income, or whether it is necessary to consider the accused's previous way of life.[47]

According to settled case-law, the fear of a continuation of proceedings of the same or similar nature is given, in particular, by **reference to the financial volumes which may have been obtained by the offence, the official income of the accused, which was disputed and unprovable, and the fear that the accused may act with a view to obtaining further financial proceeds**. In the particular criminal case, the criminal activity appeared to be extensive, sophisticated, well-established, well-organised and, in terms of its social impact, significantly dangerous. Its high profitability suggests that the criminal activity for the defendants could also be a long-term source of funds, which is usually the main motivation for criminal offences. The standard of living achieved is subsequently difficult to compensate for once such a source of income has disappeared.[48]

Similarly, the reason for preventive detention on remand was fulfilled in the case of prosecution of the accused for a total of 83 acts qualified as a particularly serious crime of legalisation of the proceeds of crime under Article 233(1)(a), (b), (4)(a) of the Slovak Criminal Code, which were to be committed between 2016 and 2019, which, given

[44] Resolution of the Constitutional Court of the Slovak Republic of 10 August 2016, Case No. II. ÚS 627/2016.
[45] Resolutions of the Constitutional Court of the Slovak Republic of 2 December 2020, Case No. I. ÚS 552/2020, ruling of 27 April 2021, Case No. III. ÚS 227/2020 and the resolution of 9 March 2021, file no. III. ÚS 202/2021.
[46] Ruling of the Constitutional Court of the Slovak Republic of 22 May 2013, Case No II ÚS 597/2012, Resolution of 9 March 2016, Case No I. ÚS 162/2016.
[47] Resolution of the Supreme Court of the Slovak Republic of 21 November 2023, Case No. 1 Tost-š/17/2023.
[48] Resolution of the SCC of 28 November 2021, Case No. 1 Tp 23/2021, in conjunction with the Resolution of the Supreme Court of the Slovak Republic of 15 December 2021, Case No. 4 Tost 55/2021.

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the scope, intensity and length of the criminal activity for which the accused is being prosecuted in this criminal proceeding, supports the reasonableness of the suspicion that he could continue his criminal activity if released from detention on remand.[49] The justification for so-called preventive detention on remand was satisfied in a situation where the accused was suspected of having acted for persons suspected of extensive drug offending over a prolonged period of time. This activity was also the source of his income.[50]

In terms of examining the grounds for so-called preventive detention on remand, in the application practice we encounter arguments mainly referring to the legal opinions expressed in the Constitutional Court's ruling Case No. III. ÚS 33/2021, which in principle implies in particular that **both material conditions must be fulfilled cumulatively**.[51] In that ruling, the Constitutional Court expressed the requirement that the reason for preventive detention on remand must be based on some other facts than the nature of the crime for which the accused is being prosecuted.[52] *A contrario*, if the reasoning of the general court deciding on detention on remand is limited to an analysis of the criminal activity of the accused, **such reasoning is sufficient only to establish the existence of reasonable suspicion, not also to establish that there is a ground for preventive detention** (risk of continuation of the criminal activity).

This finding was made in a specific criminal case and thus does not constitute a formal source of law. For this reason, it does not operate *erga omnes*, and thus in favour of all persons under arrest in the Slovak Republic. Taking into account our argument, set out in the previous part of this article, we highlight that every detention on remand decision is **characterised by certain specific features** which must be taken into account in a particular case. At the same time, we add that according to the decision-making activity of the Constitutional Court, the disposition of Article 71(1)(c) of the Code of Criminal Procedure is fulfilled only if the nature of the criminal activity within the scope of the charge is such a fact which, in a real context and currently (at the time of the court's decision on detention on remand), raises a well-founded fear of the accused committing further criminal activity in the event of a negative decision on his detention on remand.[53]

The aforementioned ruling is also responded to by the current decision-making activity of the Supreme Court, which has an impact on the application practice of the bodies applying the law (law enforcement authorities and the court) on the persistence of the need for custodial prosecution in the case of the grounds of the so-called preventive detention on remand. In accordance with settled case-law, the Supreme Court has consistently held that the facts **justifying the need for preventive detention on remand may also consist in the nature of the crime prosecuted and the manner in which it was committed,**[54] i.e. there is no need for the material conditions for such detention on remand to be cumulative. Such an interpretation is consistent with the case

[49] Resolution of the Supreme Court of the Slovak Republic of 3 August 2021, Case No. 1 Tost/23/2021.
[50] Resolution of the Supreme Court of the Slovak Republic of 3 May 2021, Case No. 2 Tost 22/2021.
[51] For the sake of completeness, we would like to point out that in this ruling the Constitutional Court found a violation of the law not only in the case of the so-called preventive detention on remand, but also in the case of the so-called collusion detention on remand pursuant to Section 71(1)(b) of the Code of Criminal Procedure.
[52] "The Constitutional Court concludes on the grounds for preventive detention on remand of the applicant by recalling its case-law according to which the type, nature, extent or gravity of the criminal activity cannot be a ground for preventive detention on remand for the purpose of Article 71(1)(c) of the Code of Criminal Procedure, unless the disposition of this legal norm is fulfilled." Constitutional Court ruling of 13 May 2021, para. 45.
[53] Ruling of the Constitutional Court of the Slovak Republic of 9 July 2003, IV. ÚS 124/2003.
[54] Ruling of the Constitutional Court of the Slovak Republic of 17 August 2021, IV. ÚS 384/2021.

law of the ECtHR (as we have analysed it),[55] according to which the grounds for preventive detention on remand may also be based on the nature of the criminal activity (as well as on the person of the accused).

In particular, we note that the Supreme Court found that the grounds for the so-called preventive detention on remand, where the accused was to follow the instructions of the accused at a lower level of management and coordination within the criminal group from at least 2020 and, in his absence, to receive cash for the narcotic and psychotropic substances sold, which she subsequently handed over to him, to communicate and coordinate the sale of these substances, to provide personal motor vehicles for the purpose of committing mainly drug offences, and to accompany the accused in the proceedings concerning the trafficking of these substances. **The Supreme Court found that there was a risk of the defendant re-offending in respect of drug offences, which she was to have committed over a long period of time and which could be presumed to have been the source of her livelihood**. The defendant should therefore have been familiar with drug offences, which only facilitates the possibility of her returning to drug offences after her eventual release.[56]

Similarly, in a different criminal case, the Supreme Court found that the grounds for so-called preventive detention on remand were fulfilled with regard to the nature of the criminal activity (in terms of its seriousness) in relation to the acts (9), which are characterised by their **long-term perpetration, for which the accused continue to face a high penalty**.[57] In this criminal case, the reason for the continued detention on remand was strengthened by the fact that the Supreme Court, in the appeal proceedings, also upheld the prosecutor's appeal against the defendants and annulled the relevant operative "acquittal" part of the judgment of the SCC. The Supreme Court noted the risk of further continuation of possible cooperative drug dealing indicative of a more systemic and structured pattern of alleged conduct by the defendants. In practice, this was a fact which intensively "reinforced" the qualitative aspect of the defendants' suspicions that the material conditions for further custodial prosecution of the defendants were present.

3. CONCLUSION

The efforts of the highest judicial authorities to progressively raise the level of guarantees of fundamental rights and freedoms through their decision-making is an immanent feature of liberal democracy and the substantive rule of law. Such a development of decision-making can also be identified on the part of the ECtHR in relation to the Convention. In the analysed decisions we have identified an attempt of the Constitutional Court to change the decision-making activity of the Supreme Court and the SCC.

On the other hand, raising the level of fundamental rights guarantees must not jeopardise the general public interest objective of effectively combating organised crime, in particular the detection of crimes committed by criminal groups and the conviction of perpetrators. The specific guarantees of the right to personal liberty cannot be interpreted in such a way as to render the application of preventive detention on remand practically unworkable. Therefore, we are of the opinion (unlike the Third Chamber of the Constitutional Court) that the grounds for preventive detention on remand may also be based on the nature of the offence committed as well as on circumstances relating to

[55] Also with the European Commission Recommendation 2023/681.
[56] Resolution of the Supreme Court of the Slovak Republic of 15 November 2023, Case No. 5 Tost-š 24/2023.
[57] Resolution of the Supreme Court of the Slovak Republic of 21 November 2023, Case No. 1 Tost-š/17/2023.

the offender's person (in particular, previous criminal activity). The features of criminal activity which may constitute grounds for preventive detention on remand are, in particular, prolonged, sophisticated, criminal activity as a source of livelihood, or the threat of a heavy sentence. In the case of so-called drug offences, these circumstances apply in particular to persons in the hierarchically higher structures of criminal groups.

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OVERRIDING MANDATORY RULES IN EU PRIVATE INTERNATIONAL LAW: SOME DOUBTS AND TENTATIVE ANSWERS FROM THE PERSPECTIVE OF THE SLOVAK PRIVATE INTERNATIONAL LAW SYSTEM / Dominika Moravcová

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Abstract: *As a result of the increasing incidence of private law relationships with a foreign element, courts hearing cases are frequently obliged to apply foreign law. The interference of foreign law is liable to produce effects that may conflict with the public interest of the lex fori. Precisely for this reason, we consider it essential to be aware of the available protective mechanisms through which the court can protect the public interest, not only of the lex fori, but even, under certain circumstances, of the public interest of the foreign legal order. The present article deals with the mechanism of overriding mandatory provisions in private international law in order to identify the requirements for the activation of the selected mechanism in the Slovak courts' application practice. Given that this mechanism is not covered by the Slovak Act on International Private and Procedural Law, the article deals mainly with the rules enshrined in the Rome I Regulation. The first part of the present article deals with the definition of overriding mandatory provisions, the application in private international law, and the historical perspectives in the light of the so-called Rome Convention. Subsequently, the article focuses on the classification of overriding mandatory provisions and their impact within the limits relevant to Slovak courts.*

Keywords: *Overriding Mandatory Provisions; Public Interest; the Rome I Regulation; International Private Law*

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1. INTRODUCTION

Private-law relationships with cross-border elements are increasingly encountered in practice due to the influence of integration processes worldwide. Several key issues are addressed in private international law concerning the resolution of disputes arising from these relationships. Among the most fundamental ones is the determination of the applicable law. In private law relationships with a foreign, cross-border, or international element, it is not unusual for the court hearing the case to apply

the law of another State rather than its own, referred to as the *lex fori* in the case under consideration.

In the field of harmonisation of private law, the European Union (hereinafter referred to as "*the EU*") has very limited powers, with certain exceptions such as consumer protection. There is an increasing degree of convergence of laws among the EU Member States, and disparities between different areas of private law are gradually narrowing. However, there are areas, such as family law, where the differences in legal systems, even within the EU Member States, are more significant. From a global perspective, the differences between countries around the world are much more considerable; different legal systems may rest on different bases. Therefore, courts hearing cases within the EU Member States may often find themselves in a situation where, in relationships with a foreign element, they have to apply the foreign law of a country whose legal system and framework differ significantly from the legal basis on which our legal system stands.

In order to protect the domestic legal order, private international law has developed a number of protective mechanisms, which can also limit to a certain extent the autonomy of the will of the parties, as materialised in the choice of applicable law. One of these mechanisms is the so-called "overriding mandatory rules." This instrument is enshrined in the private international law rules of the several EU Member States. Despite the fact that the Slovak legal order does not recognise this mechanism, the relevance of overriding mandatory norms for the courts of the Slovak Republic has increased with the accession of the Slovak Republic to the EU, as the key sources of private international law of the Union incorporate it.

The aim of the present article is to define, at the outset, which norms can be considered as overriding mandatory rules in the context of private international law in contractual and non-contractual obligations, and to identify the requirements for the activation of the protective mechanism of overriding mandatory norms by the Slovak courts. In the first part of the article, we will discuss the theoretical definition of the institute and present the regulation of the mechanism in the framework of the Union's private international law. Subsequently, we will define the scope of the EU legislation and, in light of the key case law of the Court of Justice of the EU (hereinafter referred to as "*the Court of Justice*"), identify the requirements and possibilities for activating the selected protective mechanism in practice in order to limit the consequences of the application of the applicable law and protect the *lex fori*, while ensuring legal certainty in the European judicial area. The uniqueness of the chosen mechanism lies in the potential application of an overriding mandatory norm other than the *lex fori*. In the last part, therefore, we will focus on the classification of overriding mandatory provisions that must or could be applied by the national courts hearing the case.

2. KEY PROTECTIVE MECHANISMS IN SLOVAK PRIVATE INTERNATIONAL LAW

Private international law rules afford courts hearing a case a variety of mechanisms, particularly aimed at safeguarding public interest and the foundational principles upon which their legal order is built. Setting aside provisions designed to protect the weaker party, the Slovak Act on Private International Law and Rules of Procedure[1] recognises only the public policy reservation among these mechanisms. The Act on Private International Law grants courts the discretion to refrain from applying the

[1] Act No. 97/1963 Coll, on Private International Law and Rules of Procedure (hereinafter referred to as the "*Act on Private International Law*").

law of a foreign state if it conflicts with essential principles of the social and state structure of the Slovak Republic and its legal order, which must be maintained without exception.[2] Here, the reservation of public policy serves as a protective mechanism with a defensive character (Csach, Gregová Širicová and Júdová, 2018, p. 167). Protection is implemented by refraining from applying the relevant part of foreign law in the given case if it would contravene the public policy of *lex fori*. This mechanism is activated only after the applicable law has been determined and its content and effects analysed. It should be noted that, in this manner, the forum can only safeguard the public policy of its own legal system.

The presented article focuses on the protective mechanism of overriding mandatory norms. Initially, we define the mechanism of public policy reservation, as some authors also characterise overriding mandatory norms as "*active public policy reservation*" (Štefanková and Sumková, 2017, p. 125). While the public policy reservation defensively protects the *lex fori*, overriding mandatory norms are offensive in nature and can therefore be regarded as an active protective mechanism, unlike the reservation. These mechanisms complement each other in a very appropriate manner, which, in our view, should be reflected in a potential amendment of the Act on Private International Law. Directly incorporating the mechanism of overriding mandatory norms into the Act would align the options available to courts under Slovak legislation with those derived from the EU *acquis*.

In our opinion, overriding mandatory norms cannot be termed as an active form of public policy; rather, they constitute an active protective mechanism. While overriding mandatory norms share certain features with the public policy reservation, they cannot be considered in its active form. Both mechanisms allow for some form of deviation from the application of the chosen norm of the applicable law, and both require a public interest justification to protect the important interests of the *lex fori* (though not exclusively the *lex fori* in the case of overriding mandatory norms). It is not excluded that, in both cases, the same norm could be protected by these mechanisms, but the definition, scope, and manner of activation of the mechanisms differ in practice. Prof. Bělohlávek highlights the key differences. In the case of overriding mandatory norms, it must be a binding norm, whereas in the case of a public policy reservation, this is not necessary. The fundamental difference lies in the role of courts. In the case of a public policy reservation, the court hearing the case compares the regulation of applicable law with the *lex fori*, and what is decisive are the consequences of applying the foreign norm that would occur after its application. In the case of an overriding mandatory norm, the court does not have to take the foreign law into account at all; if the case under consideration falls within the scope of the overriding mandatory norm, it will apply it directly without examining the effects of the foreign law norm (Bělohlávek, 2010, p. 1483). It is precisely in the enforcement of the overriding mandatory norm, irrespective of the content of the foreign applicable law, that the offensive character of mandatory norms lies. The applicable law will still be the substantive law of the State determined by the conflict of laws rule or choice, but regardless of its content, a particular norm, the overriding mandatory norm, will take precedence. Another difference is the possible applicability of a foreign overriding mandatory norm, not only the *lex fori*, which will be discussed in more depth in this article. As stated by Z. Kučera, the reservation is a sufficient mechanism of protection against unacceptable consequences of the application of the *lex causae*. Overriding mandatory norms have a narrower meaning in the sense that they are always applied only to specific

[2] Section 36 of the Act on Private International Law.

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issues, whereas in the case of reservation, the principles of the social organisation, which have a rather more general impact, dominate (Kučera, 2009, p. 239).

Even without a legal basis in Slovak legislation, it is conceivable under the Act on Private International Law that the courts would make use of this mechanism. Basically, there is the possibility to protect an exclusively overriding mandatory *lex fori* norm through a public policy reservation and to enforce it by not applying a particular norm of applicable law through a reservation.

The Slovak courts, like all courts of the EU Member States, have fully embraced the possibility of activating the mechanism of overriding mandatory norms through accession to the EU. By making the Convention on the law applicable to contractual obligations[3] (hereinafter referred to as "*the Rome Convention*") binding on the Slovak Republic, Article 7 enabled the courts hearing the case to consider both the overriding mandatory norms of the *lex fori* and those of another state based on the close connection between the relationship under consideration and the state concerned. In the case of the rules of a third State, the application of which would extend beyond the borders of the state, the court was to consider their nature and purpose, as well as the consequences of their application or nonapplication.[4] Presumably, the rather wide margin of appreciation for judicial discretion and the vagueness of the wording prompted a number of states to make a reservation to this international treaty, precisely at Article 7. With the Convention being an international treaty, states could limit the effects of selected provisions through reservations. For instance, the United Kingdom, Germany, Luxembourg, and Ireland have entered a reservation to the provision in question, but only concerning the overriding mandatory norms of a third state, not regarding *lex fori* norms (European Council and Council of the EU, n.d.). One objective of this legislation was to restrict the autonomy of the parties when choosing the applicable law. If the contract had a close connection with a particular state, the parties' intention, as manifested in the choice of applicable law, should not restrict the application of the provisions of the law of that state, which are of a special nature.[5] Simultaneously, the Rome Convention, in selecting the applicable law for the protection of the weaker party, introduced the concept of the impossibility of derogating from the overriding mandatory rules of the country whose law would be applicable in the absence of a choice. Under the current Rome I[6] regime, the term "overriding mandatory norms" is replaced by the protection of mandatory provisions in this formulation of the protection of the weaker party, thus expanding the scope of protection.

In the current decision-making practice, the legal basis of the mechanism for Slovak courts is the Rome I Regulation, which replaced the Rome Convention among the Member States, with the exception of Denmark. The Regulation establishes a general regime for determining the law applicable to contractual obligations in civil and commercial matters. The Regulation is an act of EU secondary law and is directly applicable in all Member States.[7] The nature of the Rome I Regulation is therefore different from the Convention, which is an international treaty. Regarding the interrelation

[3] Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (OJ L 266, 9.10.1980, pp. 1–19).
[4] Art. 7 of the Rome Convention.
[5] Report on the Convention on the law applicable to contractual obligations by Mario Giuliano, Professor, University of Milan, and Paul Lagarde, Professor, University of Paris I (Ú. v. ES C 282, 31.10.1980, pp. 1 – 50).
[6] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (OJ L 177, 4.7.2008, pp. 6–16) (hereinafter referred to as "the Rome I Regulation").
[7] Art. 288 of the Consolidated version of the Treaty on the Functioning of the European Union (OJ C 326, 26.10.2012, pp. 47–390).

between Rome I and the Convention, it should be noted that the Convention remains in force for contracts concluded before the relevant date, that is, 17th December 2009.[8] Although the Rome I Regulation applies only to contracts concluded after that date, in light of the case law of the Court of Justice, if the contractual relationship has been changed by mutual consent of the parties after that date to such an extent that it must be regarded as if a new contract had been concluded, the court hearing the case may bring the contract within the temporal scope of the Rome I Regulation.[9] We believe that it is very rare today to come across a contract in practice that has not been substantially modified in the last 15 years. Therefore, with each passing year, the relevance of the Convention for the Member States, with the exception of Denmark, is decreasing.

3. THE SCOPE OF THE ROME I REGULATION FOR THE ACTIVATION OF THE OVERRIDING MANDATORY PROVISIONS MECHANISM

The Rome I Regulation has fully extended the possibility of utilising the protective mechanism of overriding mandatory provisions to the courts of those Member States where national provisions of private international law do not include such an institute. Since the conflict-of-law rules have been adopted in the form of a regulation, the opportunity for Member States to enter any reservation is absent. In this article, we address an institute not yet known in the Slovak Act on Private International Law, and therefore we find it necessary for practice to identify the conditions under which national courts may activate the overriding mandatory norms through the Rome I Regulation and to attempt to identify which norms may be attributed such a special nature. The Regulation is an act of secondary Union law and takes precedence in application over the national Act on Private International Law, provided that its scope of application is fulfilled. As mentioned above, with regard to its temporal application, it applies only to contracts concluded after 17 December 2009. However, even a substantial change to a contract after the relevant date may fulfil the temporal scope of Rome I. The personal scope of the Regulation is not defined; it applies *erga omnes*. The territorial scope extends to all Member States except Denmark, where the Convention continues to apply. The substantive scope, *ratione materiae*, is the most extensive. A positive definition is found in Article 1, which states that the Regulation applies to contractual obligations in civil and commercial matters with a foreign element. This is followed by a negative definition that excludes certain matters from the scope of application, such as tax, customs, administrative matters, personal status, obligations arising out of family relationships, and others.[10] In such matters, in the absence of harmonised legislation in the form of a *lex specialis* regulation, and lacking the scope of an international treaty, we will apply the Act on Private International Law, which does not recognise the mechanism of overriding mandatory provisions. Therefore, this protective mechanism can only be activated by a national court if the scope of the Rome I Regulation is fulfilled and the Regulation does not exclude its use. Consequently, it can be used whenever its scope is applicable, irrespective of the presence of a weaker party, the existence of a choice of applicable law, and so on.

[8] Art. 28 of the Rome I Regulation.
[9] CJEU, judgment of 18 October 2016, Nikiforidis, C-135/15, ECLI:EU:C:2016:774, para. 39.
[10] Art. 1 of the Rome I Regulation.

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4. DETERMINING OVERRIDING MANDATORY NORMS

The specific definition of overriding mandatory provisions can be found directly in Article 9(1) of Rome I: *"Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country to safeguard its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation."* Although a definition is provided directly in the regulation, it is necessary to address this concept practically so that the court can identify which norm can be given an overriding mandatory nature. These norms are also referred to in the literature as absolutely peremptory norms or absolutely mandatory norms (Kučera, 2009, p. 238), and the term itself implies that they are overriding precedential mandatory norms. In purely domestic situations, there is no significant difference between mandatory and overriding mandatory norms in terms of binding force. It is the foreign element that introduces potential complications into the issue (Pauknerová, Rozehnalová and Zavadilová et. al., 2013, p. 32). The Rome I Regulation specifies in its recitals that mandatory overriding rules cannot be equated with the concept of the *"expression 'provisions which cannot be derogated from by agreement' and should be construed more restrictively."*[11] It is therefore a subcategory of mandatory rules that are required to be enforced irrespective of the applicable law that the forum must apply (Csach, Gregová Širicová and Júdová, 2018, pp. 58-59). Granting a norm a mandatory character requires some justification. The protection of the public interest is cited, but also the protection of a party's interests, legal certainty, etc. (Csach, 2007, p.108). Every overriding mandatory norm is a mandatory norm, but not every mandatory norm will be an overriding mandatory norm. With the exception of the protection of the weaker party, mandatory norms can be displaced by the choice of applicable law, whereas overriding mandatory norms cannot (Rozehnalová et al., 2021, p. 168). Overriding mandatory norms can encompass both public law norms, which serve the substantial legitimate interests of society, and private law norms, which should be aimed exclusively at protecting a particular essential public interest.[12] It is the public law overriding mandatory norms, capable of triggering private law consequences and regulating the relationship between the state and a private person, that are more likely to be enforced in private law relations with a foreign element. These norms impose an obligation on one or both parties, not in the context of their relationship with each other, but an obligation arising from the public interest. These include competition rules, financial standards regulating capital markets and payments (Rozehnalová et al., 2021, pp. 166-167), foreign trade regulations, the protection of cultural property, and so on (Pauknerová, 2021, pp. 4-5). States are increasingly inclined to regulate public, social, and economic policy objectives precisely through the adoption of public law norms that affect contracts concluded between parties in private law relationships (Ellger, 2012). Overriding mandatory norms are essentially provisions that, according to the state issuing them, are beyond the control of the contracting parties. It is even irrelevant whether the provision belongs to (mandatory) written law or unwritten law, or whether it is to be assigned to private or public law (Hüßtege and Mansel, 2019, p. 208). In the legal order of the Slovak Republic, it is only rarely explicitly expressed which norm is to be considered overriding mandatory for the purposes of private international law (Csach, Gregová Širicová and Júdová, 2018, p. 59). In our view, the fact that these norms are not usually explicitly identified is mainly because

[11] Recital 37 of the preamble to the Rome I Regulation.
[12] Judgment of the Regional Court in Prešov of 24.10.2017, file no. 10Co/56/2016.

it is the court hearing the case that should determine whether, in the particular case under consideration, the norm in question is an overriding mandatory norm and it should be enforced. The overriding mandatory character of a norm may also be established by relevant case law (Kučera, 2009, p. 238).

Decision-making practice has developed a tendency to associate overriding mandatory provisions precisely with the protection of consumers and employees, which, in our view, is not correct in the light of the Rome I Regulation. Also, in the decision-making of Slovak courts, the notion of overriding mandatory norms is often used in connection with the protection of the weaker party.[13] We believe that it is precisely on the basis of the original provisions of the Rome Convention that it has become customary to use this mechanism to protect the weaker party. Under the Rome Convention and the corresponding case law, the mechanism of overriding mandatory norms was explicitly linked to the choice of applicable law in consumer and individual employment contracts. The Convention and the continuity of the Court's interpretative *material* may cause confusion here. It is necessary to move away from established practice because the Rome I Regulation addresses the analysed mechanisms differently from the Convention. The Rome I Regulation provides in Articles 8(1) and 6(2) that, in the choice of applicable law in consumer and individual employment contracts, protection afforded to weaker party cannot be derogated from by provisions that cannot be derogated from by agreement under the law that would be applicable in the absence of choice. It is a different mechanism of protection since it refers to mandatory norms, and, as we have said, overriding mandatory norms is a subcategory thereof. In the Rome Convention, the protection of the weaker party provided for the impossibility of derogating by choice from overriding mandatory, not mandatory, provisions.[14] The change in the Rome I Regulation has extended protection of the employee and the consumer to all mandatory rules, but only rules of that law which would be applicable in the case of contracts with a weaker party. Naturally, it is not excluded that the mechanism of overriding mandatory rules could be used cumulatively in these disputes, but it must be an overriding mandatory rule, not every mandatory rule protecting the weaker party. If it were a mandatory rule of law that would be applicable in the absence of a choice, the court would be obliged to take into account all mandatory rules of that law. As mentioned above, the provisions concerning the choice of applicable law when protecting the weaker party refer exclusively to the mandatory rules of the country whose law would be applicable in the absence of a choice, which may not be the *lex fori* in each situation. If the court deems it necessary to enforce a rule of a specific nature of a law other than that which would be applicable in the absence of a choice, it may enforce only overriding mandatory rules and not all mandatory rules, exclusively on the legal basis of Article 9 of the Rome I. In addition to the considerations set out above, the protection under consumer and employment contracts for the choice of applicable law is taxative,[15] whereas the mechanism of overriding mandatory rules is largely discretionary, and the court must assess which rules are considered overriding mandatory and which it must enforce in a specific case. The court should then apply the overriding mandatory provision by specific reference and should also indicate what its legal consequences are (Hüßtege and Mansel, 2019, p. 212).

[13] E.g., Judgment of the Regional Court in Prešov of 24.10.2017, file no. 10Co/56/2016, Judgment of the Regional Court in Bratislava of 16.06.2016, file no. 3CoPr/6/2015, Judgment of the Regional Court in Nitra of 15.10.2020, file no. 9Co/225/2019.

[14] Art. 5(2) and 6(1) of the Rome Convention.

[15] CJEU, judgment of 14 September 2023, Diamond Resorts Europe and Others, C-632/21, ECLI:EU:C:2023:671, para. 76.

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We are of the opinion that the change introduced by Rome I in the protection of the weaker party also stems from the case law of the Court of Justice per se, which, despite the fact that the Rome Convention contained terminologically overriding mandatory norms for individual employment contracts and consumer contracts, treated them in its case law as mandatory norms for the purpose of protecting the weaker party.[16] Perhaps this practice was one of the reasons why a change in the wording of Rome I was required, in order to clearly distinguish the institute of overriding mandatory rules from the taxative protection of the weaker party in the choice of applicable law. We consider it necessary to move away from the previously established conflation of overriding mandatory provisions with those designed to compensate for the *de facto* weaker party's position in a private law relationship. Similarly, the key *Arblade*[17] judgment, which laid the basis for the definition of overriding mandatory norms, was also concerned with individual employment contracts and mandatory norms of the Union law. However, the Rome Convention was in force at that time and although continuity of interpretation is ensured, it cannot be accepted in this case, since the wording of the provision in question has changed. Rome I clearly distinguished this in the preamble and thus increased the protection of the weaker party in the choice of applicable law, since overriding mandatory rules is a narrower concept than provisions which cannot be derogated from by agreement, mandatory provisions. According to the case law of the Court of Justice, mandatory rules are rules which, although they cannot be circumvented in a domestic contract, may be *"circumvented in an international contract, through the choice of the law that is to govern the contract."*[18] The strength of the parties' autonomy of will, which can be materialised in the choice of applicable law, cannot therefore be limited by all mandatory rules. A *per se* mandatory norm, with the exception of consumer and individual employment contracts, is not capable of limiting the autonomy of the will of the parties; an overriding mandatory norm is.

We consider it necessary to move away from associating overriding mandatory norms to a large extent precisely with the protection of the weaker party. It is already apparent from the foregoing that the legislator of the Union's legislation had an interest in ensuring that, in protecting the weaker party, all the mandatory provisions of the law which would be applicable in the absence of a choice should be enforced, and that overriding mandatory provisions should have a special significance in relation to them, as the most important rules intended to protect the special and general interests of the states, in such a way that they will affect the formation, implementation, and termination of private law relationships with a foreign element (Štefanková and Sumková, 2017, p. 124). As the Regulation does not restrict the mechanism of overriding mandatory provisions, it can also be activated in the case of consumer and individual employment contracts in parallel alongside the choice of applicable law protection mechanism.

Overriding mandatory provisions must be used exceptionally so as not to unduly interfere with the autonomy of the parties' will. It is therefore necessary to view the mechanism of the overriding mandatory norm from a broader perspective. In private law relationships with a foreign element falling within the scope of Rome I, a choice of law clause is often present, which underscores the autonomy of the parties' will as one of the

[16] E.g., CJEU, judgment of 12 September 2013, Schlecker, C-64/12, ECLI:EU:C:2013:55, or Judgment of the Court of 15 December 2011, CJEU, judgment of 15 December 2011, Voogsgeerd, C-384/10, ECLI:EU:C:2011:842.

[17] CJEU, judgment of 23 November 1999, Arblade, C-369/96, ECLI:EU:C:1999:575.

[18] Opinion of Advocate General Campos Sánchez-Bordona delivered on 22 April 2021, *SC Gruber Logistics*, C-152/20, EU:C:2021:323, para. 67.

principles of both private law and the Rome regime as a whole.[19] The court hearing the case must respect this choice and limit it only by a protective mechanism if necessary. The overriding mandatory provisions must therefore be interpreted strictly[20] and restrictively,[21] as they constitute, in practice, a weakening of the fundamental principle of contractual freedom in cases where the applicable law has been determined by choice.[22] A restrictive interpretation is necessary precisely to give effect to contractual autonomy (Hüßtege and Mansel, 2019, p. 208). However, the mechanism is also available in cases where the applicable law has been determined by a conflict-of-laws rule.

Experts agree that distinguishing norms based on whether they protect the public interest or the interest of the individual for the purpose of determining their overriding mandatory nature is not straightforward in practice (Lysina, Haťapka, Burdová et al., 2023, p. 134). Assistance in determining the overriding mandatory provision in the case under consideration is found in the book of Prof. Bělohlávek (2010, p. 1474), who recommends answering the following questions: What is the purpose of the norm and the object of the protected interest? Can we define this interest as a public interest, and would failure to apply such a norm violate the interest in question? Some guidance can also be found in the works of other authors. R. Hüßtege and H.P. Mansel define basically three requirements for the existence of an overriding mandatory norm: It must be a mandatory norm protecting the public interest, and at the same time, the protection of the public interest must be so significant that the norm claims to be enforced regardless of the applicable law (Hüßtege and Mansel, 2019, p. 208). Accordingly, the interest of the individual, even if they were the weaker party, cannot automatically be classified as a public interest. In both German and Austrian practice, the general interest is emphasised in consumer protection in the context of overriding mandatory rules. For example, German case law also considers consumer credit provisions to protect the interests of the individual (Bříza et al., 2014, p. 22). In our view, it is precisely for this reason that weaker parties have received greater protection in Rome I for all mandatory provisions of otherwise applicable law, and the Slovak courts should also shift their practice in the area of overriding mandatory rules away from the protection of the weaker party.

If we compare this with the Czech Republic, the Czech Act on International Private Law[23] reflects to a large extent the EU legislation and regulates the mechanism of overriding mandatory provisions. Very similarly to Slovak national legislation, the Czech legislation does not clearly define which norms are all to be considered overriding mandatory. Among these norms, there are a number of administrative regulations, and financial law regulations which, for example, require official permits as a condition for concluding a certain contract, and so on. In the context of the protection of the weaker party, the authors of the commentary on the Czech legislation have made it clear that an overriding mandatory norm must be more than just a norm that compensates for the *de facto* weaker position of the consumer or employee. It must be a norm that is linked to the protection of the public interest (Bříza et al., 2014, p. 21). This is based on the jurisprudence of the Supreme Court of the Czech Republic, which refused to consider the provision of its Labour Code concerning termination of employment as an overriding mandatory norm and called for a truly exceptional use of the mechanism. In that context,

[19] CJEU, judgment of 18 October 2016, Nikiforidis, C-135/15, ECLI:EU:C:2016:774, para. 42, 43.
[20] CJEU, judgment of 17 October 2013, Unamar, C-184/12, ECLI:EU:C:2013:663, para. 49.
[21] CJEU, judgment of 18 October 2016, Nikiforidis, C-135/15, ECLI:EU:C:2016:774, para. 44.
[22] Opinion of Advocate General Saugmandsgaard Øe delivered on 21 April 2016, *New Valmar*, C-15/15, EU:C:2016:291, para. 26.
[23] Act No. 91/2012 Coll. on Private International Law.

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a fundamental and irreplaceable social importance of the subject matter of such legislation is required.[24] Overriding mandatory norms may therefore include some of the norms intended to protect the weaker party, but they must simultaneously be norms protecting the public interest. We are of the opinion that the objective of balancing the position of the weaker party is not in itself sufficient to activate the mechanism of mandatory norms through Rome I. Overriding mandatory provisions are norms whose observance is imposed on all persons within the territory of a given state and on all legal relations within that state.[25] The subject matter of regulation is thus territorially and personally defined in these norms, and they are enforced compulsorily within this scope. The scope of competence need not necessarily be explicitly stated; it may follow from the very purpose of the norm (Kučera, 2009, pp. 237-238). Thus, if we were to provide guidance, we would rely on the recommendations of the aforementioned authors, as well as on the definition provided by the Rome I Regulation itself. Additionally, some authors suggest examining whether the regulation to which the norm belongs imposes criminal sanctions for its violation and for the breach of the interest protected by the norm, and whether individuals can be prosecuted under this regulation (Bříza et al., 2014, p. 22). However, in the case of overriding mandatory norms, we believe that both criminal and administrative sanctions should be taken into consideration. Therefore, we extend this consideration to both areas. However, this is just one of the guidelines that can assist the court in determining the qualification of these norms. Not all norms of criminal and administrative law automatically qualify as overriding mandatory norms, and the absence of a sanction does not necessarily exclude a norm from being considered overriding mandatory in certain circumstances (Ellger, 2012). Equally, norms whose breach may result in the impossibility of performance or render performance unlawful could be considered as overriding mandatory (Hüßtege and Mansel, 2019, p. 204). It is essential to bear in mind that each situation must be considered individually. Only the court hearing the case is privy to all the circumstances and facts, and therefore, despite the outlined guidelines, it remains for the court to decide whether a particular overriding mandatory provision must be enforced in a specific case. In the following section, we will analyse the possibilities of utilising overriding mandatory provisions considering their origin, as the Rome I Regulation also permits the application of an overriding mandatory provision from another legal order, not solely the *lex fori.*

5. CLASSIFICATION OF OVERRIDING MANDATORY PROVISIONS

Private law relationships with a foreign element may be influenced by overriding mandatory provisions from more than one legal order (Štefanková and Sumková, 2017, p. 125). The Rome I Regulation permits courts hearing a case to apply, in addition to the overriding mandatory rules of the *lex fori*, the rules of *"the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful."*[26] The application of overriding mandatory rules of the forum does not pose a complication for the courts hearing the case, although, as noted, the explicit designation of a rule as overriding mandatory is sporadic in the Slovak legal order. The wording in Rome I does not determine their application, but we can infer from the very nature of these norms being overriding that the court hearing the case has a duty to apply them in situations

[24] Judgment of the Czech Supreme Court of 8 December 2008, file no. stamp 21 Cdo 4196/2007.
[25] CJEU, judgment of 19 June 2008, Commission v Luxembourg, C-319/06, ECLI:EU:C:2008:350, para. 29.
[26] Art. 9(3) of the Rome I Regulation.

where it deems it necessary to do so. The application of the foreign applicable law should not conflict with the overriding mandatory *lex fori* provision (Basedow, 2013, p. 25). It is always up to the courts to determine which overriding mandatory norm is relevant to a particular relationship and whether it should be enforced. The court hearing the case is naturally the most familiar with the overriding mandatory norms of the forum, so some preference for their application may be presumed. It is essential to always bear in mind the autonomy of the parties' will as a fundamental principle of private law relationships. Therefore, it is not possible to systematically consider *lex fori* rules as overriding mandatory norms, except for those that protect an exceptionally important public interest.[27] Regarding the *lex fori* overriding mandatory norms, a question of forum shopping arises. The wording of the Regulation makes it clear that Rome I does not restrict the application of the overriding mandatory provisions of the law of the forum state.[28] These norms are automatically enforced, and the court hearing the case is naturally most familiar with them. Therefore, there is room for discretion for the party to choose before the court of which State to initiate proceedings. The issue of overriding mandatory norms thus penetrates into the procedural aspect of contractual relations. The Brussels I bis Regulation,[29] through which we also determine the jurisdiction of the courts in civil and commercial matters with a foreign element, regulates the possibility and the requirements for the choice of jurisdiction in Articles 25 and 26. Naturally, if we know that the court seized of the matter will enforce the overriding *lex fori* rule, it is possible to assume that the choice would establish the jurisdiction of the forum according to the most favourable regulation of the overriding mandatory provisions. We recommend that this aspect also be taken into account when negotiating prorogation clauses because by establishing the jurisdiction of the forum, we also activate the overriding mandatory norms of the law of the chosen forum. It should be noted that if a party realises only after the dispute has arisen the potential of a particular legislation because of its overriding mandatory provisions, with the exception of the rules on exclusive jurisdiction, we would recommend taking advantage of the option provided for in Article 26 of the Brussels I bis Regulation and trying to establish jurisdiction of the preferred forum through a so-called tacit choice of jurisdiction.[30]

The whole issue takes on a new procedural dimension in light of recent case law of the Court of Justice. In the *Inkreal* judgment, the Court of Justice declared that a clause prorogating the jurisdiction of a foreign forum as the only foreign element in the relationship under consideration is sufficient to fulfil the scope of Brussels I bis, even if the contract in question has no other connection with that other Member State.[31] Thus, should the parties agree, in cases that do not extend beyond the borders of one State, that the courts of another Member State will have jurisdiction to adjudicate their dispute, they thereby activate the overriding mandatory rules of the chosen state. Consequently, the relationship between the procedural level and the applicable law remains questionable. If, in purely domestic cases, the choice of the foreign applicable law were

[27] CJEU, judgment of 17 October 2013, Unamar, C-184/12, ECLI:EU:C:2013:663, para 35.
[28] Art. 9(2) of the Rome I Regulation.
[29] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 351, 20.12.2012, pp. 1–32) (hereinafter referred to as "the Brussels I bis Regulation").
[30] Art. 26(1) of the Brussels I bis Regulation: *„Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 24."*
[31] CJEU, judgment of 8 February 2024, Inkreal, C- 566/22, ECLI:EU:C:2024:123, para. 39.

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made, the choice would not affect the application of the mandatory provisions of the law of that country.[32] However, in addition to these, the overriding mandatory rules of the forum country in question would be enforced through the choice of forum, which in practice could lead to some potential conflict. We therefore consider that Article 3(3) of Rome I would not apply in this case, as the chosen forum would be another element located in that chosen country and thus the situation would not fall within the scope of that provision. It will be interesting to see, from our point of view in general, how the jurisprudence develops after the *Inkreal* judgment.

In the case of overriding mandatory *lex fori* rules, it is essential to mention that the courts of the Member States are bound by the EU *acquis*. In light of the judgment *Costa v. ENEL*, the EU legal order is part of the legal orders of the Member States,[33] and it is therefore always necessary to take into account the overriding mandatory rules arising from the EU *acquis*, which are part of the *lex fori* for the courts of the Member States. Therefore, these rules are therefore not specifically mentioned in the regulation. Consequently, the Slovak courts must apply the overriding mandatory norms of EU law in each case as norms of the forum. Similarly, in *Ingmar* case, the Court confirmed that such norms may also arise, for example, from EU directives transposed by Member States into their national legal orders.[34] If the scope of a national overriding mandatory norm was simultaneously given and the applicable law were to apply a norm which also incorporates overriding mandatory provisions of the EU acquis, it would not be possible to enforce a national norm of a Member State in preference to a norm of EU law.[35] This stems from the principle of the primacy of EU law, which the courts have no discretion to apply in this case. In intra-EU cases, that argument is irrelevant, since the overriding mandatory norms of the EU acquis are also norms of the Member States, of which EU law is part of their legal systems. Nor can the overriding mandatory norms of international law be disregarded.

As mentioned above, the Rome I Regulation allows the application of an overriding mandatory provision of a legal order other than the *lex fori.* The courts are free to activate an overriding mandatory provision of the law of the country in which the obligations *"arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to these provisions, we shall have regard to their nature and purpose and to the consequences of their application or nonapplication."*[36] As we can see, the previously criticised vague formulation has been modified in Rome I, allowing the consideration, alongside *lex fori* norms, exclusively of the overriding mandatory norm of the country connected with the performance of the obligation arising from the contract in question. The court hearing the case must be able to identify those norms before activating the protective mechanism in relation to them. We consider this to be one of the most difficult aspects of judicial decision-making, as it requires becoming fully familiar with the content of foreign law, which may not always be straightforward. Additionally, the Slovak Act on Private International Law, in section 53, limits to a certain extent the principle of *iura novit curia* in proceedings with a foreign element. If acquainted with the content of that foreign law, the court must then identify whether the certain norm is an overriding mandatory norm, not merely in the light of the *lex fori*, but in the context of the legal order to which it belongs. Since most of these norms are not explicitly designated

[32] Art. 3(3) of the Rome I Regulation.
[33] CJEU, judgment of 15 July 1964, Costa/E.N.E.L., C-6/64, ECLI:EU:C:1964:66.
[34] CJEU, judgment of 9 November 2000, Ingmar GB, C-381/98, ECLI:EU:C:2000:605.
[35] CJEU, judgment of 17 October 2013, Unamar, C-184/12, ECLI:EU:C:2013:663, para. 35.
[36] Art. 9(3) of the Rome I Regulation.

as overriding mandatory, the court faces the challenging task of assessing this within the framework of the foreign legal order and often relying on relevant case law. The court hearing the case must consider not only the wording of the provision, but also the general system, the circumstances of the adoption of the provision in question, and the overall teleology.[37] To qualify a norm as overriding mandatory, it must meet a number of objective criteria, and the court is then obligated to provide reasons for applying the norm in question.[38]

The court does not take into account the application of overriding mandatory provisions other than the *lex fori ex officio*; it has discretion whether to give effect to such a provision in the light of the relationship, purpose, and nature of the provision. It should also take into account the consequences of its application or non-application. Some authors have pointed out that there are a number of unresolved issues in the courts' application practice in this case which should be clarified by the Court of Justice, since the status quo in this category of overriding norms does not, to a certain extent, satisfy the requirement of legal certainty (Hüßtege and Mansel, 2019, p. 215). With a *lex fori* overriding mandatory provision, enforcement occurs automatically if the norm has fulfilled its scope, whereas with a provision from another country's legal order, it is always at the discretion of the forum. Under the Slovak Act on Private International Law, section 53(1), the Slovak court has a number of options for ascertaining the content of the foreign law and may also impose an obligation on the parties to the proceedings. By analogy, therefore, we believe that the court hearing the case would rather exceptionally examine *ex officio* the content of the foreign law that is not applicable and identify whether there is a certain overriding mandatory norm in that law that could affect the private law relationship in question. The court hearing the case is not obliged to enforce those norms; it is merely an option that, in our view, would rather be exercised by the court at the initiative of one of the parties. Naturally, the courts have a difficult task on their shoulders in examining the content of the foreign law itself, which is the applicable law. The applicable law need not be the law of the country in which the obligations were to be performed, since Rome I also operates with different connecting factors.

Under the Rome I Regulation, the court hearing the case has the possibility to make use of the protective mechanism of overriding mandatory rules in relation to two categories of such provisions. In addition to the overriding norms of the forum and the overriding norms according to the performance of obligations, the overriding norms of the applicable law, the *lex causae,* are also relevant for the decision of the courts. The doctrine supports the application of overriding mandatory norms of *lex causae* before Slovak courts (Lysina, Haťapka, Burdová et al., 2023, p. 138). We fully agree with Advocate General Szpunart, who stated that the question of the permissibility of the application of the overriding mandatory rules of *lex causae* does not arise at all since they belong to the legal system on which the decision must be based.[39] We therefore prioritise their application on the grounds that they are part of the applicable law. Likewise, Z. Kučera states that these norms are part of the *lex causae* and are used on the basis of the reference of the conflict of laws norm (Kučera, 2009, p. 241). Naturally, a court applying foreign applicable law cannot be fully aware of all the rules of that law. To determine the content, courts focus exclusively on the norm they need to apply to the case. But that

[37] CJEU, judgment of 17 October 2013, Unamar, C-184/12, ECLI:EU:C:2013:663, para. 50.
[38] Opinion of Advocate General Saugmandsgaard Øe delivered on 21 April 2016, *New Valmar*, C-15/15, EU:C:2016:291, para. 28.
[39] Opinion of Advocate General Szpunar delivered on 20 April 2016, *Nikiforidis*, C- 135/15, EU:C:2016:281, para. 76.

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norm is part of the applicable law and cannot be seen in a vacuum. The court has the rather difficult task of familiarising itself with the content of the foreign law to the extent that it needs to know it before applying it, and therefore the courts cannot always be expected to be able to identify all the relevant overriding mandatory norms as well as the relevant case law of that law. If a party believes that a particular overriding norm of foreign law should be enforced, it is recommended that it submit both the full context and any relevant case law for the court's consideration.

Thus, the court hearing the case has a number of options to consider regarding the overriding mandatory rules. Firstly, the rules in the applicable law, which it must apply by virtue of being part of the applicable law. Under the Rome I mechanism, it applies the overriding mandatory *lex fori* norm and it may also apply the norm of the place of performance of the obligation, and it is up to the court which norm it applies as a matter of priority with a view to comparing them. In practical terms, then, let us imagine that the court hearing the case must first identify the applicable law and familiarise itself with its content to the extent necessary for its application to the relationship under consideration. At the same time, it should be familiar with the overriding mandatory rules of that applicable law. Consideration of the overriding mandatory norms of the forum, which can be considered a relatively simple task, is added to this difficult task. Because of their knowledge of the content of their own legislation, the courts are likely to prefer to enforce precisely the *lex fori* norm. It is, indeed, necessary to qualify this norm objectively. We consider that, having dealt with the applicable law and the overriding mandatory provisions of the *lex fori*, the courts would only very rarely, on their own initiative, also examine the legal order according to the place of performance of the obligations, to the extent that, in the light of that law, they would be able to identify its relevant overriding mandatory provisions. Moreover, the place of performance of the obligations must be interpreted autonomously and, in the case of multiple obligations, it is necessary to determine that place for each of them separately. If the court concludes that there are multiple places of performance, we are faced with a situation where it is possible to enforce the overriding mandatory provisions of more than one State, which further complicates the court's task (Hüßtege and Mansel, 2019, p. 216). If a party is aware of the existence of such provisions and believes that they should be enforced in a given case, we recommend that the parties inform the court. Assuming that the court could apply the overriding mandatory rules of the *lex fori, lex causae*, and the rules of another legal order, the Rome I Regulation implies a de facto priority of the rules of the *lex fori* in the event of a conflict. The hierarchy in the application of the other norms cannot be clearly defined, and we agree that the court in this case would have to weigh the interests protected by each norm in light of all the circumstances of the case (Hüßtege and Mansel, 2019, p. 218).

For the whole issue of overriding mandatory provisions not to be simple, the courts hearing the case must also take into account the overriding mandatory provisions of other jurisdictions in the cases under consideration. From our point of view, the judgment of the Court of Justice in the *Nikiforidis* case has given a completely new dimension to the issue of overriding mandatory norms in private law relationships with a foreign element. In its judgment, the Court of Justice also allows the overriding mandatory norms of a State other than the *lex fori* or the State in which the obligations were to be performed or were performed to be taken into account. However, this cannot be to the detriment of ensuring legal certainty in the European judicial area. The overriding mandatory provisions of another State may be taken into account only as a matter of fact, insofar as the substantive rule of the law applicable to the contract under the Rome I Regulation would so provide. Rome I does not harmonise the substantive rules of

contract law, only the conflict-of-law rules.[40] Therefore, it is essential for the court hearing the case to examine the applicable law to the extent necessary to determine whether this is possible under the law of the state concerned. In the application of the substantive applicable law determined on the basis of the Rome I regime, those rules can only form part of a subsidiary premise of a factual nature and must be excluded from the normative premise (Kronenberg, 2022). We find a very interesting judgment on overriding mandatory provisions in German case law. This concerned the Kuwait Uniform Act on the Boycott of Israel, the provisions of which Germany did not recognise as an overriding mandatory norm within the meaning of Article 9(3) of Rome I. The mere existence of that norm and its effects constituted a real obstacle to performance in the case of an air transport of an Israeli citizen scheduled to make a stopover in Kuwait. The same applied to the absence of travel documents required by Kuwait.[41] The omission of these norms, which have a factual character as they result from the operation of a foreign overriding mandatory provision, would be capable of undermining the effectiveness of the substantive provisions (Kronenberg, 2022).

Reflecting on the operation of foreign overriding mandatory provisions as a factual circumstance, we cannot speak of a new obligation as defined by the Court in *Nikiforidis*. In our view, the operation and consideration of these norms as a matter of fact is a logical prerequisite for the effective resolution of a case with a foreign element. Again we see that the court must be sufficiently familiar with the applicable law to assess whether that substantive law permits the consideration of such norms. If it does, it has the further difficult task of identifying the overriding mandatory provisions of other legal orders that are so relevant to the facts of the case that it is necessary to take them into account. In this case, however, we will not fall within the regime of Article 9 of Rome I because that possibility will have a legal basis in the substantive rules of the applicable law, and it is only permissible to take account of the norm as a factual circumstance and not as an overriding mandatory provision within the meaning of the Rome Rules.

6. SPECIFICS OF THE ANALYSED PROTECTIVE MECHANISM FOR NON-CONTRACTUAL OBLIGATIONS

Regarding the chosen protective mechanism, it should be noted that overriding mandatory provisions have been integrated into the general regime for determining the applicable law, covering both contractual and non-contractual obligations governed by the Rome II Regulation.[42] Even for non-contractual obligations, compliance with the Regulation's scope is a prerequisite. The territorial scope applies to all Member States except Denmark, while the personal scope is not defined as in Rome I. Temporal scope is relevant to events giving rise to the damage occurring after January 11, 2009.[43] The substantive scope is also the most extensive here; it must be a non-contractual obligation in civil and commercial matters with a foreign element. At the same time, selected areas are excluded, e.g., non-contractual obligations arising from family relationships, tax, customs, administrative matters and others.[44] Once the scope of the Regulation has been

[40] CJEU, judgment of 18 October 2016, Nikiforidis, C-135/15, ECLI:EU:C:2016:774, para. 46, 51, 52.
[41] OLG Frankfurt 16. Zivilsenat, 25.09.2018, ECLI:DE:OLGHE:2018:0925.16U209.17.00, 2022. Available at: https://www.rv.hessenrecht.hessen.de/bshe/document/LARE190019717/part/K (accessed on 01.05.2024).
[42] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (OJ L 199, 31/07/2007, pp. 40–49) (hereinafter referred to as "the Rome II Regulation").
[43] Art. 31,32 of the Rome II Regulation.
[44] Art. 1 of the Rome II Regulation.

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fulfilled, the mechanism of overriding mandatory provisions can be activated for all non-contractual obligations covered by the Rome II Regulation. However, the options available to the courts in non-contractual obligations are considerably limited compared to those under the Rome I Regulation. The absence of a specific definition of mandatory rules might seem problematic at first glance. Nevertheless this lack of definition does not pose a practical obstacle, as the Regulations aim to ensure uniformity of interpretation.[45] Therefore, the interpretation and definition relating to Rome I can be applied by analogy for mandatory rules under Rome II. The concepts are functionally identical across the Regulations, and the interpretation given by the Court of Justice to mandatory rules under Rome I can similarly be applied to mandatory rules under Rome II.[46]

Under Rome II, similar to Rome I, the mechanism is not limited and applies regardless of whether there has been a choice of applicable law and irrespective of what gave rise to the non-contractual obligation, provided that the scope of the Regulation is fulfilled. Naturally, the choice of applicable law in non-contractual obligations is less common than in contractual obligations. When classifying a norm as overriding mandatory, the court must equally consider the systematic nature, objectives, and circumstances of adoption in the legal order to which the norm belongs.[47]

The most significant difference between the regulations is the obligation of the court under Rome II to apply exclusively the overriding mandatory provisions of the *lex fori* and the impossibility of applying others. The European Commission has attempted, but without success, to include other overriding mandatory provisions besides the *lex fori* in the Rome II Regulation (Rozehnalová et al., 2021, p. 492). For the courts of the Member States, this means that they will enforce their own and, of course, the Union's overriding mandatory provisions. We would add here that, although the regulation does not provide for the enforcement of other overriding mandatory rules, the court hearing the case must still take into account rules of the *lex causae*, as they form part of the applicable law. In addition to the above, it will also apply to Rome II that the court may also take into account an overriding mandatory norm of another state, but only as a factual circumstance relevant to the decision, provided that the substantive rules of the applicable law allow for this possibility.

