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THE IMPLEMENTATION OF BCTrustAI.SL INTO THE AUTOMATED PRACTICES OF DIGITAL LABOUR PLATFORMS TO ENSURE FAIRNESS, TRANSPARENCY AND ACCOUNTABILITY

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Abstract: *Since digital labour platforms may infringe upon the rights of platform workers through automated decision-making and monitoring practices, the European Parliament and the Council has adopted the Directive (EU) 2024/2831 on improving working conditions in platform work (Directive 2024/2831). This directive seeks to foster fairness, transparency, and accountability, establishing four key requirements in its algorithmic management chapter: transparency, human oversight, human review, rights to information and consultation. However, due to the abstract nature of these provisions, meeting the normative expectations of the directive poses a challenge. This paper presents the implementation of the Blockchain-Based Trustworthy Artificial Intelligence Supported by Stakeholders-In-The-Loop Model (BCTrustAI.SL) into the automated decision and monitoring practices used by digital labour platforms. It aims to discuss theoretically the validation of the concept of BCTrustAI.SL, setting the stage for subsequent technical proofs of concept.*

Key words: *Digital Labour Platforms; Platform Workers; Automated Decision and Monitoring Mechanisms; Transparency; Human Oversight; Human Review; Information and Consultation; Provision of Information to Workers; Blockchain Technology; Trustworthy AI.*

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1. INTRODUCTION

The shift from mechanisation to digitalisation (Knell, 2021) driven by significant improvements in information and communication technologies (ICT), particularly artificial intelligence (AI), has given birth to the creation of new sectors, employment models, and operational practices (Feuerriegel et al., 2020). One sample is digital labour platforms, which employ platform workers and rely on AI algorithms for automated decision-making and monitoring practices to manage the workers (Kalamatiev and Murdzev, 2022; Uzunca and Kas, 2023). Although these algorithms are innovative, they cause significant mistrust due to unfairness, opaqueness and the lack of accountability. They may lead to power imbalances that favour platform owners and service requesters (van Doorn, 2017, pp. 905–910). Additionally, they can reinforce discrimination, as bias in the data or algorithm design impact minor groups (Muller, 2019, pp. 176–196). In

response to these issues, the directive 2024/2831[1] represents a step in protecting the rights of platform workers on digital labour platform, it has been adopted on 23 October 2024.

The directive focuses on promoting fairness, transparency and accountability in these practices. Thus, its third chapter (Algorithmic Management) outlines four key requirements: ensuring transparency (Article 9), facilitating human oversight (Article 10), mandating human review (Article 11), and enhancing information and consultation rights (Article 13 and 14). Transparency is the key requirement for clear disclosures about data usage and decision-making processes that impact individuals (Toy, 2023). Human oversight refers to observation and evaluation of automated systems to protect individuals from adverse effects (Tóth et al., 2022). Human review ensures that decisions made by automated systems are open to challenge and scrutiny by humans, thereby providing a mechanism for accountability (Tóth et al., 2022). Finally, information and consultation are two rights mandate that affected individuals are kept informed and can participate in discussions regarding significant changes to automated systems, fostering a collaborative approach to governance and oversight (Lin et al., 2024). Nevertheless, these key requirements are too abstract to effectively meet the three aims established by the directive (Schmager and Sousa, 2021, p. 537, 541; Schmitz et al., 2022, pp. 795–796; Zicari et al., 2023, pp. 2–3; Hohma and Lütge, 2023, p. 905). Thus, Göksal and Solarte Vasquez designed BCTrustAI.SL as a socio-technical model to concretise the abstract elements of institutionalised trustworthy AI concepts (Göksal and Vasquez, 2024, pp. 1–3).

BCTrustAI.SL is a socio-technical model that operationalises the abstract trustworthiness elements—characteristics, principles, and key requirements—of AI systems applying blockchain technology. This model encompasses the characteristics of trustworthy AI *"robustness, ethicality and lawfulness, and human-centeredness."* It is founded on the principles including "*harm prevention, fairness, and human autonomy, which guide its application*." It is also built on the key requirements *"data protection, data governance, technical robustness and safety, transparency, accountability, diversity and non-discrimination, and human agency and oversight.* (Göksal and Solarte Vasquez, 2024, pp. 3–6)." It merges elements from the Blockchain Framework for Trustworthy AI (BF.TAI) (Nassar et al., 2020), BlockIoTIntelligence (Singh et al., 2020), and the Society-In-The-Loop (SITL) framework (Rahwan, 2018). The unique feature of the BCTrustAI.SL is that all AI algorithms can be integrated with this model during the training and data analysis phases, ensuring they operate within its framework. Consequently, this paper aims to implement the model into the most common automated decision or monitoring practice deployed by digital labour platforms, which causes mistrust among platform workers.

This paper maps the kind of practices employed by digital labour platforms and selects one of them, focusing on those that may be at risk of being associated with biased decision-making and invasive monitoring. Following this selection, the BCTrustAI.SL will be implemented into the selected practice to assess whether it meets the normative key requirements as outlined in the third chapter of the directive proposal. This is a theoretical implementation discussion that seeks to validate the BCTrustAI.SL concept in preparation for its technical proof of concept.

The following section provides a detailed background on the automated decision and monitoring practices to map and select one for the implementation and the directive with a specific focus on the four key requirements. The third section introduces and

[1] Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 on improving working conditions in platform work. http://data.europa.eu/eli/dir/2024/2831/oj

elaborates on BCTrustAI.SL. The fourth explains the selected practice with particular focus on its components, stakeholders and operational workflow and the implementation of BCTrustAI.SL into the practice. The final section concludes with a summary of the findings and contributions of this work.

2. EXPLORING OPERATIONAL AND REGULATORY LANDSCAPES OF AUTOMATED PRACTICES IN PLATFORM WORK

This section maps the automated decision and monitoring practices employed by digital labour platforms and selects the one for the implementation of the BCTrustAI.SL. It also examines the challenges associated with the chosen practice. Additionally, this section delves into the background of the directive.

2.1 Operational Landscape: Mapping the Automated Decision-Making and Monitoring Practices and Selection the Most Common One

In technology-driven work environments, automated decision-making and monitoring mechanisms are integral in the operational practices of digital labour platforms. As shown in **Table 1**, this part aims to map these practices. It identifies stakeholders and categorises the practices by colour codes: practices involving automated decision-making are shown in light grey, those with automated monitoring mechanisms are in dark grey, and practices that involve a mix of both are indicated in grey.

Table 1: Outline of Automated Decision-Making and Monitoring Practices Employed by the Digital Labour Platforms

Name	Direct Stakeholders	Reference
Task allocation practice	Platform operators, Workers, Customers, Technology developers, Data scientists, analysts	(Rozas et al., 2021) (Alasoini et al., 2023)
Conflict Resolution Practice	Platform operators, Workers, Customers, Technology developers, Legal advisors, Community groups and advocacy organisation	(Weiss, 2020) (Lee and Cui, 2024)
Platform Worker's Performance Evaluation Practice	Platform operators, Workers, Customers, Technology developers, Data scientists, analysts and engineers	(Rosenblat et al., 2017) (De Stefano and Aloisi, 2018, pp. 19–21) (Chan, 2019) (Alasoini et al., 2023)
Dynamic - Surge Pricing Practice	Platform operators, Workers, Clients or Customers, Technology developers, Economists and market analysts,	(Battifarano and Qian, 2019) (Yan et al., 2020) (Nunan and Di Domenico, 2022) (Cram et al., 2022) (Kopalle et al., 2023)

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Name	Direct Stakeholders	Reference
Digital Tracking Practice	Platform operators, Workers, Clients or Customers, Technology developers, Privacy and data protection advocacy groups, Data engineer, Data scientists, analysts and engineers	(De Stefano and Aloisi, 2018, pp. 19–21) (Joyce and Stuart, 2021) (Hernandez et al., 2024)
Behavioural Influence Practice	Platform operators, Workers, Clients or Customers, Behavioural scientists, Economics, Ethics boards and advisory panels, Technology developers	(Wang et al., 2022) (Uzunca and Kas, 2023)

Source: Table prepared by the authors.

Task allocation practice refers to an automated process that systematically distributes tasks among workers using decision-making algorithms, assessing factors like availability, skill level, and past performance to optimise workflow (Alasoini et al., 2023). Conflict resolution practice is another automated process, and it addresses and resolves disputes among platform operators, workers, and clients, typically through predefined protocols and mediation strategies (Lee and Cui, 2024). Performance evaluation practice is defined as an automated procedure of assessing the performance of platform workers using quantitative and qualitative metrics such as task completion rate, quality of work, client feedback, and adherence to platform standards (De Stefano and Aloisi, 2018; Chan, 2019; Alasoini et al., 2023). Dynamic-Surge Pricing Practice refers to a method for service prices based on real-time demand and supply conditions through automated decision-making algorithms (Battifarano and Qian, 2019; Yan et al., 2020). Digital Tracking Practice is the systematic use of sensors and automated monitoring mechanism to monitor, collect, and analyse data on the activities, locations, and work patterns of workers (Joyce and Stuart, 2021; Hernandez et al., 2024). Finally, behavioural influence practice refers to the application of behavioural science techniques combined with automated decision-making and monitoring mechanisms to subtly guide and optimise worker actions and decisions, enhancing productivity and engagement (Wang et al., 2022; Uzunca and Kas, 2023).

Among the practices identified above, the platform worker's performance evaluation practice was selected for the implementation of the BCTrustAI.SL. It could generate mistrust due to its potential for discrimination (Grgurev and Radic, 2023) and intrusive surveillance (Mettler, 2024) via automated decision-making and monitoring mechanisms. These systems can exacerbate existing bias or data inaccuracy, leading to unjust evaluations and possible economic or reputational damage to workers (Jahanbakhsh et al., 2020; Fredman et al., 2020). The opaqueness of these processes and workers' inability to challenge or comprehend the rationale behind evaluations intensify feelings of mistrust and vulnerability (Chen et al., 2023). Along with biased decision making and lack of transparency, the invasive monitoring aspect of these systems involves excessively tracking worker activities and behaviours, which can feel overbearing and contribute to a lack of trust (Mettler, 2024). The platform worker's performance evaluation practice involves both automated decision-making and monitoring mechanisms and is prominently utilised across digital labour platforms (Dunn, 2020; Duggan et al., 2020).

2.2 Regulatory Landscape: Exploring the Background of the Directive and the Provisions of Its Algorithmic Management Sections

To better understand the regulatory framework surrounding digital labour platforms, it's crucial to delve into the Directive 2024/2831. Particular emphasis should be placed on the four key requirements. By examining these requirements, it is possible to study how they safeguard platform workers, and ensure that the development, deployment and use of automated decision and monitoring systems remains transparent, fair and accountable. Art. 9 mandates the disclosure of the use and specifics of automated monitoring and decision-making systems that impact their work conditions. It requires platforms to inform workers about the monitoring of their actions and the automated decisions that could affect their job security, earnings, and working conditions. This information must also be available to workers' representatives and labour authorities upon request. Art. 10 requires from the platforms monitoring and evaluating the impact of decisions made or supported by automated systems on workers' conditions, specially assessing potential risks to their health and safety. To safeguard these conditions, platforms should employ sufficiently trained and competent human personnel to oversee these systems. Article 11 establishes the right of platform workers to seek explanations and human review of decisions made by automated systems that significantly affect their working conditions. It mandates digital labour platforms to provide workers access to human contact to discuss the circumstances and rationale behind such decisions. Articles 13 and 14 determine that digital labour platforms must engage in open dialogues with platform workers' representatives—or directly with workers in the absence of representatives—regarding decisions related to the implementation or significant modification of automated monitoring and decision-making systems. The aim is to foster social dialogue in AI governance.

Reviewing institutionalised European Union (EU)'s Regulatory Framework on AI (Joamets and Vasquez, 2020, pp. 112, 115–122) shows that these four provisions highly align with the elements of the trustworthy AI concept proposed by EU (Göksal et al., 2025). The Ethics Guidelines, published in 2019 by the Independent High-Level Expert Group on Artificial Intelligence (AI HLEG)[2] , have institutionalised trustworthiness as a core attribute of AI at the EU level. Art. 9 primarily addresses issues of transparency in automated decision and monitoring mechanisms, it is one key requirement according to the Ethics Guidelines to ensure trustworthiness of AI. Transparency ensures that all elements of the AI process are accessible, understandable, and verifiable by users and other stakeholders (AI HLEG, 2019, p. 18). Articles 10, 11, 13 and 14 have a link with accountability and human agency and oversight, these are another two key requirements in the Ethics Guidelines. Accountability mandates that AI systems and their operators are responsible for the outcomes of their actions, ensuring that AI operations are justifiable, traceable, and that any adverse effects can be adequately addressed (AI HLEG, 2019, pp. 19–20). And, the key requirement of human agency and oversight, advocating for the active involvement of platform workers or their representatives in the automated decision-making and monitoring processes. Human agency and oversight ensure that AI systems incorporate human input and direction effectively, allowing humans to retain control over AI decisions and to intervene or override AI operations whenever necessary. This ensures that AI systems enhance human capacities without replacing them,

[2] Independent High-Level Expert Group on Artificial Intelligence Set Up By The European Commission. (2019). Policy and Investment Recommendations for trustworthy AI.

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maintaining critical human control in sensitive and impactful AI applications (AI HLEG, 2019, pp. 15–16).

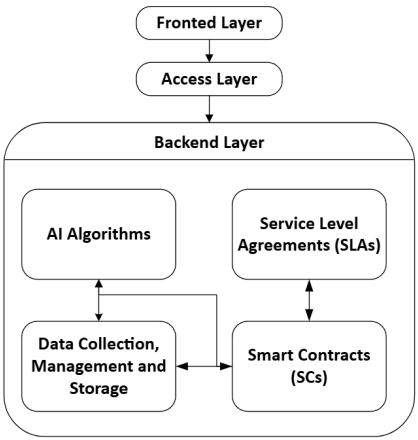
3. THE BLOCKCHAIN-BASED TRUSTWORTHY AI MODEL (BCTrustAI.SL)

This section presents the BCTrustAI.SL (Göksal and Solarte Vasquez, 2024), detailing its structure and functionality in three distinct parts. Firstly, the model's components will be introduced, subsequently, the workflow dynamics of the model, and finally, the discussion will explore how the model conforms and complies with the requirements of institutionalised trustworthy AI concept.

3.1 System Architecture

The BCTrustAI.SL's architecture is structured across two main tiers as seen in the Figure 1. The Backend Tier comprises five distinct intelligence layers: Access, Smart Contracts (SCs), Human Agency and Oversight (HAO), AI, and Data Governance. The Data Governance Layer is further segmented into two sub-layers, each containing four levels. The first, an Internet of Things (IoT) Device Sub-layer, handles data received and managed from IoT sources. The second, the Other Data Sub-layer, is responsible for data acquisition from various other sources through Web-based Platforms (WBPs).

Figure 1: Visualising the Blueprint of BCTrustAI.SL



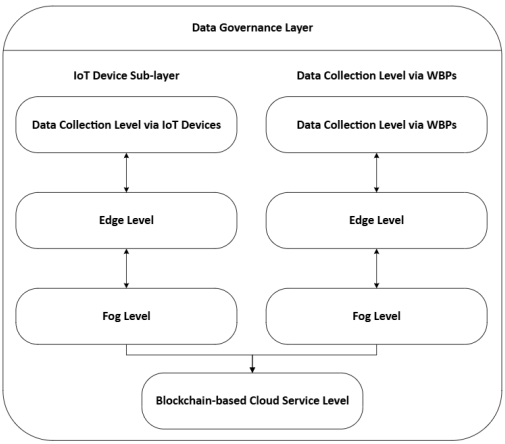
Source: The figure was created by the authors

Stakeholders interact with the system through the Frontend Tier with Decentralized Applications (DApps) component. The DApps should adhere to usability criteria, including heuristics for user-centric graphic design (Jang et al., 2020) and legally relevant attribution factors (Solarte-Vasquez and Nyman-Metcalf, 2017, p. 226–232). These interfaces allow stakeholders to select parameters and pre-coded Service Level Agreements (SLAs) for the HAO operations. In the Backend, the Access Layer serves as a crucial link between the two tiers, ensuring robust data connections between the DApps and the SCs. It supports multiple data transfer protocols to enhance system flexibility.

The SCs layer autonomously governs the system by executing data transactions based on parameters set by the SLAs. This layer has direct connections to the HAO, AI, and Data Governance layers. The HAO layer governs all operations related to AI governance mechanisms. From this layer, various protocols for impact assessments, user experience (UX) evaluations, and ethical compliance monitoring are initiated. The AI Layer contains algorithms for data processing and decision-making, including explainable AI (XAI) algorithms that clarify how these processes are conducted.

The Data Governance Layer oversees the storage and management of system data, which includes input, output, insights from training and analysis, as well as operational and raw data collected during various phases. This layer is organised hierarchically into levels and sub-layers specifically designed for data gathering as shown in Figure 2. One sub-layer specialises in IoT sources, while the other focuses on WBPs. Data collection is categorised into different levels: Data Collection, Edge, Fog, and a Blockchain-based Cloud Service levels. Data entry begins at the Data Collection Level within each sub-layer. The Edge Level houses intelligent base station nodes that collect and categorise external traffic data. The Fog Level consists of Fog Nodes essential for executing algorithms that manage resources, energy efficiency, and scalability in real-time on external traffic data. Finally, the common Blockchain-based Cloud Service Level, supported by its algorithmic intelligence, enhances system efficiency and fortifies the distributed storage with robustness and security through blockchain technology.

Figure 2: Visualising Data Governance Layer of the BCTrustAI.SL



Source: The figure was created by the authors

3.2 Operational Processes

In the operation, the BCTrustAI.SL system is activated when stakeholders use the DApps at the Frontend Layer. Here, they set their preferences within the pre-defined SLAs to suit their objectives. This action triggers the corresponding SCs that oversee and execute all algorithmic processes, including data collection, training, and analysis. The SLAs function as customisable templates designed to accommodate the specific terms and conditions required for each operation that the SCs undertake. These templates,

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which are multimodal, should be crafted by developers drawing on expert knowledge to represent various types of operations.

In the Data Governance Layer, raw data initially enters from IoT Devices or WBPs. In the first sub-layer, a network of diverse IoT devices and sensors connected in nodes generates raw data, which is sent to the Edge Level. AI-enabled Base Station Nodes utilise this IoT device network to gather a second type of input consisting of external traffic data. Both this and the data from WBPs undergo algorithmic evaluation at the Edge Level, focusing on scalability, load balancing, and other crucial network considerations. The first raw data inputs from both sub-layers advance to their respective Fog Levels, where AI-enabled fog nodes analyse the internal traffic of this data in real time, addressing network challenges as they arise. Subsequently, all this input, along with the initial output from traffic analysis in each sub-layer, is forwarded to the Blockchain-based Cloud Service Level. Here, the data is sorted, pre-processed, and stored. By this stage, all data has undergone some processing and is no longer considered 'raw'. The outcomes from this phase, excluding traffic-related data, become the primary input for the AI Layer, where core AI functions, such as data analysis or Machine Learning (ML) training, are carried out.

Data moves continuously and synchronously between the AI-enabled Blockchain-Based Cloud Service and the predictors. The primary data input is relayed to the AI Layer for algorithm training and analysis. A preliminary output, along with insights generated by the predictors, is then sent back to the Cloud Service Level at the Data Governance Layer for both storage and further HAO activities involving expert stakeholders and users. Ultimately, this initial output and insights are forwarded to the HAO Layer for evaluation and possibly additional HAO actions.

The final stages involve stakeholders interacting with DApps to define SLAs using a unique set of templates tailored for post-analysis/training HAO activities. The goal is to activate the SCs that handle transactions across the different layers. Ultimately, stakeholders hold the decision-making power, choosing to approve, reject, or request enhancements. These steps form a feedback loop subsystem, which is a critical part of implementing and enhancing AI governance mechanisms. If the final outputs are rejected, the training phases will restart, and the HAO cycles will continue until further adjustments are deemed unnecessary.

3.3 The Model's Conformity and Compliance with the Four Key Requirements

BCTrustAI.SL achieves the practical implementation of the abstract requirements of institutionalised trustworthy AI framework by establishing a robust and complex infrastructure that incorporates chosen technologies and principled processes. Along with other elements of trustworthy AI, this model ensures conformity with the three trustworthy AI key requirements that are crucial for the compliance with the four provisions outlined by the directive that are transparency, accountability and human agency and oversight.

BCTrustAI.SL excels in operationalising transparency through a multi-layered approach that integrates blockchain technology and advanced algorithmic processes. This robust integration ensures that every transaction and decision made by the AI system is recorded on a decentralised ledger, enabling traceability, a foundational element of transparency. Beyond mere traceability, BCTrustAI.SL also places a strong emphasis on communication and explainability, crucial elements of transparency. The system employs XAI predictors to elucidate the reasoning behind its decisions, making these processes accessible and comprehensible to all stakeholders. Additionally, the

model utilises communication protocols with its HAO layer to ensure solid human agency and oversight. This focus on traceability, explainability, and communication ensures that transparency in BCTrustAI.SL is not merely theoretical but a practical reality, deepening on the operational life of the AI system.

In terms of accountability, BCTrustAI.SL's architecture supports the identification of decision-making processes, which can be attributed to specific AI actions. This capability is crucial for maintaining the scrutiny and accountability of AI/ML applications. According to Felzmann et al. (2020, p. 3338), meeting transparency key requirement fosters a stronger accountability by ensuring that actions are both visible and justifiable to all stakeholders.

The model also facilitates extensive human agency and oversight by incorporating mechanisms such as human-in-the-loop (HITL) (Wu et al., 2022, p. 2), human-on-the-loop (HOTL) (Li et al., 2020), human-in-command (HIC) (Johnson, 2023), and stakeholders-in-the-loop (SITL) (Göksal and Solarte Vasquez, 2024) across its operational phases. These mechanisms ensure that human judgement is integral in training, monitoring, and retraining processes, enhancing the system's adherence to ethical standards and regulatory compliance. Together, these features establish BCTrustAI.SL not just as a tool, but as a partner in decision-making, elevating the standard for human-centred AI applications.

4. IMPLEMENTATION OF BCTrustAI.SL INTO THE AUTOMATED PLATFORM WORKER'S PERFORMANCE EVALUATION PRACTICE

This section will focus on the automated platform worker's performance evaluation practice, specifically its components, stakeholders, and operational dynamics. The implementation of the BCTrustAI.SL model into this practice will be explored.

4.1 Overview of Automated Performance Evaluation Practices

Automated Performance Evaluation (APE) Systems for platform workers encompass a series of interconnected *components* that are Data Collection and Algorithmic Evaluation (Waldkirch et al., 2021). Data Collection Mechanism refers to the systematic acquisition of specific, quantifiable information related to the activities and outcomes of platform workers. This component focuses on capturing a wide array of performance-related data points such as task completion times, customer ratings, adherence to schedules, and acceptance rates for assigned tasks. The scope and nature of the data collected are tailored to the particular requirements and operational nuances of the platform (Fredman et al., 2020). The Algorithmic Evaluation Mechanism processes the collected data to assess platform worker performance. This mechanism employs AI predictors to analyse the gathered metrics, calculating performance scores based on predefined criteria such as efficiency, reliability, customer satisfaction, and rule compliance. These predictors are designed to provide an evaluation and focus on measurable outcomes (Park and Ryoo, 2023).

In the ecosystem of APE System, the stakeholders include platform workers, platform operators, customers, developers, and data scientists, analysts and engineers (Jahanbakhsh et al., 2020; Waldkirch et al., 2021). Platform workers are the individuals engaged in completing various tasks assigned through the platform, whose performance is directly evaluated based on metrics described above. They are essential to the operational dynamics of the platform as their performance data fuels the APE System, influencing not only their immediate job opportunities and earnings but also their long-

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term career prospects within the digital platform environment (Gallagher et al., 2023). Platform operators are entities or individuals who manage and oversee the functioning of the platform, responsible for setting the operational parameters and standards that define the working environment. They configure and maintain the performance evaluation system, ensuring that it aligns with broader business objectives and regulatory requirements. As key stakeholders, their role is critical in balancing the needs of customers and platform workers, while ensuring that the platform remains competitive and compliant with industry standards. Through their oversight, platform operators directly influence the effectiveness and integrity of the APE System, shaping the overall platform ecosystem (Harmon and Silberman, 2019). Customers refer to the end-users who utilise the platform to engage services offered by platform workers. They provide feedback and ratings based on their interactions and satisfaction with the services received. This input is important for the data collection mechanism of the performance evaluation system, as it directly influences the performance scores of platform workers (Lu et al., 2024). Developers and data scientists, analysts and engineers are two different actors in the APE System for the backend (Ahopelto, 2023). Developers are professionals who build, implement, and maintain the technical aspects of the APE System. They ensure the platform's infrastructure supports all functionalities related to performance evaluation, from data entry interfaces to the complex backend processes that handle data storage and processing. Their work is essential for the smooth operation and scalability of the system, as they address both immediate technical issues and long-term software enhancements (Shestakofsky and Kelkar, 2020). Data scientists, analysts and engineers are experts who specialise in analysing large sets of data and developing algorithms that process and interpret this information within the APE System. They apply statistical analysis and machine learning techniques to derive actionable insights from performance data, which inform the algorithmic evaluation mechanisms. Their contributions are critical in designing predictive models that assess worker performance fairly and accurately, ensuring that the system's outputs are both reliable and transparent (Basukie et al., 2020).

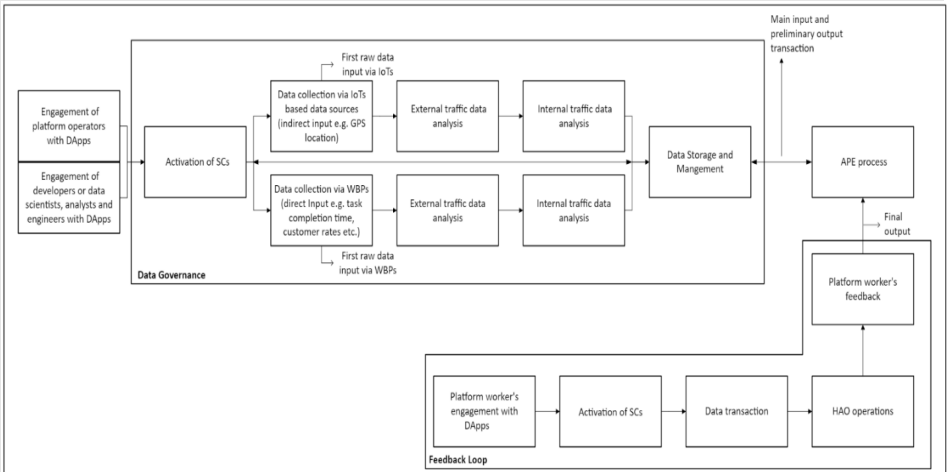
The *operational workflow* of the APE System as described by Waldkirch et al. (2021) is a sophisticated sequence that begins with the Data Collection Mechanism, where data about platform workers' activities and outcomes, such as task completion times, customer ratings, schedule adherence, and task acceptance rates, are gathered continuously. This mechanism uses various data sources and collection methods to ensure a holistic view of worker activities and outcomes. The primary source of data includes direct inputs from the platform's digital interface, where task completion times are logged, customer ratings are recorded, and worker adherence to schedules is monitored. Each interaction or transaction made by a worker is automatically tracked by the system, capturing details such as the time taken to complete tasks, the quality of service delivered as rated by customers, and the frequency and timeliness of task acceptance and completion (Rosenblat et al., 2017; Chan, 2019; Alasoini et al., 2023). In addition to these direct measures, the system also integrates indirect input such as GPS tracking for location-based tasks, which helps in monitoring route efficiency and punctuality in real-world settings. This is particularly relevant for delivery and transportation services where geographical movement and time efficiency are critical performance indicators (De Stefano and Aloisi, 2018). This data is then fed into the Algorithmic Evaluation Mechanism, where AI predictors analyse the metrics to assess each worker's performance. These predictors calculate performance scores based on criteria like efficiency, reliability, customer satisfaction, and compliance with rules (Harmon and Silberman, 2019). Throughout this process, developers and data scientists,

analysts and engineers monitor and refine the technical and analytical aspects of the system, ensuring its accuracy, while platform operators use the insights generated to make informed decisions about operational changes, data updates and strategic directions (Wu et al., 2022).

4.2 The Implementation of BCTrustAI.SL with APE System

After the system is implemented, it will be activated when platform operators interact with the DApps at the Frontend Layer. Operators select the parameters from pre-defined SLAs related data collection and APE process. These initiate the corresponding SCs that execute all algorithmic operations. The SCs begin the data gathering and analysis needed to evaluate platform worker's performance, which takes place across two sub-layers: the Data Governance Layer and the AI Layer, the latter utilising AI and XAI predictors. The stages and operational flow of the implementation are illustrated in Figure 3.

Figure 3: Operational Processes of APE System after Implementation



Source: Original chart prepared by the authors.

When platform operators interact with the DApps to activate the related SCs, the data collection process begins. During this phase, the system gathers the raw data as well as internal and external traffic data for analysis. Subsequently, this collected raw data is analysed using AI and XAI predictors to evaluate the performance of platform workers. After the analysis, a preliminary output is generated.

In addition to platform operators, developers, data scientists, analysts, or engineers also need to engage with the DApps to oversee the data collection and analysis processes. The raw, external and internal traffic data from the collection process are collected and stored along with preliminary and final outputs from the analysis process in a Blockchain-Based Cloud Service. When the stakeholder activates a relevant SC, the necessary data is retrieved from the Blockchain-Based Cloud Service to carry out the oversight process.

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Specifically, storing the raw data, preliminary outputs, and final outputs in the Blockchain-Based Cloud Service, and making them accessible to all stakeholders as needed, is critical to meeting the traceability aspect of the transparency key requirements (Mora-Cantallops et al., 2021). Along with the traceability aspect, ensuring the accessibility of communication for all stakeholders is crucial. This is because the user-centric design of the DApps will provide an interface that facilitates easy access to all necessary data regarding automated decision-making and monitoring processes, ensuring clear communication across stakeholders (Solarte-Vasquez and Hietanen-Kunwald, 2020, pp. 186–191). Furthermore, the aspect of explainability will be achieved through the use of XAI predictors located within the AI Layer. For instance, if a platform worker wants to understand the reasons behind a recent decrease in their performance rating, the XAI predictors can generate a detailed breakdown of the contributing factors, such as changes in customer satisfaction scores or task completion times (Hassija et al., 2024). This detailed feedback could allow the worker to identify specific areas for improvement and directly address any concerns about the fairness or accuracy of the evaluation process.

Just like the communication aspect of transparency, providing a user-centric interface through the DApps will successfully meet the key requirement of human oversight by allowing all stakeholders to interact with the system effectively (Sharp et al., 2021). This ensures that stakeholders can monitor and evaluate the impacts of automated decisions on platform workers. For example, platform operators can use these interfaces to track real-time data flows and AI decision logs, which include details on how decisions such as task assignments or performance evaluations are made. This capability could enhance immediate human intervention when necessary to correct or modify AI decisions that may adversely affect platform workers, thereby supporting a more dynamic and responsive governance model (Hadzovic et al., 2024).

Ensuring transparency and facilitating human review inherently strengthens accountability—a key requirement tightly interwoven with transparency (Felzmann et al., 2020, p.3338). Consequently, this aligns closely with the Directive 2024/2831, which proposes specific measures for human review to ensure accountability within digital labour platforms. For instance, platform workers could challenge and seek clarification on automated decisions that impact their work schedules and compensation. If a worker notices a sudden decrease in allocated tasks or an unexpected change in pay rates, they can request a human review of the algorithm's decision. And the authorised human can review the related automated process on the row data, the parameters of predictors and preliminary and final outputs by activating related SC to receive data via DApps.

With the implementation, besides data collection and analysis, the APE System will also include a feedback loop as mandated by the directive under Article 13 and 14. Platform workers may engage with the DApps, activating the relevant SC. This SC will then manage the HAO operation, providing feedback on the preliminary outputs generated post-analysis. This feedback will inform the creation of the final outputs, completing in that way the APE process. For example, platform workers will be able to directly interact with the data that has been used to evaluate them, querying the system for further details or discrepancies they perceive in their ratings. They can submit corrections or provide additional context, which may alter how their performance is ultimately assessed and reported. This capability ensures that the evaluation process remains dynamic and interactive, rather than static and unilateral (Lin et al., 2020).

5. CONCLUSION

Advancements in AI and ICT have led to catalysing digital labour platforms that use AI for decision-making and monitoring. However, concerns regarding fairness, transparency, and accountability in these practices have eroded stakeholder trust. In response, the European Commission introduced the Directive 2024/2831, which outlines four key requirements to enhance these aspects, but the directive's key requirements are often considered too vague for practical application on digital labour platforms. Thus, this paper explained that the implementation of BCTrustAI.SL into the selected automated decision-making and monitoring mechanism (Platform Worker's Performance Evaluation Practice) operationalises the directive's provisions and validates the model conceptually.

BCTrustAI.SL was designed as a socio-technical proposal that conforms and complies with the elements of the institutionalised trustworthy AI framework, encapsulating the four key requirements specified in the Directive 2024/2831. Following its implementation, the APE System has the capacity to enhance fairness, transparency and accountability:

- becoming transparent as Art. 9 mandates. Because it is founded on blockchain technology, every transaction and decision made by the AI system is recorded on a decentralised ledger, enabling traceability. It also uses XAI predictors to clarify decision-making processes, making them understandable to the stakeholders. Additionally, it uses communication protocols in its HAO layer to facilitate robust stakeholder interactions.
- becoming accountable and ensures human review as Article 11 requires. The implemented APE System, based on blockchain architecture, supports the identification and attribution of decision-making processes to specific AI actions.
- allowing human oversight and information and consultation as required in Article 10, 13 and 14 by promoting extensive human interaction through various AI governance mechanisms during operational phases. These mechanisms integrate human judgment in training, monitoring, and retraining processes, boosting the system's conformity and compliance with ethical standards and regulations.

With the implementation, the APE System may have potential for significant advancements in conformity and compliance with the directive's four key requirements. However, the underlying infrastructure of blockchain technology currently lacks the capacity to fully support the BCTrustAI.SL model's integration into automated platform worker performance evaluation practices. Thus, it is essential to focus on enhancing the capacity of blockchain technology to accommodate larger datasets and facilitate broader stakeholder interaction. This advancement requires targeted research and development efforts. Additionally, there is a need to concentrate on the practices and algorithms employed by digital labour platforms. By focusing more on these areas in academic research, there is an opportunity to improve the effective implementation.

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HOW HUMANITARIAN AND HUMAN RIGHTS LAW SHAPE CONFLICTS WITHIN STATES

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Abstract: *This paper explores the legal status of non-international armed conflicts (NIACs) under international humanitarian law (IHL) and international human rights law (IHRL). It examines treaty and customary law provisions governing NIACs, focussing on the threshold of violence that distinguishes these conflicts from internal disturbances and the involvement of non-state actors. Identifying the applicable legal framework is crucial for ensuring compliance with international law, but determining when a situation escalates to an armed conflict is challenging due to the lack of a precise legal definition. The article delves into key issues such as protecting civilians and their rights in NIACs, emphasising the complexities these situations present. By addressing these challenges, the study advocates for greater accountability among parties to these conflicts. It underscores the urgent need for clearer guidelines and consistent implementation to uphold legal norms and safeguard human rights during internal armed conflicts.*

Using a doctrinal approach, the research analyses legal texts, treaties, and case law to clarify the boundaries and intersections between IHL and IHRL. It also reviews state practices and judicial decisions to better understand how these bodies of law interact and the factors that influence the classification of a situation as an armed conflict. The article aims to enhance legal clarity and promote uniform application in addressing the unique challenges of NIACs.

Key words: *Non-International Armed Conflicts; International Humanitarian Law; International Human Rights Law; Legal Framework; Challenges*

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1. INTRODUCTION

News coverage and social media often focus on armed conflicts involving non-state armed groups, highlighting the prevalence of non-international armed conflicts (NIACs). These conflicts are characterised by the involvement of a variety of non-state actors, such as armed dissident groups,[1] paramilitary forces, guerrillas, and ethnic or vigilante groups (Franco, 2004). Countries such as Myanmar, Syria, Mali, Sudan, and Colombia have experienced prolonged NIACs, some lasting for decades. However, NIACs are not a modern phenomenon; they have existed long before the rise of the modern state (Dinstein, 2021). Historical examples include the civil wars of the Roman Republic, the fitna of the Islamic Caliphate, and the internal battles of the Chinese Empire. The

[1] Inter-American Commission on Human Rights, Inter-American Yearbook on Human Rights OEA/Ser.L/V/II.102 doc. 9 rev. 1 (1999), Chapter IV.

American Civil War (1861-1865) and the Spanish Civil War (1936-1939) are modern examples that left significant historical impacts (Dinstein, 2021).

Over the past 50 years, NIACs have resulted in genocide and mass killings in Bosnia, Cambodia, Congo, and Rwanda. In the postcolonial period, numerous nations have suffered severe losses due to ongoing NIACs, with some still unresolved or at risk of re-erupting. Despite the brutality of these conflicts, international humanitarian law (IHL) recognises and regulates the conduct of armed groups during such conflicts, while international human rights law (IHRL) traditionally does not extend a similar recognition. However, IHRL is increasingly invoked to establish a clearer legal framework to address the "*shadowland*" between IHL and IHRL in NIACs (Kooijmans, 1999).

The Colombian conflict, Latin America's longest-running conflict, began in the 1960s and involves government forces, rebel groups, and paramilitaries. Political concerns and fears of legitimising rebel groups have made the Colombian government hesitant to grant them legal status. For instance, during the Uribe administration (2002-2010), the government refrained from labelling the situation as an "*armed conflict*", instead classifying it as a "*terrorist threat*" (Rosero, 2013). This reluctance stemmed from fears of conferring belligerency status to the Revolutionary Armed Forces of Colombia (FARC), which would have granted the group a degree of international legal recognition. However, under contemporary IHL, formal recognition is not required for a situation to qualify as an armed conflict, which means that the government could acknowledge the conflict without granting political status to the groups involved.

The international community often hesitates to acknowledge conflicts involving non-state armed groups (NSAGs) due to concerns over legitimising them. For example, it took years to formally recognise the NIAC in Syria, which began in 2011 (Blank and Corn, 2013). This reluctance stems from fears that granting recognition under international law could contradict their domestic classification as unlawful combatants. This caution is evident in the language of Additional Protocol II, which deliberately avoids referring to armed groups as *"parties."* While Common Article 3 of the Geneva Conventions and Additional Protocol II impose obligations on NSAGs in NIACs, the extent of their role in shaping International Humanitarian Law (IHL) remains contentious (Hiemstra and Nohle, 2018). States resist ceding lawmaking power to NSAGs, and domestic definitions of such groups vary significantly. For example, Syria rejected the classification of its conflict by the ICRC as a NIAC, highlighting the political sensitivities involved.

The recognition or nonrecognition of armed groups has profound legal and political implications, influencing the application of IHL, civilian protection, and accountability for war crimes. Non-recognition can also hinder humanitarian negotiations and complicate civilian safety (Abboud, 2016).

This article examines the legal status and classification of NIACs within the framework of IHL and International Human Rights Law (IHRL). The research aims to analyse the evolving legal criteria and frameworks that determine the classification and regulation of NIACs under IHL and IHRL. It seeks to clarify the complexities in distinguishing NIACs from internal disturbances, assess how NIAC standards have been applied in practice, and evaluate the challenges states face in accepting international scrutiny over internal conflicts. In addition, the study investigates how recent developments in conflict dynamics and international jurisprudence influence the interpretation and application of IHL in NIACs.

By examining treaty law, customary law, and international jurisprudence, the research aims to clarify the legal status of NIACs and how both IHL and IHRL can be

effectively enforced to ensure comprehensive protection of individuals during such conflicts.

2. THE KEY DEVELOPMENTS

2.1 Connecting Human Rights and Humanitarian Law in Times of Conflict

Armed conflict and widespread violations of fundamental human rights persist despite efforts by the international community. Each crisis underscores the inadequacies of international law, which often seems powerless to prevent even the gravest atrocities, such as genocide in Bosnia, Rwanda, etc. To many, international law appears insufficient to address these violations effectively. Although international lawyers may not fully agree with this bleak assessment, they recognise the theoretical challenges in addressing these issues. Human rights and humanitarian law, though providing a framework of standards, do not offer straightforward solutions to prevent violations of human dignity during war and peace.

On the other hand, significant progress has been made in establishing international norms, with a robust body of human rights and humanitarian law. These rules, while comprehensive, remain incomplete and must evolve to address emerging challenges. Developments such as the establishment of the International Criminal Court and the jurisprudence of tribunals for former Yugoslavia and Rwanda signal progress. However, creating new norms and institutions alone cannot adequately protect individuals. Understanding the root causes of violations, a task often undertaken by sociologists and political scientists, is critical along with exploring the potential of existing legal instruments.

Comparative law offers a promising approach by examining how different legal systems address similar issues, allowing for cross-pollination of solutions. A comparative analysis of human rights and humanitarian law reveals shared goals, such as protecting human integrity, and highlights opportunities for mutual adaptation. In the following section, we will investigate the evolution of systemic similarities and differences between IHL and IHRL legal regimes to evaluate the potential of comparative approaches in addressing violations.

2.1.1 History Separated but Interrelated

The Westphalian system established sovereign equality and non-intervention as central principles, emphasising reciprocal obligations between states. However, the rise of human rights law and the law of armed conflict in the past century has eroded these principles by extending international law into the domestic sphere. International humanitarian law (IHL), one of the earliest branches of public international law, initially focused on state relations and developed from customary law (Schindler, 2003). Some IHL principles date back to the Middle Ages and include concepts like chivalry (e.g., Charter of Medina, Bill of Rights of 1688). Its formalisation began with the 1864 Geneva Convention,[2] followed by various accords aimed at protecting individuals during armed conflicts. IHL emerged from concerns for war victims, while IHRL originated from addressing domestic atrocities, such as the Nazi death camps (Cerna, 1989).

Initially, the connection between IHL and IHRL was overlooked due to the emerging status of IHRL and the concerns of the UN that the integration of IHL might

[2] Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 22 August 1864.

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undermine the *jus contra bellum* principles. The 1948 Universal Declaration of Human Rights did not address human rights in armed conflict, and this issue was also absent during the drafting of the 1949 Geneva Conventions.

Post-World War II legal advancements, such as the Nuremberg Trials, the Genocide Convention, and the Geneva Conventions, marked a shift in international law from a state-centric to an individual-centric approach. Common Article 3 of the 1949 Geneva Conventions established the complementarity of IHL and IHRL by ensuring humane treatment for noncombatants in non-international armed conflicts (NIACs), prohibiting violence against their life, integrity, and dignity.[3] The existence of such conflicts does not absolve States from their obligations under the American Convention for all persons under their jurisdiction. The United Nations gradually acknowledged the relevance of human rights in armed conflicts. In 1953, the General Assembly invoked human rights during the Korean conflict,[4] and in 1956, the Security Council urged the Soviet Union to respect fundamental rights after invading Hungary.[5]

The interplay between human rights and humanitarian law gained prominence in the late 1960s and early 1970s. By the late 1960s, IHL faced stagnation, while IHRL law flourished, marked by the adoption of the 1966 International Covenants on Civil and Political Rights and Economic, Social, and Cultural Rights, and even more. Given the pressing need to protect victims of conflicts in regions such as Algeria, Nigeria, and the Middle East, a partial integration of human rights and humanitarian law appeared pragmatic.

The 1968 UN International Conference on Human Rights in Tehran significantly advanced this integration. The conference, influenced by the political climate of decolonisation and conflicts like the Six-Day War (Chen, 2021), adopted resolutions combining human rights and humanitarian law principles.[6] For example, Resolution XXIII, adopted at the Conference, emphasised that even during armed conflicts, humanitarian principles must prevail and linked peace with the full observance of human rights. Although its language was vague, the resolution marked a change in how the relationship between human rights and humanitarian law was conceptualised. Resolution XXIII was reiterated in 1968 by UN General Assembly Resolution 2444, entitled "*Respect for Human Rights in Armed Conflicts*," which mandated the Secretary-General to suggest steps to improve the protection of individuals during armed conflict.[7] Subsequent reports by the Secretary-General in 1969 and 1970, titled "*Respect for Human Rights in Armed Conflicts*", significantly contributed to the view that human rights and humanitarian law are closely intertwined.

Building on these reports, the General Assembly adopted Resolution 2675 in 1970, affirming that fundamental human rights, as established in international law, remain fully applicable in armed conflict.[8] These resolutions, leading to the 1977

[3] IACtHR, *Case of the Serrano-Cruz Sisters v. El Salvador*, Judgment, Preliminary Objections, Series C, No. 118, November 23, 2004.
[4] GA Res 804 (VIII) (3 December 1953) UN Doc A804/VIII.
[5] GA Res 1312 (XIII) (12 December 1958) UN Doc A38/49.
[6] A/7720, Report of the Secretary General (1969), Respect for human rights in armed conflicts, 11 para. 19. Available at: https://documents.un.org/doc/undoc/gen/n69/254/40/pdf/n6925440.pdf (accessed on 04.04.2025).
[7] A/RES/2444(XXIII), Resolution of UN. General Assembly (23rd sess. : 1968), Respect for human rights in armed conflicts, 263. Available at: https://digitallibrary.un.org/record/202681?v=pdf (accessed on 20.11.2024).
[8] A/RES/3238(XXIX), Resolution of UN. General Assembly (29th sess. : 1974-1975), Restoration of the lawful rights of the Royal Government of National Union of Cambodia in the United Nations, 269. Available at: https://digitallibrary.un.org/record/189985?ln=en&v=pdf (accessed on 04.04.2025).

Additional Protocols, reflected existing links between the two bodies of law rather than introducing entirely new concepts.[9]

Both human rights and humanitarian law share a core humanitarian concern, although their historical development and scope differ. Humanitarian law, rooted in regulating wartime conduct, predates human rights law but has been influenced by humanitarian values expressed in the Martens Clause of the 1899 and 1907 Hague Conventions and later documents. The Martens clause states that populations and belligerents are protected by international law, based on usages between civilised nations, humanities laws, and public conscience, even in cases not covered by the current Regulations.[10] While human rights law primarily addresses state-individual relationships in peacetime, it draws from humanitarian principles, as seen in the influence of the Universal Declaration of Human Rights on the 1949 Geneva Conventions.