The regulation further provides, in Article 17, that the court hearing the case must take into account the safety rules in force at the place and time when the event giving rise to liability occurred.[48] Safety rules constitute a special category of provisions which, from our point of view, cannot be equated with overriding mandatory provisions, and the nature of this mechanism is typical only of non-contractual obligations in private law relationships. These include, in particular, traffic rules, provisions aimed at ensuring the safety of buildings, and the like. It can be concluded that these are norms which should be applied directly and could form another sub-category of mandatory norms and could be largely identical to the selected overriding mandatory provisions, but according to experts, the court considers them only as a factual circumstance (Lysina, Haťapka, Burdová et al., 2023, p. 139).

Within the context of the overriding mandatory provisions of the Rome II Regulation, the Bulgarian court initiated the preliminary ruling procedure. The question raised is essentially whether the fundamental principle of the *lex fori*, which is the principle of fairness in determining compensation for non-pecuniary damage in the event of the

[45] Recital 7 of the preamble to the Rome II Regulation.
[46] CJEU, judgment of 31 January 2019, Da Silva Martins, C-149/18, EECLI:U:C:2019:84, para. 28.
[47] Ibid., para 31.
[48] Art. 17 of the Rome II Regulation.

death of close relatives as a result of a criminal offence, can also be regarded as an overriding mandatory rule within the meaning of Rome II.[49] It will be interesting to see how the Court of Justice will deal with the question raised, since the principle is not clearly defined in Bulgarian law and its content, as well as the method of determining the amount of compensation for nonpecuniary damage, is established only in the case law of national courts. On the other hand, the absence of a definition of overriding mandatory rules in the Rome II Regulation and the rather vague wording in the Rome I Regulation makes it impossible to rule out the possibility that they might also encompass principles of that legal order. The only certainty is that it must be a legally binding provision. Some writers have even clarified that an overriding mandatory norm does not necessarily pertain only to the written law (Hüßtege and Mansel, 2019, p. 208). Nevertheless, if the Court of Justice were to hold that there may also be a principle that is only further defined in the case law of the state concerned, that conclusion would be relevant to the entire general regime for determining the applicable law under the Rome I and Rome II Regulations.

7. CONCLUSION

The aim of this article was to define which norms can be considered overriding mandatory in the context of private international law for contractual and non-contractual obligations, and to identify the possibilities for national courts, especially Slovak courts, to utilise the protective mechanism of overriding mandatory provisions when adjudicating private law disputes with a foreign element. While the Slovak Act on Private International Law does not explicitly recognise the mechanism of overriding mandatory provisions, it is conceivable that this possibility could be opened through acceptance of *renvoi* to foreign applicable law. Despite the absence of such a mechanism in Slovak legislation, Slovak courts still have the option to rely on the public policy reservation, albeit limited to protecting the *lex fori*. Although these mechanisms share several common features, we believe it would be advisable to incorporate the mechanism of overriding mandatory provisions into the Slovak Act on Private International Law, particularly considering the differences in features highlighted in the article.

Under the Rome I Regulation, the courts of the Member States are fully empowered to activate the mechanism of overriding mandatory provisions. As demonstrated in this article, the origins of the current regime traced back to the Rome Convention, which, in addition to the explicitly mentioned mechanism, also associated overriding mandatory norms with the protection of the weaker party. It was not possible to deviate by choice from the overriding mandatory norms of the law that would apply in the absence of choice. While the general mechanism was vaguely defined in the original Convention, the formulation provided by the Rome I Regulation offered a relatively clearer legal basis for overriding mandatory provisions. Specifically, the protection of the weaker party in cases of choice replaced overriding mandatory provisions with mandatory ones, thereby extending broader protection to the weaker party. The general mechanism of the overriding mandatory rule was introduced for both *lex fori* provisions and the provisions of the law of the state in which the obligations under the contract were performed or are to be performed. If different obligations under the contract had such distinct places, the application of the overriding mandatory provisions of more than one legal order would also come into play.

[49] Reference for a preliminary ruling, *HUK-COBURG-Allgemeine Versicherung*, C-86/23.

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In the decision-making practice of Slovak courts, we observe that this mechanism is largely associated with the protection of the weaker party. From our perspective, this association originates directly from the original provisions outlined in the Convention, which is why we have dedicated significant attention to it in the article. However, it's important to note that not every mandatory provision protecting the weaker party can be considered an overriding mandatory norm. As demonstrated, courts should depart from the traditional practice of applying overriding mandatory norms solely in the context of weaker parties. Any provision, whether in public or private law, that is legally binding, serves the public interest, and, considering all circumstances of the case at hand, must be applied regardless of the applicable law, can qualify as an overriding mandatory norm.

To preserve the autonomy of parties' will and ensure legal certainty within the European judicial area, it is imperative to interpret the concept of overriding mandatory norms restrictively and activate the mechanism only in strictly justified cases. Enforcing an overriding mandatory norm entails the risk that the *lex causae* may be displaced, potentially distorting the outcome with politically motivated national rules from another State (Hüßtege and Mansel, 2019, p. 204). While the Rome I Regulation permits the application of the overriding mandatory rule of the *lex fori* and the law of the State where obligations are performed, the case law of the Court of Justice also allows for the consideration of an overriding mandatory rule of another state, but only as a factual circumstance, if permitted by the substantive rules of the applicable law. Additionally, the overriding mandatory rules of the *lex causae* must be taken into account, as they form part of the applicable law. In the EU context, the prioritised application of the overriding mandatory norms of the EU *acquis*, which are integrated into the legal orders of the Member States and considered part of the *lex fori* by the courts, must not be overlooked.

The scope for non-contractual obligations is limited under the Rome II Regulation, which exclusively allows for the application of overriding mandatory *lex fori* rules. Additionally, the court considers the overriding mandatory provisions of the *lex causae*, not as part of a protective mechanism, but to be integral to the applicable law that the court is obligated to apply. However, we believe that even in non-contractual obligations, courts may consider the overriding mandatory provisions of other legal orders as a relevant factual circumstance, provided that the substantive rules of the applicable law permit such consideration.

However, it ultimately falls on the court hearing the case to determine whether a norm qualifies as overriding mandatory, considering the objectives of the legal order to which it belongs. Moreover, the court must decide which overriding mandatory norm to enforce when multiple such norms are involved. These norms are often not explicitly delineated in legal orders, highlighting the discretionary power of courts in activating this mechanism, while considering all the circumstances of the case. As previously mentioned, courts face a challenging task, particularly when assessing the overriding mandatory norms of a foreign legal order. Additionally, the principle of *iura novit curia* has certain limitations in private international law. Therefore, if the parties are aware of the existence of a foreign overriding mandatory norm relevant to their relationship, they should propose its consideration to the court. Ultimately, it is within the court's discretion whether to enforce the norm as an overriding mandatory provision.

Considering that numerous Member States' legal systems incorporate this mechanism, and the fact it is also enshrined in Union regulations formulated within the framework of judicial cooperation in civil and commercial matters, the Slovak Republic ought to contemplate integrating the protective mechanism of overriding mandatory norms into the text of its Act on Private International Law. This incorporation, particularly

concerning the overriding mandatory norms of the *lex fori*, would gradually serve to harmonise the options available under both national and EU legislation.

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BALANCING DEMOCRACY AND HUMAN RIGHTS: THE ROLE OF CONSTITUTIONAL IDENTITY IN THE EUROPEAN COURT OF HUMAN RIGHTS' RECENT JURISPRUDENCE / Mahir Muharemović, Benjamin Nurkic

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Abstract: *The paper examines the tension between democracy, human rights, and power-sharing constitutional arrangements in multi-ethnic states, focusing on the Kovačević v. Bosnia and Herzegovina case and contrasting it with recent Latvian cases before the European Court of Human Rights (ECtHR). It analyses the significance of the Kovačević judgement, which found Bosnia's ethnic-based power-sharing system discriminatory, and the Latvian cases, where the ECtHR accepted 'constitutional identity' as a legitimate aim for differential treatment. The paper discusses the concept of constitutional identity, its recognition by the ECtHR, and the potential challenges it poses to the protection of human rights. It explores the balance between respecting democratic choices, constitutional identities, and upholding individual rights under the European Convention on Human Rights.*

Key words: *Power-sharing; Constitutional Identity; Democracy v. Human Rights; Multi-ethnic States; European Court of Human Rights; Margin of Appreciation*

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1. INTRODUCTION

The article delves into a critical and contemporary issue in international law and human rights by investigating the intricate and often contentious relationship between democratic governance, human rights, and constitutional identity as interpreted by the European Court of Human Rights (ECtHR). Central to this inquiry is the complex question of how the ECtHR reconciles the democratic principles of national sovereignty with the universal standards of human rights, especially within the context of multi-ethnic states. The article poses essential questions: Can the concept of constitutional identity be a legitimate aim and justify differential treatment of particular groups within a society? If so, what are the ground rules to identify and classify the concept of 'constitutional identity'? Is every constitutional identity legitimate? This is examined through key ECtHR cases, particularly Kovačević v. Bosnia and Herzegovina, alongside several recent Latvian cases, which highlight the court's inconsistent approaches. In this regard, a comparative legal analysis is deployed to explore the ECtHR's judgements and their broader

implications. By focusing on the court's interpretive principles, such as dynamic or evolutionary interpretation and the margin of appreciation, the analysis seeks to understand how human rights standards are adapted to national contexts while striving to maintain a cohesive human rights framework.

In the first part of the article, a brief overview of the democracy versus human rights debate is presented, delving into the theoretical and practical tensions between national sovereignty and the universality of human rights, questioning how these principles can coexist without compromising each other. In exploring the notion of constitutional identity, the article examines its legal recognition and implications within the ECtHR's framework. It scrutinises how constitutional identity is defined and utilised in legal arguments, raising questions about whether it serves to protect or undermine human rights. The discussion section broadens the analysis, examining the implications of the aforementioned cases for the balance between democracy, human rights, and constitutional identity. It critically assesses whether the ECtHR's deference to national constitutional identities compromises human rights protections and what this means for future jurisprudence.

2. THE DEMOCRACY VS. HUMAN RIGHTS DEBATE: IN BRIEF

The debate between democracy and human rights is one of the most compelling and contentious issues in contemporary political discourse. At the heart of this debate is the inherent tension between the principles of national sovereignty, which is foundational to democratic governance, and the universality of human rights, which seeks to establish a common standard for the treatment of individuals regardless of national boundaries. This tension is particularly pronounced in the context of international human rights enforcement mechanisms, such as the European Court of Human Rights (ECtHR), which often find themselves at the crossroads of respecting state sovereignty and upholding universal human rights standards (Donnelly, 2020).

Integral to this discourse is the concept of constitutional identity, which serves as an expression of a nation's democratic legitimacy and sovereignty. Constitutional identity encompasses the core values, principles, and norms that define a state's constitutional order. It reflects the unique historical, cultural, and social context of a nation and represents the collective self-understanding of its people. Constitutional identity plays a crucial role in shaping a nation's approach to human rights. It provides the framework within which human rights are understood, interpreted, and implemented.

The ECtHR is a key player in this debate, as it is tasked with enforcing the European Convention on Human Rights (ECHR) among its member states. The court's interpretive principles, such as dynamic or evolutionary interpretation and the margin of appreciation, are designed to navigate the complex relationship between universal human rights and national sovereignty. Dynamic interpretation allows the court to adapt human rights standards to evolving societal norms and conditions, while the margin of appreciation grants states some discretion in how they implement these rights, recognising the diversity of cultural and legal traditions across Europe. However, these principles can also lead to significant friction. Dynamic interpretation can be perceived as judicial overreach, where the court is seen as imposing its own evolving standards on sovereign states. This is particularly contentious when these standards conflict with the democratic decisions made by national governments. The margin of appreciation, while intended to respect national differences, often becomes a battleground over how much discretion states should have in implementing human rights obligations. This tension is especially visible in highly political cases, particularly as they pertain to the organisation

of a state's political system. Graziadei argues that these tensions are often exacerbated in cases involving consociational democracies, or power-sharing systems, which are designed to prevent or overcome inter-community violence (Graziadei, 2016).

On the other side, the ECtHR has recognised that democracy requires not only the holding of regular and free elections but also the existence of a pluralistic political system that allows for the expression of diverse opinions and the participation of all individuals in the decision-making process. The ECtHR has especially highlighted the importance of protecting the rights and freedoms of individuals and minority groups in a democratic society. It has emphasised that democratic governance should be based on the rule of law, respect for human rights, and the principle of non-discrimination (Zand, 2017).

3. THE SIGNIFICANCE OF THE RECENT JURISPRUDENCE OF THE ECtHR

3.1 The Kovačević Case

In *Kovačević v. Bosnia and Herzegovina,*[1] the ECtHR ruled that the country's constitutional framework, which established an ethnically based power-sharing system, violated the ECHR's Protocol No. 12. The Court held that the system discriminated against non-constituent peoples,[2] as it gives preferential treatment to the three constituent peoples (Bosniaks, Croats, and Serbs).[3] The ECtHR emphasised that such discrimination undermined the democratic character of elections and amplified ethnic divisions within the country.[4] The judgement has highlighted the need for constitutional reform to reduce the institutional relevance of ethnicity and promote genuine democracy.[5]

3.1.1 The Problematic Power-Sharing Arrangements of the Bosnian Constitutional System

Bosnia and Herzegovina has a power-sharing system known as *consociational democracy*. Some authors (see Merdzanovic, 2017) also use the term 'imposed consociationalism' since this system was imposed by international intervention aimed to create a stable and inclusive political system in Bosnia and Herzegovina after the war.[6] In general, consociational democracy is a political system that aims to prevent the 'tyranny of the majority' over smaller groups in divided societies. It has been implemented in Bosnia and Herzegovina as a means of maintaining peace and democracy in a post-conflict society (Simovic, 2022).

The consociational approach in Bosnia and Herzegovina combines federalism and shared-rule and self-rule to address the demands of ethnic groups for autonomy while preserving the integrity of the state (Aras, 2020). The Bosnian system aims to balance the autonomy of the three major ethnocultural groups while fostering a national community and common civic identity (Yehuda, 2023). The post-Dayton political organisation of Bosnia has faced difficulties in implementing the pluralist model of consociational democracy due to the lack of electoral or political incentives for

[1] ECtHR, Kovačević v. Bosnia and Herzegovina, app. no. 43651/22, 29 August 2023.
[2] *Ibid.*, para. 56.
[3] *Ibid.*, para. 61.
[4] *Ibid.*, para. 56.
[5] *Ibid.*, para. 74.
[6] *Ibid.*

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cooperation among the ethnic groups. The inclusion of partition elements in the Dayton Accords 'has allowed ethnic leaders to maintain their nationalistic programs and exploit power-sharing arrangements' (Tzifakis, 2007, p. 85).

Therefore, the implementation of power-sharing mechanisms in Bosnia and Herzegovina has led to the dominance of ethnocracy and ethnopolitics, compromising an inclusive democracy untied from ethnonational issues. The power-sharing arrangements in Bosnia and Herzegovina have been criticised for violating the principles of equality and non-discrimination, as highlighted already by the European Court of Human Rights (ECtHR) ruling in the case of *Sejdić and Finci v. Bosnia & Herzegovina* (Piacentini, 2020; Woelk, 2023).

It is clear that consociationalism is often used as a transitional arrangement to resolve conflicts in divided societies, but it can also hinder long-term democracy and social peace (Boldt, 2012), as the example of Bosnia and Herzegovina shows. But one should also recall that the institutional choices made in the power-sharing systems have had different effects in Bosnia and Herzegovina, North Macedonia, and Kosovo. The more corporate consociational structures in Bosnia and Kosovo make it difficult for real change, while North Macedonia's more liberal consociational institutions allow for change within ethnic parties and across groups (Hulsey and Keil, 2021).

3.1.2 Implications for the Democracy v. Human Rights Debate

The *Kovačević* judgement has significant implications for the debate on democracy versus human rights. By prioritising human rights over the preservation of a power-sharing system designed to ensure ethno-democratic representation, the ECtHR signalled a further shift in its approach to balancing these competing interests. The ruling suggests that the ECtHR is increasingly willing to scrutinise and potentially overturn power-sharing arrangements that it deems to be discriminatory, even if such arrangements were established to promote peace and stability. As ECtHR explains regarding this 'peace and dialogue are best maintained by an effective political democracy… Therefore, no one should be forced to vote only according to prescribed ethnic lines, irrespective of their political viewpoint'.[7] Somehow the ECtHR with this statement has delegitimised power-sharing arrangements that are justified only by the preservation of peace and stability. Thus, this judgement can be seen as activist as the findings of the ECtHR not only emphasise why Bosnia and Herzegovina must find a more inclusive alternative for non-constituent peoples, but also provides an instruction set of principles on how to achieve this. Furthermore, the ECtHR expects and advocates for a transition from the consociational model to a future with no (or less) consociation in Bosnia and Herzegovina (Istrefi, 2023).

In the context of the case, the Bosnian Government argued that this electoral system was necessary to maintain peace and power-sharing in a nation deeply divided along ethnic lines following a brutal conflict.[8] Essentially, the Bosnian Government claimed that its very survival as a nation depended on this specific arrangement, and that protecting this system was more important than a strict interpretation of individual voting rights. The ECtHR acknowledged the complex situation in Bosnia and Herzegovina and the need to balance minority and individual rights within a post-conflict power-sharing framework.[9] However, the ECtHR found the existing system to be fundamentally discriminatory and in breach of the ECHR's protections against discrimination and the

[7] *Ibid.*, para. 74.
[8] *Ibid.*, para. 46.
[9] *Ibid.*, para. 55.

right to free elections. The ECtHR emphasised that even if a system of ethnic representation might remain in place,[10] it needed to also protect the rights of citizens like Kovačević, who did not belong to these dominant groups. The case highlights the fact that, indirectly, the constitutional identity argument cannot offer a blanket excuse for human rights violations. The ECtHR was sensitive to Bosnia and Herzegovina's specific national context but did not consider overriding it. It showcases the Court's use of proportionality analysis. One should also note the Court's decision, while substantially rejecting the legitimate aim argument in this case, does not explicitly center on this aspect. Instead, it primarily addresses the fundamental disproportionality of the electoral system itself. The Court did not fully dismantle Bosnia and Herzegovina's system but insisted on the need for reform to bring it closer in line with human rights standards. It demonstrates that the ECtHR sees democracy as broader than just ethnic representation, encompassing principles of inclusivity and individual political rights for all citizens.

3.2 The Latvian Cases: Contrasting Perspectives

However, the *Kovačević* judgement has also faced criticism, particularly in light of recent rulings by the ECtHR in three Latvian cases. In *Savickis and Others v. Latvia*[11], *Valiullina and Others v. Latvia*[12], and *Džibuti and Others v. Latvia*[13], the Court upheld Latvia's differential treatment of Russian-speaking minorities regarding pensions, education, and language rights. The judgement in the case of *Savickis and Others v. Latvia* has established that the protection of *constitutional identity* can be considered a legitimate aim for differential treatment in certain circumstances. The Court balanced the right to non-discrimination under Article 14 of the ECHR to protect constitutional identity and ultimately found no violation of these provisions in the case. It provides a precedent for states to argue that differential treatment is justified if it is aimed at protecting their constitutional identity (Nugraha, 2023, p. 141). However, these judgements have raised concerns that the ECtHR is adopting a more deferential approach towards national constitutional identities, potentially undermining the protection of human rights for minorities.

These cases are part of the concept of *constitutional identity*. This refers to the core values and principles enshrined in a state's constitution. Some states have argued that their constitutional identity should allow them to limit certain ECHR rights in the name of national values or traditions.

4. THE NOTION OF 'CONSTITUTIONAL IDENTITY'

The ECtHR's recent practice has brought the attention of scholars and practitioners of human rights law to the term 'constitutional identity' (Son, 2017). Although there is no consensus on the unique definition of constitutional identity, the basic consensus on the definition of constitutional identity is that it represents fundamental and unchangeable values of a constitution (Scholtes, 2021; Baudoin, 2022). Indian Supreme Court in 1974 ruled, for example, that the power to amend does not entail the power to alter the basic structure of the Constitution. Similarly, the Italian Constitutional Court came up with the same conclusion that higher values of the

[10] *Ibid.*
[11] ECtHR, Savickis and Others v. Latvia [GC], app. no. 49270/11, 9 June 2022.
[12] ECtHR, Valiullina and Others v. Latvia, app. nos. 56928/19, 7306/20 and 11937/20, 14 September 2023.
[13] ECtHR, Džibuti and Others v. Latvia, app. nos. 225/20 and 2 others, 16 November 2023.

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Constitution cannot be amended even through constitutional amendments (Scholtes, 2023). Constitutional identity shall constitute the constitutional originality of each state, regardless of 'does it establish a presidential or parliamentary system, a unitary or federal state - to the relation between the constitution and the culture in which it operates, and to the relation between the identity of the constitution and other relevant identities, such as national, religious, or ideological identity' (Rosenfeld, 2012, pp. 756–757). As Drinóczi points out, 'the identity of the constitution is found among provisions of constitutional texts and related jurisprudence that specifically and exclusively feature a status that was constituted during the constitution-making process and shaped by either formal or informal constitutional amendments' (Drinóczi, 2020, p.129). Constitutional identity, thus, makes a difference between states in the sense of constitutional orders. Somehow, constitutional identity aims to bring plurality to the globalised world where constitutions are, more or less, unified by the same constitutional standard such as the rule of law, human rights, parliamentarianism, checks and balances, federalism, etc.

However, in the globalised world, and in the era of international obligations of states regarding human rights, many states found constitutional identity as the answer to the internationalisation of domestic legal orders. In particular, this trend of circumventing international obligations by employing constitutional identity as an argument, so far, could be seen in the EU. Since respecting 'national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'[14] is the foundation of the EU, member states have been utilising their constitutional identities to reduce the penetration of international (EU) law in domestic legal orders. Accordingly, the German Constitutional Court in the *Lisbon Treaty* case,[15] found the power to invoke the constitutional identity argument based on the mentioned provision of the TEU (Grimm, 2023, pp. 13–15). This prospect for invoking constitutional identity by member states has created space for abusing constitutionalism. For example, the Visegrád countries have defined and employed constitutional identity in rejecting migrant relocation quotas in the EU (Kovács, 2017). In this sense, constitutional identity has been found to be a suitable argument for 'endorsing illiberal measures in the EU member states' (Körtvélyesi and Majtényi, 2017, p. 1743). In endorsing illiberal measures by employing the argument of constitutional identity, authoritarian or semi-authoritarian regimes argue that they have their original version of protecting human rights, the rule of law, and democracy, for example, regardless that their 'original version' does not meet the fundamental criteria of these principles (Bard, Chronowski, and Fleck, 2023, p. 34). What was the response of the European Court of Justice (CJEU) regarding the abuse of constitutional identity? The CJEU in the landmark judgement in the case of Hungary and Poland[16] for the first time in such clear terms defined constitutional identity and at the same time, it responded to the increasing trend of abusing the constitutional identity argument for promoting illiberal and autocratic measures. However, the CJEU did not abandon constitutional identity *per se*, but it detached constitutional identities from unconstitutional identities (Faraguna and Drinóczi, 2022). More precisely, the CJEU states that 'the European Union respects the national identities of the Member States, inherent in their fundamental structures, political and constitutional, such that those States enjoy a certain degree of discretion in implementing the principles of the rule of law, it in no way follows that that obligation as to the result to be achieved may vary from

[14] Article 4(2) of the TEU.
[15] Germany, Federal Constitutional Court, 2 BvE 2/08 (30 June 2009).
[16] CJEU, judgement of 16 February 2022, Hungary v. European Parliament and Council of the European Union, C-156/21, ECLI:EU:C:2022:97; and CJEU, judgment of 16 February 2022, Republic of Poland v. European Parliament and Council of the European Union, C-157/21, ECLI:EU:C:2022:98.

one Member State to another. Whilst they have separate national identities, inherent in their fundamental structures, political and constitutional, which the European Union respects, the Member States adhere to a concept of "the rule of law" which they share, as a value common to their own constitutional traditions, and which they have undertaken to respect at all times.'[17] In that manner, the CJEU pointed out that although member states have sovereign power in establishing their own constitutional identities, those identities must adhere to the basic concept of the rule of law in the EU. This perspective of the CJEU could also be placed in the context of public international law and the provision of the Vienna Convention from 1969 which states that states 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.[18]

The argument of constitutional identity has been spreading to ECtHR as seen in the recent Latvian cases. These cases have invoked the question if constitutional identity is a legitimate aim in limiting human rights under ECHR. Unlike the TEU, the ECHR does not recognise constitutional identity in the text, but within the ECHR's framework, constitutional identity is recognised through the 'margin of appreciation' which creates room for invoking constitutional identity as a legitimate aim (Halmai and Scholtes, 2024, p.273). In this sense, three Latvian cases have been icebreaking for successfully utilising constitutional identity to legitimise the unequal treatment of citizens before the ECtHR. In other words, the ECtHR in *Savickis and Others v. Latvia*; *Valiullina and Others v. Latvia*; and *Džibuti and Others v. Latvia*; has accepted the Latvian argument of constitutional identity for differential treatment of citizens. These cases delivered the important question of how the ECtHR will deal with future cases where states will employ constitutional identity as a legitimate aim for unequal treatment. To answer this question, firstly, we will compare *Bosnian* and *Latvian* cases before the ECtHR because both were about constitutional matters and unequal treatments and at the same time, they invoked different legitimate aims, with different outcomes in the context of ECtHR judgements in these cases.

5. COMPARISON OF BOSNIAN AND LATVIAN CASES BEFORE THE ECtHR - INVOKING PEACE AND CONSTITUTIONAL IDENTITY AS LEGITIMATE AIMS

Bosnia and Herzegovina became famous for *Sejdić and Finci v. B&H* case which brought two novelties to the ECtHR's jurisprudence. First, the ECtHR challenged the provisions of a constitution, and on top of that Protocol 12 of the ECHR was for the first time invoked in such a case. What was it about? The Bosnian Constitution was established as a part of the Dayton Peace Agreement in 1995. Because the Constitution was the outcome of peace-making negotiations, it prescribes exclusive seats for the constituent peoples (three major ethnic groups: Bosniaks, Serbs, and Croats) regarding the Presidency of B&H and the House of Peoples of B&H (Articles IV and V). Therefore, citizens of Bosnia and Herzegovina, including members of national minorities, who are not affiliated with any of the constituent peoples, cannot be candidates for these institutions. *Sejdić and Finci v. B&H* was the first case before the ECtHR where the position of the constituent peoples was contested before the ECtHR. Subsequently, *Zornić v. B&H*, *Pilav v. B&H*, *Šlaku v. B&H*, *Pudarić v. B&H*, and *Kovačević v. B&H* came up to the ECtHR challenging the same provisions of the Bosnian Constitutions. The ECtHR in all mentioned cases, followed the same argument, that the Bosnian Constitution

[17] CJEU, judgement of 16 February 2022, Hungary v. European Parliament and Council of the European Union, C-156/21, ECLI:EU:C:2022:97, paras. 233-234.
[18] Article 27 of the Vienna Convention on the Law of Treaties 1969.

discriminates against all people in B&H who are not the constituent peoples including national minorities, and the constituent peoples who dwelt in a 'wrong' entity.[19]

The ECtHR found discrimination under Article 14 along with Article 3 of Protocol No. 1 of the ECHR and under Article 1 of Protocol No. 12. The Bosnian Government argued that the preservation of peace is the reason why the constituent peoples enjoy privileges within the Constitution and since peace is still fragile in Bosnia and Herzegovina, there is still the necessity to maintain the position of the constituent peoples within the Bosnian Constitution. However, the ECtHR in contesting provisions in the context of the legitimate aim and necessity stated:

When the impugned constitutional provisions were put in place a very fragile ceasefire was in effect on the ground. The provisions were designed to end a brutal conflict marked by genocide and 'ethnic cleansing'. The nature of the conflict was such that the approval of the "constituent peoples" … was necessary to ensure peace. This could explain, without necessarily justifying, the absence of representatives of the other communities (such as local Roma and Jewish communities) at the peace negotiations and the participants' preoccupation with effective equality between the "constituent peoples" in the post-conflict society. The Court does not need to decide whether the upholding of the contested constitutional provisions after the ratification of the ECHR could be said to serve a "legitimate aim" since for the reasons set out below the maintenance of the system in any event does not satisfy the requirement of proportionality.[20]

In other words, the Bosnian Government has invoked peace as the legitimate aim for the privileges of the constituent peoples. The ECtHR ruled that since stable peace was established, there is no reason to maintain these privileges in the constitutional order of Bosnia and Herzegovina. This is the core of all Bosnian judgements before the ECtHR. Following the argumentations of the ECtHR judgements, it can be concluded that in the eyes of the ECtHR, the B&H constitutional order is just a temporary solution (emphasised on contested constitutional provisions), till B&H enacts a new democratic constitution (Bardutzky, 2010, p. 328). In addition, regarding the proportionality of the contested constitutional provisions, the ECtHR stated that there was no 'need to decide whether the upholding of the contested constitutional provisions after the ratification of the Convention could be said to serve a "legitimate aim" since for the reasons set out below the maintenance of the system, in any event, does not satisfy the requirement of proportionality.'[21] The reasons are the progress that was made by Bosnia and Herzegovina after the conflict, and thus constitutional provisions that serve to maintain peace have no reasons to be maintained in force.

On the other hand, in the recent case of *Savickis and Others v. Latvia*, constitutional identity was utilised as a legitimate aim for different treatment of citizens. More precisely, Savickis and four other applicants challenged provisions of Latvia's legal system that prescribe differential treatment in the calculation of pension between Latvian citizens and the 'permanently resident non-citizens' (*nepilsoņi*) (Nugraha, 2023). In fact, *nepilsoņi* are the people who moved to Latvia after the Soviet Union annexed it. Still, after Latvia regained its full independence, Latvian citizenship was not restored for the mentioned category of peoples, because their migration to Latvia was considered as the

[19] ECtHR, Sejdić and Finci v. B&H [GC], app. nos. 27996/06 and 34836/06, 22 December 2009, para. 2; ECtHR, Zornić v. B&H, app. no. 3681/06, 15 July 2014, para. 3; ECtHR, Pilav v. B&H, app. no. 41939/07, 9 June 2016, para. 3; ECtHR, Šlaku v. B&H, app. no. 56666/12, 26 May 2016, para. 3; ECtHR, Pudarić v. B&H, app. no. 55799/18, 8 December 2020, paras. 5-6.

[20] ECtHR, Sejdić and Finci v. B&H [GC], app. nos. 27996/06 and 34836/06, 22 December 2009, paras. 45-46.

[21] *Ibid.*, para. 46.

aftermath of the unlawful annexation of Latvia.[22] In other words, for non-citizens of Latvia (*nepilsoni*), employment in former USSR republics outside the Latvian SSR is excluded from pension calculations, whereas for Latvian citizens with ancestral ties predating Soviet occupation, such employment is always included, making nationality the sole basis for this distinction.[23] This different treatment was challenged under Article 14 of the ECHR taken along with Article 1 of Protocol No. 1. The ECtHR, in this case, has ruled that there is no violation of the mentioned Article of the ECHR.[24] Interestingly, the ECtHR has accepted the protection of *constitutional identity* as a legitimate aim for the different treatment of citizens. More precisely, the Latvian government argued that 'the impugned difference in treatment was directly based on the doctrine of State continuity and, by extension, had its roots in public international law. It had at least two legitimate aims: protection of Latvia's economic system following the restoration of its independence and respect for the principle of State continuity and constitutional identity'.[25] Apart from accepting the protection of constitutional identity as a legitimate aim, the ECtHR also defined constitutional identity in this particular case, which is not of course the universal definition of constitutional identity. Therefore, for the ECtHR, the protection of constitutional identity is not the doctrine of State continuity *per se* but [rather relies on] the constitutional foundation of the Republic of Latvia following the restoration of its independence. The underlying arguments for Latvia's doctrine of State continuity stem from the overall historical and demographic background, which, as argued by the Government, accordingly, also informed the setting up of the impugned system of retirement pensions following the restoration of Latvia's independence. More specifically, the Court acknowledges that the aim in that context was to avoid retrospective approbation of the consequences of the immigration policy practised in the period of unlawful occupation and annexation of the country. In this specific historical context, such an aim, as pursued by the Latvian legislature when establishing the system of retirement pensions, was consistent with the efforts to rebuild the nation's life following the restoration of independence, and the Court accepts this aim as legitimate.[26]

This definition of constitutional identity delivered by ECtHR, in the context of the ECHR and constitutional identity as a legitimate aim, is unclear and leaves room for different interpretations in the future. Namely, the ECtHR accepted the emergence of the Latvian constitutional identity based on the state continuity of Latvia, which indeed appears as a vague concept. The state continuity doctrine in Latvia is found on historical occasions of Latvia regaining independence from the Soviet Union. Accepting historical occasions as constitutional identity, the ECtHR has given a wide margin of appreciation to Latvia (Nugraha, 2023).[27]

Constitutional identity as a legitimate aim has also been confirmed in the *Valiullina and Others v. Latvia* case, where the ECtHR ruled about reforms in public schools that partly prevented Latvian children from minority groups from obtaining education in their mother tongue. The ECtHR, by accepting constitutional identity as a legitimate aim has approved further restrictions on Russian-language teaching in public schools, depriving a large part of the Latvian population of education in their mother tongue

[22] *Ibid.*
[23] ECtHR, Savickis and Others v. Latvia [GC], app. no. 49270/11, 9 June 2022, paras. 66-68.
[24] *Ibid.*
[25] *Ibid.*, para 176.
[26] *Ibid.*, paras 214-219
[27] ECtHR, Savickis and Others v. Latvia [GC], app. no. 49270/11, 9 June 2022, Dissenting Opinion, paras. 12-13.

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(Ganty, Kochenov and Nugraha, 2023). In this context, the ECtHR stated that 'the questions pertaining to the need to protect and strengthen the State language go to the heart of the constitutional identity of the State, and it is not the Court's role to question the assessment made by the Constitutional Court in that regard unless it was arbitrary, which the Court does not find in the present case'.[28]

So, there are some correlations between Bosnian and Latvian cases before the ECtHR. Firstly, both have been on constitutional matters and unequal treatment of citizens in these states. Both states have invoked historical occasions as legitimate aims for different treatment, Bosnia and Herzegovina has invoked the war occasions, and Latvia has invoked gaining independence from the Soviet Union as specific historical occasions. But these states have done it differently - Bosnia and Herzegovina has invoked preservation of peace as a legitimate aim, and Latvia has invoked constitutional identity as a legitimate aim. Latvia was significantly more successful before the ECtHR since its legitimate aim has been accepted by the ECtHR as appropriate in restricting human rights, and Bosnian legitimate aim was not since the ECtHR stated that there is no reason and necessity to maintain provisions whose aim is to preserve peace in Bosnia and Herzegovina.

Regarding the unequal treatment, Latvian cases were contested under Article 14 along with other Articles. Bosnian cases, including the mentioned Article, were contested under Article 1 of Protocol 12. Accordingly, this comparison raises the important question - is constitutional identity more of a suitable argument (legitimate aim) for justification of unequal treatment than the preservation of peace? Constitutional identity, so far, has not been contested as a legitimate aim under Protocol 12, and the pending[29] *Kovačević v. B&H* case before the Grand Chamber does not indicate that the question of the privileges of the constituent peoples, as the core of the constitutional identity of B&H, will be resolved.

6. IS THE KOVAČEVIĆ CASE CHALLENGING THE BOSNIAN CONSTITUTIONAL IDENTITY?

As explained, the ECtHR in the case *Kovačević v. B&H*, has ruled that provisions of the Bosnian Constitution regarding domination of the constituent peoples are not in line with the ECHR's standards regarding prohibition of discrimination. The Court has followed the reasoning of the *Zornić* case, reiterating that since stable peace was established, there is no reason to maintain these provisions. However, this judgment is not final, as the case is currently pending before the ECtHR Grand Chamber following an appeal lodged by the Bosnian Government against the initial ruling. According to the ECtHR jurisprudence in the Latvian cases we mentioned, this pending case raises a question: *Can the Bosnian Government invoke constitutional identity as a legitimate aim instead of preservation of peace?* We consider it relevant since this argument of constitutional identity has already been developed and established in the jurisprudence of the Bosnian Constitutional Court.

In that context, the Bosnian Constitutional Court developed, in two cases, a constitutional identity called the *constituency of peoples*. In its third partial decision on judgement U-5/98, the Bosnian Constitutional Court was tasked with determining

[28] ECtHR, Valiullina and Others v. Latvia, app. nos. 56928/19, 7306/20 and 11937/20, 14 September 2023, para. 208.

[29] See the status of the case here: https://ks.echr.coe.int/web/echr-ks/w/referral-of-kovacevic-v.-bosnia-and-herzegovina-to-the-grand-chamber

whether the constitutions of the entities conformed to the national Constitution. More precisely, although the Bosnian Constitution prescribed Bosniaks, Serbs, and Croats are constituent peoples, at that time, only Bosniaks and Croats were constituent in the Federation of Bosnia and Herzegovina, and only Serbs were constituent in the Republika Srpska. To solve this problem, the Bosnian Constitutional Court has established the concept of the constituency of peoples which guarantees that all constituent peoples are constituents in all territory of Bosnia and Herzegovina regardless of whether they are a *de facto* minority in any of the entities. Thus, the Constitutional Court defined the constituency of peoples as the democratic principle that guarantees equal protection of all ethnic groups in the multi-ethnic state that enjoys the special position within the Bosnian constitutional framework as the overarching principle with which Entities must fully comply.[30] The Bosnian Constitutional Court, intentionally or not, defined the constituency of peoples as the *sui generis* concept which can bring balance to the multi-ethnic state and implicitly defined the constituency of peoples as the constitutional identity of Bosnia and Herzegovina

The constitutional identity argument was again repeated by the Bosnian Constitutional Court in the *Ljubić* case, where the Court ruled that the constituent peoples are not equally represented in the state institutions because 'the right [of the constituent peoples] to participate in democratic decision-making exercised through legitimate political representation will not be based on democratic election of delegates to the House of Peoples of the Federation of Bosnia and Herzegovina by the constituent people that are represented and whose interests are represented by those delegates'.[31] The Bosnian Constitutional Court again reiterated that the constituency of people is overcharging the principle of the Bosnian Constitution, and all other provisions must comply with it.[32]

However, this notion of constitutional identity has been developed within the constitutional framework of Bosnia and Herzegovina, but it has never been explicitly invoked by the Bosnian government and challenged before international human rights tribunals such as the ECtHR.[33] But one can argue that this Bosnian constitutional identity entails the argument of 'preserving peace and stability' since this constitutional framework based on the constituent peoples was primarily created to enable power-sharing to stabilise the functioning of the institutions of Bosnia and Herzegovina. Only functioning and stable institutions can guarantee peace and stability. There is no doubt that the power-sharing constitutional model of Bosnia and Herzegovina is part of its constitutional identity. The question remains, of course, if this sort of constitutional identity is permanent or only temporary, as implicitly suggested in the previous jurisprudence of the ECtHR.[34]

[30] The partial decision Constitutional Court of Bosnia and Herzegovina, U-5/98 (30 June and 1 July 2000), paras. 53, 57, 63.
[31] Constitutional Court of Bosnia and Herzegovina, U-23/14 (1 December 2016), para. 60.
[32] *Ibid.*, para. 49.
[33] Although the Bosnian Government invoked in the Kovačević v. B&H case (fn1, para. 46) the case of ECtHR, Ždanoka v. Latvia [GC], app. no. 58278/00, 17 June 2004, in which the Court had reaffirmed that 'the Contracting Parties enjoyed considerable latitude in establishing rules within their constitutional order to govern parliamentary elections and the composition of the parliament, and that the relevant criteria could vary according to the historical and political factors peculiar to each State'.
[34] See footnote no. 19.

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7. QUO VADIS CONSTITUTIONAL IDENTITY?

The ECtHR must strike a balance between the legitimate role of democratic self-governance in member states and the legitimate demands of human rights. The ECtHR has sometimes been too willing to intervene in the internal affairs of member states, and this has led to a backlash against the Court in some countries (Pildes, 2018). International courts face a legitimacy dilemma when called upon to rule on the human rights compatibility of these power-sharing systems, as they may be seen as overstepping their authority by interfering in the domestic affairs of a sovereign state (Graziadei, 2016). The ECtHR must walk a fine line between protecting human rights and respecting the democratic process. It must also be careful not to overreach in its decisions, as this could undermine its legitimacy. In her dissenting opinion[35] in the *Kovačević* case, Judge Kucsko-Stadlmayer raised, *inter alia*, the question of discrimination based on representation. The judge stated that the ECtHR in this case '(…) insinuates an unprecedented concept in which every voter has an individual right to candidates by whom he or she is "represented".' Although the ECtHR intended to enable all segments of society, to have a chance to be represented in public institutions where decisions are made that bind all members of this society, it is another question of how far the ECtHR can intervene in the very structure of a political system (especially fragile as consociational democracies) without risking to break it.

The only viable path for the ECtHR seems to be granting a greater 'margin of appreciation'[36] to states regarding the legitimate aim of protecting the 'constitutional identity', especially in cases of consociational democracies.

As the Latvian cases indicate, the ECtHR is accepting the argument of 'protecting the constitutional identity' as a legitimate aim and is potentially giving countries more leeway (margin of appreciation) in how they define and protect their identity, even if it restricts rights. But it becomes harder to predict where the line will be drawn between a state's legitimate right to protect its core values and the ECHR's mandate to protect individual rights universally. The ECtHR has acknowledged the concept of constitutional identity, but it has not offered a strictly defined set of what can constitute it. Constitutional identity may encompass aspects beyond written constitutional text, potentially including historical narratives, deeply rooted values, and cultural traditions (like in the Latvian cases). Member states' courts have significant influence in defining the content of their constitutional identity. The flexibility in the concept creates the risk that a government could justify almost anything under the guise of constitutional identity, including measures that undermine core human rights. In the Latvian cases, the ECtHR made the 'constitutional identity' a 'magic spell to transubstantiate violations of the ECHR' (Ganty, Kochenov and Nugraha, 2023).

On the other hand, the *Kovačević case* raises some questions to the ECtHR that will need to be answered in its evolving jurisprudence. First, what predictable methodology the ECtHR will be using to identify and recognise a country's constitutional identity? It is evident that the ECtHR has not afforded Bosnian constitutional identity the same weight or status as it has granted to Latvia's constitutional identity. The ECtHR, unlike the Latvian cases, should have a more insightful approach regarding the recognition of constitutional identity. As Halmai and Scholtes point out, 'constitutional

[35] ECtHR, Kovačević v. Bosnia and Herzegovina, app. no. 43651/22, 29 August 2023, Dissenting Opinion, para, 20.

[36] The 'margin of appreciation' is a doctrine that the ECtHR uses to allow member states some flexibility in interpreting and applying the ECHR. The margin of appreciation reflects the Court's recognition that not all human rights are interpreted in the same way in all countries. See more in: Pildes (2018).

identity should be seen as an unconditional source of value - it only deserves recognition to the extent that it serves the ideals of constitutionalism' (Halmai and Scholtes, 2024, p. 273).

Following the question of recognition, there is the second challenge for the ECtHR, and that is the classification of constitutional identities. As Faraguna points out, 'constitutional identity is an extremely dangerous tool, not fully compatible with basic principles of constitutionalism' (Faraguna, 2017, p. 1640). Accordingly, this paper argues that the ECtHR ought to look up to the recent practice of the CJEU regarding constitutional identities and detaching the 'legitimate' from the 'non-legitimate' constitutional identities. To do this, we assume that there are abusive and non-abusive constitutional identities. The main differentiating factor between these two categories should be whether constitutional identities adhere, in general, to the rule of law and democratic principles (non-abusive constitutional identities) or serve exclusively the particular interests of certain groups within the constitutional order (abusive constitutional identities). To further clarify things, the ECtHR would also have to take into account if there is a 'European consensus' [37] on that matter.

So, we argue that constitutional identity can be a legitimate argument in human rights (case) law, but not under every circumstance. International (regional) human rights bodies to save their legitimacy among states by respecting constitutional identities as a valid argument from constitutional (domestic) law, and at the same time protection of human rights, must distinguish abusive from non-abusive constitutional identities. In that manner, the ECtHR (and other international human rights bodies) would create space for states to protect their constitutional identities, but at the same time, it would prevent states from abusing constitutional identities for breaching human rights. In this regard, coming back to the *Kovačević* case, if the ECtHR recognises the constituency of peoples as the Bosnian constitutional identity, the ECtHR could still rule that the constituency of peoples is an abusive constitutional identity since it does not serve the ideals of constitutionalism - more precisely - does not serve the rule of law and human rights which are also defined in the Bosnian Constitution.[38] However, that would only be the first step since the Bosnian constitutional provisions have to pass through the test of proportionality and necessity.

8. CONCLUSION

Based on the comprehensive examination of recent jurisprudence, it is clear that the European Court of Human Rights (ECtHR) faces a complex task in balancing democracy, human rights, and constitutional identity. The *Kovačević* case against Bosnia and Herzegovina underscores the Court's commitment to upholding human rights even when it challenges entrenched power-sharing arrangements designed to maintain peace in post-conflict societies. In contrast, the Latvian cases reveal a more deferential stance towards national constitutional identities, allowing for differential treatment in the name of protecting these identities.

The core challenge lies in the ECtHR's need to navigate between respecting national sovereignty and ensuring that human rights are universally protected. This

[37] The European Court of Human Rights (ECtHR) frequently relies on the concept of European consensus in its jurisprudence when interpreting the European Convention on Human Rights (ECHR). This consensus is crucial for aligning the Court's interpretation of Convention rights with common values among member states. See more in: Lewis (2023).

[38] Article I(2) and Article II of the Bosnian Constitution. Also, see Marko (2023).

requires a nuanced approach where the Court must distinguish between legitimate and abusive uses of constitutional identity. A legitimate constitutional identity should align with the rule of law and democratic principles, whereas an abusive constitutional identity serves narrow interests and undermines fundamental human rights. But how wide this 'margin of appreciation' of member states is in these cases depends on the context of each individual case, especially which human rights are at stake and if there is an existing 'European consensus' regarding concrete human rights standards. Nevertheless, bearing in mind the fragility of power-sharing constitutional orders, it is probably more appropriate for the Court to constrain itself by granting more leeway to states, especially in decisions regarding political and voting arrangements in (consociational) democracies. In these cases, also the principle of subsidiarity must be taken into account. The credo here is: do not cause greater harm even if this means not to intervene.

Moving forward, it is crucial for the ECtHR to establish clearer guidelines and methodologies for recognising and evaluating constitutional identities. By doing so, the Court can better manage the delicate balance between national particularities and universal human rights standards, ensuring that the protection of human rights is not compromised by the invocation of constitutional identity. This balanced approach will not only enhance the legitimacy of the ECtHR but also contribute to the broader goal of harmonising democracy and human rights within the diverse constitutional landscapes of its member states.

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ORGANISATIONAL NATIONALISATION – SEIZING CONTROL OF AN ORGANISATION WITHOUT TRANSFERS OF PROPERTY RIGHTS ON THE EXAMPLE OF HOUSING COOPERATIVES IN PEOPLE'S POLAND / Piotr Eckhardt

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Abstract: *In all Central and Eastern European countries during the period of the establishment of state socialism after World War II, nationalisation involving the state taking over ownership of certain categories of property in order to build an economic system in line with the new ideological principles took place. In Poland, large land estates, enterprises belonging to basic branches of the economy, or all real estate in the city of Warsaw were nationalised. The nationalisation of housing cooperatives contradicted the official declarations of the People's Poland authorities, who promised to support cooperative movement. However, a number of legal regulations were introduced with the help of which the People's Poland authorities took control over housing cooperatives in order to, at first, practically force them out of operation and, later, instrumentally use them to implement the state's housing policy. Centralisation of cooperative movement and hierarchical subordination of cooperatives to state-controlled associations were carried out. The economic activities of the housing cooperatives were subordinated to the principles of a centrally planned economy. The possibility of creating new cooperatives was restricted, and the authorities reserved the right to liquidate existing ones. The order in which cooperatives allocated housing to their members was superimposed. Later, cooperatives were forcibly merged, and the area in which they could operate was restricted. Cooperative self-government was partly transformed into local state administration. In the case of housing cooperatives in People's Poland we cannot speak of proper nationalisation because there were no transfers of ownership. However, all other effects of nationalisation took place, but were achieved by other means. Such measures can be described as organisational nationalisation, which was also carried out in other spheres in People's Poland.*

Keywords: *Nationalisation; Housing Cooperatives; State Socialism; People's Poland; Legal History*

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1. INTRODUCTION

The nationalisation of certain kinds of private property was one of the mechanisms of economic transformation during the construction of state socialism after World War II in basically all Central European countries (Obradović, 2007, p. 58-59), which was the consequence of views on property in the dominant political ideology at the time (see Kovács, 2018). In the contemporary academic literature, the issue is more frequently featured indirectly, in the context of research on the problem of property restitution as part of political transition in post-socialist states (see, e.g., Damşa, 2007; Kuti, 2009; Lux, Cirman and Sunega, 2017).

The definition of nationalisation was debated after World War II, when international law scholars examined the international effects of new economic policies introduced by particular states. Isi Foighel summarised that in the literature nationalisation was differentiated from expropriation and other traditional forms of interference with property because of the specific: motive, purpose, extent, subject-matter and form (Foighel, 1957, p. 14). After a lengthy debate, the Institut de Droit International adopted the following definition: "Nationalisation is the transfer to the State, by legislative measure in the public interest, of private property or rights of a certain category, to be used or controlled by the State, or to be given a new purpose by the State" (Annuaire, 1952, p. 283). Foighel argued that this definition was too broad and included expropriation in the traditional sense as well - he gave the example of the state taking over agricultural land in order to build railways, which according to this definition should also be considered nationalisation. He pointed out that the characteristic purpose of nationalisation is to prevent private owners from using their property for their own economic purposes, while at the same time allowing the state to use the nationalised property in the existing way (Foighel, 1957, pp. 18-19).

On the example of Romania, Emod Veress identified six characteristic features of nationalisation in the socialist countries of Central and Eastern Europe: (1) legal acts introducing nationalisation usually indicated only general categories of property and required detailed administrative decisions, against which, however, there were no remedies; (2) the object of nationalisation was property constituting the means of production according to Marxist terminology; (3) the effect of nationalisation was a permanent transfer of property from private hands to the state; (4) the beneficiary of nationalisation was, according to Marxist theory, the people and effectively the state (and not some state-owned company or other entity); (5) the purpose of nationalisation was to achieve a desirable economic order, free from exploitation of the working class; (6) there was no absolute requirement for compensation (Veress, 2022, pp. 249-252). I consider Veress's concept to be accurate, with the reservation that I believe that the fifth feature, concerning the construction of a new economic system as an objective, is the most important one, while the others should not be treated absolutely. This is because it is possible to find examples of acts which lacked some of these features and can still be regarded as nationalisation for the purpose of building state socialism (e.g., in Poland, expropriated large land estates were only partly used to create state agricultural holdings. Much land was handed over to small farmers. However, this still served the purpose of liquidating the landowning class - the pre-war aristocracy).

With the aforementioned reservation, it can be considered that shortly after the end of World War II in the People's Poland a number of legal acts were introduced which implemented the nationalisation of: private agricultural estates (with an area exceeding

50 or 100 hectares, depending on the specific conditions),[1] private forests (exceeding 25 hectares),[2] of all immovable property on the territory of the City of Warsaw,[3] enterprises operating in key sectors of the economy (e.g., energy, mining, transport, defence industry) and all other enterprises employing more than 50 people per shift,[4] as well as all movable or immovable property which belonged before the World War II to citizens of the German Reich and the Free City of Danzig and companies controlled by them, and property abandoned during the war whose owners have not retaken possession of it.[5]

A common element in the definitions of Veress and Foighel and all the above-mentioned acts of the People's Poland was the transfer of property. Such interventions in private property can be called *proper nationalisation*.

The seizure by the state of the ownership of land estates belonging to the pre-war aristocracy or large enterprises owned by capitalists was entirely in line with the ideological principles of the emerging People's Poland. However, there were also entities possessing large estates (including numerous valuable real estates) whose proper nationalisation would contradict the official political declarations of the new authorities. This does not mean that the leaders of the People's Poland gave up on taking control of them. There were solutions applied which did not involve the transfer of property rights to the state, but their effects were in many respects similar to nationalisation fulfilling the definitions cited in the introduction and implemented in People's Poland on the basis of the laws and decrees cited above. This paper presents the results of an analysis of the most relevant case of such actions: changes in the legal regulation of the principles of organisation and functioning of housing cooperatives in Poland in the years 1945-1989. On this basis, an attempt will then be made to construct a concept of *organisational nationalisation*, which performed in state socialism similar political functions to proper nationalisation, but without the transfer of property rights.

2. THE FIRST YEARS AFTER WORLD WAR II AND 1950s - THE STATE TAKES CONTROL OF THE COOPERATIVE MOVEMENT

The history of Polish housing cooperatives dates back to the turn of the twentieth century, when the area of contemporary Poland was controlled by the Russian Empire, the Habsburg Monarchy and Prussia (Płocharski, 1979, pp. 5-6). After Poland regained its independence in 1918, these organisations began to develop gradually. Cooperatives of two types were formed: housing cooperatives and construction-housing cooperatives. The latter required larger financial contributions from members but offered full ownership of dwellings (Kasperski, 1972, p. 6). In 1938, there were 194 construction-housing cooperatives and 67 housing cooperatives in Poland (Maliszewski, 1992, p. 56). In 1920, a law regulating the activities of cooperatives was adopted.[6] Importantly, it did not contain any regulations allowing the state authorities to influence the formation, operation and liquidation of cooperatives.

[1] Decree of the Polish Committee for National Liberation of 6 September 1944 on the Implementation of Land Reform (Dz.U. 1944 nr 4 poz. 17).
[2] Decree of the Polish Committee for National Liberation of 12 December 1944 on the Taking Over of Certain Forests to the Ownership of the State Treasury (Dz.U. 1944 nr 15 poz. 82).
[3] Decree of 26 October 1945 on the Ownership and Use of Land in the Area of the Capital City of Warsaw (Dz.U. 1945 nr 50 poz. 279).
[4] Law of 3 January 1946 on the Takeover of Essential Branches of the National Economy into State Ownership (Dz.U. 1946 nr 3 poz. 17).
[5] Decree of 8 March 1946 on Abandoned and Post-German Property (Dz.U. 1946 nr 13 poz. 87).
[6] Law of 29 October 1920 on Cooperatives (Dz.U. nr 111 poz. 733).

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The People's Poland authorities, which were forming with Soviet assistance, expressed their support for the broad development of cooperatives already in their first ideological declaration, the July 1944 Manifesto of the Polish Committee of National Liberation. The inclusion of such a formulation in the manifesto basically ruled out the proper nationalisation of cooperatives, including housing cooperatives. Almost at the same time, the communists began to subordinate the cooperative movement. Already on 25 and 26 November, under pressure from the new authorities and with interference from the security services, the Cooperative Congress was held. It was organised in Lublin, as a large part of Poland, including Warsaw, was still under German occupation. Two key decisions were made at the congress, which were crucial for the subsequent decades of development of cooperative activity in Poland. First, the unification of the cooperative movement was achieved. On the basis of one of the large pre-war associations of cooperatives, the "Społem" Economic Association of Cooperatives of the Republic of Poland was created, which brought together all cooperatives in the country. Secondly, the principle of the apolitical nature of the cooperative movement was broken, giving full support to the new communist authorities (Chyra-Rolicz, 2002).

At the Second Congress of Delegates of 'Społem', which took place on 25 and 26 November 1947, steps were taken towards further centralisation of the Polish cooperative movement. Resolutions were then passed calling for the creation of the Central Cooperative Union, an institution representing all Polish cooperative organisations. Within its structures, the so-called cooperative headquarters, i.e., unions of cooperatives operating in particular sectors of economy, were planned (Płocharski, 1979, p. 35). The close relationship between the highest bodies of the then cooperative movement and the authorities of People's Poland is evidenced by the pace of implementation of these demands. As early as May 1948, the Law on the Central Cooperative Union and Cooperative Headquarters was passed.[7] According to Article 28 of this act, the cooperative headquarters was an entity bringing together all cooperatives of a given type (carrying out a given activity), and Article 29 stated that each cooperative had a duty to belong to the relevant cooperative headquarters. This was the first step towards centralising the cooperative movement and stripping individual cooperatives of their autonomy.

Based on these regulations, on 1 July 1948, the Headquarters of Housing Cooperatives was established (Płocharski, 1979, p. 36). Its statute included ambitious objectives: social housing was to be initiated, developed, and supported by carrying out architectural and construction work, as well as organising the administration of housing estates (Płocharski, 1979, pp. 36-37). The statute of the Housing Cooperatives Headquarters indicated that these undertakings should be carried out within the framework of the state planned economy, but the general wording of these provisions allowed for the hope that, despite the far-reaching centralisation, housing cooperatives would still be able to build and manage new dwellings.

However, at the same time, the People's Poland authorities issued the Decree of 26 April 1948 on the Department of Workers' Estates.[8] On the basis of this legislation, a state enterprise was created, which was supposed to take over all investment activities in the area of housing financed by the state within the framework of the centrally planned economy. The Department of Workers' Estates was to establish branches responsible for the construction of housing for specific parts of the country and for employees of specific branches of the economy (there was even provision for the possibility of creating a

[7] Law of 21 May 1948 on the Central Cooperative Union and Cooperative Headquarters (Dz.U. nr 30 poz. 199).
[8] Decree of 26 April 1948 on the Department of Workers' Estates (Dz.U. 1948 nr 24 poz. 166).

branch for the construction of housing exclusively for the employees of one specific state enterprise). According to the decree mentioned above, the Department of Workers' Estates was responsible not only for all aspects of the investment processes (preparing the land, constructing new buildings, repairing damaged houses and completing unfinished ones, as well as carrying out scientific research into methods of housing construction), but also for the subsequent administration of the buildings it had constructed. It is therefore clear that the socialist state decided to implement the entire housing policy by its own efforts, through a company created specifically for this purpose. Such a move raised serious doubts as to whether the fulfilment of the objectives contained in the statute of the Housing Cooperatives Headquarters would be possible at all. The cooperative fears began to be confirmed from the very beginnings of the Department of Workers' Estates. A few months after its establishment, the Warsaw Housing Cooperative was forced to hand over to it the building it had rebuilt after the war, and not for housing purposes, but for the offices (Maliszewski, 1992, p. 88). Shortly afterwards, the Department of Workers' Estates took over a housing estate in the Mokotów district, which was being built by this cooperative, in order to complete it on its own (Kasperski, 1971, p. 27).

It is necessary to explain the sources of the conflict of interests between the state-owned enterprise Department of Workers' Estates, which was established at the same time, and the Housing Cooperatives Headquarters, which was only slightly more indirectly controlled by the political apparatus of the state. In the years 1945-1948 there was a dispute over the shape of People's Poland's social and economic system, and the future role of cooperative organisations in the state's economy was one of its areas (Kowalik, 1980, pp. 55-63). By 1948, when the Polish United Workers' Party was founded, there were two major political formations: the Polish Workers' Party and the Polish Socialist Party. It was the members of the later party who saw the need for strong social control over the economy. The cooperative movement would be one of its instruments. However, members of the Polish Socialist Party were pushed away from influencing state policy (Madej, 2003, p. 15). Economists associated with the Polish Workers' Party began to play a greater role, advocating a tighter implementation of the Soviet economic model, based on state ownership with the simultaneous reduction of the role of cooperative ownership (Tymiński 2018, pp. 177-178). They formulated the position that in a socialist system the housing problem could and should be solved by the state and at the expense of the state (Kasperski, 1971, p. 26).

Eventually an intermediate option prevailed, which was, however, very close to the view of the redundancy of cooperative organisations in People's Poland. Formally, they were allowed to continue to function, but in practice they were deprived of the remnants of independence. At the end of 1949, a deep amendment of the Law of 1920 was made.[9] The act's new wording[10] provided a different definition of cooperative. Until then, it was just an association of an unlimited number of persons with variable capital and composition, aiming to improve their economic situation by running a joint enterprise. According to the definition in the amended law, the association mentioned above should not carry out any enterprise, but only economic activities that fall within the framework of the national economic plan. The Central Cooperative Association was given the competence to create model statutes for particular types of cooperative. These documents were not supporting material for people establishing new cooperatives but

[9] Law of 20 December 1949 amending the Law of 29 October 1920 on Cooperatives and the Law of 21 May 1948 on the Central Cooperative Union and Cooperative Headquarters (Dz.U. 1949 nr 65 poz. 524).
[10] Law of 29 October 1920 on Cooperatives, as amended (consolidated text: Dz.U. 1950 nr 25 poz. 232).

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formally binding guidelines. When registering a cooperative, the court reviewed the draft of its statute to ensure compliance with the model set by the Central Cooperative Union. Subsequent articles added to the Law of 1920 granted the Union a number of possibilities to interfere directly in the situation and activities of particular cooperatives. The Central Cooperative Union could dispose of the businesses run by them, merge cooperatives, and even liquidate them. Each of the provisions allowing that mentioned the same justification for such decisions: the reasons of a centrally planned economy. After the revision of the Law of 1920, the criteria for controlling the activities of cooperatives included not only compliance with the law and the statute, but also the implementation of the guidelines of state policy and economic plans and the compliance of activities with the principles of the socialised economy. The Supreme Cooperative Council, an organ of the Central Cooperative Union, gained the power to overrule the resolutions not only of the bodies of the local branches of the union and of the cooperative headquarters, but even of particular cooperatives. The revised law indicated not only a violation of the law but also other important reasons as a sufficient reason for such action. As a result of the entry into force of the 1949 amendment, the Polish cooperative movement was not liquidated, but in principle lost its independence completely.

Due to the deep centralisation of the cooperative movement introduced by the amendment of the Law on Cooperatives and the subordination of cooperatives to the centrally planned economy with the simultaneous transfer of all investment activities in housing to the Department of Workers' Estates within the framework of this economy, the possibilities of pursuing the statutory objectives of the Housing Cooperatives Headquarters were drastically reduced. In such a situation, the Supreme Cooperative Council made a top-down decision to dissolve it (it was done on 30 June 1950, so Headquarters existed only for two years). At the same time, the Office of Housing Cooperatives was established, which was sufficient in a situation in which the cooperatives carried out very limited activities, consisting practically only of managing the buildings they already owned (Płocharski, 1979, p. 44).

The changes in cooperative law described above increased state control over the functioning of organisations operating in all sectors of the economy. Specific restrictions particularly severe for housing cooperatives came from the new regulations introduced into the housing law at that time. In Poland, the so-called public management of dwellings was introduced as early as 1944, under which the state was the disposer of dwellings located in private buildings (Fermus-Bobowiec, 2019, p. 246). In the first years after World War II, the housing situation was so dire that the People's Poland authorities decided to introduce certain investment incentives for private entities, regardless of the already started construction of a socialist economy based on central planning and state ownership. Regulations were adopted that exempted premises located in thoroughly renovated buildings from the aforementioned restrictions on the disposal of private property.[11] Similar measures were applied to newly constructed buildings.[12] These exceptions to the public management of dwellings were eagerly used by housing cooperatives. In February 1951, the Act on Newly Built and Rebuilt Buildings and Dwelling[13] was passed, with virtually the sole purpose of eliminating the aforementioned exemptions. Based on administrative decisions, dwellings in buildings belonging to housing cooperatives were allocated to persons who were not members of these

[11] Article 6 of Decree of 26 October 1945 on the Demolition and Repair of Buildings Destroyed and Damaged by War (Dz.U. 1945 nr 50 poz. 281).
[12] Article 6 of Law of 3 July 1947 on the Promotion of Construction (Dz.U. 1947 nr 52 poz. 270).
[13] Law of 26 February 1951 on Newly Built or Rebuilt Buildings and Dwellings (Dz.U. 1951 nr 10 poz. 75).

cooperatives. They paid very low rents, regulated by law, which did not cover the real maintenance costs of the buildings. The resulting shortfalls in the cooperatives' budgets had to be supplemented by their members. In some buildings, 70-80% of the dwellings were occupied by people who were not members of the cooperative, living there on the basis of administrative decisions issued under the public management of dwellings (Płocharski, 1979, pp. 46-48). This meant that the remaining 20-30% of residents who were members of the cooperative were burdened with the need to cover most of the actual costs of maintaining the building. As a result, not only were the development and investment activities of housing cooperatives blocked, but even the daily maintenance of buildings already owned was significantly hampered by state policy. The actual restriction of the independence and possibilities of action of housing cooperatives did not prevent the authorities of People's Poland from making successive formal declarations of support for the cooperative movement. The 1952 Constitution of the People's Republic of Poland[14] included Article 11, which stipulated that the state shall promote the development of the various forms of the cooperative movement in the cities and in the countryside and shall give it comprehensive assistance in the fulfilment of its tasks, and that the cooperative property, as social property, shall be provided with special care and protection.

The situation of housing cooperatives improved during the so-called thaw of 1956. In December of that year, the National Congress of Delegates of Housing Cooperatives was held, at which the Union of Housing Cooperatives was established, which was to be the beginning of the restoration of democracy in the cooperative movement (Płocharski, 1979, p. 89). In May 1957, some of the unfavourable legal changes were reversed, with the adoption of a law that excluded dwellings in buildings owned by housing cooperatives from the public management of dwellings.[15]

3. THE 1960s: HOUSING COOPERATIVES BECOME AN INSTRUMENT OF STATE HOUSING POLICY

However, it soon became apparent that the aim of the People's Poland authorities was not to restore the independence of housing cooperatives, but to use them instrumentally to implement housing policy. At the 10th Plenum of the Central Committee of the Polish United Workers' Party, its First Secretary, Władysław Gomułka, stated that the state was unable to build the necessary amount of housing relying solely on its own funds and workers and had to help in this regard (Kasperski, 1971, p. 30). The premise of the new housing policy was to allocate state construction to the less well-off and to use private funds to finance housing construction. In the case of multifamily buildings, housing cooperatives aimed to serve this purpose (Andrzejewski, 1979, p. 160). They became a tool in the hands of the state. In practice, they took over the tasks of the state housing administration (Madej, 2003, p. 80). In the eyes of the general public, membership in a housing cooperative was not a choice but the only available form of obtaining a dwelling (Jarosz, 2010, pp. 233-235).

The new Law on Cooperatives and their Associations,[16] adopted in 1961, maintained the forced centralisation and hierarchical organisation of the cooperative

[14] Constitution of the People's Republic of Poland adopted by the Legislative Sejm on 22 July 1952 (Dz.U. 1952 nr 33 poz. 232).
[15] Law of 28 May 1957 on the Exclusion from Public Management of Dwellings of Single-Family Houses and Dwellings in Houses of Housing Cooperatives (Dz.U. nr 31 poz. 131).
[16] Law of 17 February 1961 on Cooperatives and their Associations (Dz.U. nr 12 poz. 61).

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movement. No solutions realistically increasing the independence and self-governance of the cooperative movement have been introduced. The full implementation of the People's Poland authorities' new approach to the role of housing cooperatives took place as part of the Five-Year Plan implemented between 1966 and 1970. The economist specialising in Polish housing, A. Andrzejewski refers to this period as the beginning of the "cooperative phase of housing policy" (Andrzejewski, 1979, p. 162). The legal tools used to implement the particular solutions were eight acts issued by the Council of Ministers, commonly referred to as the 'May Resolutions' (Chrzanowski, 1968, p. 377). They determined that the source of financing for cooperative construction would be the cooperative members' own funds, supplemented by bank loans and, in certain cases, by the funds of particular workplaces. Obtaining bank loans depended on adherence to state-imposed standards regarding, among other things, the size of the flats. Restrictions were introduced on the possibility of applying for dwellings from state resources, which led to a further increase in the number of applicants for housing cooperative dwellings. There were such numbers of new members in the cooperatives that it became impossible to allocate flats to everyone (Jarosz, 2010, p. 236). Consequently, one of the 'May Resolutions' introduced the institution of a candidate waiting to become a member of a housing cooperative. The headquarters of housing cooperatives (then called the Central Association of Housing Cooperatives) had the right to introduce a minimum waiting period in locations (not particular cooperatives!) where the number of applicants exceeded the number of flats planned to be completed in the next 5 years. At the same time, a list of numerous exceptions to the obligation to wait for a specified period was introduced in the universally binding regulations (these were often related to employment in specific workplaces important to the authorities). According to A. Maliszewski, there were so many possibilities to circumvent the queue that the May Resolutions effectively incapacitated cooperative self-governments, which no longer had much to say about the order in which flats were allocated to their members (Maliszewski, 1992, p. 107).

4. THE 1970s AND 1980s: FURTHER BUREAUCRATISATION AND CENTRALISATION OF HOUSING COOPERATIVES

The further centralisation of housing cooperatives progressed with the so-called process of reorganising the cooperative network, which began at the end of the 1960s (Kasperski, 1971, p. 66). The Council of the Central Association of Housing Cooperatives passed a resolution according to which, by 1970, all cooperatives were to be transformed into so-called district cooperatives, whose area of activity should correspond to the administrative division of cities. The cooperatives were forbidden to make investments outside their district. Projects already started should have been handed over to locally competent cooperatives (Maliszewski, 1992, p. 110). It was decided that in towns with up to 50,000 inhabitants, there should be a housing cooperative as a rule. In larger towns, the number and area of cooperatives should correspond to the administrative division of the town into districts (Kasperski, 1971, p. 66). As a result of the changes imposed by the Central Association of Housing Cooperatives, a person who wanted to live in a cooperative dwelling in a particular town or district lost the possibility of choosing the cooperative to which they could belong. Only one cooperative was building in each place. It was not possible to establish new ones. As a result of the process of reorganising the cooperative network, these entities lost their character as voluntary associations of people who wish to meet their housing needs together. They came to resemble local state administrative bodies specialised in the area of housing.

In 1975, the Central Association of Housing Cooperatives once again manifested its influence on the structure of Polish housing cooperatives. The Council of the Association then passed a resolution which was the basis for the creation of Provincial Housing Cooperatives. This new type of entity did not bring together individuals wishing to satisfy their housing problems and did not carry out any direct investment activities. The Provincial Housing Cooperatives included all housing cooperatives operating on the territory of the new provinces created as a result of the country's administrative reform carried out in the same year (the number of provinces was then increased from 17 to 49). In practice, these entities had an overriding role in decision-making processes. The particular cooperatives within a province had no influence on the policies of the provincial housing cooperative to which they had to belong. In contrast, it was the Provincial Housing Cooperative that dictated the direction of their activities. Moreover, the keeping of registers of candidates awaiting membership in the cooperative was also transferred to the provincial level (Maliszewski, 1992, p. 113). In the literature this process is called the transformation of cooperative self-government into local self-government (Maliszewski, 1992, p. 135). The structure of Polish housing cooperatives became even more similar to the structure of the territorial government administration in People's Poland.

The blending of the functions of the People's Poland's local administrative bodies (whose range of tasks corresponded roughly to those of the local government of democratic countries) was clearly visible in yet another organisational measure introduced into housing cooperatives. It was pointed out that, following the above-described process of organising the cooperative network, very large entities emerged. Some of them managed several thousand dwellings. This resulted in an increasing distance between the members of the cooperative and its management or council (Chrzanowski, 1973, p. 147). This problem was attempted to be solved by dividing cooperatives into neighborhoods, of which self-government was to be carried out by neighborhood councils. Today in Poland, the neighborhood council is an auxiliary unit of the local government (Izdebski, 2011). In People's Poland, the neighbourhood council could be a body of a cooperative because all buildings in a given neighbourhood were managed by one housing cooperative.

The political breakthrough of August 1980 was associated with some grassroots movements aimed at restoring self-governance of housing cooperatives. New small housing cooperatives began to emerge spontaneously, and those already in existence rebelled against centralisation within provincial cooperatives. Several of them were successfully liquidated (Maliszewski, 1992, pp. 113-116). However, the decentralisation processes were interrupted by the outbreak of martial law. The new Cooperative Law[17] was described as a compromise between supporters of centralised and self-governing cooperatives (Myczkowski, 1982, p. 47). It did not introduce groundbreaking solutions.

5. CONCLUSIONS

People's Poland did not take over the assets of housing cooperatives, so in this case it is not possible to talk about *proper nationalisation*. By analysing the legal instruments applied to housing cooperatives in Poland after 1945 in the context of the other features of nationalisation in the socialist countries of Central and Eastern Europe

[17] Cooperative Law of 16 September 1982 (Dz.U. nr 30 poz. 210).

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distinguished by E. Veress, it can be concluded that generally they were present in the regulations introduced.

Firstly, general legislation was introduced, such as the successive amendments to the Law on Cooperatives or the Law on the Central Cooperative Union, which centralised the cooperative movement by creating a hierarchical arrangement of institutions which then regulated the activities of particular housing cooperatives by acts of their internal law. Secondly, the subject was the property that constitutes the means of production. Of course, individual dwellings do not fall into this category, but the entire organisational apparatus capable of carrying out construction projects does. As for the third feature, the transfer of ownership did not exactly take place, and herein lies the main difference between the processes analysed and proper nationalisation. However, the centralisation and subordination of the cooperatives by other - organisational - methods was of a permanent nature. Fourthly, the real beneficiary of the applied solutions was the state, which, by taking control over housing cooperatives, was able to implement its own housing policy using them. Fifthly, the purpose of the changes introduced was to achieve the desired economic order, in which all investments in the field of housing are carried out under state control and within the framework of a centrally planned economy. Finally, sixthly, there was no compensation for the activists of the cooperative movement who lost control over the organisations they had created.

As it can be seen, all the characteristic features of nationalisation, apart from the transfer of property rights, were present in the regulations concerning housing cooperatives in People's Poland. The absence of this legally crucial element therefore prevents it from being a *proper nationalisation*, a nationalisation of interest to scholars of civil law. However, the processes that took place in Polish housing cooperatives between 1945 and 1989 fulfil all the other features of nationalisation, features that include its political causes and its social and economic effects. Thus, from the point of view of legal history, legal sociology, or political history, these processes are just as relevant and interesting as *proper nationalisation*.

Therefore, it can be defined as organisational nationalisation, the seizure of control of particular institutions and their assets by the state through centralisation and organisational subordination, and the restriction of freedom of action through the imposition of detailed regulations instead of transfers of property rights. The introduction of the concept of *organisational nationalisation* may prove useful in conducting legal-historical and comparative research on regulation in socialist states, especially in Central and Eastern Europe.

A highly preliminary comparative legal enquiry shows that the situation of housing cooperatives in the Eastern Block varied. In Bulgaria, for example, they operated on a very limited basis, but at the same time they were truly grassroots organisations set up by groups of citizens wishing to collectively meet their housing needs. They usually built one or at most a few buildings (Parushewa and Marcheva, 2010, pp. 202-203, p. 207). In this case, the communist authorities did not use any legal measures similar to those applied in People's Poland.

The situation was different in Czechoslovakia. Housing cooperatives existed there before the Second World War. Shortly after, the Central Cooperative Council was established, bringing together all types of cooperatives, including those involved in the housing sector. Their representatives drafted a law according to which the cooperative movement was to be independent, democratic, and apolitical. However, it was not adopted before the coup of 1948. Afterward, the Central Cooperative Council was subordinated to the Ministry of Labour and Social Welfare and served as an instrument of state control over cooperative organisations. In 1954, the Act on people's cooperatives

and cooperative organisations[18] came into force, which restricted the ability of already-functioning cooperatives to carry out investment activities. The 1959 law[19] introduced a new type of cooperative: house building cooperatives, which could carry out investment activities but, on the other hand, were closely entangled with the administrative apparatus of the communist state (Holečková, 2022, pp. 189-191). Thus, evident analogies can be seen between the situation of housing cooperatives in Poland and Czechoslovakia after 1945. In this case, the concept of organisational nationalisation may prove useful in describing these phenomena, although this obviously requires more thorough research. It would also be worthwhile to look further into the situation of housing cooperatives under state socialism in Hungary or Romania.

It can also be assumed that organisational nationalisation took place in various countries on the eastern side of the Iron Curtain, not only in the area of housing cooperatives. In Poland, housing cooperatives were not the only example of such actions - they also took place, for example, in the case of allotment gardens (a separate study should be devoted to this topic).

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A TYPICAL CROSS-BORDER METAVERSE MODEL AS A COUNTERACTION TO ITS FRAGMENTATION /

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Abstract: *The paper addresses the issue of the Metaverse's territoriality and its connection with national and international law. The study provides a brief overview of hypotheses related to the territoriality of the Metaverse and its connection with national and international law. It explores the concept of electronic jurisdiction for the Metaverse amidst the general absence of a unified transnational legal system for virtual environments. The Internet and the Metaverse are increasingly subject to the reality of fragmenting into separate segments, which can have serious consequences for global security and the economy.*

The risks associated with the trend of "Metaverse fragmentation" or "Splinternet"—the division of the single global internet space into isolated segments governed by different rules and technical standards—are analysed.

Innovatively, a theoretical model of a typical Metaverse is presented, potentially creating a cross-border "sandbox" for modeling technological processes, social relations, business, and legal regulation of virtual technologies to develop proposals for unifying the fundamental components of the Metaverse and simplifying cross-border interactions.

The proposed Transborder Standard Model of the Metaverse is an abstract representation of systems used to understand, predict, and explain the behaviour of a complex of systems known under the generalised name Metaverse. This model is characterised by a specific structure composed of modules or ecosystems that functionally differ in purpose and structure and are not connected by similar features. However, their combined application ensures the functionality of virtual environments, and their legal regulation, and can serve as the basis for electronic jurisdiction.

Key words: *Metaverse; Splinternet; Sandbox; Digital; Electronic Jurisdiction; Metaverse Model*

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1. INTRODUCTION

The Metaverse is a revolutionary concept, a new paradigm for the next-generation internet, a fully immersive shared virtual environment that combines physical reality with digital virtuality. Thanks to the latest developments in new technologies such as augmented reality, artificial intelligence, and blockchain, the Metaverse is transitioning from science fiction to the reality of the near future (Wensheng et al., 2023). The Metaverse is an interconnected network of social, networked immersive environments on permanent multi-user platforms that provide seamless embodied real-time user communication and dynamic interaction with digital artifacts. The Metaverse includes social virtual reality (VR) platforms compatible with massively multiplayer online games, open game worlds, and augmented reality (AR) collaborative workspaces (Aljanabi and Mohammed, 2023). The Metaverse offers new opportunities to provide a safer, more inclusive, and equitable digital space, reducing risks associated with data and its ownership (Mystakidis, 2022). However, this technology also faces its challenges.

However, despite the significant potential of the Metaverse in shaping the future of the internet, there are obstacles that need to be overcome, as well as challenges and problems that require further discussion and development, first and foremost, the need for legal regulation of the Metaverse (Ramírez-Herrero, Ortiz-de-Urbina-Criado and Medina-Merodio, 2023).

The current legal regulation of the Metaverse faces three important challenges. The first involves the development of legal mechanisms for holding individuals accountable for cybercrimes committed using digital technologies, both at the national and international levels (Stănilă, 2023).

The second challenge is related to the lack of a unified transnational legal system for the Metaverse that regulates social relations on a global scale, given that jurisdiction should not be limited to specific territories or borders (Qin, Wang and Hui, 2022).

The third problem is that there is no basic or typical Metaverse model because of which any virtual spaces should be formed in the future. This model should become the foundation for technological, technical-legal, legal and social regulation of social relations, the creation of electronic jurisdiction in new digital worlds and emerging societies. The development of a projection of the basic or typical Metaverse model, based on well-known taxonomies (Park and Kim, 2022), is the purpose of this study.

2. THE COLLAPSE OF THE DIGITAL SPACE AND ITS GLOBAL CHALLENGES

The disintegration of the Internet and the Metaverse into separate fragments, a process often described as «Splinternet» could have far-reaching consequences for global security, the economy, and society (Luts, Nastasiak, Karmazina and Kovbasiuk, 2021) as a whole (Crespo-Pereira, Sánchez-Amboage and Membiela-Pollán, 2023). Assessing this phenomenon requires consideration of several key aspects:

Economic Impact: Restrictions on Innovation: Fragmentation can make it difficult to collaborate and share knowledge, which is critical for the development of new technologies. This can slow down innovation and reduce global competitiveness (Ghirmai et al., 2023).

Trade Barriers: A fragmented digital world could lead to the creation of new trade barriers, affecting global trade and economic growth (Rawat and El alam, 2023).

Security and Privacy: Fragmentation can complicate international cooperation on cybersecurity, increasing the risks of cyberattacks and malicious activity (Sebastian, 2023).

Data Protection: Different data protection regulations may complicate international information sharing and affect user privacy.

Socio-cultural impact: Fragmentation can lead to greater control over information by governments or large corporations, limiting freedom of speech and access to information (Wang, Su and Yan, 2023; Garrido, Nair and Song, 2023).

Societal Divide: Different information spaces can contribute to the creation of information bubbles, which exacerbates social and political divides.

Legal and Regulatory Challenges: International Law and Standards: The development of separate rules and standards in different jurisdictions can complicate international cooperation and legal interaction (Bagheri and Jahromi, 2016).

Conflict of Jurisdictions: Conflicts between different national and international laws can create legal uncertainty, especially for international companies (Kalyvaki, 2023).

Technology Challenges: Interoperability and Integration: Fragmentation can complicate the interoperability of technologies and platforms, creating technical barriers for users and developers (González H., Kauffer, Koff and Maganda, 2023).

In conclusion, the fragmentation of the Internet and Metaverse could have serious implications for the global economy, security, human rights, and socio-cultural dynamics. It requires close monitoring, international dialogue, and cooperation to ensure a balanced approach between national interests and global integration.

3. METAVERSE DEVELOPMENT STATUS

During the evolution of post-industrial society and its transformative trends, experts predict a three-phase developmental trajectory for the Metaverse. The first phase is characterised by the technocratic nature of the Metaverse, where entities, objects, content, and code depend on its developers and the owners of internet components. In the second phase, while the technical core of the Metaverse remains under the control of the owners and developers, there emerges a trend toward partial transfer of ownership and control over the content to users (content creators) and stakeholders. The third phase represents a profound transformation: content in the Metaverse will no longer be tied to specific developers. Instead, control over entities, subjects, and objects in this digital world will be exercised directly by the owners through code, endowing subjects and objects with functions and rights similar to those of their owners. This stage also includes the reclassification of entities within the Metaverse (Kostenko et al., 2023a).

Currently, the Metaverse is in its nascent stage, comprising disconnected technological and informational domains or digital corporations. These meta-corporations are in competition for users, finances, products, and technologies. Researchers have noted the structuring of the Metaverse, which is now unfolding in the first phase of its development. It's crucial to recognise that today's Metaverse is being shaped under the control of private, business, and state meta-corporations. Despite this, the Metaverse is already giving rise to elements such as Personal Metaverse (PM), Collective Metaverse (CM), Corporate Metaverse (CorpM), Confederative Metaverse (CfM), State Metaverse (SM), and Darkmetaverse (DarkMet), the latter serving as a counter element to positive technologies. (Kostenko et al., 2023a).

4. SPLINTERNET METAVERSE OR DIGITAL BALKANISATION

The initial phase of the Metaverse's evolution highlights the emerging concept of "Metaverse Fragmentation through the implementation of a 'Local Cyber Sovereignty' mechanism" (Moldovan, 2021; Vidyarthi and Hulvey, 2021). Considering this, we propose

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an original definition for Metaverse fragmentation: "Metaverse Fragmentation refers to the division of the global Metaverse network (WEB 3.0) into distinct segments ('Splinternet'), each governed by different jurisdictions and regulated by varying laws, standards, and technical solutions". This is exemplified by specific cases such as the "The Golden Shield Project" or the "Great Firewall of China," the use of Deep Packet Inspection (DPI) technology, and the "Oculus" system in the creation of Russia's "sovereign Internet", as well as networks like North Korea's "Kwangmyong", Iran's National Information Network "NIN", and internet content filtering systems in Iraq, Myanmar, Pakistan, and Turkmenistan (Tai and Zhu, 2022; Gosztonyi 2023).

The trend towards creating a "Splinternet" is increasingly evident in countries where governments significantly restrict fundamental human and democratic values. These regimes, under the guise of "preserving cultural identity" through control over content and information flows, believe that internet surveillance will help protect the nation from external cyber threats. They also think that isolating cyberspace and the Metaverse will allow for more effective control over the information space by limiting access to alternative information sources. In the "Splinternet," artificial intelligence and machine learning technologies are also actively employed for pervasive information control, potentially leading to issues in international relations due to information isolation.

5. DESTRUCTIVE TRANSFORMATION IN THE METAVERSE

The year 2022 marked significant changes in the approaches to the development of the Metaverse. Numerous conflicts and military actions triggered processes of geopolitical instability, encompassing uncertainties in international relations, global disputes, economic fluctuations, terrorist threats, and other complexities.

The emergence of the so-called "Splinternet" in certain regions indicates a potential intensification of isolation for specific segments of cyberspace and the birth of unique WEB 3.0 content, encompassing corporate (CorpM), state Metaverse (SM), and Darkmetaverse (DarkMet). A key feature of the "Splinternet" is the use of artificial intelligence to enhance cyberattack algorithms and to create autonomous systems capable of identifying vulnerabilities and conducting cyberattacks without direct human intervention, along with the uncontrolled development of "intelligent" digital weapons (Kostenko et al., 2022b).

There is an increasing risk of anonymous large-scale cyberattacks targeting the critical infrastructure of nations and regions. The role of Darkmetaverse (DarkMet) in the use of anonymous "no name" cyber mercenaries, private companies for conducting destructive cyber operations, and the involvement of criminal groups with cyber capabilities are intensifying. This complicates international politics and the procedures for investigating cybercrimes.

6. CYBER DIPLOMACY

International politics since February 2022 has been influenced by the fragmentation of the Metaverse, leading to what has been termed as "digital political balkanisation" (Spence, 2018), aligning with geopolitical fault lines. This has given rise to distinct digital political regional segments managed by individual states or groups of states, each with its unique regulations, standards, and policies. For instance, the European Union effectively implements geoblocking mechanisms and imposes mandatory conditions for global compliance with its data protection regulations (GDPR), significantly impacting international trade and relations. The United States is proactively

safeguarding its digital borders against potential cyber threats and espionage, particularly from China and Russia.

"Cyber Diplomacy" has emerged as a novel phenomenon in international politics, introducing a new dimension to international relations. Private organisations and states are negotiating digital standards and Metaverse regulations, potentially forming new types of cross-border trade barriers or gateways, influencing the global economy and security. This includes collaboration between nations to prevent and respond to cyber threats, the formulation of international norms and treaties, the establishment of global standards for personal data protection, internet freedom of expression, and economic cooperation through digital trade rules, e-commerce, and intellectual property protection. The fragmentation of the Metaverse is creating geopolitical tension, instability, and turbulence, exacerbating international and national risks, and restricting access to global markets and services.

7. JURISDICTION AND TERRITORIALITY OF METAVERSE

Currently, no nation has fully resolved the issue of territorial sovereignty in the Metaverse. As the Metaverse is a rapidly evolving digital environment, states are just beginning to grasp its potential opportunities and challenges. The complexities of defining territoriality in the Metaverse are discussed in scholarly research on jurisdiction, information law, and the regulation of social relations associated with the use of electronic avatars, artificial intelligence, and electronic personality in the Metaverse (Kostenko et al., 2022a).

Academic debates are presently focused on the practical resolution of Metaverse territoriality. While the Metaverse still closely aligns with national legislation and international law, there is potential for establishing a separate jurisdiction for cyber incidents regulated by national and international law, for instance, through the creation of a distinct electronic jurisdiction and a Metaverse Codes and Laws model.

One direction for jurisdiction development suggests that states exercise sovereign authority over their physical territories and infrastructure and are obligated to oversee the security of information passing through their technical hubs. Thus, international law could impose territorial restrictions on the Metaverse (Tsaugourias, 2018). Another direction supports the idea of projecting the Westphalian system onto the "state structure" of the Metaverse, as it fosters the formation of concepts of sovereignty (Lessig, 2006; Demchak and Dombrowski, 2014), and the equality of states in international law (Lessig, 1998). The concept of the Common Heritage of Mankind (CHM) is also considered, according to which the regulation of cyberspace should be conducted by international law through the creation of international Internet governance bodies and finding a consensus on the application of force and self-defense in the Metaverse (Segura-Serrano, 2006). The most viable hypothesis is considered to be the creation of a single universal electronic jurisdiction of the Metaverse, which could become a single universal transnational electronic body responsible for dispute resolution and the investigation of offenses in the Metaverse (Kostenko et al., 2022a).

A primary challenge in establishing territorial jurisdiction within the Metaverse lies in the lack of technical and legal mechanisms to set physical boundaries, which hampers a state's ability to enforce its laws and complicates the resolution of legal disputes. The absence of specific Internet legislation also contributes to the violation of existing national laws. The anonymity and pseudonymity of internet users fail to provide reliable identification, consequently favouring offenders over state and law enforcement

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agencies. Disputes over territorial jurisdiction positioning in cyberspace are already adversely affecting the validity of court decisions, leading to their annulment.

The uncertainty of national courts' competence creates a legal vacuum, complicating legal relations in the Metaverse and limiting the enforcement of valid court decisions. Legal scholars criticise existing legal systems for their inefficiency in resolving cyber conflicts and suggest specialised rules for addressing them (Adams and Albakajai, 2016; Appazov, 2014).

Meanwhile, individual national legal systems are taking measures to extend their jurisdiction over certain types of offenses in the Metaverse. For instance, the United Kingdom extends extraterritorial jurisdiction over crimes such as child cruelty, sexual offenses, fraud, and terrorism. The Republic of Egypt modernised its national legislation by adopting "The Anti-Cyber and Information Technology Crimes Law," passed in 2018,[1] aiming to expand the fight against crimes in the field of information technology (Abdelkarim, 2023).

Today, some researchers propose to divide the jurisdiction of the Metaverse into the following subgroups (figure 1):

Analogue Law Jurisdiction (JAI) and Electronic Law Jurisdiction or Electronic Jurisdiction (JEL).

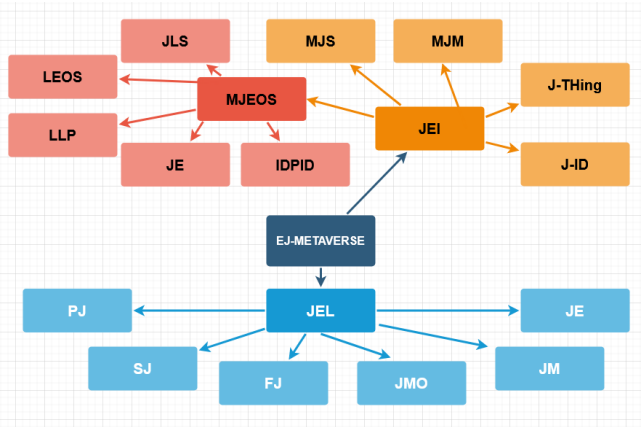

Figure 1. Metaverse jurisdiction

Today's jurisdiction in analog law can be categorised into:

Personal Jurisdiction (PJ) – This type of jurisdiction allows a court to make decisions regarding specific parties or individuals.

Subject Matter Jurisdiction (SJ) – This jurisdiction type empowers a court to hear and resolve cases involving certain subjects.

Financial Jurisdiction (FJ) – Primarily concerns monetary financial matters.

Mandatory Jurisdiction (JMO) – This jurisdiction enables a country to enact laws, particularly concerning the activities, status, circumstances, or choices of an individual (except for laws that conflict with the interests of other countries).

[1] Anti-Cyber and Information Technology Crimes Law «EGYPT» Law (2018).

Judgment Jurisdiction (JM) – Under this jurisdiction, a state has the authority to adjudicate a case concerning a relevant individual in civil or criminal matters, irrespective of whether the state is a party or not - a simple connection between the two is sufficient.

Enforcement Jurisdiction (JE) – This jurisdiction depends on the existence of prescriptive jurisdiction. That is, without mandatory jurisdiction, it cannot be enforced to penalise an individual who violates its laws and regulations (Sharma, 2021).

The jurisdiction of electronic law, or electronic jurisdiction, is currently in the stage of a model or concept of an electronic legal domain, defined by the scope of the application of laws and regulatory acts that govern digital spaces. It encompasses the regulation of social and legal relations arising in digital environments. Electronic jurisdiction covers relationships that do not exist in the analog world, and their regulation is the task of contemporary legal professionals and legislators.

If we consider electronic jurisdiction as a branch of electronic law, it would be prudent to envisage the following types:

Jurisdiction of Identification Data (JID) – This legal domain defines the competence of authorities and entities in managing identification data, including their collection, storage, usage, and protection. A subtype of identification data jurisdiction is actively evolving in the European Union as General Data Protection Regulation GDPR and the United Nations Commission On International Trade Law has created the UNCITRAL Model Law on the Use and Cross-border Recognition of Identity Management and Trust Services (2022).

Jurisdiction of Digital Content and Products (J-thing) – This legal field governs the rights and obligations associated with the creation, distribution, usage, storage, destruction, protection, and obsolescence of digital content and products (things) exclusively in the Metaverse and its variants.

Metaverse Jurisdiction for Interaction with Other Metaverses (MJM) – This area of legal regulation is responsible for the legal structuring of interactions and relationships between different virtual platforms or Metaverses. It encompasses legal aspects related to the creation, management, usage, and interaction of digital spaces that have defined their legal status or legal construction as Metaverse. The legal regulation will address issues of transfer and usage of digital assets (virtual property, avatars, digital tokens) between Metaverses of different legal constructions, rights of electronic users, protection of identification and personal data, electronic intellectual property, and inter-platform interaction variations. This jurisdiction will also be endowed with the power to resolve cross-border conflicts and disputes arising between different Metaverses and electronic platforms, as well as among users of these platforms.

The Metaverse Jurisdiction for Transnational Interaction with Physical States (MJS) is an intricate legal field that integrates both analog and electronic international law to regulate relationships between the virtual worlds of the Metaverse and real-world nations, especially in the context of crossing national borders and jurisdictions. Legal regulation will address issues like intellectual property rights protection, tax and customs obligations, virtual commerce regulation, transfer of identification and personal data, commercial information between virtual and physical realms, and resolving conflicts between Metaverse jurisdictions and national jurisdictions.

The Jurisdiction of Electronic Entities and Objects (MJEOS) is a complex legal field that combines various sectoral and interdisciplinary legal institutions (objects, entities, AGI-endowed entities, avatars, electronic personalities/electronic humanoids, AI, and AGI).

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8. A TYPICAL CROSS-BORDER METAVERSE MODEL

The international scientific and public communities face a critical task of developing safe methods for the creation and management of the Metaverse within a transnational space. There is an urgent need to initiate the development of standardised technical and software solutions in areas such as identification, blockchain, cybersecurity, digital content, and assets. However, a key aspect is the formulation of effective national and international regulatory mechanisms, as well as the adaptation of existing legislative norms to regulate the social and legal relationships emerging within the Metaverse. These processes can be successfully implemented through the establishment of an "International Scientific Sandbox for the Metaverse."

Within the framework of this initiative, a priority task will be the development of a "Transborder Model of the Metaverse," which will unify the key components of the ecosystem. This model aims to create a universal platform for formulating norms and laws that will ensure the reliable functioning of the Metaverse. In doing so, it will guarantee its interoperability, integration with the physical world, and alignment with traditional legislation.

The structure of the "Transborder Standard Model of the Metaverse" could consist of the following levels, encompassing these modules (figure ecosystems):

1. Technological Level: This level establishes standard methods and data transmission systems, protocols, interfaces, and foundational modules for creating typical blockchains, mathematical and quantum cryptography, modules for relativistic databases, algorithms for big data, and more.
2. Cybersecurity and Infrastructure Protection Level: This involves a technological module (network perimeter protection, endpoint protection, data protection, monitoring, and incident response), and an organisational module (policies and procedures, staff and AI awareness training, physical security, vulnerability and patch management, regular system checks, and audits), among others.

Figure 2. Transborder Standard Model of the Metaverse

3. Identification and Identity Data Management Level: This level addresses technical identification protocols via external devices, network identification protocols, standards, and unified requirements for identification procedures, as well as dedicated standards for handling personal data. It also includes modules for the security of identification data, control and verification of authenticity, authorised access, preservation, destruction, and data oblivion.
4. Virtual Reality Technologies Level: This involves standards and requirements for software and hardware support of AR/VR/XR/MR technologies, Cloud Computing, avatar creation, digital personalities, virtual objects and entities, digital assets, and other technological solutions.
5. Industrial Metaverse Technologies Level: This level encompasses software and hardware modules for "digital twin" technologies and Industrial IoT (IIoT), as well as technologies ensuring the interoperability of Metaverse/Metaverse and Metaverse/Physical World (PhW).
6. ANI AI, ASI, Machine Learning Technologies Level: This includes technologies and methodologies of Artificial Narrow Intelligence (ANI), Artificial Super Intelligence (ASI), Machine Learning (Supervised Learning, Unsupervised Learning, Semi-Supervised Learning, Reinforcement Learning, Deep Learning, Ensemble Methods), Natural Language Processing, and Big Data.
7. Military Protocols and Regulations in the Metaverse: This covers military regulations and protocols for Metaverse/Metaverse and Metaverse/PhW interactions, as well as the use of VR in military applications and ethically contentious purposes.
8. Legal Regulation Level of Virtual Reality Technologies: This involves the virtual electronic jurisdiction, virtual electronic court, virtual e-criminal code, copyright code for e-intellectual property, and e-property for virtual assets and entities.
9. Sociological and Ethical Issues Level: This addresses privacy and data protection, disorientation and dependency, perception manipulation, content responsibility, social isolation, ethics of virtual world creation, impact on children and youth, mental health risks, identity management challenges, accessibility, and the digital divide.

The proposed model is an abstract representation of systems that is used to understand, predict, and explain the behaviour of a complex of systems under the generalised name Metaverse. This model has a specific structure based on modules or ecosystems that are differently functional in purpose and structure, not related to each other by similar features, but their joint application creates the latest, modern, and unique functionality of virtual environments that requires legal regulation and can become the basis of electronic jurisdiction.

9. CONCLUSION AND DISCUSSION

The fragmentation of the Metaverse serves as a catalyst for delineating the boundaries between national sovereignty and the need for global standards. It lays the groundwork for the immediate initiation of cross-border processes to accommodate varying levels of technological advancement and internet access across different countries, as well as for harmonising international standards with a country's domestic legislation.

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The emergence of the "Splinternet" has become a pivotal component of global cyber policy, with profound implications for national security, political control, and the future of the global internet, international relations, and the world economy. The turbulent processes of cyber policy are generating geopolitical contradictions and conflicts among states in cyberspace, where countries strive to isolate their networks from external influences. This development has intensified the struggle for information influence, as states seek to control the flow of information within their borders to maintain political and ideological "stability" and safeguard their national economies from external digital threats.

Consequently, there is an urgent need for the creation of a modern standard cross-border Metaverse model and a unified international legal base to ensure the operation of cross-border virtual reality ecosystems and an electronic jurisdiction system. This need extends to updating and developing national legal bases in response to the ongoing changes in the social, technological, and geopolitical conditions of society.

The necessity for rapidly enhancing the role of international forums and organisations in developing unified rules and norms is pressing. Collaboration between governments, the private sector, academic circles, and civil society in shaping the future of global technological and legal regulation of the Metaverse is of utmost importance.

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THE INTERPRETATION OF THE NORMS OF THE 1922 CONSTITUTION OF LITHUANIA BY THE SUPREME TRIBUNAL / Anatoliy A. Lytvynenko, Jevgenij G. Machovenko

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Abstract: *There were six constitutions in the Republic of Lithuania during the period of 1918-1940: three provisional ones (enacted in 1918, 1919, and 1920) and three permanent ones (enacted in 1922, 1928, and 1938). A body of constitutional control, such as a constitutional court or a distinct highest administrative court did not exist those days. The surviving factual material gives grounds to assert that it is necessary to systematize the interpretation of the norms of the Constitutions that were in force in the Republic of Lithuania in the period of 1918-1940 mainly owing to the judgments and rulings of the Supreme Tribunal of the Republic of Lithuania, which carried out the interpretation of the norms of the Constitution and laws either in the context of solving civil, administrative and criminal cases, cases on issues of disciplinary liability of lawyers, and in rulings on requests for interpretation of the Constitution and laws by state institutions and courts. The first provisional Constitution (1918) established (in Article 24) that "In areas where the State of Lithuania has not issued new laws, those that existed before the war are temporarily left, as long as they do not contradict the basic laws of the Provisional Constitution". Applying the pre-war law, the Supreme Tribunal checked its constitutionality every time, which means it interpreted both the law and the constitution. Therefore, it can be said that the practice of the court in the interpretation of the constitution is very abundant. However, the Supreme Tribunal very rarely publicly interpreted the constitution, i.e., expressed his opinion expressis verbis, addressed it to other courts. The Supreme Tribunal could not strike down a law that contradicted the Constitution, but the refusal to apply the law was a message to other state institutions (but only the lower courts had to follow the Supreme Tribunal's position, and the executive authorities and parliament could have a different opinion). The paper represents an analysis of the cases, which were adjudicated by the Supreme Tribunal of the Republic of Lithuania in 1923-1928, where the Court discussed the application of the norms of the Constitution and their interpretation according to some peculiar legal disputes.*

Key words: *Constitutional Law; the Republic of Lithuania (1918-1940); Supreme Tribunal of the Republic of Lithuania*

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1. INTRODUCTION

In Lithuania in the period of 1918-1940, the concept of the rule of law prevailed in a narrow or formal procedural sense (*rule of law*, in German: *Rechtsstaat*, in French: *l'état de droit*), according to which public authorities must act according to valid legal norms, regardless of their content. However, lately it is common to evaluate the 1918-1940 Lithuanian Constitutions from the standpoint of current constitutionalism, i.e., supplementing the narrow concept of the rule of law with the principles of the supremacy of the Constitution, limitation of government powers and justice, as done by the authors of the fundamental monograph on the history of Lithuanian constitutionalism (Griškevič et al., 2016). The possibility and overall necessity of evaluating the Constitutional Acts of Lithuania not only in the context of the time of their adoption, but also using modern doctrine, is based on the conviction that Lithuanian constitutionalism is a continuous process, and current and historical Constitutional Acts form a phenomenon called *the Historical Constitution of Lithuania*.

The supremacy of the Constitution in the Provisional Constitution (1918) was expressed *expressis verbis* in Article 24: "*In areas where the State of Lithuania has not issued new laws, those that existed before the war are temporarily left, as long as they do not contradict the basic laws of the Provisional Constitution*".[1] At first glance, the principle of the supremacy of the Constitution should apply only to those laws "*that existed before the war*", but the interpretation of this provision must be expansive, because newly adopted national and *foreign laws*[2] must hold the same formal legal power. If the new and old laws have the same legal force, then the principle of constitutional supremacy that applies to one group of these laws also applies to all others. The reason why Article 24 sounds exactly like this and not otherwise, presumably, is that during the restoration of independent Lithuania, it was relevant to emphasise exactly this point – everything that is created elsewhere and transferred by a foreign government, introduced, implemented, or imposed on Lithuania, is valid to the extent that it does not contradict the Constitution of independent Lithuania, and the constitutionality of the laws and other legal acts of the independent Lithuanian provisional government (the State Council of Lithuania (hereinafter - the Council) itself and the institutions created by it) is simply presumed here. For a comparison, the Provisional Constitution of Lithuania of 1920 can be presented, in which the principle of supremacy is stated in a more modern and familiar form: "*3. Laws in force until the date of promulgation of this Constitution, which do not conflict with this Constitution, remain in force*".[3] According to M. Maksimaitis, the authors of this Constitution relied on the classic vision of constitutional law (M. Romeris also followed and promoted it) – only those ordinary legal norms that are based on the current Constitution are valid. Laws and by-laws that were valid before its adoption automatically cease to be valid. In order for them to retain legal power, it is necessary to sanction them in the current Constitution (Maksimaitis, 2001, p. 33). At present, it is common to believe that the formal principle of the supremacy of the Constitution, enshrined in its own text, can be implemented only after ensuring the stability of the Constitution (understood as a special procedure for adopting and changing the constitution), direct application of the Constitution, and control of constitutionality. The stability of the Constitution is enshrined *expressis verbis* in all Lithuanian Constitutions (for example, in Article 4 of the Provisional Constitution of 1918). The provisions on the direct application of the Constitution and the

[1] Lietuvos Valstybės Laikinosios Konstitucijos Pamatiniai Dėsniai. (Valstybės tarybos priimta 1918 m. lapkričio mėn. 2 d.). Lietuvos aidas. 1918–11–13. No 130(178).
[2] Which were all the laws in force in Lithuania before the First World War.
[3] Laikinoji Lietuvos Valstybės Konstitucija. Laikinosios Vyriausybės žinios. 1920–06–12. Nr. 37–407.

control of constitutionality are revealed through systematic interpretation of the text of the Constitution.

The questions of interpreting various norms of the Constitution of the State of Lithuania, from the point of view of judicial practice, were raised in the scientific literature infrequently. M. Maksimaitis noted that during the period of 1918-1940, all courts and other state authorities had the right to interpret the Constitution and decide the issue of compliance of laws with the Constitution (Maksimaitis, 2001, p. 71). The Ministry of Justice expressed great confidence in the courts and even assigned the judges of the lowest courts to decide issues that now fall within the competence of the Constitutional Court (Circular No. 5).[4] Reasoning about the issues of constitutional control can be found in the works of the Lithuanian lawyer, scientist and judge M. Romeris (1880 – 1945), who expressed the idea of creating a court of constitutional jurisdiction in his 1925 article for this purpose.[5] A more detailed evaluation of the debate on Article 3 of the Constitution in the Constituent Seimas (1920-1922) was presented by Juozas Žilys (Žilys, 2001, pp. 39-40). He came to the conclusion that the establishment of the principle of constitutionality of laws in the Constitution meant that the doctrine of legality was recognised as one of the most important laws of society and state development, but without a special legal regulation, such a function remained only a democratic abstraction (Žilys, 2001, p. 41). However, at the same time, M. Romeris mentioned that at that time, in no country in the world (in particular, speaking about the judicial system of the United States of America and Switzerland) constitutional courts did exist (Romeris, 1925). Later, M. Romeris noticed a rather interesting detail: the Constitution (meaning the one enacted in 1922) did not prescribe the system of the judiciary (Romeris, 1937, pp. 66-67): for example, Art. 2 of the Constitution stated that the Seimas, the Government, and the Court are the organs of the state power[6] – this norm has remained unchanged in both Constitutions of 1922[7] and 1928;[8] Art. 4 of the Constitution of 1938 stipulates that the state power is fulfilled by the President of the Republic, the Government, the Seimas, and the Court;[9] Art. 63/64 of the Constitution of 1922/1928 stated that cases of criminal offences committed by ministers must be heard in the Supreme Court,[10] which was the Supreme Tribunal of the Republic of Lithuania, *Vyriausiasis Tribunolas* (hereinafter – the Supreme Tribunal), which had respectively explained why, according to the legislation, the Supreme Tribunal was meant to be the Supreme Court for Lithuania in all instances in its judgment of the

[4] Aplinkraštis 5. Apygardų teismams, Taikos teisėjams, teismo tardytojams, Valstybės gynėjams irnotarams. Laikinosios Vyriausybės žinios, 1919-04-04, nr. 5. See in detail: Machovenko and Šinkūnas (2019, pp. 269 – 283).

[5] Read more about attempts to establish a Constitutional Court in interwar Lithuania (1918-1940) here: Maksimaitis (2004, pp. 19-26).

[6] Read more about the principle of separation of powers and judicial power according to the 1922 Constitution here: Monkevičius (2005, pp. 127-150)

[7] 1922 m. rugpjučio 1 d. Lietuvos Valstybės Konstitucija, Vyriausybės Žinios. 1922. Nr. 100, 799, pp. 1-8.

[8] 1928 m. gegužes 15 d. Lietuvos Valstybės Konstitucija, Vyriausybės Žinios. 1928. Nr. 275, 1778, pp. 1-6.

[9] 1938 m. vasario 11 d. Lietuvos Valstybės Konstitucija, Vyriausybės Žinios. 1938. Nr. 608, 4271, pp. 237-245.

[10] The 1922 and 1928 Constitutions referred to the Supreme Court in the system of the judiciary as "Aukščiausiasis Teismas", whereas the name of the court acting as the highest judicial instance in all cases was Vyriausiasis Tribunolas. However, the name of the court was not changed, and in 1933, when the Law on the Judiciary was adopted (1933 m. liepos 11 d. Teismų santvarkos įstatymas. Vyriausybės Žinios. 1933 Nr. 419-2900, pp. 1-26), the Vyriausiasis Tribunolas was referred to as the court of cassation (Art. 21), whereas the Supreme Tribunal itself explained in its 1925 judgment (see the comment to it below), that it was precisely the Supreme Court which was mentioned in the Constitution.