The two bodies of law have influenced each other's evolution. For example, the prohibition of genocide stems from the wartime concept of crimes against humanity, while human rights principles have shaped humanitarian law provisions such as non-discrimination and protections against torture. The 1977 Additional Protocols incorporate human rights principles, such as those reflected in Article 75 of Protocol I, resembling provisions in the International Covenant on Civil and Political Rights.[11]

Scholars proposed the theory of complementarity, suggesting that IHL and IHRL, while distinct, are mutually supportive (Cassimatis, 2007). Three main arguments support this view. First, IHRL fills gaps in IHL, especially where IHL is unclear or limited. For instance, fair trial rights in human rights treaties are broader than those in the Geneva Conventions and Additional Protocols. Second, IHRL offers mechanisms for implementing IHL, as individuals often turn to human rights bodies to address IHL violations due to limited IHL enforcement options. This fills an institutional gap, promoting a pro-human rights perspective in IHL. Third, humanitarian considerations have influenced IHL since the late 19th century, replacing concepts like reciprocity, as seen in the Martens Clause (Shanks-Dumont, 2020).

Despite efforts to align human rights and humanitarian law, significant differences persist, particularly in their scope and relationships. Human rights law primarily governs state-individual interactions during peacetime, focussing on fostering harmony and supporting individual development. In contrast, humanitarian law addresses relationships during wartime, particularly between belligerent states, combatants, and protected persons, and is inherently grounded in hostility.

Recent developments have narrowed these gaps, with crossovers emerging in areas such as "*third generation*" rights in human rights law, which emphasise global solidarity, and the expansion of humanitarian law through instruments like common Article 3 of the 1949 Geneva Conventions. Despite overlaps, these frameworks remain distinct, reflecting divergent purposes—human rights emphasise protecting individuals' dignity and freedoms, while humanitarian law balances humanity with military necessity.

[9] Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949. Available at: https://www.icrc.org/en/publication/0421-commentary-additional-protocols-8-june-1977-geneva-conventions-12-august-1949 (accessed on 10.11.2024).

[10] Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899, par. 69; Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, par. 77.

[11] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

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Both systems share a foundation in humanitarian values, yet their practical applications differ. For example, while human rights law prohibits acts like torture in all circumstances, humanitarian law considers such norms in the context of armed conflict. These nuances require careful comparative analysis to avoid oversimplification or misapplication.

The interaction between these systems is multifaceted, encompassing concurrent applicability in armed conflicts, areas of substantive superiority, and gaps in protection (Provost, 2002, p. 10). Efforts such as the proposed Declaration of Minimum Humanitarian Standards[12] aim to address deficiencies, while systemic comparisons reveal structural and substantive insights. Adopted in 1990, the declaration has no formal legal status as a binding treaty (Petrasek, 1998). Instead, it is considered soft law, representing expert consensus on minimum humanitarian standards applicable in all situations of violence and conflict (Crawford, 2012). It acknowledges that in internal conflicts, normal constitutional and legal safeguards often fail, making it necessary to define fundamental protections.

The declaration fills a critical legal gap in NIACs, where both IHL and IHRL may be inadequate. IHL, particularly Common Article 3 and Additional Protocol II to the Geneva Conventions, applies only to conflicts that meet specific intensity thresholds, leaving many so-called *"grey-zone conflicts"* unregulated (Crawford, 2012). Similarly, human rights law can be insufficient due to the limited scope of non-derogable provisions, weak international enforcement mechanisms, and challenges in legally defining conflict situations (Meron and Rosas, 1991). The declaration specifically targets "*grey-zone conflicts*", which do not meet the criteria for applying IHL but still involve significant violence. Although efforts to formally adopt the declaration at the United Nations have stalled, the concept of fundamental standards of humanity has gained traction. The declaration remains an important reference in discussions on protecting human rights and human dignity in conflicts that fall outside the traditional IHL and IHRL frameworks.

By exploring selected themes, normative frameworks, reciprocity, and the translation of norms into practice, this analysis seeks to deepen understanding and inform the development and application of both legal regimes.

2.2 How Human Rights and Humanitarian Law Differ on Individual Rights

Human rights and humanitarian law differ significantly in their approach to individual rights and procedural capacities. Human rights law emphasises granting positive rights to individuals, empowering them to enforce these rights through recognised procedural mechanisms. On the contrary, humanitarian law protects individuals' interests without necessarily granting enforceable rights, often relying on states or other entities to act on behalf of individuals.

International law, traditionally state-centric, has grappled with the dissociation of rights from enforcement. The case law highlighted that procedural incapacity to enforce a right does not negate the existence of the right itself.[13] States, for example, can act on behalf of individuals in international forums, as seen in cases brought to the United Nations Compensation Commission (Lauterpacht, 1950, p. 27). However, mechanisms that allow individuals direct access to enforcement bodies, particularly under human rights law, create rights that are more substantive and actionable.

[12] Declaration of Minimum Humanitarian Standards Adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, in Turku/Åbo Finland, 2 December 1990.
[13] Peter Pázmány University v. Czechoslovakia, (1933) PCIJ Reports, Ser. A/B No. 61, par. 231.

This distinction reflects the broader normative framework of the two systems. Humanitarian law focusses on safeguarding individuals' fundamental interests during armed conflicts, often mediated through states or collective protections. In contrast, human rights law directly empowers individuals, emphasising personal development, dignity, and state accountability. Despite these differences, the two systems share a fundamental concern for protecting human interests, albeit through distinct methods and mechanisms.

International human rights law unequivocally grants individuals basic rights directly. In cases involving injuries to foreign nationals, there is some debate on the rights-holder, as the offending party is not the individual's state of nationality. However, in human rights law, the state of nationality often emerges as the violator, leaving the individual, or occasionally a group or people, as the sole rights-holder (Henkin, 1979). Attempts to frame human rights primarily as state obligations have generally been met with resistance, emphasising the individual-centric nature of this legal framework. For example, the 1983 ASEAN Declaration of Basic Duties of Peoples and Governments was seen as challenging the universality of human rights rather than providing a viable alternative (Blaustein, Clark and Sigler, 1987).

Human rights apply universally and unconditionally to individuals under the jurisdiction of states bound by international norms, regardless of nationality or location. Treaties like the European Convention on Human Rights and the American Convention on Human Rights broadly define jurisdiction as the power of state, not just its territorial limits.[14] This interpretation establishes that states are responsible for upholding human rights even in territories under their effective control abroad. On the contrary, restrictive formulations such as those in Article 2(1) of the International Covenant on Civil and Political Rights, which binds obligations to the territory and jurisdiction of a state, have been challenged for excluding individuals from occupied or foreign territories.[15]

The direct applicability of many human rights norms underscores their nature as individual rights. These norms often do not require any further legislation to be invoked in national courts, as seen in the European Convention on Human Rights and the International Covenant on Civil and Political Rights. While not all international norms are self-executing, their applicability strengthens the individual's ability to claim rights within municipal legal systems.

Human rights law also reflects broader public policy concerns, as evident in mechanisms such as interstate petitions under human rights conventions and the ability of the European Court to continue cases in the general interest despite the withdrawal of a petitioner.[16] This universality and individual focus distinguish human rights law, ensuring that individuals enjoy rights against any state bound by international norms, irrespective of their geographic or political context.

On the other hand, the normative framework of humanitarian law, aimed at reducing human suffering during armed conflicts, does not grant rights to individuals as explicitly as human rights law does. Early conventions, such as the 1864 Geneva Convention, emphasised protecting human dignity without mentioning rights. This absence continued in the 1899 and 1907 Hague Regulations, with the concept of "*rights*"

[14] ECtHR, Cyprus v. Turkey, app. no. 6780/74 and 6950/75, 26 May 1975; ECtHR, Loizidou v. Turkey (Preliminary Objections), app. no. 15318/89, 23 March 1995, par. 310.
[15] International Covenant on Civil and Political Rights, 16 December 1966, General Assembly resolution 2200A (XXI).
[16] European Convention on Human Rights, Article 37 (1). Available at: https://www.echr.coe.int/documents/d/echr/Convention_ENG (accessed on 12.10.2024).

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first appearing in the 1929 Geneva Convention Relative to the Treatment of Prisoners of War.[17] The 1949 Geneva Conventions, influenced by the Universal Declaration of Human Rights, included explicit references to the "*rights*" of protected persons (Pictet, 1958, p. 77). Key provisions of the 1949 Geneva Conventions indicate dual ownership of rights by individuals and states.[18] These provisions prohibit states from waiving rights conferred upon individuals and prevent individuals from renouncing their protections. This dual ownership allows both individuals and states to act independently to enforce these rights. However, the practical enforceability of these rights remains limited. For instance, prisoners of war have few mechanisms to act on their rights while in detention, and states are constrained by the realities of conflict.[19] The rights referenced in the Conventions are better understood as minimum standards of treatment rather than enforceable individual rights. For example, the prohibition on derogations through special agreements reflects the establishment of unalterable treatment standards rather than rights akin to those in human rights law (Provost, 2002, pp. 29-32). This distinction extends to other provisions. Article 85 of the 1949 Third Geneva Convention ensures that convicted war criminals retain protections under the Conventions. This principle, once contested, is now reaffirmed in Article 44(2) of the 1977 Protocol I, further emphasising that humanitarian law establishes obligations on states rather than rights for individuals (Dinstein, 1986, p. 345, 354–356). Similarly, Article 5 of the Fourth Geneva Convention, which suspends certain protections based on military necessity, illustrates that humanitarian law standards are tied to security concerns rather than individual entitlements.

The 1977 Protocols, while incorporating elements inspired by human rights law, largely retain the focus on treatment standards. For instance, Article 75 of Protocol I includes due process guarantees derived from Article 14 of the International Covenant on Civil and Political Rights but does not characterise them as individual rights. This reflects the broader trend in humanitarian law of emphasising obligations on states over direct individual rights.

In practice, the enforcement mechanisms of humanitarian law, centred on punitive measures against violations, align with its focus on public order rather than individual entitlements. Humanitarian law norms are generally not self-executing, reinforcing their role as standards of conduct imposed on states rather than rights granted to individuals. This framework reflects the overarching principle that humanitarian law, rooted in international public order, establishes obligations on those wielding power rather than granting actionable rights to individuals.

3. THE LEGAL STATUS OF NIACS

3.1 Understanding NIACs

The legal status of NIACs under international law remains complex. Early humanitarian law focused exclusively on interstate conflicts, excluding NIACs, such as civil wars, due to principles of non-intervention, recognition, and state sovereignty (Verzijl, 1978). The Hague Conventions of 1899 and 1907, for instance, applied only to state

[17] Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, Articles 42, 62, 64, 83 and 96.
[18] Common articles 6 and 7-8.
[19] Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, Article 60.

conflicts, protecting individuals as adversary objects, and relying on reciprocity among states.[20]

Since the 19th century, the nature of conflict has evolved significantly, particularly after World War II, leading to a considerable expansion in the regulation of NIACs. The rules governing NIACs today are viewed as an extension of the *jus in bello* norms applicable in international armed conflicts (IACs), which began developing a century earlier. Currently, most armed conflicts are of a non-international nature and take place within the borders of a single state, involving government forces and organised armed groups or, in some cases, multiple organised armed groups without direct state involvement.

The 1949 Geneva Conventions marked a milestone in humanitarian law by expanding protections, though they were primarily aimed at regulating interstate armed conflicts. Common Article 2 to the four Geneva Conventions states that the Conventions apply to all declared wars or any other armed conflicts between two or more High Contracting Parties, even if one party does not recognise a state of war. This absence of a definition has led to various academic (Dinstein, 2005), professional, and judicial efforts to clarify these terms, as seen in *Prosecutor v. Tadić*.[21]

International armed conflict generally refers to interstate conflict. According to the ICRC Commentary, when two states engage in hostilities, it is considered an armed conflict under Common Article 2 (Pictet, 1960). This applies even if one party denies the existence of a state of war. The duration of the conflict, the intensity of violence, or the number of forces involved are irrelevant. It is sufficient for the armed forces of one state to detain enemies under the parameters of Article 4. Even without active hostilities, the act of detaining protected persons is enough to trigger the application of the Conventions, regardless of the number of individuals apprehended.

There have been three key developments in defining NIAC (Crawford, 2010). The initial event took place in 1993 with the formation of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). These tribunals played a crucial role in elucidating the criteria for NIACs by assessing whether crimes occurred within the context of armed conflict and whether such conflicts were classified as international or non-international. The subsequent significant development arose in the aftermath of September 11, marked by the introduction of the phrase *"war on terror"*. This prompted inquiries into the classification of conflicts that extend beyond conventional boundaries and the applicable international law principles that should govern them. Some have contended that the *"war on terror"* signifies a development in customary international law (Lietzau, 2003, p. 80). However, the difficulty resides in pinpointing adversarial entities, be they terrorist organisations or individual actors. The hostilities in regions like Afghanistan and Iraq have been categorised as non-international armed conflicts, drawing upon Common Article 3, customary humanitarian law, human rights law, and relevant domestic legislation. Nonetheless, events such as the London and Madrid bombings were classified as criminal offences within the framework of international criminal law and human rights law, as opposed to being addressed under humanitarian law. The third significant moment occurred in 2016, when the ICRC Commentaries on the First Geneva Convention re-examined the concept of non-international armed conflict, with particular emphasis on Common Article 3 in response to developments following September 11th.

[20] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.
[21] ICTY, *Prosecutor v. Tadic*, Case No. IT-94-1, Appeal Decision, October 2, 1995.

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The commentaries offered a comprehensive analysis of the legal framework relevant to internal conflicts, considering the evolving nature of conflict dynamics.

3.2 Recognising Convenient Criteria

Determining what constitutes a NIAC remains contentious, with the concept evolving significantly in recent years. Contemporary NIACs, including asymmetric and transnational conflicts, differ from traditional NIACs of the past (Graham, 2012). Recognising an NIAC requires identifying specific criteria. The ICRC Commentary outlines various factors for establishing the existence of either an international or non-international armed conflict.[22] These factors, described as "*convenient criteria*," help distinguish genuine armed conflicts from brief uprisings (Pictet, 1952).

The applicability of Common Article 3 depends on the circumstances of each conflict, including whether organised armed groups are involved and whether they are capable of sustaining protracted violence and adhering to humanitarian law (Pejić, 2007). Recent interpretations suggest that Common Article 3 can extend beyond the borders of a single state, addressing conflicts that traditional definitions might not capture (Bradley, 2017). This broader application helps prevent gaps in humanitarian protection, especially in complex scenarios.

However, despite these theoretical advancements, states are often reluctant to submit internal conflicts to international scrutiny, complicating the practical application of IHL in NIACs. This hesitancy underscores the challenges of ensuring compliance with humanitarian norms in evolving conflict situations.

Common Article 3 applies to situations involving at least two parties, making it crucial to determine whether non-state armed groups qualify as "*parties*" to a conflict. Unlike identifying state parties, this determination is complex and lacks formal criteria. However, widely recognised standards require that the violence reaches a certain intensity and involves at least two organised parties capable of conducting sustained hostilities.

The ICRC's Commission of Experts and various judicial decisions, such as the 1995 *Tadić* decision, have outlined the necessary criteria: (1) violence must be intense enough to compel the use of armed forces rather than police, and (2) the non-state armed group must exhibit a minimum level of organisation (e.g., command structure, discipline, and territorial control). The ICTY has elaborated on these requirements in cases like *Prosecutor v. Boškoski and Tarčulovski* and *Prosecutor v. Haradinaj*, where factors such as frequency, duration, severity of clashes, use of military equipment, and impact on civilians are considered to determine intensity. Organisation is evaluated on the bases of command structures, planning capacity, and the ability to engage in agreements such as ceasefires or peace accords.

Article 1(2) of AP/II further clarifies that internal disturbances such as riots or isolated violence do not qualify as armed conflicts, establishing the lower threshold for Common Article 3. The ICTY's assessments have demonstrated that even if violence is widespread, as seen during the Los Angeles riots, it does not meet the NIAC threshold without an organised armed group involved (Greenwood, 2003).

These standards are crucial to distinguish NIACs from internal disturbances, but their application can be complex, depending on the context and evolving dynamics of a conflict.

[22] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949. Commentary of 2016.

3.3 Broadening the Reach of Common Article 3

For Common Article 3 to apply, the non-international armed conflict must occur within the territory of one of the High Contracting Parties. However, the International Court of Justice (ICJ) has broadened its interpretation, affirming that Common Article 3 embodies fundamental humanitarian principles applicable in any armed conflict. Some authors have viewed this as indicating a potential third requirement in Common Article 3 (Bradley, 2017), which was largely overlooked until after 9/11. If a geographical condition exists, then the application of Common Article 3 would be suspended if the conflict extends into the territory of another state. Two scenarios highlight this issue (Bradley, 2017):

1. If state armed forces extend their operations against non-state actors into another state, Common Article 3 would cease to apply.
2. If non-state actors cross into another state, a new NIAC could arise if it meets the intensity threshold, and Common Article 3 would only apply once this condition is satisfied.

A broader interpretation is crucial because a strict territorial scope may not suffice to meet humanitarian protection needs. For example, in cross-border conflicts such as Rwanda's operations against the Interahamwe militia in the Democratic Republic of Congo, a narrow reading would imply that obligations under humanitarian law end at the border. In such "*spillover*" situations, the ICRC advocates for both parties to continue adhering to Common Article 3.

The scope of Common Article 3 and Additional Protocol II (AP/II) to the Geneva Conventions differs significantly, as AP/II has a higher applicability threshold. Concerns about state sovereignty led to a more restrictive and explicit text. AP/II applies only when non-state parties control territory sufficient to conduct sustained military operations and enforce its provisions. This criterion parallels the traditional requirements for the recognition of belligerency in international law.

The non-state party must be capable of maintaining military operations and enforcing the Protocol, as its applicability depends on the context of the situation. AP/II specifically governs conflicts involving state armed forces and dissident armed forces or other organised armed groups, excluding conflicts solely between non-state actors. This limitation prevents AP/II from extending humanitarian protection to conflicts that involve only armed groups, as seen in Lebanon, Angola, and the ongoing violence in the Democratic Republic of Congo.

Thus, AP/II's applicability is more limited compared to Common Article 3, which remains legally significant even when AP/II is in effect. Article 1(1) of AP/II supplements and enhances Common Article 3 without modifying its application requirements. Although AP/II does not explicitly mention the role of ICRC in providing services during NIACs covered by the Protocol, this right persists due to the interconnected nature of the two treaty regimes.

However, the application of IHRL to NSAGs remains legally uncertain. Although discussions on their human rights obligations are increasing, the framework is far less defined compared to their recognised responsibilities under IHL. IHRL traditionally applies to states, raising questions about whether and how it can bind NSAGs. The lack of legal recognition for these groups and the state-centred nature of international law make it difficult to hold them directly accountable under human rights treaties. Unlike IHL, which explicitly regulates NSAGs in armed conflicts, IHRL does not provide a clear framework for their obligations.

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Despite these challenges, some suggest that NSAGs may bear human rights responsibilities in certain contexts (Rodenhäuser, 2020). When they control territory and populations, they often assume governance roles, enforcing laws, administering justice, and providing basic services. Some groups even voluntarily commit to respecting human rights norms, signalling a growing awareness of their international responsibilities (Rodenhäuser, 2020). The question of whether IHRL can legally bind NSAGs remains open (Heffes, 2020). As armed conflicts evolve, so does the need for a clearer legal approach to NSAG accountability. Their growing role in conflict zones makes it crucial to address this gap and ensure better protection for civilians under both IHL and IHRL.

3.4 Evolving Definition

Two legal developments have shaped the definition of non-international armed conflicts. AP/II sets a high threshold, applying only to conflicts within a state's territory between its armed forces and organised groups with responsible command, territorial control, and the capacity for sustained military operations. In contrast, Common Article 3 of the Geneva Conventions does not require such conditions. AP/II supplements but does not alter Common Article 3. Thus, there are two types of NIACs: those meeting AP/II's criteria (governed by both AP/II and Common Article 3) and those that only meet Common Article 3's lower threshold.[23] The definition of a NIAC is based on two criteria: the intensity of fighting, indicated by the seriousness, frequency of attacks, and use of government forces,[24] and the organisation of non-state armed groups, which must have command structures, conduct military operations, and adhere to IHL.[25] The ICC Statute introduces a third category, describing "*protracted armed conflict*" between state forces and organised groups, seen by some as an intermediary between Common Article 3 and AP/II. The Rome Statute is considered by some as *lex posterior* to AP/II (Art. 8(2)(f)). The application of IHL to NIACs is determined by facts, not formal recognition, and triggers IHL, limiting the state's use of force and ensuring humanitarian assistance.

4. LEGAL FRAMEWORK

At the international level, there is no organisation to promptly and objectively determine the legal status of NIACs at their onset or to classify violent situations as armed conflicts. Instead, states and conflicting parties must decide which legal framework will govern their military operations. A thorough examination of the facts is crucial before making any legal determinations, but this is often complicated by disputed facts. The rules of IHL applicable to NIACs are derived from both treaty and customary law. Although there are numerous provisions and treaties, the treaty-based rules for NIACs remain relatively limited compared to those governing international armed conflicts. Customary international humanitarian law, however, plays a critical role in addressing significant regulatory gaps in the context of non-international armed conflicts.

4.1 Treaty Law Provisions

The four Geneva Conventions of 1949 marked a significant shift by incorporating Common Article 3, which provided a universal text specifically addressing non-

[23] ICTY, *Prosecutor v. Tadic*, Case No. IT-94-1, Appeal Decision, October 2, 1995.
[24] ICTY, *Prosecutor v. Boškoski and Tarčulovski*, Trial Judgment, Case No. IT-04-82-T, Trial Chamber II, July 10, 2008.
[25] ICTY, *Prosecutor v. Limaj, Bala, and Musliu*, Trial Judgment, Case No. IT-03-66-T, November 30, 2005.

international armed conflicts (NIACs). Although its language is broad, Common Article 3 established foundational principles for NIACs, serving as a cornerstone norm in this context.[26] Present in all four Geneva Conventions, it aims to protect civilians by establishing conduct rules for involved parties, earning it the designation as a "*convention within a convention*" (O'Connell, 2009).

Common Article 3 applies to conflicts "*not of an international character*," meaning that at least one party is a non-state actor, and it encompasses conflicts between non-state armed groups alone. It establishes rights and responsibilities that ensure basic protection for civilians and individuals no longer participating in hostilities, prohibiting actions such as murder, hostage taking, and humiliating or degrading treatment. For many years, it stood as the sole written regulation embodying widely accepted humanitarian principles for internal conflicts, mandating that all parties respect the dignity of noncombatants.

The 1977 Additional Protocol II (AP/II) expanded the Geneva Conventions by introducing more specific NIAC regulations, but with a narrower scope than Common Article 3. AP/II "*develops and supplements*" Common Article 3 without altering its application, providing additional protections for detainees, the wounded, medical personnel, and civilians. Unlike Common Article 3, which applies to all NIACs, AP/II requires government involvement and territorial control of rebel groups, thus excluding conflicts solely between non-state actors, such as the Lebanese and Somali Civil Wars. AP/II also emphasises that it does not infringe on state sovereignty or the government's right to maintain law and order.[27]

Article 8(3) of the Rome Statute echoes this stance, stressing that these obligations must be fulfilled by "*all legitimate means*", implying that while governments are responsible for restoring law and order, they must act in accordance with the laws of NIACs. The Rome Statute further affirmed that conflicts solely between non-state groups can be classified as non-international armed conflicts (Article 8(2)(d)). Additionally, Article 8(2) of the 1998 Rome Statute of the ICC enumerates war crimes committed in NIACs, reinforcing the significance of these treaties in the international legal framework.

Several other treaties also address NIACs. For instance, Article 19 of the 1954 Hague Convention for the Protection of Cultural Property obliges parties in NIACs to protect cultural property.[28] The 1999 Second Protocol to this convention reiterates these protections, ensuring their applicability in internal conflicts (Second Protocol to the CPCP, 1999). However, states often classify such conflicts differently, viewing them as stability operations or peacekeeping missions rather than clear-cut armed conflicts.

4.2 Customary Law

Customary international law binds all states except those that persistently objected during its formation. The ICJ, in cases like *Libya/Malta* and *North Sea Continental Shelf*, clarified that customary law arises from state practice and *opinio juris*,

[26] Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, Article 3.
[27] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.
[28] Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, 14 May 1954, The Hague, *Laws of Armed Conflicts* 999, 1007.

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with the latter emphasising a sense of legal obligation. [29] Although unanimity is not required, state practice must be sufficiently extensive.[30]

Customary norms for non-international armed conflicts (NIACs) are rooted in general state practice, which serves as the basis for their recognition in international law. However, state practice on specific issues in NIACs remains sparse, leaving much of the customary framework beyond Common Article 3 underdeveloped. This gap has prompted calls for progressive development, driven largely by humanitarian concerns. Although these efforts are commendable, it is essential to distinguish between existing legal norms (*lex lata*) and aspirational goals (*lex ferenda*) to maintain legal clarity (Arajärvi, 2011). Blurring this line risks undermining the legitimacy of customary law.

A prominent example of this effort to expand *lex lata* lies in efforts to strengthen environmental protections during armed conflicts. The International Law Commission's (ILC) 2019 Draft Principles on the Protection of the Environment in Relation to Armed Conflicts reflect this ambition.[31] Principle 13(2) calls for measures to prevent widespread, long-term, and severe environmental damage during armed conflicts, applying equally to NIACs and IACs. Although the principle aspires to strengthen environmental safeguards, its practical implementation remains uncertain, especially given the complexities of contemporary conflicts. The ILC further emphasises the civilian nature of the natural environment through Principle 16(3), which prohibits attacks on environmental elements unless they serve as military objectives. Although this framework aims to enhance environmental protections, it struggles with the practical challenge of distinguishing between military objectives and civilian elements in the fluid and complex dynamics of armed conflict. This tension highlights the broader conflict between ambitious legal principles and the realities of state behaviour in NIACs.

The International Committee of the Red Cross (ICRC) has cautiously endorsed the idea that parties to NIACs may share obligations similar to those in IACs regarding environmental protection (Henckaerts and Doswald-Beck, 2005). The ICRC emphasises the principle of "*due regard for the protection and preservation of the natural environment*", aligning with broader international environmental law, where the duty of due diligence has emerged as a foundational norm (Viñuales, 2020).

The principle of "*due regard*" for environmental protection within the context of military operations is underscored in established legal frameworks (Dinstein and Dahl, 2020). Numerous methodologies have been suggested to address environmental degradation, such as agent-based modelling and simulation (ABMS), which aim to enhance comprehension and evaluation of the environmental repercussions associated with conflicts (Quandeel, 2023). The ICRC has issued guidelines aimed at enhancing environmental protection in the context of armed conflicts (Maurer, 2021). However, current state practice provides little evidence of widespread adoption of these principles in NIACs. Although the natural environment is implicitly acknowledged, it has not yet achieved the status of special customary protection in these conflicts.

The development of customary law for NIACs began with the adoption of the Geneva Conventions in 1949. The Nicaragua Judgment of 1986 cemented Common

[29] ICJ, *Case Concerning the Continental Shelf (Libya/Malta)*, [1985] Rep. 13, 29.
[30] ICJ, *North Sea Continental Shelf Cases (Germany/Denmark; Germany/Netherlands)*, [1969] Rep. 3, 43.
[31] International Law Commission (2022). Texts, instruments and final reports. Protection of the environment in relation to armed conflicts. Available at: https://legal.un.org/ilc/texts/8_7.shtml (accessed on 04.04.2025).

Article 3 as a universally recognised reflection of customary international law, making further debate over its status unnecessary.[32] With its provisions firmly established as customary, the focus has shifted to supplementary instruments like Additional Protocol II (AP/II), which aim to build upon and refine the foundational protections laid out in Common Article 3. This progression underscores the ongoing evolution of NIAC norms as they adapt to the contemporary challenges in armed conflict.

The International Criminal Tribunal for the former Yugoslavia (ICTY) supported this view in the *Tadic* Appeal Decision (1995),[33] asserting that the nature of the conflict does not alter the applicability of these minimum rules.[34] Furthermore, the ICTY recognised that provisions such as Common Article 3, Article 19 of the 1954 Hague Convention, and core elements of Additional Protocol II have become customary law. In *Prosecutor v. Delalic et al.* (1998),[35] the ICTY noted that incorporating internal armed conflict provisions into the 1949 Geneva Conventions was initially groundbreaking, but these norms have since solidified into customary international law.[36]

Many provisions of Additional Protocol II are now accepted as customary international law, binding all parties in NIACs (Tsagourias and Morrison, 2018). These include prohibitions on targeting civilians, starvation, and attacks on objects essential for civilian survival. They also mandate the protection of medical and religious personnel, medical units, and transports, alongside safeguarding noncombatants, the wounded and sick, and individuals deprived of liberty. Other rules prohibit forced civilian displacement and ensure special protections for women and children.

Customary international humanitarian law (CIHL) extends beyond Common Article 3 and Additional Protocol II by covering additional conduct of hostilities rules (Tsagourias and Morrison, 2018). These encompass the distinction between civilian objects and military targets, prohibitions on indiscriminate attacks, the principle of proportionality, and protections for specific individuals and areas, such as humanitarian personnel, journalists, and protected zones. It also restricts certain methods of warfare, including the denial of quarter and perfidy.

IHL applies in an NIAC until the conflict reaches a conclusion, typically marked by a peaceful settlement, as seen in the 2016 peace agreement between the Colombian government and the FARC. To hold an armed group legally responsible, it must be "*independent*". An armed group must maintain independent control over its actions, separate from state influence, to bear international obligations. For example, while a group may receive military supplies from a state, it must operate and plan its military strategies independently to assume full responsibility.

The criterion of independence clarifies which groups bear obligations under international human rights law. However, it does not account for complex scenarios in which groups have varying degrees of state affiliation. Strict adherence to the independence requirement often excludes groups operating in international armed conflicts, since they are typically under state control. Nonetheless, some groups may

[32] ICJ, *Military and Paramilitary Activities (Nicaragua v. U.S.)*, 1986, June 27, paras. 218 and 114.
[33] ICTY, *Prosecutor v. Tadic*, Case No. IT-94-1, Appeal Decision, October 2, 1995.
[34] *Ibid*.
[35] ICTY, *Prosecutor v. Delalic et al.*, Trial Chamber, 1998.
[36] *Ibid*.

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retain sufficient independence, such as those referenced in Article 1(4) of Additional Protocol I or de facto authorities.

5. IHRL AND NIACS

The relationship between the law of non-international armed conflict and human rights law reveals a complex dynamic. NIAC and IHRL intersect, creating a continuum rather than a strict divide. Although both protect individuals, they differ in their approach: NIAC allows attacks on military objectives based on status, while IHRL demands justification for lethal force as a last resort, regardless of status. In NIACs, combatant status does not exist, as Common Article 3 of the Geneva Conventions and APII do not grant combatant privilege to fighters opposing state forces. Instead, national law applies, meaning that such fighters can be prosecuted for offences like murder or manslaughter after the conflict. Members of organised armed groups are always lawful targets, similar to combatants in international conflicts. Civilians, however, remain protected unless they directly participate in hostilities, in which case they lose their protection for the duration of their involvement and may be lawfully attacked. This rule is recognised in customary IHL and codified in Common Article 3 and Article 13(3) of APII. On the other hand, IHRL mandates equal protection of life unless an immediate threat is present.

Key areas of overlap include protection of life, prohibition of torture, basic criminal justice rights, non-discrimination, protection of women and children, and regulation of the right to food and health (Melzer, 2008). These overlaps are especially evident in NIACs, where IHRL complements IHL's safeguards. The *lex specialis* principle prioritises the law on NIAC in conflict scenarios but does not nullify IHRL obligations, ensuring that IHRL remains relevant (Ashri, 2019).

While human rights law remains applicable during non-international armed conflicts, as reaffirmed by the Preamble of Additional Protocol II, the coexistence of these legal frameworks requires careful navigation. Both systems aim to protect individuals, but their application often hinges on context, presenting challenges when they must operate simultaneously. The complexity intensifies when the law on NIAC and human rights law overlap in both time and space. The ICJ's Wall Advisory Opinion outlined three scenarios: some rights fall solely under international humanitarian law, others under human rights law, and certain areas straddle both.[37] These distinctions reflect the need to reconcile potential conflicts. The principle of *lex specialis*, articulated in the Nuclear Weapons Advisory Opinion, provides a solution by prioritising the more specific law, typically law on NIAC, in situations of overlap or inconsistency.[38] This principle was reinforced in the *Kunarac* Judgment, where the ICTY highlighted the necessity of tailoring human rights norms to fit the specificities of NIAC.[39] The principle of *lex specialis*, rooted in the maxim that specialised rules override general ones, is essential for determining the governing framework during hostilities. For example, the law of armed conflict dictates the permissible use of force in combat, even if such actions might contravene general human rights norms under ordinary circumstances. In other words, in case of conflict, the law on NIAC prevails over the IHRL. Despite its practical value, the *lex specialis*

[37] Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004, 43 ILM 1009, at 1038 (2004).
[38] Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996, at 226, 257.
[39] ICTY, *Prosecutor v. Kunarac et al.*, (Trial Chamber 2001), par. 467.

principle is not without controversy. Critics argue that it oversimplifies the intricate interplay between these two legal systems. Nonetheless, it remains integral to contemporary international law, ensuring that the law on NIAC governs the conduct of hostilities while accommodating the broader protections of human rights law where possible. Rather than abolishing human rights law, *lex specialis* temporarily defers its application in favour of law on NIAC where the two conflict.

The European Court of Human Rights (ECtHR) has displayed varying interpretations of the *lex specialis*. In the *Esmukhambetov* case,[40] it acknowledged relevant NIAC provisions, but failed to fully engage with them, while in *Isayeva v. Russia*, the Court appeared to prioritise human rights law over NIAC law, citing the absence of explicit proportionality principles in NIAC treaties.[41] Such decisions risk undermining established customary NIAC norms and create uncertainty in legal frameworks. Proportionality illustrates the nuanced tension between these regimes. Although it is a cornerstone of both human rights law and NIAC, its application differs (Kretzmer, 2009, pp. 27-28). In human rights law, proportionality regulates state actions, ensuring minimal interference with individual rights. In NIAC, proportionality balances military necessity against potential civilian harm, providing a practical tool to limit hostilities. Integrating proportionality into customary NIAC strengthens its coherence and resolves discrepancies with human rights norms.

There is a debate on whether IHRL should be the main legal framework used in NIACs, with IHL being applied only when a particular level of violence is reached (Kretzmer, 2009). While the International Committee of the Red Cross (ICRC) and the IHL community viewed IHRL as idealistic and politically driven, contrasting with the pragmatic and impartial approach needed to alleviate suffering in armed conflicts (Oberleitner, 2015), some authors advocate for the complementary use of both IHL and IHRL to ensure the most effective protection of civilians (Matthews, 2013). Others have described this relationship as convergence (Vinuesa, 1998), or confluence (Quentin-Baxter, 1985). Historically, IHL governed armed conflicts, while IHRL applied in peacetime. The application of IHRL to non-state actors in NIACs is a subject of ongoing debate. There are disputes about the legal justification for holding armed groups responsible under human rights law (Fortin, 2017). Although facing difficulties, there has been a movement towards aligning the regulations that apply to both international and non-international armed conflicts. This has been achieved primarily through the establishment of customary international law (Crawford, 2008).

Human rights law itself provides for exceptions to the deprivation of life under specific circumstances. Article 2(2)(c) of the European Convention on Human Rights permits the use of force "*no more than absolutely necessary*" to quell riots or insurrections. This flexibility underscores the need for separate frameworks tailored to different challenges. However, the dynamics of NIACs often demand more comprehensive protections and obligations, particularly concerning fighters and civilians who receive both supplementary protections and the corresponding responsibilities.

The divergence between human rights law and NIACs lies in their fundamental purposes. Human rights law seeks to protect individuals from state abuse, focussing on

[40] ECtHR, Esmukhambetov et al. v. Russia, app. no. 23445/03, 29 March 2011, par. 76.
[41] ECtHR, Isayeva et al. v. Russia, app. no. 57950/00, 24 February 2005, par. 168–201.

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the relationship between the state and its citizens. By contrast, IHL aims to mitigate the impact of armed conflict by regulating hostilities and providing protections that extend to all parties, including non-state actors. This broader scope complicates the enforcement of human rights obligations against insurgent groups, which often lack the organisational capacity to uphold responsibilities similar to those of states.

While both frameworks centre on human dignity, they differ significantly in approach. IHL legitimises acts such as lawful killings in combat and detention under prescribed conditions, which run counter to the prohibitions established by human rights law.

However, these differences do not render NIACs and human rights law entirely incompatible. Their interaction on a practical level often reveals opportunities for complementarity. Human rights norms can supplement IHL, particularly in safeguarding civilian populations during conflicts. By respecting the distinct roles of each framework, their interplay can strengthen protections in armed conflicts without compromising the integrity of either system.

Common Article 3 of the Geneva Conventions offers no greater protection than IHRL, as it applies only when the laws of war are triggered, potentially weakening the right to life under IHRL. The International Court of Justice (ICJ) in its Advisory Opinion on Nuclear Weapons clarified that whether a deprivation of life is arbitrary during a conflict is governed by international humanitarian law (IHL) as *lex specialis*. The ICJ also noted that the use or threat of nuclear weapons could violate the right to life under the ICCPR, which mainly applies during peacetime, but remains relevant during conflict unless Article 4 derogations are invoked. Thus, the right not to be arbitrarily deprived of life persists in armed conflict, regulated by IHL as *lex specialis*.

The coexistence of NIAC and IHRL is reinforced by ICJ advisory opinions and judgments.[42] The ICJ highlighted that when both legal regimes apply, NIAC prevails as the specialised law. This was reaffirmed in 1996 when the ICJ examined whether the use of nuclear weapons violated international law, specifically Article 6 of the ICCPR, which safeguards the non-derogable right to life.[43]

The ICJ addressed human rights law in armed conflict and occupation in two cases: the 2004 Advisory Opinion on Israel's separation wall in Palestinian territories[44] and the 2006 conflict between the Democratic Republic of Congo and Uganda (Armed Activities on the Territory of the Congo).[45] In the latter, the ICJ held Uganda responsible for human rights and humanitarian law violations as an occupying state.

6. CHALLENGES IN APPLYING IHL

The application of IHL to NIACs poses significant challenges, particularly in protecting civilians and prosecuting war crimes, which are essential for ensuring accountability. One major issue is the classification of conflicts. IHL applies differently to IACs and NIACs, and distinguishing between the two can be complex. For example, the

[42] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, paras. 106-13, July 9.
[43] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, July 8, 1996, I.C.J. Reports 1996, par. 25.
[44] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, reproduced in document A/ES-10/273 and Corr.1
[45] ICJ, Democratic Republic of the Congo v. Uganda, Judgment, I.C.J. Reports 2005, p. 168, par. 216.

conflict in Syria was classified as a NIAC by the ICRC, affecting the legal framework for civilian protections. However, the Syrian government rejected this designation, illustrating the disputes that can arise when defining the nature of a conflict.

The legitimacy of actors in NIACs also complicates IHL's application. Assessing factors such as the intensity of violence and the organisation of armed groups is subjective, leading to inconsistent application of IHL (Ruys, 2021). This inconsistency undermines civilian protection and complicates war crime prosecutions. Asymmetric conflicts, where there is a power imbalance between parties, present additional challenges. In such contexts, distinguishing combatants from civilians is difficult, as seen in the Mindanao conflict, where local residents acted as part-time insurgents (Ferrer and Cabangbang, 2012). This fluidity complicates the application of IHL and civilian safety.

The prosecution of war crimes in NIACs is further hindered by unclear legal frameworks. Although IHL prohibits acts such as murder, torture, and rape of civilians, its enforcement is challenging. The ICRC's NIAC designation allows for war crime prosecutions, but it is not legally binding and can be contested by the conflicting parties. Additionally, legitimacy concerns regarding non-state armed groups complicate efforts to hold their members accountable (Ruys, 2021).

Despite the aim of IHL to reduce suffering, it cannot fully address the broader political, economic, and ideological issues affecting civilians in conflict zones. Enhanced respect for IHL would improve civilian protection, but modern conflicts present significant challenges to its interpretation and implementation (Droege and Durham, 2021). A perception gap between the promises of IHL and its enforcement, as highlighted by the media and NGOs, undermines the credibility of the law and the willingness to comply (Sassòli, 2007).

To strengthen legal accountability, it is crucial to address these ambiguities by ensuring consistent conflict classification, refining criteria for assessing NIACs, and improving legal frameworks for war crime prosecutions. Bridging the gap between the theoretical protections of IHL and its practical application is also necessary to restore its credibility and effectiveness.

7. CONCLUSION

The relationship between IHL and IHRL has evolved significantly, particularly after World War II. Legal milestones such as the Nuremberg Trials and the Genocide Convention shifted the focus of international law toward individual rights. Common Article 3 of the 1949 Geneva Conventions underscored this shift by mandating humane treatment in NIACs. Despite their shared humanitarian goals, IHL and IHRL differ fundamentally: IHRL governs state-individual relations during peace, emphasising dignity and freedom, while IHL focusses on wartime conduct, balancing humanity with military necessity.

In NIACs, IHL permits actions like lawful killings and detention under strict conditions, whereas IHRL prioritises individual protections, even in conflict. Both frameworks overlap in areas such as the right to life, the prohibition of torture, and basic justice. However, conflicts arise when their rules diverge. The *lex specialis* principle addresses these tensions by prioritising IHL in hostilities while maintaining relevance of IHRL where applicable.

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States often avoid recognising NIACs to sidestep IHL obligations, opting instead for the universal application of IHRL. This hesitation comes from fears of legitimising non-state actors and the need to uphold state sovereignty. Instead, they prefer to label these groups as criminal or terrorist organisations, maintaining their authority while avoiding any legal recognition of opposing forces. This creates gaps in regulating non-state actors, undermining protections for civilians. Future research should explore practical enforcement of these norms in real-world conflicts and establish clearer criteria for identifying NIACs and non-state actor responsibilities. By respecting their distinct purposes and leveraging their complementarities, IHL and IHRL can collectively enhance protections in armed conflicts.

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INHERITANCE OF AN ENTERPRISE OF A SELF-EMPLOYED ENTREPRENEUR: A COMPARISON OF POLISH AND SLOVAKIAN REGULATIONS

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Abstract: *The work presents a comparative legal analysis of the issue of inheritance of businesses of natural persons in Poland and Slovakia. The subject scope was established, namely the concepts of enterprise and sole proprietorship in Poland and Slovakia were compared (taking into account the Act on succession management that has been in force in Poland relatively recently). Then, civil law institutions in the case of the death of a natural person running a business activity were discussed, distinguishing them into actions that the entrepreneur himself may undertake during his lifetime and possible actions of legal successors after the entrepreneur's death. The conducted considerations allow to conclude that the analysed legislation largely provides for similar legal solutions, and the differences demonstrated (in particular the institution of succession management regulated in the Polish legal system) may constitute mutual inspiration for future amendments.*

Key words: *Inheritance; Sole Entrepreneur; Trade; Trading License; Heir; Administrator*

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1. INTRODUCTION (RESEARCH PROBLEM)

The inheritance of an enterprise by a natural person is a very important question in practice. The death of a natural person running a business (sole proprietor) has significant consequences in the sphere of the enterprise he or she runs. That's because the indicated economic activity is closely related to self-employed entrepreneur. Such an entrepreneur personally creates his position in market, is responsible and entitled under the contracts, administrative decisions concern him, is the one who employed the employees and has obligations towards them, etc.

After the death of a sole proprietor, his enterprise exists in civil law aspect. The lack of effective management of this enterprise may poses a threat to its existence. Such issues as rules regarding the continuation of existing contractual relations, entrepreneur obligations towards employees, public and legal obligations (related to civil law, commercial law, administrative law, labour law and social security, tax law, and other) require regulations. Even if some issues are regulated, the provisions are contained in various legal acts, which undoubtedly creates difficulties in their application. The continuation of the activity of a sole proprietor (making binding decisions or simply the possibility of using the deceased entrepreneur's business name at all) may and often raised justified doubts, especially until the inheritance proceedings are completed. It seems necessary to secure the interest of the enterprise and ensure its continuation after

the entrepreneur's death, especially to ensure legal successors time to decide whether they want to continue operating the enterprise after the death of an entrepreneur on their own, sell the enterprise or close it down.

An important reason for undertaking this analysis is, among others, the polish Act of July 5, 2018, on the succession management of a natural person's enterprise and other facilitations for success in enterprises,[1] which is a relatively new legal act that regulates the legal situation of taking over an enterprise after the death of an entrepreneur running a business as a natural person and entered into the Central Registration and Information on Economic Activity (CEIDG).[2] It is said that the institution of the succession manager was not directly modelled on any institution regulated in another legal system (Wrzecionek, 2020), what makes it unique and therefore worth attention.

In turn, in reference to the above, applicable Slovak law doesn't contain any similar consolidated legal regulation. It should be noted that the legal regulation of the issue of conducting business after the death of a natural person - sole proprietor is quite complex. The death of a natural person - a sole proprietor does not automatically lead to the termination of his/her trade licence by law; however, the Trade Licensing Act does not exclude this possibility. The continuation of a sole proprietor's trade after his death is not excluded by the law, however, the continuation of a sole proprietorship after the death of a sole proprietor is subject to a number of conditions and is reserved only for a specified list of persons who are entitled to enter into the business of another sole proprietor under specified conditions, which in practice results in a wide complex of legal consequences, both on the part of heirs, third parties, as well as selected state authorities. In connection with this issue, it should also be noted that the death of a sole proprietor raises a number of issues relating to the transfer of debts, liability for the obligations of the sole proprietor, as well as the operation of the business, if the sole proprietor had employees. The procedure in the event of the death of a sole proprietor is regulated by the Act No. 455/1991 Coll. Trade Business Act (hereinafter only as „**Trade Business Act**"), together with Act No. 513/1991 Coll. Commercial Code provision (hereinafter only as „**Commercial Code"),** as well as Act No. 40/1964 Coll. Civil Code, as amended (hereinafter as „**Civil Code**") and inheritance procedure, regulated in the Act No. 161/2015 Coll. Code of Extra-contentious Litigation (hereinafter as „**CEL**") .

The purpose of the analysis undertaken in this paper is to compare the binding regulations in Poland and in Slovakia regarding the actions to ensure continuation of business of sole proprietor that may be taken by the entrepreneur himself while he or she is still alive, as well as to present legal solutions appropriate in a situation where the entrepreneur has not taken any actions related to the succession of the enterprise and continuation of his business activity. The proposed theme has not been the subject of a wide comparative analysis so far. The considerations carried out may be a base for further studies, as well as serve contribution to changing regulations or introducing new solutions in the national laws.