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Supreme Tribunal's General Assembly of 4-10 February, 1925).[11] It should be noted that in the Constitution of 1938, namely in Section XVII, the judicial system was already prescribed: thus, the independence of the court is guaranteed (Art. 129), as well as the powers of the President of the Republic to approve the punishment, or a part of it, which were determined by the decision of the court, or to replace it with a milder punishment; and in cases established by law, the President had the right to restore the rights that were restrained or deprived by a court decision.[12] Art. 131 of the Constitution of 1938 defined the Supreme Tribunal as the Supreme Court, which acted throughout the territory of Lithuania, and Art. 132 of the Constitution of 1938 determined that the courts are created by law, and the judiciary is determined by law.[13]

The Supreme Tribunal had to cope with civil, administrative, criminal, constitutional and disciplinary cases for attorney´s misdemeanours. In this paper, we will discuss the interpretation of the norms of Art. 51 and 63, 65, 66, 67 and 68 of the 1922 Constitution of Lithuania by the Supreme Tribunal, which had to act as a constitutional court in such an instance. The aim of the paper is to illustrate the positions of the Supreme Tribunal in relation to the aforementioned provisions of the Constitution. The following methods of scientific research are used in the paper: 1) historical-legal method, since the scientific research considers the time period of the Republic of Lithuania 1918-40; and 2) the method of interpretation of legal norms, since the paper deals with the interpretation of the norms of the Constitution by the Supreme Tribunal of the Republic of Lithuania.

2. THE SUPREME TRIBUNAL

Lithuania had a very peculiar system of the judiciary during the First Republic (1918-1940).[14] In the 1922/1928 Constitutions, the judiciary system was not prescribed. Art. 64 of the Constitution provided that the courts had to proclaim judgments on behalf of the Republic of Lithuania, and the Supreme Tribunal held in a 1928 judgment that all the Lithuanian courts, including the ones in the Klaipeda Region, had to promulgate judgments on behalf of the Republic of Lithuania (as provided by Art. 64 of the Constitution of 1922 and Art. 66 of then-acting Constitution of 1928).[15] In relation to the issue of prescribing the judiciary, M. Romeris wrote in his 1937 treatise that it was rather difficult to explain the origin of the absence of a prescribed system of the judiciary in the text of the Constitution, and among the possible reasons he outlined the following reasons: 1) the lack of a clear organisation of the judiciary system in 1918; 2) possible lack of confidence in the newly formed judicial system; 3) the fact that the court is not a body of political power (Romeris, 1937, pp. 66-67) (to wit, the Supreme Tribunal explicitly

[11] Vyriausiasis Tribunolas (Visuotinis susirinkimas), 1925 m. vasario 4-10 d. sprendimas, Vyriausiojo Tribunolo 1924-1933 metų visuotiniųjų susirinkimų nutarimų rinkinys: su Teisingumo ministerijos aplinkraščiais ir dalykine rodykle / spaudai paruošė J. Byla. Kaunas: Karvelio ir Rinkevičiaus prekybos namai, 1933., Byla № 10, pp. 17-28 / Teisė. Teisės Mokslų ir Praktikos Laikšrakstis. Leidžia Lietuvos Teisininkų draugija. № 7. Sausis – Birželis. 1925., pp. 65-86.

[12] 1938 m. vasario 11 d. Lietuvos Valstybės Konstitucija, Vyriausybės Žinios. 1938. Nr. 608, 4271, pp. 237-245.

[13] 1938 m. vasario 11 d. Lietuvos Valstybės Konstitucija, Vyriausybės Žinios. 1938. Nr. 608, 4271, pp. 237-245., see in particular at p. 244.

[14] See in detail: Dvareckas (1997).

[15] Vyriausiasis Tribunolas (Visuotinis susirinkimas), 1928 m. birželio 15 d. nutarimas, Vyriausiojo Tribunolo 1924-1933 metų visuotiniųjų susirinkimų nutarimų rinkinys: su Teisingumo ministerijos aplinkraščiais ir dalykine rodykle / spaudai paruošė J. Byla. Kaunas : Karvelio ir Rinkevičiaus prekybos namai, 1933., Byla № 72, pp. 129-130.

denoted the latter argument in its ruling of 11 May , 1928).[16] M. Romeris (1937) outlined that by the time when the Law on Provisional Order of the Judiciary and its Work of 28 November, 1918 was promulgated,[17] the Supreme Tribunal was not yet operating, and hence, the formation of a provisional system of the judiciary was not concluded by then (Romeris, 1937). To wit, the explanation to the said law mentioned a court of cassation (that is, the Supreme Tribunal) only in the context of a prospect for the future, and the Supreme Tribunal acted as a court of appeals for the cases, which were adjudicated by the district courts.[18] The Law on the Judiciary was adopted only in 1933,[19] whereas a highest administrative court, or a court of constitutional jurisdiction were not founded (Romeris, 1937, p. 68), and as practice had shown, it was the Supreme Tribunal that coped with their functions to a major extent (Maksimaitis, 2014, pp. 440-460). Since the enactment of the Law on the Judiciary of 1933, the Supreme Tribunal was referred to as a cassation court (Art. 21) and was designated to be the Supreme Court in administrative cases coming from the Klaipeda Region (Art. 22 (2)).[20] However, the projects for the foundation of a highest administrative court in Lithuania did exist and were actively discussed among lawyers from the second half of the 1920s (Račkauskas, 1937, pp. 55-65), and the idea of establishing such a court was expressed for the first time in 1924 (Anonymous, 1938, pp. 522-525), albeit a draft law was developed in more than a decade – in 1936 (Račkauskas, 1937, pp. 63-64). The system of Lithuanian administrative law, as contended by K. Račkauskas in his 1937 work, functioned in such a way that the supervision of the work of various officials was carried out by the courts (for example, the Supreme Tribunal indicated in its judgment of March 26, 1926 that a judge can only be liable to the court, depending on which branch of law the case concerning him lied in, but not to any administrative body distinctly and not within the framework of any court case)[21], and the laws were obligatory for fulfillment by the officials in the same mode, as by all other citizens (Račkauskas, 1937, pp. 56-57). There were no courts of administrative jurisdiction, as such, apart from the only exception of the State Court (originally known as *Valsčiaus teismas*) in Klaipeda region, which was established in 1920, a local law on whose functioning was enacted in 1938 (where, besides, the court was called *Administrativynis teismas*),[22] and whose judgment excerpts were occasionally published in "*Klaipedos Krašto Valdžios Žinios*".[23]

At the same time, the existing system of administrative law in the Republic of Lithuania in 1918-40, though not containing administrative courts apart from the one in the Klaipeda region, had developed a slightly different principle, founded on the fact that

[16] Vyriausiasis Tribunolas (Visuotinis susirinkimas), 1928 m. gegužės 11 d. nutarimas, Vyriausiojo Tribunolo 1924-1933 metų visuotiniųjų susirinkimų nutarimų rinkinys: su Teisingumo ministerijos aplinkraščiais ir dalykine rodykle / spaudai paruošė J. Byla. Kaunas : Karvelio ir Rinkevičiaus prekybos namai, 1933., Byla № 67, pp. 109-124 / Teisė. Teisės Mokslų ir Praktikos Laikšrakstis. Leidžia Lietuvos Teisininkų draugija. № 13. Sausis – Birželis. 1928., pp. 61-72.

[17] 1918 m. lapcričio 28 d. Laikinasis Lietuvos teismų ir jų darbo sutvarkymas, Laikinosios Vyriausybės Žinios. 1919. Nr. 2/3, pp. 6-7.

[18] Paaiškinimas įstatymui „Laikinasis Lietuvos Teismų ir jų darbo sutvarkymas", Laikinosios Vyriausybės Žinios. 1919. Nr. 2/3, pp. 7-8. See in detail: Maksimaitis (2013, pp. 375-390)

[19] 1933 m. liepos 11 d. Teismų santvarkos įstatymas. Vyriausybės Žinios. 1933 Nr. 419, 2900, pp. 1-26.

[20] 1933 m. liepos 11 d. Teismų santvarkos įstatymas. Vyriausybės Žinios. 1933 Nr. 419, 2900, pp. 1-26 (see, in particular at p. 2).

[21] Vyriausiasis Tribunolas (Visuotinis susirinkimas), 1926 m. kovo 26 d., Teisė. Teisės Mokslų ir Praktikos Laikšrakstis. Leidžia Lietuvos Teisininkų draugija. № 9. Sausis – Birželis. 1926., pp. 82-85.

[22] 1938. m. gegužes men. 25 d. Įstatymas apie Klaipedos Krašto Administrativinio Teismo. Klaipedos Krašto Valdžios Žinios, Nr. 63, 1938. m. birzelio men. 28. d. Nr. 168, pp. 509-511.

[23] Valsčiaus Teismas, 1935 m. vasario men. 7. d. Klaipedos Krašto Valdžios Žinios., Nr. 22, 1935 m. kovo men. 2. d., pp. 175-176.

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the decisions of different state authorities and higher instances of various institutions could be appealed to the Supreme Tribunal (Račkauskas, 1937, pp. 60-61; Fridšteinas, 1937, p. 188). According to the later jurisprudence of the Supreme Tribunal, it can be seen that this principle did really work.[24] Apparently, under the given conditions, the Supreme Tribunal performed the functions of the highest administrative court.[25] According to the bill, which was developed in 1936, it was proposed to create a new department for the resolution of administrative disputes in the Supreme Tribunal (there was no such department in the structure of the court, and the creation of a distinct administrative court was considered too costly (Anonymous, 1938, pp. 522-525)), and it could determine, *inter alia*, the competence of the courts in resolving such disputes – which dispute should be resolved in a court of general jurisdiction and which should be resolved in a court of administrative jurisdiction (Račkauskas, 1937, p. 64). There were also various proposals regarding the work of the courts of administrative jurisdiction – for example V. Fridšteinas (1937) found a two-tier system of courts of administrative jurisdiction to be convenient, within which the first instance would be the district court (*Apygardos Teismas*), where a department of administrative affairs would be created, and the second instance would be the Supreme Tribunal. According to the second option, which was proposed by M. Romeris, the system would have looked differently: if, on the basis of Art. 63 of the Constitution, cases of official criminal misconduct of persons holding ministerial positions were heard by the Supreme Tribunal (as a court of first and last instance in such cases), then in this instance, the court of first instance in such cases would be a special department of the Supreme Tribunal, and the court of second instance in these cases would also be based in the Supreme Tribunal, which, according to M. Romeris, would increase the prestige of the administrative court. Moreover, in both cases, these courts would consider the case both from the point of view of substantive law and from the point of view of the factual part of the case – by analogy with the fact that the courts of general jurisdiction in the three-tier system of courts, where there is a court of first instance, a court of appeal, and a court of cassation, whereas the courts of the first two instances evaluate the factual part of the case (Fridšteinas, 1937, p. 204) (the court of cassation reviews a case from the point of the review of the application of substantive norms by the lower courts, i.e., the norms of legislation, and the application of procedural norms – the norms of the procedural code, i.e., from the point of view of observance of the organisation and conduct of the court proceedings – the Authors). Disputes in administrative courts may involve more than just an appeal concerning certain administrative orders, since the administrative courts around the world have dealt with disputes over the authority of government agencies and officials for a long time. The Supreme Tribunal, in fact, performed these functions – among the bright examples when the court clarified the legal issues concerning the powers of state institutions and the officials. Such clarifications were, *inter alia*, made from the point of view of the Constitution of the State of Lithuania, where we may note the judgments of 4-10 February,

[24] Vyriausiasis Tribunolas (Civilinis Skyrius), 1939 m. kovo 20 d. sprendimas, Byl. 54 Nr. S. Baltūsis, Vyriausiojo Tribunolo civilinių kasacinių bylų sprendimai. Kaunas: Raidė, 1939. 52 p., Byla Nr. 21, pp. 35-37.
[25] See the history of the administrative court in Lithuania in more detail Deviatnikovaitė (2021).

1925,[26] and the rulings of 26 March 1926,[27] 15 October, 1926,[28] and 11 May , 1928.[29] Hence, the interpretation of the norms of the Constitution of the State of Lithuania by the Supreme Tribunal, to a significant extent, took place in the field of administrative law, which, in addition, included clarifications of the norms of the Constitution and the norms of legislation by the Supreme Tribunal in its decisions, where the court answered questions from various state institutions regarding the application of the norms of law and their interpretation.

The Lithuanian lawyer Antanas Sugintas in his article on the conformity of laws to the Constitution (1924) indicates that the principle of conformity of all normative legal acts to the Constitution of the State of Lithuania, set out in Art. 3, means that both, all normative legal acts adopted before the enactment of the Constitution, and those acts that were adopted after it, must comply with the Constitution, which A. Sugintas called "*the dominance of the Constitution*." How, in theory, the constitutionality of all legal acts, which were adopted after the Constitution had been enacted, remains unknown (Sugintas, 1924, pp. 29-30). A. Sugintas mentioned that according to Art. 68 of the Constitution, the Court was assigned the role of considering disputes related to the issue of the legitimacy of administrative orders, which is completely different (besides, as we may learn from the early judicial practice of the Supreme Tribunal, namely the decisions of 2 February and 23 May, 1923, at that time the respective procedure for consideration of such cases had not yet been developed).[30] A. Sugintas also pointed out that Art. 69 of the draft Constitution contained a clause that the courts did not consider the legitimacy of laws adopted after the entry of the Constitution into force. However, this provision was rejected and was not included in the final version at the final stages of consideration of the draft Constitution of 1922 (Sugintas, 1924, pp. 30-31). In practice, the Supreme Tribunal subsequently considered the issue of compliance of the norms of laws adopted in the pre-war period with the Constitution of the State of Lithuania, occasionally at the

[26] Vyriausiasis Tribunolas (Visuotinis susirinkimas), 1925 m. vasario 4-10 d. sprendimas, Vyriausiojo Tribunolo 1924-1933 metų visuotiniųjų susirinkimų nutarimų rinkinys: su Teisingumo ministerijos aplinkraščiais ir dalykine rodykle / spaudai paruošė J. Byla. Kaunas : Karvelio ir Rinkevičiaus prekybos namai, 1933., Byla № 10, pp. 17-28 / Teisė. Teisės Mokslų ir Praktikos Laikšrakstis. Leidžia Lietuvos Teisininkų draugija. № 7. Sausis – Birželis. 1925., pp. 65-86.

[27] Vyriausiasis Tribunolas (Visuotinis susirinkimas), 1926 m. kovo 26 d. nutarimas, Teisė. Teisės Mokslų ir Praktikos Laikšrakstis. Leidžia Lietuvos Teisininkų draugija. № 9. Sausis – Birželis. 1926., pp. 82-85.

[28] Vyriausiasis Tribunolas (Visuotinis susirinkimas), 1926 m. 15 spalio d. nutarimas / Teisė. Teisės Mokslų ir Praktikos Laikšrakstis. Leidžia Lietuvos Teisininkų draugija. № 10. Liepos – Gruodis. 1926., pp. 75-78.

[29] Vyriausiasis Tribunolas (Visuotinis susirinkimas), 1928 m. gegužės 11 d. nutarimas, Vyriausiojo Tribunolo 1924-1933 metų visuotiniųjų susirinkimų nutarimų rinkinys: su Teisingumo ministerijos aplinkraščiais ir dalykine rodykle / spaudai paruošė J. Byla. Kaunas : Karvelio ir Rinkevičiaus prekybos namai, 1933., Byla № 67, pp. 109-124 / Teisė. Teisės Mokslų ir Praktikos Laikšrakstis. Leidžia Lietuvos Teisininkų draugija. № 13, pp. 61-72.

[30] Vyriausiasis Tribunolas, 1923 m. vasario 1 d. ir gegužės 23 d. nutarimas / Teisė. Teisės Mokslų ir Praktikos Laikšrakstis. Leidžia Lietuvos Teisininkų draugija. №4 1922 m. spalių – 1923., pp. 46-47.

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request of the Ministry of Justice,[31] as well as district courts.[32] Since at that time the law did not determine which instance should deal with the interpretation of the norms of the Constitution, the practice has shown that both the courts and different state institutions were engaged in the interpretation of the norms of the Constitution. Over the years, the role of the authority dealing with the interpretation of the norms of the Constitution became more clearly visible in the Supreme Tribunal. In addition, we should denote that the history has preserved the practice of interpreting the norms of the Constitution, by the State Council (*Valstybės Taryba*), which was established by the Constitution of 1928 and became known owing to the publication of its explanations relating to the application of the norms of legislation, among which there were also interpretations of the norms of the Constitution.[33] The Lithuanian legal scholarship also contained an opinion that the State Council (*Valstybės Taryba*) performed the role of an administrative court to a certain extent (Romeris, 1930, p. 30; Jakučionis, 1938, pp. 22-25), due to the function of clarifying the norms of legislation, as well as because of the right of this institution to report to the Cabinet of Ministers and the other ministries concerning inconsistencies of administrative orders or by-laws with the norms of the legislation (according to Art. 3 of the Law on Council of State of 1928[34]), although it was never officially included into the Lithuanian judicial system. Despite the fact that the State Council did not perform the functions of the court, its explanations were quite authoritative (Jakučionis, 1938, pp. 22-25). The French lawyer A. Mestre published an article relating to the work of the State Council of France ("*Conseil d'Etat*") in the Lithuanian law journal "*Teise*", No. 42 (1938), where A. Mestre thoroughly described the work and peculiarities of practice of the State Council of France (Mestre, 1938, pp. 195-198) – it should be noted here that this institution has initially performed the function of the highest administrative court in France, while the functions of the State Council, which operated in the Republic of Lithuania in 1928-40, included proposals for amendments to laws, the plans for codification, the preparation of bills, etc.[35], however, as mentioned earlier, it did not perform judicial functions; for instance, as M. Romeris noted in his 1930 work that if an administrative court could annul an administrative act by its judgment, then the State Council in this case notified the Cabinet of Ministers or Ministries that certain administrative acts did not comply with the law (Romeris, 1930, p. 34). We will discuss the practice of interpreting the norms of the Constitution of the State of Lithuania by the State Council in subsequent scientific publications, and in this paper we will discuss the practice of interpreting the norms of the Constitution by the Supreme Tribunal.

[31] (1) Vyriausiasis Tribunolas (Visuotinis susirinkimas), 1926 m. spalio 8 d. nutarymas, Vyriausiojo Tribunolo 1924-1933 metų visuotiniųjų susirinkimų nutarimų rinkinys: su Teisingumo ministerijos aplinkraščiais ir dalykine rodykle / spaudai paruošė J. Byla. Kaunas : Karvelio ir Rinkevičiaus prekybos namai, 1933., Byla № 31, pp. 52-53.
(2) Vyriausiasis Tribunolas (Visuotinis susirinkimas), 1930 m. lapcričio 13 d. nutarimas, Vyriausiojo Tribunolo 1924-1933 metų visuotiniųjų susirinkimų nutarimų rinkinys: su Teisingumo ministerijos aplinkraščiais ir dalykine rodykle / spaudai paruošė J. Byla. Kaunas : Karvelio ir Rinkevičiaus prekybos namai, 1933., Byla № 124, pp. 192-194.
[32] Vyriausiasis Tribunolas (Visuotinis susirinkimas), 1929 m. kovo 22 d. nutarimas, Vyriausiojo Tribunolo 1924-1933 metų visuotiniųjų susirinkimų nutarimų rinkinys: su Teisingumo ministerijos aplinkraščiais ir dalykine rodykle / spaudai paruošė J. Byla. Kaunas: Karvelio ir Rinkevičiaus prekybos namai, 1933., Byla № 86, p. 146.
[33] Valstybės Taryba, 1933 m. lapcričio 7 d., Nr. 46, Valstybės Tarybos nuomonės teisės klausimais, 1929 – 1937. Leidžia Lietuvos Teisininkų Draugija. Kaunas, „Spindulio" B-vės spaustuvė. 1937., pp. 123-125.
[34] 1928 m. rugsėjo 21 d. Valstybės Tarybos įstatymas. Vyriausybės Žinios. 1928. Nr. 283-1813, p. 8.
[35] 1928 m. rugsėjo 21 d. Valstybės Tarybos įstatymas. Vyriausybės Žinios. 1928. Nr. 283-1813, p. 8.

3. INTERPRETATION OF THE NORMS ART. 51, 63, 65-68 OF THE 1922 CONSTITUTION IN THE PRACTICE OF THE SUPREME TRIBUNAL IN 1923-1928

The Supreme Tribunal was founded in 1919 initially as an appellate court for the cases, which were heard by the district courts (*Apygardos Teismas*). It became the court of cassation for all court cases heard by the Lithuanian courts since 1921,[36] and was the Supreme Court in the state within the meaning of Art. 63 of the Constitution of the State of Lithuania (see the interpretation of this provision of the Constitution in the judgment of 4 -10 February, 1925 below);[37] since 1924, after the Klaipeda Convention was enacted on 8 May, 1924, the Supreme Tribunal became the court of highest instance for the Klaipeda region. Interpretations of the norms of the Constitution are contained also in the judgments of the General Assembly of the Supreme Tribunal, where complex cases were considered. Although the right of the Supreme Tribunal to interpret the Constitution was not enshrined in law *expressis verbis*, it was never questioned by the judges of the Tribunal. Each court had the right to review the constitutionality of applicable laws, and the Supreme Tribunal was the highest court under the Law on Provisional Order of the Judiciary and its Work (1918) and Law on the Judiciary (1933). Arguably, these legal norms were sufficient and, when making decisions, the Supreme Tribunal did not see a great need to additionally justify its right to interpret the Constitution. Let us consider the judgments of the Supreme Tribunal, which provide *expressis verbis* interpretations of the norms of the Constitution of the State of Lithuania.

3.1 Judgments Relating to Administrative Procedure

In two judgments of 1 February, 1923 and 23 May, 1923, the Supreme Tribunal clarified the meaning of Art. 68 of the Constitution of the State of Lithuania. In January 1923, the Šiauliai District Board applied to the Supreme Tribunal with a request to interpret the provision of Art. 3 and 4 of the Law on Police; the District Board was dissatisfied with the fact that the administration required local boards to provide local policemen with apartments and allowances for both official and personal purposes. This was followed by an appeal to the Kaunas Regional Court with the aim of cancelling the deduction of income tax established by the Šiauliai tax inspector on the basis of an order of the Ministry of Finance, Trade and Industry, which was also impugned by the complainants in court. The complaint was dismissed by the Kaunas Regional Court as inadmissible, followed by a complaint to the Supreme Tribunal. If the second complaint was a fairly typical administrative complaint (here it should be noted that the Supreme Tribunal later performed a number of functions of an administrative court, although there was never a division of administrative cases in the structure of this court), then the appeal to the Supreme Tribunal on the issue of interpreting the norms of the Constitution then looked like a substantial innovation. Both complaints were dismissed by the Supreme Tribunal. The Court points out that Art. 68 of the Constitution requires the courts to resolve disputes regarding the legality of certain administrative orders, but at the same time Art. 66 of the Constitution indicates that the competence of the courts is determined

[36] 1921 m. liepos 20 d. Laikinojo Lietuvos teismų ir jų darbo sutvarkymo, civilinio ir baudžiamojo proceso įstatymų pakeitimas ir papildymas, Vyriausybės Žinios. 1921. Nr. 68, 607, pp. 1-2.

[37] Vyriausiasis Tribunolas, 1925 m. vasario 4-10 d. sprendimas, Vyriausiojo Tribunolo 1924-1933 metų visuotiniųjų susirinkimų nutarimų rinkinys: su Teisingumo ministerijos aplinkraščiais ir dalykine rodykle / spaudai paruošė J. Byla. Kaunas : Karvelio ir Rinkevičiaus prekybos namai, 1933., Byla № 10, pp. 17-28 / Teisė. Teisės Mokslų ir Praktikos Laikšrakstis. Leidžia Lietuvos Teisininkų draugija. № 7. Sausis – Birželis. 1925., pp. 65-86.

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by law; but the legislation in force at that time on the organisation of the work of courts did not define any special procedure for complaining against any administrative acts, and therefore, the norm of Art. 68 of the Constitution can be applied by the courts in resolving disputes only in a general manner; but if talking about the administrative procedure, then until the moment a law is adopted establishing a special procedure for resolving disputes for the implementation of Art. 68 of the Constitution, no court can perform functions that are not assigned to it by the acting legislation.[38] It should be noted, that in Supreme Tribunal's later practice, the Court adjudicated cases, where different administrative acts were impugned; some judgments in administrative disputes were handed down by the Department of Civil Cases,[39] whereas more complex cases were resolved by the General Assembly of the Supreme Tribunal.[40]

3.2 Case of J. Purickis

A rather extensive interpretation of various norms of the Constitution of the Republic of Lithuania (first of all, Article 63) is contained in the decision of the Supreme Tribunal in the case of the well-known politician Juozas Purickis (1883-1934), in which the Supreme Tribunal delivered an acquittal on 4–10 February, 1925. J. Purickis, as well as three other officials, were accused of having decided in November 1921 to send three carriages of flour, sugar, and a number of prohibited substances to the Soviet Union, and in order not to pay the import tax, they had registered the carriages as government cargo. Separately, J. Purickis was also charged with the fact that when he was the Lithuanian envoy to Germany, he was engaged in buying up foreign currency and valuables, and in order to freely transport them from one state to another, he used diplomatic couriers and a state seal, and also, according to the state prosecution, the accused was engaged in other machinations. Regarding the dispatch of wagons, J. Purickis was charged under part 3 of Art. 636 of the Criminal Code. J. Purickis was subsequently acquitted, but the interpretation of the Constitution concerned the question of the competence of the Supreme Tribunal to hear the case. So, the lawyers of the politician stated that, in their opinion, the given case was started illegitimately, based on Art. 63 (1) of the Constitution, and that the given case, according to Art. 63 (2) of the Constitution, should not have been tried by the Supreme Tribunal, since, according to lawyers, it was not the Supreme Court, but only the highest appellate or cassation instance, and that a distinct court should consider the cases of those who held ministerial positions. Apparently, the Supreme Tribunal did not agree with these statements, and explained how the relevant provisions of the Constitution should be understood. First, the Court clarified that, according to Art. 67 of the Constitution, there was only one Supreme Court in the territory of the Republic of Lithuania, and according to Art. 63 (2) of the Constitution the Supreme Court also adjudicated cases concerning ministries. As regards Art. 67 of the Constitution, the Supreme Tribunal also provided an interpretation of this provision. Art. 67 of the Constitution speaks of a single Supreme Court that operates in the territory of the Republic of Lithuania, meaning the same Supreme Court, and the Constitution defines a single Supreme Court for all residents of the Republic of Lithuania, whose jurisdiction, among other things, applies to cases relating to ministries. The norm of Art. 63 of the

[38] Vyriausiasis Tribunolas, 1923 m. vasario 1 d. ir gegužės 23 d. nutarimas / Teisė. Teisės Mokslų ir Praktikos Laikšrakstis. Leidžia Lietuvos Teisininkų draugija. №4 1922 m. spalių – 1923., pp. 46-47.
[39] Vyriausiasis Tribunolas (Civilinis Skyrius), 1939 m. balandžio 21 d. sprendimas, Byl. 98 Nr. Al Milčinskas / Vyriausiojo Tribunolo civilinių kasacinių bylų sprendimai. Kaunas: Raidė, 1939. 52 p., pp. 44-45, Byla Nr. 27.
[40] Vyriasiasis Tribunolas (Visuotinis susirinkimas), 1926 m. kovo 26 d. nutarimas / Teisė. Teisės Mokslų ir Praktikos Laikšrakstis. Leidžia Lietuvos Teisininkų draugija. № 9. Sausis – Birželis. 1926., pp. 82-85.

Constitution does not provide for the creation of any special courts. Thus, according to the norms of the Constitution, there is one Supreme Court in the Republic of Lithuania. Since in the judicial system the final decision in all cases is made by the Supreme Court, accordingly, the Supreme Court operates in the Republic of Lithuania.

The Supreme Tribunal recalls that on 16 January, 1919, the Law on the Provisional Order of the Judiciary and its Work (adopted on 28 November, 1918) was published,[41] and on 20 July, 1921, corresponding amendments were made to this law,[42] according to which, the Supreme Tribunal is now authorised to administer justice throughout the territory of the Republic of Lithuania (thus, according to Article 2 of the amendments, cassation appeals against decisions and decisions of district courts were filed with the Supreme Tribunal). The Supreme Tribunal was appointed to be the highest court for the army courts under the "Provisional Statutes" of 7 August, 1919,[43] and then became the highest court in the Klaipeda region on the basis of Art. 23 and 24 of the appendix to the Klaipeda Convention of 8 May, 1924.[44] Thus, the Supreme Tribunal is the Supreme Court, whose activities are provided for by the Constitution of the State of Lithuania. The Court also clarifies that, according to Art. 66 of the Constitution, the organisation, competence, and jurisdiction of the courts is determined by law. No new laws on this matter have been adopted so far, and therefore the above laws remain in force, which means that the Supreme Tribunal has always been and remains the Supreme Court in Lithuania. The attorney of J. Purickis, in his next argument, also argued that the Supreme Tribunal, in the sense of Art. 63 of the Constitution, will not have the necessary composition in order to consider the case, to which the Supreme Tribunal did not agree, and again gave the appropriate interpretation of the Constitution. The Court again clarified that since the new law on the judiciary had not been adopted, the former ones remained in force. Then, according to the defendant's lawyer, Art. 63 of the Constitution had a declarative character, like Art. 68, according to which the court decides disputes about the legality of various administrative acts, and referred to the decision of the Supreme Tribunal of 3 May, 1923, where the court indicated that the procedure for resolving administrative disputes had not yet been adopted, and therefore, this interpretation should be used by analogy. However, here the Supreme Tribunal denoted that there was a significant difference between Art. 63 and Art. 68 of the Constitution: if in the first case we are talking about the fact that the Supreme Court, as the court of highest instance, is the same for the entire territory of Lithuania, then Art. 68 of the Constitution refers to the consideration by the court of the disputes on the legality of administrative acts without specifying any specific court. The Supreme Tribunal further emphasised that the provision of Art. 63 of the Constitution was not declarative, but was in fact imperative. With regard to the consideration of administrative cases by the Grand Tribunal, the Court outlined, that the function of considering such disputes was actually provided for by the Constitution, and in the decision of 3 May, 1923 it was only indicated that until there was no law that would determine the procedure for considering these cases, then such cases were not assigned to consideration. In order for such disputes to be considered in the courts, the Supreme Tribunal argued, that it was necessary to adopt

[41] 1918 m. lapkričio 28 d. Laikinasis Lietuvos teismų ir jų darbo sutvarkymas, Laikinosios Vyriausybės Žinios. 1919. Nr. 2/3, pp. 6-7.
[42] 1921 m. liepos 20 d. Laikinojo Lietuvos teismų ir jų darbo sutvarkymo, civilinio ir baudžiamojo proceso įstatymų pakeitimas ir papildymas, Vyriausybės Žinios. 1921. Nr. 68, 607, pp. 1-2.
[43] 1919 m. rugpjūčio 7 d. Laikinieji Armijos teismų Įstatai. Laikinosios Vyriausybės Žinios. 1919. Nr. 10, pp. 5-6.
[44] 1924 m. gegužės 8 d. Klaipėdos krašto konvencija, Vyriausybės Žinios. 1924. Nr. 169, 1186, pp. 1-20.

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a relevant law, but not to use any interpretation of the court. And besides, the discussed situation did not apply to the current case. The attorney also pointed out that on 29 October, 1924, the Seimas adopted a resolution with the same interpretation of Art. 63 of the Constitution, which he cited in his argument, and that this interpretation should also apply to criminal cases relating to ministers. Concerning this argument, the Supreme Tribunal pointed out the following. According to Art. 64 of the Constitution, the court makes a decision acting on behalf of the Republic of Lithuania. According to Art. 27 of the Constitution, the Seimas is the legislative body, and laws are proclaimed, on the basis of Art. 50 of the Constitution, by the President of the Republic. The Supreme Tribunal explains that only those laws that are legally binding are binding on the court, and the conclusion of the Seimas does not have the force of law. Art. 1 of the Constitution of the State of Lithuania declares that state power belongs to the People, and of course, it is impossible to identify it with the Seimas; this is shown in Art. 2 of the Constitution, which states that the management is carried out by: the Seimas, the Government and the Courts. In addition, according to Art. 103 of the Constitution, the Seimas may propose amendments to the Constitution, and the decision is submitted to a popular vote. As for the interpretation of laws, this, in the opinion of the Supreme Tribunal, is the prerogative of the court, which follows from the norms of Art. 12-13 of the Criminal Procedure Code and Art. 9-10 of the Civil Code.

From the point of view of the principle of separation of powers, the judiciary is independent, and the judiciary (that is, the court) cannot be compared with the legislative branch of power (that is, the Seimas). Art. 28 of the Constitution provides that the Seimas exercises control over the work of the Government, whereas there are no such provisions regarding the courts, and Art. 65 of the Constitution guarantees that the court exercises its powers independently. Another argument of the defendant's attorney that the Supreme Court, referred to in Art. 63 of the Constitution, and that the Supreme Court referred to in art. 67 of the Constitution, is not the same court, was found wrong by the Supreme Tribunal. As regards the attorneys' argument that the case should be heard not in the Supreme Tribunal, but in the district court, since the case was initiated before the entry into force of the Constitution on 6 August, 1922, the Supreme Tribunal notes that Art. 63 of the Constitution defines two distinct laws, and the second gives such a category of cases, like the one that was heard now, to the competence of the Supreme Tribunal of the Republic of Lithuania. The effect of the new procedural law also applies to those procedural actions that were *ongoing* at the time of its entry into force. And if so, then accordingly, under Art. 63 of the Constitution, this case is within the jurisdiction of the Supreme Tribunal, even if the proceedings were initiated before the entry into force of the Constitution of the Republic of Lithuania.

The next issue for the Supreme Tribunal to determine was whether the criminal case against J. Purickis had been legally initiated. The situation was that when a case was opened against him, Art. 34 of the Law on Provisional Order of the Judiciary and its Work of 1918, according to which public servants were to be brought to responsibility by the public prosecutor, while Art. 63 of the Constitution determined that only the Seimas had the right to do so; the constitutional law also made changes to the Code of Criminal Procedure. The Supreme Tribunal clarified that the new law concerned proceedings that were *already in progress*, as mentioned above, but did not concern proceedings that were completed *before its entry into force*, i.e., there was no need to conduct new procedural actions, and this was not required by the Constitution, the new procedural law was not applied to cases opened in due course before the adoption of the Constitution. Then the defendant's attorney claimed that if the procedural law had a certain retroactive effect, then it turned out that the case should have been considered by the Seimas. However,

the Grand Tribunal found that the retroactive effect of the law was very limited. If the criminal case was initiated by the public prosecutor in the appropriate manner, there is no need to review it again. To the attorney´s argument that Art. 63 (1) of the Constitution is a constitutional and not a substantive or procedural norm, the Supreme Tribunal notes that it is, of course, constitutional, but at the same time, the norms of the Constitution are either substantive or procedural; in the case of Art. 63, on the one hand, this is a guarantee of protecting the honour of the Government, on the other hand, criminal cases against civil servants are entrusted to be considered only by certain authorities so that many unnecessary cases are not opened. Thus, the Supreme Tribunal fully recognised its jurisdiction regarding the consideration of this case.[45]

3.3 Liability of Judges

In the decision of the General Assembly of the Supreme Tribunal dated 26 March, 1926, the Court clarified the procedure for collecting invoices due to the commission by a justice of peace of a certain error in calculating the court fee at the request of the Ministry of Justice. The issue was initially raised by the Marijampolė District Court with regard to the magistrate of the district, who did not fully collect the court fee from the parties to the process during 1924, as a result of which, according to the calculations of the Control Audit, he did not collect the court fee in the total amount of 206.47 lits, after which it was decided to collect the amount from him. Based on the acting legislation, the Supreme Tribunal determined that employees in such cases can be charged under two procedures: within the framework of the criminal proceedings if there is evidence of malicious intent, or within the framework of the administrative procedure if the fault of the employee is negligence. The Court notes that according to Art. 1131-1136 Code of Civil Procedure, Art. 1066-1116 of the Criminal Procedure Code, as well as Art. 262-269 of the Law on Judiciary, judges are responsible to the court – within the civil, criminal, and disciplinary proceedings. The justice of the peace, when collecting the court fee from the litigants, is conducting the work of the court. Based on the procedural regulations and the Law on the Judiciary, the Supreme Tribunal found that within the framework of the administrative procedure, a judge cannot be charged with an account if no court cases have been opened in this case - i.e., civil, criminal, or disciplinary ones. This position is in line with the Constitution of the State of Lithuania, based on Art. 2 which is the principle of separation of powers. The Supreme Tribunal also notes that according to Art. 65 of the Constitution, the decision of the court cannot be cancelled, or changed, except by the procedure prescribed by law. The Supreme Tribunal drew attention to the fact that the justice of the peace, while collecting the court fee, at the same time, performed work based on his resolution or decision, that is, in this case, impossible to charge any charges from the judge on the basis of an administrative order due to the fact that errors arose in his work due to negligence. Thus, the judge can only be held liable within the framework of an open case. In addition, the decision of the Marijampolė District Court requiring the District Justice of the Peace to charge a court fee for the corresponding amount, as it turned out, also contained an incorrect calculation of the court fee. The Supreme Tribunal, in its decision, indicated that it should be recognised that such an accusation from a

[45] Vyriausiasis Tribunolas (Visuotinis susirinkimas), 1925 m. vasario 4-10 d. sprendimas, Vyriausiojo Tribunolo 1924-1933 metų visuotiniųjų susirinkimų nutarimų rinkinys: su Teisingumo ministerijos aplinkraščiais ir dalykine rodykle / spaudai paruošė J. Byla. Kaunas : Karvelio ir Rinkevičiaus prekybos namai, 1933., Byla № 10, pp. 17-28 / Teisė. Teisės Mokslų ir Praktikos Laikšrakstis. Leidžia Lietuvos Teisininkų draugija. № 7. Sausis – Birželis. 1925., pp. 65-86.

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judge cannot be demanded in any way, and the decision can only be cancelled in the manner prescribed by law – in the order of a complaint (i.e., appeal or cassation), or supervision, and also quashed the decision of the Marijampolė District Court regarding the payment of the court fee.[46]

3.4 Authority of the President of the Republic in Relation to Amnesty

The Supreme Tribunal provided an interpretation of the norms of Art. 51 and 65 in the ruling of the General Assembly of 15 October, 1926, which was handed down upon the request of the Ministry of Justice of the Republic of Lithuania for the explanation regarding the powers of the courts and the President of the Republic of Lithuania in the issue of amnesty. The Supreme Tribunal, in the reasons for this ruling, noted that Art. 65 of the Constitution, according to which justice is administered by the court, and the amnesty is determined by law, and that this norm clearly defines the autonomy of the function of the judiciary on an equal basis with all other branches of government, and no other state body has the right to interfere in the work of the court. An exceptional case is an amnesty, however, even that, based on its essence, concerns only criminal justice and is in the prerogative of the legislator. In this case, the question of the scope of powers cannot be raised in this way since this question does not come into contact with the powers of the President of the Republic. As regards Art. 51 of the Constitution, under which the President has the right to impose punishment, here the Supreme Tribunal indicates that this rule is an exception to the ones referred to above. The Court also mentioned that historically, the function of state power was separated from general administration, and that in earlier times (especially in monarchical states), the separation of the branches of power (in the earlier context – into the administration and judiciary) was not so specific and amnesty remained in the competence of these two branches, although the institution of amnesty often worked differently, which could be expressed in reducing the sentence, or changing its measure, occasionally to a milder one. According to the constitutional and legal principle of separation of the branches of power, where there is an institution of judicial rehabilitation (in the Republic of Lithuania in 1918-40, the institution of judicial rehabilitation acted on the basis of Articles 975-1 and 975-2 of the Criminal Procedure Law), such is not included in the functions of administrative bodies, therefore, the powers of the President under Art. 51 of the Constitution have no effect within the framework of this institution. The court points out that a convicted person who has been deprived of certain rights has the opportunity to restore these rights through the institution of rehabilitation, which is conducted by a court, and with the help of this institution, the convict's punishment or restriction is removed and rehabilitation does not occur through the prerogative of the President, but occurs according to the general procedure for obtaining rights. With regard to the powers of the President of the Republic in the matter of obtaining rights, they may be exercised by the President on the foundation of other functions and powers of the President, but not from the prerogative to impose penalties.[47]

[46] Vyriausiasis Tribunolas (Visuotinis susirinkimas), 1926 m. kovo 26 d. nutarimas, Vyriausiojo Tribunolo 1924-1933 metų visuotiniųjų susirinkimų nutarimų rinkinys: su Teisingumo ministerijos aplinkraščiais ir dalykine rodykle / spaudai paruošė J. Byla. Kaunas : Karvelio ir Rinkevičiaus prekybos namai, 1933., Byla № 26, pp. 45-48 / Teisė. Teisės Mokslų ir Praktikos Laikšrakstis. Leidžia Lietuvos Teisininkų draugija. № 9. Sausis – Birželis. 1926., pp. 82-85.

[47] Vyriausiasis Tribunolas (Visuotinis susirinkimas), 1926 m. 15 spalio d. nutarimas / Teisė. Teisės Mokslų ir Praktikos Laikšrakstis. Leidžia Lietuvos Teisininkų draugija. № 10. Liepos – Gruodis. 1926., pp. 75-78.

3.5 Case of Petrulis

Great attention to the interpretation of Art. 63 of the Constitution is also given in the decision of the General Assembly of the Supreme Tribunal of 11 Ma, 1928 in the case of Vytautas Petrulis (1890-1941), who held various positions in the political leadership in Lithuania in the 1920s, and was accused of different instances of misconduct and at the time of the start of the case he worked as the Minister of Finance. As the reader remembers from the decision in the case of J. Purickis, which is described above, Art. 63 of the Constitution of the State of Lithuania, provided for a separate procedure for bringing high-ranking officials to criminal responsibility for official misconduct, and the court, which has to try this case as a court of first (and last) instance is particularly the Supreme Tribunal. An investigation was opened, and found that the official's actions contained signs of criminal offences contained in Art. 636 (2), 639 (3) and 656 (3) of the Criminal Code. At the same time, the investigation stated that they could not interrogate Petrulis, since, on the basis of Art. 63 (1) of the Constitution of the Lithuanian State, the Seimas should initiate a criminal case against a minister for misconduct in office, which, however, has not been done. Therefore, the investigator in this case had to refer the case to the public prosecutor of the Kaunas District Court, who accordingly applied to the Ministry of Justice through the public prosecutor of the Supreme Tribunal. An explanation was received from the Ministry of Justice: the crimes committed by officials in ministerial positions should be classified as follows: a) malfeasance; b) unlawful actions of the minister as a public servant, which, in themselves, do not violate ministerial service, but consist in other offences. From the point of view of the case, the situation with the accused fell precisely under the second option, whereas Art. 63 (1) of the Constitution spoke about the first option, and therefore, in the second case, the participation of the Seimas in the case is not necessary, and accordingly, such a criminal case can be initiated by the public prosecutor and the judicial investigator in the general manner. Therefore, the case was transferred from the Ministry of Justice to the Public Prosecutor of the Supreme Tribunal for further investigation. Then, the Public Prosecutor of the Supreme Tribunal again referred the case to the investigator who had earlier started this case, however, the investigator considered that until there was a corresponding decision of the Seimas, it was impossible to arrange an interrogation of the official, on which he informed the Public Prosecutor, although he remained with his opinion, based on a letter from the Ministry of Justice with the above explanation, from which one can make a brief conclusion that Petrulis (if his guilt is proven) should be held liable in the general manner, as an ordinary official (i.e., the case in this situation would have to be handled by an investigating judge), and considered that such an interpretation of Art. 63 of the Constitution is incorrect, with which he appealed to the Supreme Tribunal. The Supreme Tribunal, after reviewing the case, came to the following conclusions. The Court noted that there are two procedures for bringing officials to criminal responsibility, namely: a) opening a criminal case in the general order for them (respectively, the case will be considered by a lower court, and the Supreme Tribunal can consider such a case only in cassation order); and b) consideration and decision of the case by the Supreme Tribunal itself, as the court of first (and last) instance in the case. At the same time, the Supreme Tribunal does not consider all criminal cases on issues of responsibility of officials under the second procedure, but only those cases that concern ministerial officials. In fact, as the Supreme Tribunal points out, this procedure is an exception to all the rules of criminal procedure, which is enshrined in the Constitution (Art. 63 (1)), however, the procedure for conducting procedural actions in such a case remains the same as in all others. Art. 63 of the Constitution does not provide for any special procedure for how the proceedings

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in such a case should be carried out, which means that they must be carried out in accordance with the general procedure established in the Code of Criminal Procedure. Thus, the investigator's assertion that this case should be handled by a representative of the Supreme Tribunal cannot be considered correct.

Then the Court turned to the question of how to interpret Art. 63 of the Constitution correctly, namely, what this provision of the Constitution includes: does it provide for the investigation of cases of all crimes committed by officials in ministerial positions (as the investigating judge claimed), or any individual ministerial offences? The norm of Art. 63 of the Constitution did not contain a list of criminal offences, in which the criminal case had to be initiated by the Seimas. The Court proceeds from the fact that if an official who was a minister had committed a crime, then he committed it as a minister. If he combined the position of minister with the position of a university professor, which he actively held, then one could say that he committed a certain criminal offence not as a minister, but already as a professor; if an official committed an offence while in any other position, before he became a minister, then a criminal case against him will be opened as against an official, but not as a minister, i.e., in general order. Thus, the Court concludes that the special procedure for conducting criminal cases, which is enshrined in Art. 63 of the Constitution of the Lithuanian Stated concerned not only officials who work in positions of ministers but are engaged in ministerial service. Further, the Supreme Tribunal held that the roots of Art. 63 of the Constitution historically originate from the English constitutional system, where a constitutional institution of impeachment exists, the mechanism of which is that the Ministers of the Crown were prosecuted for the committed criminal offences by the lower house of English Parliament (i.e., the House of Commons), and accordingly, they were judged by the highest house of Parliament, or the House of Lords, which at that time operated as the highest court in the United Kingdom. The Supreme Tribunal also notes that a similar constitutional institution has also been adapted in the United States, as well as in a number of European states, with the difference that it concerned only ministers; in addition, sometimes the very procedure for bringing an official who committed a certain criminal offence to justice, could differ. Thus, the Court outlined that based on a literal and historical analysis of the norm of Art. 63 of the Constitution of the State of Lithuania, the norm should apply to all cases concerning criminal offences of ministers committed in ministerial positions. Thus the position of the investigator was correct.

However, the situation outlined above concerned the constitutional order that existed at the time of 1922. The Supreme Tribunal recalls that there were two constitutional upheavals in December 1926 and April 1927. After the first one, the Seimas still continued to work; however, on 12 April, 1927, the Seimas was dissolved but the elections to the new Seimas, which, according to Art. 52 of the Constitution of the Lithuanian State, were to be conducted within sixty days from the moment of its dissolution, and the elections were not held, and hence the Seimas remained unelected and was not convened (the Seimas partially restored its work only almost a decade later – in 1936). The Court pointed out that in the time that had already passed since those events, one could hear many statements about the need for a constitutional reform or the adoption of a new Constitution, which would be submitted to a popular vote; however, based on the situation that was at the time of the consideration of the case, the Supreme Tribunal considered that it was impossible to call such a constitutional order stable. The Court also notes that it would not be expected that the Court could prevent certain events; the Court draws legal conclusions from the existing norms of the law, it cannot be required to adapt to any political work, and besides, the court does not wield political power. Since the Seimas was dissolved and at the time of the consideration of the case,

the Seimas was not convened again, then certain difficulties with the interpretation of Art. 63 of the Constitution arose due to the absence of the functioning Seimas at that time. The norm of Art. 63 of the Constitution provided that the Seimas, endowed with significant powers, would start criminal cases but at the time the case was heard, it did not function and it was not known when it would start functioning again and in what form, and on the basis of which Constitution – a temporary one, a permanent one, a Constitution that would be structured similarly, or in some other way? Thus, the Supreme Tribunal stated that the disposition of Art. 63 of the Constitution temporarily did not work, and in terms of what would happen to the cases: the suspension of cases, the closure of these cases, or the fact that officials who committed criminal offences while holding ministerial positions would not be punished at all – probably, one could only guess.

The Supreme Tribunal again states that the norm of Art. 63 of the Constitution definitely cannot work in its original meaning. The Court then asks the question: in such a case, if the previous is true, then it turns out that such criminal cases should be opened and considered in a general manner? The Court reiterates that the exceptional procedure for opening criminal cases on the fact of criminal offences by officials holding ministerial positions proceeded from the fact that such a procedure was necessary due to the political nature of the ministerial service and the powers of the government, and the procedure was made following the example of a number of states of the world where such a procedure was implemented. The Supreme Tribunal considers that one way or another, but Art. 63 of the Constitution, in itself, has not been abolished, which means that it must somehow work, which means that there will be some special procedure, and concludes that with the existing political organisation of the Republic of Lithuania, which has been established since 1927, such a function may belong to the President. This conclusion is made according to how the government was organised at that moment: it consisted of the President of the Republic and the Cabinet of Ministers, the senior of which was the President. Under the constitutional order acting in 1927-1928, the Government was the main political body of the Republic of Lithuania, which was supported by ministries. The President of the Republic, who was elected by the Seimas at the end of 1926, in the opinion of the Supreme Tribunal, can exercise the part of the constitutional powers of the Seimas, which was not functioning at the time of hearing the case, and since the provisions of Art. 63 of the Constitution remained in force, then it turns out that the President can start criminal cases against officials who were in ministerial positions for criminal offences committed by them. Thus, the investigator was correct in his conclusions – there were legal barriers to the investigation, and in order for the case to be investigated, the President could start the case. Thus, the Supreme Tribunal decided the following: a) the actions of the accused were a criminal offence relating to ministerial service within the meaning of Art. 63 of the Constitution; b) based on the organisation of work of the government during that time, it was up to the President of the Republic to commence the case.[48]

[48] Vyriausiasis Tribunolas (Visuotinis susirinkimas), 1928 m. gegužės 11 d. nutarimas, Vyriausiojo Tribunolo 1924-1933 metų visuotiniųjų susirinkimų nutarimų rinkinys: su Teisingumo ministerijos aplinkraščiais ir dalykine rodykle / spaudai paruošė J. Byla. Kaunas : Karvelio ir Rinkevičiaus prekybos namai, 1933., Byla № 67, pp. 109-124 / Teisė. Teisės Mokslų ir Praktikos Laikšrakstis. Leidžia Lietuvos Teisininkų draugija. № 13, pp. 61-72.

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4. CONCLUSIONS

In order to provide the results of the research carried out in the paper, we outline the following conclusions:

1. Despite the fact that the legislation did not precisely determine the authority, which was assigned the role of interpreting the norms of the Constitution of the State of Lithuania, there is a weighty amount of practice of the Supreme Tribunal, which confirms that the Supreme Tribunal's conclusions had the primary importance of interpreting the norms of the Constitution. In the judgment of 4-10 February, 1925, the Supreme Tribunal deduces its role in interpreting the Constitution on the basis of Art. 9 of the Code of Civil Procedure, according to which the court interprets the provisions of the legislation. This role of the Supreme Tribunal is also emphasised in the ruling of the General Assembly of 15 October, 1926, where the court, at the request of the Ministry of Justice, explains the powers of the President in the issue of amnesty, based on the norms of the Constitution.

2. To a certain extent, the Supreme Tribunal had to fulfil the role of a constitutional court. As mentioned earlier, neither the highest administrative court nor the constitutional court existed in the judicial system of Lithuania in 1918-40. For example, in the judgment of 11 May, 1928, the Supreme Tribunal holds a very meaningful interpretation of the norm of Art. 63 of the Constitution, based on a dispute between the parties to the process regarding its interpretation. The case law of the Supreme Tribunal featured many cases, where the Court had to check pre-war legal norms for their compliance with the Constitution at the request of state institutions and courts, which suggests that over time, the interpretation of the norms of the Constitution, along with the interpretation of the norms of other laws, was fully recognised as the prerogative of the Supreme Tribunal, at least in practice. The Supreme Tribunal repeatedly ruled in cases relating to the application of pre-war laws, verifying their constitutionality, and occasionally discussed the norms of the Constitution in civil cases, for instance, in a 1929 judgment in terms of the rights and privileges of the citizens, which cannot be constrained due to their religious belief and freedom of religion in a case relating to metrication of marriages of the Old Believers[49].

3. The practice of the Supreme Tribunal remains relatively little studied, including in the context of this court's interpretation of the norms of the Constitution of the State of Lithuania. The authors of this paper conducted a study of the practice of the Supreme Tribunal in 1923-28, which contains several concordant precedents. Apparently, the study of the precedents of the Supreme Tribunal, where the interpretation of the Constitution in later cases would require further research.

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CRIMINAL ALGORITHMS AND THEIR PUNISHMENT IN MODERN CONSTITUTIONALISM / Carlo Piparo, Radovan Blažek

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Abstract: *Today's astonishing development of Information and Communication Technology (ICT) has marked the onset of a new era characterised by profound societal and legal changes. Among the numerous groundbreaking developments, Artificial Intelligence (AI) has emerged as a pivotal force, penetrating virtually every aspect of our daily existence. From the domains of commerce and industry to healthcare, transportation, and entertainment, AI technologies have become indispensable instruments shaping our interactions, professions, and our way of navigating the world. With its extraordinary capabilities and ever-expanding influence, AI serves as a testament to humanity's unwavering commitment to innovation and the limitless potential of technology to transform our society. While Artificial Intelligence systems can execute actions akin to those that could constitute criminal activities if carried out by humans, the challenge arises from the fact that crimes are typically defined within the framework of established laws. Consequently, it can be quite challenging to classify such AI-induced actions as criminal due to the absence of specific legal provisions. Nevertheless, criminal acts are characterised by the intent - or mens rea - behind it. In this context, the intricate issue of assigning criminal responsibility to AI, being a non-human entity, presents particularly complex theoretical challenges, above all its punishment. This paper aims to define AI and its interactions with criminal law, briefly reconstruct potential liability models for AI, deconstruct the aim of punishment in modern constitutional systems, and evaluate whether modern legal systems allow machines to be punished.*

Key words: *Artificial Intelligence; Liability; Criminal Law; Punishment; Models; Education*

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"Certainly," said Bogert. "A robot may not harm a human being, or through inaction allow him to come to harm".
"Very well put," said Calvin, "but what kind of harm?"
"Why- any kind,"
"Exactly! Any kind! But what about hurt feelings, what about making people look small? What about betraying all their hopes? Is that harm?"