2. SYSTEMATISATION OF THE CONCEPTUAL SCOPE

In case of comparative analysis of inheritance of an enterprise by a natural person seems important to systematise conceptual issues. At this point, the concepts of

[1] Act of July 5, 2018, on the succession management of a natural person's enterprise and other facilitations for success in enterprises, Journal of Law 2021, item 170, hereinafter: "**Act on the succession management**".
[2] CEIDG is a register regulated in Act of March 6, 2018, on the Central Registration and Information on Economic Activity and the Information Point for Entrepreneurs, Journal of Law 2022, item 541, hereinafter: "**Act on Central Registration**".

an enterprise and an entrepreneur running a business as a natural person (sole proprietor) require confrontation.

2.1 Enterprise

2.1.1 Polish Law

According to Polish doctrine there are three meanings of the concept of an enterprise, i.e. subjective, functional and objective. In subjective terms, an enterprise means an entity of civil law, e.g., a state-owned enterprise. In its functional sense, the term enterprise is used to designate some economic activity. After all, this concept in its objective meaning covers the components that form the basis of a business activity.

Developing the objective meaning of the enterprise it is worth mentioning the art. Art. 55^1 of the Polish Civil Code.[3] Pursuant to this provision, an enterprise shall be an organised complex of material and non-material components designed for carrying on an economic activity. It shall particularly include: 1) a designation that identifies an enterprise or its separate parts (the name of the enterprise); 2) ownership of immovable or movable properties including devices, materials, goods and products, and other proprietary rights to immovable and movable properties; 3) rights under contracts of lease and contracts of tenancy of immovable and movable properties and rights to use immovable and movable properties under other legal relationships; 4) receivable debts, rights attached to securities, cash means; 5) concessions, licences and permissions; 6) patents and other industrial property rights; 7) author's economic rights and neighbouring economic rights; 8) business secrets of an enterprise; 9) books and documents connected with the economic activity carried on (art. 55^1 of the PCC). The enterprise is distinguished from property, because a property is just a set of elements that make up an enterprise, while the enterprise also contain an element of organisation (its functionally organised property complex).[4] An enterprise is considered as an independent legal good, and as such it may be the object of civil law transactions (Gniewek, 2021), as well as being the object of inheritance. While it must be emphasised that enterprise is not an entity (the entity is the entrepreneur), therefore enterprise has neither legal capacity, i.e. the ability to be the subject of rights and obligations, nor capacity to undertake legal actions, i.e. the ability to independently enter into legal relationships.

In connection with the issue raised in this paper, the attention should be paid to the concept of an enterprise in the context of the Act on the succession management. That's because the mentioned Act uses the term "running an enterprise in inheritance" (Art. 2), but does not introduce the clear legal definition of this term. The provisions provide that the inherited enterprise includes intangible and tangible components intended for the entrepreneur's business activities, constituting the entrepreneur's property at the time of his death (Art. 2 sec 1 of the Act on the succession management). Further, if, at the time of the entrepreneur's death, the enterprise within the meaning of Art. 55^1 of the PCC was the entire property of the entrepreneur and his spouse, the inheritance of the enterprise includes the entire enterprise (Art. 2 sec 2 of the Act on the succession management). At last, the inherited enterprise also includes intangible and tangible assets intended for conducting business activities, acquired by the successor administrator or on the basis of the activities referred to in Art. 13 of the Act on the succession management, in the period from the death of the entrepreneur to the date of

[3] Act of April 23, 1964, The Civil Code (consolidated text, Journal of Law of 2023, item 1610, as amended), hereinafter: **the PCC** (Polish Civil Code).
[4] Poland, Supreme Court, II CSK 215/09 (3 December 2009), Legalis No. 303899.

expiry of the succession management or the expiry of the right to appoint a succession administrator (Art. 2 sec 3 of the Act on the succession management). However, taking into account all the provisions of the Act on the succession management (such as Art. art. 5, 17, 29, 32) the term "enterprise" appears in an objective and functional sense. It is not only a material substrate (in the objective sense, a set of components of an enterprise), but also means conducting a specific business activity (in the functional sense). Broadly understood, "running a business in inheritance" means performing all activities related to running such a business, both in the area of decision-making and acting towards third parties (Kopaczyńska-Pieczniak, 2018, pp. 4-11). In other words, an enterprise in inheritance is created at the time of the entrepreneur's death, and it is based on intangible and tangible assets used by the entrepreneur to run a business during his or her lifetime.[5]

However, it should be emphasised here that not every enterprise run by a natural person on the basis of an entry in the CEIDG will become an inherited enterprise upon the death of the entrepreneur. It is possible that the entrepreneur regulates the legal status of the enterprise during his lifetime, e.g., making this enterprise the subject of an absolute legacy created in the will drawn up in the form of a notarial deed (art. 981^1 of the PCC).

Due to the fact that the discussed issue of inheritance of an enterprise by a natural person appears to be extensive, situations where the enterprise is the object of inheritance and is covered by marital property are left out of the scope of this considerations. Further analysis therefore concerns the situation when the deceased entrepreneur was the sole owner of the enterprise.

2.1.2 Slovakian Law

In the Slovak law we can find many direct and indirect definitions of the enterprise. Pursuant to the Article 118 Section 1 of the Civil Code,[6] an enterprise falls under the category of an eligible subject of legal relations. It can thus be the subject of private law disposition, but also the subject of enforcement of a decision, the eligible subject of inheritance, donation, as well as other private law dispositions (e.g., within the meaning of Section 476 of the Commercial Code). Article 5 of the Commercial Code defines an enterprise as a set of tangible as well as personal and intangible elements of a business which belong to the entrepreneur or serve, by their nature, the operation of the enterprise. This particular aspect of the entrepreneur's authority to dispose of the components of the enterprise with the purpose of assigning these components to the operation of the enterprise is significant in relation to the entrepreneur-physical person or legal person that was not established for the purpose of business (Grambličková and Patakyová, 2022, p. 32).

An enterprise includes goods, rights and other assets owned by an entrepreneur and used or intended by their nature to be used in the operation of the enterprise. The term undertaking refers to a specific set of business activities carried on within a single business entity. Tangible assets of the enterprise are represented, for example, by real estate, if owned by the entrepreneur. The personal elements are constituted by the entrepreneur, his qualifications, experience and will be all the more specific the more complex the requirements under the specific legislation are. The intangible elements represent intellectual property rights from the economic sphere - such as exclusive rights

[5] Poland, Supreme Administrative Court in Warsaw, II GSK 1749/21 (23 November 2021), Legalis No. 2634788.
[6] According to the Article 118 Section 1 of the Civil Code: *The objects of civil law relationships are things, animals and, if their nature permits, rights or other property*.

(the right to the trade name and other industrial property rights) and non-exclusive rights (the reputation of the legal entity, trade secrets, know-how, logo, franchise), rights under a licence agreement. Therefore, it is always possible to refer to an enterprise only if all of its legally defined components, i.e. the tangible, intangible and personal exist at the same time. An enterprise may be the subject of legal relations, which means that it may also be the subject of inheritance and must be included in the assets and liabilities of the inheritance in the succession proceedings. After the death of the testator-owner of the enterprise, it is necessary to ensure the continuance of the operation of the business. This process is regulated by the provisions of Article 184/1 of CEL[7] when the notary, as a court commissioner, appoints an administrator of the inheritance in cases where it is necessary for the maintenance of the assets of the inheritance, within the scope defined by the court. The administrator is usually appointed from the heirs, persons close to the heir, but may also be a notary. The resolution appointing the administrator sets the scope of the administrator's rights and obligations, as well as an indication of the administrator's responsibility for the property in his charge which forms the basis of the inheritance proceedings. The administrator is obliged to handle the inheritance with professional care, is obliged to carry out the acts necessary for the maintenance of the inheritance during the inheritance proceedings and is obliged to report to the court on his/her activities on an ongoing basis. The administrator is also entitled to file a petition for the enforcement of receivables owed to the testator. Following the aforesaid it should be stated that a sole proprietor may not appoint his or her own administrator during his or her lifetime. This applies even if he had made such an appointment in his last will. It follows from Section 478 CC that the acquisition of the inheritance cannot be made subject to conditions as to the heir's disposition with regard to the inheritance. Conditions are understood under this provision to be legal conditions, the impositions of time and an instruction.

2.2 Entrepreneur – Sole Proprietor

2.2.1 Polish Law

In the Polish legal system, an entrepreneur is defined in various legal acts. The Polish Civil Code defines entrepreneur as a natural person, a legal person or an organisational unit referred to in article 33^1 § 1 conducting business or professional activity on its own behalf (Art. 43^1 of the PCC). The Entrepreneurs' Law[8] defines entrepreneur as a natural person, a legal person or an organisational unit that is not a legal person, to which a separate act grants legal capacity, conducting business activity (art. 4 sec 1); also partners in a civil partnership are entrepreneurs in the scope of their business activities (art. 4 sec 2). It should be also taken into account that Art. 1 of the Act on the succession management limited the scope of its regulation to the entrepreneur who conducted business activity in his own name on the basis of entry in the CEIDG.

Natural persons conducting business activity (sole proprietor) in Poland should obtain an entry in the Central Register and Information on Business Activity. That means the formal condition is the entry of the entrepreneur into CEIDG, that is a public register, a system for recording the establishment and running of business activities by natural

[7] According to the Art. 184 Sec. 1 of the Code of Extra-contentious Litigation: "*The administrator of the inheritance carries out the actions necessary for the maintenance of the assets included in the inheritance, within the extent determined by the court*".

[8] The Act of March 6, 2018, Entrepreneurs' Law, Journal of Law 2023, item 221, hereinafter: "**Entrepreneurs' Law**".

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persons individually and under civil partnership agreements (art. 860 and following of the PCC) on a nationwide scale (Żywicka, 2019). By the way, the CEIDG is a register of entrepreneurs who are natural persons, but not a register of business activities conducted by these persons (Kozieł, 2019). The registration confirms the legality of the business activity of a sole proprietor. Therefore, it is concluded that it may be every sole proprietor, regardless of the type of business activity, as well as those who conducted professional activity, excluding those entrepreneurs who have not been registered, even if they have submitted an appropriate application, and those who are not subject to such entry (the exclusion applies to persons performing trivial activities referred to in Art. 5 section 1 of the Entrepreneurs' Law, unless they have submitted an appropriate application and have been entered into CEIDG, as well as individual farmers conducting business activities referred to in Art. 6 of the Entrepreneurs' Law, see Kopaczyńska-Pieczniak, 2018, pp. 4-11).

2.2.2 Slovakian Law

In Slovakia, a natural person can perform the business in several forms, either independently, as a sole proprietor, or in partnership with another natural person.

According to Article 2/2 of the Commercial Code, an entrepreneur is a) a person registered in the commercial register, b) a person who operates a business on the basis of a trade licence, c) a person who operates a business on the basis of a licence other than a trade licence pursuant to special regulations, d) a natural person who carries out agricultural production and is registered in the register pursuant to a special regulation. A trade is only one of the four categories listed above, the general principle is that every trade is a business, but not every business has to be a trade.

The largest type of entrepreneurship of a natural person is the operation of a trade within the meaning of Act No. 455/1991,[9] which refers to natural persons engaged in activities that are trades and are compulsorily registered in the trade register. A trade is any independent and continuous operation of an activity which is not excluded from the Trade Licensing Act and which is operated by a natural person in his own name, on his own responsibility, for the purpose of making a profit. A person may carry a trade on the basis of a trading licence, which must also be issued to an entity that is required to be entered in the commercial register if it carries on an activity that is a trade. Therefore, even for persons who are registered in the commercial register, the right to conduct business does not arise for activities which are a trade on the basis of registration in the commercial register, but on the basis of a trading licence (Kopál and Urmín, 1994, p. 16). When it comes to the definition of the trade, the Trade Licensing Act, chooses a combination of the so-called positive definition of the scope of application with a negative definition of what does not belong to the scope of the trade.[10] In this respect, a trade is only an activity which is carried out (i) continuously, (ii) independently, (iii) under one's own name, (iv) on one's own responsibility, (v) for the purpose of making a profit, (vi) under the conditions laid down by the Trade Licensing Act.[11] The general conditions are

[9] Act No, 455/1991 Coll. On trade business, as amended (hereinafter as the "**Trade Licensing Act**").

[10] Art. 3 Sect. 1, 2, 3 and 4 od the Trading Act stipulates activities that are not considered as trade, such as activities of attorneys, psychologist, notaries, translators.

[11] In the case of a trade, the term (i) continuity of activity - must be understood as meaning that it is not a coincidental, rare or one-off activity; seasonal activities also fulfil the condition of continuity, as they fulfil the condition of a certain temporal repetitiveness of the activity; it may be a relatively long-term effort to carry out an economic operation, but this does not imply that it is unlimited in time, ii) autonomy of conduct - it is to be

(i) at least 18 years of age, (ii) legal capacity, (iii) legal integrity. Trade Licencing Act divides trades into either declared or licensed. This distinction results from whether it is sufficient to obtain the Trading license only simply declaration in front of the Trade Licensing Authority or whether it is necessary to fulfil professional competence, which are either professional or other competence required by the Trade Licensing Act or other legislation. Professional competence means the qualifications necessary to operate a trade and experience in the relevant or related field. The assessment of the fulfilment of the condition of professional competence is regulated by various legal provisions and depends on the level of education or qualification required to operate a trade. Other competence is understood, for example, as compliance with the conditions relating to the premises, technical and technological equipment strictly necessary for the safe conduct of the trade (Hamráček, 2023, pp. 94–95). A natural person may start its business only after notifying the Trade Licensing Authority, which will enter the person into the Trading Register and issues a Trading licence.[12] Granting a Trading licence creates the conditions for the operation of a trade, in the event that a natural person starts to carry out business activities, creates an enterprise within the meaning of Section 5 of the Commercial Code. It should be also pointed out, that, pursuant to the Article 10 Sect. 7 of the Trade Licensing Act, Trading license cannot be transferred to another person, which means that if the sole proprietor wishes to transfer his business to another person, or after his death, his Trading licence is never transferred to the transferee, only the enterprise and the transferee, or persons inherited the enterprise are obliged to fulfil the conditions for the operation of the trade within the meaning of the Trade Licensing Act (see more details in Section 3.1.2. of this paper).

The second form in which physical person can carry out business activities is in association with another physical person - civil partnership. This legal regulation is contained in § 829 et seq. of the Civil Code, which regulates the Contract of Association. The Civil Code does not grant legal personality to such associations, which means they do not hold the capacity for rights and obligations and thus cannot be independent parties to legal relations, nor can they be an independent subject of rights and obligations. An association can be founded by at least two natural persons, its advantage is that it has no registration obligation in any registry.

understood when the entrepreneur is driven by his or her own considerations and makes his or her own decisions about business plans and activities, decides for himself or herself the time, place, manner and extent of his or her business, is autonomous in obtaining income; iii) acting on own behalf - it is understood when the entrepreneur acts in business relations under his/her own business name; iv) acting on own responsibility - it can be understood both if the entrepreneur is responsible for the business with his/her own assets, bears the risk of his/her business, i.e. bears both the profit and the possible loss, and at the same time the entrepreneur is responsible for the violation of the conditions and obligations arising from the generally binding legal regulations; (v) acting for the purpose of making a profit; in principle, the aim of the business is to make a profit, although the entrepreneur may not always succeed in this aim, the intention to make a profit is decisive; (vi) acting under the conditions laid down by the Trade Licensing Act (Hamráček, 2023, pp. 30–31).

[12] The Trade Licensing Office is the district office competent according to the place of residence of the natural person, in the case of a foreign person it is the address of the place of activity of the enterprise or the foreign branch of the enterprise of the foreign person. The Trade Register registers data on sole traders - individuals determined by the Trade Licensing Act. The registration, change and deletion of these data are carried out by the district offices, departments of trade business, the administrator is the Ministry of Justice of the Slovak Republic.

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2.3 Recapitulation

In a view of the above the considerations made at this paper concern only natural person as an entrepreneur. Therefore, on the contrary, within the scope of the considerations undertaken in this paper is not an enterprise in inheritance in the event of the death of a partner in other partnerships/companies. Additionally, due to the breadth of the issue and significant differences in the analysed legal systems, the authors decided not to discuss the inheritance of an enterprise by a natural person under civil partnership agreements. This issue may freely be the subject of separate considerations in future.

Moreover, due to the fact that the discussed issue of inheritance of an enterprise by a natural person appears to be extensive, situations where the enterprise is the object of inheritance and is covered by marital property are left out of the scope of consideration. Further analysis therefore concerns the situation when the deceased entrepreneur was the sole owner of the enterprise.

3. ENTREPRENEUR ACTIVITIES TO ENSURE THE CONTINUATION OF BUSINESS ACTIVITY AFTER DEATH

3.1 Establishment of Succession Management

3.1.1 Polish Law

In the Polish legal system, among the *mortis causa* solutions that the entrepreneur himself can take in connection with his business activity, the most important is the establishment of succession management. The aim of mentioned institution is to secure the interest of the enterprise and ensure its continuation after the entrepreneur's death. It is said that before the Act on the succession management came into force it was difficult to organise the continuation of business activity by the legal successors of the deceased entrepreneur, because the only regulation was art. 20 of the Constitution of the Republic of Poland providing for the principle of economic freedom (Babiarz, 2021). The provisions of the Act on the succession management provide for, among others: possible solutions in the event of death/after the death of a natural person running a business, but also regulate issues related to the management of the inherited enterprise until the date of establishment of the succession management or the expiry of the right to appoint the succession management (Art. 13-16 of the Act on succession management), rules regarding the validity of existing legal relationships (art. 30 of the Act on the succession management), possibility to use a business name of the deceased entrepreneur from the date of opening of the inheritance to the division of the inheritance with the addition "in inheritance" (art. 17 of the Act on the succession management).[13]

The conditions for establishing a succession management are specified in the Art. 6 of the Act on succession management. This provision states that in order to establish a succession management by a sole proprietor, it is required to appoint a succession manager, consent of the person appointed as the succession manager to perform this function and enter the succession manager in the CEIDG. It should be emphasised that if the entrepreneur does not submit an application for entry of a succession manager in the CEIDG, then after his death, the succession management may be established only as a result of the appointment of a succession manager pursuant to Art. 12 of the Act on the succession management (Article 10 of the Act on succession management). It is worth adding that the suspension of business activity does not constitute an obstacle to the establishment of a succession management (Art. 6, sec. 2)

[13] More about succession management, for example: Martyniec and Rataj (2019).

of the Act on succession management), but a succession management cannot be established if the entrepreneur's bankruptcy has been announced (Art. 6 sec. 3 of the Act on succession management). In the circumstances discussed, succession management is established at the moment of the entrepreneur's death, unless the entrepreneur's death certificate does not contain the date of death or the moment of the entrepreneur's death is specified in the decision confirming the death or declaring the entrepreneur dead (Art.7 of the Act on succession management).

Pursuant to Art. 9 of the Act on succession management, an entrepreneur may appoint a succession manager by designating a specific person to act as a succession manager or by stipulating that upon his death, the indicated proxy (commercial proxy) will become the succession manager. Both the appointment of a succession manager by the entrepreneur and the consent of the person appointed as a succession manager to perform this function require written form under pain of nullity (Art. 9 sec. 2 of the Act on succession management). It is worth adding that a natural person who has full legal capacity and at the same time has not been legally prohibited from conducting business activity, as referred to in Art. 373 section 1 of the Act of February 28, 2003 - Bankruptcy Law,[14] or a punitive or protective measure in the form of a ban on conducting specific business activities, including business activities performed by an entrepreneur or business activities in scope of property management (Art. 8 of the Act on succession management).

As stipulated in Art. 18 of the Act on succession management, succession management includes the obligation to run an enterprise in inheritance and the authorisation to perform judicial and extrajudicial activities related to run an enterprise in inheritance. From the moment of establishment of the succession management, the succession manager exercises the rights and obligations of the deceased entrepreneur resulting from his business activity as well as the rights and obligations arising from running an enterprise in inheritance (Art. 29 of the Act on succession management). This means that the succession manager represents the enterprise externally, exercises rights and obligations in the field of enterprise management (e.g., may enter into new legal relations by concluding contracts, see Wrzecionek, 2021, pp. 46-51), and exercises rights and obligations in the field of tax law, labour law and social security (Art. 31 sec. 2 of the Act on succession management), as well as may exercise the rights and obligations arising from administrative decisions regarding the inherited enterprise (see Chapter 7 of the Act on succession management) (Martyniec and Rataj, 2019, p. 59) These are the competences of the successor manager that guarantee the continuation of the activity of the sole proprietor until the enterprise is taken over by the legal successors. It should be emphasised that the succession administrator acts on his own behalf, but on behalf of the owners of the inherited enterprise (Art. 21 sec. 1 of the Act on succession management). Therefore, he enters into the general legal situation of an enterprise in inheritance, and the actions taken by him relate not to his assets, but to a separate asset mass, which is the enterprise in inheritance (Martyniec and Rataj, 2019, p. 59).

It should be noted that the succession management is a temporary institution (see Art. 59 of the Act on succession management). The assumption is that it will last until the enterprise is taken over by the legal successor (heir, absolute legatee, purchaser of the enterprise). However, its purpose is to achieve lasting effects in the form of continuation of business activity by a person (persons) who, as a result of inheritance or, for example, sale of the enterprise, will permanently manage the enterprise (Bieluk, 2022).

[14] Act of February 28, 2003 - Bankruptcy Law, Journal of Laws of 2020, item 1228.

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Representatives of the doctrine state that succession management is an institution that provides the company with an effective manager and allows for continuity of business activities and a smooth takeover of these activities by the target buyer (Bieluk, 2022). Thanks to the succession management, persons entitled after the death of a sole proprietor have time to put their affairs in order, in particular to determine the circle of heirs, divide the inheritance, as well as think and prepare for the possible continuation of the deceased's business activity. During this time, the enterprise operates, functions, and does not disappear from the market. However, as a result of appointing a succession administrator, there is no substitution of another entity, i.e. a natural person, e.g., an heir, in place of the deceased entrepreneur. As a rule, death is a sudden event, and by appointing a successor manager, the entitled persons gain time to make decisions and, possibly, to create conditions for the continuation of the deceased's business activity (e.g., to continue business activity on their own account), because at that time the enterprise is operating (can operate), as it operates in the entrepreneur's life.

3.1.2 Slovakian Law

In the Slovak legislation there is no possibility for a sole proprietor to set up succession management during his lifetime, the only way in which a sole proprietor can manage the succession of his business during his lifetime is by testamentary disposition of the enterprise and his trade.

In case of the death of a sole proprietor, the Trade Licensing Act in Art. 13 distinguishes 3 situations - 1. proceedings until the end of the inheritance proceedings, 2. proceedings 6 months after the end of the inheritance proceedings, 3. procedure required after 6 months from the end of the inheritance proceedings.

1. Continuing the trade during inheritance proceedings until the end of the inheritance proceedings - in the event of the death of a natural person - a sole proprietor, the trade may be continued until the end of the inheritance proceedings by (i) the heirs by intestate succession, if there are no testamentary heirs, or (ii) the testamentary heirs and the spouse, even if he or she is not the heir, if he or she is a co-owner of the property used for the trade, (iii) the spouse if he or she is a co-owner of the property used for the trade, if the trade is not continued by the heirs, and (d) the administrator of the estate, if appointed by the court. This order shall be binding for the Trade Licensing Office. Under the Trade Licensing Act, the entitled persons are only obliged to notify the Trade Licensing Office within one month after the death of the sole proprietor that they are continuing in the trade, provided that they meet the condition of competence to carry on the trade of the sole proprietor. If these persons do not meet the conditions, they must appoint a responsible representative without delay. If these persons wish to continue their trade after the death of the entrepreneur, they must notify the trade licensing authority within one month of the death of the entrepreneur at the latest. Business relationship with suppliers and customers remains unchanged.

In the case of the death of a sole proprietor, there is no transfer of the trading licence to a person who is entitled to continue the business, i.e. there is no creation of a new business entity, but only the acquisition of the right of one of the entitled subjects until the end of the inheritance proceedings.[15] Until the end of the inheritance proceedings, this person carries on a trade in the name of and on the basis of the trading licence acquired by the deceased sole proprietor, and does not carry on his/her own business. The persons entitled are therefore not, in the legal sense, successors to the

[15] Slovakia, Constitutional Court, I. ÚS 142/2017 (22 March 2017).

sole proprietor, i.e. they do not become a new business entity to which the rights and obligations of the deceased sole proprietor have been transferred. Those entitled persons only acquire the right to continue the business as an executor of the trading licence acquired by the sole proprietor prior to his death. This follows from the provision of Article 10 Sect. 6 of the Trade Licensing Act, according to which it follows that a Trading licence cannot be transferred to another person. Until the end of the inheritance proceedings, the entitled person conducts business under the business name of the deceased testator - sole proprietor, registered in the Trading Register, during the inheritance procedure this person is not a legal successor of the deceased sole proprietor and therefore the rights and obligations of the deceased sole proprietor are not transferred to him.[16]

The entitled person is temporarily – until the conclusion of the inheritance proceedings – authorised to carry on the business of the deceased sole proprietor under the scope of the trade licence granted to the deceased, without having to meet the general and specific conditions for conducting a trade (i.e. age of 18 years, legal capacity, integrity). However, if these conditions are not fulfilled, a representative who does meet them must be appointed. Furthermore, this person is not required to meet the condition of professional competence; it is sufficient for them to appoint a responsible representative who fulfils this requirement.

It is also important to note that there may be a concurrence of more entitled persons to continue the business after the natural person - sole proprietor. For example, if several legal heirs are willing to continue the business after the testator - sole proprietor. This issue is resolved by the case law of the courts in a way according to which, if several entitled persons are interested in continuing the business after a sole proprietor, there may be a simultaneous exercise of the right to continue the trade. However, such coexistence can only occur at the relevant degree of succession level (for example, by several legal heirs). These persons have acquired a special legal status by which they have legally entered into the rights and obligations of the sole proprietor who acquired the trading licence before his death and the right to continue the business to the same extent as the deceased sole proprietor. If these persons are not interested in the continuing of the business after the sole proprietor, they must notify the Trade Licensing Office of this fact and the Trade Licensing Office will then declare the trade licence of the sole proprietor in the register as inactive.

If the entitled person is the administrator of the inheritance, appointed by the notary according to Article 184 of CEL, the administrator is obliged to notify the Trade Licensing Office about fulfilment of the special requirements for operating the business. However, if the administrator does not meet such requirements, he must appoint a responsible representative who meets these requirements. Appointment of the administrator of the inheritance does not create a new legal entity.[17]

The role of the administrator of the inheritance is to carry out, until the final decision in the inheritance proceedings, the acts necessary for the maintenance of the assets included in the inheritance, and to act with professional care in the performance of his duties. The termination of the authorisation to exercise his role takes place upon the final court decision terminating the inheritance proceedings.

2. Continuing the trade after the final settlement of the inheritance proceeding at the latest within 6 months after the final settlement of the inheritance proceeding - after the final settlement of the inheritance proceeding, those who inherited property from the sole proprietor, including the property that was used for the operation of the trade (i.e.

[16] Slovakia, County Court Žilina, 14 Cob 16/2016 (20 October 2016).
[17] Slovakia, Supreme Court, 7 Sžso 61/2011 (15 August 2012).

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the business), shall continue the trade. In this case, a new business entity is not created, but the heirs continue the business of the deceased sole proprietor, with no change in the business name, the subject of the business. Contracts concluded with suppliers, customers and the deceased sole proprietor remain unchanged. They are obliged to notify the Trade Licensing Office of the continuation of the trade within one month of the end of the succession proceedings. Heirs do not have to obtain a new trade licence in their own name, but they must meet all the criteria required for carrying on all types of trade or appoint a responsible representative to act for them.

3. Procedure required after 6 months from the end of the inheritance proceeding - if the heirs wish to continue the business of the deceased sole proprietor for more than 6 months after the final conclusion of the inheritance proceeding, they must obtain their own trade licence for the operation of the trade before the expiry of this period in accordance with Article 13 Sect. 6 of the Trade Licensing Act, which results in the establishment of new business entities. If they do not take this action, they may no longer carry out business activities.

The above does not apply, i.e. the exemption from the obligation to obtain a new trade licence applies if the surviving spouse of the sole proprietor was a co-owner of the property used for the trade or who acquired that property or an interest therein by inheritance. In such a case, he may continue the trade of the deceased sole trader after the expiry of 6 months from the end of the succession proceedings without obtaining his own trading licence, while operating his business on the basis of the trading licence of the deceased spouse. If the surviving spouse is a sole trader, he/she shall notify the trade licensing authority within one month following the end of the succession proceedings of the business name under which he/she will continue to trade.

3.2 Testamentary Dispositions

3.2.1 Polish Law

Civil Code provisions in the field of inheritance law, provide for a number of institutions in the event of death that can be used by natural persons, including those who are self-employed. Among other things, an entrepreneur - the future testator - can prepare a testament. Then, he can determine the circle of heirs, but it can also, for example, appoint only one person to the inheritance, and thus protect the enterprise against its division into parts (which would happen in the event of several people claiming the right to the inheritance).

Moreover, an entrepreneur may, by means of a testamentary disposition, oblige a statutory or testamentary heir to provide a specific property benefit to a specified person (ordinary legacy, Art. 968 § 1 of the PCC). The legatee may demand the execution of the legacy (immediately after the announcement of the testament, Art. 970 of the PCC), so it causes only obligatory effects, and is therefore not an effective solution for continuing the business activity of a sole proprietor.

Another regulation, worth attention, absolute legacy provision in a will drawn up in the form of a notarial deed (Article 981^1 of the PCC).[18] The design feature of the above-mentioned institution is the *ex lege* acquisition at the moment of opening the inheritance by the absolute legatee of the item (singular succession). An absolute legacy, unlike an particular (ordinary) legacy (causing only obligatory effects), has a material effect at the moment of opening the inheritance, in which the absolute legatee immediately becomes the owner of the thing, and this feature brings him closer to the status of an heir

[18] Wider about absolute legacy: Górniak (2023, pp. 285–360).

(Sylwestrzak, 2023). Establishing an enterprise as an object of absolute legacy automatically excludes this item from the estate. As an aside, it should be noted that the acquisition of an enterprise in the form of an absolute legacy upon the death of the entrepreneur is temporary, because the absolute legatee has the opportunity to submit a declaration of acceptance or rejection of the subject of the debt collection legacy (Art. 1012 in connection with Article 981^5 of the PCC). The legislature clearly indicates that an enterprise may be the subject of an absolute legacy (Article 981^1 § 2 point 3 of the PCC), however, what the absolute legatee will actually acquire is determined not by the moment of drawing up the testament, but by the moment of opening the inheritance (Dyszlewska-Tarnawska, 2019). The acquisition of the subject of the legacy by the absolute legatee at the time of opening the inheritance undoubtedly gives the entitled person the opportunity to take over the estate allocated to him (the enterprise) immediately, i.e. without having to wait for the heirs to execute the legacy or without the need to wait for the division of the inheritance, in which it is finally decided who will received a given asset (Sylwestrzak, 2023). However, as in the case of traditional inheritance, an absolute legacy enables the transfer of items from the inheritance to a specific person, i.e. in the discussed case, an enterprise understood as all tangible and intangible assets used to run a business. Legal succession in the ownership sphere is a reliable basis for the continuation of the deceased's activity, but it is not sufficient.

The above-mentioned activities i.e. made a testament and appointing a legatee (either ordinary or absolute), in themselves do not constitute the possibility of formally and automatic continuing the business activity of a sole proprietor in the literal sense. Their object may include, among others enterprise in its objective meaning, but it cannot be a business activity. Legal succession in the ownership sphere is a reliable basis for the continuation of the deceased's activity, but it is not sufficient. Continuing business activity based on elements of the acquired enterprise is not the same as continuing the this business activity (Zięba and Wróbel, 2012). In the circumstances discussed above, it is additionally necessary for the entitled person to have a confirmation of the acquisition of inheritance, an inheritance certificate or a European certificate of inheritance (Art. 1027 of the PCC), which may be time-consuming, but above all requires the involvement and activity of the entitled person. However, thanks to the provisions of the Act on succession management, the entrepreneur's testamentary heir or absolute legatee, who, in accordance with the announced testament, is entitled to a share in the enterprise in the estate, may, among others: appoint a succession manager, as well as perform activities necessary to preserve the estate or the ability to run the enterprise in the inheritance.

The issue of appointing a succession manager by the indicated entities is regulated in detail by Art. 12 of the Act on succession management. Pursuant to this provision, if the succession management has not been established at the time of the entrepreneur's death, after the entrepreneur's death, the succession management may be appointed, among others, by: the statutory heir of the entrepreneur who accepted the inheritance, or the testamentary heir of the entrepreneur who accepted the inheritance, or the absolute legatee who accepted the absolute legacy, if, in accordance with the published testament, he is entitled to a share in the enterprise in inheritance (sec. 1). In such a case, the appointment of a succession manager requires the consent of persons who have a joint share in the enterprise in the inheritance greater than 85/100 (sec. 3), and if no final decision confirming the acquisition of inheritance has been issued, no deed of inheritance has been registered, nor has a European certificate of inheritance been issued, the amount of shares in the enterprise in the estate is determined taking into account all persons known to the person appointing the successor manager who are entitled to a share in the enterprise in inheritance at the time of appointing the succession

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manager (sec. 4). The right to appoint a successor manager expires after two months from the date of the entrepreneur's death. If the entrepreneur's death certificate does not contain the date of death or the moment of the entrepreneur's death was indicated in the decision confirming the death, this period runs from the date of finding the entrepreneur's body or the date of the decision confirming the death becomes final (sec. 10). It can be stated that if the entrepreneur's testamentary heir or absolute legatee does not decide to appoint a succession manager, then to as a result of the death of a sole proprietor, commercial contracts, concessions, licenses, permits (as a rule, they are not object to civil law transactions),[19] as well as employment contracts of employees[20] (Art. 63^2 § 1 of the Labour Law)[21] directly related to natural person as entrepreneur and his business activity, expires. Then the entitled person can obtain appropriate administrative decisions and regulate employee matters anew (Blajer, 2016, pp. 531–543) as a new entrepreneur.

Regarding the competences of the testamentary heir of an entrepreneur or absolute legatee to perform activities necessary to preserve the property or the ability to run an enterprise in inheritance, the relevant provision is Art. 13 of the Act on succession management. This provision states that in the period from the death of the entrepreneur to the date of establishment of the succession management, and if the succession management has not been established - until the date of expiry of the right to appoint the succession manager, among others: the entrepreneur's testamentary heir or absolute legatee who, in accordance with the announced testament is entitled to a share in the enterprise in inheritance, may perform actions necessary to preserve the assets or the ability to run the enterprise in inheritance, consisting in particular of: 1) satisfying due claims or accepting receivables resulting from the entrepreneur's obligations related to the performance of business activities, arising before his death; 2) disposal of tangible current assets within the meaning of Art. 3 sec. 1 point 19 of the Act of 29 September 1994 on Accounting[22] (see sec. 1). The persons in question may also perform ordinary management activities in the scope of the business activity carried out by the entrepreneur before his death, if the continuity of this activity is necessary to maintain the possibility of its continuation or to avoid serious damage (sec. 2).

Finally, it is worth pointing out the possibility of an entrepreneur appointing an executor in his will (Art.986 of the PCC). The executor of the will acts on his own behalf, but in someone else's interest (for someone else's benefit) - he should be treated as an indirect substitute.[23] His tasks include (as provided for in Art. 988 of the PCC), unless the testator has decided otherwise, managing the inheritance property, repaying inheritance debts, in particular executing ordinary legacies and orders, issuing the inheritance property to the heirs in accordance with the will of the testator and the law, and in any case immediately after the division of the estate (§ 1). The executor of the will may sue and be sued in matters arising from the administration of the estate, or an organised part or a specified component. He may also sue in matters concerning rights belonging to the state and be sued in matters concerning inheritance debts (§ 2). The executor of the will

[19] Pursuant to Art. 42 of the Act on succession management, the owner of the enterprise (a person with a valid confirmation of the acquisition of the subject of the absolute legacy) may submit to the public administration body that issued the decision related to the enterprise an application for the transfer of this decision to it within six months from the date of the entrepreneur's death (if succession management has not been established).

[20] Employee employment contracts do not expire on the day of the employer's death if the absolute legatee takes over the employee under the terms specified in Art. 231 of the Labour Code, provided that the acquired enterprise meets the criteria of a workplace (Article 632 § 3 point 1 of the Labour Code).

[21] The Act of June 23, 1974, Labour Code, Journal of Law 2023, item 1465, hereinafter: "**Labour Code**".

[22] Act of 29 September 1994 on Accounting, Journal of Laws of 2019, item 351, as amended.

[23] Poland, Supreme Court, I CSK 62/10 (11 August 2010), Lex no. 1375302.

should hand over to the person to whom a thing was left on an absolute legacy, the object of that legacy. (§ 3). Therefore, the executor of the will takes care of the proper fulfilment of the will of the testator (he is to secure the implementation of the will of the testator expressed in the testament, for more see Wolak, 2023). The executor of the will is basically responsible for maintaining the estate in the best possible condition and expediting the division of the estate, especially if there is a conflict between the heirs/legatees. However, the executor of the will does not have any special powers regarding the sole proprietor's business.

3.2.2 Slovakian Law

A sole proprietor may alter the scope of the heirs of his enterprise. If this is the case, these entities (both natural and legal) shall have preference over the intestate heirs. Testamentary succession is, however, limited by the right of forced heirs under Article 479 of the Civil Code, according to which, if the natural person make a testamentary disposition of the business and trade to someone other than his descendants, they may claim the relative invalidity of the will and are entitled to half of the legal share of inheritance if they are adults and the entire legal share of inheritance if they are minors. If the inheritance also includes a trading licence, as mentioned above, this does not automatically cease if the descendants wish to continue the trade of the sole proprietor, they shall notify the trade licensing authority of this fact within one month of the death of the sole proprietor. The Trade Licensing Office is bound by the order of heirs according to Article 13 Section 1 of the Trade Licensing Act, which are descendants only if the testator did not leave heirs by will. Thus, if he has left heirs by will and the descendants have been omitted and claim the relative nullity of the will, they become heirs in the proportions mentioned above. The heirs of the intestate, including the descendants, are obliged to have the authority to carry on a business identical to that of the sole proprietor. If they do not possess with such authority, they shall be obliged to appoint a responsible representative.

According to Slovak law, it is not possible that the sole proprietor regulates the legal status of his enterprise during his lifetime, e.g., making this enterprise the subject of an absolute legacy created in the will drawn up in the form of a notarial deed. Similarly, it's not possible to appoint the administrator of the will during his lifetime.

It follows from the provision of the Article 478 of the Civil Code that the acquisition of an inheritance cannot be subject to any conditions, which are understood to be legal conditions, time stipulations and imposed orders.

If the will contained any of the above-mentioned conditions, they would have no legal effect.

3.3 Power of Attorney and Commercial Proxy

3.3.1 Polish Law

The legislator regulates power of attorney in the provisions of Art. 98-109 of the PCC. As a rule, a power of attorney expires with the death of the principal or attorney, however, the power of attorney may be stipulated differently for reasons justified by the content of the legal relationship that is the basis of the power of attorney (Art. 101 § 2 of the PCC). Therefore, the authorisation may continue to exist even after the death of the principal, and therefore also in case of a sole proprietor. However, it should be noted that pursuant to Art. 101 § 2 of the PCC, there is no extension of the legal capacity of the principal and granting it to him even after death, which would allow the attorney to act in

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the situations specified in this provision on his behalf and with consequences for him. The importance of this provision is that in the situations specified therein, the attorney may act on behalf of the heirs of the deceased principal (even if they are not yet known).[24] Such an attorney may be revoked by the heirs. Formally, however, there are no obstacles to an attorney acting despite the death of an entrepreneur managing (taking care of) the deceased's enterprise. If the power of attorney does not expire with the death of the principal, such an attorney has a power of attorney document, which enables him to manage the enterprise immediately after the principal's death (the type of power of attorney granted is also important). However, the scope of actions (authorisations) that can be undertaken in relation to individual business activity has not been specified, so this solution raises many doubts. Significant difficulties may include, among others: public law regulations, e.g., regarding a license granted to a deceased sole proprietor.

A special type of power of attorney is a commercial proxy. It is a power of attorney granted by an entrepreneur subject to the obligation of entry in the Central Register and Information on Economic Activity or in the register of entrepreneurs of the National Court Register, which includes the authorisation to perform judicial and extrajudicial activities related to running the enterprise (Art. 109^1 § 1 of the PCC). In accordance with applicable regulations, an entrepreneur may stipulate that upon his death, the designated proxy will become the successor manager (Art. 9sec. 1, point 2 of the Act on succession management). Then the observations regarding the appointment of a succession manager will remain appropriate. Pursuant to Art. 38 of the Act on Central Registration, an entrepreneur entered in CEIDG may publish information about his/her attorney or commercial proxy via the CEIDG IT system (sec. 1), and, in the case of a commercial proxy, indicate whether he/she has stipulated that upon his/her death the proxy will become the successor manager (sec. 2). It should be clarified that until the date of entry into force of the Act on succession management, the provision of Art. 109^7 § 4 of the PCC stipulated that the death of an entrepreneur does not result in the expiry of commercial proxy. This wording encouraged entrepreneurs planning succession to establish a proxy in the event of death. Nevertheless, this solution raised a number of doubts (including regarding the functioning of the institution of commercial proxy when the heirs did not have the status of an entrepreneur) and was therefore criticised (for more see Wrzecionek, 2020). Currently, the provision of Art. 109^7 § 4 of the PCC, states that the loss of legal capacity by an entrepreneur does not result in the expiry of the commercial proxy. Given this wording of the provision of Art. 109^1 of the PCC, and at the same time the lack of a regulation analogous to Art. 101 § 2 of the PCC (allowing for the establishment of a power of attorney that does not expire upon the death of the principal), it is concluded that the commercial proxy always expires upon the death of the entrepreneur (Osajda, 2024).In addition, it can be considered that the Act on succession management introduces the principle of priority of succession management and excludes an enterprise in inheritance from estate management on general principles (Pilich, 2021).

3.3.2 Slovakian Law

The legislator regulates power of attorney in the provisions of Art. 31 – 33 of the Civil Code. As a rule, a power of attorney expires with the death of the principal or attorney (Art. 33b/d). Slovak law does not allow to grant a Power of Attorney with the effects of

[24] Poland, Supreme Court, IV CSK 252/14 (21 January 2015), OSNC-ZD 2016/2/22; Poland, Supreme Court, I CSK 362/07 (24 January 2008), OSNC 2009/3/46.

mortis causa, the Power of Attorney is no longer valid after the death of the sole proprietor. According to legal doctrine it could be admitted that the grantor expresses in the power of attorney a desire that the principal represent his interests even after his death. In such a case, the power of attorney does not terminate on the death of the principal and the heirs have the option to revoke the power of attorney (Jurčová, 2019, p. 219).

3.4 Mortis Causa Donation of Enterprise

3.4.1 Polish Law

The donation *mortis causa* is not a contract legally regulated in Polish law. This is the argument that it is not a completely forbidden option (because of the principle of freedom of contract). The Supreme Court recognised the conclusion of a donation *mortis causa*, stating as a thesis that it is permissible to conclude a donation contract in the event of death if its object are specific things or rights, and the refusal is not contrary to the principles of social coexistence.[25] The doctrine is divided, which means that some authors approve of the Supreme Court's opinion (Bieranowski, 2014, p. 31 et seq.), others are quite critical (Justyński, 2014, pp. 1263-1278; Księżak, 2015, pp. 123-128.). For this reason alone, making a donation of an enterprise in the event of death should be questioned. Moreover, for the same reasons as in the case of testamentary dispositions, there is no basis for the possibility of formally continuing the business activity of a sole proprietor as a consequence of the donation of the enterprise.

3.4.2 Slovakian Law

The legal framework for the disposition of property in the event of death is currently governed by the provisions of the Civil Code on intestate succession (Art.476 of the Civil Code). In addition to the prohibition of *donation mortis causa* (Art. 628 Sect. 3 of the CC), the law also prohibits joint testamentary succession of several testators (Art. 476 Sect. 3 of the CC). Pursuant to Article 628 Sect. 3 of the Civil Code, if the person makes *donation mortis causa*, such a legal action is absolutely invalid.

3.5 Transformation of a Sole Proprietors into a Commercial Law Company

3.5.1 Polish Law

The transformation of a sole proprietor (a natural person running a business activity, entered into the CEIDG) into a commercial law company or its economic transformation involving the transfer of the enterprise to the company are not *mortis causa* legal actions. Transformation is an action that can be undertaken by a sole proprietor during his or her lifetime, and which will also enable his or her legal successors to continue the business. Then we are no longer dealing with the issue that is the subject of these considerations.

Because it is a noteworthy solution, it can be stated that, according to the provisions of Art. 551 § 5 of the Commercial Companies Code,[26] an entrepreneur who is a natural person conducting business activity on his or her behalf within the meaning of

[25] More arguments for the admissibility of the donation mortis causa are in Poland, Supreme Court, III CZP 79/13 (13 December 2013), OSNC No. 10/2014, item 98.

[26] Act of September 15, 2000, The Commercial Companies Code (Journal of Law of 2024, item 18, as amended, hereinafter: "**Commercial Companies Code")**.

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the Entrepreneurs' Law (transformed entrepreneur) may transform the form of business into a sole proprietor company (transformed company), i.e. a limited liability company or joint stock company. The procedure for transforming an entrepreneur who is a natural person into a capital company is regulated in detail in Art. 584^1–584^{13} Commercial Companies Code. When reviewing the above-mentioned provisions, it can be stated that the transformed entrepreneur becomes a transformed company upon entry in the register (transformation date), as stipulated in Art. 584^1 of the Commercial Companies Code. The issue of rights and obligations is regulated by Art. 584^2 of the Commercial Companies Code, from the content of which it should be concluded that on the date of transformation, the transformed company generally becomes the subject of rights and obligations, the subject of which was the transformed entrepreneur and which are related to his current business activity (in particular permits, concessions and reliefs, which were granted to the entrepreneur before its transformation, unless the act or the decision granting a permit, concession or relief provides otherwise). In turn, a natural person (i.e. the entrepreneur subject to transformation) becomes a partner or shareholder of the transformed company on the date of transformation. Therefore, the transformed entrepreneur ceases to be the subject of rights and obligations, and only his joint and several liability with the transformed company for the obligations of the transformed entrepreneur related to the business activity he has previously conducted remains (within specified time limits) (Art. 584^{13} of the Commercial Companies Code). What is important for the present considerations, it remains controversial in the doctrine and case law whether the transformation of a sole proprietor into a commercial law company should be treated as a type of universal succession, which has a limited scope and takes place as a result of one legal event *inter vivos*, and not *mortis causa*, or turn, the transformation of a sole proprietor in question is a special form of continuation (quasi-continuation) of the activity of a sole proprietor business activity.[27]

3.5.2 Slovakian Law

Transformation is an action that can be undertaken by a sole proprietor during his or her lifetime, and which will also enable his or her legal successors to continue the business. The transfer of the trade during the life of the sole proprietor to the successor of the entrepreneur is not directly regulated in the Slovak legislation, therefore it is necessary to apply the related provisions of other legal regulations. It should be noted that under Article 10 Sect. 7 of the Trading Act a trade licence cannot be transferred to another person. It follows from the above that the trade licence is linked to the person of the sole proprietor and cannot be the subject of civil law relations (e.g., donation, inheritance).

However, a sole proprietor may, during his lifetime, transfer the business to his or her descendants as well as to any third party, either **(i) by selling the business or (ii) by contributing the sole proprietor's business to a commercial company.**

(i) In the case of selling the business, it is a legal regulation under Article 476 - 488 of the Commercial Code No. 513/1991 Coll. regulating the sale of the company. In such a case, the sole proprietor and his successor conclude a contract on the sale of the business, on the basis of which the ownership right to the things, rights and other property values constituting the business and which are used for the operation of the sole proprietor's business passes to the successor of the sole proprietor. All rights and

[27] See: Poland, Supreme Court, III CZP 133/22 (31 January 2023), OSNC 2023, no. 7–8, item 7; Poland, Court of Appeal in Szczecin, I ACa 45/16 (10 March 2016), Lex no. 2044443. In: Tofel (2024).

obligations arising from commercial law relationships shall also pass to the successor, as is the case where the sole trader employed employees. It is necessary that the successor is a natural person - sole proprietor and possesses a trade licence for the exercise of the trade, the subject matter of which was entered in the trade licence by the transferring sole proprietor.

Another option for a sole proprietor to transfer his business to another person during his lifetime is through **(ii) the contribution of the sole proprietor's share of the business to the successor company.** In this case, the condition is that the successor is not a natural person - sole proprietor, but acts in business relations as a legal person. In such a case, it is necessary to quantify the value of the sole proprietor's business and to increase the share capital of the company by that value. All rights and obligations in relation to business partners and employees are transferred to the company by the contribution. In this case, too, in order for the company to be able to carry on the business of a sole trader, it is necessary for it to have as its object of business those activities which are covered by the sole proprietor's trade licence.

3.6 Recapitulation

Summarising the above, it can be noted that the establishment of succession management appears to be a promising tool (given its relatively short period of validity, still requiring verification in practice, including in case law) to ensure the continuation of business activity after death. In the absence of a similar (close) regulation in Slovakian law, its detailed analysis may be valuable for future legal solutions. At the same time, it can be stated that the application of other proposed solutions, i.e. testamentary dispositions, power of attorney and commercial proxy, as well as *mortis causa* donation, both in Polish and Slovakian law, does not provide certainty as to ensure the continuation of business activity after death. In turn, the indicated process of transformation of a sole proprietor is rather the solution during lifetime, but not exactly in the case of death.

4. POSSIBLE ACTIONS OF LEGAL SUCCESSORS AFTER THE DEATH OF AN ENTREPRENEUR

4.1 Polish Law

The inheritance opens upon the death of the testator (Art. 924 of the PCC), and the heir acquires the inheritance upon the opening of the inheritance (Art. 925 of the PCC). The acquisition of the inheritance therefore occurs *ex lege*, regardless of the heirs' awareness. What is more, as a result, from the moment the inheritance opens, the heir may take possession of the inheritance, manage it and collect the benefits. From that moment on, the heir is also entitled to dispose of the entire inheritance, as well as individual components of the inheritance property (Kawałko, 2019). However, the security of legal transactions requires that the heir proves his status with an appropriate document (Karaszewski, 2024).

Therefore, in practice, it is necessary to formally regulate the acquisition of inheritance (conducting proceedings for the confirmation of the acquisition of inheritance and then division of the inheritance). Such proceedings are conducted by the court at the request of a person with an interest in it, or a notary public draws up a deed of inheritance certification under the principles specified in separate provisions. It should be noted that this will not happen without the cooperation of the deceased family members (potential heirs), and the length of such proceedings may also make it difficult to maintain and continue the business activity. Meanwhile, in accordance with art. 30 sec. 2 of the Act on

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Central Registration, the entrepreneur is deleted from CEIDG immediately after 2 months from the date of death or finding the entrepreneur's body, no later than within 7 days from the date on which this period expired, unless the entry in CEIDG contains information on the appointment of a successor manager by the entrepreneur or a successor manager was appointed during this period.

In response to the difficulties of inheriting the company, a valuable solution was introduced by the Act on succession management. This Act provides in detail possible actions of legal successors after the death of an entrepreneur. It should be noted that in the meaning of art. 14 of the Act on succession management, legal successors are: the entrepreneur's spouse who is entitled to a share in the enterprise in the inheritance, or the entrepreneur's statutory heir, or the entrepreneur's testamentary heir or an absolute legatee who, in accordance with the announced testament, is entitled to a share in the enterprise in the inheritance. The actions that may be taken by indicated group (legal successors) after the death of the entrepreneur (assuming that the deceased entrepreneur did not take appropriate actions, in particular did not appoint a successor manager), until the final decision confirming the acquisition of inheritance, registration of the inheritance certificate or issuance of the European Certificate of Inheritance, include: among others the ability to perform activities necessary to preserve assets or the ability to run an enterprise in inheritance (see the previously mentioned Art. 13 of the Act on succession management). An important right in a situation where the deceased entrepreneur and natural person running a business (sole proprietor) did not appoint a succession manager during his lifetime is the possibility of appointing a succession manager (Art. 12 of the Act on succession management). If the succession management has not been established at the time of the entrepreneur's death, after the entrepreneur's death, the succession administrator may be appointed by: 1) the entrepreneur's spouse who is entitled to a share in the enterprise in the inheritance, or 2) the statutory heir of the entrepreneur who accepted the inheritance, or 3) the entrepreneur's testamentary heir, who accepted the inheritance, or an absolute legatee who accepted the debt collection legacy, if, in accordance with the announced testament, he is entitled to a share in the enterprise in the inheritance.

In turn, after the decision confirming the acquisition of inheritance, registration of the inheritance certificate or issuance of the European certificate of inheritance becomes final, the succession manager may only be appointed by the owner of the inherited enterprise (Art. 12 sec. 2. The right to appoint a successor manager expires after two months from the date of the entrepreneur's death. However, if the entrepreneur's death certificate does not contain the date of death or the moment of the entrepreneur's death is indicated in the decision confirming the death, this period runs from the date of finding the entrepreneur's body or the date of the decision confirming the death becomes final (Art. 12 sec. 10). Appointing a succession manager after the death of an entrepreneur requires a number of additional actions, but it seems to be a convenient solution due to the status and powers of the succession manager in terms of continuing the business activities of the deceased entrepreneur.

Broader rights have the owner of the inherited enterprise, who is a person who, in accordance with a final decision confirming the acquisition of inheritance, a registered inheritance certificate or a European inheritance certificate, acquired intangible and tangible assets intended for the entrepreneur to conduct business activities, constituting the entrepreneur's property at the time of his death, on the basis of inheritance by statute, or will or acquired an enterprise or a share in an enterprise on the basis of an absolute legacy provision (Art. 3 sec. 1 of the Act on succession management). For example, the owner of an enterprise in inheritance may submit to the public administration body that

issued a decision related to the enterprise an application to transfer this decision to him (for more information, see Art. 42 of the Act on succession management).

4.2 Slovakian Law

As it was described previously, there is no possibility under the Slovak law for a sole proprietor to set up succession management during his lifetime. The only way a sole trader can administer the succession of his business during his lifetime is by testamentary disposition of his business and trade. Other than that, in case of the death of a sole proprietor, the Trade Licensing Act in Art. 13 distinguishes 3 situations:

1. proceedings until the end of the inheritance proceedings,
2. proceedings 6 months after the end of the inheritance proceedings,
3. procedure required after 6 months from the end of the inheritance proceedings.

As the relevant provisions have already been discussed in subchapter 3.1.2 of this paper, the present section will reference them without additional commentary.

5. CONCLUSION

The previous (general) inheritance regulations mainly focus on the assets left by the deceased entrepreneur, and not on the continuation of his business. Inheritance of a sole proprietor's business represents a complex legal process with consequences for heirs, contractual parties, as well as obligations towards third parties. Based on the above considerations, it can be stated that Polish regulations, and specifically the Act on succession management, address the problems that may be encountered by the heirs of a deceased sole proprietor. In the provisions discussed, the legislator focuses on the actions that may be taken by the heirs in order to continue the business of the deceased sole proprietor. In Slovakia, the similar regulation to the Polish law is missing. The death of a natural person who is a sole proprietor results in the termination of the trade license, however, the business itself, as a set of assets and legal relationships, may pass to the heirs within the inheritance proceedings. During the inheritance proceedings, the notary appoints an administrator who manages the business until the conclusion of the inheritance process. The heirs can decide to continue the business, in this case they must obtain a new trading license within the conditions stated by the law. If the heirs do not wish to continue the business of the sole proprietor, the business may be liquidated, with the assets being divided among the heirs according to the provisions of inheritance law.

The issue addressed in this article appears to be extensive and quite complicated. Meanwhile, the heirs of a natural person, especially those interested in continuing the deceased's business activity, may encounter a number of formal difficulties. Sole proprietor as the simplest form of conducting business activity should be equally simple to continue after the entrepreneur's death. The review of possible actions in the event of death, as well as actions that can/must be taken by heirs, proves that there is no ideal, simple, fast, etc. institution in this respect, both in Polish and Slovakian law. All of the discussed ones seem to be insufficiently adapted to the situation of the entrepreneur's death and to the needs of the heirs. It can be stated that in principle it is impossible to maintain full continuity of business activity on all applicable legal levels. As a functional solution may be considered the Polish regulation of the succession manager, which really focuses on the possibility of continuing (resuming) business activity. This is a relatively new regulation, it should be verified in practice. Still relevant,

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in both legal systems, are demands to accelerate the inheritance procedures necessary for the efficient continuation of the business activity of a sole proprietor.

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LEGAL DESIGN FOR INFORMED SHARENTING AND CONSENT OF THE CHILD ON SOCIAL NETWORKING SITES

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Abstract: *Children are increasingly active in social life through social networking sites and parents have begun sharing more posts including their children's pictures and other personal data. As a result, children's privacy becomes even more susceptible to the infringement of values within the bounds of right to privacy. The term "sharenting" refers to parents and other relatives sharing personal data of the child. Sharenting may cause significant risks that may affect the child all throughout their life such as "digital kidnapping" and potential future bullying among peers. When parents share posts on social networking sites, they essentially provide consent on behalf of the child. Valid consent from the parents and/or child is an important aspect in the infringement of personality rights. In all instances, the children's best interests should be taken into consideration. To raise awareness about protecting children and to ensure that consent is valid, legal design should be implemented in creating information texts. In this study, a system proposal has been developed for posting children's photos on social media, which involves asking questions and displaying warning messages when children's photos are shared. Within this framework, legal design is utilised in order to form clear and more comprehensible texts for users on social media platforms.*

Key words: *Legal Design; Sharenting; Best Interest of the Child; Personality Rights; Informed Consent*

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1. INTRODUCTION

As in most aspects of our lives, the digital age has also changed the notion of privacy for children as well as adults. Sharing personal information, photos, details about one's life on social media platforms may cause violation of personality rights and right to privacy. People often share children's photos and videos without being fully informed of the immediate and long-term consequences of their online disclosures. This becomes a

more complex problem when the sharing party is parents who share posts about their children. The term "sharenting" is used where parents and other relatives share personal data of the child. Sharenting can cause significant risks that have the potential to impact children throughout their lives and may lead to harmful outcomes such as "digital kidnapping" and bullying among peers. When children or their parents are unaware of the potential risks of sharing online, they fail to manage their social media privacy settings, or consent to terms and conditions without being fully informed.

As gatekeepers of the child's right to data privacy, parents have certain legal responsibilities for their children (Blecher-Prigat, 2018; Wagner and Gasche, 2018; Plunkett, 2019a). However, parents who are gatekeepers also become so-called "narrators of their children's stories". This results in a conflict of interest while parents, who should protect their children's digital privacy and personality rights, also decide to share posts and may be blinded by their personal preferences (Gligorijević, 2019; Steinberg, 2017). Moreover, parents, who should act as gatekeepers, may also not have the adequate knowledge or may not be sufficiently digitally literate or technologically aware (Donovan, 2020).

There have always been discussions about the terminology and scope of the right to privacy and personality rights. When Stig Strömholm wrote 'Rights of privacy and rights of the personality: a comparative survey' in 1967, he suggested that the term "right to privacy" was a predominantly American term, whereas the term "personality rights" were used in the European context. We preferred to use the term "the right to privacy" as one of the aspects of personality rights in this article. On the other hand, where the term "right to privacy" is used in the national and international legislation, we also used this term to stick to legislative terminology.

Raising awareness and promoting accessible legal knowledge and information about the potential risks of using social media to share children's photos and videos may avoid these risks. To raise awareness towards the risks of sharing children's personal information (especially photos and videos of children) on social media platforms, we firstly recommend that a pop-up window with a warning text (informed consent text) should appear when a child's photo or video is shared. And secondly, we recommend that legal design should be implemented in forming these texts. Legal design is a method implementing different design techniques to communicate legal information, especially to certain disadvantaged target groups. Using legal design to produce accessible information to parents and children about the legal scope and potential risks of using social networking sites (hereinafter also referred to as "SNS") would be a very efficient tool that offers *ex ante* protection for children.

In the theoretical background of our article, we delved into the concept of "sharenting," examining the risks involved through providing concrete examples. In methodology part, we subsequently shifted our focus to a comprehensive exploration of the application of legal design in information texts. This involved a detailed analysis of how legal design methodologies enhance clarity, accessibility, and user understanding when conveying information. Through this examination, we aimed to underscore the importance of employing legal design principles in mitigating potential risks associated with sharenting and fostering a more effective and user-friendly communication landscape.

The General Data Protection Regulation (GDPR) is used as the primary reference due to its significant global impact on data privacy legislation and the tendency of social networking sites to align their policies with its provisions. Furthermore, a need for special protection of children's personal data is emphasized in no. 38 of GDPR's recitals, while visualization is also underlined as a probable tool for transparency of information

regarding protection of personal data in no. 58 of GDPR's recitals (Aulino, 2019; Buitelaar, 2018).

2. SHARENTING & ITS RISKS WITH AN EMPHASIS OF CASE LAW

Posts violating children's personality rights are becoming more prevalent, especially on Social Networking Sites-SNS such as Facebook, Instagram or TikTok. These posts are frequently utilised for socialising, commercial purposes, and publicity through exploiting children (Brosch, 2018; Plunkett, 2019b). Usually, it is the children's acquaintances sharing such posts, including their parents, relatives, friends, and teachers. Posts shared by parents constitute the largest proportion of postings (Haley, 2020). This is why the term "sharenting," a mix of the words parenting and sharing, appears in the literature (Haley, 2020; Husi-Stämpfli, 2021; Zorluoğlu Yılmaz, 2021; Steinberg, 2017). However, the term "sharenting" is understood to include cases where personal data and sensitive information is shared, stored, or published by persons other than parents, i.e., grandparents and other relatives, adult caregivers or teachers, and school staff.

Children are social beings, and they begin to have more roles in social life, especially when the nursery/school years begin. As a result, they become even more susceptible to the infringement of values within the bounds of personality rights. Sharenting even affects a child's digital footprint; social life begins in his/her newborn days through the photos, videos, or other digital material shared by the parents on SNS.

Children's public and private lives, among many other personal values, are harmed when their images are carelessly shared on social media. If this image is degrading, it will also interfere with the children's sense of dignity. The harm caused by a post may be considered a violation of bodily integrity. Since bodily integrity includes both physical and mental integrity, the exploitation of children's emotions should also be regarded in this context.

Sharenting is common. Even by 2010, 92 % of children by the age of two was found to have an online presence in the US, while another survey conducted in the US, the UK, Canada, Australia, New Zealand, Japan, France, Germany, and Italy in very same year resulted in 82 % of children under the age two to have a digital footprint (Shepherd, 2018; AVG Digital Diaries, 2011). According to a newer study by Moser et al. (2017), over 90% of new parents upload photos of their children on Facebook.

Potential risks of sharenting may be listed as follows: in addition to pictures, personal and sensitive data of the child, such as residence (or geographic location in general), school, biometric information, age, and birthday may lead to stalking, "digital kidnapping" and potential bullying among peers (Turgut, 2021). Moreover, sensitive photos of children become an attraction for paedophiles, who distribute these photos even further. It may also have an adverse effect on the child's perception of privacy as an individual by affecting the child's understanding of private places like home, school, and playground as public sphere (Plunkett, 2019a). Psychologists underline that "sharenting" may cause harm to the child's psychological and sociological development, as parents are the most trusted individuals of the child (Günüç, 2020). According to Hancock, "*Potentially the greatest threat to a child's privacy can come from their own parents.*" (Hancock, 2016, p. 29). Another important type of risk of sharenting is that by creating a digital footprint of the child, parents cause the child's data to be added into the big data world, potentially affecting education, employment, healthcare, and access to financial services of the child in the future continuing throughout his/her life (Gligorijević, 2019; Montgomery et al., 2017).

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The fact that these shares leave permanent digital footprints is disregarded (Donovan, 2020). Once the data becomes available online, it becomes an eternally accessible digital footprint (Williams-Ceci et al., 2021). In an incident that took place in Hong-Kong, an adult woman's childhood pictures were posted online by her mother without her consent and made available to public via Facebook (Cheung, 2019). Although the mother made the photos available to friends only after the woman's request, the mother had about 1000 "friends", most of whom she was not acquainted with in real life (Cheung, 2019). It is quite safe to assume that these people would be able to distribute these photos and once a photo becomes online, it could stay online for a long time. So, sharenting's effects is not only limited with childhood.

Legal disputes regarding sharenting rarely reach courtrooms (Blecher-Prigat, 2018). In a court case in Italy, a 16-year-old teenager requested the court to stop his mother from further posting photos of him on Facebook and erase the already posted ones during the parents' divorce case (Smith, 2018). The court decided in favour of the request, and the mother faced a £9,000 fine should she post any more photos of her son without his consent (Smith, 2018). However, this decision is understood to be based on a person's copyright on his/her photos. As understood, court seemed not to acknowledge concept of sharenting and child's right to privacy.

In a recent decision of the Higher Regional Court of Düsseldorf, the parents of two girls were separated and had shared custody of their children (OLG Düsseldorf, 20.7.2021 – 1 UF 74/21). The father was in a relationship with a hairdresser who took photos of girls and published them on the Facebook and Instagram accounts of her salon for publicity. The father was aware of the situation and consented, but when the mother of the children found out about the photos on Facebook and Instagram, she sent an e-mail to the father demanding the removal of all photos featuring their children from all SNS within three days, as well as a signed document agreeing not to share any further photos of the children within seven days. The father's partner continued to share new photos of the children even while the original photos of the children were still online. The mother took the matter to court, and this was the first instance where a court issued an injunction order stating that because parents shared custody, the mother's consent was also required. Therefore, the unauthorised posting of photos on SNS and commercial use of photos breached the mother's custodial rights, and the children's consent could not substitute for the mother's consent. However, the father appealed on the grounds that he was away on vacation when the summons was delivered, so he didn't know about the injunction trial; therefore, he was not present in court and the injunction was given in his absence. He further alleged that the mother was not interested in the well-being of their children and that it was all about a "small war" with him. According to the father, the photos were normal with children getting haircuts and did not harm the children's personality in any way. The injunction order meant that his partner will not be allowed to post any photos of the girls until they are eighteen of age even if the children give their consent, which is not realistic, and does not conform with social media use habits. He stated that this conflict caused a war of loyalty between the children. Moreover, he claimed that the mother and maternal grandmother shared photos of the children without his consent. The Higher Regional Court of Düsseldorf decided that there were not any procedural breaches in the injunction order. The Higher Regional Court's decision is important because it explicitly underlined that sharing of photos on SNS has effects on children's development and privacy and that their personality rights should be protected because photos of their childhood would probably be there forever and will be seen by an unlimited number of people (OLG Düsseldorf, 20.7.2021 – 1 UF 74/21). Based on these grounds, the court affirmed the injunction order pursuant to the German Civil Code par.

1628, which orders taking action in accordance with the best interests of children because shared photos affect the integrity of their personality and privacy. On the other hand, the Higher Regional Court affirmed that the consent of the children would not change the situation as both parents' consents are required for sharing photos as parents have shared custody (OLG Düsseldorf, 20.7.2021 – 1 UF 74/21).

As exemplified in this case, most parents either don't know or are not sufficiently concerned with the potential risks and possible harms of sharenting (Lipu and Siibak, 2019; Special Eurobarometer 2015). This makes it particularly important to raise awareness about the potential risks of sharenting and inform both parents and children about their legal rights and responsibilities.

3. CONSENT AND THE BEST INTEREST OF THE CHILD

In most sharenting cases, parents have given prior consent to transmission, publication or storage of the private and/or sensitive data of the child, as they have already accepted the social networking site's terms and privacy conditions. So, the consent of parents and/or child is an important aspect of the matter. Of course, the consent must be legally valid, and the validity of the consent has specific requirements. The validity of consent is crucial not only to prevent violations of personality rights but also to comply with personal data protection laws. That is because posting photos and sensitive data of children without their consent on social media constitutes unlawful personal data sharing and is punishable by administrative measures.

Consent will only be valid if a person has the capacity of judgement. Those persons will be deemed to be able to decide in the best interest of themselves. If children have the capacity of judgement, their consent must be obtained before sharing posts about them on social media. The parent's consent will be sought if the children lack capacity of judgement. However, when the parents share posts, they essentially give their consent on behalf of the child. This may result in conflicts between the parent's custodial rights and the child's best interests. The child's best interests, not the parents', should be taken into consideration when making a decision in such a case.

In the European Union (EU), there is no universal age for having the capacity of judgement, this varies depending on the specific context and the child's development. Children start using digital media at an early age, and parents usually support this for educational purposes (Nikken and Schols, 2015). It is generally acknowledged that individuals over the age of 13 have the capacity of judgement when it comes to using social media. However, it is impossible to assign a specific age to every social media post as each child develops differently, and each social media platform features different content. In accordance with GDPR Article 8, minors must be at least 16 years old to consent to sharing their personal data, while member states may impose a lower age restriction of no less than 13 years. On the other hand, it is also said that children (such as those who are 7-8 years old) might have the capacity of judgement at younger ages in terms of gaining parental consent while posting photos of them on social media (Husi-Stämpfli, 2021).

If, in the particular case, it is considered that the child has the capacity of judgement, then consent should be sought from the child and not from their parents regarding posts about the child. For instance, even though a high school student aged 15 or 16 does not want their photos to be shared on the school's social media accounts, sharing such information based only on a consent form signed by the child's parents will not make it legal to interfere with that child's personality rights.

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However, within the framework of the right to be forgotten, children who have the capacity of judgement also have the right to have the posts they have shared or validly consented to about themselves removed (GDPR 17). The right to be forgotten is underlined in Recital 65 of the GDPR as being particularly significant in erasing online posts when consent was granted while the consenting person was a minor and the risks were not fully anticipated.

The extent of the consent must be clear, and sufficient information must be provided for the child's or parent's consent to be considered valid. Particularly before consent forms are collected by third parties such as schools, nurseries, and test center administrations, the children or their parents must be adequately informed about which data (identification information, photos, etc.) will be shared with whom, on which platforms, and for what purposes. General and ambiguous consent forms will not be considered valid consent.

Although the consent of the parent and/or child (adolescent) is necessary for valid consent, the consent requirement shall not be sufficient protection (Gabriel, 2019). Information about risks, legal provisions, and responsibilities should be given in a manner easily understood by both parents and children. As a human right, children's right to data privacy should be protected without regard to the age of the subject and/or the right of parental control (Gligorijević, 2019). However, the prioritisation of parental consent is criticised as it may cause harm to children's right to (data) privacy in terms of sharenting (Gligorijević, 2019; Takhshid, 2023).

A text including clear and explicit statements written in readable fonts, in a language that can be understood by both the parents and the child who has the capacity of judgement, should be presented during the consent process regarding social media posts. Simple language understandable to children should be used, especially in texts aimed at children, according to the provisions of Article 12 of GDPR.

Following the child's consent, it is important to clarify - using age-appropriate images and symbols - which photos and information will be shared where, with whom, and for how long. Although what really matters is the child's consent, when parents are asked for their consent regarding a child who lacks the capacity to make decisions for themselves, they should consider what is in the child's best interests.

The fundamental tenet at the core of both domestic laws – particularly those pertaining to custody and protection of children – and international treaties governing children is prioritising the best interests of the child. This principle also calls for respecting the child's right to participate and, in this case, obtaining the child's consent or opinion.

The GDPR provisions are compliant with Articles 3 and 18 of the United Nations Convention on the Rights of the Child (Convention), which regulate that the best interests of the child should be taken into consideration in decisions regarding the child and in parents' raising their children, respectively. Article 12 of the Convention states that when a decision is taken in the best interest of the child, their opinion should also be taken into account if the child is in a position to comprehend the consequences of the decision. The child's opinion should be taken on social media posts involving the child to the extent of their puberty, even if it is debatable whether the child has the capacity of judgement and it is determined that the parents can consent on their behalf. This provision, however, cannot be used to justify a choice that is not in the child's best interest. When faced with consequences for behaviour that is contrary to the interests and personality rights of the child, an influencer mother, for instance, who makes money by sharing private photos of a child between the ages of 7-8, cannot justify her actions with the relevant provisions of the Convention, even if she shares the photos after asking her child. On the other hand, it is against the provisions of the Convention for parents to share photos of a child at that

age without the child's consent. The Convention is also an important source for EU law (Japharidze, 2023).

So, it would be fair to state that even the consent of the child is neither an ultimate solution nor does it offer satisfactory protection against the risks of sharenting in some cases. Considering the potential risks that may continue for a lifetime for the child, and that it would be hard for the child to take necessary legal actions before he/she comes of age, it would be much wiser to focus on preventing those risks *ex ante* rather than focusing on *ex post* legal remedies. In this sense, raising awareness about these risks may play an important role. However, it is a well-known fact that the terms and conditions of SNS are long texts, including different policies altogether. Furthermore, there are no differences in form or content for different types of users, i.e., parents, adolescents, and elderly people who are susceptible to greater risk. It is hard for both adults and children to comprehend longer texts (Kohlmeier and Klemola, 2021). Legal design shall be an effective tool for improved accessibility. While the overall length and mere text form of the terms and conditions on which consent relies is one issue, different needs for accessibility for different groups are another issue.

The ability of parents to determine whether information shared about their children on social media is beneficial or harmful to them depends heavily on information texts. The risks of sharing, particularly for children, should be explained in such documents; these explanations should be written in a way that parents can understand. In this regard, the sentences should be brief, straightforward, and accessible; it is crucial to offer remarkable explanations using symbols and visuals.

In sum, it is in the best interest of the child that sufficient *ex ante* precautions against possible risks of sharenting be taken not only by receiving parents' and child's consents but also by giving the necessary information and awareness about different aspects of sharenting with particular emphasis on possible risks. In order to do that, legal design shall be a convenient and powerful tool.

4. METHODOLOGY

This study employs legal design methodologies to develop disclosure and information texts that prioritise clarity, accessibility, and user understanding in the legal domain. By integrating design thinking principles, legal design transcends conventional, complex legal language, making information more user-friendly. This includes thoughtful use of typography, layout, and visual elements to create a visually appealing and easily digestible format. Through the application of legal design, this study aims to empower individuals to make informed decisions by simplifying legal jargon and complex concepts. By bridging the gap between legal requirements and user comprehension, it contributes to a more transparent and equitable legal communication environment.

4.1 The Term Legal Design

Legal design, in simple terms, is a design method that tries to improve the readability of legal texts (Mardin, 2021). It is a movement aiming for the legal system to work better for people through an interdisciplinary approach and a combination of work between human-centered and visual design, civic technology and participatory policymaking (Doherty, 2020).

Visualisation is an essential element of legal design (Botes and Rossi, 2021). Users can establish a holistic perspective that words cannot convey by using bold headers, summaries of lengthy and complex literature, and visualisation tools like tables

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and diagrams. While some of the tools used in visualisation can be prepared without any prior design education or expertise, others need the assistance of qualified designers (Berger-Walliser et al., 2017).

Visualisations are used in legal design to make complex terms understandable and to make the uninteresting ones interesting (Doherty, 2020). Although visualisation is frequently used in legal design, other design methods and tools are also employed (Berger-Walliser et al., 2017).[1]

4.2 Legal Design in Information Texts

Legal terminology is extremely complicated and difficult to understand, especially for laypeople. Also, considering the length of the documents, users frequently choose not to read these materials, or even if they do, find them difficult to understand. This fact causes users to abandon reading the texts altogether (Rossi et al., 2019). Information texts are another piece of text that people struggle to read or understand. This leads users to give consent to interference with their personality rights based on texts they have not read or understood. It is crucial that the information texts provided before obtaining consent for social media posts regarding children clearly explain the harmful repercussions of sharing. The validity of the consent to be given based on such texts will be impacted by any text that is unclear or insufficient in this regard.

The regulations on the processing of personal data will apply here because the values subject to social media shares are considered personal data in terms of GDPR. The legal design provisions of the GDPR are significant in this regard since they serve as a model for domestic legal design laws.

4.3 Legal Design within the GDPR Framework

The use of standardised symbols is required to implement the principle of transparency in mandatory disclosures regarding the processing of personal data, according to paragraph 7 of Article 12 of the GDPR. The provision states that the information disclosed to the data owners must be readily visible, understandable, and legible. It must also include standardised symbols to provide a meaningful general description of the procedure to be performed. In cases where the symbols are presented electronically, the symbols must be machine/computer-readable (Hamamcıoğlu, 2022).

Pursuant to the GDPR, such symbols may be used in privacy policies, disclosure texts, application permissions and public notifications. It might be particularly helpful to make privacy statements easier to access and understand by using standardised symbols. Users' understanding of the implications of their consent can be strengthened by emphasising the risks associated with the data collection procedure. As a result, communication about data practices can be improved (Rossi and Lenzini, 2020a). The person in question can make conscious decisions and use their rights much more easily (Paal and Pauly, 2021).

Indeed, emoticons, vector graphics and icons have been part of our private and professional lives for some time, i.e. emoticons and emojis used for digital communications. Visualisation provides better comprehensibility and cross-language communication (Kohlmeier and Klemola, 2021). Serving as signs, these symbols are also known as "pictograms". Pictograms were invented to be able to communicate quickly and clearly without using words in order to get the user's attention. Pictograms should

[1] For several sub-types of legal design such as product design, service design, organisational design and system design, apart from visualisation designs, please see Hagan (2022).

be carefully chosen so that their meanings are understood without further explanation. While creating these symbols, broad representations that can be connected to their intended meanings, such as through shared experience, should be employed. The ability of pictograms to be understood in all cultures and languages without using words is also crucial. In contrast to other visual aids like comics, images, and charts, they are not meant to provide explanations of information. In this way, pictograms allow the performance of a desired conduct, the prevention of undesirable behaviour, or the provision of information about a particular situation without attempting to change the recipient's behaviour (Rossi and Lenzini, 2020a).

A sloppy or complicated design, however, can result in a misinterpretation of the necessary information and, as a result, incorrect conclusions. Thus, it is crucial to establish standardisation in pictogram production. This is necessary because symbols are a form of universal communication that successfully gets through obstacles like language, culture, and age. For instance, despite their place of origin, the majority of traffic signs are made to guide cars. To preserve cultural neutrality and prevent misunderstandings along the journey, such a wayfinding system is systematised in specific combinations of symbols, forms, and colours with little usage of writing. Likewise, the public symbol system used to guide pedestrians and passengers in transportation facilities (like airports) is made to communicate complicated messages to individuals of various ages and cultures. Once again, specific ISO criteria govern how safety and public information issues are visually communicated (Rossi and Lenzini, 2020a). Pictograms can also be used to represent ideas in cybersecurity, such as the padlock used in encrypted communication (Rossi and Palmirani, 2020). The standardised requirements of the symbols used in these domains, however, cannot be directly applied within the purview of GDPR. Future data protection symbols must therefore be approached from a broad, interdisciplinary perspective. To communicate research findings on what standardised symbols can be created independently of culture and spoken language in the global arena, we recommend the establishment of a group of experts and institutions. This is because making the symbols visible, accessible, and comprehensible will be made much easier thanks to the research findings from the studies carried out by this group (Rossi and Lenzini, 2020a). We believe that when screen usage is more limited, comprehensible visualisations — particularly in the context of mobile applications—will be even more important (Hamamcıoğlu, 2022).[2]

In conclusion, the potential risks can be mitigated by using pictograms alongside the text rather than entirely replacing them. The symbols must be supported by robust experimental data, which is crucial. Misrepresentation, oversimplification, or placing undue emphasis on one topic over another may cause data owners to make misinformed decisions. As a result, data owners may accidentally permit practices that violate privacy (Rossi and Lenzini, 2020a).

Research seeking to implement the symbols that aim to promote transparency within the purview of GDPR must be followed. Therefore, the "information overload problem" can be overcome by the proper usage of legal design in this domain (Hamamcıoğlu, 2022). The application of legal design for personal data protection purposes is not just limited to the creation of standardised pictograms. Standardised symbols are simply one solution for the privacy policies' frequent lack of transparency (Rossi and Palmirani, 2020).

[2] For similar views, please see Spindler and Schuster (2019).

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4.4 Using Legal Design for Protecting Children Against Risks of Sharenting

Main reason behind sharenting is neither ignorance nor neglect by parents, but rather a lack of knowledge of the parents about the rights, responsibilities and the importance of understanding the risks associated with sharenting and the digital identity of a child (Steinberg, 2017; Plunkett, 2019b). Furthermore, scholars advise parents to familiarise themselves and understand the privacy policies of SNSs (Steinberg, 2017). It is also noted that parents nor children can be expected to comprehend the risks under the current scheme of "one-click" agreement to user terms and privacy policies (Jasmontaite and de Hert, 2015). This may also be referred to as "click or abandon" approach, which psychologically nudges parents into agreeing with vague and complex terms and policies (Donovan, 2020). These all lead to an information asymmetry of parents regarding the content of user terms, privacy policies and risks of sharenting. Legal design works as an *ex-ante* or preventive tool, which may be particularly suitable for overcoming risks of information asymmetry experienced by parents when using SNSs and against sharenting (Haapio et al., 2021). People who are aware of their rights and responsibilities may pursue justice and conform to legal norms better, even without the help of a lawyer. So, informing parents about such rules is necessary to protect children against the perils of sharenting; it may even be a tool easier to implement than traditional protective legal provisions because children may be unable to instigate their legal rights in such cases. It should be recognised that different characteristics of target groups require different approaches and different designs in legal design. Younger children perceive personality rights differently from adolescents (Walser Kessler, 2015; Kohlmeier and Klemola, 2021). Thus, legal design aimed at sharenting should be adapted for parents, younger children, and adolescents respectively.

Another aspect of legal design is human-centered design (McKeever and Royal-Dawson, 2023; Rossi and Lenzini, 2020b). It can prove an efficient tool for reaching out to different target groups. Human-centered design is a design approach that is not limited to legal design; it focuses on developing products product or services from the user's perspective. In other words, human-centered design incorporates the needs and preferences of the user with empathy and interacts with them to reach the desired outcome (McKeever and Royal-Dawson). By application of human-centered design, legal document designers shall use empathy and collaborate with the target group of the legal document to identify potential problems and develop solutions, using interviews, surveys and brainstorming sessions, as well as experimenting with different designs for an optimal document. Therefore, to raise awareness about sharenting and help parents understand the associated risks and responsibilities, it would be very appropriate and useful to implement a human-centered design approach in designing "user" guides for sharenting.

Visualisation of legal rules by using pictograms shall make legal texts easier to comprehend and help reduce the language barrier both in terms of legal terminology and across different languages. In this manner, a shift from legal documents to user guides should be considered (Haapio et al., 2021). Visualisation methods like a clear layout, skimmable headings, numbered steps, companion icons and icon systems are advised (Haapio et al., 2021). Taking into account the multi-sensory aspect of legal design, apps, playbooks, websites and similar interactive solutions shall be really useful and helpful to reach different target groups more effectively. The creation of labels and labelling systems may be considered like icons in GDPR. Plunkett (2019a) proposes that a labelling system, modelled on nutritional labelling, could address the information asymmetry between digital technology providers and parents in the context of sharenting. Recital 58

of the GDPR also requires that the information to all data subjects should be provided with a clear, audience-appropriate language, i.e., usage of icons (Buitelaar, 2018).

In the content of a typical user guide for sharenting, concept of digital identity and its effect throughout a person's life, risks of oversharing in SNS's, scope and importance of consent, a reminder for parents to consider their children views should be included. User terms and privacy policies as long and complex legal texts with vague information and "click or abandon" approach must be changed with application of legal design. Legal design should be implemented in forming shorter, clear, plain, and comprehensible language in terms of user and privacy policies. The scope of risks associated with sharenting and the digital world generally should not be confined to the user agreements of SNS's, but there should be public campaigns aimed at parents, setting a code of conduct in the digital world with an emphasis on privacy and consent matters. Legal design may also be used to design such campaigns and courses.

4.5 Design Proposal: Visual & Interactive Information System for Social Media

Humans acquire visual messages better than text. Rossi and Palmirani (2015) stated that the support of visual elements in legal design helps to alleviate the cognitive load of reading and understanding complex documents such as legal texts. In this part of the study, informative texts were examined, loaded legal texts were analysed in line with reader needs, and the texts were categorised according to the types of information to be conveyed. In establishing the design criteria, careful consideration was given to the visual language and format of social media. Subsequently, the functionality of visual elements and the design of the user experience were developed in alignment with these considerations. A comprehensive review of sources influencing the development of legal design literature led to the identification of specific tools and methods tailored for each type of information.

In this study, a system proposal has been developed for the sharing of child photos on social media. The system operates by prompting users with specific questions and displaying warning messages during the sharing process. Within this framework, the texts that appear progressively according to the answers given when the child's photo is shared include the questions of whether the children or their legal representative consents to the sharing, whether sharing the child's photo is in the child's best interest, whether appropriate privacy settings have been applied, and what legal remedies that the child/legal representative can apply in cases where there is a lack of consent, interest of the child, or appropriate application of privacy settings and/or the risks that the child may face. Prior to designing the interfaces for the Visual & Interactive Information System, a preliminary clarification text (Figure 1) is prepared, including numbered questions and answers that correspond to the steps in the system's process flow.

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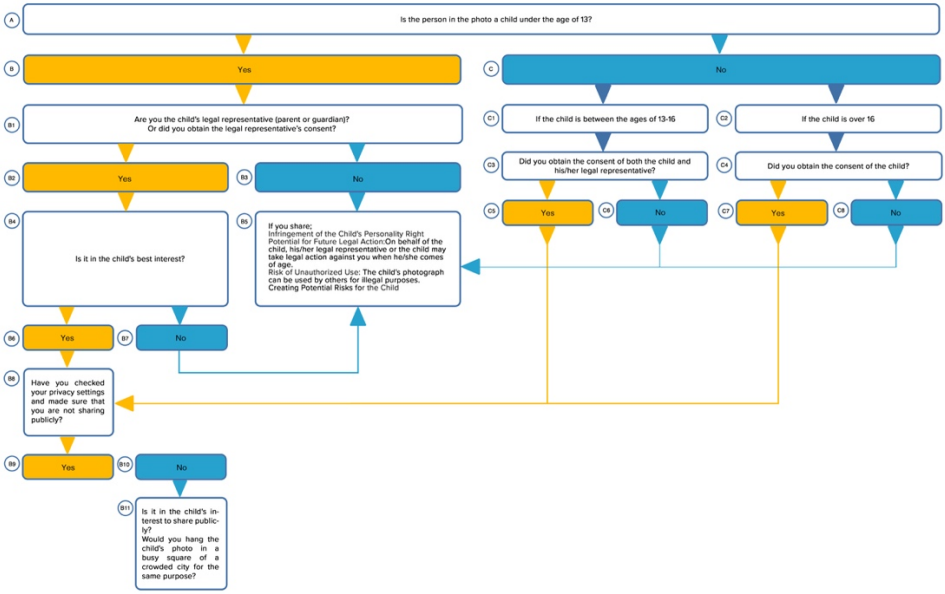

Figure 1: Clarification text draft, steps are numbered[3]

This system adopts a user-centric approach to achieve comprehensible communication, emphasising the need to consider user characteristics to enable informed decision-making and the exercise of individual rights. In this context, we propose an age-based consent framework: Children aged 16 and over should be able to give consent on their own, while children between 13 and 16 may only give consent together with their parents. For children under 13, only parental consent is required. In any case, parents must make their decision about their consent according to the principle of the child's best interest. In order to effectively convey this information and underscore the potential legal scenarios and associated risks about sharenting, the proposal incorporates legal design principles. In accordance with the suggestions of Rossi and Lenzini (2020b), it adheres to the essential notion of prioritising the holistic user experience, shaping a choice architecture that is not only meaningful and empowering but also caters to users' needs and capacities in a manner that is usable, transparent, and fair.

In an increasingly visual-centric digital world, visual data takes precedence, particularly in the realm of social media usage, shaping user behaviour towards "watching" rather than "reading" (Sroka, 2022). The proposed design aims to inform users with visual warnings in line with their social media usage patterns in situations that may cause legal problems. The design system uses a face & silhouette recognition algorithm

[3] Due to its size, Figure 1 is also available in higher resolution online on the website of the Bratislava Law Review: https://blr.flaw.uniba.sk/index.php/BLR/article/view/967

based on the analysis of facial features, human gait, or body proportions to distinguish between children and adults (Ge et al., 2013; Taha et al., 2024; Wu and Guo, 2013). When a person attempts to share a photo/video of a child, the face & silhouette-based recognition algorithm detects the child's age and raises an alert (Figure 2). This notification prompts the individual posting the image to provide information regarding the age range of the child depicted. This approach serves a dual purpose: increasing awareness about this matter and pre-emptively mitigating potential issues that may arise.

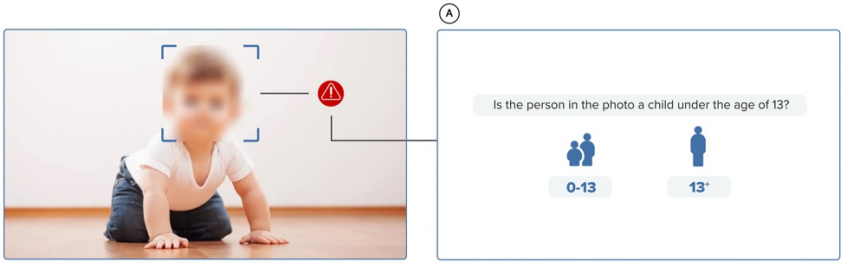

Figure 2: The algorithm identifies the child's face and silhouette, and a visual alert appear[4]

In the first phase, the process flow is shaped by two different factors: child's age and the individual, who is the target user sharing data about the child. Since different age ranges are subject to different legal processes, the user was asked to indicate which of the age ranges the child falls into 0-13 and, 13 and over, as illustrated in Figure 3. Within this context, the target users may be both the legal representative of the child (parent or guardian), or it could be any relative or acquaintance who knows the child. Thus, the warning and information content flow in the design was formed for two different personas.

[4] Due to its size, Figure 2 is also available in higher resolution online on the website of the Bratislava Law Review: https://blr.flaw.uniba.sk/index.php/BLR/article/view/967

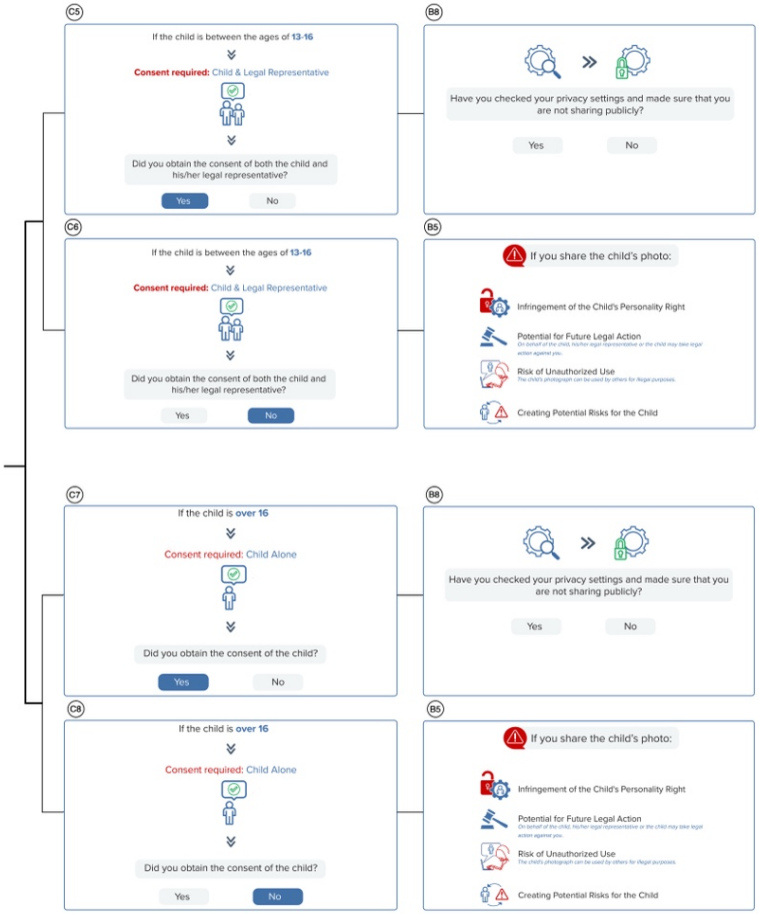

Figure 3: Process flows: If the child whose photo is shared is under/over 13 years old[5]

Texts that contain definitions and explanations on legal and financial issues and enumerated items in the content of the clarification text were defined. In this direction, considering the reader's need for easy follow-up and easy readability of the text, the existing design systems (lines, shapes, arrows, colours, thickness and thinness of lines and icons) were used in accordance with the holistic design language with the focus on the hierarchical distribution of information and ensuring that the loaded text is interesting and memorable. Berger-Walliser et al. (2017) state that the use of such symbols can increase the comprehensibility and effectiveness of the text for the user. This method is

[5] Due to its size, Figure 3 is also available in higher resolution online on the website of the Bratislava Law Review: https://blr.flaw.uniba.sk/index.php/BLR/article/view/967

used to highlight certain aspects of the legal text, pointing out to the reader that words constitute a prohibition or a duty, which can be a good guidance for future behaviour.