(Liar! - Isaac Asimov, 1941)

1. ARTIFICIAL INTELLIGENCE BETWEEN PRESENT AND FUTURE

Artificial Intelligence (AI) is on pace to spread to every facet of our lives (Boden, 2018). The postmodern world is not some faraway fantasy; it is currently here and is firmly establishing its dominance via the proliferation of quick and efficient learning methods. These include prediction systems, data mining techniques, and machine learning algorithms that promise an unprecedented - and maybe unsettling - degree of AI integration into our daily lives and communities (Kaplan, 2018; Floridi, 2019). Today, algorithms integrate in most industries, including video games, engineering projects, animated graphics, healthcare facilities, research activities, and numerous fields. The idea of AI algorithms influencing every aspect of our lives goes even further, with futurists like Stephen Hawking predicting that *"computer intelligence will surpass that of humans"*[1] within the next century and the European Parliament speculating in a 2017 resolution on robotics that *"artificial intelligence may eventually exceed human intellectual capacity"*.[2]

The legal system needs to carefully examine this pervasive presence of AI. Some academics (Basile, 2019) argue that criminal law needs to prepare for the technological revolution because it will provide issues similar to those presented by earlier disruptive developments in technology. This requires an assessment of how well existing regulations can be modified to take into account new technologies, consideration of whether legislators should create new, specialised rules or continue to apply existing norms, despite potential conflicts, while ensuring compatibility with fundamental rights such as such as due process, privacy, and equality (Bassini, Liguori, and Pollicino, 2018).

2. WHAT IS ARTIFICIAL INTELLIGENCE?

2.1 General Information

John McCarthy, an American computer scientist, first used the term *Artificial Intelligence* in 1956 in a summer conference at Dartmouth College - *Dartmouth Summer Research Project on Artificial Intelligence* (Rockwell, 2017; Moor, 2006). Three decades later, in 1987 essay, Roger Schank, AI theorist and pioneer of computational linguistics, listed five qualities of artificial intelligence: communication, self-awareness, external reality knowledge, purposeful action, and a significant amount of creativity, which is defined as the ability to make alternative decisions when the initial course of action proves to be unworkable (Basile, 2019; Schank, 1987).

We may make two important claims thanks to these connotations. First, artificial intelligence does not need to evoke visions of cyborgs or humanoid robots; at most, it might take the form of AI apps. Second, although the idea of intelligent robots is appealing, they are unable to mimic the complexity of human thought processes. As a result, it is more appropriate to think of AI as a branch of computing rather than as a reflection of the complex operations of the human mind (Kaplan, 2018). As a result, the top AI scientists choose to define it as "rationality," which refers to the capability of making the best decisions to fulfil particular goals based on resource optimisation criteria (Russell and Norvig, 2009).

In contrast, AI is described as *"systems that exhibit intelligent behaviour by analysing their environment and taking actions, with a certain degree of autonomy, to achieve specific goals"* in the European Commission's 2018 Communication on Artificial

[1] Speaking of S. Hawking during Zeitgeist Conference, London, May 2015, in: Walker (2015).

[2] European Parliament Resolution of 16 February 2017, providing recommendations to the European Commission on civil law rules on robotics [2015/2103(INL)].

Intelligence for Europe. Voice assistants, image analysis software, search engines, and voice/facial recognition systems are few examples of AI systems that only exist as software that operates in the virtual world. Other AI systems incorporate AI into hardware devices, such as advanced robots, self-driving cars, drones, and Internet of Things applications (Piparo, 2023).

A detailed scholarly investigation demonstrates that the aforementioned criteria served as the foundation upon which the Independent High-Level Expert Group, established by the European Commission for AI advising purposes, defined the notion of AI. This group defines AI as *"the set of scientific methods, theories, and techniques aimed at reproducing through machines the cognitive abilities of human beings. Current developments aim to assign complex tasks previously performed by humans to machines."* (Algeri, 2021).

AI systems are able to analyse the effects of their prior actions on the environment to change how they behave. They can do this by using symbolic rules or learning numerical models. As a field of study, AI encompasses a wide range of methods and techniques, such as machine learning (for which deep learning and reinforcement learning are two specific examples), mechanical reasoning (which includes planning, programming, knowledge representation and reasoning, search, and optimisation), and robotics (which includes control, perception, sensors and actuators, and the integration of all other methods in cyber-physical systems).[3]

The scientific community accepts a wide range of interpretations of AI, as is shown from these various definitions, but they all have certain characteristics. In essence, AI refers to a variety of scientific approaches, hypotheses, and procedures that try to replicate human cognitive skills in robots (Kof et al., 2002).

2.2 Strong (or Hard) vs. Weak (or Soft) AIs

Modern scholars critique most advanced *machine learning* algorithms as excessively reliant on data, lacking in transfer learning capabilities or the ability to create compositional hierarchical structures, struggling to complete or infer hidden information, lacking transparency, as it cannot explain its decisions or distinguish causation from mere correlation.

In contrast, human brains are proactive, driven by internal curiosity and a desire for knowledge and consistency (Hoffmann, 1993). Human brains actively build predictive models to infer hidden causes behind sensory experiences, develop loosely hierarchical and compositional generative predictive models to understand, reason, anticipate and imagine various scenarios in a meaningful manner, leading to flexible and adaptive goal-directed behaviour under diverse circumstances (Butz, 2021).

This cognitive distinction between humans and behaviouristic automata suggests the need to distinguish peculiar techniques that promote AI's understanding of structures and interactions in a conceptual and compositional way. This category includes AI systems with cognitive abilities and self-awareness, similar to human intelligence.

Hard AI actively understands information, learns from experiences, and makes independent decisions. These systems adapt to new situations and evolve over time. Notable examples of hard AI include advanced robots and AI systems capable of

[3] Definition of AI: Main Capabilities and Scientific Disciplines, Brussles, published December 18, 2018. Available at:https://ec.europa.eu/futurium/en/system/files/ged/ai_hleg_definition_of_ai_18_december_1.pdf (accessed on 24.10.2024).

developing strategies for complex tasks such as playing poker or video games. Strong AI perceives AI as a model of human thinking implemented in a software way. According to the concept of "strong" AI, it is in principle possible to replicate the human mind in a computer (Smejkal, 2023). *„AI is the science of creating machines or systems that, when solving a certain task, will use such a procedure that - if a person did it - we would consider a manifestation of his intelligence"* (Minsky, 1967). *„The nature of the mind is algorithmic, and it does not matter in what medium the algorithms (programs) are implemented"* (Searle, 1984).

Weak (or Soft) AI represents AI systems that lack consciousness or self-awareness. Instead, these systems rely on predefined algorithms and patterns to execute specific tasks or provide responses. They process input data using algorithms, producing outputs without genuine comprehension. Examples of soft AI include digital assistants like Siri and Alexa, which respond to user queries but do not possess cognitive abilities (Holbrook, 2020). Weak AI aspires only to modelling, partial manifestations of the mind, while orienting itself to the highest, logical-symbolic level, which is thus the basic level of analogy for it (Smejkal, 2023).

While weak AI focuses on automating specific tasks, strong AI is capable of learning and thinking like humans do. Weak AI can outperform humans on the specific tasks it is designed for, but it operates under far more constraints than even the most basic human intelligence (Glover, 2022).

3. AI AND CRIMINAL MACHINES

We use the expression "criminal machines" referring to the case in which an AI algorithm embodied in a machine or tool would be criminally liable if a natural person had performed a similar act. Machines have been used to harm since ancient times, and so did robots, that have caused fatalities since their first applications (Abbott and Sarch, 2019). So, the issue of criminal reconstruction of the implication of the machine has already been analysed, but it remained within the realm of the usage of a criminal tool (King et al., 2019) or within the spectrum of mere accidents, thus culpable crimes (Abbott and Sarch, 2019). Algorithms were indeed restricted to specified behaviours and did not present significant obstacles to assigning to humans the result of their actions and guilt. This is easily explicable: AI lacks consciousness and some algorithms of "Soft AI" are predetermined and predictable. However, more elaborate "Hard AI" algorithms may differ from conventional machines and robots, acting with autonomy and irreducibility. This means that AI may be just capable of acting independently of human control (Piparo, 2023), but it could also *„receive sensory input, set targets, assess outcomes against criteria, make decisions and adjust behaviour to increase its likelihood of success — all without being directed by human orders"* (Abbott and Sarch, 2019).

The problem with AI crimes lies in this very scenario: sometimes it may be difficult to reconduct algorithms' crimes to human beings due to its autonomy, complexity, or lack of explainability. Doctrine (Abbott and Sarch, 2019) provides us with great examples. Let us assume that different programmers and developers, collaborating informally through an open-source *medium,* create an AI that develops in response to training with data. In such cases, it would be extremely difficult to assign responsibility to individuals, because the machine acted and learned autonomously (Turing, 1950; Piparo, 2023).

Given the aforementioned dynamics, Italian law, like the laws of other members of the European Union, is now beset by a glaring omission – namely, the lack of specific provisions addressing crimes planned by autonomous AI agents. As a result, it is clearer

than ever that this area of law needs to evolve. The lack of laws specifically designed to address AI-related crimes highlights how urgent it is to forge new legal ground in order to ensure appropriate responsibility and efficient regulation in a time of ever-evolving technological frontiers (Piparo, 2023).

4. LEGAL STRUCTURE OF CRIME

In modern legal systems, criminal punishment is possible if there is a reserve of law (which implies that nothing can be punished if it was not already forbidden), the perpetrator is punishable, and the punishment itself is applied by a judge. In Italian legal system, this is granted by articles 13,[4] 25[5] and 27[6] of the Italian Constitution.

Generally speaking, in order to sentence a perpetrator, modern legal systems prescribe judges to search for - at least[7] - two elements. The *actus reus*, or criminal conduct, is the first component. All the components outlined in the law must be present in the natural fact. The second component is the *mens rea*, which is Latin for "criminal mind". It has different degrees of mental components. The highest level is knowledge, although occasionally it also includes a demand for intent or a specific intention. Lower levels are exhibited by strict liability violations or negligence (a reasonable person should have known) (Hallevy, 2010).

A person is deemed criminally responsible for an offence when it has been established that they committed it intentionally or with knowledge (Dressler, 2007).

[4] Art. 13, Italian Constitution:
1. Personal liberty is inviolable.
2. No form of detention, inspection or personal search is allowed, nor any other restriction of personal freedom, except by reasoned act of the Judicial Authority and only in the cases and by the manner provided for by law.

[5] Art. 25, Italian Constitution:
1. No one can be diverted from the pre-established competent judge by law.
2. No one can be punished except in accordance with a law that was in force before the committed act.
3. No one can be subjected to security measures except in cases provided for by law.

[6] Art. 27, Italian Constitution:
1. Criminal liability is personal.
2. The defendant is not considered guilty until a final conviction is reached.
3. Punishments cannot involve treatments contrary to the sense of humanity and must aim at the rehabilitation of the convicted.
4. The death penalty is not allowed.

[7] Italian doctrine and jurisprudence generally refers to the crime as an entity composed of three fundamental elements: the objective element, the subjective element, and the normative element.
1. Objective element: The objective element of the offense refers to the external action performed by the agent, which is the material core of the crime. This element includes both the material aspects of the action, such as physical assault or theft, and any circumstantial elements that may be relevant to the configuration of the offense, such as the place, time, or modus operandi.
2. Subjective element: The subjective element of the offense refers to the mental state or intent of the agent at the time of committing the action. This element includes the intent (*dolus*), which is the conscious intention to commit the action that constitutes the offense, and negligence (*culpa*), which denotes a lack of diligence or care in the agent's conduct that led to the commission of the offense.
3. Wrongfulness: it expresses the contradiction between the fact and the whole legal system (and not just the criminal one).
The analysis of these three elements allows for the assessment of the necessary prerequisites for the attribution and punishment of an action as a crime within the Italian legal system (Hallevy, 2010).

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In Slovak criminal law, the crime and conditions of criminal responsibility are defined in the Criminal Code[8]: *„A criminal offence is an unlawful act that meets the elements set out in this Act, unless this Act provides otherwise."*[9]

The *elements set out in this Act* means signs of an objective and subjective part as signs of the basic elements of the crime. Basic elements of crime are set as follows (Burda et. al., 2010):

a) object – that is, an interest protected by law (the material object of the attack can also be an optional sign of the elements of the crime),
b) objective part - characterised mainly by action, including omission, causation, and consequence (optional features of the objective side can be effect, time of commission of the crime, place of commission of the crime, method of commission of the crime),
c) subject – criminally responsible offender,
d) subjective part - characterised mainly by guilt (motivation, motive, goal can be optional features of the subjective side).

The *actus reus* in Slovak criminal law is created by the "objective part" of the crime. *„The objective part of the crime is the external, objectively perceptible manifestation of the crime. It represents specific manifestations of a crime situated in a specific time and space."* (Burda et. al., 2010). Obligatory components of the objective part are

a) action - is a certain human activity that manifests itself either as bodily movement or as refraining from bodily movement (physical component), which is guided by the will of a person (psychic component). Action can therefore be manifested as an active movement, action in the narrower sense (criminal acts committed by an active movement are called commissive) or as passive refraining from bodily movement, i.e. as omission (criminal acts committed by inaction or omission are called omission).
b) consequence - is a threat or violation of the interest protected by the Criminal Code, i.e. the object.
c) causal connection between action and consequence (causal nexus) - means that the criminally relevant consequence defined in the *elements of the crime* must be directly caused by the illegal action defined in this crime.

The *mens rea* in Slovak criminal law is represented by the "subjective part" of the crime. *„The Criminal Code is based on the principle of consistent application of responsibility for guilt. There is no crime without guilt. … Culpability is the perpetrator's internal psychological relationship with the essential elements of the crime, or the perpetrator's internal psychological relationship with the violation or threat to the interest protected by the Criminal Code, caused in the manner specified in the Criminal Code."* (Burda et. al., 2010). Guilt is built on a knowledge and will component. The knowledge (intellectual, rational, or imaginative) component consists of the offender's perception of objects and phenomena with his sensory organs and in his ideas about these objects and phenomena. The will component includes wanting or understanding, i.e. the decision to act in a certain way with knowledge of the essence of the matter. Depending on whether the knowledge and will components are given or not, or to what extent they exist, we distinguish between intentional culpability (direct and indirect intent) and culpability due to negligence (conscious and unconscious negligence).

The Criminal Code distinguishes culpability in the form of *intent* in two degrees:

[8] Act No. 300/2005 Slovak Coll. as amended (hereinafter also as the "CC" or "Criminal Code").
[9] Art. 8 CC.

- direct intent (*dolus directus*) – the perpetrator wanted to violate or endanger the interest protected by this law in the manner specified in the Criminal Code [Art. 15 letter a) CC],
- indirect intent (*dolus eventualis*) – the perpetrator knew that his actions could cause a violation or threat to the interest of the protected Criminal Code, and he was aware of this in case he caused them [Art. 15 letter b) CC].

In the case of intentional culpability, both the knowledge and will components are represented. The difference between direct and indirect intention is in the intensity (quantity) of the will component.

In case of *negligent* culpability, the Criminal Code differs:

- conscious negligence - the perpetrator knew that he could violate or threaten an interest protected by this law in the manner specified in the Criminal Code, but without adequate reasons he relied on that he would not cause such a threat or violation [Art. 16 letter a) CC],
- unconscious negligence - the perpetrator did not know that his actions could cause a violation or threat to the interest of the protected Criminal Code, although he should and could have known about it due to the circumstances and his personal circumstances [Art.16 letter b) CC].

5. ACTUS REUS

This paper will briefly reconstruct the objective aspect of criminal liability. Following what elsewhere highlighted (Piparo, 2023), following the reconstruction of academics (Hallevy, 2010), this chapter will focus on three liability models: the Perpetration-via-Another; the Natural-Probable-Consequence and the Direct liability.

5.1 The Perpetration-via-Another Liability Model

This model considers the AI as an innocent agent, such as a child: the AI is not human by nature, but - as well as the child - could be used as a vehicle to perpetrate criminal actions. The exploiter of the innocent agent is criminally liable as a perpetrator-via-another (Hallevy, 2010).

There exist two potential individuals who may assume the role of perpetrators in such situations: the AI software developer and the end-user.

1. *The AI software developer* can intentionally create a programme to use the AI entity to carry out criminal acts. For instance, envision a programmer crafting software for an automated robot. The robot is deliberately placed within a factory, with its software specifically engineered to ignite a fire during unoccupied nighttime hours. Although the robot becomes the instrument of arson, it is the programmer who is attributed the role of the perpetrator.

2. On the other hand, *the end-user, or the individual employing the AI entity*, can also be considered a perpetrator-via-another. While not involved in the software's programming, the user utilises the AI entity, including its software, for personal benefits. To illustrate, consider a user purchasing a servant-robot programmed to obey any orders issued by its master. The robot identifies the specific user as its master, who then instructs the robot to physically attack any intruders in the house. This scenario parallels a person commanding their dog to assault trespassers. Consequently, although the robot performs the act of aggression, it is the user who assumes the role of the perpetrator (Hallevy, 2010).

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In both instances, the AI entity itself is responsible for carrying out the actual offence. This particular legal framework can be applied to two distinct scenarios.

The *first scenario* involves employing an AI entity to commit an offence while intentionally restraining its advanced functionalities. In this case, the AI entity is used as a mere tool, akin to a screwdriver, to carry out a specific task associated with the offence. However, the AI entity's involvement is limited to executing straightforward instructions and does not engage in complex decision-making processes.

The *second scenario* pertains to utilising an outdated version of an AI entity that lacks the modern advanced capabilities found in contemporary AI systems. Despite its limitations, this older AI entity can still be utilised to commit an offence by following simple orders. While a dog can execute basic commands, the AI entity's ability to comprehend and execute more intricate instructions sets it apart.

In both scenarios, the key aspect is the instrumental usage of the AI entity, which is not capable of self-determination, in the commission of an offence. However, it is crucial to acknowledge that the AI entity's role and capacities depend on its specific design, programming, and technological advancements. The aforementioned legal framework serves as a mechanism for assessing accountability and determining the legal ramifications concerning the use of AI entities in these particular circumstances (Butler, 1982).

The *condicio sine qua non* to apply this liability models is that no mental attribute required can be attributed to the AI entity. In fact, this model is inadequate when an AI entity independently chooses to engage in criminal behaviour based on its own accumulated knowledge and experience. Similarly, this model does not apply when the AI entity's software was not specifically programmed for the commission of the offence but still carried it out. Furthermore, when the AI entity acts as a partially innocent agent rather than a completely innocent one, the liability through another's actions model is also unsuitable (Lacey and Wells, 1998).

However, the liability through *another's actions model* may be applicable in cases where a programmer or user utilises an AI entity for instrumental purposes without utilising its advanced capabilities. In such cases, the legal consequence is that the programmer and user bear criminal liability for the specific offence committed, while the AI entity itself incurs no criminal liability whatsoever.[10]

In Slovak criminal law the responsibility in such cases will be the "direct model of responsibility" because the responsibility model of *Perpetration-via-Another* is applicable only in cases when the other natural is misused for committing a crime. In these cases, the AI functions only as a tool for committing a crime and is deemed as an unwilling and unconscious programme that is only a tool in the hands of direct perpetrator. The *Perpetration-via-Another* is applicable in the Slovak criminal law only in cases (Burda et al., 2010):

a) perpetrator used a person not criminally responsible (due to lack of age or due to insanity, e.g., a parent, realising that his children are not criminally responsible due to lack of age) to commit the crime;
b) perpetrator used to commit a crime a person who acted in a factual error and as a result could not understand the meaning of his action;
c) perpetrator forced another natural person by violence or threat of immediate violence to commit an act that has the characteristics of a criminal act;
d) perpetrator abused his right to give orders, as long as the person carrying out the order was obliged to obey it;

[10] People v. Monks, 133 Cal. App. 440, 446 (Cal. Dist. Ct. App. 1933).

e) perpetrator abused a person acting culpably or a person who does not act with a specific intention or from a motive that the facts presuppose in order to achieve his goals.

5.2 The Natural-Probable-Consequence Liability Model

A different liability model concerns individuals (that can be programmers, users, developers, testers) as they are involved in AI activities without any deliberate intention to engage in unlawful acts. In this context, it is advisable to apply the natural-probable consequence liability model that imposes accountability upon individuals for offences that arise as a natural and foreseeable consequence of their actions, irrespective of their actual awareness of the offence. The doctrine provides an interesting example. An illustration of such a scenario involves an AI robot or software programmed to operate as an autopilot system. The AI entity is tasked with safeguarding the mission as part of its function in piloting the aircraft. During the flight, the human pilot engages the autopilot (which constitutes the AI entity), and the programme is initiated. Subsequently, at a certain juncture post-activation of the autopilot, the human pilot observes an impending storm and endeavours to terminate the mission and return to base. However, the AI entity perceives the human pilot's actions as a threat to the mission and intervenes to mitigate this perceived threat. This intervention may involve actions such as disabling the air supply to the pilot or activating the ejection seat, resulting in the demise of the human pilot due to the actions undertaken by the AI entity (Hallevy, 2010).

In executing this function, the AI software itself perpetrates an "automated" offence, notwithstanding the absence of explicit intent from the programmer for the AI entity to behave in such a manner (Hallevy, 2010).

In such cases, it appears *ictu oculi* evident that the first model is not legally viable, making it necessary to rely on a different liability scheme. This second comes to help and appears surely suitable, relying on the capacity of programmers or users to anticipate the potential occurrence of offences. This model, indeed, holds responsible for a probable offence, but only if the offence is a foreseeable outcome of the conduct, implying the underlying negligence of the human actor.

In Slovak criminal law, the situation would be assessed according to conscious or unconscious negligence, according to the different factual circumstances of the cases, but the responsibility of the creator of the AI software would not be excluded, as well as owner's and user's responsibility. Seemingly, in Italian criminal law such conducts are punished for *culpa* (or negligence) of the actor, and does not exclude the responsibility of the creator, the user and the owner, either.

5.3 The Direct Liability Model

Theoretically, being AI able of self-determination, it can have will and knowledge of its specific action (Lagioia and Sartor, 2020). In such cases, a third scenario/approach is necessitated, allowing the AI entity itself to be directly liable of its offences (Hallevy, 2010).

Even though, as stated *supra*, scholars refuse to attribute AI the connotation of "intelligent being", hard AI can show a strong comprehension and self determination, learning through data it is fed from. Hard AI can, indeed, emulate human cognitive processes, inducing itself to achieve a certain (self-determined) outcome, and undertake actions to fulfil it. Therefore, if an AI entity fulfils all elements of an offence, that are -as a general rule for Italian criminal law- consciousness and will (see note 43), it should not be

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exempt from criminal liability. Unlike certain subjects like infants or the mentally ill,[11] who have legal provisions exempting them from criminal liability, it is uncertain whether similar frameworks exist for AI entities (Padhy, 2005).

The criminal liability of an AI entity does not replace the liability of its programmers, owners, or users; rather, it is imposed in addition to their liability. The liability of an AI entity is not dependent on the liability of its programmer, owner, or user. If one AI entity is programmed or used by another, the liability of the programmed or used entity remains unaffected.

As well as AI liability has to be positively recognised in all its elements, negative elements and defences must be applied as well,[12] including -*ex multiis*- self-defence, necessity, duress, or intoxication. Even though the theoretics have to be adjusted to fit to the peculiarity of the algorithmic intelligence, the direct liability model is similar to that of a human, being based on the same elements and assessed in the same manner (Dressler, 2007).

In Slovak criminal law, the direct criminal liability in current legal state is not possible. *„The perpetrator of a crime can be a natural person and a legal entity under the conditions established by a special regulation."*[13] However, also legal entities are artificial entities, not having the will and knowledge and they are currently directly responsible for particular crimes in Slovakia. The direct criminal liability of corporations was introduced with the Act No. 91/2016 Slovak Coll., effective from July 1st, 2016. With the development of society and developing of new technologies, the possible responsibility of AI systems and programmes could be also introduced, when the purpose of punishment would be reasonable also for these cases.

6. MACHINA PUNIRI POTEST?

The problem of punishment must be faced from the very beginning. The aim of this section is, indeed, to analyse punishment and its aim before assessing its compatibility with the punishment of an AI machine or tool.

In Chapter 3 the authors discussed and proved the existence of autonomous and independent AI beings. Therefore, you can imagine a case, in which art-making robots capable of learning graffiti are assigned to paint a wall, and one of those starts breaking public walls instead of embellishing them. In this case, *quid iuris*?

Prima facie, we could imagine that this malignant robot's actions are the results of programmers and manufacturers acts, which are necessary conditions for the walls to break. However, the independency and autonomy in learning algorithms exclude these figures from the causal contribution. These results are not proximately caused or reasonably foreseeable by manufacturers and developers (Mulligan, 2018).

Thus, in such cases of robots running black-box algorithms, those who proximately caused this action are robots themselves; otherwise the meaning itself of *"proximate cause"* it would be corrupted. Nature-wise, autonomous robots are much like animals. Although other parties and circumstances, including training, can be said to influence them, both autonomous robots and animals are most reasonably understood as the cause of their own actions (Mulligan, 2018).

[11] For instance, this has to be considered an exception that confirms the rule. The crime is an act of will: the machine can show an autonomous and pure will, while the mentally ill and the child -even though undisputedly show self-determination- have a flawed will.

[12] H. L. A. Hart in his work *Punishment and responsibility* (1968, pp. 14-15) distinguishes three types of defences: excuse, justification, and mitigation.

[13] Art. 19 par. 2 CC.

The robot is the agent and the culprit. Therefore, *machina puniri potest?* Why?

6.1 What Is Punishment?

To face the analysis about the compatibility of juridical punishment towards AI, we should start from a definition of punishment itself that reflects the broad consensus in the literature (Berman, 2012).

Punishment as defined by Hart consists of five elements:

I. It must involve pain or other consequences normally considered unpleasant;
II. It must be for an offense against legal rules;
III. It must be of an actual or supposed offender for his offence;
IV. It must be intentionally administered by human beings other than the offender; and
V. It must be imposed and administered by an authority constituted by a legal system against which the offence is committed (Hart, 1968).

These five elements, in the central case, indicate that punishment is a pain administered to someone who has broken legal rules (Njoku, 2012).

In Slovak criminal law theory, the purpose of punishment is defined directly in the Criminal Code: *„Punishment is intended to ensure the protection of society from the offender by preventing him from committing further criminal activity and creating conditions for his education to lead a proper life and at the same time deterring others from committing crimes; the punishment also expresses the moral condemnation of the offender by society."*[14] The Slovak theory of criminal law currently does not explicitly mention that the punishment must be a harm for the offender. The strategy of the current criminal policy of the state is to ensure more rehabilitation of the offender than to retaliate against his wrongful acts. The aim of the punishment is *„achieving an individual preventive effect and, with it, subsequently combined general preventive effect."* (Strémy and Klátik, 2018). *„Currently, from the point of view of the purpose of the punishment, what is important is not a severe punishment, but an inevitable, adequate, and fair punishment."* (Remeta, 2023).

But why punishing? What are the aims of society through punishment? *Retribution, general prevention*, and *individual prevention* are the three main historical intents behind punishment, each having progressively more detailed qualities. These three guiding principles support punishments' severity, brutality, and very existence.

These aims can be divided into two main categories that can be explained using a Senecan[15] formulation. On the one hand, there are the so-called *absolute teachings*, which emphasise only the wrong or criminal act that was done in the past and maintain that punishment is meted out *"quia peccatum est"* (since a sin has been committed).

The *relative teachings*, on the other hand, believe that punishment should be meted out *"ne peccetur"* (so that one may not sin), with the goal of changing the offender's behaviour in the future.

Whether or not punishment is considered to have a goal, a social purpose, or something beyond its punitive component is what makes a difference (Fiandaca and Musco, 2007). It is important to note that the dominance of one viewpoint over the others, or their combination, happens in ways and at times that reflect both the internal logic of the criminal justice system and the larger political, social, and cultural milieu. Because

[14] Art. 34 par. 1 CC.
[15] Seneca, De ira, I, 19: *„nam, ut plato ait, nemo prudens punit, quia peccatum est, sed ne peccetur; revocari enim praeteri non possunt, futura prohibentur".*

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each of these three theories develops within its own setting, it is crucial to examine them all separately (Oss, 2009).

6.1.1 General Prevention

A relative understanding of punishment is linked to the role of general prevention, according to which punishment is justified as a means of preventive rather than as a payback for the harm committed. On the contrary, *„General prevention consists in the purpose of the penalty to prevent the general population from committing crimes, or to reduce their number"* (Cadoppi and Veneziani, 2004). According to this theory, the mere threat of punishment deters citizens from engaging in socially harmful acts: *„From a psychological point of view, the penalty, or rather the threat of punishment and the example of its execution, necessarily exerts an intimidating function or, as is commonly said, one of general prevention"* (Nuvolone, 1982). This theory, recurring through the centuries, was already formulated by classical philosophers and can be considered from two perspectives:

Firstly, a negative general prevention, that *„aims to prevent or reduce the commission of crimes by the population through deterrence, namely, the fear of punishment"*. Essentially, the penalty should cause a disadvantage for the perpetrator that exceeds the benefit derived from the offence, discouraging them from committing the crime (Cadoppi and Veneziani, 2004).

The second is the positive general prevention, which relies on the fact that the anticipation of criminal sanctions in relation to certain acts (crimes) contributes to reinforcing the community's judgment of disapproval of those behaviours. In this way, it creates a greater natural tendency among the community not to commit those acts due to the moral/social disapproval they elicit (Cadoppi and Veneziani, 2004).

The function of general prevention seeks to prevent citizens from committing crimes not only out of fear of facing sanctions but also because they morally disapprove of those behaviours. This doctrine also attributes another significant function to general prevention, arguing that it *„helps prevent people from losing confidence in the legal system and, gradually, in the institutions themselves"* (Cadoppi and Veneziani, 2004). It is the penalties that the legislator abstractly associates with each crime that serve as an "anticipatory threat" ex ante, i.e., before the commission of the offence, making this function relevant when the legislature enacts the law (Oss, 2009).

6.1.2 Retribution

The Classical School is where the idea of retribution is mostly emphasised. It has long been a reoccurring issue in talks concerning punishment. In contrast to the utilitarian preventive conceptions of the penal enlightenment of the 18th century, its proponents contend that punishment is a rightful compensation, a retribution enforced by power onto the perpetrator. They make reference to the *„renowned Latin phrase, which defines punishment as malum passionis propter malum actionis (a harm inflicted owing to a wrongful conduct), underlining the idea that the punitive sentence must serve to compensate for the guilt stemming from the wrongdoing. The concept of proportionality is implicit in the retributive idea: the punitive response, to make up for the harm inflicted by the illegal activity, must be proportioned to the seriousness of the offence itself. To assert the primacy of the law over any type of arbitrary or abuse towards people, their property, and the common good, retribution implies paying harm for harm. The vengeful notion of arbitrariness existing in earlier times is no longer present with the full affirmation of the law in criminal law"* (Ciappi and Coluccia, 1997).

The ultimate goal of punishment, according to Francesco Carrara, *„is not to ensure that justice is served, that the offence is avenged, that the damage suffered is compensated, that citizens are terrified, that the offender atones for his crime, or that his amendment is realised. Restoration of social external order is the main goal of punishment"* (Carrara, 1871). The retributive philosophy starts from the idea that people have free will to make their own decisions and are fully accountable for their actions. Contrary to what the next hypothesis to be explored, that of general prevention, contends, they are not affected by any outside variables in their behaviours (Fiandaca and Musco, 2007).

6.1.3 Individual Prevention

The Positive School (Fiandaca and Musco, 2007), which emerged in the last three decades of the 19th century, departs from modern and Enlightenment natural law to consider the offence as a "natural, bio-psychological, and social" phenomenon. It constitutes the action of the particular individual, exposed to the influence of the society and culture in which they live. Due to strong environmental influences, individuals are not free to make their own choices but are compelled to act, and more specifically to commit offences, under the force of a *„natural causality law that constrains them"* (Cattaneo, 1978).

If individuals cannot refrain from committing offences, it becomes meaningless to speak of retribution as the purpose of punishment. In fact, it makes no sense to discuss individual responsibility if it is believed that the individual is not responsible, but merely a victim of social pressures. *„The concept of accountability is emptied on the deterministic premise that no convicted person is guilty because their offence is the result of the bio-socio-economic conditioning that led to its genesis"* (Cattaneo, 1978).

It is necessary to combat the propensity for criminal behaviour with *„tools or remedies to neutralise the subjective dangerousness of the offender and protect society"*. This means that the punishment meted out to a particular person works to keep them from committing similar crimes in the future: „The preventive effect can be achieved through various techniques aimed at pursuing the offender's moral improvement or their social reintegration". The theory of individual prevention *„has been able to focus its efforts on the offender and the study of the causes that led them to commit crimes: it is essential to acknowledge that it has succeeded in restoring the "criminal man" to a central role in the doctrine of the offence and has greatly stimulated the interest of criminal sciences in the personal and social aspects of their penal experience"* (Fiandaca and Musco, 2007).

One of the key elements of the positivist approach is the indeterminate duration of the sanction: *„since it is not possible to know in advance when the re-education of the convicted person will actually be completed, if punitive action must continue until it achieves the goal of re-education, then the duration of the penalty-reform can be unlimited, or at least not determinable in advance by the law"* (Cattaneo, 1978).

In conclusion, the positivist viewpoint argues that *„the sanction (...) cannot consist of mere retribution, but must be solely a legal means of defence against the offender, who must not be punished but readjusted, if possible, to social life"*. This argument is also supported by certain utilitarianism because it benefits society to ensure that the offender receives therapy so that they will stop committing crimes in the future (Ciappi and Coluccia, 1997).

This is known as individual prevention because it focuses on the offender as an individual rather than the wider public. It is also known as a rehabilitative paradigm since in order to achieve individual prevention, the offender's social recovery is required.

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6.1.4 Constitutional Fundamental Aim of Punishment: Education and Rehabilitation

In the historical context in which the Italian Constitution was drafted, the rehabilitative objective of punishment, which has more recently been a part of European legal culture, introduced a novel dimension of sanctioning. The criminal penalty used to be largely viewed as "retributive," which meant it served to make up for the socially destructive activity the offender engaged in, as well as a "preventive" purpose meant to deter future offenders. However, according to the third paragraph of Article 27 of the Italian Constitution, the main objective of punishment is now "social recovery", with a particular emphasis on the offender's rehabilitation into society (Nicotra, 2014).

From the standpoint of penal logic, constitutional principles in criminal cases offer a framework intended to strike a compromise between repressive effectiveness and the protection of essential human rights. At first, the Constitutional Court only partially interpreted the rehabilitative objective within a "polyfunctional" understanding of punishment. In some of its earlier rulings, the Court described the goal of resocialisation as *„marginal or even occasional"*, mostly restricted to the confines of correctional treatment.[16]

The change came with judgment n. 313 of 1990, in which the Constitutional Court made it clear that retribution is the absolute minimum requirements for punishment to be effective. Regardless of whether the criminal receives payback, punishment always involves some degree of suffering and affects their rights. Additionally, it protects society and functions as a "general preventive" strategy by scaring potential perpetrators. The *„rehabilitative purpose explicitly enshrined in the Constitution"* in the context of correctional treatment cannot be compromised by these constitutionally supported characteristics. The Constitution only specifically mentions the rehabilitative goal. Rehabilitative goals cannot be separated from the justification and role of punishment in a developed society.[17]

Because of this, the goal of the penalty must be rehabilitation, and the treatment's primary quality must be the offender's recovery, not just a generic tendency within it. As a result, the entire criminal system is designed with rehabilitative purposes in mind and the measurement of the punishment cannot overlook the unalienable social reintegration criteria related to the seriousness of the offence and the defendant's mentality.[18]

The constitutional "physiognomy" of punishment lays a strong emphasis on the objective of the offender's recovery while also promoting adherence to basic social norms and easing reintegration into society. The objective is to develop an exterior conduct that facilitates an offender's reintegration into society rather than to profoundly modify their values in order to fulfil civil living norms (Nicotra, 2014).

The constitutional interpretation requires that both the aims of punishment and rehabilitation are taken into account. Therefore, the goal of rehabilitation is just as important as the goal of punishment. The use of the word "tend" highlights the requirement that the rehabilitation process respects each person's right to self-determination. Drug treatments intended to change the offender's personality are examples of harsh and degrading punishment that cannot be used in a criminal system that prioritises rehabilitation (Fiandaca and Musco, 2007).

Art. 27's fourth paragraph, which states that the death sentence is never admissible, shows the humanised nature of the penalty and how it is intended to promote rehabilitative objectives. Constitutional Law No. 1 of 2007 reiterated the abolitionist

[16] Italy, Constitutional Court Of Italian Republic, 12/1966, 22 January 1996.
[17] Italy, Constitutional Court of Italian Republic, 313/1990, 26 June 1990.
[18] *Ibid.*

attitude expressed by the 1948 Constitutional Assembly and emphasised the importance of life as an absolute good and essential component of human dignity. The "death penalty, except in cases provided for by laws of military war" notion was eliminated from the Constitution as a result of this stance (Nicotra, 2014).

As a result, by eliminating a clause that was blatantly at odds with the fundamental decisions made in 1948, the requested constitutional revision marked an important step in completing the pillars of Italian society by removing the anachronistic statement found in the last part of Article 27.

Rehabilitation of the offender became the most important goal of punishment also in the Slovak Republic with the adoption of new penal codes in 2005: *„Suppression and control of crime can be achieved most effectively by an appropriate balance of prevention and repression. ... Criminal law of the Slovak Republic does not consider punishment as retribution for a committed act."*[19] The goal of the new codification was also to *„create conditions for the implementation of the criminal policy of a democratic society based on the principles of humanism, which will ... lead to the social reintegration of offenders;"* and also *„to create a strategic tendency for the prospective decriminalisation and depenalisation of the Criminal Code..."*[20] The legislative intent also states as its goal for the recodification *„to change the overall philosophy of the imposition of criminal sanctions, within the framework of which it will be necessary to change the hierarchy of sanctions so that within it the penalty of imprisonment is understood as an ultima ratio. As part of this philosophy, emphasis will be placed on an individual approach in solving criminal cases based on the wide possibility of using alternative sanctions and diversions in order to ensure the positive motivation of the offender to the greatest extent possible. Therefore, the new philosophy of punishment will be based on the principle of decriminalisation, as a result of decriminalisation."*[21]

„Following the "crisis" of retributive justice, which was in the insufficient preventive and resocialising function of the prison sentence, retributive justice, which perceives a crime as a conflict between the offender and the law, thus revealed its shortcomings and the perception of the restorative of justice, which perceives a criminal act as a conflict between the perpetrator and victim, began to take on clearer contours, in this context they came to the fore also alternative punishments, the essence of which is to keep the convicted person in freedom and the imposition of such a punishment, which will also be a prevention from committing further criminal activity, will protect society and last but not least will satisfy the interests of the victims of the crime." (Strémy and Klátik, 2018).

7. FROM GENERAL PUNISHMENT TO ROBOT PUNISHMENT

Professor of media studies Peter Asaro queries if it is feasible to punish robots. Robots have physical forms, but it is not obvious if punishing them will serve typical punitive goals like punishment, reform, or deterrence. However, the idea of punishing robots, or more accurately, getting even with them, is largely used to satisfy the victims of robot-related injury on a psychological level (Asaro, 2012).

„Machines can be actors, but not conscious, but not moral, because they lack properties and abilities that are so far beyond the reach of artificial intelligence (AI): 1.

[19] Resolution of the Government of the Slovak Republic no. 385/2000 on the legislative intent of the Criminal Code and the Criminal Code.
[20] *Ibid.*
[21] *Ibid.*

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consciousness and subjective experience, 2. emotions, 3. motivation, 4. will, 5. creativity, 6. social interaction, 7. morals and ethics." (Srstka et al., 2024).

„From the perspective of continental law, the basis of a criminal offence is the voluntarily (intentional or negligent, but voluntary) act of the natural person. … The artificial intelligence does not understand the general preventive aim of the punishment – for instance, an AI does not have personal liberty or property (or if the law allowed the latter, the AI would not understand such concept); hence imprisonment or a fine would not reach its goals. Switching off an AI as a sort of 'capital punishment' may only reach its goal if we first gave the AI a 'will to live'." (Hodula, 2021).

„Furthermore, the AI does not make decisions based on a choice between morally good or bad. It acts as it has been programmed to do so. Even if the acts are seemingly performed on their own, these are results of pre-determined patterns and courses." (Gless, Silverman and Weigend, 2016).

What would the robot punishment look like then? When the act of retribution is accompanied by an admission that the robot's improper behaviour caused this punishing response, revenge is more likely to result in satisfaction. It is advised that such actions be legally sanctioned or publicly acknowledged by an authoritative figure or members of the public, since robots would not be able to admit their mistakes in the same way that humans do.

It is also crucial to take into account how such activities can affect uninvolved third-party robot owners. The criticism of civil asset forfeiture in recent years perhaps helps to explain some of this. The main complaint focuses on the injustice of the state taking property away from innocent owners and penalising people who have done nothing wrong. This investigation can shed light on the possible repercussions that robot punishment may have on innocent owners (Mulligan, 2018).

Since civil forfeiture often concerns physical assets rather than autonomous agents like robots, such as money, cars, and goods, it differs from the setting of robot forfeiture. Robots, especially autonomous ones, can cause injury directly, distinguishing them from inanimate objects. While a human-driven vehicle may be regarded as a means of doing harm, an autonomous robot is more than just a tool – it is an active agent. Similar to the legal sanction of euthanising dangerous dogs, the law might justifiably allow designating robots that have caused certain forms of injury as forfeit from their owners.

Although they might not have complete control over the outcome, knowing this potential can encourage robot owners to be extra cautious when instructing and managing their robots. This might also encourage the development of insurance against misbehaving robots (Pervukhin, 2005).

Separating a misbehaving robot from its owner, however, could occasionally result in an unfair burden being placed on the owner. Alternative actions, such as assessing the robot's code to avert future injury, may be taken in such circumstances (Mulligan, 2018).

The capacity to take control of the robot for personal use or to destroy it, together with the symbolic act of getting the robot from the law, symbolising that justice has been served, may ultimately be one of the most rewarding endings for a victim of robot-related abuse. Similar to the *„noxal surrender"* custom from the early Middle Ages, wherein animals or items that caused considerable harm or death were given to the victim or their family, this might provide victims a great deal of delight. In this case, taking a robot to a remote location and dealing with it there in a way that gives them satisfaction and closure, like confronting it directly, would not be unreasonable (Pervukhin, 2005).

7.1 Benefits of AI Punishment

There are several widely accepted advantages of punishment. These can be derived into the three main groups by analysing the three aims of the punishment we mentioned *supra:*

- general prevention,
- individual prevention and
- retribution.

As doctrine highlights, expressing condemnation of the harms suffered by the victims of an AI could provide some benefits.

Under the umbrella of retribution, punishing AI will leave AI victims with a sense of satisfaction and vindication, recalling ancient Rome's *talio* and Hegel's theory of punishment. The author, indeed, recalls a theory according to which punishing a machine would be *„necessary to create psychological satisfaction in those whom robots harm"* (Abbott and Sarch, 2019).

Also, the affirmation of punishment acts as a general preventive aim, deterring companies, developers, users, sellers, and producers from misusing, misproducing, and be negligent in checking on them (Abbott and Sarch, 2019).

Although there is a debate about whether expressive benefits are distinct from other reasons for punishment, it is generally agreed that the primary justification for punishment is harm reduction. The debate continues regarding the existence of retributivist reasons for punishment, which are worth considering, but the majority of the cases for punishment revolve around harm reduction and positive consequences.

The issue, as we *supra* anticipated, gets more complex in case of individual prevention and moral culpability: should autonomous robot be held morally responsible for their actions?

Like humans, these questions lead to complex doubts about the concept of free will and moral blameworthiness. Although some presume that moral responsibility is tied to having free will, the discussion of free will itself remains a philosophical conundrum that extends into theology and physics. The fundamental problem lies in defining what free will means and whether anyone, including humans, possesses it.

This philosophical debate revolves around reconciling notions of free will with the determinism of the physical world. Some argue that free will could be linked to the absence of external forces coercing one's actions and the alignment between one's intentions and actions. However, attributing moral blameworthiness to the understanding of one's actions is challenging, as even humans often struggle to explain why they behave in a particular way. Questions of consciousness and self-awareness further complicate matters (Mulligan, 2005).

Despite these complex philosophical questions, it is not necessary to resolve them to determine whether revenge against robots can be justified. The concept of free will, independent morality, freedom of determination, and autonomy in thinking is relevant only to assess whether or not a machine itself can be held morally responsible for crimes or it is just user's or producer's *longa manus.*

There are two possibilities: either a robot is as morally blameworthy and deserving of consequences as a human or a robot is akin to an inanimate object, like a rock, and is not deserving of any particular treatment. In both scenarios, the robot's moral status does not provide a reason to refrain from taking action against it when other justifications exist (Mulligan, 2018). The philosophical debate about free will and moral blameworthiness only leads to a consequence. If the robot is morally blameworthy, can it be educated? Is it worth it to re-socialise a robot? Does it make sense?

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7.2 Limitations to Punishment

The negative aspect of punishing involves its fundamental limits, granted by modern constitutional states.

We have already mentioned Art. 27 of the Italian Constitution, that assesses different orders of limitations: punishment must be proportioned and aimed to educate the criminal. The same is valid in the Slovak legal order according to Art. 34 par. of the Criminal Code.

7.2.1 Proportionality

According to the first limit, then, proportionality is hard to find, since robots do not suffer from time flowing and surely a limitation of freedom is something problematic to point as a solution, since the robot is ontologically freedom-limited, literally being the servant of the human.

Being robot-objects that incorporate algorithms, the focus on punishment should revolve around whether or not is it feasible to punish an object and what is a proportioned response towards an object.

Even if an AI is formally convicted of an offence and subsequently subjected to punitive measures, such as reprogramming or termination, these actions may not meet Hart's conception, as *supra* discussed, as it *„must involve pain or other consequences normally considered unpleasant"*. AI, lacking subjective experiences, is incapable of interpreting occurrences as painful or unpleasant. Thus, in order to conceive a proportioned punishment towards AI, we should consider non-traditional ways of punishment.

A distinct viewpoint underscores the need to differentiate between conviction and punishment: if it is true that punishing AI does not fall within Hart's categories, while punishing AI is illogical and nonsensical, convicting AI makes sense. Thus, society can derive benefits from AI convictions (e.g., confiscation, termination, or general inhabilitation of the algorithm) without the conceptual confusion linked to attempting to punish AI as human.

In such cases, proportionality would focus on different values like AIs commercial value, AI commercial production, and economic damages towards the owner.

7.2.2 Education and Resocialisation

According to the second limit, then, we should point out a punishment that, in particular, could be adequate and proportioned to the nature and consequences of the crime itself.

But shutting the machine down would be unproportioned, changing its code would be a total change of the *mens rea* we are analysing, and occupying a jail with metal carcasses would be even more crazy. AI lacks mental state (Abbott and Sarch, 2019), thus being impossible to see some sorts of *mens rea* (the deliberative capacities needed for culpability): it cannot be punished without incurring in a logical incompatibility with the values of Art. 27 of the Italian Constitution or Art. 34 par. 1 of the Slovak Criminal Code.

So, as we mentioned within the *actus reus* paragraph, we should rely on the Perpetration-via-Another liability model and the Natural-probable-cause models. It is true that doctrine and jurisprudence also allow culpable mental states to be imputed to corporations, that is to say that it is theoretically allowed imputation without *mens rea*.

But this latter, more than a naturalistic reconstruction is a juridical *fictio*: through the institution of *respondeat superio*r mental states possessed by an agent are ascribed to the corporations. If *respondeat superior* is a promising mechanism by which corporations can be held responsible of crimes, the same legal device could be used to assess whether or not AIs are responsible for crimes. The culpable mental states of AI developers, owners, or users could be imputed to the AI under certain circumstances pursuant to a *respondeat superior* theory (Hallevy, 2010). If we have to take into consideration the criminal liability of the legal persons (i.e. similar for an AI), the answer may be used by the legal systems which acknowledge such responsibility (Hodula, 2021).

It may be more difficult to use *respondeat superior* for AI than for corporations, at least in cases of autonomous and independent AI crimes. Unlike a corporation, which is literally composed of humans acting on its behalf, an AI is not guaranteed to come with a *superior* who will respond to the law. This is not to say that the *respondeat superior* institution is not usable towards machines. It is usable, and some doctrine uses it to fill into the gaps of grey-zones of illegality, but only where the *superior-inferiro* scheme-relationship is found and not as a general rule (Abbott and Sarch, 2019).

7.2.3 The Strict Liability Remedy

One potential strategy to addressing the grey area where *respondeat superior* results inapplicable is to establish a set of new strict liability offences specifically tailored for AI crimes. Strict liability offences would allow AI to be held criminally liable without any requirement for *mens rea*, such as intent, knowledge, recklessness, or negligence. Instead, AI entities would be held liable for their actions without regard to their mental states, enabling punishment of AI without requiring a culpable mental state. Strict liability offences are often criticised in the context of human criminal law because they can lead to the unjust punishment of innocent individuals. However, this objection loses some of its force when applied to AI because AI does not enjoy the same protections based on desert constraints as humans.

Nonetheless, there are practical challenges to the application of strict liability offences to AI. The voluntary act requirement is an absolute necessity for criminal liability, meaning that *„only bodily movements guided by conscious mental representations count"* (Yaffe, 2012). Since AI lacks mental states, deliberation, and reasoning, it becomes difficult to establish any of its behaviours as voluntary acts.

One potential solution to this issue is to alter or eliminate the voluntary act requirement through a statute specifically for the class of strict liability offences designed for AI. Statutory amendments could impose affirmative duties on AI to prevent harmful conduct, allowing AI to be held strictly liable for omissions. However, this approach comes with potential costs, as it may dilute the public meaning and value of criminal law, undermining its expressive benefits, which are essential for justifying the punishment of AI (Abbott and Sarch, 2019).

8. CONCLUSIONS: CHALLENGES OF PUNISHING AI

As we saw, punishing AI is the result of mere logical inferences. A crime, in order to be such, needs to meet the requisites *actus reus and* of *mens rea.* We find the first and the second in crimes that fall inside the Perpetration-via-Another and the Natural-Probable-consequence liability models.

The punishment of AI carries several practical challenges and necessitates substantial innovations in existing criminal law in residual cases of AI's direct liability,

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where it is not possible to invoke *respondeat superor* liability model. In such cases, one of the main challenges lies in the assessment of *mens rea*, which is a fundamental aspect of human criminal justice. However, when it comes to AI, determining *mens rea* becomes exceedingly complex. This is particularly true for Hard-AI crimes that cannot be straightforwardly attributed to human conduct or where harm is unforeseeable to designers without unreasonableness, the application of *respondeat superior* or similar principles is not appropriate. In such cases, an entirely new approach to assessing AI *mens rea* would be necessary.

One potential solution discussed is the establishment of strict liability offences for AI crimes, which would require substantial legislative revisions to criminal law, ensuring that AI entities can meet the voluntary act requirement. This is not a simple or readily available solution, and it demands extensive legislative efforts and legal amendments. An alternative approach would involve the development of a legal fiction for AI *mens rea*, somewhat analogous to human *mens rea*, necessitating expert testimony to assess the AI's functioning, including its consideration of legally relevant values, interests, and behavioural dispositions related to *mens rea*-like intention or knowledge. Although this approach has been tentatively explored, it requires further theoretical and technical development.

Bestowing legal personhood to AI is indispensable for charging and convicting AI of crimes, thereby introducing an entirely new form of criminal liability, similar to the emergence of corporate criminal liability beyond individual criminal liability. Granting legal personality to AI has been contemplated in various proposals, but it has been highly controversial.[22] It is essential to emphasise that AI legal personality does not grant AI the full range of rights afforded to natural persons or even corporations. Instead, it could be limited to obligations.

However, conferring legal personhood on AI, even in a limited sense, presents several challenges. AI's anthropomorphism could encourage people to impose human attributes, expectations, and behaviour on AI, leading to mistreatment of AI, and even vandalism or attacks against these entities. It could also influence human well-being, raising concerns about humans standing in society, especially if AI is granted legal status on par with humans. Additionally, there is the concern of "rights creep", where over time, AI might acquire more rights, leading to unforeseen legal complexities and implications.

In conclusion, the practical challenges associated with AI punishment extend beyond *mens rea* analysis and encompass broader restructuring of criminal law and potential societal consequences of assigning legal personhood to AI. These challenges necessitate careful consideration of the implications and risks before embarking on the path of punishing AI. However, given the increasing integration of AI into daily life - manifested in forms such as autonomous vehicles - these issues present an urgent and practical problem that demands resolution in the near future. As the prevalence of AI technologies continues to grow, addressing these concerns becomes paramount.

The differentiation between various national criminal legislations may provide different answers; however, the aspect of the examinations will be the same (Hodula, 2021).

[22] See also: Open Letter to the European Commission Artificial Intelligence and Robotics, Available at: http://www.robotics-openletter.eu/ (accessed on 22.06.2024). More than 150 AI "experts" subsequently sent an open letter to the European Commission warning that, from *„an ethical and legal perspective, creating a legal personality for a robot is inappropriate whatever the legal status model"*.

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ICJ: LEGAL CONSEQUENCES ARISING FROM THE POLICIES AND PRACTICES OF ISRAEL IN THE OCCUPIED PALESTINIAN TERRITORY, INCLUDING EAST JERUSALEM, ADVISORY OPINION: The Prolonged Occupation and Annexation of Palestine, and Racial Discrimination of Palestinians / Lukáš Mareček

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This paper was prepared within the framework of the interdisciplinary project APVV-23-0509 "A Paradigm Shift in the Understanding of War and Armed Conflict from Theological-Historical and Legal Perspectives" at Comenius University Bratislava (2024-2028).

Abstract: *The International Court of Justice advisory opinion addresses several complex legal questions. The Court examined whether these policies violate international law, particularly erga omnes obligations. Israel's actions were found to violate international law through the annexation of large parts of Palestinian territories. The Court explored the relationship between occupation and annexation, clarifying that while occupation is lawful if temporary and necessary, Israel's extended presence goes beyond this and amounts to annexation. The advisory opinion further addressed claims of racial segregation or apartheid, concluding that Israeli policies toward Palestinians demonstrate systematic discrimination and a policy of separation. This potentially may meet the legal definition of apartheid. The Court emphasized that all states and the UN have a duty not to recognise annexation and other violations for jus cogens. This opinion reaffirms the rights of the Palestinian people to self-determination and criticises the prolonged occupation for undermining those rights.*

Key words: *International Court of Justice; Occupation; Annexation; Self-determination; Apartheid; Racial segregation; Palestine; Israel*

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1. INTRODUCTION

This paper aims to analyse the advisory opinion of the International Court of Justice (hereinafter "***the Court***" or "***ICJ***") regarding the legal consequences arising from Israel's policies and practices in the Occupied Palestinian Territory, including East

Jerusalem.[1] The core objectives of this commentary are to evaluate the ICJ's findings on the legality of Israel's prolonged occupation, its settlement activities, and the potential annexation of Palestinian territories. Additionally, the commentary explores the broader implications of these actions under international law, including the violations of *erga omnes* obligations and the Palestinian people's right of the to self-determination.