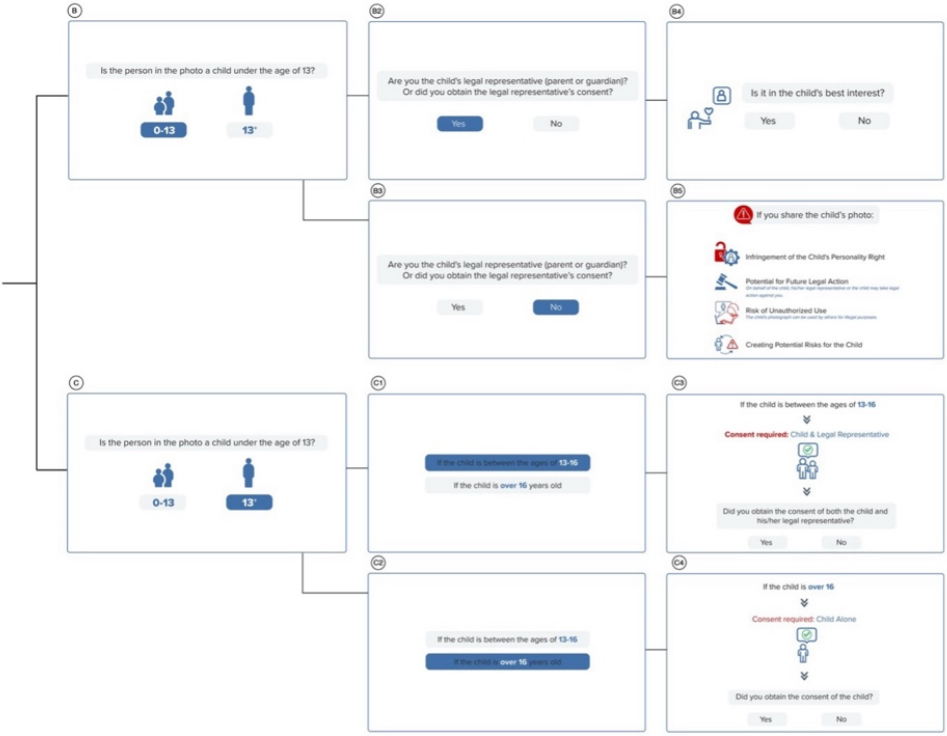

Figure 4: Process flows: If the child whose photo is shared is between 13 – 16 or over 16 years old[6]

As the child's age is one of the main determinants in terms of child's personality rights, the objective is to emphasise the distinctions between the prerequisites for obtaining consent and the potential consequences associated with sharing information about children of varying age ranges (see Figure 4). In this phase, it is important to visualise the process flows to provide participants with a clear roadmap and explain the steps. This format offers users an informative overview of the action's background, guidance on the necessary steps to prevent unfavourable legal consequences, and a clear understanding of the potential issues they might encounter if these precautions are not heeded. In this context the design patterns identified by Rossi et al. (2019) and the general design guidelines, templates and case studies created by the Stanford legal design lab are utilised to create the format and deliver the specified messages.

[6] Due to its size, Figure 4 is also available in higher resolution online on the website of the Bratislava Law Review: https://blr.flaw.uniba.sk/index.php/BLR/article/view/967

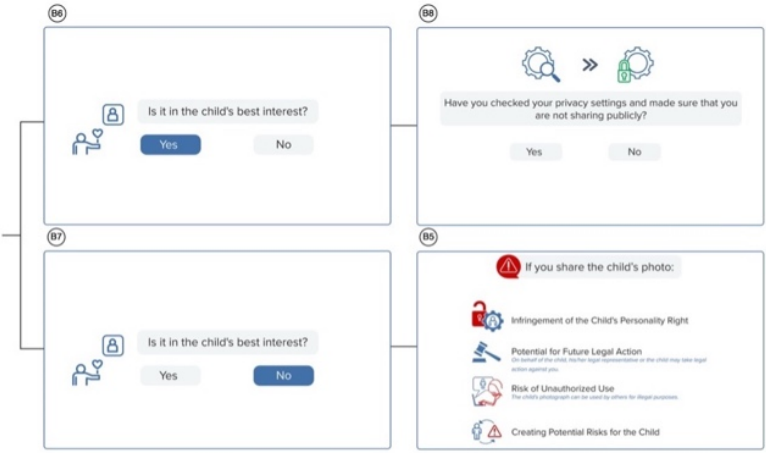

Figure 5: Process flow steps: Directing user to consider the child's best interest[7]

The interactive interface aims to make social media users consider the child's privacy rights, the importance of the age range, consent requirement and the issue of whether sharing is beneficial to the child or not before sharing data about a child. In the process flow shown in Figure 5, B8 and B5 are the most repeated contents. Step number B5 reveals the possible consequences of sharing a photo of a child and includes visual elements demonstrating and matching the written statements.

Figure 6: Process flow steps: Directing user to control privacy settings[8]

After informing the user about the consent requirement, the system directs the user to check their privacy settings (Figure 6). Step number B8 includes icons symbolising privacy, setting controls to ensure the content is not shared publicly. The

[7] Due to its size, Figure 5 is also available in higher resolution online on the website of the Bratislava Law Review: https://blr.flaw.uniba.sk/index.php/BLR/article/view/967
[8] Due to its size, Figure 6 is also available in higher resolution online on the website of the Bratislava Law Review: https://blr.flaw.uniba.sk/index.php/BLR/article/view/967

icons and symbols used in the visual interactive information system are selected based on the existing social media visual language in order to look familiar to users. The following step aims to gain insight into this behaviour by having the user imagine an example in daily life that might correspond to publicly sharing data about the child. The first symbol designed in step number B11 consists of red-coloured 'share' and 'world' icons to warn the user about sharing publicly. The second symbol illustrates an imagined scenario and underscores the potency of visualisation in conveying the sensation of an undesirable outcome.

Tredwell (2021), in her study on the careful use of typography in the transmission of legal texts, emphasises the need to use different styles and sizes of fonts to highlight certain elements and guide the readers' eyes more easily throughout the text. In this direction, it is aimed to design the structure of the clarification text (headings, sections, subsections, etc.) in a way to make it more prominent to increase readability and to pay attention to the holistic language and the selection of colours and fonts suitable for the readability target. The colours (blue (light & dark), red, green) used in the visual identity design of the information content were interpreted contextually and applied consistently within the text to convey the same/similar meanings. Created in the 18th century by Goethe (1810/1967), colour theory emphasises the role of colours in human perception and their emotional effects. According to Perry and Wisnom's (2003) study, people react directly to colours and shapes. Therefore, designers use colour attributes to increase the recognisability of brands and strengthen the visual memory of organisations. Colours can contain specific messages and trigger specific reactions between the central nervous system and the cerebral cortex (Chang and Lin, 2010). People experience psychological changes when encountering different colours; colours can stimulate, excite, and create other emotions.

In order to convey the right message to the participants in this study, colours were carefully used in a contextually appropriate manner by evaluating them within the framework of emotions, states and meanings specified in communication and psychology and semantics studies. Research in the fields of colour theory and communication psychology supports that blue increases trust and evokes a sense of calmness (Alberts and van der Geest, 2011; Yüksel, 2009). In this study, blue is preferred to convey this feeling to individual investors while making the complexity of legal knowledge understandable and accessible. Blue is employed in light and dark variations, with user selections indicated by a transition from light blue to dark blue when the user interacts with the buttons. Red is a bright, warm colour that evokes strong emotions and is considered an intense colour that creates a sense of excitement or intensity, which can even be associated with anger (Ren and Chen, 2018). In this study, red was used to emphasise risky, critical issues and situations that require attention in the legal context. Finally, safe, natural, and usual situations and behaviours were emphasised with green (Grimes and Doole, 1998). The specified colour coding was repeated in the same/similar meaningful situations to create a pattern, thus reinforcing the colour and perceived meaning matches.

5. CONCLUSION

Sharenting poses certain risks and dangers to children's welfare. We determined that sharenting, in other words, sharing a child's data via SNS, shall constitute a breach of the child's personality rights if the principle of the child's best interest is disregarded or without the child’s consent is not taken into account, in accordance with international law

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and national legislations. However, it is crucial to establish *ex ante* precautions to minimise the risks and dangers of sharenting.

Consent of the child is critical; however, the child's age is a key determinant in ensuring the validity of such consent. Although certain legislation, i.e. GDPR, sets an age range for valid consent and major SNS policies seem to abide by such standards, it should be noted that a more generalised approach is necessary given that both parents and children worldwide are engaging with SNSs. We propose the following age classification: children aged 16 and above should be able to provide consent independently, while children between 13 -16 may only give joint consent with their parents (both parental and child consent). For children under 13, only parental consent is required. In any case, parents must make their decision based on the principle of the child's best interest.

Consent may only serve as a protective measure if the individuals providing it are sufficiently informed. Without adequate information, consent becomes merely "blind", and the hazards of sharenting shall not cease. In order to mitigate the potential hazards of sharenting, it is essential that SNS users are adequately informed about the risks of sharenting, both with or without consent. Furthermore, the significance and requirement of consent must be clearly communicated to the SNS users. On the other hand, delivering this information is challenging. Information overload and/or the use of legal or technical terminology that is hard to comprehend are obstacles to comprehension. This study proposes legal design as a tool for overcoming these obstacles and making parents and children much more aware of the risks of sharenting and the importance and necessity of consent.

Legal design aims to transform legal tools and documents to ensure that the law is communicated to all people and that this communication is understandable by those with and without legal education (Murray, 2021). The proposed Visual and Interactive Information System consists of carefully designed interfaces, including schematisation of possible situations using diagrams and roadmaps, and predicting future needs by means of legal tools that provide a clearer understanding of the terms of the legal relationship. This system serves as an explanatory and interactive resource designed to educate individuals who share children's data on social media platforms. Using a combination of visual and interactive features provides a comprehensive explanation that provides a more comprehensive understanding of the relevant legal principles and their implications for protecting children's privacy in the digital space.

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Zorluoğlu Yılmaz, A. (2021). Sharenting and Limits of Custody. *Selçuk Law Review*, 29(4), 3318-3417.

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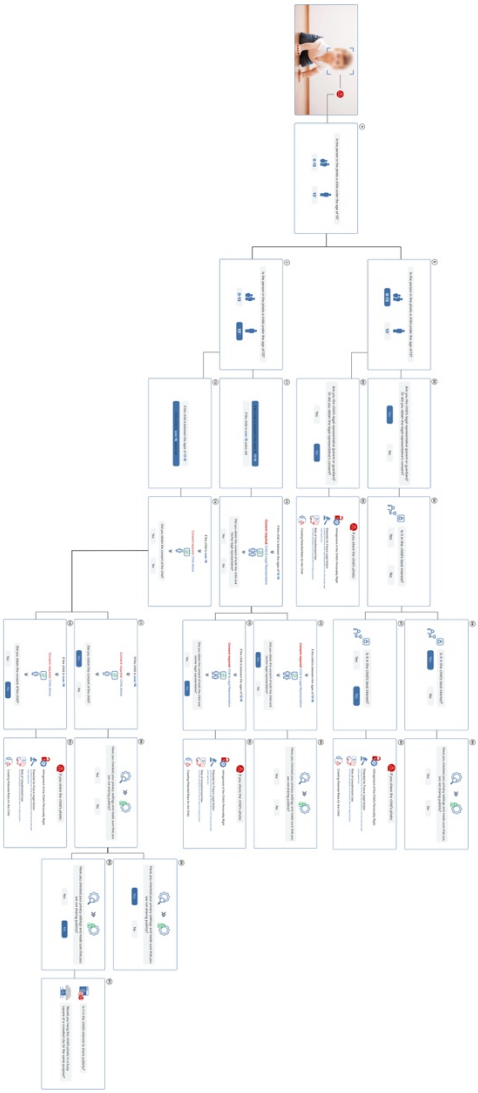
Appendix A: Process flow of Visual & Interactive Information System[9]



[9] Due to its size, Appendix A is also available in higher resolution online on the website of the Bratislava Law Review: https://blr.flaw.uniba.sk/index.php/BLR/article/view/967

ARTICLES

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PROPOSALS OF PUBLIC LAW INSTRUMENTS FOR STRENGTHENING THE PRIVATE LAW PROTECTION OF FRANCHISEES

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Abstract: *There are presented proposals for public law instruments aimed at strengthening the legal protection of franchisees, who are often in a weaker economic position in relation to the organisers of franchise networks. The main objective of the study is to present and discuss ways of legally increasing the effectiveness of franchisee protection, which is currently regulated in private law. The author postulates that regulations in private law are not sufficient due to the strong economic disproportions between the parties to the franchise agreement. Different approaches to the regulation of the franchise agreement can be observed in different legal systems. Many countries do not have detailed legal regulations regarding the franchise agreement, and these agreements are often based on general principles of freedom of contract. However, the need to protect franchisees, who are usually weaker contractors, is increasingly being noticed. International initiatives such as the "UNIDROIT Model Franchise Disclosure Law" were also indicated, which aim to protect franchisees by regulating the information obligations of franchise network organisers. Models of legal regulation of the franchise agreement. The proposals also include more advanced regulations that define the rights and obligations of the parties to the franchise agreement and issues related to unfair competition. The document presents arguments for the introduction of instruments for the protection of franchisees in public law. It was noted that franchising is a phenomenon of social importance that deserves the attention of the legislator. There are also concerns about pathological phenomena in the area of franchising, such as excessive exploitation of franchisees or the risk of unfair practices The document emphasises that franchisees should have access to similar forms of protection for consumers and employee. The document ends with the statement that private law regulations may not be sufficient to protect franchisees. It is proposed that protection in public law should complement private law regulations, which could increase the effectiveness of protecting franchisees' interests.*

Key words: *Franchisee; Franchisor; Collective Interests of Franchisees; Weaker Party; Private Law; Public Law*

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1. PURPOSE OF THE STUDY

The essential aim of this study is to generally present and discuss proposals on how to legally increase the effectiveness of the legal franchisee protection, which is regulated in the private law (Harlow, 1980). The study concerns of possible and universal

legal measures through the special „leverage" of public law institutions.[1] Therefore, the research assumption is the following: if the franchise contract has been regulated in private law (e.g., in the sphere of pre-contractual obligations of the organiser of the franchise network and/or in the sphere of the rights and obligations of the parties to the contract), the level of legal protection of franchisees achieved in this way is not sufficient, due to usually strong economic disproportions between the parties to the franchise contract. The basic research method used in the study will be the formal-dogmatic method.

Franchising as a complex socio-economic phenomenon may be regulated not only by provisions belonging to the group *of ius privatum* rules (civil law or commercial law). With regard to certain issues, franchising is the obvious subject of *ius publicum* direct regulation, in particular in the field of public competition law or tax law (Goyder, 1989). In the study there are shortly presented general remarks on the possible scope of the regulation of the franchising agreement in private law and arguments in favour of increased legal private law protection for franchisees (Adamus, 2024b). Finally, there are recommended some possible universal instruments of public law which could be used to increase the legal protection of all franchisees and only them.

2. EXAMPLES OF LEGAL REGULATION OF FRANCHISING IN PRIVATE LAW IN DIFFERENT LEGAL SYSTEMS

It is necessary to emphasise the economic disproportions between the organiser of the franchise network (a global, regional, national, or even local entrepreneur; with the advantage of practice, experience, economic potential) and the franchisee (very often a natural person for whom franchising is an alternative to an employment contract that protects the employee, see, e.g., Mathewson and Winter, 1985; Klein, 1995). Often, a candidate for a franchisee has no previous experience with running any business at his own risk (Bar-Gill, 2007, p. 749). This applies not only to cases in those countries where franchising is experiencing dynamic development.

Not all legal systems provide for detailed private law regulation of the franchise contract (Teubner, 1991; Abell, 2013; Jankalowa and Jankal, 2004; Sotiroski, 2016; Adamus, 2020, 2022a, 2023). However, a franchise contract may exist in commercial practice without its detailed regulation in private law, simply based on the general principle of freedom of contract. Nevertheless, it is more and more often perceived as a subject of legislation serving mainly to protect the private (personal) interests of franchisees (Kerkovic, 2010, p. 104). Franchisees are – as a rule – economically weaker contractors and mainly for this reason they deserve special legal support through private and public law (Vdovichen and Voroniatnikov, 2019, pp. 27-32). Contemporary conducted research indicates the need for protection of the weaker party of the contract in private law regulations (Micklitz, 2004; Jagielska, 2023, 2024).

Protection of the franchisee against exploitation within the framework of contractual relationships is possible on the basis of general principles of private law (in the absence of specialised legal defence instruments). Nevertheless, it is less effective than with the existence of specialised legal institutions directly devoted to franchise agreement.

[1] It is possible to protect the interests of all franchisees under public competition law completely independently of the regulation of franchising under private law. However, this text is not about traditional public competition law. It is not about protecting competition in general. It is about protecting the collective interests of contractors of franchise network organisers.

The International Institute for the Unification of Private Law (UNIDROIT) recommended the „UNIDROIT Model Franchise Disclosure Law" (2002). UNIDROIT essentially addresses (a) the issue of documents disclosed by the franchise network organiser prior to the conclusion of the agreement and (b) the legal consequences of the network organiser's failure to comply with this obligation (Kerkovic, 2010, pp. 103-118). The proposed model law clearly aims at the legal protection of franchisees (Soliyenko, 2015). The structure of the Model Law, which places strong emphasis on the pre-contractual relationship, is reminiscent of consumer protection standards in European Union law (Cretu and Spasici, 2020, p. 31).

Another international scientific initiative should also be mentioned. „The Draft Common Frame of Reference (DCFR): Part E. Commercial agency, franchise, and distributorship" also addresses the issue of franchising in private law. The document was prepared by the „Study Group on a European Civil Code and Research Group on EC Private Law" („Acquis Group"). This project refers not only to the franchisor's disclosure obligations prior to concluding a franchise agreement, although here the draft regulation is rather modest, but indicates the manner of regulating the rights and obligations of the parties to the franchise agreement as a type of named agreement – *contractus nominatus* (in the case of the franchise distribution model) (Nils and Zimmermann, 2010). The draft indicates that a number of provisions concerning the franchise agreement should take not so much a dispositive form, but the form of mandatory provisions (*ius cogens*) of private law.

The European Union law does not generally address the issue of the civil rights and obligations of the parties to the franchise agreement. In the vast majority of European Union countries, no specific legal regulation concerning the franchise agreement has been adopted (Abell, 2012, p. 19). There is no special regulation codifying franchising as a type of obligation relationship (*contratus nominatus)* in Germany (Cochet and Kumar Garg, 2008), Austria (Spiegelfeld and Krenn, 2008, p. 5), Denmark, Czech Republic (Antonowicz, 2011; Ctibor and Horackova, 2017), Finland, Greece, Portugal, Poland, Slovenia, Slovakia (Petrova, 2020, pp. 30-36). The United Kingdom (ceased to be a member of the European Union) has not adopted any special private rules for franchising activity.

In the second group, there is a minimalist regulation of private-law issues related to the institution of franchising. The legislation boils down to specifying the requirements that are expected from the franchisor in terms of informing franchisee candidates about the franchise network. These laws do not define the rights and obligations of the parties to the franchise agreement. These countries include: Belgium (Wormald and Maude, 2005, p. 3), France (Loewinger and Lindsey, 2006, pp. 11-16), Spain and Sweden. Finally, some countries of the European Union have adopted the original regulation on franchising (Italy, Lithuania, Latvia, the Netherlands, Romania). Franchising is regulated in other countries of the world, such as: Australia (Spencer, 2007, pp. 27-30), China (Jones and Wulff, 2007, p. 57), Vietnam (Nguyen and Wisuttisak, 2023), Brazil (McGahey, 2014), Chile (Carey, Samples and Silva, 2014), USA (Gurnick and Vieux, 1999, p. 37), Argentina (Marzorati, 2001, pp. 43-46), Mexico, Malaysia (Harif and Azhar, 2001), Russian Federation (Nikulin and Shatalov, 2013, p. 89). Therefore, different approaches to the problem of franchising as well as different models of regulation could be observed.

3. POSSIBLE MODELS OF LEGAL REGULATION OF THE FRANCHISE AGREEMENT

The legislator has several options as to the scope of the franchising activity regulation. Legal regulation of the franchising agreement can take place in subsequent

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stages. There is the possibility of the so-called minimalist regulation based on the model law, covering such issues as the protection of franchisees at the pre-contractual stage, i.e.: (a) regulating the franchisor's obligation to provide minimum information about the franchise network provided to the person interested in franchising, including the regulation of the scope of information obligations; (b) regulation of the deadline for the franchisor to provide the information. The legal protection of a franchisee candidate at the pre-contractual stage is an entitlement instrument characteristic of consumer law, which also emphasises consumer protection even before the conclusion of the contract.

The next level is to regulate the franchise taking into account the scope of the model law regulations, as well as additionally defining the rights and obligations of the parties to the franchise agreement. Through such a legislative procedure, the franchise agreement will undoubtedly become a named agreement (*contractus nominatus*). In most cases, the provisions relating to the franchise agreement will be dispositive in nature (such a legal norm applies in the absence of a different will of the parties).

A level that includes a) regulation covered by the model law, b) defining the rights and obligations of the parties to the franchise agreement, and c) regulating other issues related to private law, including typical examples of forbidden acts of unfair competition (in private law) in connection with franchising (for example, offering to others the possibility of joining a franchise network without prior thorough and sufficiently lengthy examination of its business model, and in particular through the organiser of the network or its legal predecessor; significantly different treatment of franchisee applicants and franchisees under similar conditions) goes a step further.

4. ARGUMENTS IN FAVOUR OF FRANCHISEES PROTECTON IN PUBLIC LAW

From an axiological point of view, there are many arguments for regulating protective instruments for franchisees in public law.

1) Undoubtedly, franchising is a momentous social phenomenon that deserves the attention of the legislator. This is evidenced by the number of franchise networks available, as well as the number of people involved in franchising. There is a strong trend of increasing the popularity of franchising (argument referring to the socio-economic significance of franchising).
2) Legal regulation of successive areas of social and economic activity is a natural consequence of the progress and development of the law. Many sorts of commercial activity have been subject to detailed regulation (the argument referring to the civilisational mission of the law).
3) Franchising is a playground of selfish market games focused on maximising profits. As a consequence, it is prone to taking advantage of the actual advantages that exist in business transactions. The natural imperative of business activity is to maximise profits, not social responsibility. Factors such as the global size of some franchise networks, their international nature, the ease of using the services of the best law firms (which is important that procedural law is usually governed by the principle of formal truth), and the length of court proceedings should be taken into account. In such circumstances, the operation of private law norms in the event of a serious civil dispute may not be sufficiently effective (the argument referring to franchising as an instrument of the market game).
4) The last argument for regulation is the existence of pathological phenomena in the field of franchising. The risk of disproportionate exploitation of the franchisee and shifting a disproportionately large part of the costs of market

expansion to the franchisee („slave franchise"), Risk of loosing of initial charges for a not prepared and worthless franchise („black franchise"). The risk of taking away the franchise if the activity is profitable („franchise that does not tolerate success"). The risk of illegal use of *the* franchisor's know-how („franchise theft"), and the risk of lack of competence to run a business on the part of the franchisee („franchise ineptitude") (Dnes, 1992; Adamus, 2024a, pp. 2-9).

The idea of regulating franchise protection in public law has its pros and cons. Any normative regulation is likely to increase the costs of running a business by franchisors (costs resulting from adapting their operations to the new regulations). However, these are not key or critical costs for franchisors' business operations. However, if the legal guarantees are attractive to franchisees, the security of this activity may encourage more candidates to take up the franchise business and consequently translate into profits for franchisors.

5. LEGAL PROTECTION PROVIDED FOR CONSUMERS, EMPLOYEES IN PUBLIC LAW

In the international discussion, the question of whether a franchisee is a consumer or not is more and more often asked (Buchan, 2012; Rodríguez-Yong, 2011; Adamus, 2022b). Paradoxically, the answer to this question is not unambiguous. No doubt, the debate on the international forum is simplistic. This is because it detaches itself from specific concepts, such as "entrepreneur"/"consumer" used in a given legal system. By its very nature, a franchisee is an entrepreneur who is a separate person from the franchisor. Even if a franchisee is a natural person, it does not establish an employment relationship with the organiser of the franchise network. In civil-law transactions, a franchisee acts as an entrepreneur in its own name and on its own risk.

Franchisees are very often natural persons (individuals). The status of franchisees excludes these individuals from being treated as "consumers" or "employees" in their relationship with the network organiser, although the status of a franchisee (who is an individual) is quite similar to a consumer or employee. Meanwhile, consumers and employees enjoy multi-level legal protection. Using an analogy to modern consumer law: mature legal systems not only give the consumer the right to privately file a complaint to the court but also strengthen consumer protection in the public interest by granting specific competences to special public administration bodies in order to protect consumers. From the point of view of the interests of a specific consumer, public law regulations, through their preventive and repressive functions, have an impact on improving consumer service standards. An analogous legal solution can be adopted with regard to strengthening the private law protection of franchisees. Similarly, employees, although the employment contract is subject to private law, enjoy the benefits of legal protection that has its source in public law. Legislators usually do not stop at regulating the employment contract in private law because this is not a sufficient solution. Legislators establish state institutions to control employment conditions, occupational safety, etc.

For the economically weaker party to the legal relationship, theoretically the legal system may offer legal protection to the franchisee a) based on certain consumer protection standards, b) based on certain employee protection standards, c) according to the original concept designed directly for franchising, and d) according to a mixed variant combining the previously mentioned elements.

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Some of the proposed franchisee protection schemes are similar to legal measures used to protect consumers. Consumer law places particular emphasis on protecting the consumer even before a legal relationship is established. Meanwhile, in many legal systems, certain information obligations for a franchisee candidate reduce the scope of permissible advertising and marketing tools in the acquisition of franchisees. In some legal systems, the fundamental rule of civil law *pacta sunt servanda* is weakened in order to protect consumers. This applies to the possibility of easy withdrawal from consumer contracts concluded at a distance and from consumer contracts concluded outside the entrepreneur's place of business (Riefa and Hörnle, 2009). The franchisee is allowed to withdraw from the franchise agreement within a limited period of time.

6. ENTREPRENEUR AS A WEAKER CONTRACTOR

European Union law deals with the issue of protecting the actually weaker party in a legal relationship. However, this is more of an occasional regulation than a systemic one.

However, this is more of an occasional regulation than a systemic one in some special circumstances (Schebesta et al., 2018; Daskalova, 2019, 2020; Knapp, 2020, p. 62). Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain[2] stipulates that: „Within the agricultural and food supply chain, significant imbalances in bargaining power between suppliers and buyers of agricultural and food products are a common occurrence. Those imbalances in bargaining power are likely to lead to unfair trading practices when larger and more powerful trading partners seek to impose certain practices or contractual arrangements which are to their advantage in relation to a sales transaction. Such practices may, for example: grossly deviate from good commercial conduct, be contrary to good faith and fair dealing, and be unilaterally imposed by one trading partner on the other; impose an unjustified and disproportionate transfer of economic risk from one trading partner to another; or impose a significant imbalance of rights and obligations on one trading partner. Certain practices might be manifestly unfair, even when both parties agree to them. A minimum Union standard of protection against unfair trading practices should be introduced to reduce the occurrence of such practices, which are likely to have a negative impact on the living standards of the agricultural community. The minimum harmonisation approach in this Directive allows Member States to adopt or maintain national rules which go beyond the unfair trading practices listed in this Directive". The Directive deals with the prohibition of unfair trading practices. Each Member State shall designate one or more authorities to enforce the prohibitions at national level ('enforcement authority').

7. REGULATION OF PUBLIC PROTECTION OF COLLECTIVE INTERESTS OF FRANCHISEES

There is always a risk that the economically stronger party to the contract will, in practice, ignore private law regulations adopted for the protection of the weaker party of the contract. Incurring liability for a violation of private law requires a lengthy civil trial. At the same time, civil procedures are very often based on the principle of formal truth (which in practice requires considerable activity of the parties to the proceedings) and

[2] Official Journal of the European Union L 111/59.

not on the principle of substantive truth (which requires the court to independently strive to establish objective truth, even with a passive attitude of the party or parties) (Summers, 1999; Kotz, 2003, p. 61). Not always the weaker party will benefit from court protection instruments. Therefore, establishing legal norms of private law is the first level of regulation and ensuring their effectiveness is the next level of legislation. In some circumstances, even the best private regulation of franchising activity may not be effective in practice (Adamus, 2021, 2024b).

There is no doubt that the global standards of franchise law lead to the thesis that franchisees, although they have the status of entrepreneurs, are subject to special legal protection, similar to the protection designed for consumers or employees both in private and public law.

As a consequence, it should be mentioned the following example of legal protection of consumers or employees. A specialised public administration body may take action to determine, prohibit, and eliminate the effects of harmful practices by entrepreneurs in order to protect consumers or employees (who are not individualised). In such cases, the public interest is protected. As a result of the instruments used by the administrative body (including fines for entrepreneurs or fines for decision-makers at entrepreneurs), there is usually some improvement in the standards of treatment of consumers or employees.

One should formulate the proposal of protection of collective interests of franchisees who are natural persons. Legal protection should be implemented by the competent public administration body (bodies). The direct purpose of this idea is to protect the interests of not individualised franchisees (franchisees in general.) It is not about protecting the interests of competing franchise networks (protection of business competitors, protection of the competition itself) or about protecting the interests of consumers (who are customers of franchisees).

The legislator could prohibit in the public law, in a general way, the commercial practices of franchisors violating the collective interests of franchisees. The clarification of prohibition should be made at a general level, using typical general clauses. Therefore, a practice infringing the collective interests of franchisees could be understood as the conduct of an entrepreneur who is the organiser of a franchise network that is contrary to the law or generally accepted ethic rules. It would be necessary to give specific examples of prohibited practices. The legislator should exemplify in particular: breaching the contractual obligation to provide franchisees with reliable, true, properly verified and complete information about the conditions of joining and participating in the franchise network. Another prohibited practice should involve repeated (not exceptional) abuse of certain rights of franchisees. The practice that infringes the collective interests of franchisees should be stipulating contractual penalties, severance fees and other such lump-sum charges for franchisees in excessive, disproportionate amounts; abuse of the right to impose contractual penalties and other lump-sum charges on franchisees. The next example of the practice that infringe the collective interests of franchisees are deeds of unfair competition against franchisees.

The legislator should clarify the concept of collective interest of franchisees. It is not an individual (personal) interest. It is a kind of public interest. The sum of the individual interests of franchisees is not the collective interest of franchisees.

It would be necessary to provide a fundamental norm that in cases of practices infringing the collective interests of franchisees, the competent public authority (special or existing and performing tasks in the field of public competition protection) should be required. The competent administrative authority should have the power to determine that the collective interests of franchisees have been violated; the power to prohibit

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infringement of the collective interests of franchisees; the power to take decisions imposing an administrative penalty; the competence to issue a decision accepting the franchisor's obligation to behave in a specific way (e.g. aimed at removing the effects of infringing the collective interests of franchisees. In the latter case, the authority would not impose an administrative penalty. Decisions of an administrative body should, in accordance with general rules, be subject to review by an administrative court or any other proper authority.

The essence of the concept is the protection of the public interest of franchisees in relation to the collective interests of franchisees. In other words, such a statutory regulation would not protect the individual interests of a particular franchisee, but the interest of franchisees as a whole. The protection of the collective interests of franchisees would have both a punitive and preventive value.

8. CONCLUSIONS

In the modern doctrine of civil law, one postulates: (1) recognition of the protection of the weaker party (without limiting it to the entrepreneur-consumer relationship) as one of the basic principles of contract law; (2) acceptance that the protection of the weaker party does not conflict with the principle of freedom of contract but complements it; (3) adoption in the provisions of contract law (e.g., the general part of obligations) of a regulation protecting the weaker party, e.g., based on the solution found in the Czech Civil Code (Jagielska, 2023, 2024). However, the weaker party to the contract could be protected by public law.

Regulating in the private law issues of franchising activity may not be sufficient. In practice, the exercise of rights before the court is associated with very high costs for franchisees. On the other hand, for franchisors a court dispute does not require considerable expenses. Thus, even the best-written rules of private law may not be effective enough if judicial protection is only illusory.

It should be assumed that public law protection of franchisee interests will rather be a "second-line" regulation. First, the legislator will introduce private law regulation, although parallel regulation of both issues cannot be ruled out.

The "leverage" that increases the effectiveness of private law norms may be public law norms, including the so-called „prohibition of infringing the collective interests of franchisees". However, it is only one of many applicable public law institutions to protect franchisees.

Delegation of competence to the administrative body to examine the manner in which the franchise agreement is performed would be subject to review by administrative courts.

The introduction of this reinforcement may take place at the same time as the introduction of the franchise private regulation into the legal system or as part of the next issue of legal protection.

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LEGAL BIM IN ITALY: AN ADMINISTRATIVE CASE-LAW APPROACH

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Abstract: *The evolution of new technologies in the construction sector has led to a new building method. In concrete terms, Building Information Modelling (BIM) has revolutionised the construction work method. Although the most significant BIM literature focuses on natural sciences, in Italy, BIM is also heavily used in public procurements. While the EU law, Article 22(4) Dir. 2014/24/EU, stimulated the application of building information electronic modelling tools, in 2017, in Italy, a Ministerial Decree, required the use of it for all public tenders over 100 million EUR from January 2019, which every year would have decreased until January 2025 with 1 million EUR (Article 6 MD no. 560 of 1st December 2017). Although this Ministerial Decree is not in force anymore, the new Code of Public Contracts of April 2023 confirmed the threshold and the temporal view. In other words, the Code of Public Contracts of 2023 requires BIM for all public tenders over 1 million euros starting from January 2025. So, while the EU only incentivised EU Member States, the Italian legislator included BIM as a mandatory requirement through a secondary source in 2017 or a primary source in 2023. This research values the role of Italian administrative judges in legal BIM. Its goal is to uncover the position of Italian judges that can also be used by other judges when they deal with similar issues. In addition, it considers whether new technologies have changed the approach that judges use when deciding public procurements where BIM is included.*

Keywords: *Administrative Jurisdiction; BIM; Case-Law Study; Italy; Public Procurements*

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1. INTRODUCTION

Law and new technologies impact each other. This is also the case in the construction industry, where new technologies have led to a new construction method, called Building Information Modelling (BIM).

Without going into the details of the scientific literature (among others, Romano, 2021; Paparella and Zanchetta, 2020; Tiberi, 2019; Garagnani, 2019; Ferrara and Feligioni, 2019; Guida, 2019; Picaro, 2018, 2019; Dell'Acqua, 2018; Mastrodonato, 2017; Pavan, Mirarchi and Giani, 2017; Caffi et al., 2017; Maltese, 2017), BIM should be considered as an information store of all the data related to all aspects of the building; among others, it includes information on mechanical engineering, civil engineering, architecture, structure, and the construction of building life. Thus, BIM keeps all construction information. Simply put, BIM aims to resolve the previous problems related to 2D application (Sher, et al., 2009; Aranda-Mena, et al., 2008), such as issues related to space (Jereb, 2009; Winch and Deeth, 1994) or effective communication between different levels of end-users (McKinney and Fischer, 1998) or data exchanged (Borrmann, 2018).

Law is shaped by technology, and law can stimulate innovative technologies. Technology creates new possibilities, and people engage in new forms of conduct (Moses, 2011), which shall be ruled by law. Obviously, technological changes occur within a broader social preference (Pinch and Bijker, 1984). Focusing on the case of BIM, the literature has argued whether the traditional rules of the Italian civil code can resolve problems related to BIM contracts, particularly in the case of integrated BIM. In more concrete terms, Italian legal scholars (among others, Picaro, 2024, 2020, 2019, 2018; Racca, 2019; Tiberi, 2019) have studied legal BIM by also proposing a new approach to BIM contracts, which they have called the relational approach (Veshi, Venditti, Picaro and Bashmili, 2024; Veshi, Venditti and Picaro, 2023). This approach should be considered a subsidiary and can be applied if the traditional approach does not resolve the problems of that specific case. The relational approach is based on collaborative technologies and the typical BIM contract, *alliance*. This approach values the construction costumes and usages that allow the agreement to be interpreted according to new, unplanned, and unexpected construction situations.

In addition, the law shapes how people develop technology (Mayer-Schonberger, 2010) and can incentivise their use. Focusing on the case of BIM, both EU law and the Italian legal system have stimulated the introduction of BIM. At the EU level, Article 22(4) Dir. 2014/24/EU states: *For public works contracts and design contests, Member States may require the use of specific electronic tools, such as building information electronic modeling tools or similar*. Although the *acquis communautaire* left discretion to the Member States to include or not BIM as part of their national legislations, the Italian legislator introduced BIM with the Ministerial Decree (MD) no. 560 of 1st December 2017, a secondary legal source. While the EU law did not require the introduction of BIM, the Italian MD 560/2017 required it. In other words, starting in January 2019, all public procurements of over 100 million EUR shall include the use of BIM (Article 6 MD 560/2017).[1] The economic threshold was reduced every year. Indeed, since January

[1] For clarity it shall be stated that in an incidental proceeding (Council of State, Opinion, No. 01349/2019 of 18/04/2019), the Council of State underlined that the MD 560/2017 was not coherent with the Italian legislation since the Italian government did not request the mandatory opinion of the Council of State (established in Article 17(3) Law no 400 of 23rd August 1988). MD 560/2017 was modified with MD no. 312 of 2 August 2021. The MD 312/2021 confirmed the decision of the legislator of 2017 by underlying that MD 560/2017 was not a regulation, the Article 43(5) of the new Code of Public Contracts of April 2023 states that

2025, BIM has been mandatory for all public procurements of over 1 million EUR (Article 43 Code of Public Contracts of April 2023). Not only national law but also regional legislation has positively seen BIM. For instance, Article 7(2)(h) Regional Law of Veneto no. 14 of 4th April 2019[2] or Article 5(3) Regional Regulation of Puglia no. 13 of 22nd May 2017[3] have incentivised the use of BIM.

This contribution applies an administrative case-law study to legal BIM in Italy. The investigation focuses on the case of Italy since the new Italian Code of Public Contracts of April 2023 underlines the mandatory requirement of BIM for public procurements over 1 million EUR from January 2025. The case-law approach is used since, although Italy, as part of continental Europe, is based on a civil-law system, the Consultative Council of European Judges has already observed the importance of legal decisions in countries based on a civil law system (Council of Europe, 2008). Moreover, during their legal reasoning, sometimes, Constitutional Courts also consider the decisions of other Constitutional Courts (Passaglia, 2022).[4] By considering that the law cannot change as fast as the technological advances (Moses, 2011), courts, in the case of BIM, as part of new technologies, might "substitute" national lawmakers.

This research has examined 54 legal decisions, in addition to the opinion of the Council of State regarding MD 560/2017, which was uncovered above. Nevertheless, while Annex 1 uncovers all of them, the contribution only focuses on the essential principles of Italian jurisprudence. It shall be stated that the vast majority of the legal decisions are decisions, while few ordinances were found. The judicial review has two goals. First, and more importantly, it informs readers regarding BIM and administrative law since legal BIM is a new discipline of study. The contribution is written in English since judges from other countries might face similar problems, while the literature has shown that several times, judges also consider the decisions of foreign judges (Passaglia, 2022). Second, while new technologies might have shaped the civil relations within the BIM contract (Veshi, Venditti, Picaro and Bashmili, 2023), this contribution interrogates if judges have applied a conservative approach to public procurements where BIM is included.

The structure of this contribution is as follows: Section II focuses on discretionary powers of the public administration in bids where BIM is included. In addition, Section III uncovers legal decisions dealing with interpreting invitations for bids. Moreover, Section IV studies the judicial approach regarding BIM certificates. In conclusion, the research reviews the Italian legal decisions by considering if judges have applied an innovative approach or used identical or similar interpretative rules to public

Allegation I.9 is abrogated once the MD of the Minister of Infostructures and Transportations has been approved, after requesting the mandatory opinion of the Council of State (Article 43(5) Code of Public Contracts). Although it is not part of this contribution, it shall be underlined, for clarity purpose, that there is an ongoing discussion if MD 312/2021, with the goal to not leave a legal vacuum, will be applied until there will be a new MD.

[2] According to the Regional Law of Veneto, without using BIM, under certain conditions, the existing volume of buildings can be increased by up to 25 percent, in the case of using BIM, the volume can be increased by up to 35%.

[3] According to the Regional Regulation of Puglia, the use of BIM is a mandatory requirement since the project of a new purification plant is drawn up according to the use of specific electronic modelling methodologies and tools for infrastructures (Building Information Modelling) and with the assessment of the life cycle (Life Cycle Assessment) according to the provisions and regulations by current legislation.

[4] According to this study conducted with the Italian Constitutional Court, the average impact of rulings with references between 2000 to 2021 is 0.9%. However, in the last five years, there has been an increase with a peak of 3.1 % in 2019. Concrete examples of them are: Italian Constitutional Court, no. 10/2015 of 09 February 2015 where the Constitutional Court used the jurisprudence of Austria, Germany, and Spain.

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procurements where BIM is included since BIM is part of new technologies in the construction industry.

2. LEGAL BIM AND CASE-LAW IN ITALY: THE DISCRETIONARY POWERS

This Section studies the legal decisions of Italian jurisprudence regarding BIM, focusing on the case of discretionary powers. It shall be explained that the Italian jurisdiction is divided between ordinary and administrative jurisdictions. Whereas the authors of this study did not find any legal decisions from ordinary Italian judges, several legal decisions were found on public tenders, part of the administrative jurisdiction.

First of all, the national and international literature agree that BIM has several advantages compared to CAD (Veshi, Venditti and Picaro, 2023). The main problem with CAD was the digital representation of geometry. In other words, there was a need to represent the components of a building rather than just the lines and arcs used to draw them (Ibrahim, 2006). Although BIM is a recent approach to the construction method (Volk, 2014; Eadie et al., 2013; Arayici, 2008), it offers users unification of the design approaches, independently from design updates, by guaranteeing consistency and coordination of the project between different stakeholders (Bryde, Broquetas and Volm, 2013). However, in Italy, as explained in the introduction, legal BIM – or better, the introduction of BIM in the legal system – is a recent event done only in 2017, modified in 2021, and then also with a primary source in 2023.

So, when the invitation for bids does not establish specific rules regarding BIM and the presentation of BIM is not a mandatory requirement established in the public procurement, the BIM partly presented in 2D, even with some possible *clash detections* that can be resolved in the execution phase, can be considered as a BIM model.[5] In addition, when BIM is not a mandatory requirement for the invitation for bids, the plaintiff shall prove that the application of BIM, rather than CAD, would have brought further advantages to the entire project as a whole and not just to single parts of it. In other words, the Court will dismiss the case if the plaintiff's claim is based only on the fact that the plaintiff presented BIM while the winner presented just CAD without proving that, in that concrete case, the project, as a whole, would benefit more from the application of BIM rather than CAD.[6]

Second, and more importantly, the public administration has technical discretion on public procurements when applying the BIM method. Technical discretion is one of the main principles of administrative law. However, the principle of results is the principal value that shall orient the use of the discretionary powers (Article 1(4) Code of Public Administration). It shall be underlined that the principle of results is the mixture of the administrative tenets of efficiency, effectiveness, and cost-effectiveness in addition to good performance (Article 1(3) Code of Public Administration). In other words, the technical discretion of the public administration is limited by other principles that aim to help the public administration choose the course of action that best suits the public interest. Thus, judicial review of administrative discretion is limited. This is also the view of the EU Court of Justice that limits the judicial review to the "manifest error of assessments or misuse of powers."[7] In other words, judicial review is limited to the separation of powers: while law limits the space of discretion without commanding the

[5] Regional Administrative Tribunal of Lombardia, Decision, Session I, No. 01210/2017 of 29/05/2017.
[6] Council of State, Decision, Session V, No. 02276/2019 del 08/04/2019; and Regional Administrative Tribunal of Marche, Decision, Session I, No. 00398/2018 of 30/05/2018.
[7] CJEU, judgment of 11 July 1985, Remia and Others v. Commission, Case 42/84, ECLI: EU:C:1985:327, para 34.

choice made therein, courts enforce the law without attaching the technical action chosen, within the discretionary powers that the public administration, within the legal determinations.[8]

This is also applied in public procurements where BIM is used as a construction method. For instance, while the plaintiff, the third-best bidder, filed a lawsuit against the Public Administration for an arbitrary position, the Court dismissed the case since the review of the administrative judge on the exercise of the evaluation activity by the commission cannot replace that of the public administration, except in the case of an abnormality that could not be recognised in the concrete case.[9] Again, the fact that a participant, the second-best offer, in an invitation for bids was the only one that presented BIM does not give the right to the participant to have higher points than the winning offer, if the invitation for bids includes, as a voice of the public procurement, not only the inclusion of BIM but also the clarity of presentation or the use of different software. The public administration, within the legal determinations, chooses the best offer.[10] In addition, if both participants, the plaintiff (the second-best bidder) and the counter-interested party (the winning offer), presented BIM, the public administration can attribute higher points to the winning offer since the winning offer included in his offer a higher perceptuality of recycling products. This falls within the technical discretion of the public administration.[11]

As established by doctrine[12] and the EU jurisprudence,[13] the judge cannot substitute themself for the technical discretion of the public administration. In concrete terms, even if BIM is applied as a construction method in public procurement, "the evaluation of the offers and the attribution of scores by the judging commission fall within the broad technical discretion granted to this body."[14] The judge can exercise a substitute review within the "limits of excess power due to the abnormality of the technical choices."[15] The discretionary powers also remain within the parameters of the technical capacity of the participants and specific subjective requirements for participation without entering into the case of excess powers due to the abnormality of the technical choices. In other words, "by constant jurisprudence, in the sector of public procurement, the technical evaluations of the contracting authority, as an expression of technical discretion, are removed from the legitimacy review of the administrative judge, unless they are manifestly illogical, irrational, unreasonable, arbitrary or based on an equally clear and manifest misrepresentation of the facts"[16] [authors' translations]. Thus, the Public

[8] CJEU, judgment of 11 September 2002, Pfizer Animal Health v. Council, Case T-13/99, ECLI: EU:T:2002:209.
[9] Regional Administrative Tribunal of Sicilia, Decision, Session II, No. 00529/2023 of 16/02/2023.
[10] Regional Administrative Tribunal of Toscana, Decision, Session I, No. 00977/2022 of 02/08/2022.
[11] Council of State, Decision, Session III, No. 6058 of 02/09/2019.
[12] Among others, Koven (2024); Singh (2022); Milshin, et al. (2022); Sultan and Azeem (2023).
[13] Among others, CJEU, judgment of 11 July 1985, Remia and Others v. Commission, Case 42/84, ECLI: EU:C:1985:327 and CJEU, judgment of 11 September 2002, Pfizer Animal Health v. Council, Case T-13/99, ECLI: EU:T:2002:209.
[14] *.....la valutazione delle offerte e l'attribuzione dei punteggi da parte della commissione giudicatrice, rientrano nell'ampia discrezionalità tecnica riconosciuta a tale organo.* Council of State, Decision, Session V, No. 02276/2019 of 08/04/2019.
[15] *..... una erroneità o di un eccesso di potere per sviamento e travisamento dei fatti e dei presupposti.* Council of State, Decision, Session V, No. 02276/2019 of 08/04/2019.
[16] *Per giurisprudenza costante, nel settore degli appalti pubblici, le valutazioni tecniche della stazione appaltante, in quanto espressione di discrezionalità tecnica, sono sottratte al sindacato di legittimità del giudice amministrativo, salvo che non siano manifestamente illogiche, irrazionali, irragionevoli, arbitrarie ovvero fondate su di un altrettanto palese e manifesto travisamento dei fatti.* Regional Administrative Tribunal of Emilia Romagna, Decision, Session II, No. 00452/2017 del 30/05/2017.