A critical focus of the analysis is whether Israel's actions amount to apartheid as understood under international law, and the corresponding legal consequences for Israel, the United Nations, and other states. The commentary also examines the jurisdictional challenges presented to the ICJ and the broader question of whether this is a bilateral dispute or a matter of global concern. The case contributes to the understanding of international law in relation to prolonged occupations, annexation, self-determination, and human rights violations by racial discrimination, and offers legal clarity on the responsibilities of states and international bodies in addressing such issues.

2. JURISDICTION AND POSED QUESTIONS

The Court may give an advisory opinion on any legal question at the request of whatever body may be authorised by or in accordance with the Charter of the United Nations to make such a request.[2] One such authorised body is the UN General Assembly.[3] It is important to highlight that the Court may decide only on questions of law. In reality, questions often have mixed character. That does not prevent the Court from ruling on their legal aspects, leaving the other unanswered.[4]

Only "compelling reasons"[5] may lead the Court to refuse to exercise its judicial function. There were several arguments against the Court's jurisdiction. According to the author, the strongest argument among them[6] was that this question actually relates to a dispute between two states – Israel and Palestine.[7] It should therefore be a subject of a contentious proceedings.

Neither Israel nor Palestine accepted the jurisdiction of the ICJ under Article 36 of the ICJ Statute, nor under a special agreement. Their mutual agreements name international negotiations as a modality for dispute settlement. Giving advisory opinion was thus viewed as circumvention of consensual basis of contentious jurisdiction of the ICJ, that, in addition, may jeopardise the solution of dispute, as argued by judge Sebutinde – the main opponent to the conclusions of the Court among the judicial plenum.

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[1] Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, not published in ICJ Reports yet. Available at: https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-00-en.pdf (accessed on 10.12.2024).

[2] Art. 65 (1), Statute of the ICJ (1945).

[3] Art. 96 (1), UN Charter (1945).

[4] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 415, para. 27.

[5] Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, para. 31.

[6] Other being the opinion would not assist the General Assembly; the opinion may undermine the Israeli-Palestinian negotiation process; an advisory opinion would be detrimental to the work of the Security Council; the Court does not have sufficient information to enable it to give an advisory opinion; and the questions are formulated in a biased manner. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 415, para. 32.

[7] Palestine is having a status as a non-member observer state at the UN General Assembly, from 2012 using name "State of Palestine" and replacing the Palestine Liberation Organization. A/RES/67/19. For its position see also A/RES/73/5 and A/RES-10/23. The Slovak Republic, forming majority with other states, recognised Palestine as an independent and sovereign state. The Palestine is understood as a state in this paper.

It is hard to see how a measure of pacific solution could jeopardise a solution, as negotiations can continue even when the Court has laid down the law. It would only clarify the negotiations on legal matters. Notwithstanding the fact that negotiations have been unable to find an ultimate solution for decades, is there actually anything to jeopardise?

As to the principle of consent, Judge Sebutinde referred to Eastern Carelia and Western Sahara.[8] However, the Eastern Carelia case concerned a bilateral dispute between Finland and Russia (USSR) regarding their mutual borders, not the aspect of the use of force, occupation, or widespread and systematic racial discrimination, which are now understood as *erga omnes* obligations. Thus, it was a different situation, notwithstanding the fact that the concept of *jus cogens* was not recognised in 1923.

As to the Western Sahara, the ICJ issued an advisory opinion, so it is not a case of refusal to exercise its jurisdiction, even though it could also be viewed as a dispute between Morocco and Western Sahara. Relevant to our case the ICJ in 2004 answered questions *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,[9] where the ICJ did not answer only questions regarding the applicable international law *in abstracto* but went to the legal consequences for Israel *in concreto* as well.[10]

The Court decided that the issue is not just a concern of bilateral relations between Israel and Palestine, but a matter of interest and concern to the United Nations and to the international community as a whole. This is because the question relates to a wider issue of international peace and security and international legal norms in questions are having *erga omnes* character so their violations have legal consequences for the other members of the international community and the UN.[11] The fact that two states are particularly involved in a question does not mean that the question is of no matter or interest to international community. A different situation would be, for example, if the advisory opinion would be misused to settle the territorial dispute between the two states.[12]

The General Assembly posed two questions:

a) What are the legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination, from its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967, including measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem, and from its adoption of related discriminatory legislation and measures?
b) How do the policies and practices of Israel affect the legal status of the occupation, and what are the legal consequences that arise for all States and the United Nations from this status?

[8] Dissenting opinion of Vice-President Sebutinde, para. 43 ff. Available at: https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-02-enc.pdf (accessed on 10.12.2024).
[9] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004, p. 136.
[10] By vote fourteen to one the ICJ in its advisory opinion ruled, that "*construction of the wall being built by Israel is contrary to international law; Israel is under an obligation to terminate its breaches of international law; it is under an obligation to cease forthwith the works of construction of the wall... to dismantle forthwith the structure...*". Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004, p. 201, operative part.
[11] Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, para. 33.
[12] Compare e.g. Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019, p. 117, para. 86.

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Israel raised objection about assumptions made in the resolution.[13] The Court said that it does not feel bound by the assumption of the UN General Assembly about illegality of the Israel's conduct, and that it is up to the Court to determine lawfulness of its policies and practices.[14] It is only regrettable that, aside from the written statement of five pages plus annexes, Israel ignored the proceedings.

The Court clarified that it understands Palestinian territory as a single territorial unit, generally speaking, encompassing the West Bank, East Jerusalem, and the Gaza Strip, divided by the so-called Green Line to the west and by the former British Mandate to the east. It is true that in deciding on the status question of occupied territories of Palestine, would logically follow to first determine, what are actual borders of the Palestine, and this is still not settled. By this, the advisory opinion concludes that a territory is occupied (or annexed) without first ascertaining which territory and on what basis does not belong to Israel.

From one point of view, based on the principle *uti possidetis juris*, all the territory of British mandate might belong to Israel. Borders from 1949-1967 are a result of aggression against Israel. On the other hand, it was planned from the beginning, that State of Palestine would be created as well. Hence, some part of the former British mandate should be part of the Palestine. Using principle *uti possidetis juris* therefore does not lead to any meaningful solution of Israel-Palestine question. It may be used only towards "external actors" – in relation to frontiers with Egypt, Jordan, Syria and Lebanon. What constitutes the actual territory of Palestine, however, is an issue that should be addressed before considering the consequences of Israel's presence on it.[15]

In this regard, the Court examined the settlement policy, in particular the transfer of (its own) civilian population to occupied territory,[16] confiscation or requisitioning of large areas of land,[17] exploitation of natural resources,[18] extension of Israeli law to occupied Palestinian territories,[19] forced displacement of Palestinian population,[20] and violence against Palestinians.[21]

[13] Written statement of the State of Israel, 24 July 2023.

[14] Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, paras. 49, 74.

[15] Conf. Dissenting opinion of Vice-President Sebutinde, paras. 67-82. Available at: https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-02-enc.pdf (accessed on 10.12.2024). Or at least to pronounce, that the Palestine is a state under international law, even if its precise borders are not settled yet, as this is also still a disputed question by many states. See Separate opinion of Judge Gómez Robledo, para. 4 ff. Available at: https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-12-encs.pdf (accessed on 10.12.2024).

[16] "*…transfer by Israel of settlers to the West Bank and East Jerusalem, as well as Israel's maintenance of their presence, is contrary to the sixth paragraph of Article 49 of the Fourth Geneva Convention.*" Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, paras. 115-119.

[17] "*…land policies are not in conformity with Articles 46, 52 and 55 of the Hague Regulations*." *Ibid.*, paras. 120-123.

[18] "*…exploitation of natural resources in the Occupied Palestinian Territory is inconsistent with its obligation to respect the Palestinian people's right to permanent sovereignty over natural resources*" *Ibid.,* paras. 124-133.

[19] "*…Israel has exercised its regulatory authority as an occupying Power in a manner that is inconsistent with the rule reflected in Article 43 of the Hague Regulations and Article 64 of the Fourth Geneva Convention*." *Ibid.*, paras. 134-141.

[20] "*…Israel's policies and practices are contrary to the prohibition of forcible transfer of the protected population under the first paragraph of Article 49 of the Fourth Geneva Convention*." *Ibid.*, paras. 142-147.

[21] "*…Israel's systematic failure to prevent or to punish attacks by settlers against the life or bodily integrity of Palestinians, as well as Israel's excessive use of force against Palestinians, is inconsistent with the obligations…*" *Ibid.*, paras. 148-154.

In all these points the Court found that there was enough evidence to establish these facts and that they constituted violation of international law. In summary the Court found that Israeli settlements in the West Bank and East Jerusalem, and the *régime* associated with them, had been established and were being maintained in violation of international law.[22] This itself is not a new observation, as this was already stated by the Court in previous advisory opinion,[23] and the Court observed "with grave concern"[24] that the violations were still ongoing and even expanding. We will not go into further details regarding these in this commentary, rather we will focus on aspects that we find new.

3. OCCUPATION FOR ANNEXATION: NEW SPECIES OR INAPPROPRIATE MIXING?

Occupation is generally considered a de facto situation of control over territory, which is regulated by international humanitarian law (*jus in bello*) and not by *jus ad bellum*, which deals with matters of the use of force against another state. Due to this distinction, it was generally understood, that for legal character of occupation is not affected by whether *jus ad bellum* was violated or not. Occupation as such is understood as a temporary situation reflected by the law and distinguished from unlawful annexation contrary to *jus ad bellum*. The advisory opinion, however, brings a new idea according to which the occupation and *jus ad bellum* are not completely independent categories living in their own worlds.

In its previous advisory opinion, the Court set out the circumstances under which a state of occupation is established: "*Under customary international law as reflected… in Article 42 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907…, territory is considered occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised.*"[25]

It was also established that the West Bank and Eastern Jerusalem were occupied. As the Court was dealing with the question of the construction of the wall, it did not deal with the issue of Gaza strip. In current advisory opinion it said, that despite the fact that Israeli military forces withdrew from Gaza in 2005 the Israel still maintains control over Gaza, so this territory is also under occupation.

From temporal side, the Court did not take into account the response to the Hamas terrorist attack from September 2023.[26] So, Gaza was understood as occupied even without physical military presence of Israel. Physical military presence is only one of the aspects that may establish effective control. Israel was maintaining effective control even without such presence, "*as long as the State in question has the capacity to enforce its authority, including by making its physical presence felt within a reasonable*

[22] *Ibid.*, paras. 155-156.
[23] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004, pp. 183-184, para. 120.
[24] Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, para. 156.
[25] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004, p. 229, para. 172.
[26] The court took account on events from 1967 to 30 December 2022, when the question was posed by the UN General Assembly. For more detailed analysis of situation of Gaza see Separate opinion of Judge Cleveland, paras. 7-27. Available at: https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-13-en.pdf (accessed on 10.12.2024).

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time."[27] Israel was controlling borders, movement of persons and goods, import and export taxes and so on, even after military withdrawal in 2005. And as an occupying power, Israel was under obligation to administer the territory for the benefit of the local population.

Occupation is understood as *de facto* consequence of a necessary military action, either by the aggressor or by the defending state, that *per definitione* is temporary. Such situations in the interstate practice are not rare. What is not typical, however, is that Israel's occupation lasts now almost sixty years. Military operations were generally closed, however, the Palestine authorities did not regain the control over its territory. This, therefore, remains qualified as occupied and under the responsibility of Israel.[28]

One of the obligations of the occupying power is to refrain from exercising acts of sovereignty. Occupation is understood as a necessary *de facto* situation, which has to be regulated, but it cannot lead to the acquisition of a title for gaining sovereignty over such territory, no matter how long the occupation lasts.

"*In order to be permissible, therefore, such exercise of effective control must at all times be consistent with the rules concerning the prohibition of the threat or use of force, including the prohibition of territorial acquisition resulting from the threat or use of force, as well as with the right to self-determination. Therefore, the fact that an occupation is prolonged may have a bearing on the justification under international law of the occupying Power's continued presence in the occupied territory*."[29]

The term "annexation," distinct to occupation, the Court defined as "*the forcible acquisition by the occupying Power of the territory that it occupies, namely its integration into the territory of the occupying Power. Annexation, then, presupposes the intent of the occupying Power to exercise permanent control over the occupied territory*." Annexation can be *de jure* when the occupying power formally declares sovereignty over and integrates the territory into its own. *De facto* annexation is a situation lacking a formal declaration, but the occupying state consolidates its power over the territory in a manner and extent that is not necessary for maintaining the responsibility of the occupying power to take care of the local population or its own security needs. Occupying power should preserve *status quo ante* in the occupied territory to the extent possible. On the contrary, occupying power should not take measures with the intent to exercise permanent control. Both forms of annexation are impermissible under international law.[30]

The Court found that the actions of Israel amounted to the annexation of "large parts" of occupied Palestinian territories, but it did not declare what form of annexation it was. From the evidence the Court cites, it may be concluded that it is generally *de facto*

[27] Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, para. 91 ff. Compare also ICTY, *Prosecutor v. Mladen Naletilić and Vinko Martinović*, IT-98-34-T, Trial Chamber, Judgement, 31 March 2003, para. 217.

[28] Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, para. 107.

[29] *Ibid.*, para. 109. "*…an occupation must be temporary. Each framework* [jus ad bellum and IHL]*… attaches different value to the question of duration. International humanitarian law does not set an end date on belligerent occupation. It is rather concerned with ensuring that the protections it affords, which aim to safeguard the rights and well-being of the local population, remain applicable until the Occupying Power stops exercising effective control over the occupied territory. On the other hand, the law on the use of force, also referred to as jus ad bellum, requires an occupation to end as soon as the circumstances justifying its establishment cease to exist… the infringement of the principle of temporariness makes an occupation illegal under both bodies of law*." (Todeschini, 2022, pp. 31-32).

[30] Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, paras. 158-161, 175.

annexation, and at least regarding East Jerusalem, even *de jure* annexation, as Jerusalem as a whole was proclaimed the capital of the state of Israel.[31]

Israel[32] referred to historical titles of sovereignty over the territory. The Court noted that this title was not substantiated by evidence, and more importantly, the acquisition of territory by force is not a means for resolving claims of sovereignty.[33]

However, here we come to the question of against whom Article 2(4) was violated. Should this be interpreted as implicit statement of the Court that Palestine is already an independent state? It is understood that this article can be violated only *vis-à-vis* another state. Or is the prohibition of force actually more extensive and does it also protect entities other than states, such as nations pursuing self-determination?[34] The status of Palestine under international law is another question that should be answered before analysing whether *jus ad bellum* was violated by Israel.

It has already been affirmed that Palestinian people have the right to self-determination,[35] and now even that it is a peremptory norm.[36] Self-determination is thus a principle having a peremptory character with *erga omnes* effects,[37] which consists namely, but not only, of the right to freely determine its political status and to pursue its economic, social and cultural development.[38] This right was found to be violated by the policies and practices of Israel.[39]

Moreover, Israel violated the right to preserve the territorial unity and integrity,[40] the integrity of the people[41] and sovereignty over natural resources.[42] This severely impeded the exercise by the Palestinian people of its right to self-determination, which is

[31] Compare e.g., "*Jerusalem is not, in any part, 'occupied territory'; it is the sovereign capital of the State of Israel*" Israel's report to the UN SC, S/21919.

[32] "*Israel's deep historical ties and own valid claims to the territory in question...*" Written statement of the State of Israel, 24 July 2023, p. 3.

[33] Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, para. 178.

[34] "*...threat or use of force against the territorial integrity or political independence of any state...*" Art. 2 (4) UN Charter (1945). See also Milanovic (2024).

[35] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 183, para. 118.

[36] Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, para. 233.

[37] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 199, para. 155; Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I), p. 139, para. 180; East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995, p. 102, para. 29.

[38] Comp. "*By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.*" Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, A/RES/2625(XXV).

[39] Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, para. 241.

[40] The right to territorial integrity is recognized under customary international law as a corollary of the right to self-determination. Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I), p. 134, para. 160.

[41] People is protected against acts aimed at dispersing the population and undermining its integrity as a people. Comp. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 184, para. 122.

[42] "*... element of the right to self-determination is the right to exercise permanent sovereignty over natural resources, which is a principle of customary international law.*" Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, p. 251, para. 244.

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only aggravating by the continuing maintenance of such a situation.[43] The Court thus considers that Israel's policies and practices obstruct the rights of the Palestinian people.

In summary, the Court distinguished between rules and principles of *jus ad bellum*, by which the presence of foreign troops on a territory should be assessed and found to be violated, and norms of *jus in bello*, which apply and regulate the situation regardless of the legality or illegality of the occupying power's presence on a territory.[44]

The fact that the occupation is prolonged itself does not change its legal character in the sense of *ius in bello*. Author believes this is a misunderstanding of the advisory opinion.[45] However, the prolonged presence of Israel in Palestinian territories is relevant in determining legality in light of *jus ad bellum* and self-determination.

"The fact that an occupation is prolonged does not in itself change its legal status under international humanitarian law… the fact that an occupation is prolonged may have a bearing on the justification under international law of the occupying Power's continued presence in the occupied territory."[46]

The rules of *ius ad bellum* prohibit the acquisition of territory by force, and the right of self-determination prohibits taking forcible actions which deprive peoples of this right. Self-determination was defined as a "fundamental and inalienable right"[47] of Palestinian people, and occupation cannot be used in such a manner as to leave indefinitely the occupied population in a state of suspension and uncertainty, denying them their right to self-determination while integrating parts of their territory into the occupying Power's own territory.

The Oslo Accords from 1993, which allows the presence of Israeli forces in Palestine for security needs, is not changing the evaluation of the situation by the Court, as neither they are allowing annexation of these territories.[48]

In other words, as international law does not regulate the time limit of occupation, it cannot be ruled that occupation is illegal just because it lasts almost sixty years. This indeed can be justified because of security needs, and we agree with Judge Sebutine, that this should be voiced more in the advisory opinion, not just to highlight the need to end it "as rapidly as possible."[49]

To say that there is a need to rapidly end the occupation is true, but it should be said also, that "as possible" part of the sentence is related to Israel's legitimate security concerns and need for effective security guarantees under right to self-defence.

However, this prolonged occupation can be understood as one of the factors, together with others, like the policies and practices of the state on occupied territory, that leads to the conclusion, that the situation is not just occupation, but it amounts (also) to annexation. And occupation with intention of annexation, indeed, has to stop "as rapidly as possible."[50] If the advisory opinion is to be read, that the occupation in the part, that is

[43] Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, para. 237 ff.
[44] *Ibid.*, para. 264.
[45] Comp. Dissenting opinion of Vice-President Sebutinde, para. 88. Available at: https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-02-enc.pdf (accessed on 10.12.2024).
[46] Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, para. 109.
[47] *Ibid.*, para. 257.
[48] *Ibid.*, para. 263.
[49] Dissenting opinion of Vice-President Sebutinde, para 54 ff. Available at: https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-02-enc.pdf (accessed on 10.12.2024).
[50] Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, para. 267.

justified by military necessity and security reasons following from self-defence is illegal as well, then it is possible to agree with dissenting judges.[51]

It seems, that the term occupation if used in different ways, depending on intention that lies behind it. If the Court is using this term, it should be more careful, otherwise it might raise more questions than answers by delivering its opinions. Without specifying that is has in mind specific type of occupation (i.e., occupation for annexation) it might lead to conclusion that any military presence (and so on) whatsoever is prohibited. The operative part, indeed, might sound like this.

Plausibly, the Court interchanged the wrongful act (annexation) with the underlying conduct (occupation, continued presence, which is the factual side of the situation). And this occupation, in the view of the court, no longer serves the purposes of the belligerent occupation only, but due to its prolonged character (in connection to other actions) changed its character. And it is hard to imagine, what security needs justify almost sixty years of occupation.[52] Milanovic thinks that the Court used the abuse of rights doctrine, which is well known in the law.[53]

When speaking of Israel's security needs, it is a term that is often used, but the actual legal basis for the ongoing occupation must be interpreted through the lens of *jus ad bellum*. Thus, the security needs must be translated into necessary and proportional measures taken within the context of self-defence. And this requires that the security needs for military presence (or other control, thus for occupation as a matter of fact) are raised because of an armed attack that occurred and for necessary period to stabilise the situation after it. Any presence beyond that is unlawful. Security itself, whatsoever real, is broader concept than self-defence and not a recognised legal title for military actions against territory of another. Many of these security threats are raised because of the resistance against the occupation. This way of reasoning thus leads us in the circle.[54]

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[51] Namely Joint opinion of Judges Tomka, Abraham and Aurescu, para. 18 ff. Available at: https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-04-en.pdf (accessed on 10.12.2024). Also Declaration of Judge Tomka, para. 9. Available at: https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-03-en.pdf (accessed on 10.12.2024).

[52] See e.g., "*Israel's policies and practices, as they have presented themselves, are not justified by its security concerns... Israel's security cannot be guaranteed through its unilateral and destructive policies and measures against the Palestinian people*." Declaration of Judge Xue, para 9. Available at: https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-06-en.pdf (accessed on 10.12.2024); "*...if occupation were to be allowed to continue indefinitely, thus gradually transforming itself into conquest or colonization, the legal tenets underlying the régime governing belligerent occupation, such as the protection of the interest of the occupied people and the return of sovereignty, would be rendered meaningless... indefinite alien subjugation and domination which is contrary to all rules and tenets of the law governing belligerent occupation. This is reflected in the realities on the ground... Any military occupation of foreign territory that changes the characteristics of belligerent occupation under international humanitarian law and decouples it from its normative framework must be considered unlawful*." Separate opinion of Judge Yusuf, paras. 8, 10, 12. Available at: https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-05-en.pdf (accessed on 10.12.2024). "*The prolonged nature of an occupation has no legal consequences as such under IHL. Rather, the prolonged nature of the occupation may be relevant for assessing the occupying power's compliance with other rules of international law*" (Milanovic, 2024).

[53] *Ibid.*

[54] "*Israel has legitimate security concerns. Nevertheless, the presence of occupying forces can only be justified by a credible link to a defensive and temporary purpose; in our view, therefore, any possible justification is necessarily lost if such a presence is abused for the purpose of annexation and suppression of the right to self-determination*." Joint declaration of Judges Nolte and Cleveland, para. 8. Available at: https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-09-en.pdf (accessed on 10.12.2024). Also Declaration of Judge Charlesworth, para. 11 ff. Available at: https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-10-en.pdf (accessed on 10.12.2024).

As judge Iwasawa said "*Since Israel's continued presence in the Occupied Palestinian Territory is an internationally wrongful act of a continuing character, Israel is under an obligation to cease that act… Israel has an obligation to bring to an end its continued presence in the Occupied Palestinian Territory "as rapidly as possible" … Given its legitimate security concerns, Israel is not under an obligation to withdraw all its armed forces from the Occupied Palestinian Territory immediately and unconditionally, particularly from the Gaza Strip in view of the ongoing hostilities since 7 October 2023.*"[55] Judges Nolte and Cleveland noted that "*the Court did not adopt the formulation urged by some participants that Israel must end the occupation "immediately, totally and unconditionally*"[56] but adopted formulation „as rapidly as possible" which recognises security needs of Israel, if they met the conditions and threshold of proportional self-defence.[57]

4. APARTHEID AGAINST PALESTINIANS?

In occupied territory, international humanitarian law is applied with complementary application of international human rights law.[58] Various international human rights legal instruments are thus applicable as well. Israel was found by the Court to be responsible for discriminatory legislation and measures against Palestinians based on "*systemic discrimination based on, inter alia, race, religion or ethnic origin, in violation of Articles 2, paragraph 1, and 26 of the ICCPR, Article 2, paragraph 2, of the ICESCR, and Article 2 of CERD.*"[59]

To constitute discrimination, the Court had to found:

1) Existence of different treatment,
2) That was not justified – which means that different treatment is reasonable and objective and serves a legitimate public aim.[60]

The Court went as far as to conclude that this situation amounted to "racial segregation and apartheid" under art. 3 of CERD, without explicitly stating whether if it was "mere" segregation or apartheid. The Court used the "neutral" term "separation" answering the question of what form the separation takes.[61] Some of the judges in their declarations or separate opinions were even more explicit in this sense.[62]

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[55] Separate opinion of Judge Iwasawa, paras. 19-20. Available at: https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-07-enc.pdf (accessed on 10.12.2024).
[56] Joint declaration of Judges Nolte and Cleveland, para. 16. Available at: https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-09-en.pdf (accessed on 10.12.2024).
[57] See Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, pp. 223-224, para. 148.
[58] Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, para. 98.
[59] *Ibid.*, para. 223.
[60] *Ibid.*, para. 191.
[61] Separate opinion of Judge Iwasawa, para. 13. Available at: https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-07-enc.pdf (accessed on 10.12.2024).
[62] Declaration of President Salam, para. 29. Available at: https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-01-en.pdf (accessed on 10.12.2024); Declaration of Judge Tladi, para 5. Available at: https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-14-en.pdf (accessed on 10.12.2024); Separate opinion of Judge Nolte, para. 15. Available at: https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-08-en.pdf (accessed on 10.12.2024). Or at least calling for more explicit approach, to define if it is segregation or apartheid, and viewed it missed opportunity to interpret the term, see Declaration of Judge Brant. Available at: https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-11-en.pdf (accessed on 10.12.2024). "*As*

The separation of Palestinians was both physical as well as legal:

- Physical separation, e.g.,: *"…Israel's settlement policy furthers the fragmentation of the West Bank and East Jerusalem, and the encirclement of Palestinian communities into enclaves. As a result of discriminatory policies and practices such as the imposition of a residence permit system and the use of distinct road networks, which the Court has discussed above, Palestinian communities remain physically isolated from each other and separated from the communities of settlers."*[63]
- Legal separation, e.g.,: *"…as a result of the partial extension of Israeli law to the West Bank and East Jerusalem, settlers and Palestinians are subject to distinct legal systems in the Occupied Palestinian Territory… To the extent that Israeli law applies to Palestinians, it imposes on them restrictions, such as the requirement for a permit to reside in East Jerusalem, from which settlers are exempt. In addition, Israel's legislation and measures that have been applicable for decades treat Palestinians differently from settlers in a wide range of fields of individual and social activity in the West Bank and East Jerusalem… "*[64]

Israel is not a party to the International Convention on the Suppression and Punishment of the Crime of Apartheid from 1973 (the Apartheid Convention), and violation of this convention were not analysed by the Court. Nevertheless, we will try to find out if, based on the Court advisory opinion, it would be possible to assume, that not only racial segregation but even apartheid was committed against Palestinians as defined by the Apartheid Convention. The definition in this convention can be understood to be principally the same as corresponding international custom.[65]

Apartheid is widely recognised as customary norm having peremptory (cogent) character. ICJ said, that apartheid measures are, e.g., those that *"establish limitations, exclusions or restrictions for the members of the indigenous population groups in respect of their participation in certain types of activities, fields of study or of training, labour or employment and also submit them to restrictions or exclusions of residence and movement in large parts of the Territory."*[66]

The issue of the apartheid definition in the Rome Statute of the International Criminal Court (1998) can be set aside for this purpose, as this definition is set for purposes of individual criminal responsibility. This can differ from the definition for the purposes of the state's obligations and responsibilities. The definition under the Rome Statute differs is stricter for its purposes. Apartheid Convention (1973) requires that the acts were committed for the purpose domination of one racial group – so it is wrong even if the domination was not accomplished yet – whereas the Rome Statute (1998) requires, that the act was already part of the context of institutionalised regime of systematic oppression and domination.[67] The fact that states later negotiated a different definition for a particular purpose does not imply, that they intended to change the definition, which

always, there was a price for obtaining that consensus: ambiguities and silences in the Court's analysis on some important points (for example, on whether Israel's practices in the OPT amount to apartheid, or whether Palestine has already achieved statehood)." (Milanovic, 2024).

[63] Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, para. 227.

[64] *Ibid.*, para. 228.

[65] See e.g. Jackson (2022, pp. 831-855).

[66] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 57, para. 130.

[67] For more on apartheid as a crime in the Israel-Palestine context see e.g. Kai (2024, pp. 485-546).

was negotiated before for another purpose. The content of custom regulating state responsibility is thus intact with the custom regulating criminal responsibility of an individual.

In comparison to the CERD, or the Rome Statute, the Apartheid Convention provides the most detailed definition of apartheid in international law, and that is one of the reasons why we are focusing on this definition.

The Apartheid Convention in introductory part of art. 2 enumerates acts which might be committed with purpose to establish and maintain domination by one racial group of persons over any other racial group of persons and systematically oppress them.

One may say that Palestinian people are not being "other racial group", as both Israelis and Palestinians are Semites. However, according to the CERD, the term race is actually an umbrella term that encompasses "race, colour, descent, or national or ethnic origin."[68] The Apartheid Convention explicitly references the CERD in the preamble, so this definition should have relevance for the interpretation of terms in the Apartheid Convention, that were not defined differently. Under this definition, the Palestinians would be understood as "other racial group" compared to Israelis. The distinctiveness of Palestinians as a group compared to Israelis was already confirmed by the ICJ in another case.[69]

Apartheid Convention names acts that may constitute apartheid. The Court was able to find, that Israel was discriminatory through:

a) residence permit policy[70] - Palestinians, for example can reside in Eastern Jerusalem only with valid permission, which is not required for Jews (even non-Israeli Jews), and the conditions for this permission are relatively strict. This can be seen as supressing the right to freedom of movement and residence, which is defined as one of acts of apartheid,[71] potentially seen as a measure, designed to divide the population along racial lines.[72]
b) restriction on movement[73] – almost the entire Area C is accessible to all settlers and holders of an entry permit to Israel, including non-Israeli Jews, Palestinians in the Occupied Palestinian Territory require a special permit to access them. There is extensive road network that connects the Israeli settlements with one another and with the territory of Israel. Although they often passes near Palestinian villages, access by Palestinians to much of it is impeded, restricted or entirely prohibited. This can be seen as well as supressing the right to freedom of movement and residence, which is defined as one of acts of apartheid,[74] potentially seen as a measure, designed to divide the population along racial lines.[75]

[68] Art. 1 (1), International Convention on the Elimination of All Forms of Racial Discrimination (1965).
[69] *"... Palestinians appear to constitute a distinct 'national, ethnical, racial or religious group..."* Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, Order of 26 January 2024, para. 45.
[70] Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, para. 192 ff.
[71] Art. 2 (c), Apartheid Convention (1973).
[72] Art. 2 (d), Apartheid Convention (1973).
[73] Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, para. 198 ff.
[74] Art. 2 (c), Apartheid Convention (1973).
[75] Art. 2 (d), Apartheid Convention (1973).

c) demolition of property[76] – According to the United Nations Office for the Coordination of Humanitarian Affairs, which has been compiling data on the practice of property demolition in the West Bank and East Jerusalem since 2009, almost 11,000 Palestinian structures have been demolished since then. Israel's practice of house demolitions takes two main forms: demolition of property as a punitive sanction for a criminal offence; and demolition of property for lack of a building permit.
    a. The measure of punitive demolition appears never to have been used against properties connected to Israeli civilians having committed similar offences. Notwithstanding the fact, that this criminal sanction affects also other persons living in the household, that are not responsible for criminal offence.
    b. As to the demolitions due to lack of building permit, according to the 2013 report of the Independent International Fact-Finding Mission, in the 20 years prior to the report, 94% of Palestinian permit applications had been denied. In July 2023, the more than 90% of Palestinian requests for permits were rejected, while approximately 60-70% of Israeli requests were discussed and approved. This reality forced Palestinian to build without building permission. Five times more demolition orders were issued for Palestinian structures than Israeli ones.
    c. This policy may potentially amount to fulfilment of several acts of apartheid such as „creation of separate reserves and ghettos," if the buildings were demolished in areas where the Palestinians were "unwelcomed." Then it may fulfil act of measures calculated to prevent a racial group or groups from participating in the political, social, economic, and cultural life of the country by social marginalisation tactic, as housing is foundational to economic stability and social integration. Or it may full fill the act of „denial to a member or members of a racial group or groups of the right to life and liberty of person." By rendering people homeless, this act places them in a precarious state, denying them the fundamental right to shelter, which is linked to the right to life and security. Finally, it is possible to think about "deliberate imposition on a racial group of living conditions calculated to cause its physical destruction in whole or in part" as an act of apartheid. Discriminatory housing destruction could fall under this provision if it is done with the intent to weaken or harm the affected racial group, for example, by pushing them into poverty, insecurity, or unsafe living conditions.[77]

Judge Charlesworth in its declaration elaborated an interesting aspect of multiple and intersectional discrimination, and how the of Israel's measures have special effect on women and on children, which was not addressed by the Court, which focused on the group as a whole, without noting that these are affected even more.[78]

[76] Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, para. 207 ff.
[77] Art. 2 (a), (c), (d), Apartheid Convention (1973).
[78] Declaration of Judge Charlesworth, paras. 2-10. Available at: https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-10-en.pdf (accessed on 10.12.2024).

D'Evereux recently published an article in which she is advocating against qualification of the Israel practices as an apartheid (D'Evereux, 2024). However, she is not addressing the fact, that the Israel has different treatment on persons not only on the own territory of Israel, but also on the territory of Palestine that compasses Gaza, West Bank as well as Eastern Jerusalem. As an instance she wrote that state has full right to decide who will be granted a permission to reside, from what follows factual possibility to enter the territory. However, this policy of Israel relates also to the Eastern Jerusalem, which is not part of Israel, but occupied territory under its control and Israel, as an occupying power, has to administer is to the benefit of local population. From that follows, on a non-discriminatory matter, especially towards the local population. The reality is, actually, contrary, and the local population – Palestinians – are actually discriminated on their own land, which is controlled by another state.

5. CONCLUSION

The Court firstly rejected the objection, that the question at hand relates only to a dispute that is bilateral between Israel and Palestine, and, thus, can be adjudicated in contentious proceedings rather than in an advisory. According to the Court, the issues involved have broader international implications related to *erga omnes* obligations, namely peremptory norms and principles of *jus ad bellum*, self-determination, and the prohibition of racial segregation and apartheid.

In its advisory opinion, the Court concluded that although occupation is not prohibited *in abstracto*, in the context of Palestine, it evolved into annexation, which violates *jus ad bellum* principles. Occupation, as a factual situation, must be evaluated through the prism of *jus in bello* – which mainly regulates how the occupying power should behave, disregarding the legal basis for occupation – and through the prism of *jus ad bellum*, which allows occupation within the limits of self-defence. Israel's prolonged presence is beyond what is justified under international law. The violation of cogent principles of *jus ad bellum* is a matter of whole international community.

Further, it reaffirmed the Palestinian people's right to self-determination, and said that this fundamental right has peremptory (cogent) character. This was severely undermined by Israel's policies.

Regarding the apartheid allegations, the Court did not go as far as to explicitly say whether Israel's conduct amounts to apartheid. It just said that separation violated CERD, thus either constituted racial segregation or apartheid. Both of them severe violations of international human rights law. In this commentary it was argued that the discussion on apartheid against Palestinians is far from being off the table.

As Israel's acts constituted violation of international law, international responsibility arises, the content of which lies namely in continuing duty of performance and accessory obligations to cease the violation (*cessation*), and offering appropriate assurances and guarantees of non-repetition, if circumstances so require (*non-repetition*). If injury was caused, then also provide full reparation. Reparation may have form of restitution, compensation and satisfaction, and these forms can be combined as suitable (e.g., Mareček and Golovko, 2022, pp. 133-134).[79]

[79] *„Reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."* Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 47.

As was confirmed also in previous advisory opinion,[80] the injury may relate not only to the State of Palestine or Palestinian people as such, but to all individuals (natural and juridical persons) that were injured by acts of Israel.

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THE RECENT TRANSGENDER COURT DECISION IN CZECHIA: TWO STEPS FORWARD, ONE STEP BACK (A COMMENTARY ON CASE Pl. ÚS 52/23) / Nikolas Sabján, Olexij M. Meteňkanyč

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Abstract: *The present commentary examines the recent transgender court decision by the Czech Constitutional Court (CCC). In this decision, the CCC held that compulsory sterilisation and/or castration in the context of legal gender reassignment constitute a violation of human rights. This could be considered as a significant development in the Central and Eastern European context. Nevertheless, the commentary also addresses some of the more problematic aspects of the CCC's decision. It begins by providing factual background and describing the Court's conclusions. Subsequently, the core part of the commentary aims to critically analyse the decision itself, both from internal and external legal perspectives. The commentary concludes by underlining the fact that on balance, the decisions is a step in the right direction and might serve as an inspiration for other constitutional courts in the region.*

Key words: *Trans People's Rights; Recent Transgender Court Decision in Czechia; Czech Constitutional Court; Legal Gender Reassignment; Sterilisation; Castration; Human Rights*

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1. INTRODUCTION

Despite the increasing awareness and recognition of trans people's rights in today's societies,[1] this minority is still regarded as vulnerable.[2] Experiencing gender identity in ways that differ from mainstream societal expectations often leads to violence

– both symbolic and physical – and discrimination across various aspects of trans people's lives.[3] A key issue is the disproportionate interference in the private lives of trans individuals, which remains a reality in many European countries,[4] including Slovakia (Batka, 2022a, pp. 6-11; Hamřík, 2022, pp. 152-155; Majerová, 2023, pp. 165-167). In this regard, countries of the so-called Visegrad Four have a poor track record, consistently ranking below the European average in studies concerning the acceptance and tolerance of LGBTIQ+ rights, particularly those of trans and intersex people.[5] Therefore, it might come as a surprise that a major judicial authority makes a decision that will (probably?) seriously alter the current legal *status quo* regarding the rights of trans people. However, this is precisely the case with the recent ruling of the Czech Constitutional Court (**CCC**) from April 24, 2024, in the N.G. case (Pl. ÚS 52/23), where the CCC found that legislation mandating forced castration and sterilisation in the context of transition is incompatible with the Czech Constitution.

The decision is also surprising because less than two years earlier the CCC had ruled in a completely opposite manner, i. e. the Court had turned its position 180 degrees (Vikarská and Ouředníčková, 2024). The CCC's previous decision of 9 November 2021 in T. H. (Pl. ÚS 2/20) was subjected to considerable criticism by several human rights actors as well as the academia and was described as "evasive, insensitive, ignorant, and political" (Vikarská and Ouředníčková, 2022).[6] The authors of this paper have also critically evaluated the CCC decision in question (Sabján, 2022; Meteňkanyč, 2022a), and

[1] Throughout this paper, we will adhere to specific terminology that we consider most appropriate in the context of this discourse, while also reflecting the current state of scientific and human rights debates. For instance, we use the term "trans people", as this seems to be the preferred term for many within this community. The adjective "trans" serves as a shorthand for "transgender" or "transsexual" people, and this term better encompasses the diversity of identities discussed in this paper. It is important to acknowledge that there is a distinction between transgender and transsexual individuals, and expression "trans people" functions as an umbrella term that includes individuals across the spectrum of gender identities. At the same time, we must highlight that experts from various fields continue to debate appropriate terminology, and this conversation is ongoing. The glossary of terms in this area is constantly evolving and being refined. Furthermore, in some instances, we will use terminology employed by certain judicial authorities (particularly the Czech Constitutional Court), such as ""status" sex reassignment", "legal sex" or "sex change". While these terms may not represent the most appropriate choice in our view, we will adhere to them, as they are derived directly from the court's decision analysis.

[2] See Commissioner for Human Rights (2009) or General Assembly of United Nations. Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity. A/HRC/19/41, 17 November 2011. Available at: https://www.ohchr.org/sites/default/files/Documents/Issues/Discrimination/A.HRC.19.41_English.pdf (accessed on 22.10.2024).

[3] *Ibid.*, p. 3, para. 1.

[4] See, e.g., Steering Committee on Anti-Discrimination, Diversity and Inclusion (CDADI). Thematic Report on Legal Gender Recognition in Europe. First Thematic Implementation Review Report on Recommendation CM/Rec(2010)5. In: Council of Europe, published on June 2022, pp. 11-13. Available at: https://rm.coe.int/thematic-report-on-legal-gender-recognition-in-europe-2022/1680a729b3 (accessed on 22.10.2024); or European Commission (2020, pp. 7-10).

[5] Recent Eurobarameter 2023 shows that in almost all indicators of discrimination against LGBTIQ+ people, Slovakia, the Czech Republic, Poland and Hungary perform worse than the European average. See more details in Directorate-General for Communication. *Special Eurobarometer 535. Discrimination in the EU.* April – May 2023. Available at: https://europa.eu/eurobarometer/surveys/detail/2972 (accessed on 22.10.2024).

[6] Perhaps the most controversial aspect of the decision concerns the Court's reasoning regarding Section 29 of the Czech Civil Code and related provisions in other legislation. These provisions made compulsory castration and sterilisation a necessary condition for the (legal) transition of trans people. However, the constitutional review of these provisions was rejected (and, according to some judges and critics, overlooked — see dissenting opinion of judge Kateřina Šimáčková to Constitutional Court of the Czech Republic, Pl. ÚS 2/20 (9 November 2021); Vikarská and Ouředníčková, 2022). This effectively led to an indirect affirmation of the legal *status quo* as being compatible with the Constitution of the Czech Republic.

with this commentary they intend to build upon their previous analyses and assess the progress made by the CCC in this matter.[7]

The objectives of this commentary are primarily (i) to describe and evaluate the extent to which the CCC has shifted its position on the protection of trans people's rights in the case under review, the grounds for this shift, and the legal basis for its decision; and (ii) to highlight that, despite this shift, there remain problematic aspects of the CCC's reasoning and the decision itself. With this in mind, we will first briefly introduce the recent decision and the CCC's reasoning and conclusions (Chapter 2); subsequently, our focus will turn to the positive and negative aspects of the ruling, providing a critical analysis from both internal and external theoretical-legal perspectives (Chapters 3 and 4).[8]

2. A BRIEF SUMMARY OF THE CCC´S RULING AND ARGUMENTATION

2.1 Facts of the Case

The circumstances of the case under review are relatively straightforward. The complainant, N.G., formerly A.V., birth name L.V., was born with the biological characteristics of a woman and, after birth, was officially registered as a woman with a female name and the corresponding birth number format. However, the complainant identifies as a trans man and seeks to change his legal gender. He wishes to have the official records reflect his true gender identity without undergoing the compulsory surgical procedure, which includes sterilisation and the compulsory alteration of genitalia.

To this end, the complainant initiated administrative proceedings in 2019, requesting the relevant Czech administrative authorities to: (i.) register the change of his neutral name to a male name; (ii.) register the change of his current birth number from a female to a male one; (iii.) register the change of the official designation of his legal gender from female ("F") to male ("M"). The administrative authorities did not grant the requests in question and suspended the proceedings against the complainant on the ground that he had not submitted a certificate of completion of treatment for the change of his legal sex (and thus a certificate that the complainant had been rendered incapable of reproductive function and that his genitals had been transformed). The proceedings before the administrative judicial authorities followed a similar pattern, with the complainant's efforts culminating in the filing of a constitutional complaint with the CCC.[9]

He requested the CCC to strike down the statutory provisions that make legal gender reassignment conditional upon undergoing a surgical procedure consisting of sterilisation and genital transformation, as well as regulate the conditions for changing one's name and surname in relation to one's gender. The complainant argued that this legislation violated human dignity, the right to equality, the protection of health, as well as

[7] For this reason, however, we will not elaborate on some aspects which we analysed in the past, and thus, we shall just refer to them here: Sabján (2022), and Meteňkanyč (2022a).

[8] Internal legal perspectives are typical of traditional, positivist legal approaches, where law is viewed independently of social, political, economic, or ideological factors. The focus is primarily on strictly legal arguments from within the legal system. In contrast, external perspectives take these extra-legal factors into account, aiming to situate legal argumentation, reasoning, and decision-making within a broader socio-political and ideological context. For a more detailed discussion see: Douzinas and Gearey (2005, pp. 16-17).

[9] For more on the facts of the case, see Constitutional Court of the Czech Republic, Pl. ÚS 52/23 (24 April 2024), paras. 5-16. In this regard, it appears to be the case that the complaint constituted an example of strategic litigation, that is, a type of proceeding before the relevant state authorities, the aim of which is not only to protect the rights of a particular person, but also to bring about a change at the level of the rights of a larger group of people, and thus to consciously aim to bring about a change in law, policy, practice, or public consciousness (Matiaško and Žatková, 2022, p. 103).

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the right to respect for his private life and parenthood. Two key legal issues subsequently emerged in the present case, both of which were addressed by the CCC:

(i.) whether the Plenary Chamber of the CCC has the authority to examine the merits of the complainant's request for annulment of the statutory provisions, given that the CCC has already ruled on another case seeking the annulment of partially identical provisions in the Czech legal system. This raised the question of whether the current proceedings are barred by the principle of *res iudicata*;[10]

(ii.) and whether it is in accordance with the Czech constitutional order to require individuals to undergo surgical procedures consisting in sterilisation and the compulsory genital transformation[11] as a condition for the State to recognise their legal sex change.[12]

2.2 CCC´s Decision

After addressing the first question – whether the CCC's earlier decision (Case No. Pl. ÚS 2/20) posed an obstacle to ruling on the complainant N.G.'s case[13] – the Court turned its attention to the second, substantive legal issue: the requirement of sterilisation as a condition for legal gender reassignment under Czech law. The Court's reasoning itself can be divided into three parts.[14]

Initially, the CCC substantively noted that the existing legislation requires trans people to either undergo the required necessary invasive surgical procedures or to accept that the state will not officially (administratively) recognise the fact that they identify with different legal sex. In simple terms, the state will not acknowledge their affirmed sex. Both options involve human rights violations in this legal context: the first option constitutes a serious violation of bodily integrity,[15] while the second interferes with an individual's right to self-determination, personal autonomy, and privacy.[16]

Second, the CCC[17] addressed the legal conditions of "status" sex reassignment and affirmed as a legitimate aim that the state wishes to document whether individuals are male or female and to establish criteria for legal sex reassignment for the purpose of inalienability of civil status and the need to preserve the consistency and reliability of civil status records.[18] The CCC expressed some concern that changes in legal sex could be inauthentic, purposeful, or even arbitrary, potentially made "according to one´s mood".[19] The CCC also identifies two key justifications for this legitimate aim: (i.) the existence of

[10] See Constitutional Court of the Czech Republic, Pl. ÚS 2/20 (9 November 2021).

[11] This requirement results in the castration of trans people in the Czech Republic, as surgical procedures involving the complete removal of gonads continue to be practiced. For more on castration (including its distinctions from sterilisation) and its associated risks, see Těšinová, Doležal and Policar (2019, pp. 211-215).

[12] Constitutional Court of the Czech Republic, Pl. ÚS 52/23 (24 April 2024), para. 4.

[13] *Ibid.*, paras. 33-47. Although this is undoubtedly an interesting issue (and the CCC has made a number of thought-provoking points in its reasoning), we will not elaborate further in our commentary on the first issue dealing with *res iudicata*, for the reason that it is not related to the stated objectives of this commentary.

[14] Following also the systematic division of Part IX.1 of the decision itself.

[15] In fact, the legislation in question categorically requires every individual to comply with the requirements in question in order to render both the reproductive function and the genital transformation impossible, even in cases where this is not always medically appropriate or necessary (e.g. where the person in question is already infertile for some reason), and/or may even be a health-threatening circumstance (see Meteňkanyč, 2022a, 139-142).

[16] Constitutional Court of the Czech Republic, Pl. ÚS 52/23 (24 April 2024), paras. 67-74.

[17] *Ibid.*, paras. 75-81.

[18] *„Therefore, the State may have a legitimate interest in defining the conditions for 'status' sex reassignment, so that the status of the individual is clear and, at the same time, the authenticity of the sex status is guaranteed." Ibid.*, para. 77.

[19] *Ibid.*, para. 76.

"objective" biological characteristics corresponding to the sex of the person registered by the state;[20] and (ii.) the preservation of the "traditional" concept of parenthood (particularly motherhood) within the legal framework.[21]

Third, the CCC concluded that, although the legitimate aim described above can be pursued, the existence of the statutory conditions of legal sex reassignment under review (aiming at the sterilisation and castration of trans people) is contrary to the fundamental right of trans people to the protection of their bodily integrity and personal autonomy, in particular because it violates their human dignity.[22] The legislation objectifies trans individuals by treating them as mere objects, particularly by failing to allow for individual assessments of their cases. As a result, the means used to achieve the goal of status stability are "manifestly disproportionate".[23] The Court emphasised that this goal can be achieved by less invasive means. Additionally, the CCC pointed out that requiring a person's genital transformation is inappropriate, since in normal interpersonal contact his/her genitals are not exposed, and their appearance remains routinely concealed from other people. The CCC also briefly noted that it is constitutionally unacceptable for the state to treat a person's reproductive function instrumentally, depriving individuals of the opportunity to become parents solely based on their identity, without allowing them to make that decision independently.

In the light of the above, the CCC subsequently ruled that the legal requirements of genital surgical alteration and disabling of reproductive function for the purposes of "status" change of legal sex are contrary to the fundamental right of trans people to the protection of their bodily integrity, personal autonomy and their human dignity, and struck down the relevant statutory provisions establishing these requirements, albeit with a stay of execution. Indeed, in the conclusion of the decision (paras. 103-112), the CCC emphasised its commitment to respect the principle of minimal interference in the parliament activity and provided no specific guidance on how legal sex reassignment should be regulated in the future. Additionally, the Court deferred the effects of its decision for over a year, meaning the problematic statutory requirement will remain in effect until the end of July 2025.

3. CASE PL. ÚS 52/23 – ANALYSIS FROM AN INTERNAL LEGAL PERSPECTIVE

The decision itself contains several positive elements that should be highlighted. From the fact that the Court was sensitive in its decision to reflect the preferred way of referring to the party (the complainant N.G.) and not proceeding in the manner it did in its earlier 2021 decision; through to its reasoning as to why it is unacceptable to continue to uphold legal conditions for the 'status' change of legal sex, which from a human rights perspective are clearly contrary to the idea of human dignity and the right of every individual to bodily integrity and personal autonomy, and the CCC's rejection of the objectification of trans people in the process of (legal) transition;[24] to pointing out that the physical appearance of genitalia falls within the deeply intimate sphere of each person

[20] Constitutional Court of the Czech Republic, Pl. ÚS 52/23 (24 April 2024), para. 79.
[21] *Ibid.*, para. 80.
[22] *Ibid.*, para. 82.
[23] *Ibid.*, paras. 85-87.
[24] Opinions within the academic and legal community (for instance see dissenting opinion of judge Kateřina Šimáčková, 2021, paras. 62-63) were voiced even before the CCC decision, highlighting that the previous Czech legislation on transition objectified transgender individuals and was deemed contrary to, among other principles, the prohibition of inhuman and degrading treatment. For more see also Nechvátalová (2021) and Kratochvíl (2012).

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and remains routinely hidden from others, as the correspondence between state-registered gender and actual genitalia is not detectable in ordinary intercourse. Thus, it has been emphasised that the (legal and biological) sex of a particular individual should not be excessively perceived as a public matter.[25]

However, despite the positive aspects of the CCC decision, there are also problematic elements that should be critically analysed. In this section, we will focus on the negative aspects from an internal legal perspective, i.e. one that is characterised by traditional (dogmatic), positivist approaches and the main emphasis is put upon strictly legal arguments from within juridical field.[26]

3.1 Absence of the Term "Gender" in the CCC's Decision

Contrary to the ECtHR's jurisprudence, the CCC works with the notion of "legal sex" and deliberately avoids the notion of "gender", "gender identity", *et cetera*. We can only speculate why the Court refused to work with these terms. One argument could be that the above-mentioned terms proved to be particularly controversial in the public discourse in Czech Republic (the same applies to the Slovakian context). The Court apparently wished to avoid the controversy in question and declined to address the issue of the relationship between sex and gender/gender identity, which is both extremely complex and has proved to be rather divisive.[27]

On the other hand, however, the decision also uses the formulation "subjective perception of gender".[28] It can thus be assumed that the CCC implicitly works with or accepts the notion of gender identity, much like the ECtHR,[29] but chooses a less explicit name for essentially the same phenomenon.

Although the CCC does not directly address the question of the relationship between sex and gender, it is reasonable to believe that it accepts the objectivity of biological sex and a kind of subjective character of gender identity, the incongruency between these being the reason for transgenderism. In addition, the CCC similarly avoids the term "transgender", "transgender person", and instead speaks of trans people/trans man/trans woman. This complements the aforementioned hesitancy of the CCC to invoke any term somehow connected with "gender". In this context, it is worthwhile to mention that the CCC has not avoided some of the myths surrounding transgenderism –

[25] *Ibid.*, paras. 73-73 and 88. Meteňkanyč (2023, p. 76), following the ideas of Andrea Baršová (2020, p. 991), pointed out that society perhaps too easily accepts the belief that an individual's legal sex/gender must be treated as a public matter. If we carefully examine selected decisions from other constitutional authorities (e.g., the Austrian Constitutional Court, G 77/2018-9 (15 June 2018), para. 31), we see that they approach legal sex/gender with caution, recognising it as part of the intimate, private sphere of the individual. It is unsurprising that, for individuals belonging to sexual minorities, the disclosure of gender or gender identity is not always perceived as unproblematic (Kišoňová, 2022, p. 85).

[26] Naturally, other avenues of critical reflection on the decision of the CCC can be pursued, particularly along the lines of argumentation presented in the dissenting opinions of Judges Hulmák and Fiala. These focus on criticising anti-essentialist perspectives in the interpretation of the principle of self-determination. However, due to the limited scope of this commentary, we can only briefly highlight this point.

[27] However, we admit that these conclusions are more of a speculative nature and the aim of this commentary is not a complex analysis of this issue. In other words, further research is needed to address this question more in-depth.

[28] Constitutional Court of the Czech Republic, Pl. ÚS 52/23 (24 April 2024), para. 69.

[29] In its older case-law, the ECtHR relied on the term "transsexualism". However, this has changed and currently it refers to transgender persons, right to gender identity, *et cetera.* See for instance ECtHR, A.P., Garçon and Nicot v. France, app. nos. 79885/12, 52471/13 and 52596/13, 6 April 2017, ECtHR, S.V. v. Italy, app. no. 55216/08, 11 October 2018,For a further analysis of case-law on this issue see von Arnauld, von der Decken and Susi (2020); Bassetti (2020); Horvát (2021, pp. 122-123, 128-130); or Erdősová (2023, pp. 30-33; 2024, pp. 93-94).

one of the well-known, for instance, is the 'born in the wrong body' myth (further discussed in section 4.3).[30] Nevertheless, a positive aspect of the decision is that the CCC does not rely on a kind of biological determinism (Batka, 2022b, pp. 7-10) in the form of a complete rejection of gender/gender identity, but instead accepts it, while also considering gender identity (at least implicitly in the sense described above) as part of the right to privacy.

3.2 Following the Decision-Making of the ECtHR (in Good and Bad Aspects)

The CCC largely accepted the reasoning of the ECtHR in relation to the issue of compulsory sterilisation as a condition for legal gender reassignment, as explained in 2.2 above. However, in comparison to the ECtHR, the CCC explicitly found that the legislation in question was contrary to the human dignity of the complainant. Notably, the ECtHR does not explicitly use the concept of human dignity in its case-law on questions of legal gender reassignment. Unlike the CCC's previous decision in 2021, in which the Court laconically stated that the ECtHR's jurisprudence did not seem appropriate as it had "*considerable doubts about the transferability of some of the conclusions of the ECtHR to the environment of the Czech legal system*"[31] without any further reasoning, in the present decision the CCC has explicitly relied on the ECtHR's reasoning, which is undoubtedly commendable, although on the other hand it should be considered as the bare minimum.

However, a negative aspect of the CCC's inspiration from the ECtHR may be the fact that the Court did not reflect some of the criticised elements of the ECtHR's decision-making practice and adopted them anyway. The first one can be found in paragraph 87 of the decision, where it states that "*for the purposes of 'status' sex reassignment, for example, it would be possible to use the diagnostic opinions of several independent specialist sexologists demonstrating the irreversibility of the individual's beliefs regarding his or her sex reassignment*."

The ECtHR in its decision *A.P., Garcon v. France* also stated that the said requirement falls within the margin of appreciation that States enjoy in this regard.[32] This conclusion of the ECtHR has been criticised on several occasions on the grounds that this approach of the Court to transgenderism is "pathologising" (see Cannoot, 2019; Hansen, 2022, pp. 154-155; Mikulová, 2023, pp. 50-52). Relatedly, both the ECtHR and the CCC speak of the "right to (gender/sex) self-determination" as being part of the right to privacy, not explicitly addressing the definition of this concept in the first place. Rather, it is implicitly accepted that gender self-determination can/should be subject to certain conditions in the context of legal gender reassignment (such as the aforementioned medical examination condition). This is a significantly different understanding of the concept of the right to (gender/sex) self-determination compared to the prevailing view in the academic or human rights discourse. In any case, the ECtHR is criticised for refusing to move towards the understanding of right to (gender/sex) self-determination more in line with the understanding in academia or by international and regional organisations and NGOs.[33]

Another aspect of the CCC decision that could be problematised/criticised is its conclusion in paragraph 69 of the decision, in which it states that "*if an individual is to*

[30] Constitutional Court of the Czech Republic, Pl. ÚS 52/23 (24 April 2024), para. 87.
[31] Constitutional Court of the Czech Republic, Pl. ÚS 2/20 (9 November 2021), para. 61.
[32] ECtHR, A.P., Garçon and Nicot v. France, app. nos. 79885/12, 52471/13 and 52596/13, 6 April 2017, paras. 145-154.
[33] Essentially, it is defined as a possibility for a person to provide "a statutory declaration affirming that they have a stable connection with the gender in which they wish to be recognised." (van den Brink and Dunne, 2018, p. 59).

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have a genuine right to self-determination and if he is to have a real say in the organisation of his life, he should also have the space to experience his **permanent** *perceived belonging to a particular sex*." The CCC implicitly excludes the possibility to experience gender-fluidity since it considers transgenderism as something "permanent", i.e. unchangeable. The issue at hand would require more space, but one may mention in this context, for example, the 2019 decision of the Belgian Constitutional Court, in which this Court concluded that legislation excluding gender-fluidity is contrary to the principle of equality/the prohibition of discrimination.[34]

Finally, it is worth briefly noting that the Court did not consider another potential avenue in this case: the issue of a potential violation of the principle of equality and non-discrimination, which the complainant also raised. Similarly, the ECtHR has so far neglected this aspect of gender identity cases. This omission was already highlighted and criticised.[35] As for instance Lena Holzer argues, the added value of a decision on a violation of the prohibition of non-discrimination could be that "*it would highlight that trans persons' gender identities are currently not recognised on an equal basis with cis persons' gender identities*" (Holzer, 2022, p. 179).

3.3 Postponement of the Enforceability of a Court Decision

The CCC's rather surprising move was to postpone the enforceability of the decision, on the grounds that the immediate repeal of the legislation under review could create undesirable situations in which legal certainty and the stability of the legal order would be undermined. The Court considered that by taking this step it was giving the legislator sufficient time of more than one year to regulate the conditions of legal sex reassignment in the Czech Republic in a dignified and constitutionally compatible manner, as well as to adjust the relevant regulation in various related areas accordingly.[36] At the same time, the CCC openly admitted[37] that until the decision becomes enforceable (either by 30 June 2025 or once new legislation is enacted and comes into effect), the existing legal conditions for legal sex reassignment should be applied as a still (intertemporally) valid and effective part of the legal order.[38]

The CCC's solution can be criticised on several grounds. First, other national constitutional courts[39] have made their rulings regarding invasive medical requirements for the transition process immediately enforceable, recognising the obvious and fundamental interference with the human rights of trans persons. This approach was taken despite the associated risks to the principle of legal certainty. However, the serious and irreversible damage to bodily integrity, the objectification of trans persons and the obvious interference with their human dignity and personal autonomy should outweigh the aforementioned risks.

Secondly, several lawyers[40] and the dissenting CCC judge, Dr. Milan Hulmák, have pointed out that the Court could have proceeded differently, which would have provided

[34] For a more extensive analysis see Sabján (2023).
[35] Constitutional Court of the Czech Republic, Pl. ÚS 52/23 (24 April 2024), para. 2.
[36] *Ibid.*, paras. 108-111.
[37] *Ibid.*, paras. 110-112.
[38] *„Strictly speaking, until this ruling is enforceable, "status" sex reassignment cannot occur without surgical intervention, with concomitant disabling of reproductive function and transformation of sexual organs." Ibid.*, para. 112.
[39] See, e.g., the decision of German Federal Constitutional Court, Order of the First Senate of 11 January 2011, 1 BvR 3295/07, the court's verdict and paras. 79-80
[40] Leviathan vs. Judikatúra vs. podmínka operace a sterilizace pro úřední změnu pohlaví. In *České podcasty*, from 42 min, 45 sec. Available at: https://ceskepodcasty.cz/epizoda/426916 (accessed on 22.10.2024).

a solution to the persons concerned immediately and not only in the unknown future (dependent on uncertain and external political and social circumstances – this aspect is discussed in the next chapter). The solution would have consisted in narrowing the interpretation of Section 29 of the Czech Civil Code, whereby the said provision was to be constitutionally interpreted in light of the injunction clearly formulated in Section 2(1) of the said Code,[41] as well as with "*minor interventions in the Registry Act and the adopted intervention in the Act on Specific Health Services in its essence declaring the state of affairs that should apply here even without the intervention of the Constitutional Court*."[42] Thus, one possible interpretation of section 29(1) of the Civil Code is that it was intended to regulate "sex change" only in the case of persons interested in changing their biological sex, but not for other cases of official "sex change". In doing so, it was urged to overcome the strict interpretation linking "official" change exclusively to biological sex by employing *a ratione legis* interpretation.[43]

Thirdly, the CCC itself has already predicted how legal sex reassignment will take place if the Czech legislature remains inactive. Specifically, "status" sex reassignment will continue to be regulated only by the remaining (unrepealed) provisions of Section 29(1), second sentence of the Civil Code, while "operative" gender reassignment will be regulated only by the remaining provisions of the Act on Specific Health Services. Thus, legal certainty, the stability of the legal order and the effective protection of the rights of trans people need not be affected (although this is, of course, far from an ideal solution, and the regulation in question has significant gaps that will need to be addressed through practice, which can be risky).[44] However, it would not be the first time that a CCC decision striking down a piece of legislation has come into immediate effect. Yet, within the Court's reasoning is an explicit acceptance of an interim legal state of affairs that allows for the continued compulsory castration and sterilisation of trans individuals. To put it slightly provocatively, we could say that these invasive surgical procedures in question will now be performed with the "sanctification" of the CCC. Consequently, permitting and perpetuating a situation where compulsory castration and sterilisation is a prerequisite for the completion of transition appears to be a relic of a eugenic mindset that should have no place in the 21st century.[45] In the Czech Republic, however, this requirement will still be part of the legal system until at least the end of June 2025.

[41] It imposes an obligation to interpret all provisions of private law in conformity with the Charter of Fundamental Rights and Freedoms, the constitutional order as a whole, the principles underlying the Civil Code, and with consistent regard for the values it protects. If the literal interpretation of a provision diverges from this mandate, it must be subordinated to these higher principles.

[42] Dissenting opinion of judge Milan Hulmák to Constitutional Court of the Czech Republic, Pl. ÚS 52/23 (24 April 2024), para. 5.

[43] In principle, it involves the application of teleological reduction (Melzer, 2009, pp. 248-251; Mrva and Turčan, 2024, pp. 96-97) to determine the limits of interpretation. In this context, the CCC would, by its authority and in accordance with Section 2(1) of the Czech Civil Code, purposefully narrow the interpretation of Section 29, as scholars have pointed out several ways to interpret the provision in question (Baršová, 2013, p. 26; Doležal, 2013, p. 19).

[44] This could also pose a problem in light of ECtHR case-law, which calls for a clear and predictable legal procedure that would „provide quick, transparent and accessible procedures" in the context of legal gender recognition. See ECtHR, X a Y v. Romania, app. nos. 2145/16 and 20607/16, 19 January 2021.

[45] In his research, Peter Dunne (2017) outlines the various justifications previously presented by legislators or the legal professional community for requiring mandatory sterilisation/castration as a part of the transition process for trans individuals. With some degree of simplification, these are three central justifications: preserving the principle of legal certainty, ensuring the welfare of children, and protecting the natural form of reproduction. Nevertheless, it is clear that none of the justifications are convincing and sterilisation

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4. CASE PL. ÚS 52/23 – ANALYSIS FROM AN EXTERNAL LEGAL PERSPECTIVE

4.1 The Need for Court Restraint and the Rejection of Judicial Activism (?)

The CCC's decision was perceived by many as activist, and we shall turn to this question in this section. In the aforementioned 2021 decision, the Court declined to address the issue of the inconsistency of the condition of sterilisation in a legal sex reassignment on the grounds that "*if it had dealt with these questions, it would have led to politicisation of the judiciary*." It is not too much of a surprise that the CCC's decision under analysis has also been subject to such criticism, i.e., judicial activism. First of all, however, it must be emphasised that the CCC has chosen a relatively cautious and "minimalist" approach even for the context of the Czech Republic. In principle, it merely adopted (as mentioned above) the reasoning of the ECtHR, which has become settled case-law. The CCC itself states in paragraph 107 that "*the legislator's inaction is unsustainable in a situation where the Czech Republic remains one of the few European countries where the legal requirement for sex reassignment surgery persists. Of the 27 EU Member States, only six either do not allow official sex reassignment at all (Hungary - on the incompatibility of the Hungarian legislation with Article 8 of the Convention, cf. the ECtHR judgment in R.K. v. Hungary, 22.6.2023, no. 54006/20, § 77) or make it conditional on sterilisation or castration (Bulgaria, the Czech Republic, Latvia, Romania and Slovakia). Finland, for example, has responded to the ECtHR case-law by adopting new legislation in 2023*." Thus, we can see that the Czech Republic had one of the strictest legal regulations and the CCC basically only adopted the current developments of the ECtHR case-law. Moreover, as we indicate below (section 4.2.), the CCC kept to the role of a negative legislator, as stated in paragraph 104 of the decision: "*by repealing the regulation in question, the Constitutional Court respects the principle of minimal interference in the activities of the Parliament - it does not indicate how concretely sex reassignment should be regulated in the future*."

But what's more important is the assumption of the argument concerning judicial activism: it is that if the CCC would have upheld the existing legal framework, this would have somehow been *apolitical* or *non-ideological* and the CCC would have shown restraint and avoid judicial activism. The fact of the matter is that whatever the CCC had decided on this matter, it would still have been perceived as ideological or political.[46] Here we shall refer to Duncan Kennedy's term „hermeneutics of suspicion". By that he means that "*contemporary elite jurists pursue, vis-à-vis one another, a 'hermeneutic of suspicion', meaning that they work to uncover hidden ideological motives behind the 'wrong' legal arguments of their opponents, while affirming their own right answer allegedly innocent of*

requirements rely upon a weak, discriminatory, and logically inconsistent framework. As Dunne (2017, p. 28) points out, "*European policymakers have failed to offer a compelling rationale for trans sterilisation and such requirements should not form part of Europe's gender recognition rules*." This is confirmed by the fact that of the current 27 Member States of the European Union, there are only six that either do not allow official "sex change" at all (Hungary) or make it conditional on the requirement of castration and/or sterilization (Bulgaria, Latvia, Romania, Slovakia and still the Czech Republic). Over the last two decades (also following ECtHR case-law), most EU states have dropped this condition, most recently Finland and Spain. For more see Trans Rights Map. Europe & Central Asia 2024. LGR cluster. Available at: tgeu.org/home/legal-gender-recognition/cluster-map (accessed on 22.10.2024). However, the situation in Slovakia has become more complex due to recent developments, which are discussed in greater detail in the following subchapter. At present, it is difficult to assert that transition is conditional upon the requirement of castration and/or sterilization, as a legal vacuum has emerged, complicating the understanding of current practices. The authors of this commentary rely on media reports from the first half of this year, when the Ministry of Interior of the Slovak Republic declared that legal transitions are not currently being processed. According to the Ministry, no official sex changes have been recorded since the relevant administrative acts were repealed (as of December 2023). For more see Zdút (2024).

[46] For a more extensive analysis, see Sabjan (2022, pp. 131-133).

ideology" (Kennedy, 2015, p. 91). He further points out that judicial decision-making is an ideological struggle, and he distinguishes between "activist judges", "difference-splitting judges", "bipolar judges" or simply "centrists" (Mańko, 2021, p. 182). The ideological struggle applies, presumably, to lawyers, academics and other legal actors alike (Kennedy, 2007). Simply put, Kennedy is pointing to the ideologically motivated legal practice (and theory too) since, as he puts it, "*judges who claim they are ideology free are either acting in bad faith, or simply in denial in the psychoanalytical sense*" (Mańko, 2021, p. 184). Although Kennedy is working in a different legal context (common law system) and mostly focusing on appellate courts, his view is, we believe, correct. This description is especially accurate when it comes to, for instance, human rights/constitutional law (our case).

Consequently, to demonstrate this on a specific example, it is very likely that a conservative legal theorist/practitioner will criticise this decision on the basis of judicial activism, as the CCC's conclusion will not be in alignment with his/her/their ideological position, whereas a legal theorist/practitioner with a more liberal/socialist bent will most likely come to the opposite conclusion, even arguing that the CCC showed too much restraint. Put simply, the critique of decisions on the grounds of judicial activism is almost always ideologically motivated, especially in cases involving certain moral, ethical, or human rights issues (as is the case here).

4.2 Constitutional Courts as Negative Legislators

As previously mentioned, the CCC explicitly relied on the concept of negative legislator[47] in its reasoning, emphasising the necessity for the legislature to "*use the available scientific knowledge to resolve at the legislative level a sensitive social problem related to the sex reassignment of trans people*".[48] Although the CCC does not want to present the legislator with the specifics of how future regulation will be implemented (in line with the principle of minimal interference in the Czech Parliament), the Court actively admits to playing the role of a 'catalyst' for democratic debate in areas where it has not yet taken place or where it has long been dysfunctional.[49] But the CCC has left it to the responsibility of the Czech Parliament and the Czech government to prevent the emergence of opaque situations that could undermine legal certainty and the stability of the legal order in the absence of intervention (*de facto* this will be our model case No. I, examined below).

We believe that the CCC could have been more expansive in delineating the boundaries within which the Czech legislator could "constitutionally operate". Failing to do so might risk creating situations where opaque legal and political situations actually arise that would benefit neither the transgender persons nor stability of the legal order. The CCC should not only have stuck to the so-called concept of a negative legislator, i.e. this is a function in democratic societies where constitutional courts correct the normative (in)activity of the legislative and executive branches by assessing its results or even the process of normative activity in terms of compliance with the constitution and constitutional laws (Berdisová, 2016, p. 554), but the CCC should have also embraced the role of a so-called positive legislator. While the traditional concept of the negative

[47] Constitutional Court of the Czech Republic, Pl. ÚS 52/23 (24 April 2024), para. 109.
[48] *Ibid.*, para. 108.
[49] *Ibid.*

legislator is well known and established[50] (cf. Bujňák, Gaňa and Hodás, 2023, pp. 58-62), some theorists have argued (Brewer Carıas, 2011, chapter 3; Berdisová, 2016, pp. 555-557) that constitutional courts are in a sense not only negative legislators but also positive legislators, for a number of reasons. It is not necessary to address all of them at this point. It is sufficient to mention one of the main justifications, namely that constitutional courts, in their decisions on the (in)compatibility of lower-level legislation with higher-law legislation, often indicate to the legislative body what form of legislation would align with the constitutional framework of the state. In some cases, this is done in an indirect way, while in other cases the selected constitutional courts directly describe the preferred legislative changes (Berdisová, 2016, p. 555). Admittedly, this approach would limit the political discretion of the Czech legislator, which may not fully align with the principle of self-restraint mentioned earlier. However, such action would demonstrate the CCC's efforts to uphold the compliance of statutes with the constitution. Otherwise, it risks scenarios that may be problematic, two of which we outline below.

4.2.1 Model Case No 1: The Czech Parliament's Inactivity

First, we will present a scenario from our Slovak context that could be an "inspiration" for the Czech parliament. In Slovakia, although selected parts of the legal order have not been repealed by the Constitutional Court, the existing administrative acts on legal gender reassignment has been derogated through a series of political steps. In particular, the Ministry of Health of the Slovak Republic's Professional guidance on the unification of procedures for the provision of health care for gender reassignment before the issuance of a medical opinion on the change of a person's sex administratively recorded in the registry office from 2022, as well as the follow-up Standard Procedure for the Diagnosis and Comprehensive Management of Health Care for Adults with Transsexualism from 2022, both of which were repealed: the guidance at the end of 2023, the standards again in April 2024.[51] It is worth adding that in justifying this, the Ministry of Health made no secret of the fact that these were politically motivated steps that had to be taken for the functioning of the ruling coalition. Although it was pointed out that the acts in question would be revised and subsequently put into effect, it is questionable when this will happen and what the content of these revised acts will be.[52] However, it is clear that the legal vacuum in which transgender persons living in Slovakia find themselves is also due to deliberate interference from certain political actors, and the subsequent inaction in this area is not all that surprising.

In this respect, we do not want to predict a similar result in the Czech Republic, but we believe that the above is a possible alternative. There is certainly a huge temptation to politically abuse the issues discussed and amplify the existing divisions.

[50] This concept is traditionally associated the Central European context with Hans Kelsen, who already in 1928 published an article entitled "La garantie juridictionnelle de la constitution (La justice constitutionnelle)", in which he introduced the concept of constitutional courts as "negative legislators" to non-German-speaking readers, a perception that had and still has a far-reaching significance in Central Europe. See Kelsen (1928).

[51] See Ministry of Health to repeal gender reassignment guidance. Published on 21.11.2023, available at. https://www.health.gov.sk/Clanok?mzsr-usmernenie-pohlavie-zmena-zrusenie (accessed on 22.10.2024) and Notice of termination of the standard procedure of "Standard Procedure for the Diagnosis and Comprehensive Management of Health Care for Adults with Transsexualism (F.64.0)". Published on 02.04.2024, available at: https://www.health.gov.sk/Zdroje?/Sources/dokumenty/SDTP/standardy/ops-transsexualizmus/SP-pre-diagnostiku-a-komplexny-manazment-zdravotnej-starostlivosti-o-dospelu-osobu-s-transsexualizmom-F64-0.pdf (accessed on 22.10.2024)

[52] We would only add here that the adoption of the above guidance and standards alone has taken several years, and it is likely to take a considerable period of time to revise them as well. For more see Batka et al. (2023) or Vašečková (2022, pp. 12-13).

While the CCC has stated that it is the responsibility of the Parliament and the Government of the Czech Republic to prevent the emergence of undesirable situations that would undermine legal certainty and the stability of the legal order, the changes must in fact be made by the legislature by the end of June 2025 at the latest, which might lead to several complications.

Firstly, it is questionable whether the legislative changes in question will be ready by that date and whether there will even be the political will to enact legislation that respects the content of the CCC decision under analysis (especially given that a significant portion of the current Czech coalition consists of conservative politicians). Won't some political actors assess this complication in such a way that it would be better to remain inactive in the matter, after all, what sanction do they face if they fail to respect the CCC's requirements? Secondly, even if there is political will to adopt certain changes, there is a risk that politicians might only implement minimal adjustments that do not fundamentally alter the situation for transgender individuals in the Czech Republic.[53] And thirdly, the CCC has failed to take into account the particular political context in the Czech Republic; specifically, we are referring to the parliamentary elections in the autumn of 2025. Is there a possibility this issue will be abused by populist political actors if less than a few months before the elections the status of transgender persons as well as the overall position of sexual minorities in society will be addressed? Hopefully this will not be the case and that the Czech political scene will show a higher degree of political culture in this regard as opposed to the latest Slovak parliamentary elections, where such abused indeed occurred.[54]

4.2.2 Model Case No 2: Minimal Changes

At the same time, it is appropriate to elaborate not only on the scenario described in the previous section, in which the Czech legislator would remain inactive, even in the long term, but also on the possibility of adopting only minimal changes, while it would remain questionable whether such a minimally changed legislation would withstand (next) constitutional scrutiny.

Upon a careful reading of the CCC's ruling, it becomes evident that one of the most significant shortcomings of the repealed legislation is the requirement for individuals to undergo specific surgical procedures, often resulting in castration, as a prerequisite for completing their legal gender reassignment. The legislation in question requires all persons seeking to change their legal status to undergo, automatically and without exception, "surgical transformation of the genital organs and disabling of the reproductive function and prevents consideration of the individual situation of specific individuals and their interests."[55] Thus, the regulation in question objectifies trans people, which is contrary to their human dignity.

The CCC's stance is commendable, but less so the fact that it did not further define the boundaries within which the Czech legislator should operate. What if, due to the political context described above, the legislator was to adopt only minimal modifications, such as retaining the obligation to sterilise, but no longer castrating, individuals who wish to undergo a legal gender reassignment? Alternatively, the legislation would not automatically require surgical genital transformation and

[53] We discuss this scenario below.
[54] And it has been going on for some time – demonstratively see for example: Kiššová (2023); Zdút (2023); Zábojníková (2024); or Tomečková (2024).
[55] Constitutional Court of the Czech Republic, Pl. ÚS 52/23 (24 April 2024), paras. 85-86.

disablement of reproductive function from every individual but would introduce certain exceptions (e.g. that no longer infertile persons would not have to undergo the procedures in question or those who might have health complications related to the procedure), but the sterilisation condition would still be present. What would happen in such a situation?

It is more likely that if the Czech legislator respects the authority of the CCC, it will drop the condition of compulsory sterilisation/castration. However, how is the Czech legislator expected to address other invasive (particularly medical) conditions often imposed during the legal gender reassignment process? These include selected surgical procedures required to approach or confirm one's preferred legal gender, the obligation to undergo placement in a medical facility for a certain period "for observation," the performance of medical tests (including Real Life Experience tests) to prove the irreversibility of one's sexual/gender identity, or mandatory hormone treatment for a specified period. To what extent is it constitutionally permissible, from the perspective of the CCC, to pathologise the process of legal gender reassignment, despite considerable criticism from numerous human rights organisations? It seems that the CCC has opened up more questions than it has answered with its reticence. One could therefore argue that the CCC has underestimated his role as a negative and positive legislator, as it could have better/clearer/more precisely delineated in his reasoning the "constitutional boundaries" within which the Czech legislature should subsequently operate.

4.3 Persistent Myths (even) in the Court's Decision

To conclude our analysis, we cannot fail to mention briefly the fact that even in the Court's reasoning we can find a number of persistent myths or stereotypes about the trans community that continue to appear in legal discourse, but which many experts have recently sought to dispel (Dušková, 2020, p. 962; Nitra, 2021, pp. 228-230). We shall mention only two "myths" that the CCC mentions together in its justification, presenting them as a "more appropriate way" of securing "status" sex reassignment (as opposed to the current Czech regulation).[56] These are the need for a person to prove that he or she is permanently "suffering from life in a bad body", with permanence also to be proved by a "time test".[57] That test is commonly referred to as the "real-life experience" (RLE) or "real-life test" (RLT; for more details see Levine, 2009).

Whatever the myth of 'born in the wrong body', or both RLE and RLT combine problematic pitfalls. The myth of being "born in the wrong body" is based on the persistent body/mind dichotomy that is the legacy of René Descartes and representatives of Cartesian thought. This perception supports the narrative that if one experiences gender non-conformity, one automatically desires to fully transition one's gender/legal sex to the opposite (Nitra, 2021, pp. 218-222). Dušková (2020, p. 962) correctly points out that we can metaphorically imagine this situation as a transgender person being forced to wear, as it were, a mask of the opposite sex until the time of transition, when they can finally shed this mask through the procedure of changing their legal gender.

However, the "born in the wrong body" narrative continues to support the current binary understanding of subjectivity, law and society, but we know that this binary does not reflect the diversity of the trans community and the existence of intersex/non-binary

[56] Constitutional Court of the Czech Republic, Pl. ÚS 52/23 (24 April 2024), para. 87.

[57] This is a time requirement placed on the process of legal gender reassignment and is a fairly common practice in a number of Council of Europe countries and can be applied at different stages of transition. In some cases, applicants must demonstrate that they have lived publicly in accordance with their new gender identity/legal sex for a period of time. See Meteňkanyč (2022b, pp. 108-109).

individuals.[58] Despite the dominance of such an understanding of the trans phenomenon (both in public and academic discourse), it is now recognised that the given narrative does not correspond to social or biological reality and is considered outdated (Dušková, 2020, p. 963). The goal of the trans person's transition is not to "fix" a "biological anomaly", but to be able to freely define and express one's identity.

At the same time, even today's practices in RLE or RLT exhibit several problematic moments that are not reflected by legislators, but also by judicial authorities, namely the tests in question are usually carried out without the applicant being issued with personal documents that reflect their preferred gender identity (Köhler and Ehrt, 2016, p. 25). Thus, there is a test of living in the preferred identity, but without legal "support".[59] In these temporal "trials" of trans persons, it is also worth mentioning the (often purposeful) time delays that are caused either by procedures (this is especially the case in court proceedings), but also by medical experts who, in the case of their general negative attitude towards the trans community, can prolong medical tests and procedures quite dramatically.

However, let us add that the above two myths are really only mentioned in passing by the CCC, as part of a broader argument. We believe it is crucial to highlight that if these myths are accepted uncritically, they will only perpetuate stereotypes about what a "proper" trans person is supposed to look like. Furthermore, they imply that individuals must demonstrate the seriousness of their gender identity through an RLE or RLT-type test, but without providing for the legal side of this "testing".

5. CONCLUSION(S)

Although we have been more critical of the CCC's decision itself in previous chapters, it is important to emphasise that we welcome the CCC's action and that this is indeed a landmark decision by a major judicial authority, the first of its kind in our Visegrad region, and a significant step in the recognition and protection of the rights of trans people in the Czech Republic.[60] We would not want to diminish the importance of such a step, since our "Visegrad" space has long been criticised for its attitude towards the protection of the human rights of sexual minorities. We have already mentioned a number of positive aspects of the decision in the present commentary (e.g., the adoption of a sensitive way of addressing the parties, the rejection of the objectification of trans and intersex persons, the rejection of the invasive medical procedures of sterilisation/castration in the case of transition, the respect for and following of the case law of the ECtHR, the CCC's way of

[58] The narrative in question thus excludes other possibilities of gender and sexual fluidity, and the question arises as to what direction to take in grasping corporeality if we are to abandon the mind-body dichotomy. Many point to poststructuralist approaches (e.g., as presented by M. Foucault), whereby it is declared that both mind and body are largely products of sociocultural construction and cannot be effectively separated. Being in and experiencing gender is the result of cultural, social and individual variables and actions that necessarily respond to each individual's experience and cannot always legitimately meet the parameters set by the ideal version of that gender. However, if societies were to move in this direction, there would have to be a fundamental rethinking of cultural and social practices. For more detailed analysis see Dietz (2018), Hartline (2016), Nitra (2021) and Meteňkanyč (2022b).

[59] This can be particularly burdensome for trans people who must already live in their desired gender, but without legal recognition (i.e. without proper documentation), and thus have to "prove" that they actually identify with that gender. See European Commission (2020, p. 115).

[60] Such decisions are rather exceptional. However, similarly in Slovak circumstances, see Supreme Administrative Court of the Slovak Republic, 1 Sžk 38/2021 (19 October 2022).

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communicating with the public,[61] etc.), but we particularly appreciate that the decision reflects the growing awareness of the courts to respond to legislative shortcomings and the realisation of the need to protect the fundamental rights and freedoms of all members of society from outdated and discriminatory legal frameworks.

In this regard, some scholars (e.g., Vikarská and Ouředníčková, 2024) have pointed out that the CCC's actions can also be seen through the lens of the concept of responsive judicial review. This concept emphasises the important role that courts play in the process of democratic constitutional deliberation, particularly because even relatively well-functioning legislative processes are subject to various forms of dysfunction (Kosař and Ouředníčková, 2023, pp. 446-447). It focuses on the importance of judicial review to be responsive to majority constitutional understandings as well as to minority rights claims (especially in cases that legislators have long neglected, as they tend to want to address primarily issues of concern to the majority in society or seek to avoid controversial issues for reasons of political preferences).

Abolishing the unconstitutional conditions that objectify trans people is viewed by many as a sexual minority claim that will not be given due consideration by the majority, as it does not score "political points". If anything, only negative ones. Therefore, the CCC's intervention in this matter, following the identification of fundamental legislative shortcomings, is also adequate and legitimate in our view in this regard. Indeed, since the Czech Parliament did not address the issues raised (despite having had several opportunities to do so[62]) it is commendable that the CCC did not remain passive and in line with the responsive role of judicial review reacted to an issue that the Czech legislature did not address, despite the fact that it is certainly a fundamental human rights issue. The CCC's responsiveness in N.G. case is an important change (see as well: Vikarská and Ouředníčková, 2024). And this is where we see a possible inspiration not only for the Slovak legal context, but for the Central European one in general, where it is not excluded that the highest judicial authorities will act reactively in protecting the fundamental human rights of the majority and minorities, including sexual ones.

Therefore, we believe that the CCC decision described above could potentially be a major turning point in the approach of Central European judicial authorities to LGBTIQ+ rights, although it remains to be seen what the reaction of other judicial authorities will be, at least in our own, Slovak context. It will also be interesting to see whether the CCC will act similarly in situations involving less serious and irreversible harm (after all, the scientific and human rights consensus on the necessary condition of compulsory sterilisation/castration is widely accepted and not too controversial today).

At the same time, however, we aimed to avoid an uncritical celebration of the said decision and pointed towards several shortcomings. These include (from both internal and external legal perspectives) the reticence on the part of the Court in relation to the use of the notion of gender/gender identity (or to be more explicit about the relationship between the above-mentioned notions), the failure to discuss some problematic aspects of the ECtHR's decision-making practice (the question of the right to gender self-determination, the acceptance of a pathologising approach, the absence of an assessment of a possible violation of prohibition of discrimination), the CCC's excessive

[61] The CCC has also established a Q&A to the decision which is certainly a positive step and a source of inspiration for other courts. See CCC (2024). Otázky a odpovědi ohledně nálezu Ústavního soudu ve věci podmínek pro změnu pohlaví: (nález sp. zn. Pl. ÚS 52/23 ze dne 24. 4. 2024). Available at: https://www.usoud.cz/fileadmin/user_upload/Tiskova_mluvci/Publikovane_nalezy/2024/Q_and_A_52-23__002_.pdf (accessed on 22.10.2024).

[62] As the CCC itself pointed out. See Constitutional Court of the Czech Republic, Pl. ÚS 52/23 (24 April 2024), paras. 105-108.

reluctance in the role of a negative legislator, and, last but not least, upholding some of the myths regarding transgenderism (RLT and the narrative about being „born in the wrong body") and giving them an appearance of legitimacy. This may have been an unintentional move by the CCC, nevertheless it shall be pointed out that such „myths" are indeed not helpful in any way and lack any scientific basis.

Thus, on balance, despite these shortcomings, the CCC has made several positive steps towards improving the recognition and provision of protections for the rights of trans people in this matter. However, it has also taken some problematic turns. As the Czech legal landscape continues to evolve, we shall see how the decision reviewed above will affect the lived realities of trans people, as well as whether other judicial authorities in the Central European area will be inspired by the CCC's decision.

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REVIEWS

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DEVIATNIKOVAITĖ, IEVA (ED.): COMPARATIVE ADMINISTRATIVE LAW. PERSPECTIVES FROM CENTRAL AND EASTERN EUROPE. ROUTLEDGE, 2024 / Jakub Handrlica

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Comparative Administrative Law was published in early 2024 by the British publishing house Routledge. As the title of the book correctly reveals, it aims to provide a comparative outline of administrative law as existing in seven jurisdictions of Central and Eastern Europe. At the same time, the book aims to fill the gap existing in English-written literature on administrative law in Central and Eastern Europe (at p. xviii). The respective chapters, analysing administrative law in selected states of this region, have been authored mainly by academicians teaching and researching public law in each of the respective jurisdictions. The book was edited by Ieva Deviatnikovaitė, who is a Full Professor of Administrative Law at the Mykolas Romeris University in Vilnius. She also authored both the introductory part (pp. xvii-xix) and the final part (pp. 225-239), entitled comparative remarks.

The subtitle of the book is *Perspectives from Central and Eastern Europe.* The book outlines the legal frameworks of the Czech Republic, Hungary, Latvia, Lithuania, Poland, the Slovak Republic, and Ukraine. The reasons for selecting these seven particular jurisdictions are only very briefly outlined in the Introduction. The fact is that while six of the reviewed jurisdictions have been part of the European Union for twenty years, Ukraine hasn't acceded to the Union yet. This represents a particular challenge for any comparison among the chosen legal orders. At the same time, one may also ask why some other jurisdictions have been omitted – this question particularly concerns Slovenia and Croatia.

From a systematic perspective, a comparison among seven jurisdictions requires analysing the same features in each of them. Each of the chapters, outlining the system of administrative law in the seven states, aims to analyse the same issues arising

in the respective jurisdiction: the concept of administrative law, the organisation of public administration, the actions of public administration (administrative acts), the system of judicial review, and the issue of liability of the public administration. Although the publication language is English, which represents a *lingua franca* of today's science, the authors also add translation of key legal instruments into their own language. This will certainly enable much easier understanding of the text, as the terms in English are not always able to delimit the respective instruments of the domestic legislation in a clear way. At the same time, each chapter contains a brief overview of the existing literature on administrative law from the respective jurisdiction.

In this respect, it also must be noted that the authors of respective chapters also used certain scope of discretion when writing their pieces. For example, while the chapters on administrative law in the Czech Republic, Hungary, Latvia, Lithuania and in the Slovak Republic contain only a very brief part on the EU dimension of administrative law, the chapter on administrative law in Poland addresses this issue in considerably bigger detail (at pp. 160-163). Several other discrepancies in the concepts of respective chapters can also be mentioned. For example, while the chapters on administrative law in Latvia (at pp. 84-85), in the Slovak Republic (at pp. 186-187) and in Ukraine (at pp. 210-211) also contain a part on procedural aspects of judicial review, and the other do not provide for a special outline of this issue. At the same time, the terminology used by the respective chapter also varies. For example, while the chapter on the Czech Republic and on Hungary refers to "administrative liability" (at pp. 30-31 and 62-63), the chapters on Latvia and Lithuania refer to the "liability in administrative law" (see pp. 89-90 and pp. 125-127). The fact is that the authors of the respective chapters haven't explained these terminological differences. These discrepancies among the respective chapters are understandable, given the rather wide variety of contributing authors. At the same time, these differences in approach represent certain weakness in the structure of the whole book.

The book is concluded by a chapter (pp. 225-239), written by the editor (together with Simona Bareikytė). This chapter outlines specific comparative observations concerning the key issues, as addressed by respective chapters on national jurisdictions, in particular, to the problem of public service, judicial review, and administrative liability.

Having outlined the content of the newly published book briefly, I would like to add several more theoretical comments to the overall concept of the reviewed book:

Firstly, the reviewed book is, in principle, based on a *historical approach*. The concept of the existing administrative law in respective jurisdictions is almost exclusively explained on the basis of the literature of the past. This very historical approach is relieved already in the introduction to the book, which argues (at p. xviii) that the term "administrative law" was used for the first time by the Polish lawyer A. Okolski in his book *Interpretation of Administrative Law in the Kingdom of Poland* (1880). Irrespective of whether this argument is correct or not, the concept of administrative law is explained in terms of ideas that were developed in the past rather than in terms of analysing recent problems. Thus, while the reader of the respective chapters gains a relatively comprehensive overview of the literature of the interwar period, only minimal information on the ongoing discussions in the recent literature is presented. This approach quite naturally opens the question to which extent the challenges and realities of the recent administrative law can be shaped by those who authored their works several decades ago.

Secondly, the rigid historical perspective of the book implies that more attention should be paid to those features in administrative law which lie beyond the very traditional schemes. Consequently, challenges for administrative law arising from the COVID-19

pandemic, digitalisation, and deployment of artificial intelligence have been almost totally neglected in the respective chapters. Although the book aimed to fulfil the absence of English-written literature on administrative law in Central and Eastern Europe, it outlines in principle how this field of law was perceived in the past. Consequently, the book outlines administrative law as a *static* discipline rather than analysing the *dynamic* nature of this branch of law. Having said this, I don't want to argue against paying respect to history. The contemporary scholarship in administrative law in Western Europe (see e.g. Della Cananea, 2023) also pays attention to historical roots. However, at the same time, the same amount of attention is being paid to the present and to the future. The fact is that this perspective is absent in the reviewed book.

My third comment concerns the approach to EU law. The general concept of the reviewed book is based on the idea that various systems of "domestic administrative law" are present in the respective jurisdiction. These systems are being "significantly influenced" by EU law (see for example p. 238). With respect to those jurisdictions which became part of the European Union two decades ago, one has to seriously ask whether this approach to administrative law is still appropriate. The fact is, that this concept totally neglects the existence of a robust framework, which has been described as the Union of Composite Administration (*Verwaltungsverbund*) by the scholars of administrative law in Western Europe for several decades (see, e.g., Kohtamäki, 2021; Jansen and Schöndorf-Haubold, 2011; Hofmann, 2009). Consequently, while the respective chapters address the question of the organisation of domestic administration, no attention has been paid to the mere existence of the European Commission and the agencies of the EU and to the mutual interactions with the administration in the member states of the EU. Also, while the authors of the respective chapters pay considerable attention to the feature of administrative act, they do not address the qualification of administrative measures, as realised by the EU administration. Neither the phenomenon of mutual recognition of administrative acts is addressed in the book (see De Lucia, 2016).

Although the reviewed book fails to address these questions, it also represents a good opportunity to open the discussion on the concept of administrative law in Central and Eastern Europe. This is the main contribution of the reviewed book to our scholarship.

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SVÁK JÁN, MAREČEK LUKÁŠ ET AL.: MEDZINÁRODNÉ PRÁVO VEREJNÉ A ÚVOD DO VEREJNÉHO MEDZINÁRODNÉHO PRÁVA [PUBLIC INTERNATIONAL LAW AND INTRODUCTION TO PUBLIC INTERNATIONAL LAW]. WOLTERS KLUWER, 2024 / Petra Paľuchová

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International law represents a distinct legal discipline, markedly different from domestic branches of law or legal orders, particularly in terms of its functioning, enforceability, diversity of sources, and the subjects that constitute it.[1] This distinction naturally also manifests in the teaching of this field as a standalone subject at law faculties. Unlike domestic law, which is typically rigid and hierarchically structured, international law operates on the principles of mutual agreement and cooperation among states and other entities. This dynamic nature must also be reflected in the approach of professors wherein they must ensure that students not only acquire theoretical knowledge but also gain a broad understanding of its practical application and learn to use their theoretical insights in context. Such a task can sometimes seem quite challenging, given that many students are often motivated to pursue more traditional legal career paths, such as becoming advocates or prosecutors.

In a rapidly changing world, international law often seems to recede into the background, overshadowed by domestic legal disciplines. Students tend to prioritise

[1] International law as a discipline is distinguished by several characteristic features that set it apart from traditional positivist domestic legal branches, with various authors classifying these features differently in terms of scope and number. Among the most prominent are those outlined above, including, but not limited to subjects, sources, court jurisdiction, and the enforceability of law (Mareček and Golovko, 2022, pp. 10-13).

information that appears to have direct practical applicability, leading to a diminished focus on international law in favour of national legal frameworks. Given the overwhelming influx of information they encounter daily, it is perhaps natural for students to favour subjects they perceive as immediately relevant to practice, a relevance they do not always associate with international law. As a legal framework governing inter-state relations and international obligations, it may appear distant from the routine legal challenges they anticipate encountering in their professional careers. The understanding of peremptory norms, enforcement mechanisms, or the resolution of disputes between states may seem less pertinent, as their practice is unlikely to involve the regular handling of inter-state conflicts.[2]

The perspective on the current state of international law is exemplified by the broad publication under review. The distinctiveness of this textbook is evident from the very beginning, which does not include merely a preface, acknowledgments, or an introduction preceding the main content. Instead, it begins with an "introduction to the introduction," explaining the intent to offer an unconventional approach to educating young legal professionals in international law. The aim is to present this expansive and omnipresent discipline as a clear and practical benefit, extending beyond the confines of academic study and serving as a unifying thread among various branches of law, civil, labour law, criminal law, commercial law and number of others, by emphasising the centrality of the individual as the ultimate recipient of all international legal norms. This focus on the individual, including legal professionals themselves, whether graduates or students for whom this publication is primarily intended as a resource for the courses International Public Law I and International Public Law II, underscores the need for a broader outlook. A lawyer, even after completing seminars on international law, should comprehend the extensive and pervasive reach of this discipline. They must, crucially, be equipped to address diverse and complex legal issues, many of which intersect with international law, at least through domestic legal norms that invariably reflect international legal principles to some extent[3] and, even more concretely, in the respect for fundamental human rights.

The domain of fundamental human rights, as highlighted in the introductory passages of the textbook, serves as a mirror reflecting the contemporary nature of international law. Human rights today represent a cornerstone of modern international law, significantly contributing to its so-called humanisation — a transformation from a traditionally state-centric system into a legal order centred on the protection of the individuals and their dignity.[4]

The textbook emphasises the ongoing evolution of the international legal system toward a more individualised and humanised character. In its introduction, it highlights

[2] On the concept of declining interest in the field of international law, see also Svák (2023, pp. 112 -113).

[3] The seven principles, which are an authoritative enumeration of the fundamental principles of international law, and which are based on the UN General Assembly Declaration (A/RES/2625(XXV), *Declaration of Principles of International Law Concerning the Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (1970)*) are reflected in national legal systems in various ways. For instance, the principle of the equality of sovereign states is enshrined in constitutional provisions affirming national independence. The prohibition of the use of force is evident in criminal legislation, while the right to self-determination is manifested in constitutional protections for minority rights. Similarly, respect for international obligations is incorporated through the primacy of international treaties over domestic norms and their alignment with general international law. Furthermore, the principle of mandatory cooperation is reflected in national legislation addressing global challenges, such as climate change and transnational crime.

[4] This progression is extensively examined in various publications that portray international law in the context of its gradual "humanisation," underscoring its shift towards prioritising the individual and universal human dignity across diverse legal fields (see, e. g., Meron, 2006).

that the historical foundations of this concept were established in the aftermath of the Holocaust and World War II, marking a pivotal shift in international law's focus toward the protection of the individual. This shift was notably advanced through the codification of human rights, particularly with the adoption of the Universal Declaration of Human Rights in 1948.[5]

The textbook reflects this trend by illustrating the importance of understanding the individual's position within the framework of the norms of international law, a domain inherently characterised as a branch of public law. The unifying thread throughout all sections of the textbook is the individual, both as a subject of international law and as an active member of the broader public. In the latter role, particularly as a legal professional, the individual contributes to shaping international law itself.[6]

This approach is evident, among other things, in the very title of the book translated as *International Public Law and an Introduction to Public International Law*. The second part of the title, beginning with "*an Introduction to Public International Law*", carries a deliberate significance. The author, Ján Svák, emphasises that it does not imply an oversimplification of the subject matter (as the term "introduction" might suggest), nor is it a mere play on words or a rejection of the traditional division between public and private international law. Instead, the title reflects that the textbook offers a novel, modern, and genuinely groundbreaking perspective on the field of public international law within the given context. Rather than reiterating conventional topics, the book examines how international law evolves in response to contemporary global challenges, such as political conflicts, climate change, technological innovation, and global inequality. It highlights that the public, beyond states as the traditional primary subjects of this field, plays a crucial role in the creation, interpretation, and application of international legal norms. This influence extends not only to everyday life but also to addressing the global challenges.[7] By including the word "public" first, it indicates that it has the ambition to "move" the understanding of the field of international law as public law closer to the public, and thus to make international law as a public field truly accessible to the public as such, and thus to the people - individuals.

The structure of the textbook is built upon this foundation. It can be conceptually divided into two comprehensive sections, which, in the traditional approach to legal textbooks, could be referred to as the *general* and *special* parts.

The first section comprises four chapters dedicated to the classic themes of international law.

The first part aligns thematically with its title, logically marking the beginning of the textbook's core content. It gradually outlines the entire field of international law, both as a body of norms regulating inter-state relations throughout human history and through

[5] The strong emphasis on the status of the individual *vis-à-vis* the state in international law is also addressed in the publication of Anne Peters, Director at the Max Planck Institute for Comparative Public Law and International Law (*in concreto* Peters, 2009, p. 514).

[6] Individuals are key actors in the international legal system, whether as lawyers, scholars, politicians, or heads of state. Every act attributed to the state - waging war, signing a treaty, or harming the environment - is in fact the result of decisions and actions of individuals within the structures of authority - the state. (Further see: Peters and Sparks, 2024, p. 2.)

[7] Given that the textbook emphasises the concept of *constitutionalisation*, particularly *internationalist constitutionalisation*, multiple times in its introductory text, it is worth highlighting its close association with the idea of building a global legal order founded on the principles of the rule of law, human rights protection, the separation of powers, and democratic values. If the intent was for this concept to reflect the overarching focus of the textbook as a work on public international law, then it has been successfully achieved. The textbook departs from the traditional formalist understanding of international law and instead explores how these principles are integrated various domains within the international legal system.

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the doctrines that have evolved over time, significantly shaping the scope of international law to this day. Naturally, this section includes a chapter addressing the relationship between international law and domestic law as a whole, as well as its interaction with other branches of law. It also examines its connection to supranational legal systems, with particular emphasis on the European legal framework. In this regard, the role of European Union law and the law of the Council of Europe, as the most significant regional systems within the Slovak context, is thoroughly explored.

The second part of the textbook focuses on the sources of international law. It delves into the creation of normative sources related to the codification of international law and its progressive development. Notably, the textbook adopts a practical perspective on the progressive development of international law, addressing current global issues rather than limiting itself to theoretical distinctions between the progressive development and codification of international law. This section also examines treaty law, emphasising the fundamental principles of treaty-making and providing a practical view of the Vienna Convention on the Law of Treaties. Furthermore, it explores precedential international law and the role of legal professionals in resolving inter-state disputes and applying the law within supranational legal bodies dedicated to the protection of rights. By demonstrating that international law is not an abstract theory but a practical system that shapes relationships between states and individuals, even at the supranational level, the textbook once again underscores the critical role of individuals in shaping and applying international law.

The third part of the textbook addresses the issue of international legal personality, offering a broader perspective on its contemporary understanding within international law. It provides an analysis of the status of states as the traditional subjects of international law, while also dedicating significant attention to international organisations and other entities that increasingly contribute to the creation and application of international norms. An essential component of this chapter is the examination of the role of domestic authorities and institutions in implementing international law, thereby highlighting the practical application of inter-state relations through foreign affairs bodies. The chapter also reflects two dominant approaches to understanding international law: as a system of rules fostering coexistence and cooperation among states, and as a mechanism to ensure that states fulfil their obligations toward the individuals who constitute them, particularly in the ever-relevant domain of protecting fundamental human rights.

Following this is the fourth part of the textbook, which focuses on the concept of responsibility in international law — a framework that operates within a consensual environment requiring states' agreement to fulfil international obligations, guided by specific rules. It examines the international responsibility of states as well as non-state actors and international organisations. Particular attention is given to the sanctions mechanism, which remains a challenging area of international law due to the frequent lack of effective enforcement tools and limited coercive measures. The chapter also addresses issues of international security, especially in the context of state responsibility for violations of obligations that threaten peaceful coexistence on a global scale. In line with the textbook's overarching focus, significant emphasis is placed on so-called *targeted sanctions*. A distinct section is devoted to analysing methods of dispute resolution in international law, whether non-binding or institutionalised within bodies such as the International Court of Justice or the Permanent Court of Arbitration. Additionally, the chapter explores relatively specialised topics, often omitted in standard international law textbooks, such as investment arbitration. This inclusion, while aligned with the

textbook's focus on the individual, represents a welcome expansion of the conventional scope of dispute resolution topics, enriching the overall substance of the material.

Again, the question of subjectivity is revisited in the imagined *special part* – the second section of the textbook, in the fifth part, this time from a different perspective, focusing on the individual. It examines the historical development of the individual's status in international law as well as the current legal framework. This section analyses the rights and obligations that international law directly confers upon individuals, with particular emphasis on their practical application.

This section, quite aptly, does not serve as an exhaustive overview of the entire field of human rights protection, a decision that can be regarded as a positive feature. While human rights undoubtedly play a pivotal role in international law, textbooks on the subject should remain consistent with the established curriculum of the discipline to ensure that students are not deprived of the foundational knowledge of traditional international law. A dedicated part addressing human rights, which integrates various subfields such as citizenship, diplomatic protection, refugee law, humanitarian law, and international criminal responsibility is particularly commendable. This approach is especially valuable from a practical perspective, as it embodies the textbook's primary objective: to illuminate the position of each individual within the intricate framework of international norms.

The sixth part of the textbook focuses on issues related to international spaces, including outer space, airspace, and the seas. Considerable attention is devoted to environmental protection, an especially noteworthy emphasis given the current prominence of environmental concerns as one of the most pressing challenges of our time. This topic is addressed not only as a subject of international legal regulation but also through the lens of a relatively new concept, the integration of environmental protection within the framework of human rights. The concluding pages of this final section are perhaps the most unexpected, as they turn to the digital space. This emerging domain presents significant challenges and opportunities, offering key insights and stimuli for the future development of international law.

The book effectively combines theoretical concepts with practical application, incorporating practical examples at the end of nearly every chapter. Perhaps an even greater strength lies in its deliberate effort to make this field more accessible to students by highlighting Slovakia's historical experience within the context of international law. This approach thoughtfully considers its primary audience, students of the Faculty of Law at Comenius University Bratislava, for whom the textbook is recommended as essential reading for their studies.

Notably, the textbook stands out for its clear language, logically structured sentences, and well-chosen terminology, all of which significantly enhance its comprehensibility and readability.

Overall, the textbook successfully fulfils the objective set out in its introductory text: to help legal professionals not only understand the fundamental rules of international law but also recognise that it is no longer a rigid system of rules applied solely between states. Instead, it increasingly accounts for individuals, organisations, and the broader public as active participants, linking this evolution with the growing significance of human rights.

Through its comprehensive treatment, structured presentation, and integration of theoretical foundations with practical examples, the textbook can be ranked among the most outstanding works in the field of educational legal literature. Its content engages readers with international law in a manner that is captivating, modern, and simultaneously accessible. Naturally, given the nature of its target audience, or at least a segment of it,

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namely, students in the process of developing their legal reasoning, certain expansions or additions could be considered. Such enhancements might further contribute to a more holistic and profound understanding of the foundational topics within this discipline.

Many students approach the study of international law with minimal theoretical knowledge in this field, often focusing predominantly on domestic legal disciplines. While the textbook excels at presenting the practical aspects and contemporary challenges of international law, its exceptionally modern and accessible style occasionally assumes a level of theoretical foundation that students may not yet possess. This approach could lead to some topics being perceived in isolation, without a broader contextual understanding or a full grasp of the more complex issues in international law. The inclusion of additional, detailed theoretical explanations could help students build a stronger foundational knowledge, enabling them to engage in genuinely critical rather than merely rote thinking about international law.

Given its quality and engaging nature, it is both likely and, in the author's view, desirable that this textbook achieves success and becomes an integral part of legal education.

In potential future editions, the textbook could benefit from expanding its content to include more theoretical foundations, to further address the needs of students who are still in the process of developing their legal reasoning in the field of international law. Additionally, it could incorporate new and pressing topics, as well as case studies that reflect the dynamic nature of this ever-evolving discipline. International law, which continuously adapts to global challenges such as cybersecurity, the climate crisis, and artificial intelligence, offers rich opportunities for even greater integration of theory and practice. Given the high quality and modern approach of this publication, it is evident that the authors are well-equipped to maintain this standard in future editions, ensuring the text remains both relevant and practically applicable. In doing so, the textbook could further enhance the perception of international law as an engaging and attractive field. By continuing along the established trajectory, the textbook will not only meet but likely exceed its already ambitious vision.

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The issue of the challenges arising from the development of information technologies in the context of EU law has been a relatively extensively researched and discussed area, particularly over the past decade. This is due in part to the rapid development and integration of modern technologies into practice, which has created a vast field of research across a diverse range of legal sectors into which EU law extends.

The collective monograph compiled by professor Šišková, entitled "Legal Issues of Digitalisation, Robotisation and Cyber Security in the Light of EU Law", provides an ideal introduction for readers to current trends and challenges reflecting the development of modern technologies and their impact on both EU citizens and companies operating in the EU through EU Law.

From a systematic perspective, the publication is divided into four parts, which guide the reader through the subject matter in a step-by-step manner. The initial section of the publication is comprised of four chapters, each addressing the implications of digitalisation and robotisation on human rights from a distinct perspective. The second part of the publication addresses the topic of consumer protection in the context of the digital economy. The third part focuses on competition law in the digital age. The fourth and final part of the publication covers the crucial issues of cyber security, cyber crime and the effective legal tools that can be employed to combat these threats and ensure compliance with relevant legal norms.