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Administration has discretion regarding the attribution of points without entering the case of abnormal evaluations.[17] This discretion is also given regarding evaluating two different offers, except if there is a gross error of fact, manifest illogicality, or unreasonableness. In other words, the plaintiff did not prove that its offer was so much better than the counter-interested party (as for complaints relating to the team or design) or on elements, in reality, common to both offers (as for the use of the BIM) that the public administration could have been in a gross error of fact, manifest illogicality, or unreasonableness.[18]

Although the public administration has discretionary powers, this does not mean that transparency in the evaluation might be missing. For instance, in an invitation for bids, where BIM was included, while the rules of the public procurements divided it into various tender specifications, the commission had signed the points as a whole offer. In other words, "the work of the commission does not allow [the judges] to understand, and possibly dispute, which scores were attributed to the individual parts of each attached project, as provided for in Annex G to the tender specifications."[19] However, contrary to this decision, the Court has underlined that "by constant jurisprudence, the … evaluation has a global and synthetic nature, as it cannot result in a fragmentation of the individual cost items…., or the search for specific inaccuracies in the indication of each element of the offer, and constitutes an exercise of technical appreciation, not questionable except for illogicality, manifest unreasonableness, arbitrariness"[20] [authors' translations]. Although these two legal decisions might seem different, it appears that the specification of points in sub-categories is required only when the invitation for bids requires it.

Nevertheless, in administrative law, the plaintiff shall prove its claims. For instance, while the plaintiff filed a lawsuit because the winning bid, among others, lacked "a correct methodological approach from a historical-critical-conservative point of view, nor can the use of 4D BIM software be considered an improvement, as it is the basis of every design software"[21] [authors' translations], the Court dismissed the case since the plaintiff did not prove that the winning had margins of unreliability. In other words, the plaintiff's reasoning remains merely questionable.[22] Again, in another case, if the plaintiff questions that there has been a short time for assessment of all offers, and this might be considered a problem, the plaintiff shall prove it, in this case, it did not do that.[23] Moreover, sometimes, the Court dismisses a case since even if the Public Administration awards

[17] Regional Administrative Tribunal of Lazio, Decision, Session IV, No. 17947/2022 of 30/12/2022.
[18] Regional Administrative Tribunal of Toscana, Decision, Session I, No. 01438/2019 25/10/2019.
[19] *Il lavoro della commissione non consente di comprendere, ed eventualmente contestare, quali punteggi siano stati attribuiti alle singole parti di ciascun progetto allegato, come previsto nell'allegato G al disciplinare di gara.* Regional Administrative Tribunal of Liguria, Decision, Session I, No. 00640/2018 of 23/07/2018.
[20] *Per costante giurisprudenza, la … valutazione ha natura necessariamente globale e sintetica, non potendo risolversi in una parcellizzazione delle singole voci di costo …., ovvero nella ricerca di specifiche inesattezze nella indicazione di ogni elemento dell'offerta, e costituisce esercizio di apprezzamento tecnico, non sindacabile se non per illogicità, manifesta irragionevolezza, arbitrarietà.* Regional Administrative Tribunal of Liguria, Decision, Session I, No. 00564/2021 del 21/06/2021.
[21] *è carente di un approccio metodologico corretto dal punto di vista storico-critico-conservativo né l'utilizzo del software di uso del BIM in 4D è considerabile come miglioria, in quanto alla base di ogni software di progettazione.*
[22] Regional Administrative Tribunal of Puglia, Decision, Session II, No. 00106/2022 del 20/01/2022.
[23] Regional Administrative Tribunal of Friuli Venezia Giulia, Decision, Session I, No. 00008/2020 del 07/01/2020.

the points related to BIM to the plaintiff, the ranking will still not change, and the second-best bidder would not be the winning bid.[24]

Last but not least, it shall be mentioned that the general procedural rules of territorial competence, termination of the lawsuit, preventive measures, and bureaucratic problems are applied as well as for the application of the principle of secrecy of offers and protection of competition. If the invitation for bids includes BIM and is executed in many lots, the territorial competence is one of the headquarters of the administrative authority responsible for the exercise of the administrative power, not where the act has its effects or other criteria.[25] In addition, if the public administration, in self-defence, annuls the administrative process, even if the invitation for bids includes BIM, there is still the termination of the case if the public administration has annulled the administrative proceeding.[26] Furthermore, it is possible to give preventive measures to invitations for bids that include BIM.[27] Further, it shall be mentioned that the absence of publishing the provision appointing the commission member and their CVs is only a bureaucratic problem and does not affect their ability to understand the BIM method.[28] Moreover, using identical BIM – in the concrete case, 139 out of 169 lines are identical, also in the punctuality, which means that both models are identical – leads to exclusion from the tender because the offers come from the same decision-making centre. This means violating the principle of secrecy of offers and protection of competition.[29]

To sum up, BIM is used in different public procurements, although this was optional in several invitations for bids. From the review of the Italian jurisprudence in regard to discretionary powers, this research showed that this cardinal administrative principle is also applied in cases where public procurements use BIM.

3. LEGAL BIM AND CASE-LAW IN ITALY: INTERPRETATION OF INVITATIONS FOR BIDS

This Section focuses on several cases related to interpreting the invitation of bids. The doctrine is divided regarding the interpretation of the invitation for bids: literal interpretation and theological interpretation (Monteduro, 2009). While the first interpretation values the objective meaning of the words, the second considers the general administrative principles, in particular, the public interest. In other words, the literal interpretation does not allow the judge to attribute to the words a different meaning than the one established in their literal interpretation. This is also the common interpretation given by the majority of the judges.[30] A minor group of judges agrees that the invitation of bids should be interpreted according to that interpretation that aims to

[24] Regional Administrative Tribunal of Friuli Venezia Giulia, Decision, Session I, No. 00008/2020 del 07/01/2020. Regional Administrative Tribunal of Lazio, Decision, Session II, No. 09178/2018 del 06/09/2018. Regional Administrative Tribunal of Emilia Romagna, Decision, Session II, No. 00117/2020 del 06/02/2020.
[25] Regional Administrative Tribunal of Campania, Ordinance, Session II, No. 01144/2020 of 15/09/2020. Regional Administrative Tribunal of Campania, Ordinance, Session I, No. 03249/2020 of 22/07/2020.
[26] Regional Administrative Tribunal of Campania, Decision, Session I, No. 03779/2021 of 07/06/2021.
[27] Regional Administrative Tribunal of Campania, Decree, Session I, No. 01991/2019 del 18/12/2019.
[28] Regional Administrative Tribunal of Friuli Venezia Giulia, Decision, Session I, No. 00008/2020 del 07/01/2020.
[29] Regional Administrative Tribunal of Trento, Decision, Unique Sect., No. 00176/2023 del 07/11/2023.
[30] Council of State, Section VI, Decision, no. 1877 of 08/04/2003; Regional Administrative Tribunal of Sicilia-Catania, Decision, no. 1464 of 24/08/2002; Council of State, Section VI, Decision, no.2953 of 30/05/2001; Council of State, Section IV, Decision, no. 4808 of 12/09/2000; Council of State, Section V, Decision, no. 40 of 18/01/1980.

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fulfil the public interest.[31] It might be stated that the majority of judges would like a formal approach to the words of the invitation for bids because the theological interpretation would give them higher powers, which also means a higher benchmark of liability.

Focusing on the case of legal BIM, if the invitation for bids requires that "the previous experience in BIM shall be proven by attached documentation which highlights both the type and characteristics of the intervention and the authorship of the works. This documentation may consist of: excerpts of documents, certificates of validation or regular execution, assignment or assignment contracts (even between private individuals), etc...." ..... It is clear that, to prove the previous experiences ..... useful for assigning the score, are not sufficient the attestations or declarations coming exclusively from the bidder himself, but the documentation (project and contractual) needed to be objectively and immediately referable to the works, projects or interventions whose traceability to the experiences requested by the invitation letter was predicated" [authors' translations].[32]

Since most judges will interpret the Public Administration's decision literally, the public procurement offers shall be precise without presenting irregularities. For instance, in public procurement, where BIM was part of it, the public administration correctly stated that the offer presented anomalous elements, which did not allow the offer's adequacy to be declared. The total annual costs established in the offer, in that particular case, 10.000 EUR, are meager for all the incorporated services (i.e., call centre, setting up of a technical IT desk, workforce, and the professional figures who use this equipment). Furthermore, "the annual incidence for personnel dedicated to management [must] be correctly calculated in terms of hours and costs, regardless of whether or not the structure employs them"[33] [authors' translations]. In simple words, labour costs, including the costs for BIM professionals, shall be realistic and include a calculation of hours and costs.

Although most judges will apply a literal interpretation, in a decision of the Regional Administrative Tribunal of Calabria,[34] it seems that the judges have applied a theological interpretation. After being excluded from the invitation for bids, the applicant filed a lawsuit because they disagreed with the public administration's reasoning. In that particular case, the invitation for bids included the possibility of presenting the offer traditionally or also with BIM. However, the platform could allow only 4 files. Thus, the participant sent a "Dropbox platform [that could] track and certify all activities on each individual file (uploads, modifications, deletions, views, etc.) via an integrated App

[31] Regional Administrative Tribunal of Lombardia – Brescia, Decision, no. 123 of 30/01/2002.

[32] *le esperienze pregresse in BIM dovranno essere comprovate da documentazione allegata che evidenzi sia la tipologia e le caratteristiche dell'intervento e sia la paternità dei lavori. Tale documentazione potrà essere costituita da: stralci di elaborati, certificati di validazione o di regolare esecuzione, contratti di affidamento o di incarico (anche tra privati), ecc...» ..... Si evince che, al fine di comprovare le pregresse esperienze ..... utili per l'assegnazione del punteggio, non erano sufficienti attestazioni o dichiarazioni provenienti esclusivamente dallo stesso offerente ma occorreva che la documentazione (progettuale e contrattuale) fosse oggettivamente e immediatamente riferibile ai lavori, progetti o interventi di cui si predicasse la riconducibilità alle esperienze richieste dalla lettera di invito.* Council of State, Decision, Session V, No. 02078/2022 of 22/03/2022.

[33] *l'incidenza annuale per personale dedicato alla gestione [deve] essere correttamente computato in termini di ore e costi, indipendentemente che sia o meno in carico alla struttura" Council of State, Decision, Session V, No. 04731/2023 del 10/05/2023.* However, the same approach was taken also by Regional Administrative Tribunal of Lombardia, Sec. I, no. 01980/2022.

[34] Regional Administrative Tribunal of Calabria, Decision, Session Reggio Calabria, No. 00012/2024 del 03/01/2024.

managed by the Dropbox server itself"[35] [authors' translations]. Thus, changes after closing the invitation for bids would have been seen. Although the court agrees with this approach, the Court declares the decision non-proceedable since the application should have included in the object of the lawsuit not only the decision of exclusion but also the final document of the administrative proceeding.

Interpretation of public procurements and technical discretion of the public administration are strongly connected since interpretation is an instrument for achieving discretionary powers. However, in a few cases, judges distinguish between them. For instance, after not winning the invitation for bids, the plaintiff, the second-best bidder, filed a lawsuit since the plaintiff was the only one applying the BIM methodology,[36] while it received fewer points from the winning bid. However, the Court dismissed the case not because the evaluation of offers is part of the discretionary powers of the public administration but since the invitation for bids, the evaluation included "not only the design development according to BIM standards but also the clarity of presentation in the use of different software"[37] [authors' translations]. Thus, it is "not unreasonable that the commission may have considered this second parameter unsatisfactory, leading to an overall score lower than expectations"[38] [authors' translations]. In other words, the fact that the offer is the only one that includes BIM does not mean that this is the best offer since the invitation for bids included several parameters.

The role of the judicial administrative review can also deal with the evaluation of labour costs, the object of commercial activity, or the object of the public contract. For instance, while the plaintiff claimed that the labour costs of the winning offer were underestimated, the Court dismissed the case since the plaintiff should not have included all the labour costs – the labour costs in CAD and BIM, and part of the building was already done.[39] Additionally, the Court has underlined that the offer shall be evaluated as a whole and not by considering single parts of it.[40] Again, if the invitation for bids establishes that there is a new prize, when BIM is incorporated, only when the offer indicates a higher prize than the one established in the invitation for bids, then the bidder does not have a duty to inform for the "new" prize if the "new" prize is within the highest amount established in the public procurement.[41] In addition, there is no need to have a "perfect overlap between what is described in the Chamber of Commerce certificate and the object of the procurement contract…[since]….the comparison must operate for the purpose of verifying the professional suitability of the participant, according to a non-

[35] *piattaforma dropbox traccia e certifica tutte le attività su ogni singolo file (upload, modifiche, eliminazioni, visualizzazioni, ecc.) tramite un'App integrata e gestita dal server dropbox medesimo.* Regional Administrative Tribunal of Calabria, Decision, Session Reggio Calabria, No. 00012/2024 del 03/01/2024.

[36] The term used in the legal decision is "methodology" (metodologia), while it should have been used BIM method (Veshi, Venditti and Picaro, 2023).

[37] *non era solo lo sviluppo progettuale secondo gli standard BIM ma anche la chiarezza espositiva nel ricorso ai diversi software.* Council of State, Decision, Session V, No. 09937/2023 del 20/11/2023. The same approach was stated also in the decision of the first instance: Regional Administrative Tribunal of Toscana; Session I, no. 00977/2022.

[38] *non è irragionevole che la commissione possa avere ritenuto non soddisfacente tale secondo parametro conducendo ad un punteggio complessivo inferiore alle aspettative.* Council of State, Decision, Session V, No. 09937/2023 del 20/11/2023. The same approach was stated also in the decision of the first instance: Regional Administrative Tribunal of Toscana; Session I, no. 00977/2022.

[39] Regional Administrative Tribunal of Lazio, Decision, Session II, No. 09178/2018 del 06/09/2018.

[40] Council of State, Decision, Session V, No. 07805/2019 of 13/11/2019. The same approach was stated also in the decision of the first instance: Regional Administrative Tribunal of Piemonte, Decision, No. 00059/2019 of 16/01/2019.

[41] Council of State, Not-final Decision, Session V, No. 00048/2022 del 07/01/2022.

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atomistic, but global evaluation of the performances deducted in the contract"[42] [authors' translations]. Furthermore, the plaintiff did not prove the lack of it. In the concrete case, a company that offers assistance to entrepreneurship in advanced technologies with consultancy and services can also provide geometric, architectural, technological, and plant surveys to be returned in BIM. Moreover, the transcription in the business register has the nature of publicity for third parties, and its omission is not among the cases of mandatory exclusion from the tenders established in the Code of Public Contracts.[43] Moreover, in another case, where the plaintiff pretended that the winning bid got arbitrarily higher points, the Court dismissed the case since the object of the public contract was not only that the participants presented only the front masks but also to insert all the needed data.[44]

Last but not least, the general rules of administrative law – such as the rules regarding subcontracting or contract assignment – will also be applied in the case of public procurements where BIM is used. For instance, while the plaintiff claimed that BIM was given to another company through subcontracting, resulting in the exclusion of the winning offer, the Court dismissed the case since subcontracting, within limits established by law, is allowed, although when the object of the subcontracting is the service of BIM.[45] According to the EU jurisprudence,[46] a temporary consortium of companies decides by itself how to divide and organise the work. So, the fact that the public contract has one main assignment and several accessory assessments and the leader company of the temporary consortium completes part, and not all, the main assignment is not a case of exclusion, especially if this is an invitation for bids to provide services. In simple words, it should be underlined that the public contract, although it establishes one assignment, can have several performances, including the BIM method.[47]

To sum up, the judges' interpretation of the invitation of bids is mostly literal rather than theological, confirming the previous judicial approach. However, in one case, it can be stated that judges applied a theological approach.

4. LEGAL BIM AND CASE-LAW IN ITALY: BIM CERTIFICATE

BIM is a new construction method introduced for the first time with the MD no. 560 of 1st December 2017. As a result, there is a need for a certificate system that embodies the latest implementation of new technologies in the construction industry. The construction of a BIM certificate connects academia with the building industry (Liu, 2021). However, since BIM requires knowledge in natural science – i.e., civil engineering and/or architecture – a BIM Certificate is part of higher vocational education (Wu, Jiang

[42] *non essendo peraltro richiesta una perfetta sovrapponibilità tra quanto descritto nel certificato camerale e l'oggetto del contratto d'appalto …[perché]…. il confronto operare in ragione della finalità di verifica dell'idoneità professionale della partecipante, secondo una valutazione non atomistica, ma globale delle prestazioni dedotte in contratto.* Regional Administrative Tribunal of Emilia Romagna, Decision, Session II, No. 00117/2020 del 06/02/2020.

[43] Regional Administrative Tribunal of Emilia Romagna, Decision, Session II, No. 00117/2020 del 06/02/2020; Regional Administrative Tribunal of Emilia Romagna, Decision, Session II, No. 00117/2020 del 06/02/2020.

[44] Regional Administrative Tribunal of Liguria, Decision, Session I, No. 00930/2018 of 26/11/2018.

[45] Council of State, Decision, Session V, No. 02873/2023 del 21/03/2023. The same approach was stated also in the decision of the first instance:Regional Administrative Tribunal of Calabria - Sezione staccata di Reggio Calabria n. 00878/2021).

[46] C-642/20.

[47] Regional Administrative Tribunal of Campania, Decision, Session I, No. 00319/2023 del 13/01/2023.

and Wang, 2023), which in the Italian legal system is generally incorporated in the master of first or second levels.

In simple words, as a new method of construction, new professionals have also been established. This is the case for the BIM Coordinator, BIM Manager, or BIM Modeler. Their role has also been underlined in financial terms. In more concrete terms, Article 2(5) annex[48] I.13 new Code of Public Contracts of April 2023 states that the determination of the amount to be based on public procurements, with contracts for which the adoption is mandatory of BIM methodology, shall apply a percentage increase of 10 percent on the total of calculation of the fees and before the application of the percentage relating to expenses and accessory charges, which are also calculated on the BIM percentage increase.

The new professionals in BIM are BIM Coordinators, BIM Managers, and BIM Modelers. Their job is mainly to work with other professionals and recognise different best practices within various approaches in different companies or projects (BIM Manager), or understand numerous sub-models, merge them, and create the integrated BIM (BIM Coordinator), or create and develop according to the concrete needs within many models, the best BIM model (BIM Modeler). According to the legal literature in BIM, the work of these new professionals is based on a relational approach with other professionals working on the construction project. Thus, this might justify a new approach to civil relations in the BIM contract (Veshi, Venditti, Picaro and Bashmili, 2023). However, it shall be underlined that currently, there is no register for BIM professionals. According to Article 1(1)(a) DPR 137/2012 (Decree of the President of the Republic No. 137 of 7th August 2012), professionals who are obliged to stipulate insurance contracts are those enrolled in different Orders after these Orders verify the specific professional requirements. Nevertheless, it shall be stated that in Italy, there are national registers for engineers, architects, and, recently, industrial designers, and – in general – these are also the professionals who work on BIM.

First of all, it shall be underlined that BIM requires new competences; thus, the results of the previous call for applications that are still valid cannot be used, even because the new call for applications was related to full-time positions while the previous call for applications was for a part-time position.[49] In addition, when an offer is presented, if the invitation for bids requires BIM, it must include the correct name of the BIM expert and a BIM file viewer program. Their absence is a case of exclusion from the invitation for bids.[50]

The possession of a BIM certificate is fundamental. For instance, if the invitation for bids includes a need for a BIM certificate from the new professionals, there needs to be more than merely participation in the BIM course to qualify for the attribution of the extra points related to the BIM certificate. In other words, if the public administration is attributed to an expert points for mere participation in the course while the invitation for bids includes a need for a BIM certificate, acts of the public administration are considered

[48] In legal contexts, an annex to a code serves as a supplementary document designed to complement the main legislative text. It provides specific technical details, tables, diagrams, or regulations that enhance the understanding, application, or specification of the code's provisions. This approach ensures that the main text remains concise and accessible while allowing for detailed elaboration where necessary. For instance, Annex I.13 of the Code of Public Contracts of April 2023 serves to elucidate the parameters for design, particularly in scenarios involving the application of BIM.

[49] Regional Administrative Tribunal of Campania, Ordinance, Session V, No. 00806/2019 of 22/05/2019.

[50] Council of State, Decision, Session V, No. 08173/2023 del 05/09/2023. The same approach was stated also in the decision of the first instance: Regional Administrative Tribunal of Lazio, Session Quarta-bis, 23/12/2022, no. 17487).

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void.[51] Again, if the sole responsible for the procedure of the public administration requests the certificates, as established in the invitation for bids, the lack of response is a case of exclusion from the public procurement.[52] Moreover, the absence of proof of experience in BIM, according to the rules of the invitation for bids, is a case of not winning the invitation for bids.[53] However, it shall be clarified that the certificate shall be held by the company that will do the concrete job and not by the parent company that has presented the offer.[54] Additionally, there is a difference between the BIM certificate that shall be possessed by BIM experts and other certifications that the contractor shall possess.[55] Moreover, attributing the points related to the BIM experience is part of the Public Administration's technical discretion. For instance, after not winning the invitation for bids, the applicant, the second-best bidder, filed a lawsuit since the Public Administration had assigned higher points to the winning bid, which presented a BIM Manager with only three previous experiences in the planning phase and not on the implementation phase, while the second-best bidder included a BIM Manager with more experience, also in the implementation phase. However, the Court dismissed the case since this is part of the Public Administration's technical discretion.[56]

The contractual relationship of the BIM professional with the participant in public procurement shall be clarified. For instance, if the invitation for bids includes a need for a presence in the working group of at least one young technician registered in the relevant professional register for less than five years, also a professional who includes in their CV the notion of collaborator,[57] is included in this notion.[58] Again, the case is dismissed if the plaintiff claims that the BIM work was not done by an employee but by an expert with a continuous contractual relationship,[59] if BIM is an accessory part of the public contract.[60]

Sometimes, the interpretation of public procurement can also deal with the professionals who work with BIM[61] or with the possibility of having more than one manager for the project.[62] After not winning the invitation for bids, the plaintiff, the second-best bidder, filed a lawsuit since the winner's offer did not indicate the professional who would have been responsible for BIM and his/her certificates as well as the offer did not have an existing "Project Management" structure, which would have been established only later, in the event of an assignment of the service. Thus, according to the plaintiff, the offer is indeterminate and conditional, and it should have been excluded. However, the Court dismissed the case since it agreed with the Public Administration. In other words, "In case of assignment of the service" is intended exclusively to anticipate, at the time of the presentation of the offer, the content of the service to be (eventually) performed, nor can the reference to an uncertain and non-existing structure at the time

[51] Regional Administrative Tribunal of Campania, Decision, Session VIII, No. 05468/2023 of 09/10/2023.
[52] Regional Administrative Tribunal of Piemonte, Decision, Session I, No. 00074/2021 of 22/01/2021.
[53] Council of State, Decision, Session V, No. 02078/2022 of 22/03/2022. The same approach was stated also in the decision of the first instance: Regional Administrative Tribunal of Sardegna, Decision, Session I, 7 dicembre 2020, n. 683.
[54] Regional Administrative Tribunal of Emilia Romania, Decision, Session II, No. 00117/2020 del 06/02/2020.
[55] Regional Administrative Tribunal of Lombardia, Decision, Session I, No. 01932/2019 of 28/08/2019.
[56] Council of State, Decision, Session V, No. 07908/2020 of 10/12/2020. The same approach was stated also in the decision of the first instance: Regional Administrative Tribunal of Friuli Venezia Giulia, Decision, Session I, No. 00008/2020 of 07/01/2020.
[57] The correct notion in Italian is "collaboratore".
[58] Regional Administrative Tribunal of Sardegna, Decision, Session II, No. 00027/2021 del 19/01/2021.
[59] The correct notion in Italian is "contratto continuativo di cooperazione" .
[60] Regional Administrative Tribunal of Lazio, Decision, Session Seconda Ter, No. 06281/2023 del 11/04/2023.
[61] Regional Administrative Tribunal of Salerno; Session I, no. n. 01562/2023.
[62] Regional Administrative Tribunal of Lazio, Decision, Session Seconda Ter, No. 10474/2020 del 14/10/2020.

of the offer be considered as accurate"[63] [authors' translations]. The same would have been stated in the case of BIM, since the offer indicated that regarding the preliminary cognitive activities of the intervention, a three-dimensional BIM model for the punctual elements would be presented. In other words, in an offer that includes BIM, it is also possible to include future working methods, i.e., establishing a structure for project management. Moreover, if the invitation for bids does not include the indication of BIM professionals and a BIM certificate, the offer can also establish general indications for them without being considered a conditional, uncertain, or indeterminate offer.

Eventually, because BIM projects might be complex, having more than one manager in public procurement where BIM is involved is possible. For instance, in a case, after not winning the invitation for bids, the plaintiff, the second-best bidder with the same points as the winning bid, filed a lawsuit because the winning offer included a manager who does not possess a diploma in civil or construction engineering, as the invitation for bids established, but in environmental and territorial engineering. However, the Court dismissed the case since the winning offer included a manager with an environmental and territorial engineering diploma and two co-managers with civil or construction engineering diplomas, as the invitation for bids was established. During the administrative investigation, the manager changed, within the same team of three managers. While the plaintiff considered this a change in the team's composition, which should have led to decreased points, this does not modify the team's composition for the public administration and the Court.[64]

To sum up, a BIM certificate is a fundamental requirement for participation in public procurements where BIM is included. Quite interestingly, the forms of collaboration between the BIM professional and the participant in the public bid are quite flexible.

5. CONCLUSIONS

This research reviewed legal BIM from an Italian judicial perspective. The Italian case was chosen because, starting January 2025, the Code of Public Contracts of 2023 requires BIM for all public tenders over 1 million EUR.

At the EU level, BIM was incentivised by Article 22(4) Dir. 2014/24/EU. In Italian national legislation, for the first time in Italian legal history, BIM was introduced with MD no. 560 of 1st December 2017. While the MD 560/2017 was considered unlawful by the Council of State in an incidental proceeding[65] and was modified with MD 312/2021, Article 43 Code of Public Contracts of April 2023 has introduced BIM with a primary source. Although legal BIM is a relatively new discipline, Italian judges, mostly within the public procurements, have discussed several aspects of BIM.

This research analysed 54 legal decisions over a five-year timeline, with a mandatory minimum review period of BIM introduction of three years. Notably, Article 6(1)(a) of MD 560/2017 required the mandatory use of BIM for all public tenders exceeding €100 million — a relatively high threshold. However, this threshold has progressively decreased on an annual basis. Additionally, MD 312/2021 marked a shift in Italy's approach to BIM, transitioning from a mandatory ("shall") to a permissive ("could")

[63] *In caso di affidamento del servizio" vuol esclusivamente anticipare, al tempo della presentazione dell'offerta, il contenuto della prestazione da (eventualmente) eseguire, né tanto meno può ritenersi centrato il riferimento a una struttura incerta e non esistente al tempo dell'offerta….* Council of State, Decision, Session V, No. N. 10640/2023 del 11/12/2023. The same approach was stated also in the decision of the first instance: Regional Administrative Tribunal of Salerno; Session I, no. n. 01562/2023.

[64] Regional Administrative Tribunal of Lazio, Decision, Session Seconda Ter, No. 10474/2020 del 14/10/2020.

[65] Council of State, Opinion, No. 01349/2019 of 18/04/2019.

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framework for its use. The research focused exclusively on case law available up to January 2024.

Of the 54 legal cases reviewed, 43 disputes involved public procurements utilizing BIM, with 11 cases currently under appeal. Since Italy ranks as the world's 9th largest economy (Italian Trade Agency, 2024), this number of disputes does not appear excessively high. This is particularly noteworthy given the increasing use of technology and mechanisms like dispute boards—a multidisciplinary team overseeing procurement phases, execution, and technical testing—and dispute avoidance strategies —such as alternative dispute resolution, which cannot be mandated under Italian law[66]—they play a significant role in mitigating claims (Carleo, 2019).

Moreover, BIM itself represents a transformative methodology in the construction industry, aiming to minimise errors from the design phase through to execution (Veshi, Venditti, Picaro and Bashmili, 2024; Veshi, Venditti and Picaro, 2023). Consequently, BIM emerges as a potential game-changer for the industry, offering a paradigm shift toward enhanced efficiency and accuracy.

This research divided the intervention of the Italian judges into three aspects: 1. discretionary powers of the public administration; 2. judicial interpretation of the invitation of bids; and 3. BIM Certificate. Regarding the discretionary powers of the public administration, if the invitation for bids does not include BIM as a mandatory requirement, the plaintiff shall prove that in that concrete public procurement, the application of BIM, rather than CAD, had several advantages.[67] In addition, discretionary powers are part of the public procurements where BIM is used as a construction method also when the public administration chooses the best offer[68] or the parameters of the technical capacity,[69] within the limits of excess power due to the abnormality of the technical choices[70] or gross error of fact, manifest illogicality, or unreasonableness.[71] However, discretionary powers do not mean the absence of the principle or transparency: if the invitation for bids states that the points are attributed through tender specifications, that shall be done;[72] otherwise, there is no need for their fragmentation.[73] Moreover, sometimes, the Court dismisses a case since even if the Public Administration had awarded the plaintiff the points related to BIM, still the ranking would not change, and the second-best bidder would not win the public procurement.[74] Last but not least, it shall be mentioned that the general proceeding rules of territorial competence, [75] termination of the lawsuit,[76] preventive measures, [77] and bureaucratic problems[78] are applied as well as

[66] Italian Constitutional Court, 6 Dicembre 2012, Decision No. 272.
[67] Council of State, Decision, Session V, No. 02276/2019 del 08/04/2019; and Regional Administrative Tribunal of Marche, Decision, Session I, No. 00398/2018 of 30/05/2018.
[68] Regional Administrative Tribunal of Toscana, Decision, Session I, No. 00977/2022 of 02/08/2022.
[69] Regional Administrative Tribunal of Emilia Romagna, Decision, Session II, No. 00452/2017 del 30/05/2017.
[70] Council of State, Decision, Session V, No. 02276/2019 of 08/04/2019.
[71] Regional Administrative Tribunal of Toscana, Decision, Session I, No. 01438/2019 25/10/2019.
[72] Regional Administrative Tribunal of Liguria, Decision, Session I, No. 00640/2018 of 23/07/2018.
[73] Regional Administrative Tribunal of Liguria, Decision, Session I, No. 00564/2021 del 21/06/2021.
[74] Regional Administrative Tribunal of Friuli Venezia Giulia, Decision, Session I, No. 00008/2020 del 07/01/2020. Regional Administrative Tribunal of Lazio, Decision, Session II, No. 09178/2018 del 06/09/2018. Regional Administrative Tribunal of Emilia Romagna, Decision, Session II, No. 00117/2020 del 06/02/2020.
[75] Regional Administrative Tribunal of Campania, Ordinance, Session II, No. 01144/2020 of 15/09/2020. Regional Administrative Tribunal of Campania, Ordinance, Session I, No. 03249/2020 of 22/07/2020.
[76] Regional Administrative Tribunal of Campania, Decision, Session I, No. 03779/2021 of 07/06/2021.
[77] Regional Administrative Tribunal of Campania, Decree, Session I, No. 01991/2019 del 18/12/2019.
[78] Regional Administrative Tribunal of Friuli Venezia Giulia, Decision, Session I, No. 00008/2020 del 07/01/2020.

for the application of the principle of secrecy of offers and protection of competition[79] also when the public procurements include BIM as a construction method.

Focusing on the case of the judicial interpretation of the invitation of bids, the interpretation given by the judges to the invitation of bids is mostly literal rather than theological by confirming the previous judicial approach. The legal decision regarding public procurements also using BIM dealt with several aspects, such as elements of proof of the professionals working in BIM,[80] the object of the commercial activity,[81] clarity of the offer,[82] evaluation of the labour costs,[83] the possibility to use future working methods[84] or the clarity of the object of the public contract. [85]

Regarding the BIM certificate, BIM requires new knowledge, which differs from the previous knowledge part of a public exam, the ranking of which is still valid.[86] In addition, if the invitation for bids includes BIM experts who shall be identified, the absence of the correct name of the BIM professional is a cause of exclusion.[87] But, if the invitation for bids does not include the indication of BIM professionals and a BIM certificate, the offer can also establish general indications for them without being considered a conditional, uncertain, or indeterminate offer.[88] Moreover, possessing a BIM certificate is fundamental: the mere participation in the course is different from BIM certificate[89] and the absence of proof of BIM certificate[90] or BIM experience[91] are cases of exclusion or of not winning the public procurement. However, although attributing the points related to the BIM experience is part of the Public Administration's technical discretion,[92] the BIM certificate and other certifications that the contractor shall possess are the same.[93] Furthermore, the contractual relationship of the BIM professional with the participant in public procurement is quite flexible since it can also be a collaborator[94] or a continuous

[79] Regional Administrative Tribunal of Trento, Decision, Unique Sect., No. 00176/2023 del 07/11/2023.
[80] Council of State, Decision, Session V, No. 02078/2022 of 22/03/2022. The same approach was stated also in the decision of the first instance: Regional Administrative Tribunal of Sardegna, Sec. I, no. 683 of 7/12/2020.
[81] Regional Administrative Tribunal of Emilia Romagna, Decision, Session II, No. 00117/2020 del 06/02/2020.
[82] Council of State, Decision, Session V, No. 04731/2023 del 10/05/2023. The same approach was stated also in the decision of the first instance: Regional Administrative Tribunal of Lombardia, Sec. I, no. 01980/2022).
[83] Regional Administrative Tribunal of Lazio, Decision, Session II, No. 09178/2018 del 06/09/2018. Council of State, Decision, Session V, No. 07805/2019 of 13/11/2019. The same approach was stated also in the decision of the first instance: Regional Administrative Tribunal of Piemonte, Decision, No. 00059/2019 of 16/01/2019.
[84] Council of State, Decision, Session V, No. N. 10640/2023 del 11/12/2023. The same approach was stated also in the decision of the first instance: Regional Administrative Tribunal of Salerno; Session I, no. n. 01562/2023.
[85] Regional Administrative Tribunal of Liguria, Decision, Session I, No. 00930/2018 of 26/11/2018.
[86] Regional Administrative Tribunal of Campania, Ordinance, Session V, No. 00806/2019 of 22/05/2019.
[87] Council of State, Decision, Session V, No. 08173/2023 del 05/09/2023. The same approach was stated also in the decision of the first instance: Regional Administrative Tribunal of Lazio, Session Quarta-bis, 23/12/2022, no. 17487.
[88] Council of State, Decision, Session V, No. N. 10640/2023 del 11/12/2023 (appeal: Regional Administrative Tribunal of Salerno; Session I, no. n. 01562/2023).
[89] Regional Administrative Tribunal of Campania, Decision, Session VIII, No. 05468/2023 of 09/10/2023.
[90] Regional Administrative Tribunal of Piemonte, Decision, Session I, No. 00074/2021 of 22/01/2021.
[91] Council of State, Decision, Session V, No. 02078/2022 of 22/03/2022. The same approach was stated also in the decision of the first instance: Regional Administrative Tribunal of Sardegna, Decision, Session I, 7 dicembre 2020, n. 683.
[92] Council of State, Decision, Session V, No. 07908/2020 of 10/12/2020. The same approach was stated also in the decision of the first instance: Regional Administrative Tribunal of Friuli Venezia Giulia, Decision, Session I, No. 00008/2020 of 07/01/2020.
[93] Regional Administrative Tribunal of Lombardia, Decision, Session I, No. 01932/2019 of 28/08/2019.
[94] Regional Administrative Tribunal of Sardegna, Decision, Session II, No. 00027/2021 del 19/01/2021.

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contractual relationship[95] as well as it is given the possibility to have more than one manager[96] or to establish only general indications for the BIM responsible, if the invitation for bids does not require their exact indication at the moment of the offer.[97]

To sum up, legal BIM might be used in administrative law, i.e., as part of the public procurements, as well as in civil law, i.e., contractual relations between parties. However, these two branches of law are connected. For instance, Article 12(1)(b) Code of Public Contracts states that the rules of the civil code will be applied to the stipulation of the contract and the execution phase. While there are no legal cases in the ordinary jurisdiction, several cases – 54 legal decisions plus the opinion of the Council of State related to MD 560/2017 – were found in the administrative law, mainly dealing with public procurements. Applying new technologies in the construction industry might result in a new legal approach. This is the case of legal BIM and civil law (Veshi, Venditti and Picaro, 2023). On the contrary, the examination of the Italian administrative jurisprudence on legal BIM showed that judges still apply the traditional rules on public procurements. Two clear examples could be given from the administrative jurisdiction. For instance, in its decision No. 00564/2021 of 21/06/2021, the Regional Administrative Tribunal of Liguria recalled several decisions of the Council of State.[98] The same can also be stated for the highest administrative court, the Council of State, in its decision, No. 02276/2019 of 08/4/2019, recalling a previous decision of itself.[99]

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[96] Regional Administrative Tribunal of Lazio, Decision, Session Seconda Ter, No. 10474/2020 del 14/10/2020.
[97] Council of State, Decision, Session V, No. N. 10640/2023 del 11/12/2023. The same approach was stated also in the decision of the first instance: Regional Administrative Tribunal of Salerno; Session I, no. n. 01562/2023.
[98] Among others, i.e. Council of State, Session V, Decision, no. 2437 of 22.3.2021; Council of State, Session III, Decision, no. 2168 of 15.3.2021; Council of State, Session V, Decision, no. 5215 of 26.8.2020
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FREEDOM OF EXPRESSION OF JUDGES AND THE INFLUENCE OF SOCIAL MEDIA

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Abstract: *The jurisprudence of the European Court of Human Rights and its recent decision (Żurek v Poland, application no. 39650/19), continues to shape standards for judges' freedom of expression, including standards to protect judges who speak out against detrimental judicial reforms and use of social networks by judges. As new cases emerge and soft law instruments are developed, the topic remains highly relevant and will continue to pose challenges for judges in the years to come. Judges in some EU members States face unprecedented challenges to the rule of law, as evidenced by judicial reforms in countries like Poland and Hungary. The erosion of judicial independence and impartiality in this context underscores the importance of judges' freedom of expression as a safeguard against threats to the rule of law. Raising awareness on this issue should equip judges with legal knowledge and procedural safeguards necessary to navigate the complexities of their professional roles while upholding fundamental principles of judicial independence and integrity. Furthermore, social networks have revolutionised communication in modern society, including judges. While use of social media by judges can enhance transparency and public engagement, it also raises concerns about the appropriateness of their communication, especially regarding impartiality. Judges must navigate the blurred lines between their private and public personas on social media platforms, as their actions and interaction can have implications for their perceived impartiality and judicial integrity. While there are articles devoted to the analysis of the judges' freedom of expression in constitutional crises in this paper authors are providing a comparative analysis of social media usage guidelines for judges and jurisprudence of the European Court of Human Rights to identify a proper balance between exercising the freedom of expression by judges and the limitations posed by interest of judicial independence, impartiality and public trust in judiciary and specific issues relate to the use of social networks.*

Key words: *Freedom of Expression; Judges; Social Media; Independence and Impartiality of Judiciary; Ethics; ECtHR*

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1. INTRODUCTION

Freedom of expression is a fundamental right guaranteed in many democratic societies, ensuring individuals can freely express their thoughts, opinions, and beliefs. Freedom of expression is a fundamental human right, protected under various national constitutions and international human rights treaties, such as the Universal Declaration of Human Rights (Article 19) and the European Convention on Human Rights (Article 10). The European Convention on Human Rights explicitly protects this right in Article 10, paragraph 1, which guarantees individual the freedom to hold opinion and to receive and

share information and ideas without interference from public authorities. However, Article 10, paragraph 2, recognises that this freedom can be restricted under specific conditions to balance competing interests. Any limitations must satisfy three key criteria to align with the Convention's standards: restrictions must have clear legal basis, limitations are only acceptable if they aim to protect one of the purposes explicitly listed in Article 10, paragraph 2 (national security, territorial integrity or public safety, the prevention of disorder or crime, protection of health or morals, protection of the rights or reputations of others), the restrictions must be proportionate to the legitimate aim necessary in a democratic society.

However, when individuals hold position with added social responsibility in democratic societies (Novaković and Perović, 2021), such as judges, this right becomes nuanced due to the unique responsibilities and expectations associated with their roles (Rosales and Vargas, 2022). The public tends to view statements made by judges not merely as personal opinions but as expressions imbued with the gravitas and credibility of judicial authority (Dijkastra, 2017).

Judges, due to their status as arbiters of justice and upholders of the law, occupy a position that demands impartiality, fairness, and respect for the legal system they serve. This necessitates a careful balancing of their personal freedoms with their professional duties and responsibilities (Miliković, 2023). To ensure this required balance between judges' personal freedoms and their professional obligations is maintained, ethical codes and judicial conduct rules typically outline a framework within which judges can exercise their right to expression. These codes generally emphasise the need for discretion, caution judges against making public statements or against engaging in activities that could compromise the appearance of impartiality or integrity of the judiciary (Novaković, 2019).

Throughout most of the 20th century in Europe, it was generally assumed that judges, upon taking office, forfeited their right to freedom of expression, confining their communication exclusively through the reasoning expressed in their judgements (Casarosa, Fajdiga and Morraru, 2025). However, this perception has shifted due to two significant factors: the backsliding of the rule of law and the rapid development of social media. Judicial freedom of expression has gained new importance, particularly in confronting threats to the rule of law that arise across Europe. Additionally, the rise of social media has fundamentally transformed the ways in which opinions are shared, altering not only the tone and style of expression but also vastly expanding reach and accessibility of public communication channels. These changes appear to be challenging the traditional boundaries of acceptable communication of judges.

The rapid proliferation of social media, such as Facebook, Twitter/X, YouTube, and Instagram, as well as online forums and other digital forums, has introduced new dimensions to judicial conduct, requiring careful regulation to preserve the integrity and impartiality of the judiciary (Novaković, 2022). Additional challenges for national legislator are rapid technological changes and the global nature of internet (Psychogiopoulou and Casarosa, 2020).

Social media can significantly influence public perception of the judiciary. Judges' online activities, whether personal or professional, can be scrutinised and interpreted in ways that might affect public confidence in their impartiality. The personal information of judges can be easily accessible on social media, posing risks to their privacy and security. It is crucial to ensure that judges maintain a clear separation between their personal and professional lives. Judges must navigate ethical rules carefully on social media to avoid any appearance of bias, refrain from commenting on

pending cases, and maintain decorum in all online interaction to uphold the dignity of their position.

This paper provides a comparative analysis of social media usage guidelines for judges. These guidelines underscore the delicate balance judges must maintain between engaging in public discourse and upholding the principles of judicial independence and impartiality. By examining the overarching principles and common themes across these jurisdictions, the paper highlights the shared emphasis on caution, privacy, and the avoidance of activities that could compromise public confidence in the judiciary. In the paper, authors elucidate how different jurisdictions address the ethical challenges posed by social media, emphasising the importance of safeguarding the judiciary's integrity while acknowledging judges' roles as members of society. Furthermore, authors analyse the European Court of Human Rights (ECtHR) jurisprudence on the freedom of expression of judges within the boundaries of their professional obligations. The evolving threats to judicial independence and the rule of law have significantly influenced ECtHR case law in this area, which is also analysed in the paper.

The analysis reveals both the convergences and divergences in regulatory approaches and interpretation, providing insights into the evolving landscape of judicial conduct in the digital age. The paper seeks to offer a comprehensive understanding of how freedom of expression and social media can be navigated by judges to maintain the public's trust and confidence in the judicial system.

2. RISKS OF SOCIAL MEDIA

Before delving into the ethical issues that judges face when participating in online social networking, it is crucial to comprehend the unique characteristics and associated risks of social media platforms (Meyer, 2014). These aspects significantly impact the behaviour and perception of judges who use these platforms.

Social platforms are designed for easy access and rapid dissemination of information. Social media platforms enable instant communication with a vast audience. This immediate and extensive reach amplifies the impact of judges' statements, making it easier for potentially controversial comments to spread quickly and widely.

Despite using the strongest privacy settings, information shared on social media may not remain private. For instance, a Facebook user who chooses to keep their friends' identities private cannot control their friends' decisions to make their own friends' lists publicly available. This could inadvertently expose all social networking relationships.

While some users employ pseudonyms to avoid being identified, there is no real guarantee of maintaining anonymity. Advanced data mining techniques and cross-referencing of information can often unmask users.

Social media postings are akin to written documents that remain over time. Once something is posted on social media, it becomes a permanent part of the digital record. Even after deletion, advanced technology can often retrieve, circulate, and share these postings. Anything posted can resurface at any time, potentially affecting the user's reputation and professional standing long after the original post.

The nature of communication on social media is specific and can lead to potential misinterpretations. Social media posts, especially those limited by character counts like tweets, often lack the context and nuance of more in-depth media. This brevity can lead to misinterpretation or oversimplification of a judge's statement.

The informal and casual nature of social media interactions can lead judges to let their guard down, posting content that might be deemed unprofessional or inappropriate for their position. Moreover, judges are at an increased risk of cyberbullying

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and harassment on social media due to their high-profile roles. Such interaction can be particularly damaging to their professional standing. By understanding these unique aspects and risks of social media, judges and decision-makers can better navigate the ethical dilemmas associated with their online presence and uphold the integrity and trust placed in the judiciary.

3. FREEDOM OF EXPRESSION ON SOCIAL MEDIA AND JUDICIAL ETHICS

The use of social media by judges presents both opportunities and challenges in modern digital landscape. By adhering to established guidelines and legal frameworks, judges can navigate these complexities while maintaining the integrity and impartiality essential to their roles. The development of clear and practical guidelines, coupled with insights from national and international case law, provides a robust foundation for managing judicial conduct in the age of social media. Many countries have implemented specific guidelines for judges on social media usage, outlining acceptable behaviour and potential consequences for violations. To better understand the complexities surrounding the use of social media by judges, it is essential to analyse both international and national standards on judicial conduct. The analysis will focus on the ethical standards and accountability mechanisms that judges face when engaging with social media platforms.

Moreover, the restrains that judges exercise in their freedom of expression are applicable on their behaviour on social media. Traditionally, the expectation that judges exercise significant restraint in expressing their views or opinions is rooted in principles to safeguard judicial independence and uphold the authority of judiciary (Matić Bošković, 2020). Information discussed or disclosed on social media should adhere to the same confidentiality standards as in traditional setting. Judges must refrain from discussing details of ongoing cases or revealing confidential information related to court proceedings (Seibert-Fohr, 2021). Engaging in discussion or debates about specific case on social media could create the perception of bias, so judges should refrain from commenting on the merits of cases that are pending.

3.1 Use of Social Media by Judges – Ethical Standards

The advent of social media has introduced a range of ethical dilemmas for judges, who must balance their right to freedom of expression with their professional duty to maintain impartiality, integrity, and public confidence in the judiciary.

While the Bangalore Principles of Judicial Conduct[1] and their Commentary[2] do not explicitly address social media, the values and guidelines they set forth are highly pertinent to modern discussions about judges' online behaviour. The Bangalore Principles of Judicial Conduct offer a broad and adaptable framework that can be applied across different jurisdictions to regulate judicial conduct effectively (Schoeller-Schletter, 2019). Their international applicability ensures that they remain relevant in evolving societal and technological changes, including the use of social media by judges. By adhering to these core values and developing specific national guidelines, jurisdictions can uphold the integrity, impartiality, and independence of the judiciary, thereby maintaining public confidence in the judicial system (Matić Bošković and Nenadić, 2018).

[1] Judicial Group on Strengthening Judicial Integrity (2002). Bangalore Principles of Judicial Conduct.
[2] Commentary on Bangalore Principles (2007). Available at: https://www.unodc.org/conig/uploads/documents/publications/Otherpublications/Commentary_on_the_Bangalore_principles_of_Judicial_Conduct.pdf (accessed on 30.04.2025).

The UN Non-Binding Guidelines on the Use of Social Media by Judges[3] were developed during an Expert Group Meeting held in 2018 as a response to the growing need for a structured framework addressing the ethical and practical implications of social media use by members of the judiciary. The Non-Binding Guidelines reflect the outcome of these efforts, offering practical and ethical advice tailored to the unique responsibilities of judges in a digital age. Recognising the pervasive role of social media in modern communication and its potential impact on public perceptions of impartiality and judicial integrity, these Guidelines aim to equip judges with practical recommendations for responsible and ethical use of such platforms.

At the regional level, the Council of Europe's CCJE Opinion No. 25 from 2022[4] on the freedom of expression of judges provides comprehensive advice on various aspects of the use of social media by judges. Recognising the importance of a judge's role in upholding the rule of law and democracy, the Opinion explores the legal and ethical dimensions of a judge's right and duty to speak out. This includes not only their responsibility within their own jurisdiction but also their broader role at the European and international level. The Opinion delves into two primary categories of judicial expression, expression concerning matter of judicial concern and expression on controversial public topics, where judges engage in discussions on broader societal or political issues, which might raise questions about impartiality or judicial restraint.

Furthermore, the Opinion underscores the importance of safeguarding professional confidentiality and maintaining public trust in the judiciary. Judges must be careful about what they share online to ensure they do not disclose confidential information or discuss matters that could lead to breaches of privacy or judicial secrecy (proceedings, internal judicial matters and procedural rights of the parties). To support effective public communication, the Opinion refers to the Council of Europe Recommendation CM/Rec(2010)12[5] and suggests establishing court spokespersons and communication offices to handle the dissemination of information to the public and media. Furthermore, the Opinion No. 25 recommends developing ethical codes / codes of conduct that offer clear guidance on ethical dilemmas related to social media use. Finally, while recognising that judges have personal lives and social interactions, the Opinion No. 25 emphasises that their online behaviour should not undermine public confidence in their impartiality and integrity. Judges should be cautious about their online associations and interactions, avoiding engagements that could raise doubts about their ability to act impartially. Another Council of Europe body, the European Commission for Democracy through the Law (Venice Commission), published a 2015 Report on "The Freedom of Expression of Judges",[6] which explores international standards, national laws, practices across Council of Europe member states, and relevant jurisprudence from

[3] UNODC, Global Judicial Integrity Network (2019). Non-binding Guidelines on the Use of Social Media by Judges. Available at: https://www.unodc.org/res/ji/import/international_standards/social_media_guidelines/Social_Media_2020.pdf (accessed on 30.04.2025).

[4] Consultative Council of European Judges (CCJE). Opinion No. 25 (2022) on freedom of expression of judges, CCJE (2022)4.

[5] Recommendation of the Committee of Ministers CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities, para 19.

[6] European Commission for Democracy through Law (Venice Commission). Report On the Freedom of Expression of Judges. Opinion no 806/2015, CDL-AD(2015)018, 23 June 2015. Information on more sources relevant for freedom of expression of judges is provided in the report "Judges' and Prosecutors' Freedom of Expression, Association and Peaceful Assembly, UN Special Rapporteur on Independence of Judges and Lawyers, February 2019, available at: https://www.icj.org/wp-content/uploads/2019/02/Universal-SRIJL-Judges-Advocacy-non-legal-submission-2019-ENG.pdf (accessed on 30.04.2025).

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the European Court of Human Rights. Likewise, the European Network of Councils for the Judiciary, in its 2013 "Sofia Declaration on Judicial Independence and Accountability", emphasised that while judges traditionally avoid political controversies, they bear a collective duty to speak out when the integrity and independence of the judiciary are threatened, particularly in response to governmental actions that undermine judicial independence.[7]

In the UK the Guide to Judicial Conduct[8] provides detailed advice on the use of social media by judges, emphasising the importance of maintaining judicial integrity and impartiality.[9] Judges are advised to be vigilant about their personal information online. The guide highlights the risks of 'jigsaw' research, where individuals can piece together information from various sources to build a comprehensive profile of a judge's private life. To mitigate these risks, judges should ensure that their personal life details, such as their home address, are not accessible online. Regularly searching their own names on the internet is recommended to check the availability of personal information. Additionally, judges and their close family members and friends should be cautious about posting personal details on social networking sites like Facebook and Twitter/X. Judges should avoid publishing more personal information than necessary. This precaution is particularly important to minimise the risk of fraud and ensure personal safety. Specific examples include not sharing details of holiday plans or information about family members. Moreover, judges need to be aware that once information is posted online, it becomes challenging to control its dissemination. Therefore, it is crucial to be cautious about the kind of photographs and personal details shared on social media. Photos in casual settings, especially those featuring family members, can be particularly problematic if misused or misinterpreted. Automatic privacy settings on social media platforms should be reviewed and adjusted to enhance security. Ensuring that privacy settings are as stringent as possible can help protect personal information from becoming publicly accessible. The Guide also references the Social Media Guidance for the Judiciary, issued on behalf of the Judicial Executive Board. Judges should not use social media to communicate publicly about their judicial work or related matters unless it has been discussed and approved by their superiors or the Judicial Office. To ensure safety, judges should be alert to the risks that social media use may pose to their safety and that of their family and colleagues. They must also be cautious not to undermine public trust and confidence in the judiciary by expressing, or appearing to endorse, views that could cast doubt on their objectivity. Judges are advised not to use their judicial titles on social media. Disclosing their judicial role on any platform with unrestricted public access is generally deemed inappropriate.

In Spain the Judicial Ethics Committee concluded that judges may join and participate in social networks and are therefore free to express potential political opinions (Mullor, 2023). However, it emphasised that judges must exercise self-discipline when

[7] European Network of Councils for the Judiciary (2013). Sofia declaration. Available at: https://www.encj.eu/images/stories/pdf/GA/Sofia/encj_sofia_declaration_7_june_2013.pdf (accessed on 30.04.2025).

[8] Courts and Tribunals Judiciary. Guide to Judicial Conduct, revised July 2023.

[9] Similarly in USA, the American Bar Association (ABA) issued a formal Opinion on February 21, 2013, outlining the ethical considerations and guidelines for judges using electronic social media. This opinion aims to balance transparency and engagement with the necessity of preserving judicial independence, integrity, and impartiality. The ABA's opinion acknowledges that while electronic social media can provide valuable platforms for judges to share information and interact with the public, it also poses unique challenges that must be navigated carefully. Judges may participate in electronic social media, but their conduct must always align with the Code of Judicial Conduct. A fundamental principle emphasised in the Code of Judicial Conduct is that judges must avoid actions undermining public confidence in the judiciary. See: Cooper (2014).

expressing themselves, given the institutional responsibilities and the potential impact of their statements on public confidence in judiciary.

The Ethical Aspects of the Use of Social Networks – Guide for Judges and Public Prosecutors in Serbia, provides a comprehensive resource aimed at addressing the unique challenges and dilemmas posed by the presence of judges and prosecutors on social networks.[10] Recognising the dual nature of their role as public officials and citizens, the Guide seeks to balance their fundamental rights and freedoms with the ethical obligations inherent to their professional duties. By offering practical solutions and ethical principles, it empowers judges and prosecutors to engage with social networks in a manner that upholds the integrity of their positions while allowing them to participate in the digital age as informed and responsible individuals. Specifically, when judges and prosecutors disclose their judicial roles on private social media accounts, they risk creating conflicts of interest. This risk arises from the possibility that their professional title could be perceived as a tool to gain personal, financial or reputation benefits. Social media users, including those in judicial positions, are not legally required to use their real names. They are free to adopt pseudonyms, thus allowing for a degree of privacy in their online activities. However, the Guide points out that this freedom is not absolute for judges and prosecutors. Ethical principles tied to their judicial functions impose limits on this practice. While the mere use of a pseudonym is not inherently unethical, it becomes a violation of ethical standards if it is used as a shield for inappropriate behaviour or activities. The responsibility to uphold the dignity of the judiciary extends even to anonymised online interactions. Judges and prosecutors who use social media for professional purposes are advised to refrain from sharing private or professional information. The Guide assumes that judicial officers already differentiate their private and official electronic communications and encourages the same principle to be applied to their use of social media. The Guide also highlights the potential challenges posed by online friendships, particularly with lawyers. A visible connection on social media between a judge and a lawyer who represents a party in a case they are adjudicating could lead to the perception of bias or favouritism. While online friendship with lawyers is not inherently problematic, the Guide advises avoiding connections with those who frequently appear before them in court or are involved in ongoing cases. The Guide emphasises the importance of verifying content multiple time before publication and ensuring it aligns with the ethical expectations of their roles. Posts from profiles explicitly linked to a judge or prosecutor are often interpreted as representative of the judiciary's views or their institution's official stance, even when the intention is to express personal opinions. To mitigate misunderstandings, it is recommended that judges and prosecutors clearly state that their views are personal.

A similar approach to the Serbian Guide is adopted by the CEELI Institute Report on Practical Guidelines on the use of Social Media by Judges: Central and Eastern European Context, which focuses on the ethical and professional challenges judges face when engaging with social media.[11] The Report provides tailored guidance for judges operating within the unique social, cultural, and legal frameworks of Central and Eastern Europe. Like the Serbian Guide, it balances judges' freedom of expression with their

[10] Council of Europe (2021). The Ethical Aspects of the Use of Social Networks – Guide for Judges and Public Prosecutors. Available at: https://rm.coe.int/hf9-social-media-guide-judiciary-srp/1680a4f1c7 (accessed on 30.04.2025).

[11] CEELI Institute (2019). Report on Practical Guidelines on the use of Social Media by Judges: Central and Eastern European Context. Available at: http://jupiter.hr/content/uploads/2020/01/CEELI-Institute_SoMe_Judges_GuidelinesNov2019_-1.pdf (accessed on 30.04.2025).

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obligation to maintain judicial independence and impartiality, addressing practical dilemmas and offering clear recommendations.

3.2 Behaviour on Social Media and Judge's Accountability

The behaviour of judges on social media is more scrutinised and exposed than their general conduct due to the unique nature of online platforms. Social media operates in a public, accessible, and instantaneous environment, where even seemingly casual statements or interactions can reach a global audience of millions within moments. This unparalleled visibility significantly heightens the risk of misinterpretation or controversy, as posts, comments, or shared content are often stripped of context and open to scrutiny by diverse and critical audiences, including litigants, colleagues, and the public.

Moreover, the permanence of digital content intensifies this scrutiny. Once published, social media posts leave a lasting digital footprint, even if deleted, which can be retrieved, shared, or used as evidence of alleged misconduct. Unlike in-person interactions or private communications, which are more transient and limited in reach, social media ensures that every action is potentially archived and magnified. Judges are held to exceptionally high standards of impartiality and professionalism to maintain public trust in the judiciary. Any perceived bias, inappropriate humour, or personal opinion expressed on social media can raise questions about their ability to remain fair and neutral in their official capacity. This is particularly problematic because social media blurs the line between personal and professional life, making it challenging to compartmentalise private views from judicial responsibilities.

Consequently, judicial oversight bodies and public opinion closely monitor their online behaviour, often applying stricter scrutiny than would typically be expected in offline contexts.

Oversight bodies and judicial conduct commissions play a vital role in defining appropriate behaviour and upholding accountability within the judiciary. In many jurisdictions, dedicated entities are tasked with monitoring judicial conduct to ensure compliance with ethical standards (Matić Bošković, 2017). Complaints concerning a judge's social media behaviour may prompt formal investigations, with potential consequences for violations of ethical guidelines. Depending on the severity of the misconduct, disciplinary actions can range from formal reprimands to removal from office, reinforcing the importance of maintaining the dignity and impartiality expected of judicial officeholders.

In United Kingdom, failure to adhere to the Guidance from the Judicial Conduct Investigation Office could result in disciplinary action. Similarly, in Bosnia and Herzegovina, the Law on High Judicial and Prosecutorial Council specify that any conduct which constitutes a serious breach of official duty or calls into question public confidence in the impartiality and credibility of judiciary is considered a disciplinary offense (Article 56 Point 23). In Bosnia and Herzegovina, the legal framework clearly prioritises the safeguarding of judicial independence over the unrestricted freedom of expression of judges (Gehringer et al. 2021).

In France, High Council for the Judiciary - Conseil supérieur de la magistrature (CSM)[12] has a critical disciplinary function and monitors the conduct of judges and prosecutors, addressing complaints of misconduct and ensuring adherence to ethical standards. The CSM also serves as a forum for reflection on the functioning of the justice

[12] CSM. A welcome message from the presidents. Available at: http://www.conseil-superieur-magistrature.fr/composition-organization (accessed on 30.04.2025).

system, contributing to discussions on judicial ethics and the values that should guide the judiciary. Consequently, the CSM issued the Compendium of the Judiciary's Ethical Obligations that includes detail instructions for use of social media by judges.[13] It is possible to file a disciplinary case against a judge for misuse of social media (Al-Billeh, 2023).

4. ECtHR JURISPRUDENCE ON FREEDOM OF EXPRESSION OF JUDGES

The rule of law backsliding in the EU and the erosion of judicial independence and impartiality in European contexts highlights the critical role of judges' freedom of expression as a safeguard against threats to the rule of law.[14] The issue is particularly evident in cases involving systemic challenges to judicial independence. The European Court of Human Rights jurisprudence underscores how restriction on judges' ability to speak out on matters of public interest, particularly those affecting the judiciary, pose significant risks to the rule of law and democratic governance.

The European Court of Human Rights has addressed numerous cases concerning the delicate balance between judges' freedom of expression and the necessity of maintaining judicial integrity and public confidence in the judiciary. These cases highlight the Court's efforts to delineate the boundaries within which judges can exercise their rights without compromising their roles as impartial arbiters of justice. The ECtHR interpretations provide crucial guidance on how judges can exercise their right to free expression and align with their professional obligations. The ECtHR recognises that while judges, like all citizens, have the right to freedom of expression under Article 10 of the European Convention on Human Rights, this right may be subject to greater restrictions due to the unique role in upholding impartiality and the rule of law.

The ECtHR has established several principles regarding the freedom of expression for judges.

In the landmark case *Baka v. Hungary*[15] the ECtHR considered the dismissal of Mr. Baka, a then president of the Supreme Court of Hungary, following his public criticism of legislative reforms that threatened judicial independence. The Court emphasised the importance of protecting judges' freedom of expression, especially when they are speaking out on matters concerning the functioning of the judiciary in which "*judges have not only right but also duty to express their opinion*" (para 168). The judgement emphasised that silencing judicial voices undermines public confidence in the judiciary and weakens democratic institutions. This case highlighted how political retaliation against judges for expressing dissenting views poses a direct threat to the independence of judiciary.

Specifically, judges have the right to engage in public debate on issues related to the judiciary, the legal system, and public interest, provided it does not undermine their impartiality or the judiciary's integrity. This approach was confirmed in several decisions. In the case of *Żurek v. Poland*[16] the ECtHR addresses the dismissal of a judge who publicly criticised judicial reforms in Poland that centralised control over the judiciary and eroded its independence. The case underscored that judges, as citizens, have the right to engage

[13] Conseil supérieur de la magistrature. Compendium of the Judiciary's Ethical Obligations. Available at: http://www.conseil-superieur-magistrature.fr/sites/default/files/atoms/files/gb_compendium.pdf (accessed on 30.04.2025).
[14] More on rule of backsliding in Matić Bošković and Kostić (2021).
[15] ECtHR, Baka v. Hungary, app. no. 20261/12, 23 June 2016.
[16] ECtHR, Żurek v. Poland, app. no. 39650/19, 16 June 2022.

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in public debate on matters concerning the law, the administration of justice, and judicial independence (para 227). The Court found that the actions taken against Judge Żurek were indeed a form of retaliation for his public statements (Wojtanowski, 2023). These actions were intended to silence his criticism and thus constituted a violation of his right to freedom of expression. This case sets a standard that judicial officers have the right to participate in public discourse on judicial matters, especially when democracy and rule of law are under threat. The ECtHR refers to the Report of the UN Special Rapporteur on the Independence of judges and lawyers (para 103).[17]

Both cases are emblematic of broader issues linked to the rule of law in Hungary and Poland. These countries have faced international scrutiny for reforms that undermine the judiciary's independence by introducing mechanism that enable political influence over judicial appointments and disciplinary procedures. Such measures not only jeopardise individual judges' rights but also erode public confidence in the impartiality and effectives of the judicial system. The ECtHR's jurisprudence on these cases reflects its commitment to protecting judicial freedom of expression as a professional responsibility that contributes to the broader public interest.

The ECtHR also recognises the 'chilling effect' that the fear of sanctions can have on judges, which can significantly impede their willingness to engage in public debates (*Baka v. Hungary,* para 167). The 'chilling effect' refers to the suppression or discouragement of legitimate exercise of natural and legal rights by the threat of legal sanctions (Fajdiga and Zagorc, 2023). In the judicial context, this phenomenon occurs when judges refrain from expressing their views on matters related to the judiciary and justice administration due to fear of repercussions, such as disciplinary actions, dismissal, or other punitive measures. This chilling effect is detrimental not only to judges but to society as a whole, as it stifles important discussions on judicial independence and reforms (see *Kudeshkina v. Russia*,[18] para 99-100). The ECtHR also highlighted the "chilling effect" of the measures imposed by Poland in the case of *Tuleya v. Poland*.[19] The Court observed in para 544 that these measures "*must have discouraged not only the applicant but also other judges from participating in public debate on legislative reforms affecting the judiciary, and more broadly, on matters concerning judicial independence*."

Restrictions on judges' freedom of expression must be justified, necessary, and proportionate in a democratic society. Disciplinary measures should not be excessive or serve as a means to silence legitimate criticism. Criteria 'necessary in a democratic society' was assessed in several cases, including the case of *Baka v. Hungary* (para 168-176).

The ECtHR has established important principles regarding the balance between judges' freedom of expression and their duty to maintain judicial restraint. Judges should exercise their freedom of expression responsibly, avoiding comments that could be perceived as biased or prejudicial, particularly regarding pending cases. This interpretation is highlighted in the case *Wille v. Liechtenstein*.[20] Although the ECtHR found a violation of Article 10, it acknowledged that restriction could be justified, if necessary, in a democratic society, particularly to maintain the judiciary's impartiality and independence (para 70). Specifically, the ECtHR recognised right of judges to engage in political debates, but very cautiously (Fajdiga, 2023). In this specific case the Court found that the judge professionally performed his duties, so there was no ground for disciplinary

[17] More on challenges of rule of law backsliding in Matić Bošković and Kostic (2020).
[18] ECtHR, Kudeshkina v. Russia, app. no. 29492/05, 26 February 2009.
[19] ECtHR, Tuleya v. Poland, app. nos. 21181/19 and 51751/20, 6 July 2023.
[20] ECtHR, Wille v. Liechtenstein, app. no. 28396/95, 28 October 1999.

measures. Similarly, in the case of *Kudeshkina v. Russia* the ECtHR ruled in favour of Kudeshkina, stating that her dismissal violated Article 10 (Khotynska-Nor and Moskvych, 2021). However, it acknowledged the need for judicial restraint but found that her statements were within the bounds of acceptable public criticism (para 94). In the case of *Harabin v. Slovakia*[21] the ECtHR highlighted that judges' expressions, particularly on matters of public interest and judicial administration, should not be unduly restricted by disciplinary actions that appear retaliatory.

However, if judges undermine public confidence in the judiciary's impartiality and integrity by their comments and statements there is no violation of Article 10. Over the years, the ECtHR has developed specific criteria that judges must consider to ensure their expressions remain compatible with their judicial role (Elosegui, 2021). Judges must maintain maximum discretion regarding cases they are handling. Public commentary on ongoing cases compromises their image as impartial adjudicators and undermines public confidence in the judiciary.[22] Furthermore, judges should avoid publicly criticising the conduct of other judges in relation to pending cases. Such criticism can erode public trust in the judiciary.[23] This was the situation in the case of *Olujic v. Croatia,*[24] when judge faced disciplinary proceedings for comments made about his colleagues and other public figures.

The *Danilet v. Romania*[25] is a significant test of the limits and protections of judicial expression, especially in the context of social media. The ECtHR's ruling will have far-reaching implications for judges across Europe, clarifying the extent to which they can engage in public discourse and criticism without jeopardising their positions or the integrity of the judiciary (Lemmens, 2024). Danilet claimed that the disciplinary actions against him were unjustified and retaliatory, aimed at silencing criticism of the judicial system and political interference. The issue revolves around whether the restrictions imposed on Danilet's social media activities were necessary and proportionate in a democratic society. The Romanian judicial authorities argued that Danilet's social media activity violated the code of judicial conduct, which demands impartiality, discretion, and maintaining the dignity of the judiciary. However, the ECtHR concluded that there had been a violation of Article 10, since the High Council of the Judiciary and the High Court did not take into consideration that the judge discussed an issue of general interest within a special political context. This means that any restrictions on the judges' freedom of expression need to be particularly well-justified and narrowly interpreted. Moreover, the judge did not attack the reputation or dignity of his colleague, as it was not a value judgement but a statement of fact.

5. CONCLUSION

While freedom of expression is a fundamental right for all individuals, including judges, its exercise by members of the judiciary must be carefully managed to align with their professional obligations and ethical standards. Social media, as a transformative communication platform, necessitates additional caution to mitigate risks to judicial integrity and public confidence. The nature of social media, coupled with virtually limitless and instant reach, exposes judges to broader scrutiny and amplifies the risks of perceived

[21] ECtHR, Harabin v. Slovakia, app. no. 58688/11, 20.11.2012.
[22] ECtHR, Albayrak v. Turkey, app. no. 38406/97, 31 January 2008.
[23] ECtHR, Kudeshkina v. Russia, app. no. 29492/05, 26 February 2009, para 94.
[24] ECtHR, Olujic v. Croatia, app. no. 22330/05, 5 February 2009.
[25] ECtHR, Danilet v. Romania, app. no. 16915/21, 20 February 2024.

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bias or impropriety. Unlike traditional judicial behaviour, which is typically confined to courtrooms or professional settings, social media posts and interactions are accessible to the public, including litigants and lawyers. This accessibility requires judges to exercise significant caution, as any expression of personal opinions or controversial interactions can quickly undermine their impartiality and the integrity of the judiciary.

Ethical principles such as impartiality, integrity, and independence, as articulated in instruments like the Bangalore Principles of Judicial Conduct, apply universally but face particular challenges in the digital age. Social media, often used in a private capacity, blurs the lines between personal and professional expression, creating a heightened risk of ethical breaches. Furthermore, the permanent and shareable nature of online content means a single misstep can tarnish judge's reputation and erode public trust. Judges must remain acutely aware of their unique societal role and avoid actions that could be misconstrued, especially in the highly visible and largely unregulated domain of social media.

Based on the ECtHR jurisprudence and analysed national and international standards it could be concluded that judges' comments on social networks should balance their right to freedom of expression with the need to maintain judicial independence. Judges have the right to freedom of expression, especially on matters of public interest, including the functioning and reforms of the judiciary. This right can be subject to limitations to maintain judicial independence, impartiality, and public trust in the judiciary. Disciplinary actions against judges for expressing their views must be carefully scrutinised to ensure they do not disproportionately restrict their freedom of expression. Disciplinary measures against judges for their expressions must not serve as a tool to silence legitimate critique or debate, especially on issues concerning judicial independence and the rule of law.

These principles suggest that while judges can participate in public discourse, including via social networks, they must do so in a manner that upholds the dignity and impartiality of their office, hence, the potential sanctions should be primarily applied in cases when those standards or other substantial principles of judicial office are clearly breached.

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ECtHR, Kudeshkina v. Russia, app. no. 29492/05, 26 February 2009.
ECtHR, Harabin v. Slovakia, app. no. 58688/11, 20.11.2012.
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ECtHR, Żurek v. Poland, app. no. 39650/19, 16 June 2022.
ECtHR, Tuleya v. Poland, app. nos. 21181/19 and 51751/20, 6 July 2023.
ECtHR, Danilet v. Romania, app. no. 16915/21, 20 February 2024.

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MAY ENERGY JUSTICE ENHANCE HUMAN RIGHTS PROTECTION IN THE EUROPEAN UNION?

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Abstract: *Energy justice, sustainable environment and human rights became the leading factors of some of the sustainable development goals set as the common goal of international community. The contemporary greening process is interconnecting with number of transformations in decision-making and policies. Greening process and its integral part, access to energy as the tool for preventing energy poverty is related with human rights. We assume, that access to energy is fundamental to meet basic human needs and existing human rights necessitates access to energy. The European Union is perceived as the key regional leader in greening process, by adoption of EU Green Deal. At the same time, the European Union has also the ambition to be human rights actor. Both these goals are led by declarations of the European Union and obligations of its Member States internationally. The paper presents outcomes of quantitative and qualitative research focused on the question, how the energy justice is conditioning the effective exercise of other rights guaranteed by international human rights treaties, within the European Union environment.*

Key words: *Human Rights; Human Security; Energy Justice; Sustainable Development; Human Dignity; Access to Energy; Energy Poverty*

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1. INTRODUCTION

International human rights law does not contain particular regulation or protection to right of access to energy (services). The access to affordable, reliable, sustainable and modern energy for all is set as the political goal in the sustainable development agenda, but in some forums such as within Human Rights Council,[1] UN General Assembly[2] or Council of Europe,[3] it is either recognised or discussed as the new human right. The right of access to energy accelerates in relation to ongoing processes of greening policies and the related issue of energy justice. The political and international discourse about energy justice is related to the different issues as production, distribution and consumption of energy, today and also in the future. We estimate that access to energy is fundamental to meet basic human needs and existing human rights

[1] UN (2021). Human Rights Council, A/HRC/RES/48/13. Available at: https://docs.un.org/en/A/HRC/RES/48/13 (accessed on 25.06.2025).
[2] UN (2022). UN General Assembly, A/RES/76/300. Available at: https://docs.un.org/en/A/RES/76/300 (accessed on 25.06.2025).
[3] Council of Europe (n.d.), Human rights and the environment, a priority for the Council of Europe. Available at: https://www.coe.int/en/web/human-rights-rule-of-law/humanrights-environment (accessed on 25.06.2025).

necessitates access to energy. This perspective frames the research focused on how the energy justice is conditioning the effective exercise of other rights guaranteed by international human rights treaties. The problem we address in this research concerns bridging the concept of energy justice with the human rights framework (Huhta, 2023; Basil and Heffron, 2025). More specifically, how is the distributional energy justice conditioning the effective exercise and enforcement of human rights. The hypothesis predicts that the lower access to energy also limits the access to effective human rights protection, such as civil and political rights, but also social, economic, cultural and environmental rights. Moreover, the lower socio-economic status correlates with the increased encounter with the energy poverty, which contributes to further deterioration of the living conditions of already vulnerable population groups. Besides marginalisation of the opportunities for improvement of the livelihood, the energy poverty also hampers the human rights. We have selected qualitative and subsequently quantitative methodological approach to confirm or refute this hypothesis, i.e. quantifying the energy justice and human rights protection, and ultimately measuring their relationship.

The gap created by the existence of the energy poverty or limited access to energy presents obstacle for governments to protect human rights and to fulfil positive obligation to protect its citizens' human rights and fundamental freedoms. The qualitative analysis of the legal regulation and politics adopted in the European Union in area of access to energy should provide the proper response for setting strategies and implementing policies to effective system of human rights protection. Identification of the key factors in transforming system of human rights in the European Union within so-called greening processes and understanding the necessity to balance it with the energy justice may decrease the risk of the vulnerability of people living in the Member states of the EU in different regions. Furthermore, the growing risks of struggling people from fundamental rights may be increased due the limited or no access to energy, especially in extra-ordinary times as in global pandemics, when the green policies or human rights may be properly limited and justified. Hence, we aim to contribute to the energy justice scholarship discourse in EU by establishing measurable link between energy justice and human rights, and provide for further research of related mechanisms and processes. The paper does not had ambition to provide overview of the intersection between energy justice and human rights (Basil and Heffron, 2025) but rather analyse the connection and conditionality of the effective protection and enforcement of human rights, by ensuring energy justice as the part of strategic priority of the EU energy policy. Additionally, the research aims to complement the concept of energy justice reiterated in the European Commission Guidelines 2024 – 2029 (European Commission, 2024), from the human rights perspective (Shortal and Mengolini, 2025).

2. THE RIGHT OF ACCESS TO ENERGY IN INTERNATIONAL HUMAN RIGHTS PROTECTION

After the reprisals of the WWII, the international community together with foundation of the United Nations, adopted the Universal Declaration of Human Rights, as the important step for protection of human rights and international peace. The Declaration adopted in 1948 became the cornerstone for the international system of human rights. It became an inspiration for the human rights treaties but also declaration of the international effort to universal implementation of human rights. As declared by the UN itself, "*it represents the universal recognition that basic rights and fundamental freedoms are inherent to all human beings, inalienable and equally applicable to everyone,*

and that every one of us is born free and equal in dignity and rights."[4] This commitment of the international community to protect and promote human rights has been over the years incorporated in number of human rights treaties, customary international law, political declarations, action plans and regional initiatives.

The very first codified international attempt is presented in two human rights treaties – International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights. In the text of these two conventions many of the rights from Declaration had been transformed in the form of legally binding obligation for signatory countries.

The principle of human rights protection originally worded in the Declaration have been afterwards addressed in individual human rights treaties within the UN framework, focused on fight against racial and gender discrimination, prohibition of torture, addressing rights of people with disabilities, women, children, migrants, minorities and indigenous people. All these treaties together are recognised as International Bill of Human Rights, and it simultaneously involves also positive obligation of signatory countries to action and protection of rights guaranteed.

Alongside with development of human rights treaties, also human rights policies and related goals has been set on international, follow regional and national level. The framework document reflecting the contemporary development in 21st century declared strategy to achieve Millennium Development Goals (hereinafter as "**MDGs**"), referring to combat poverty, hunger, disease, illiteracy, environmental degradation and discrimination against women.[5] As stated in the point IV., protection of common environment became an individual agenda of sustainable development, respecting the necessity of environmental actions and new ethic of conservation. There may be derived also implicit right of individual to live on a planet which is environmentally sustainable.

Continuous ambition of friendly environment evolved also in the next UN agenda in Sustainable Development Goals (hereinafter as "**SDGs**").[6] In the set vision, the UN has envisaged "a world where human habitats are safe, resilient and sustainable and where there exists an universal access to affordable, reliable and sustainable energy".[7] It is for the first time in the international human rights regulation, when the right of access to energy is explicitly stated. Details developed in the SDG7 focus on ensuring access to affordable, reliable, sustainable and modern energy for all. UN and its member states emphasise the commitment in this area will be conform to existing rights and obligations of states under international law and "the integrated approach should respect interconnections as well as cross-cutting elements across the new Goals and targets".[8]

3. ENERGY JUSTICE AND HUMAN RIGHTS PROTECTION IN THE EUROPEAN UNION

The protection and implementation of human rights is embedded in different structures of the international community, that have given a rise to a multi-layered system

[4] The Foundation of International Human Rights Law. UN, available at: https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law (accessed on 25.06.2025).
[5] United Nations Millennium Declaration. General Assembly Resolution, A/Res/55/2 of 18 September 2000. UN, 2000. Available at: https://undocs.org/en/A/RES/55/2 (accessed on 25.06.2025).
[6] Transforming our world: the 2030 Agenda for Sustainable Development. General Assembly Resolution, A/Res/70/1 of 21 October 2015. UN, 2015. Available at: https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E (accessed on 25.06.2025).
[7] *Ibid.*, point 7.
[8] *Ibid.*, point 17.

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of human rights. Nowadays, governance implies "*the interaction of various layers, which together form what has been described as multi-layered constitutions*" (Randall, 2012, p. 191). Many global issues are dealt with under the five layers of governance: global, regional, national, sub-national and municipal. The global layer is argued to have three functions: "*to overcome the incapacity of nation states, to address issues that transcend country borders, and to act as checks on the state's failure to address key issues*." (Randall, 2012, p. 191). Randall argues, "*the 'checks' element has been the strong impulse behind the creation of international human rights instruments*." (2012, p. 192).

Although global or international layer of human rights has been founded in agreement of sovereign states together with foundation of United Nations, increased number of Member States and rather political character than legal obligation to enforce human rights protection led to number of regional human rights initiatives or organisations focused on human rights protection. Jane Williams in relation to regional layer of human rights protection argues, that "*The effect might be to further the regional policy and to exert pressure on the State Party to fulfil its obligations in areas where responsibility is retained at national level.*" (Williams, 2011, p. 241). Therefore, the holistic approach to the effective implementation of human rights' protection requires adoption and implementation of the human rights catalogue and related policies corresponding to internationally set obligation but at the same time applicable to material conditions of the region and sovereign states.

The European Union is a good example of how human rights protection is implemented in a multi-layered environment. Although "*initially deemed irrelevant to European integration, fundamental rights have become increasing central to the EU legal order. Originally incorporated as negative obligations, the EU has slowly gained competences positively to develop relevant human rights standards and has established mechanisms for their enforcement.*" (Greer, Gerars and Slowe, 2018, p. 238). Today the European Union has its own human rights catalogue, the EU Charter of Fundamental Rights, which follows the general principles of human rights protection and policies of implementation, and it is thereby a key stakeholder of human rights in Europe (Mokrá, 2021). Its role is not limited to within the borders of the European Union. In pursuing its role as an international actor, the European Union not only has to set out human rights in principle and ensure that the law is adhered to in practice, but it is also leader of promoting and implementing new generation of human rights, including environmental rights as the positive obligation set within SDG framework. We agree with de Búrca, who underlined, that "*The assessment of the role of human rights in the EU must address its complexity which follows from the character of the different rights protected, actual contexts in which human rights are invoked and their different features, and the actual place and impact of the human rights invoked in that particular environment.*" (Búrca, 1995, p. 53).

Therefore, we understood as one of the key issues in effective protection of human rights its complexity, interdependence and interrelation with other rights. The hypothesis of our research states, that the level of energy justice impacts effective implementation of civil, political and economic rights.

In this sense we understand human rights in its original structure as mentioned in the Universal Declaration of Human Rights adopted within UN, divided to fundamental rights, civil and political rights, social, economic and cultural rights. The European Union in evaluation of human rights implementation use the existing system of human rights protection adopted by the Council of Europe (and its annual evaluation throughout the reached number of judgements, based on the text of Article 6, para 3 of the Treaty on European Union) as well as work on the own system referring to the adopted EU Charter

of Fundamental Rights (Article 6, para 1 of the Treaty on European Union). Solely for the purpose of this research, applying the time process in development of the correlation between effective human rights protection and energy justice, we use the European Convention on Human Rights and Fundamental Freedoms' structure. As such, civil rights are covering right to liberty and security (Article 2) and right for fair trial (Article 6). Political rights include right to free elections (Article 3 of Protocol 1), right to assembly and association (Protocol 11) and freedom of expression (Article 10). Category social, economic and cultural rights include right for private and family life (Article 8), right to marry, freedom of thought, conscience and religion (Article 9), and protection of property (Article 1 of Protocol 1). Research on effectiveness of the human rights protection as guaranteed by the Convention as well as by Charter is increasing rapidly (Brosig, 2006; Maduro, 2004; Mazák and Jánošíková, 2016; Peers, Hervey, Kenner and Ward, 2014; Pernice, 2008; Boyle, 2007), but preferably in parallel dimension, focused on either human rights or focused on energy justice, but not interlinking them. Nevertheless, the conjunction of the human rights protection and energy justice can be arguably perceived in three different dimensions: a) the access to energy as possible fundamental right; b) protection of human rights in energy-related activities (e.g., exploration and exploitation of the resources); and c) access to energy as co-determinant of the enjoyment of the human rights (which is case of our research). Although there may be foreseen relation or even interdependence of the human rights protection in different manners with the access to energy (as the part of energy justice), we consider our research as important part of the human right research puzzle.

The academic interest in the concept of the energy justice has been rapidly emerging especially in the last decade (McHarg, 2020). The inherently interdisciplinary nature (Heffron and McCauly, 2017) together with the human-centred or anthropocentric perspective (Sovacool et al., 2017) deems energy justice a viable conceptual framework for the objective of this research – evaluation of the relationship between the fundamental human rights and (lack of) access to energy.

The energy justice *per se* denotes the equal distribution of the costs and benefits within the global energy system. Moreover, it "involves burdens, or how the hazards, costs and externalities of the energy system are disseminated throughout society; benefits, or how access to modern energy systems and services is distributed throughout society; procedures or ensuring that energy decision-making respects due process and representation; and recognition, that the marginalized or vulnerable have special consideration" (Sovacool et al., 2017, p. 677). Throughout the energy 'lifecycle' (production, distribution, transportation and consumption) various asymmetries in these costs and benefits are generated that undermine the ideal energy justice equilibrium. In spite of the multifaceted nature of the energy justice, we particularly focus on the *distributional justice*, which is one of the three 'tenets' of the energy justice, along the *procedural* and *recognition* justice (McCauley, Heffron, Stephan and Jenkins, 2013). The distributional justice concerns with the question where energy injustices emerge and recognises the unequal allocation of burdens in access to energy (Jenkins et al., 2016). It corresponds with the *affordability* as one of the "distinct principles" of the energy justice, that encompasses "stable prices (minimal volatility) as well as equitable prices that do not require lower-income households to expend disproportionally larger shares of their income on essential services" (Sovacool, 2013, p. 220). Therefore, it is imperative to include the issue of energy/fuel poverty in the context of the energy (in)justice, which is defined as "inability to attain a socially and materially necessitated level of domestic energy services" (Bouzarovski and Petrova, 2015, p. 31); i.e. the lack of access to energy infrastructure and/or services.

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In the framework of energy justice, the ramifications of the energy poverty extend beyond the scope of energy-related issues. As Heffron and McCauley argue, "the energy sector impinges upon the day-to-day lives of all populations … and energy injustices more than often result in the abuse of human rights at some level" (Heffron and McCauley, 2017, p. 663). Moreover, the structure of the energy systems has provided unequal allocation of "unprecedented benefits for some and taking from others the possibility of living a life of basic human dignity" (Sovacool, 2014, p. 15). Hence, the energy poverty as the aspect of energy injustice may potentially contribute to impediment of the enjoyment of the human rights and fundamental freedoms. As the example may serve the case *Nencheva and Others v. Bulgaria*, where inadequate conditions (housing, food, heating) at a state institution for mentally disabled children resulted in the death of seven children during winter 1996-1997.[9] Consequently, the court found that the state failed to fulfil its positive obligation to protect the right to life of its citizens as provided for in Article 2 of the European Convention on Human Rights and Fundamental Freedoms.

The existence of the energy poverty in the 'developed' countries has been primarily attributed to the "contingencies such as low incomes, energy-inefficient homes and high energy prices" (Bouzarovski, 2018, p. 2). Thus, the aforementioned *affordability* principle of the energy justice shall be considered as major factor hindering the access to energy, unlike in case of 'developing countries', where the lack of (access to) infrastructure plays major role (Bouzarovski and Petrova, 2015). In the European Union, lives of almost 50 million citizens are affected by the energy poverty (Thomson and Bouzarovski, 2019). Nevertheless, the integration of the concept of energy poverty into EU energy policymaking has occurred after the ratification of the *Lisbon Treaty*, which recognised the energy as the shared competence between the Member states and EU. In other words, for the first time, "energy policy formally become a subject of community activities" (Tews, 2015, p. 268), resulting in more assertive and ambitious energy-related legislation by the European Commission. In 2009, so-called 'Third Energy Package' was introduced, consisting of two directives revising the rules for the internal market in electricity[10] and gas.[11] Among other energy market related premises, these directives explicitly acknowledge that "[e]nergy poverty is a growing problem in the Community" and call for Member states to "develop national action plans or other appropriate frameworks to tackle energy poverty" (European Parliament and Council of the European Union, 2009a). Moreover, the Member states shall "define the concept of vulnerable customers which may refer to energy poverty and, inter alia, to the prohibition of disconnection of electricity [and gas] to such customers in critical times" (European Parliament and Council of the European Union, 2009a; European Parliament and Council of the European Union, 2009b), which is situated in the broader context of the (energy) consumer protection in the EU. Despite the fact that definition of the energy poverty or energy poor/vulnerable households is prerequisite for the implementation of the energy poverty mitigation policies (Thomson and Bouzarovski, 2019), a common and harmonised 'European' definition of energy poverty does not exist. In fact, majority of the Member states do not have an official definition of energy poverty. Only Cyprus, Ireland, France and Slovak republic have official national definitions of energy poverty (Thomson and Bouzarovski, 2019), whilst other Member states principally address the energy poverty through broader social policies (European Commission, 2020).

[9] ECtHR, Nencheva and Others v. Bulgaria, app. no. 48609/06, 18 June 2013.
[10] Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity.
[11] Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas.

4. (COR)RELATION OF HUMAN RIGHTS AND ENERGY JUSTICE IN THE EUROPEAN UNION?

Although the historical development both on international and European level confirms ambition to guarantee sustainable energy as human right, which should be conform and not competitive to other existing human rights and freedoms, the interaction between human rights implementation and energy justice is still under the question there – does universal access to energy guarantee effective implementation of human rights protection or vice versa, does the effective implementation of human rights constitute the development of new human right to energy? The human rights' international requirements in area of civil and political rights, social, economic and cultural rights "provide a strong normative basis for the call for universal access to energy: unlike a framing in terms of 'human needs', which implies relationships of beneficiaries and benefactors, human rights claims entail 'an active, insistent and justified demand' premised on rights, obligations and remedies" (Solis, 1980, p. 14). Therefore, the elimination of energy poverty and access to energy is *sine qua non*e of the effective exercise of other human rights, which should be guaranteed in the current multi-layered human rights environment. The research of relation between of human rights and energy poverty faces several challenges, including measuring human rights, effectiveness of existing system(s) of protection or measuring energy poverty.

The lack of consensus on the definition and conceptualisation, alongside with the limited availability of data and indicators makes measuring energy poverty rather challenging task (Thomson, Bouzarovski and Snell, 2017). Although the energy poverty is a key concept in the Clean Energy for All Europeans package,[12] designed to facilitate a just energy transition, the energy poverty definition was adopted as part of the 2023 Social Climate Fund Regulation as "a situation in which households are unable to access essential energy services that underpin a decent standard of living and health, such as adequate warmth through heating, cooling, as temperatures rise, lighting, and energy to power appliances".[13] The regulation is efficient only since 30 June 2024. Additionally, revised Energy Efficiency Directive,[14] defines energy poverty more precisely as "a household's lack of access to essential energy services that provide basic levels and decent standards of living and health, including adequate heating, hot water, cooling, lighting, and energy to power appliances, in the relevant national context, existing social policy and other relevant policies, caused by a combination of factors, including but not limited to non-affordability, insufficient disposable income, high energy expenditure and poor energy efficiency of homes".[15] Beyond the definition, most importantly, the directive also proposes four indicators to be considered by the Member states when assessing energy poverty: inability to keep home adequately warm; arrears on utility bills; population

[12] European Commission. (2019). Clean Energy for All Europeans. Luxembourg: Publications Office of the European Union.

[13] Regulation (EU) 2023/955 of the European Parliament and of the Council of 10 May 2023 establishing a Social Climate Fund and amending Regulation (EU) 2021/1060, OJ L 130, 16.5.2023, pp. 1–51, ELI: http://data.europa.eu/eli/reg/2023/955/oj (accessed on 25.06.2025).

[14] Directive (EU) 2023/1791 of the European Parliament and of the Council of 13 September 2023 on energy efficiency and amending Regulation (EU) 2023/955 (recast), OJ L 231, 20.9.2023, pp. 1–111, ELI: http://data.europa.eu/eli/dir/2023/1791/oj (accessed on 25.06.2025).

[15] The SCF regulation was adopted in May 2023. Initially, the legislative proposal for SCF referred to a new definition put forward in the proposed Energy Efficiency Directive recast. However, the SCF regulation was adopted first and thus became the first piece of EU legislation enshrining the energy poverty definition. The compromise agreement on the EED was reached in March 2023 and then formally accepted by the Parliament and the Council. See: Widuto (2023).