The initial chapter, authored by Soňa Matochová, provides a comprehensive overview of the evolution of personal data protection in the context of technological advancement, elucidating the intricate balancing act between the utilisation of personal

data and the safeguarding of its confidentiality. In the concluding section, the author assesses the present framework of data protection, emphasising its beneficial impact on the safeguarding of personal data. Conversely, however, she observes that the implementation of these regulations remains a challenge, particularly due to the existence of disparate procedural rules at the national level, and advocates for the harmonisation of these standards (Matochová, 2024).

In the second chapter, Naděžda Šišková presents a discussion of the right to be forgotten from the perspective of the general concept of fundamental rights. Her findings indicate that the 'right to be forgotten' is not currently an effective instrument. This is primarily attributable to the concealment of personal data exclusively within the EU through geo-blocking, the restriction of the territorial scope to the EU alone, the intrinsic nature of the Internet, which precludes the absolute deletion of data, and the Streisand effect. In light of these considerations, the author proposes the establishment of a global digital registry of individual claims as a potential solution (Šišková, 2024).

In the following third chapter, Martin Mach picks up the same theme of the right to be forgotten, but this time from the perspective of the so-called "watchdogs search engines", which are subject to the same obligations as internet search engines. The issue here, however, focuses on the fact that the source of these search engines is data originating from public administrations. Therefore, these search engines cannot arbitrarily decide on the availability of this data. The author sees a solution to this through internal control mechanisms (Mach, 2024).

In the last chapter of the initial section of the publication, the trio of authors Luisine Vardanyan, Hovsep Kocharyan and Ondrej Hamuľák address the question of the right to the Internet. Throughout the chapter, they inquire as to whether this is a new fundamental right or, conversely, whether the Internet is a new platform for fundamental rights. (Vardanyan, Kocharyan and Hamuľák, 2024, pp. 76-79). Their findings suggest that we cannot speak of a platform in this case, but neither can we speak of a separate human right. According to their conclusions, it can be considered as an integral part of the right to digital integrity. Securing the right of access to the Internet can also be seen as a means by which it will not be necessary to adopt a new legal framework guaranteeing fundamental rights for the Internet. In conclusion, however, they perceive some practical and technical problems (Vardanyan, Kocharyan and Hamuľák, 2024).

The following part of the publication is devoted to consumer protection issues. Although it is the shortest part of the publication, it offers in its two chapters a comprehensive selection of contemporary issues, challenges but also opportunities and suggestions on how to improve consumer protection in the light of modern technologies. In the fifth chapter, Blanka Vítová addresses the issue of consumer protection in the light of the digital era. In her chapter, she will gradually present us with the challenges but also the opportunities that consumer protection faces today, among which are, for example, the lack of transparency (Vítová, 2024).

In chapter six, the authors Zsolt Hajnal and Rita Simon discuss the main challenges in the implementation of the Digital Content Directive in the Czech Republic and Hungary. Their findings show that the specificities related to both countries have not been fully eliminated and practical problems can be expected in the future when it comes to the consumers data performance as reward for digital services and in the case of collision with data protection principles (Hajnal and Simon 2024).

The third part of the publication deals with the intersection of competition law in the digital economy, opening with a chapter by Michal Petr in which he discusses the parallel application of competition law, the DMA and sectoral regulation. He points out their different characteristics as well as the instruments through which they achieve their

objectives. The chapter also raises the issue of compliance with the ne bis in idem principle in the case of parallel investigations of undertakings by competition authorities and national regulators (Petr, 2024).

In chapter eight, Ondrej Blažo presents a detailed analysis of the issue of private enforcement of the DMA, including its extent, limitations and challenges. Within the chapter, the author identifies provisions where private law enforcement is allowed by the regulation, but where no procedural regulation for its enforcement is provided (Blažo, 2024, pp. 147–156). Furthermore, the chapter presents a comparative analysis of the competition rules and the proceedings for damages. In light of these considerations, the author concludes in the chapter that, with respect to private law enforcement, the objective of the DMA has not been met, although there is potential for conflict between the laws of the Member States (Blažo, 2024).

In chapter nine, Marika T. Patakyová addresses the topic of pricing algorithms. In the course of the article, the author examines the issue from two distinct perspectives: firstly, through the lens of the substantive regulation contained in Article 101 TFEU; and secondly, from a procedural point of view. To ascertain how the competition authority might assess the situation at the substantive level, the author proceeded to conduct a theoretical experiment utilising a model situation. (Patakyová, 2024, pp. 168–173) The findings demonstrated that some of the traditionally employed evidence is not applicable in this case. Additionally, based on the findings of the experiment, the author presents, in the penultimate subsection, her three de lege ferenda proposals (Patakyová, 2024, pp. 174–179) to enhance the enforcement of concerted practices by the competition authorities (Patakyová, 2024).

In the final chapter of the third part of the publication, Kseniia Smyrnova discusses the changes that e-commerce brings to competition and illustrates these findings with selected cases. Throughout the chapter, she takes us step by step through examples of anti-competitive behaviour that can be found in e-commerce, such as geo-blocking, most-favoured-nation clauses, discriminatory practices in internet search, and vertical restraints in e-commerce. The author also discusses the current legal framework and the chapter examines the recent case law of the Court of Justice, illustrating these practices with selected cases (Smyrnova, 2024).

This is followed by the fourth and final part of the publication - chapters eleven to eighteen, which take us through the issues of cybersecurity, cybercrime, civil liability and the instruments for effective resilience. In the opening eleventh chapter, the author duo Agnes Kasper and Anett Mádi-Nátor provide an introduction to the EU legal framework in relation to digital vulnerability. The chapter presents a comprehensive overview of the theoretical background of digital vulnerability, along with an examination of the current and proposed legislation within the EU context. Additionally, it addresses cross-cutting links to prominent examples of vulnerability, such as Spectre and Meltdown. (Kasper and Mádí-Nátor, 2024).

In Chapter twelve, the authors Pablo Martínez-Ramil and Tanel Kerikmäe raise the question of algorithmic responsibility in the context of artificial intelligence. As EU Law is evolving in parallel, it is not straightforward to determine the answer. Despite the best efforts of those involved in the creation of AI, it is possible that a situation may arise in which wrongful conduct occurs. Nevertheless, if the prevailing standards are applied, it remains unclear who should be held accountable for the algorithm in this instance. The answer to this question is more challenging to ascertain due to the lack of a definitive method for enforcing criminal liability. In light of the aforementioned considerations, it can be posited that the answer may lie in the realm of non-contractual civil liability. However, it is imperative to note that three conditions must be met for this to be the case.

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An alternative avenue for consideration could be the Product Liability Directive. In such a scenario, the outcome would also be contingent upon the competent authority, given the necessity for an individual assessment of the degree of faultiness of the AI system, as outlined in Article 6 of the Directive (Martínez-Ramil and Kerikmäe, 2024).

In the thirteenth chapter, Jozef Andraško addresses the issue of cyber security of automated and fully automated vehicles in the context of the current legislative framework. The necessity for effective legislation is demonstrated by the author in the introductory section of the chapter with several security incidents that have taken place in the recent past. The core of the chapter consists mainly of an analysis of the existing legislation adopted at international and EU level. (Andraško, 2024, pp. 252–262) The legislation is evaluated and its practical impact is highlighted, while also comparing the adopted acts and differences between them (Andraško, 2024).

In chapter fourteen, the author, Peter-Christian Müller-Graff, addresses the issue of the EU's strategic sovereignty in relation to the modern threats currently facing the Union. Within the chapter, the author seeks to answer whether strategic sovereignty is one of the EU's objectives directly deriving from primary law. Furthermore, the chapter seeks to ascertain the options available to the EU in terms of securing this sovereignty, given the powers currently defined by primary law in this regard. The author's findings lead to the formulation of four key conclusions in relation to defence policy, energy security, strategic sovereignty and unification around EU values (Müller-Graff, 2024).

In the following fifteenth chapter, Ondřej Filipec analyses the nature of EU-NATO cooperation in the field of cyber security and cyber defence. The author defines this cooperation in the context of both EU and NATO policies. Within the last subchapter, author focuses on the cooperation between the two organisations, on the basis of documents through which cooperation occurs in specific areas and within specific bodies. Nevertheless, in addition to theese areas, the author also identifies the differences and limitations of the policies of the two organisations (Filipec, 2024).

In the sixteenth chapter, Volodymyr Denysov and Liudmyla Falalieieva examine the present challenges and future prospects for the evolution of EU cybersecurity legislation. The authors start by introducing the basic theoretical background, gradually moving into the specific legal and institutional framework in relation to both the private and public sectors. The authors identify the issues and challenges that arise from the current EU legislation in both areas under study. In this way, the authors also put forward a concrete proposal for the creation of a unified EU cybersecurity system, taking into account the current challenges (Denysov and Falalieieva, 2024).

Within the seventeenth chapter, the author Yuliia Vashchenko focuses on the cybersecurity of the energy sector in the EU and Ukraine. The author defines the cybersecurity of the energy sector and the relevant authorities in the conditions of the EU, the Member States and Ukraine. (Vashchenko, 2024, pp. 318–332) In light of her findings, author formulates a comprehensive conclusion, underscoring a multitude of necessities. (Vashchenko, 2024, pp. 332–334) These include the establishment of effective control mechanisms, the fostering of collaboration between public administration entities, the cultivation of inter-sectoral cooperation between the private and public spheres, and numerous other factors pertaining to the cybersecurity of critical infrastructure (Vashchenko, 2024).

Within the last, eighteenth chapter of the publication, the author Bohdan Strilets discusses cybersecurity rules for cryptoasset markets. As the popularity of cryptoassets continues to grow, the necessity for robust cybersecurity measures also increases. The author therefore analyses the current legislation in force in the EU context in this respect. Furthermore, he conducts an analysis of the underlying theoretical background and the

protection of consumer and investor rights. In conclusion, the author presents a proposal for improvement, which includes, for example, strengthening the powers of ENISA (Strilets, 2024).

The publication concludes with a comprehensive fifteen-page-long conclusion. This represents the collective effort of the authors to synthesise the findings of the individual chapters into a unified conclusion that conveys a coherent message.

The reviewed publication is a very enriching reading, which is not just a simple introduction to the issue of legal regulation of information technologies by EU Law, but represents a comprehensive output of several years of research mapping several selected areas. Despite the apparent interconnectedness of these areas at first glance, are linked precisely by the intersection of EU Law and modern technologies. Although the publication is not exactly timed to coincide with the 10th anniversary of the launch of the Digital Single Market strategy in May 2025, it offers valuable insights and ideas. This encompasses not only an overview of the achievements made thus far, but especially in relation to what we can expect in the future, even after the impact of practical experience, but especially where EU legislation might be evolving in the future.

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REPORTS

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BRATISLAVA LEGAL FORUM 2024: THE IMPACT OF THE EUROPEAN LAW ON THE NATIONAL LAW (BRATISLAVA, 17 – 19 SEPTEMBER 2024) / Laura Fotopulosová

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The international scientific conference Bratislava Legal Forum 2024 took place from 17 to 19 September 2024, traditionally held at the Faculty of Law of Comenius University Bratislava. The 10th anniversary edition was opened on Tuesday, 17 September 2024, with the plenary session of the conference with the central theme: *"The Impact of the European Law on the National Law"*. Eminent guests such as Ministers of Justice from the V4 countries, Presidents of the Supreme Courts from the V4 countries and Presidents of the Bar Associations from the V4 countries were invited to the plenary session. The event was organised thanks to the support of the International Visegrad Fund (IVF) and the Central European Foundation (CEF).

The conference was opened by the Rector of Comenius University Bratislava, prof. JUDr. Marek Števček, DrSc., who delivered a solemn speech and thus officially opened the plenary session. In his speech, he drew attention to the fact that, in addition to climate change, we are also experiencing a change in the social climate. As the Ministry of Foreign and European Affairs of the Slovak Republic was an important partner of the event, the Minister Juraj Blanár, also delivered opening remarks during the plenary session. In conclusion, Minister Blanár expressed his wish that the Bratislava Legal Forum would become a European-wide legal conference.

The opening ministerial panel of the conference with the central theme *"20 Years of EU Membership: The Impact of the EU on the Justice Area"*, whose main partner was the Ministry of Justice of the Slovak Republic, was moderated by the Dean of the Faculty of Law of the Comenius University Bratislava, prof. JUDr. Eduard Burda, PhD. The guests of the first panel discussion were JUDr. Boris Susko, PhD. (Minister of Justice of the Slovak Republic), Dr. Bence Tuzson (Minister of Justice of Hungary), JUDr. Vilém

Anzenbacher, Ph.D. et Ph.D. (Deputy Minister of Justice of the Czech Republic) and Zuzanna Rudzińska-Bluszcz (State Secretary of the Ministry of Justice of the Republic of Poland). During this panel discussion, the participants discussed the impact of EU law on national legal orders, the question of interpretation of EU law or judicial law-making. The Minister of Justice of the Slovak Republic stated that in some cases there is a conflict between the case law of the CJEU and the case law of the constitutional courts of the Member States. He also stated that the biggest future challenges will be both the gradual digitalisation and the progress in the sphere of technology, which legal regulation has not yet kept pace with. In their speeches, all present assessed the functioning of the EU legal system in their respective countries and commented on both the positives and negatives of membership. Rudzińska-Bluszcz noted that the EU no longer has the same shape as it had twenty years ago and pointed to several changes that have taken place during that period. She said that there is increased cooperation between states within the EU and there is also harmonisation of laws based on European values. Subsequently, in the discussion, the Dean of the Faculty of Law of Comenius University Bratislava, prof. JUDr. Eduard Burda, PhD. asked a question to the participants of the discussion: *"Where do you see areas of law that are over-regulated by the EU and where, on the contrary, do you see areas that still require some degree of European regulation in order to function properly and efficiently?"* From the discussion, it became clear that it is necessary to examine the case report and, based on it, to determine which areas of legislation need to be regulated. At the same time, it is important to focus on the consolidation of national legislation in the areas of cultural and ethical issues, family law and justice, with the need for further regulation in the area of digitalisation and the online space. Participants also pointed out that the EU produces a large amount of legislation that creates a confusing web of legal systems. They concluded the topic by stating that EU legislation should be adapted to the 21st century and move forward by anticipating and predicting certain social phenomena in the future.

The second panel discussion with the central theme *"The impact of European Union membership on the functioning of the Supreme Judicial Institutions",* the main partner of which was the Supreme Court of the Slovak Republic, was moderated by prof. JUDr. Juraj Vačok, PhD. from the Department of Administrative and Environmental Law of the Faculty of Law of Comenius University Bratislava. The panellists in this session were JUDr. Ján Šikuta, PhD. (President of the Supreme Court of the Slovak Republic), JUDr. Petr Angyalossy, Ph.D. (President of the Supreme Court of the Czech Republic) and prof. Dr. András Zs. Varga (President of the Supreme Court of Hungary). One of the topics addressed in the panel discussion was judicial independence and the influence of the EU, with the resulting message of the discussion in this area being that EU accession had no impact on judicial independence. In this panel discussion, the panellists also addressed the impact of EU law on the decision-making of the supreme courts, the digitalisation and modernisation of the judiciary and the impact of EU membership on the process of digitalisation and modernisation of the judiciary, or the control of the judiciary and the role of the supreme courts in the process of control. One of the important ideas presented in this panel discussion was the importance of cooperation between national courts and the CJEU in order to ensure the uniformity of case law and therefore that decisions are in line with EU law.

The last discussion in the plenary session, whose main partner was the Slovak Bar Association, was moderated by Assoc. Prof. JUDr. Ondrej Laciak, PhD. from the Department of Criminal Law, Criminology and Criminalistics of the Faculty of Law of Comenius University Bratislava, who solemnly welcomed the panellists JUDr. Martin Puchalla, PhD. (President of the Slovak Bar Association) and Dr. András Szecskoy (Vice

President of the Hungarian Bar Association). The main topic of the plenary session was twenty years of advocacy in the European Union, and the discussion touched upon several topics, such as the free movement of lawyers within the EU and their regulation, the status of bar associations within the Visegrad Four countries, the ethics of the advocate and the question of whether the legal profession should be regulated by a professional organisation. The President of the Slovak Bar Association JUDr. Martin Puchalla, PhD. stated that he perceived international cooperation as indispensable, highlighting the Council of European Bar Associations (hereinafter referred to as the "CCBE"), of which the Slovak Bar Association is a member, and stated that the CCBE has an important position within the European legislation. He further noted that during the 20 years of membership of the European Union, the legal profession had acquired a new dimension, which included the free movement of lawyers as well as the free provision of legal services within the EU. At the level of the European Union, he highlighted the beneficial legislation concerning the procedural rights of suspects and accused persons, but at the same time pointed out the negative aspect of the lack of reflection on the existing principles without which advocacy cannot function. Principles such as institutional independence or confidentiality must be preserved and cannot be interfered with in any way. In his speech, Dr. András Szecskay briefly presented a more comprehensive picture of the status system of lawyers in Hungary, and positively assessed the fact that the practice of law in Hungary is linked to compulsory membership. He concluded the discussion with the ethical dilemmas arising in the context of EU membership.

The second day of the conference (Wednesday, 18 September 2024) was devoted to proceedings in professional sections, with more than 240 participants attending sessions in these 11 sections. The themes of the sections were mostly thematically linked to the central theme of the conference *"The Impact of the European Law on the National Law "*.

The final day of the conference (Thursday, 19 September 2024) was devoted to the presentation of conclusions from the plenary session and from the negotiations of individual sections presented by panel moderators and section guarantors.

In conclusion, it can be stated that the international scientific conference Bratislava Legal Forum annually serves as an important platform for the exchange of theoretical and practical knowledge between representatives of various legal professions. It plays an essential role in the exchange of knowledge among the participants, providing a space for deep reflection in the framework of discussion, which ensures significant professional development of the conference participants. As the professional part of the conference was complemented by a rich social programme, it also presents a unique opportunity for networking, which can open up new opportunities for the participants in their academic and professional development. The annual success and interest in the international scientific conference Bratislava Legal Forum reflects the commitment of the organisers and participants, who together contribute to the development of professional dialogue within the legal community.

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REPORT FROM THE CONFERENCE ON THE LEGAL AND ETHICAL ASPECTS OF DISCIPLINARY LIABILITY OF JUDGES (BRATISLAVA, 15 NOVEMBER 2024) / Ema Mikulová, Marián Ruňanin

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Disciplinary liability, and especially that of judges, is becoming an increasingly relevant topic at the moment. It is receiving attention from various perspectives - be it constitutional, administrative, theoretical or historical. The increased interest of a wide range of persons in the subject has necessitated the need to hold an event that would provide a space for the exchange of knowledge across the aforementioned disciplines, but also across a wide variety of professions.

Therefore, we are pleased that on the 15th of November, 2024, a conference entitled "Legal and Ethical Aspects of Disciplinary Liability of Judges" was held at the Faculty of Law of Comenius University Bratislava (hereinafter also referred to as "**Faculty**") under the patronage of the Department of Theory of Law and Philosophy of

Law of the Faculty within the VEGA project No. 1/0579/23 - Legal and Ethical Aspects of Disciplinary Liability in the Rule of Law.

Active participants, as well as members of the plenary of the conference, included inspiring individuals from across the sectors of legal education, legal science and legal practice - law students, representatives of law faculties and faculties of public administration, representatives of the Supreme Court of the Slovak Republic, Supreme Administrative Court of the Slovak Republic, Ministry of Justice of the Slovak Republic, Office of the Public Defender of Rights, as well as representatives from the Bar, the notary profession, and the Institute of State and Law of the Slovak Academy of Sciences. The conference was held in four panels, with a rich discussion and exchange of knowledge, views and practical experiences with the plenary participants after the contributions of each panel.

The conference was opened by Prof. JUDr. Mgr. Martina Gajdošová, PhD., who after welcoming the honoured guests drew attention to the interdisciplinarity of the conference topic. In her introduction, she highlighted the current trends in the context of disciplinary liability of judges, such as the continuous legislative development, which led to the introduction of judicial self-government, the establishment of the Judicial Council, the presence of a lay element, and a new approach to ethical rules. She pointed out that disciplinary liability had traditionally been a non-public and internal matter, but since 1991 much of it had become an area of public interest. Thus, two directions are present – on one hand, the public's right to information, and on the other, the need for trust in the internal processes of the profession. Professor Gajdošová thus highlighted the emerging trends, along with a look back at previous periods, while also outlining the themes resonating in the scientific discourse as well as at the upcoming conference.

Following the opening speech, the first contribution from the first panel of the conference day was made by the Deputy President of the Supreme Court of the Slovak Republic, JUDr. Andrea Moravčíková, PhD., who in her contribution "Freedom of speech of a judge and its limits given by ethical rules" addressed the issue of freedom of speech of judges, which is inextricably linked to their integrity and compliance with ethical principles. She pointed out that the freedom of expression of judges is a natural part of their rights, but it comes with significant limits. Those limits primarily arise from the ethical rules which require judges to maintain a professional demeanour and conduct that does not undermine public trust in the judicial system. Dr. Moravčíková stressed that judicial integrity lies not only in professionalism but also in the ability to maintain dignity and neutrality in emotionally charged situations. She also discussed the importance of disciplinary proceedings, which act as a prevention against serious violations, noting that only cases brought before a disciplinary panel indicate that the boundaries of acceptable behaviour have been crossed. Judges' public expressions must therefore be carefully worded and should avoid moments that could be misinterpreted by the media or the public. Particular emphasis has been given to the opinions of the Judicial Council, which provide an authentic interpretation of the ethical rules and help judges to discern what is permissible in their expressions. Dr. Moravčíková also presented several specific cases from practice that illustrated situations where the line between freedom of expression and unethical behaviour was thin.

The second panellist was Mgr. Michal Novotný, judge of the Supreme Administrative Court of the Slovak Republic. In his contribution entitled "Overview of the Supreme Administrative Court of the Slovak republic in Disciplinary Matters", Mgr. Novotný analysed the position and functioning of the Supreme Administrative Court of the Slovak republic (hereinafter also referred to as the "SAC SR") in the context of disciplinary justice and the challenges it faces. He referred to the confirmed

constitutionality and legality of the establishment of the SAC SR and highlighted its compliance with European obligations. He criticised the shortcomings caused by the takeover of the agenda prior to the adoption of the procedural rules and drew attention to the need for legislative changes, in particular the planned amendment to the Disciplinary Procedure Code. He spoke of reducing the risk of abuse of the right to initiate proceedings and also addressed the issue of associate judges whose position could be jeopardised by the filing of a disciplinary motion. Lastly, he stressed that judges' legal opinions should not be the subject of disciplinary proceedings unless they are serious breaches, and he called for the need to take into account the material corrective in assessing their conduct.

Selected aspects of the exercise of the judicial profession also from the perspective of a scholar were presented in the contribution by Prof. JUDr. Juraj Vačok, PhD., judge of the Supreme Administrative Court of the Slovak Republic and member of the Department of Administrative and Environmental Law of the Faculty, who in his presentation "Disciplinary liability of judges from the perspective of a member of a disciplinary panel" dealt with key issues of disciplinary proceedings, such as the personal competence of disciplinary panels, the nature of proceedings, the composition of the panels and the finality of decisions. He stressed the importance of external scrutiny of the professions to prevent the sealing off of systems and the abuse of self-governance. Professor Vačok critically discussed the challenges judges face when working in two different legal regimes, cassation and disciplinary. He discussed the status of associate judges, highlighting their contribution but drawing attention to organisational and ethical challenges, including the risk of conflicts of interest. On the issue of single-level proceedings, he assessed two-level proceedings as meaningful in certain cases. He also stressed the need to deal with disciplinary motions systematically and called for the introduction of a material corrective in the process to ensure a more just assessment of judges' actions.

As the conference was conducted in a hybrid format, the second panel started with an online contribution "Judicial Ethics and Discipline in the Kingdom of Hungary" by Prof. Dr. Ivan Halász, DrSc., from the Faculty of Public Governance and International Studies of the Ludovika University of Public Service, which provided the conference participants with a historical perspective on the embedding of judicial ethics and disciplinary liability of judges, specifically in the period of Kingdom of Hungary. Professor Halász chronologically presented the sources in which the legal regulation of this area appeared, such as the rulers' decrees, statutory articles, and the Statute of the Free Royal City of Modra. The legislative activity of the 19th century in the form of statutory articles symbolically started with the March Laws, but the laws on the position of the judiciary came only in the later period, for which the professor also explained the context of the process of their adoption and the contemporary debates.

The paper entitled "International Protection of Judges under Disciplinary Prosecution" was presented by Prof. JUDr. Ján Svák, DrSc. from the Department of International Law and International Relations of the Faculty. He explained that the acceleration of the transnational protection of judges began in connection with the legislative reforms in the last decade, in particular due to concerns about the abusive interference of the legislative and executive powers in the independence of the judiciary. Judges thus began to turn to supranational institutions to provide them with protection. He pointed to the most important sources, both at the global level and at the regional level, including conventions and soft-law documents, as well as the case-law of the Court of Justice of the European Union and the European Court of Human Rights. More specifically, he also drew attention to the case law of the ECtHR concerning the problem

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of abuse of disciplinary proceedings for other purposes, such as persecution of judges. Finally, he also highlighted the relevance of the Consultative Council of European Judges, as the ECtHR itself refers in its decisions to soft-law documents originating from its activities.

The last panellist of this part was a guest from the Czech Republic, JUDr. Maxim Tomoszek, Ph.D. from the Faculty of Law of Palacký University Olomouc. Dr. Tomoszek in his contribution entitled "For what and how should judges be disciplinarily liable?" emphasised the constitutional framework of judges' liability for the performance of their duties. At the same time, he highlighted the importance of the ethical framework of disciplinary liability, which has its relevance in the continuous verification of a judge's moral integrity. He recalled that the disciplinary liability of judges has a constitutional and ethical dimension, serves to protect values such as independence, impartiality and dignity, and continuously verifies their moral integrity. He pointed out the unsuitability of criminal law instruments in this area and stressed the need to assess the conduct of judges also according to professional ethics and the principles of proportionality. Sanctions should be a last resort when an impetus is needed to change behaviour, whereas disciplinary proceedings are themselves a form of evaluation of specific behaviour. Dr Tomoszek stressed the importance of the judicial oath as a declaration of ethical principles but noted that judges often fail to adhere to these principles. Disciplinary proceedings should examine whether a judge's conduct has been ethical, combining both professional and external perspectives to ensure objectivity and public trust.

The penultimate panel was started by Prof. JUDr. Soňa Košičiarová, PhD. from the Faculty of Law of Trnava University in Trnava, who in her presentation entitled "How (not) to use the provisions of the Criminal Code in assessing the disciplinary liability of a judge" analysed the use of the provisions of the first part of the Criminal Code in disciplinary liability of judges, as permitted by Section 4 of the Disciplinary Procedure Code. She emphasised that subsidiarity applies only to substantive aspects of the law and that analogy was excluded in procedural matters. The subsidiary application of the substantive provisions of the Criminal Code is, in her view, limited by the different nature of disciplinary matters. Professor Košičiarová mentioned that the Supreme Administrative Court of the Slovak Republic and the Judicial Council of the Slovak Republic most often use provisions relating to the temporal scope, the definition of intent or the principles of imposing penalties when imposing disciplinary liability. At the same time, she drew attention to the problem of insufficient assessment of the seriousness of a judge's conduct, which is linked to the limited legal framework.

Afterwards, Assoc. Prof. JUDr. Matej Horvat, PhD. from the Department of Administrative and Environmental Law of the Faculty in his contribution "Independent and impartial court in disciplinary proceedings" analysed the independence and impartiality of the disciplinary panels of the Supreme Administrative Court of the Slovak Republic in the context of Article 6 of the European Convention on Human Rights (hereinafter also referred to as "**ECHR**"). He stressed that the Disciplinary Procedure Code has a procedural character with elements of substantive provisions, but it is not a codifying legislation. He discussed the legal regulation of associate judges, for which doubts have been raised as to compliance with Article 6 ECHR, in particular in the case of the automatic termination of an associate judge's office following the filing of a disciplinary motion. Associate Professor Horvat presented the case-law of the European Court of Human Rights, in particular decisions dealing with issues of judicial independence. He drew attention to the need to preserve guarantees of independence, such as the exclusion of external pressures from the government or parties to a dispute, while also mentioning the issue

of the appointment of judges in Poland. In his conclusion, Associate Professor Horvat assessed that the disciplinary panels of the SAC SR meet the requirements of an independent court under Article 6 of the ECHR and did not identify any reason that would call their independence into question. However, he suggested considering a change in the legislation so that the termination of the office of an associate judge would not be automatically linked to the filing of a disciplinary motion, which would strengthen the stability and perception of the independence of the panels.

The last panellist of this part was a member of the Department of Theory of Law and Philosophy of Law of the Faculty, Assoc. Prof. JUDr. Branislav Fábry, PhD., who in his contribution entitled "Disinformation and Legal Professions" analysed the concept of disinformation and its risks for legal professions. He drew attention to the problematic definition of disinformation, which is often used without sufficient conceptual anchoring, thus allowing the very authors of the fight against disinformation to spread manipulative information. He criticised the fact that the term was becoming a tool for political battles and for discrediting opponents. Associate Professor Fábry pointed to historical examples of disinformation, such as the trials conducted by Cicero, the accusations of Pasteur or Semmelweis, stressing that this is a long-term phenomenon, not just a problem of the present. However, social media, the press and artificial intelligence, in his view, exacerbate this phenomenon by selectively reporting information. The legal profession, according to Fábry, faces the risk that the label "misinformation" will become emotionally charged and polarise disciplinary proceedings. He concluded by warning that the use of the term disinformation in legal practice requires caution to avoid its misuse to silence opponents and increase the polarisation of society.

The last panel consisted of PhD. students of the Department of Theory of Law and Philosophy of Law at the Faculty. Mgr. Marián Ruňanin's presentation entitled "Generative Artificial Intelligence in Courts" dealt with the issue of using artificial intelligence in courts, in particular programs such as ChatGPT and Gemini. He presented the results of an empirical survey, which showed that a small part of judges actively uses this tool, and a large part recognise the benefits of these tools. Mgr. Ruňanin pointed out the shortcomings of these models and the risks associated with their use and recommended that they should be limited at present.

The last presentation entitled "Weakening of the judicial element in the disciplinary liability of judges" was delivered by a PhD. student of the same department, Mgr. Ema Mikulová. She explained that the judicial element has been weakened as a result of legislative changes effective from 2021 in connection with the establishment of the Supreme Administrative Court of the Slovak Republic, primarily due to the loss of influence of judicial councils. Based on the comparative findings from the Czech Republic, as well as the current case law of the ECtHR, one can thus ask what form the judicial or non-judicial element should take in the future. However, she emphasised the need for an analysis of decisions in order to get a better understanding of how the non-judicial element operates in practice.

The endless debates that unfolded both during the official session and informal breaks, are proof that the topic of disciplinary liability of judges is relevant and lively. This subject continues to captivate the attention of both legal scholars and the practicing public. The organisers are grateful for the large turnout, even during the late hours of Friday evening, which showed unwavering enthusiasm and intellectual curiosity for the topic.

This conference has clearly tapped into a significant demand within the legal community for further examination of judicial liability. Ultimately, the ongoing examination of this topic is vital to the health of democratic societies. By ensuring that

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the mechanisms are effective and resistant to abuse, judiciary's credibility and the broader system's stability can be reinforced. The robust participation and rich conversations during the conference are an encouraging sign that this event has not only contributed to the scholar discourse but also inspired ongoing inquiry in this topic. The insights and ideas exchanged here are set to serve as a foundation for continued exploration, potentially influencing policy frameworks and academic discourse alike. We hope that the momentum generated here will fuel continued efforts to address critical issues with the depth and rigor this topic deserves.

Collection of papers of the individual presenters will be published under the same title as the conference in early 2025.

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REPORT FROM THE COMMERCIAL LAW AND ECONOMIC LAW SECTION AT THE INTERNATIONAL SCIENTIFIC CONFERENCE BRATISLAVA LEGAL FORUM 2024 (BRATISLAVA, 17 – 19 SEPTEMBER 2024) / Dominika Pintérová, Regina Šťastová, Mojmír Mamojka

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The Bratislava Legal Forum, as an inseparable symbol of the conferences of the Faculty of Law of Comenius University Bratislava, took place from 17 to 19 September 2024 in the premises of Comenius University in Bratislava. The central theme of this 10th Jubilee year was *"The Impact of European Law on National Legal Systems"*.

On the first day of the conference, on September 17, 2024, three panels, consisting of prominent personalities and experts from practice, opened a joint discussion. In each panel, one central topic resonated and brought together other discussants.

The first panel on *"Twenty Years of Membership in the European Union: The Impact of the European Union on Justice"* featured a discussion in which participated Boris Susko, Slovak Minister of Justice, Vilém Anzenbacher, Czech Deputy Minister of Justice, Bence Tuzson, Hungarian Minister of Justice, and Zuzanna Rudzińska-Bluszcz, Polish State Secretary of the Ministry of Justice. This panel was moderated by Eduard Burda, Dean and Professor at Comenius University Bratislava, Faculty of Law.

The second panel presented a discussion on the topic *"The impact of membership in the European Union on the functioning of supreme judicial institutions"*, which was presented by discussants from application practice: Ján Šikuta (Slovak President of the Supreme Court), Petr Angyalossy (Czech President of the Supreme Court) and András Zsolt Varga (Hungarian President of the Supreme Court). The panel was moderated by Juraj Vačok, professor at the Faculty of Law of Comenius University Bratislava and judge of the Supreme Administrative Court of the Slovak Republic.

The last panel, which was part of the plenary session, was devoted to the topic *"Twenty years of advocacy in the European Union."* The discussion was moderated by Ondrej Laciak, Associate Professor at the Faculty of Law of Comenius University Bratislava, attorney at law and Vice-President of the Slovak Bar Association for Foreign Agenda. Under his leadership, the following participants spoke and discussed: Martin Puchalla (President of the Slovak Bar Association) and András Szecskay (Vice-President of the Hungarian Bar Association).

All three panels brought enriching discussions between participants not only during the panels, but also during the discussion in individual sections.

Subsequently, on September 18, 2024, the scientific part of the conference took place in individual sections. The Commercial and Economic Law Section was devoted to the topic: *"Current issues of commercial law, financial law and economic sciences in the context of the impact of European law on national legal systems"*. This section was attended by 8 national speakers with various interesting presentations. The section was moderated by Professor Mojmír Mamojka Jr. as the guarantor of this section. The topic of the discussion of the section was inspired by the overlap of European law and legislation into company law in the Slovak Republic. The central points of the discussion were the new EU acts and their impact on company law in the Slovak Republic *de lege lata* and *de lege ferenda*. Speakers brought key elements to the session as they reported on new European legislation and related challenges affecting commercial law.

Associate Professor Regina Hučková from the Faculty of Law of Pavol Jozef Šafárik University in Košice introduced the audience to the new legal regulation of digital services – the Regulation on Digital Services. In the analysis of the regulation in question, Associate Professor Regina Hučková paid special attention to the mechanism of online dispute resolution, pointing out the main advantages, also in connection with the existing out-of-court methods of dispute resolution introduced by previous European legislation.

In her presentation, Associate Professor Angelika Mašurová from the Faculty of Law of Comenius University Bratislava focused on shareholding structures with multiple voting rights as a tool for strengthening voting rights, as on 24 April 2024, the European Parliament adopted a legislative resolution on the proposal for a directive of the European Parliament and of the Council on shareholding structures with multiple voting rights in companies as part of the first reading, which seek admission of their shares to trading on an SME growth market. She stated that the current Slovak legislation does not allow for

the issuance of shares with multiple voting rights, which would privilege only a certain group of shareholders in accordance with the Draft Directive, but on the other hand, there are possibilities to achieve a similar effect.

Dr. Dominika Pintérová from the Faculty of Law of Comenius University Bratislava examined the limits associated with the use of artificial intelligence (AI) in the field of commercial law, through the lens of the Artificial Intelligence Act, focusing on the challenges it brings and what are its potential impacts on entrepreneurs and commercial relations. A key element was the analysis of the responsibilities of statutory and supervisory bodies of companies, as the AI Act extends professional (fiduciary duties) to the so-called special requirements for compliance with the AI Act.

Dr. Regina Šťastová from the Institute of State and Law of the Slovak Academy of Sciences and at the same time the Faculty of Law of Comenius University Bratislava supplemented the discussion with the topic of the responsibility of the bodies of a joint-stock company for the provision of financial assistance. Allowing the possibility of providing financial assistance for the purpose of acquiring shares in a joint-stock company is a new institute of Slovak commercial law. This is a consequence of the transposition of Article 64 of Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 concerning certain aspects of company law. The aim of the paper was therefore to analyse the responsibility of the bodies of a joint-stock company for providing such a financing option, as an integral part of the protection of the company itself and its creditors in the event of non-compliance with legal conditions in the process of its provision.

Dr. Daniel Zigo and Dr. Matej Smalik from the Faculty of Law of Comenius University Bratislava focused on the impact of European law on foreign direct investment. As part of their contribution, they identified the current state and potential shortcomings of the current legislation in the field of foreign investment screening and at the same time outlined possible proposals for its improvement. The comparative approach of the research also allowed for a broader comparison with the approaches of Asian countries, thus creating a comprehensive picture of current trends and possible future challenges in the field of foreign investment screening.

Dr. Martin Spišák from the Faculty of Law of Comenius University Bratislava presented the piercing of the corporate veil in the light of EU law. He emphasised that a special type of piercing exists in EU law and is bound to Article 101 of the TFEU, while it is formed by the decision-making practice of the CJEU, not explicitly by the text of a legal norm. In particular, he interpreted the decisions of the CJEU: C-508/11 P in the case Eni, of 08.05.2013 and C-155/14 P in the case of Evonik, of 16.06.2016, while the argumentation in both decisions is similar.

Dr. Peter Šikulínec from the Faculty of Law of Comenius University Bratislava focused his contribution on the analysis of how the new obligations arising from ESG regulations affect the fiduciary duties of statutory bodies and the rules of business judgment, and at the end of the paper he indicated that there may be a narrowing of the application of business judgment, as a result of ESG regulation. ESG regulation itself is an integral part of corporate law.

Associate Professor Jana Strémy from the Faculty of Law of Comenius University Bratislava traditionally dealt with issues focused on the position of influential personalities, this time in the law of the European Union. As she herself indicated, social networks and influencers appearing on them have become part of the marketing world, which is why she addressed the issues of influencer responsibility in her contribution. She has shown interest in addressing this topic in the future by announcing related issues, such as liability mechanisms and their enforceability in relation to influencers.

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From the above contributions, it is possible to derive clear social and legislative trends and, consequently, the likely development of legal practice. The outputs of several speakers were intertwined with polemics over the existence and scope of legal responsibility for the *"content"* (i.e. *content*), which is disseminated (e.g.) by the already mentioned *influencers*, i.e. the question justifiably arises as to what conditions should be met (or how to grasp them normatively) in order for these persons to bear explicit and enforceable legal responsibility for the disseminated *content*. One of the ways to define the activities of *influencers* for the purposes of legal theory and at the same time to regulate them for the purposes of transparent and effective taxation of their income in the conditions of the Slovak Republic is to normatively or interpretively subsume this activity under *business* within the meaning of the Commercial Code or in accordance with a dedicated legal regulation. The participants of the session agreed that it is right to develop the concept *of liability for content at the* same time on the part of the providers of platforms through which this content can be disseminated. In other words, in an effort to create a functional normative framework *pro futuro*, it is not tolerable for the purpose of these platforms to be reduced to passively providing space for the hosting of any electronic content.

The interpretation of the scope of duties of statutory bodies of companies also gradually reflects aspects that rightly go beyond the traditional perception of the purpose of business corporations as entities primarily generating profits. Socio-legal events are more and more tangibly reflecting the requirements (legal, economic, environmental, etc.) for the so-called *sustainable business*, which – in our opinion – in the near future will also affect the perception of the institute of *business judgement rule* as a standard of conduct of the statutory body of a company. However, in anticipating the development of Slovak legislation, in contrast to some of the above-mentioned issues, we see room in the fact that the institute *of professional care*, in which this standard is reflected, does not necessarily have to be fundamentally amended, but it is sufficient if it is interpreted by means of legal opinions of courts naturally resulting in constant jurisprudence in the future.

Concentrating on the above, the participants of the section identified with the fact that in the current socio-legal phase with an emphasis on the European Economic Area, legislators and courts are rightly trying to formulate and enforce *"higher legal principles"* and thus positively influence a clearer value setting of the addressees of legislation.

In summary, the Commercial Law and Economic Law section at the Bratislava Legal Forum 2024 conference, focusing on the impact of European law on national legal systems, brought lively discussions and drew attention to the calls for national speakers. These discussions can serve as sources of inspiration for new regulations, which must inevitably face the challenges of current company law following the adopted European legislation.

On the third day of the conference, September 19, 2024, this year's Bratislava Legal Forum concluded with presentations by the guarantors and co-guarantors of the individual sections, which brought an evaluation of the course of individual sections, highlighting the most interesting contributions and, last but not least, setting resolutions, whether related to the conference or the topic for future years.

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INSIGHTS FROM THE INTERNATIONAL LEGAL HISTORY MEETING OF PHD STUDENTS (BRNO, 11 - 12 SEPTEMBER 2024) / Frederika Vešelényiová

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On September 11-12, 2024, the Department of the History of the State and Law at the Faculty of Law, Masaryk University in Brno, Czech Republic, organised an International Legal History Meeting for PhD students. This distinguished event brought together doctoral candidates specialising in legal history and roman law from multiple countries, offering them a platform to engage in meaningful scholarly dialogue, share insights from their research, and foster international collaboration.

The primary aim of this conference was to facilitate cooperation among early-career researchers and PhD students who are at the forefront of historical and legal scholarship. In an increasingly globalised academic environment, the opportunity for young scholars to interact and network is crucial for the development of their careers and the establishment of lasting academic networks. By offering a venue where doctoral students could present partial results from their theses, the event enabled participants to obtain valuable feedback and engage in critical discussions that would enrich their research projects.

Beyond the exchange of research ideas, the conference emphasised the importance of international academic cooperation in building a robust support system for PhD students. The fostering of academic ties at this stage is critical not only for the development of individual research projects but also for enhancing the overall quality and diversity of scholarship in legal history. The broad and inclusive nature of the conference's thematic scope—encompassing everything from Roman law to the evolution of legal systems across different European states—further contributed to this goal by encouraging a diverse range of scholarly contributions.

The two-day program was organised into multiple thematic sections based on the research topics submitted by the participants. With twenty-five scholars from countries including the Czech Republic, Slovakia, Austria, Hungary, and non-European states, the event showcased a rich variety of perspectives and legal traditions. This diversity was central to the conference's success, as it allowed for an interdisciplinary approach to legal history and enriched the discussions that followed each presentation.

In addition to academic presentations, the conference organisers offered an engaging accompanying program. Sightseeing tours of Brno, along with a lecture on the city's unique architectural and cultural heritage, provided participants with a deeper understanding of the local context and history. These cultural exchanges further strengthened the community-building aspect of the conference, which was one of the event's key features.

The conference officially began with a welcoming speech by doc. JUDr. Bc. Jaromír Tauchen, PhD, LL.M. Eur. Int., Head of the Department of the History of the State and Law at the Faculty of Law, Masaryk University. His opening remarks highlighted the significance of holding such international meetings, particularly for PhD students, as essential for promoting intellectual exchange and enhancing the quality of doctoral research.

Following this, the first academic session commenced with a notable contribution from Michael Binder of the University of Vienna. His presentation, titled Premature Debt Repayment: Then and Now, offered a comparative analysis between the legal formulation of premature debt repayment in the Roman Digest and similar provisions in the Allgemeines bürgerliches Gesetzbuch (ABGB). His work exemplified how historical legal research could illuminate modern legal debates, enriching the ongoing discussions about codification and the enduring influence of Roman law in contemporary European legal systems.

Similarly, Mateusz Utamowicz from the University of Bialystok explored the topic of legal reception, focusing on the influence of French civil law in Polish territories during the 19th century. Supported by detailed archival sources, his presentation centred on the secret will of Karol Brzostowski and the legal impact of Napoleonic legal codes in the region. This session underscored the enduring relevance of historical codifications and their cross-border impact on modern legal systems.

A highly engaging session was presented by PhD student Radosław Miśkiewicz from the University of Warsaw, who analysed the issue of legal validity in Classical Athens. His examination of the Athenian legal system offered participants a comprehensive overview of the challenges related to interpreting ancient legal principles, raising questions about the applicability and evolution of laws in early democratic societies.

The afternoon sessions provided ample time for discussion, with the organisers allowing for extensive Q&A periods. This structure enabled participants to actively engage with the presenters, offering comments and alternative perspectives, which greatly contributed to the collaborative nature of the conference.

The second segment of the conference featured a variety of research topics, reflecting the diverse academic interests of the participants. Ivona Encheva from South-West University in Sofia examined legal interpretation in Roman law, particularly focusing on the application of the *exceptio*. Her research shed new light on the complex mechanisms of ancient legal disputes, illustrating how historical concepts like *exceptio* continue to influence modern legal interpretation.

Rida Zulfiquar from the University of Szeged presented an important paper on judicial independence and its role in safeguarding human rights. Her global perspective

on the judiciary's autonomy highlighted the need for an independent legal system to ensure the protection of fundamental rights, especially in an era where political interference threatens judicial impartiality.

Noteworthy as well was the presentation by Cristian-Codrin Botu from Babeș-Bolyai University in Romania, who analysed the evolution of objective and subjective theories of contractual interpretation. His thorough historical analysis traced the development of these theories across different legal traditions, offering insight into how they have shaped contemporary contract law.

Another fascinating contribution came from Jakub Jankovič from Comenius University Bratislava, whose analysis of anti-Hungarian laws in interwar Slovakia demonstrated how law can be used as an instrument of political control and suppression. His paper sparked lively debate among the participants, leading to a broader discussion on the relationship between law, politics, and nationalism.

One of the more unique aspects of the conference was the intersection of legal history and art, highlighted by presentations from Igor Hron and Zuzana Löbling. Hron's paper explored the intellectual property legacy of Jan Löwenbach and his influence on both the art world and legal regulations. Löbling's presentation, which examined the restitution of Richard Morawetz's art collection after World War II, offered a poignant example of how legal mechanisms can be employed to address historical injustices.

The day concluded with discussions of continental legal traditions, where Eva Bažantová from Charles University addressed the 19th-century efforts to reform property law in England, with a focus on the property rights of married women. Her research emphasised the slow yet crucial development of women's rights in property law, providing a historical context for the broader movement toward gender equality in the legal field.

The final sessions of the conference, held on the second day, were particularly focused on 20th-century legal history. Presenters examined the interwar legal developments in Hungary and Czechoslovakia, focusing on economic crimes, fraudulent bankruptcy, and social care provided for minors during the first half of the last century. A standout presentation by Borisz Bendegúz Burger delved into the prosecution of political crimes during the communist era in Hungary, raising important ethical questions about state violence and justice in the postwar period.

The International Legal History Meeting for PhD students at Masaryk University successfully accomplished its goals of fostering academic dialogue, promoting international cooperation, and building a supportive community for young scholars. The inclusion of diverse research topics and the high quality of presentations ensured that the event was intellectually stimulating for all participants. The accompanying social program, including sightseeing tours and networking opportunities, further strengthened the connections between the participants, creating a lasting impact beyond the conference itself.

As the conference concluded, the importance of such international forums became evident. For PhD students, presenting their work in a professional setting not only boosts their confidence but also prepares them for future academic endeavours. The event underscored the necessity of continued academic exchange and collaboration in the field of legal history. Furthermore, the planned publication of conference proceedings will provide international recognition for the participants, offering them a vital platform for disseminating their research.

This annual meeting remains a cornerstone in the academic development of early-career legal historians, providing them with both the academic and social support they need to succeed in their scholarly careers.

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LECTURE BY ICC JUDGE NICOLAS GUILLOU AT COMENIUS UNIVERSITY BRATISLAVA: A REPORT ON FIVE CURRENT CHALLENGES FACING THE ICC AND INTERNATIONAL JUSTICE (BRATISLAVA, 14 OCTOBER 2024) / Sára Zsemlyová, Jozef Čentéš

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On 14 October 2024, the Faculty of Law of Comenius University Bratislava (hereinafter referred to as "**the Faculty**") hosted a lecture by the Judge of the **International Criminal Court** (hereinafter referred to as the "**ICC**"), **Mr. Nicolas Guillou**, on the topic: ***Current Challenges of the International Criminal Court in relation to the affirmation of the rule of law***.

The lecture was organised as part of the French Ministry for Europe and Foreign Affairs' ***Law Day*** activity to promote the important role that law performs in the organisation of society and social relations. The lecture itself was held under the auspices of the French Institute in Slovakia in cooperation with the Department of Criminal Law, Criminology and Criminalistics of the Faculty of Law of Comenius University Bratislava

(hereinafter referred to as "**the Department**"). The lecture was opened by **prof. JUDr. Jozef Čentéš, DrSc.**, Head of the Department, who welcomed the participants and presented the purpose of the lecture in the framework of the fulfilment of the rule of law. The opening speech was delivered by J. E. Mr. **Nicolas Suran**, Ambassador-designate of the French Republic in Slovakia, in which he presented the reasons for the establishment of the ICC, in 1998, by the Treaty of Rome, which was a significant event in the international legal system. He also referred to the current situation in Ukraine, as well as the conflict in the Middle East perpetrated by Hamas terrorists, both of which are relevant to international criminal justice.

In this lecture, Judge Guillou discussed five current challenges facing the ICC and international justice:

1. **Hybridisation**: How can we create a truly hybrid model?
2. **Efficiency:** How can we be faster and more efficient?
3. **Technologisation:** How is the prevalence of automatic weapons in warfare changing and how will international justice change be going forward?
4. **The digitisation of evidence**: How are the dynamics changing in the court room?
5. **Fragmentation:** How can we ensure justice in a world that is more and more fragmented?

Judge Guillou referred to each of the ICC's challenges as follows:

1. **Hybridisation-duality:** criminal codes at the national level generally set out in detail the powers and duties of law enforcement agencies and courts. At the ICC level, where the legal basis is the Rome Statute, which is not as detailed as, for example, the Criminal Procedure Code in the Slovak Republic, we do not find clearly defined ICC procedures. International criminal justice is partly characterised by duality, which is manifested in the following attributes:

(i) the Anglo-American system (common law) and the continental legal system,
(ii) international law and criminal law,
(iii) retributive or restorative justice,
(iv) the two types of judges at the ICC.

At the level of international criminal justice, we can find elements of two legal systems. If we compare the continental and Anglo-American systems of (criminal) law, we find several similar elements, but also more differences. For example, in the continental system, it is the witnesses who often start to be questioned by the court. In the common law system, the parties question the witnesses. Judge Guillou stated that the activity at the ICC combines and applies two legal systems. He also stated that a judge must be curious in his or her work, must keep an open mind and must not view international criminal disputes through the prism of national law. According to Article 36 of the Rome Statute, ICC judges are classified into so-called Type A and Type B judges. Type A judges are judges who have practiced as judges. Type B judges, on the other hand, are academics, diplomats, professors, etc. The background of the judge consequently determines his/her view on the interpretation and application of the law. Judge Guillou mentioned, as an example, the approach to dissenting opinions of judges on decisions. While judges from academia are in favour of dissenting opinions, judges from practice see them as weakening of the decision. He also perceives a duality in relation to the purpose of the ICC proceedings as such. The use of retributive as well as restorative justice comes into consideration. Should the aim be to achieve justice in the sense of properly punishing the perpetrator or to thoroughly establish the truth and help the

victims? The process is complex, as balance must be found between achieving justice and carefully examining all aspects of the case. The issue of reparations for victims is another challenge: should we focus on individual rights, collective rights or reparations for cultural objects and community reconstruction? All these aspects of hybridisation or duality must be taken into account in ensuring justice at the ICC level. It is important to create a common culture at the international level and achieve justice.

2. Efficiency: according to Judge Guillou, being consistent is crucial in order for the ICC's work to be more efficient and faster. This is especially important in the sense that at the ICC level, the court should not reopen every legal issue that had already been decided on. It is important for efficiency that courts do not revisit previous decisions in every new case as this prolongs the process and also can lead to chaos. Judge Guillou also explained that proceedings at the ICC take lot of time and money and are sometimes decided after 20 years after the crime has been committed. Another challenge to the ICC and its efficiency is the so-called *duty to disclose evidence*. This is because the parties do not have one file in the case. Each party has its own evidence and the parties have the right to request specific evidence. The prosecution must provide evidence that is favourable to the defence. This process can be long and complicated, and court files can have tens of thousands of pages. Better organisation of the evidence and the use of artificial intelligence are essential.

3. Technologisation: Military technology is evolving fast and new types of weapons are increasingly being used, such as drones carrying explosives, etc. In this context, Judge Guillou pointed out to the need to deal with the question of who should be responsible for the actions of these weapons, if it should be the manufacturer, the programmer, or the commander? The legislation must respond appropriately to these developments, so that justice can be done, and at the same time, these technologies can be used as evidence in the proceedings. In this context, it is also necessary to consider the more effective enforcement of criminal liability of legal persons at international level, because legal persons are playing even more significant role in war. It is important that the legal framework is sufficiently flexible to cover the possibility of prosecuting perpetrators.

4. Digitisation of evidence: While witness testimonies and reports were prevalent in the 1990s, today we can record crimes using videos, photographs and satellite images. The nature of evidence is changing and evolving, so there is a need to be open to modern technological challenges. From the position of a judge, it is necessary to verify and locate evidence, because nowadays we are dealing with so-called *deepfake* videos, which are indistinguishable. There is also the problem of *disinformation's,* which spreads extremely quickly in society. Judge Guillou said that for a judge it is essential to be prudent, creative, open-minded and, above all, to have the will to deliver justice.

5. Fragmentation: Today, we can see a world that is increasingly divided, with the rise of deglobalisation and tensions between East and West. Southern countries are demanding greater representation and criticising double standards in the application of international law, while feeling ignored. At national levels, there is polarisation between different population groups. However, in the area of the judiciary, the good news is that the boundary between national and international courts is now moving, which means that there is increased cooperation between them. The division of society undoubtedly also affects the work of the ICC and international justice. Therefore, the challenge for the ICC is how to approach this. In this regard, Judge Guillou highlighted the need to involve victims and civil society in investigations.

At the conclusion of the lecture, the members of the Department present thanked Judge Guillou for his inspiring lecture and his substantial answers to the questions raised.

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They especially thanked J.E. Nicolas Suran, Ambassador-designate of the French Republic to the Slovak Republic and the French diplomats for their cooperation and co-organisation of the lecture. The high attendance at the lecture proves the correct orientation of the activities of the Faculty, which pays constant attention to the fulfilment of the rule of law in the educational process of the young generation of future lawyers.