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living in a dwelling with a leaking roof, damp walls, floors or foundation, or rot in window frames or floor; and the at-risk-of poverty rate. These indicators are compliant to previous Commission's Recommendation on energy poverty, which provided indicative guidance on appropriate indicators for measuring energy poverty and defining a 'significant number of households in energy poverty'.[16]

Nonetheless, we proceed with the operationalisation of energy poverty as *inability to keep homes adequately warm*, which follows the approach adopted by the European Commission and is applicable to the whole research period and data. The *inability to keep homes adequately warm* "refers to the percentage of persons in the total population who are in the state of enforced inability to keep home adequately warm" (Eurostat, 2021). It is monitored by EU statistics on income and living conditions (EU-SILC) and as primary metric is recommended energy poverty indicator (Rademaekers et al., 2016). Statistical indicators of energy poverty, such as the one in our case, are considered "important and necessary part of the research and policy landscape" (Thomson, Bouzarovski and Snell, 2017, p. 879). Furthermore, within the framework of the energy justice, Sovacool (2014) promotes a move towards human-centred methods of data collection and research. Even though, we are working with the quantitative indicator, it "encompasses the prevailing qualitative definition of energy poverty and captures self-reported thermal discomfort issues" (Thomson and Bouzarovski, 2019, p. 19).

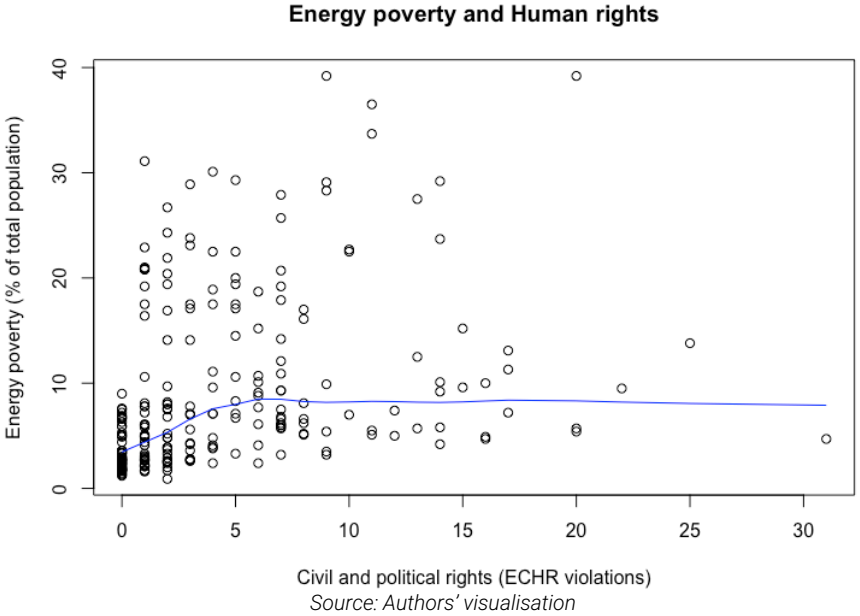
In case of human rights index, we use as relevant figures human rights violations based on the judgements in merit. The human rights' violations have been divided into two instances – *civil and political* rights and *social, economic and cultural rights* due to its division based on European Convention on Human Rights and Fundamental Freedoms, as referring in the Treaty on European Union, Article 6 para 3. Although the European Union has its own human rights catalogue, due to a very low accessibility of individual complaints to the Court of Justice of the European Union (active legitimacy), the dataset of individual violations would need to be based on outcomes of preliminary proceeding on national level. Our research intention is focused on European level and for that purpose we correlate human rights violations on individual complaints basis in the European Union Member states as decided by the European Court of Human Rights, which main human rights treaty contribute to constitution of human rights as general principle of the Union's law. Despite the jurisdiction of the European Court of Human Rights extends beyond the European Union Member states, the focus of the research is on the human rights dynamics within the EU, especially in relation to the concept of energy justice mainstreaming in the EU energy policy.

Regarding the data analysis, we have aimed at the measuring of the relationship (and its strength) between the energy poverty[17] and human rights' violations[18] in the Member states of European Union. The sample of the research consists of the 27 Member states and corresponding data for the 2015-2023 timeframe, thus creating a sample N = 243.[19] Firstly, we have opted for the simple regression analysis, in particular, utilising the LOWESS smoothing. The LOWESS stands for Locally Weighted Scatterplot Smoothing and basically form of non-parametric regression analysis, fitting a smooth

[16] Commission Recommendation (EU) 2020/1563 of 14 October 2020 on energy poverty (OJ L 357, 27.10.2020, p. 35).
[17] Using EU-SILC [ilc_mdes01] dataset.
[18] Using the annual reports of the European Court of Human Rights and statistics on violations by article and by state.
[19] Dataset of indicator of inability to keep home adequately warm for 2024 was not available by the date of paper submission, source: [ilc_mdes01] Inability to keep home adequately warm (accessed on 25.06.2025).

curve to data points. The non-parametric attribute of LOWESS adjusts the curve's best fit without *a priori* assumptions of the distribution of data or variables. As in our case, LOWESS illustrates the relationship between the variables and provides for understanding of the trend of variables. Thus, the distribution of the variables in both our examined cases, as well as cumulative human rights' violations is visualised in form of scatterplots (see *Graph 1, Graph 2 and Graph 3*) complemented with the LOWESS line.

Graph 1



Source: Authors' visualisation

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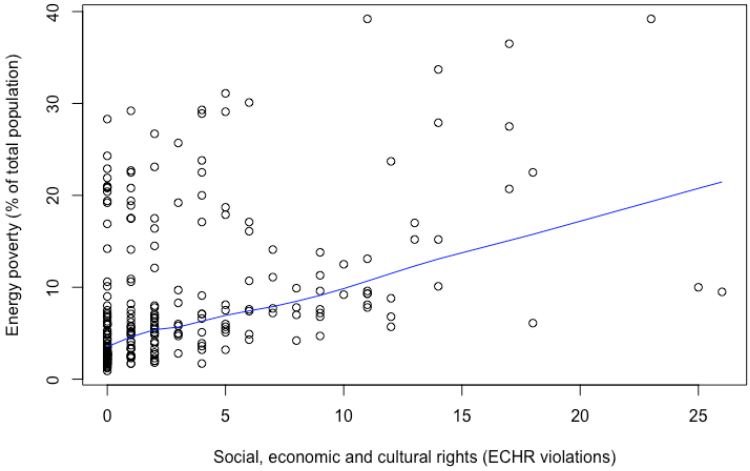
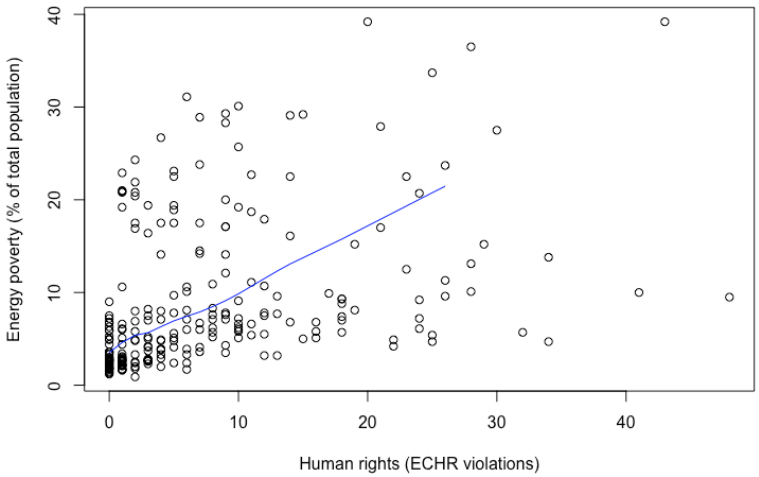
Graph 2
Energy poverty and Human rights



Source: Authors' visualisation

Graph 3
Energy poverty and Human rights



Source: Authors' visualisation

All three figures suggest a linear relationship between the variables, however, as mentioned previously the objective has not been to create predictive model but rather

estimate the existing relationship(s) between the variables. Although relation(ship) may be subject of analysis from different point of view, usually, the Pearson and Spearman correlation coefficients are used to measure the strength of the relationship between two variables in the quantitative research. Generally, both of these models provide three pieces of information: 1) covariance of the variables, i.e. whether one variable changes when the other does; 2) the direction of association in covariation, which can be positive (when one variable increases the other increases) or negative (when one variable increases the other decreases); 3) the strength, i.e. "how closely do the two variables change together," and significance of the relationship/association (McHugh, 2018, p. 1555). Nevertheless, the difference between them is that while the Pearson correlation coefficient measures the linear relationship between the values of the variables, the Spearman rank correlation coefficient measures the ranked values of each variable (which works well also with our sample – Member states). Thus, the Pearson correlation is more sensitive to the skewed distribution of variables and outliers (Courtney, 2018). We have performed a Shapiro-Wilk normality test, which suggests that our data deviate from normal distribution (*p-value* ≤ 0.05), therefore we propose the Spearman correlation coefficient, which better accommodates this occurrence.

Table 1

Between 0 and 0.19	No or a very weak correlation
0.20 to 0.29	Weak correlation
0.30 to 0.49	Moderate correlation
0.50 to 0.69	Strong correlation
0.70 to 1.0	Very strong correlation

Source: McHugh, 2018

We have proceeded with the Spearman ranked correlation test, juxtaposing the access to energy with the first- and subsequently second-generation human rights. In case of the *energy poverty/civil and political rights violations* relationship (*Graph 1*), the calculated correlation coefficient (Spearman's rho) ρ = 0.52 with the *p-value* < 0.001.[20] Although the illustration of the data and regression may not seem convincing, the fact that we have processed ranking (of the Member states) rather than values of the variables outline the meaningful relation. Furthermore, the correlation coefficient for the relationship (*Graph 2*) between *energy poverty* and *social, economic and cultural rights violation*s the ρ = 0.50 with the *p-value* < 0.001. Despite the better (visual) linear distribution of the variables than the previous case, the strength of the association is paradoxically lower. Nonetheless, in both cases the link should be considered strong and significant. For the *cumulative* correlation coefficient of both categories of human rights' violations vis-à-vis *energy poverty* (*Graph 3*) ρ = 0.56 with the *p-value* < 0.001. This suggests that marginalising outliers that may occur in each category of human rights' violations results in stronger relationship between the variables.

Therefore, in all three cases the data suggest a strong positive correlation (see Table 1) between the energy poverty and (two sub-categories of) the human rights violations, with strong statistical significance (*p-value*). Meaning that possibility of the human rights violation increases with the energy poverty exposure, based on the Member states' ranking. Even though, the outcome of the data analysis has not intended to assess the causal relationship between the energy (access) deprivation and human rights

[20] Threshold for statistical significance is set at $p \leq 0.05$.

protection, the analysis has confirmed that the occurrence of the phenomenon of the energy poverty is associated with the human rights violations in the EU Member states.

5. CONCLUSIONS AND RECOMMENDATIONS

In recent years we had reminded two important occasions related to our research topic, in 2019 there had been the 10th anniversary of Lisbon Treaty ratification, including legal efficiency of EU Charter of Fundamental Rights. In the same year, 2019, the European Commission introduced latest energy strategy *Clean energy for all Europeans*, underlining the clean energy transition as crucial component of the ambition to achieve carbon neutrality in EU by 2050. The *Clean energy for all Europeans* consists of the 8 new laws concerning the energy performance in buildings, targets for renewable energy and energy efficiency, and governance system of the energy union. Overall, the topic of energy poverty resonates in the provisions of these legislative acts, putting the (vulnerable) consumers to the heart of the energy transition (European Commission, 2019), particularly, the energy efficiency stipulations as the energy inefficiency has been identified as one of the primary drivers of the energy poverty (Thomson and Bouzarovski, 2019). Moreover, the energy justice and the concept of the just transition are also reflected in the *European Green Deal* initiative.

In the light of the results of our data analysis, suggesting the co-occurrence of the energy poverty and the human rights violations, we outline the potential contribution of the energy transition to the human rights protection. We recommend to precisely follow the principle establishing an individually justiciable right to environmental protection as stated in article 37 of the EU Charter of Fundamental Rights, "*a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development"* as the key factor impacting access to and effectiveness of civil and political and social, economic and cultural rights. The extensive interpretation of the sustainable environment as stated in international layer of human rights protection includes according to our opinion also right to access to energy and related prevention of energy poverty. The outcome in the form of energy justice is then pre-condition of the effective exercise of other generations of human rights.

European Union's legislation as well as policies should reflect the correlation between human rights and energy justice. As the first initiative we can see the policy of European Investment Bank in the Climate Bank Roadmap, declaring that from the end of 2021 the EIB will no longer contribute to the development of fossil fuel project, but on the other hand allocate financial resources for social and economic transformation, including human rights.[21] Another decisions and actions will confirm European Union's ambition to be both human rights actor and climate change leader, able to contribute to transformation of understanding human rights in the European Union within so-called greening processes.

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ON THE FALSE MYTH OF LEGAL NEUTRALITY: SOME REMARKS

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Abstract: *Studies on gender, legal feminist theories, women's studies, and, in general, feminism provide fundamental and indispensable contributions to a critical discussion of the field of law and to the contemporary philosophical debate of legality. They are characterised by a considerable expansion of the thematic area. This paper does not claim to be an introduction to the feminist analysis of the law in general or of specific theories of law, but it arises at the halfway point between some criticisms and the proposal of alternative elements. One of the aims of this study is to analyse how sovereignty is connected to the patriarchal view of society and especially to a particular concept of law. For this reason, the study will address the issue raised by some criticisms of law based on arguments developed by a feminist legal theory that underlines the false neutrality of law. My interest is to discuss the patriarchal nature of the law and some of its specific legal categories (such as sovereignty) and to highlight the need to rethink and redefine them. It starts from the premise, as underlined, that the traditional discourse on law is a discourse of power, even camouflaged at times as cognitive discourse. Then, it analyses how legal feminist theory could contribute to overruling the patriarchal structure of society and redefining traditional legal concepts (such as sovereignty). To conclude, this study tries to highlight tensions and raise constructive reflections on the issue.*

Key words: *Feminist Legal Theory; Law; Sovereignty; Murder of Honour; Shotgun Wedding*

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1. INTRODUCTION

The studies about gender, legal feminist theories, women's studies and, in general, feminists (movements) provide fundamental and essential contributions to the

critical discussion of the law field and the contemporary legal philosophical debate. They are characterised by new developments in the thematic area.[1]

In addition, over recent decades, the increase in publications in all fields of knowledge, which often intertwine, has been accompanied by the fragmentation of the traditional currents of thought.[2] Thus, in general terms, it could be said that feminist theory, specifically in relation to gender studies, tries to develop its own trajectory, highlighting accurate criticisms of the law and specifically its traditional legal categories.[3]

I am very aware that to present, the complexity of this topic is not a simple work or a simple challenge. The first difficulty encountered is to identify a unanimous or concordant position within feminist legal theory, as well as the feminist movement (without considering that even today, some studies and approaches recognise, with efforts, a theory of legal feminism while continuing to delimit it only as a feminist movement).[4] A plausible explanation for this could be found in the circumstances in which feminists have not always taken common positions related to the same aspects, problems, or phenomena. Put simply, there are many differences within feminism itself. According to Martha Fineman: 'When we speak of feminism, it is necessary to clearly state that there are many differences within feminism – difference in approach, emphasis, and objectives – that make sweeping generalizations difficult. Recognizing that there are many divergences in feminist theory, it is nonetheless possible to make some generalizations'. (2015, p. 13)

Over the years, feminism has taken many different forms and has been defined and redefined several times, making it impossible for the observer to draw a coherent picture and to indicate a coherent theoretical referential.[5] This consideration would explain the multiple internal contradictions in the same feminist movement and also its many misunderstandings derived from the numerous meanings and shades that the word 'feminism' could assume and potentially evoke (Stamile, 2016). Therefore, as underlined, this term indicates, at the same time, not only a social and/or political movement (referring to practical actions developed by women) but also a legal theory (referring to the role played specifically in the academic sphere).

Despite many divergences within feminist theory, it is possible to make some generalisations starting from the reflections that I will try to argue in this study. In other words, one of the aims of this study is to address the issue raised by some criticisms of

[1] For example, we could think of all matters involving new technologies, communications, information, as well as the Internet and the network. Undoubtedly, they are contributing to the construction of new forms of online social interactions or, as Manuel Castells (2002) states, they determined the total destruction of the old and traditional concept of society as well as of the city.

[2] For example: Faralli (2006) states: 'In the last forty years we have seen a progressive dissolution of schools and consolidated currents, and as a result, the classic distinction between legal naturalism, legal positivism and legal realism, which for a long time has allowed us to address ourselves between positions of the various authors, even if at times somewhat schematic and forced. This does not mean that legal naturalism, legal positivism and legal realism have disappeared: the first has a prominent representative in John M. Finnis; the second is linked, in different ways, with authors such as Neil MacCormick, Ota Weinberger, Joseph Raz; the third is associated with the exponents of Critical Legal Studies, economic analysis of law, as well as part of the theory of feminist law. However, some authors dispense with such theoretical trends, as they do not accept or criticise them, and therefore cannot be linked to them, but simply deal with new research.' In this paper, all translations into English are of the author.

[3] For more details see: Stamile (2020a) and Casadei (2015).

[4] For an idea about the issue of whether feminism was or is still just a mere social movement indicates that it is far from being a container of shared meanings, see: Calabrò-Grasso (2004).

[5] However, there is an extensive bibliography that attempts to describe the goals and methods of collective action of feminism, and also to indicate what the most important groups are, which are characterised by peculiar features and trends.

the law, starting from the arguments developed by scholars/theorists and feminists who underline the false neutrality of law.[6] In particular, my interest is to discuss the patriarchal and masculine nature of the law and some of its specific legal categories (i.e., how sovereignty is connected to the patriarchal view of society and especially to a particular concept of law) and to highlight the need to rethink and redefine them. It starts from the premise, as underlined, that the traditional discourse on the law is a discourse about power, even camouflaged at times as cognitive discourse. For this reason, a new vision of the law and its legal categories is proposed, without forgetting that, as Sergio Ferlito noted long time ago: 'Neither the history of facts nor that of ideas follow the same rhythms as the temporal sequences marked by the calendar. In contrast, the new always emerges within the old, and it is manifested through indicators that we need to know how to learn and to interpret' (2005, p. 9).[7]

In light of this, the first part of this article will focus on some points of the 'feminisms', particularly how the legal theory of feminists could contribute to overruling the patriarchal structure of society. Then, the false neutrality of law, understood with some examples, will be addressed. Finally, the analysis will address some remarks about the tensions and raise constructive reflections on the issue involved (the necessity to redefine traditional legal concepts such as sovereignty).

2. SOME POINTS ABOUT 'FEMINISMS'

2.1 Feminist Legal Theories: Between Equality and Difference

This paper does not claim to be an introduction to the feminist analysis of the law in general or of specific theories of law, but it stands at the halfway point, expressing some criticism of a certain way of understanding law and proposing alternative elements. Therefore, it is useful to clarify that the first wave of feminism was defined as 'equality feminism' and associated with important results such as the right to vote, access to the job market and employment in general, and the right to education and freedom of choice in the case of abortion.[8] In other words, the contributions were made in all the fields where it was possible to achieve formal equality (between men and women) or to eliminate the lack of such equality.

However, beyond discussions about the functions that formal equality can fulfil, it is worth mentioning that the reforms taken in labour law and family law are based only on equal treatment without taking into account the real conditions of women or the relations of power within the family (a context within which women are traditionally seen as subordinates). That is because of the structures of social and economic relationships that lead some members of the household to be dependent upon the others (see Okin, 1989).

[6] Here I will not consider the whole and specific form of the different waves that characterise feminism, which are common to resort to the same label ('feminism'), just as I will not deal with details of the different temporal demarcations that created and continue to feed an animated debate that seems destined to not reach a unique position. Within the immense literature on this issue see for example: Nicholson (1997); Cavarero – Restaino (2002); Grant Bowman – Schneider (1998); Facchi (2007); Kymlicka (2001); Gatens (1991); Jaggar (1983).

[7] 'Né la storia dei fatti, né quella delle idee seguono gli stessi ritmi delle sequenze temporali scandite dal calendario. Il nuovo sempre affiora invece in seno al vecchio e si manifesta attraverso indicatori che occorre saper cogliere e interpretare'.

[8] In this framework, I refer at least to the European and Anglo-Saxon context. Undoubtedly, a distinct treatment deserves the Latin American context, see for example: Torres Sánchez (2020). For more details on this respect with a specific reference to Brazil see: Camargo Kreuz (2018).

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Ignoring such differences, as the first wave of feminism seems to do, and treating all people as equals can lead to unexpected discrimination (Gianformaggio, 1993; Ferrajoli, 1993; Gerhard, 1997). In this way, the feminism characterised by equality translates into a demand for equal treatment. This means, on the one hand, the request to eliminate blatant discrimination between men and women, and, on the other, the recognition of women as subjects entitled with full autonomy by rejecting protectionist norms (Facchi, 1999, p. 135).

Subsequently, 'difference feminism', also known as the second wave of feminism, manifested itself in the requests for special treatment, which aim to achieve substantial equality by valuing differences, showing the false neutrality of the law (Facchi, 1999, p. 135). We could recognise without doubts the merit of this approach, which will become further evident, as it is the point on which I will focus.

However, it can be argued that the difference feminism attracted some criticisms[9] that will be briefly summarised in this paper. First, this approach shows a specific risk, namely that specific affirmation of special treatments based on a gender perspective could lead to those policies on women protection that have characterised, particularly, the conservative society. The latter only allowed women to engage in certain activities and, therefore, has often been fought since feminism appeared.

Despite this, the difference feminism has the merit showing that the law is a mere masculine instrument in a more incisive and clearer way and that for this reason the law itself is totally unable to offer adequate 'protection' to women. The law is based on predominantly male models, categories, and values. According to Carol Smart (1992), it is possible to identify three phases in the development of the idea that the law is not neutral but gendered. The first phase is summarised in the sentence 'Law is sexist', the second by 'Law is male', and finally by 'Law is gendered'. These three phases constitute three levels of arguments. 'May be found to be deployed simultaneously in some feminist work on law, however, it is useful to differentiate between them in order to see what analytical promise each approach has' (Smart, 1992, p. 30). The first step, law is sexist, is characterised by the criticism of current law, which is presented as rational, impartial, but instead discriminates against women. Thus, the law actively disadvantaged women by allocating to them fewer material resources (for example, in marriage and on divorce), by judging them by different and inappropriate standards (for example, as sexually promiscuous), or by denying them equal opportunities. The second step, law is male, consists of highlighting that law is intrinsically masculine; it is not that law fails to apply objective criteria but that these criteria are masculine. In the last step, law is gendered, and law insists on a specific version of gender differentiation (Smart, 1992).

In light of the aforementioned, the debate about the utility and the opportunity to use the law for these purposes parked off both at the theoretical and practical levels. The

[9] For example, see: Minow (1988, pp. 47-48) puts in this way: 'In critiques of the "male" point of view and in celebrations of the "female", feminist run the risk of treating particular experiences as universal and ignoring differences of racial, class, religious, ethnic, national, and other situated experiences. Thus, feminist analyses have often presumed that a white, middle-class, heterosexual, Christian, and able-bodied person is the norm behind "women's" experience. Anything else must be specified, pointed out. This set of assumptions recreates the problem feminists seek to address- the adoption of unstated reference points that hide from view a preferred position and shield it from challenge by other plausible alternatives. These assumptions also reveal the common tendency to treat differences as essential, rather than socially constructed, and to treat one's own perspective as truth, rather than as one of many possible as truth, rather than as one of many possible points of view. Feminism has contributed to the campaign that challenges the convergence between knowledge and power. […] Feminists have contributed incisive critiques of the unstated assumptions behind political theory, law, bureaucracy, science, and social science that presuppose the universality of a particular reference point or standpoint […]'.

same can be said about the distrust of the law, since it was considered decisively as a 'sexual' technique, thus determining the search for a law that can be defined as 'female' (Facchi, 1999, p. 139).

Furthermore, it is worth mentioning that within feminism, based on the emphasis of the differences between men and women, a more radical feminism approach has emerged. This view supports 'the differences inside the difference', with the consequence that the theories elaborated by a part of this current (for example, the 'white' part of feminism) are not accepted by the other 'ethnic' groups (such as, for example, 'black' women) because their problems refer to social, economic, and cultural conditions that are radically and totally different from each other (Abbagnano, 2008, p. 471). Thus, in a simple way, it could be inferred that the equality-difference dichotomy became stuck between a rock and a hard place in the feminism debate.[10] Most likely, only a third wave could attempt to overcome it.

Radical feminism tries to subvert those sexual and social relationship within which women are oppressed by men. According to Catherine MacKinnon, one of the main exponents of this current, the crucial point of the debate is no longer whether the law should treat women and men equally or differently since this kind of reasoning leads to the conclusion that the law would inevitably become an instrument of oppression and subordination. According to this approach, it seems clear that the theoretical contrast between equality feminism and difference feminism, developed first in the United States and then in Europe, could be overcome through a different perspective that reconciles the two alternatives. In fact, the problem lies with the extremist elements of the two theses, which would only work on a theoretical level and not on a practical level. In light of these considerations and as (provocatively) noted by Isabel Cristina Jaramillo (2009, p. 104), the criticisms and uses of the law elaborated by feminism are undoubtedly characterised by being intense and also immensely varied both in quantity and quality. Moreover, on the one hand, they depend on the way through which oppression is perceived within society and, on the other hand, on the understanding of the law and its relations with the spheres of social life (Jaramillo, 2009, p. 104).

Apparently, that is the reason why some feminists did not criticise the legal theory in its fundamental concepts, just as other feminists did not 'strategically' evaluate the law. In contrast, other feminists realised the strict relationship of the law with other spheres of social life and began to question it. However, this approach comes under three different criticisms: the theory of law, institutions, and methods of legal analysis (Jaramillo, 2009, p. 121). Notwithstanding the diversity of these points of view, the three criticisms mentioned above, which intertwine and overlap, can be used at the same time to interpret the issue through a new way of dealing with it.

2.2 When Violence Meets the Law

All feminists follow the central idea that the law is a product of patriarchal societies based on an idea of sovereignty understood as domination or as an asymmetrical relationship of power between man and woman. Since women are completely made invisible and also objectified, the reason why the law was built (and continues to be) is the male perspective (Stamile, 2020c; 2022). Therefore, with respect to the first category of criticism, the law reflects and protects the values of 'one' part of society and consequently meets and responds to its needs and interests. Even when the law seems to contemplate these needs and interests (for example, when including

[10] For more details about the compatibility between equality and difference see: Stamile (2020b, pp. 9-28).

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women), it turns out, in reality, that its application and/or interpretation of institutions are still permeated by patriarchal ideology. In its complexity, this aspect seems evident if we think about the murder of honour ('delitto d'onore') or the shotgun wedding[11] ('matrimonio riparatore'), which within the legal-social context of Italy marked an era (negatively!). The two institutes mentioned shared the same idea that basically is 'repairing' a damage or loss specifically caused to honour.[12] The murder to restore family honour (so-called 'delitto d'onore' in Italian) was provided for by the Italian Penal Code in Article 587, which is reported here in its original version:

'Chiunque cagiona la morte del coniuge, della figlia o della sorella, nell'atto in cui ne scopre la illegittima relazione carnale e nello stato d'ira determinato dall'offesa recata all'onor suo o della famiglia, è punito con la reclusione da tre a sette anni. Alla stessa pena soggiace chi, nelle dette circostanze, cagiona la morte della persona, che sia in illegittima relazione carnale col coniuge, con la figlia o con la sorella'.

'He,[13] who causes the death of a spouse, daughter, or sister when discovering her in illegitimate carnal relations and in the heat of passion caused by the offence to his honour or that of his family, will be sentenced from 3 to 7 years. The same sentence shall apply to whom, under the above circumstances, causes the death of the person involved in illegitimate sexual relations with his spouse, daughter, or sister'.

With this, the so-called 'unrepaired dishonour' could lead to murder of honour ('delitto d'onore'), but in this case, Article 587 of the Italian Penal Code recognised it as an attenuating circumstance ('circostanza attenuante'), promoting a strong reduction in penalty with respect to the same crime, although for a different reason. The provision of Article 587 of the Italian Penal Code, combined with that of article 544 of the same code [which established the terms of shotgun wedding ('matrimonio riparatore')], disappeared six years after the reform of family Law,[14] more precisely through the enactment of the Law of 5 August 1981, n. 442, called 'Abolishment of the 'honour motive' and the 'shotgun' wedding' in criminal proceedings (*Abrogazione della rilevanza penale della causa d'onore e del matrimonio riparatore*)'.[15]

It is useful to clarify that rape, a crime that carried out a penalty of imprisonment (Article 519 of the Italian Penal Code), could benefit from the extinction of the penalty (Article 544 Italian Penal Code) if the perpetrator married the victim, or even when once the penalty was enforced, both the conviction and its criminal effects ceased.

Therefore, the law offered the possibility of obtaining the benefit of the extinction of the penalty if the perpetrator 'repaired', through marriage, the consequences of the 'dishonour of the woman'. Without doubt, the reparation and its benefits were only unilateral, representing an advantage to the perpetrator (man), who prevented himself

[11] 'Shotgun wedding' means 'a wedding that the parties agreed to because somebody forced them to get married at the point of a shotgun'. It's often used figuratively to mean 'a wedding between reluctant partners' or 'a marriage that the bride or groom was forced into'. Word reference definition.

[12] In every society and every culture, there are actions and circumstances that confer and remove honour. Thus, all the cultures develop their specific relation with the other spheres related to social life which refers to honour, as such identity, morality, status. See for example: Stagi and Petti (2015), Pitt-Rivers (1977), Peristiany (1965).

[13] Interestingly, despite the use of the Italian term 'chiunque' that literally refers to 'everyone who commits the crime' without gender specification, it is worth to note that the only perpetrator could only have been a man, since the female partner could never be considered able to protect the honour of the family, therefore a perpetrator of this crime. This is why the English translation can only refer to the perpetrator as a male one, thus the necessary use of the pronoun 'he'.

[14] This law was introduced long after the referendum legalising divorce (1974), the reform of Family Law (1975), and the referendum that legalised abortion (1978) were passed.

[15] See: https://www.gazzettaufficiale.it/eli/id/1981/08/10/081U0442/sg.

from being 'the worst bad' in this specific case. Furthermore, the woman who was already a victim of that violence suffered yet another form of violence, marriage, and the obligation to live with her rapist to avoid social infamy; last but not least, this supports the 'false' justification that 'no one would be willing to marry a woman victim of rape'.

The shotgun wedding also faced a traditional and social phenomenon: the single woman, who avoided family controls and became pregnant in the worst-case scenario, was obliged to get married. On the other hand, there were also many cases in which this institution was used when a woman 'disobeying' the will of the male members of her family, decided to see a man only by talking to him.[16] Here, the etymological meaning of the word 'repair' seems to be reaffirmed or restored. The word 'repairing' comes from the late Latin version *reparator – oris*, that is, who repairs bad errors or damages through an action or an operation that can restore the previous situation. In other words, it returns to the state of purity, thus cancelling the sin that is definitely atoned for redeeming the soul itself.

Therefore, if we combine the idea of reparation with marriage, it is clear that the intention is to give 'legitimacy' or even 'legitimise', on the one hand, a violent, forced, non-consensual sexual relationship and, on the other, a reaffirmation of the superiority of men above women. Hence, in analysing the linguistic aspect, an enormous cultural and conceptual stratification emerges, which lies beyond mere lexical analysis. To veil, hide, obscure, and preserve the male essence of the law by providing the illusion of neutrality of the law. Perhaps, it would be better to label it as a forced marriage (without consent) so that the brutal gender inequality that the law itself intended to protect is clearly visible. In this way, sometimes moral and social norms were imposed without considering the will of the families, whose only choice was to accept the situation.

The purpose of this practice was to safeguard the 'family honour', as the crime was classified as 'crime against morality' and not against the abused person. This is even more evident when it appears that even in the event of rape, the reparative marriage extinguished the offence committed.[17] The two norms must be considered as 'legislative residue' of a code that was approved during the fascist period,[18] when the role of women

[16] Note that it is useful also to analyse the relation between honour and shame and how the men members of women family use the institution of shotgun wedding. For more details on this respect see for example: Stagi and Petti (2015). For more details about the distinction between arranged and forced or imposed marriages, see Danna (2013). Furthermore, women who refused to obey the male members of their family were often locked up in (lunatic, mental and psychiatric) asylums ('manicomio') and considered insane or hysterical, on this respect see for example: Valeriano (2017).

[17] A prime example was the case of Franca Viola. For more details see: Monroy (2012).

[18] The Italian Penal Code is known as 'Codice Rocco' (by name of the Minister of Justice, Alfredo Rocco, who signed the decree) and it is the result of a legislative process that lasted 5 years, from the promulgation of the Law December 4, 1925, n. 2260, with which the government was delegated to amend the Penal Code in force at that time (it is the 'Codice Zanardelli'). The Decree of October 19, 1930, n. 1398, published in the 'Gazzetta Ufficiale', October 26, 1930, n. 251 authorised the validity of the 'Codice Rocco' from July 1, 1931. 'Codice Rocco' was enacted under the Fascist regime, also known as 'ventennio fascista' from 1922 to 1943. 'Codice Rocco' is still enforced today, although the many modifications, changes and interventions made by the legislator and the Italian Constitutional Court. For example, the legislator aimed to redefine the system as a whole in a way that would represent 'the faithful mirror in which the society of our time can recognise its own values' (Fiorella, 2019). In addition, so, the Italian Constitutional Court declared the article 559 of the Italian Criminal Code unconstitutional; the rule sanctioned adultery and concubinage only if performed by women, without considering it a crime if they were performed by men. In particular, in the motivation of this decision, the Court referred to the principle of equality, provided by Article 3 of the Italian Constitution, that reads 'All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions', and by article 29 of the Italian Constitution, which

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was, 'at best' [19] that of being a wife and mother. It is a clear social imposition transformed into a 'legal obligation' to the disadvantage of all women, destined to be the losing part of the society that was thus constructed. Therefore, we could point out that the shotgun wedding ('matrimonio riparatore') seems to have its roots in some old customs that have been institutionalised over time, including by legal means. For example, in the Book of Deuteronomy of the Bible, the case of a raped young virgin is narrated: 'If a man find a damsel that is a virgin, which is not betrothed, and lay hold on her, and lie with her, and they be found; then the man that lay with her shall give unto the damsel's father fifty shekels of silver, and she shall be his wife; because he hath humbled her, he may not put her away all his days' (Dt 22, 28-29).

Perhaps this historical root could be the explanation of the 'bizarre' circumstances that led Turkey to discuss a law proposal on the introduction of the shotgun wedding ('matrimonio riparatore') in 2016. Despite the interesting issues at stake, what I would like to underline is the profound relationship between social imposition with a clear religious matrix and the law to demonstrate the false neutrality of the latter. However, I will not focus on the discussion about the amount of '50 shekels of silver' as a consequence of the offence of a 'girl without engagement (betrothal)', as I will not argue about discrimination and discriminatory differentiation between a married woman, a single woman without engagement, or just a single woman. Neither will I discuss and criticise the large literature that tries to defend the mindset of that particular time, when the woman was seen as a 'subject' to be protected and defended in order to preserve her honour, by allowing her to find a husband. According to this perspective, Voltaire seems to be clear when he tells the story of how a queen avoided a plaintiff's claim. 'He took the scabbard of a sword and continued to move it, he showed the lady that it was not possible to put the sword inside it'.[20]

It is not surprising that this strategy has been used over time by several lawyers to deny the responsibility of men who committed rape, sometimes with incredible success![21] Basically, the idea was that the rape would not exist because a woman who 'does not want' cannot be raped; otherwise, she got 'what she truly wanted'.

provides for the principle of equality within the marriage, which emphasises that marriage is ordered and based on the moral and legal equality of the spouses, and on the guarantee of family unity, within the limits established by Law ('The Republic recognises the rights of the family as a natural society founded on marriage. Marriage is based on the moral and legal equality of the spouses within the limits laid down by law to guarantee the unity of the family'). For more details see: Italian Constitutional Court, November 23, 1961, n. 64, https://www.cortecostituzionale.it.

[19] By the expression 'at best' I want to highlight that women were not always considered as objects of procreation, but in this dark time in European history, women were also a mere 'object of pleasure' for/of/by men. See: Lustig (2014). The author tells the touching story of Hanka, a 15-year-old Jewish girl, who, luckily and through her determination, manages to leave Auschwitz with the other German and Aryan women assigned to *Feldbordell Nr. 232 Ost*. These women were obliged to feel grateful being in the material comfort of Nazi soldiers even temporarily, that increasingly problematic and still, hourly, made worse by the war they were losing. It is important to note that women had not her own names but the names referred to specific or restricted to a single part of their body. The protagonist, Hanka, not only is called 'Doll' but also had marked, on her belly, an indelible word: *Feldhure* (bitch of 'field').

[20] See: Muyart de Vouglans (1757, tit. III, cap. 7, pp. 497-498), Vigarello (2001, p. 281) and Bourke (2009). For more details on rape or violence, especially about what is considered to be a woman with 'right attitude' by, for example, judges, lawyers, prosecutors and also by society see: Estrich (1987), additionally Mackinnon (2007). She argues, in a sophisticated way, about the rapes that occurred during the Balkan conflicts, as well as about the genocides, also addressing the crimes of war in relation to these specific crimes.

[21] See, for example: Sciascia (1986, p. 26), as well as Belmonti et al (1980); and the documentary 'A Trial for Rape' presented at the Berlin Film Festival, awarded the Prix Italia for documentaries and received a nomination for the International Emmy Award. A copy is kept today at MOMA in New York.

On another note, it is useful to highlight some reflections on the relationship between feminists and legal norms. The legal norms are not only formidable instruments for protecting some denied rights, but they have also been determined to slow social changes. For example, in Italy, women voted for the first time in the *referendum* of 2 June, 1946.[22] The object of the *referendum* was the choice between the republic and the monarchy. The first step toward formal equality between men and women was taken, expressed by the equal right to vote and to be voted on.[23] Later, the issue stimulated debate over it, claiming legal norms that allow equal participation in political life and equal representation.[24] This does not mean that currently we have yet achieved true equality.

Finally, feminists also criticise the methods of legal analysis (see, e.g., Bartlett, 1990; Alkan, 2012). From this perspective, they assume the need for a rereading of traditional legal texts to underline how women are marginalised, trying to individualise the experiences and values of women and how they can be included in the new reading of these texts. In addition, some feminists argue in favour of a 'female practical reason', that is, a form of female reasoning capable of considering and dealing with the difference between women, however, avoiding the famous Aristotelian dichotomy, especially in the application and interpretation of a legal norm.[25] Consequently, using the words of Katharine T. Bartlett (1990), it obtains 'the creation of a conscience 'that identifies and questions the situations and problems of women, i.e., a 'metamethod'. As noted by Isabel Cristina Jaramillo (2009, p. 127), this 'meta-method' implies a collective creation of common knowledge based on similar life experiences of women, with the aim of both modifying legislation and empowering women.

To better understand at this stage, it is quite necessary to outline some normative considerations about the hermeneutic inadequacy of various legal and conceptual categories that would seem to be firmly constructed but currently may need to be rethought and redefined.[26]

Having said that, first of all, I will focus on the peculiarities that have always characterised the law, since I would like to present additional considerations about the

[22] Here it is important to note that the 1946 Italian local elections were the first after the fall of fascism. The first turns was held on March and April 1946. The second turn of elections was held on October and November 1946. The municipal elections of March 10 were the first to which women could also participate.

[23] Curiously, the *Corriere della Sera*, on June 2, 1946, published an article in which women were invited to present themselves in the electoral areas without lipstick on their lips. The article specified that the reason was to avoid signs of recognition that would invalidate the votes. However, there is a subtle discrimination recorded also by the words used in the article. In addition, it seems to re-propose the idea that a woman is more focused on beauty and on physical and aesthetic aspects, and that issues such as politics are only male matters. In other words, the woman belongs to the world of imagination and the man to the world of reason. Here, it is also worth pointing out that, although the strongly patriarchal structure of the Italian society at the beginning of the last century (which the fascist regime exalts and reproduces in an extreme way in all areas: social, economic, legal, cultural) there was no lack of cases in which women advanced egalitarian claims. For example, the ten teachers of Senigallia ('maestre di Senigallia'), who in 1906 submitted a demand for registration on the electoral list, received by the *Corte di Appello di Ancona* with a sentence by the judge and lawyer, Lodovico Mortara, were later denied by the *Corte di Cassazione*. See: Curzio (2013), Severini (2013), Tacchi (2009), Sbano (2004), Cipriani (1991). For the decisions see: Corte d'Appello di Ancona, 25 luglio 1906, in *Giur. It.*, 1906, III, pp. 389 s.; Corte di Cassazione di Roma, 15 dicembre 1906, n. 883, in *Giur. It.*, 1907, III, 1 ss.; also in *Foro it.*, 1907, I, pp. 73 ss. This story also inspired the romance by Cutrufelli (2016).

[24] On this specific question see, for example: Shapiro (1981), as well as Phillips (1998, esp. pp. 224-240).

[25] See: Jaramillo (2009, p. 126). The author refers to 'integrations and creative reconciliations' ('integraciones y reconciliaciones creativas').

[26] In the legal-political discourse, we think, for example, of concepts such as freedoms, equality, individual and collective rights, representation of interests and protection of identities, or also of cultural rights and their compatibility with the norms of behaviour founded on social traditions. In this respect see: Facchi (2001).

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problems, as well as the political and social implications, which have origins and roots in the idea of the false neutrality of the law.

3. THE FALSE NEUTRALITY OF THE LAW

The law is composed of an irrepressible historical dimension. What I mean is that to understand the state of the law, we have not only to rethink the theory and envision the future but also to look at the past (Ferlito, 2005, p. 158).

In other words, the forms of thought together with the conceptual elaborations put down there have a strong influence on the foundation and development of the legal and political categories that shape the social order.

Therefore, it comes without surprise that a key reading would be found in studies of complex genetic and structural nexuses that connect 'religion' with the history of culture in general, and especially with the history of legal concepts; in other words, it is about 'rewriting the history of law and its legal categories' in light of the anthropology of religions and legal anthropology (Ferlito, 2005, p. 159).

Actually, this is quite familiar, since some theory considers legal anthropology as an essential part of the history of law and its production (especially in the field of Roman Law; see, e.g., Motta, 1979; Franciosi, 1983; Rouland, 1992; Pitch, 1995; also see Maine, 1861). Therefore, the main focus of religion is to remove the word 'religion' from its connection with the churches as institutions and the ecclesiastical world, making it a complex instrument of thought that shapes (not only potentially) both the form of the law and its legal, private, and public categories. For example, the influence of Christianity on the evolution and development of western law seems to be undeniable, and some scholars have even supported the thesis of the Christian roots of the European Union.[27]

However, this is not the only example of the interaction between law and religion. For instance, if we consider some fundamental concepts in the articulation of the legal discourse, such as 'law', 'justice', 'authority', 'contract', 'sanction', 'hierarchy', 'nation', and 'community',[28] they all find their basis and roots in Jewish culture, especially in the contributions of the 'Old Testament' (Ferlito, 2005, p. 161).[29]

The shotgun wedding ('matrimonio riparatore') is only an example of how this has repercussions on society, both as a gender disparity and inequality, as well as a way of reproducing an archaic patriarchal model. Moreover, it is emphasised that the religious phenomenon profoundly and incisively affected the institutional legal structure of Roman law.[30] This aspect also seems to be perceived by Carl Schmitt (1972), who affirms that the concepts of the modern doctrine of the state are secularised theological concepts because they are introduced in the doctrine of the state by theology. The secularisation becomes the process of transferring values and concepts developed 'in the centuries' at the theological and religious levels to the legal and political spheres. This could be interpreted as the existence of a nexus between theological-religious reflection and legal-political reflection, and thus between religion, power, and law, constituting the

[27] This perspective has also generated a wide controversial debate regarding Turkey's entry into the European Union. For more details on Europe's 'Jewish-Christian' roots see: Weiler (2003).

[28] The list could be much longer, here it is provided only some examples of the thesis that I am presenting.

[29] For the analysis about the different concepts and definitions of time and of the temporalities and how they influence the law and lawfulness see: Lalor (2022).

[30] For example: Champeaux (2002). Also see: Tillich (1969, esp. p. 18), the author states that the Roman church is *Roman* not only because it is influenced by Christianity but also, by the *Roman Empire*. It is defined as 'universal' and catholic, because it reveals the heritage of the Roman empire and it becomes heir to its universalism.

gravitational centre of the history of thought and of occidental political and legal doctrines (Ferlito, 2005, p. 169). From this we can identify, therefore, what is at the base of all constructions of legal-political thought and what is trying to modify, alter and change, thus what is masked or camouflaged in its false neutrality.

4. CONCLUSION

Undoubtedly, there are some forces that shape the law in an impetuous way, such as, for example, power or even social forces. Then, the question we have to ask is what the function of the law is and what the law should do, assuming that 'the law does not live in the courts, but on the roads of the world and it daily rules people's life anywhere they are' (Ferlito, 2016). Therefore, the law could not be considered a mere technique or any technique that is subservient/submitted to force or power.

In light of the examples mentioned above, one can easily deduce that society and even the law are based on a concept of sovereignty as a product of the patriarchal view that totally belongs to the 'exclusive club' of men. The law shows its false neutrality when it maintains a hierarchical order and manifests an absolute sovereignty over individuals and their bodies through its institutions. Thus, it seems that the only way to eliminate or reduce the false neutrality of the law is by limiting the arbitrary use of force to reconsider the true essence of the law. This would be possible only through a strong critique of methodological individualism, 'a criticism of rights' that would allow us to recover 'duties'. In other words, the language of rights should be substituted for or supported by the language of duties. In a world increasingly dominated by the economy and more focused on globalisation, the legal categories, in their current definition, serve almost nothing.

It seems that a feminist legal theory may succeed in destroying the false myth of legal neutrality, a typical aspect of patriarchal societies, by taking into account a variety of conceptual plans and a plurality of dimensions that stratify and overlap temporally and are not easily distinguishable. Therefore, women are called to tell a 'story' or a 'tale' that seems to be characterised by common points of 'the different knowledges'.[31] Only through this approach, which combines different knowledge and methods of analysis, should we compare problematic requirements and instances.

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[31] Here I like to remember the expression that no human science can validly overlook without another. See: Braudel (1973).

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RENEWABLE ENERGY DEPLOYMENT DILEMMAS: AN APPROACH TO ADDRESSING THE ENERGY TRILEMMA?

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Abstract: *The energy trilemma is recognised in doctrine as a means of balancing the different competing objectives of energy law and policy. The importance and weight of renewable energy in the energy trilemma is reinforced by the fact that it is a target and an important instrument in climate, sustainability and energy legislation. Despite its positive aspects, the deployment of renewable energy faces a number of obstacles, including concerns about its negative impact on the security of energy supply. It is important to develop a legal response to the controversies surrounding the deployment of renewable energy. The article aims to analyse and develop a clearer and more systematic approach to the development of renewable energy sources based on the energy trilemma. This aim was achieved using the methods of document analysis, logical-analytical, linguistic, systematic analysis. The article focuses on the analysis of scientific literature in the categories of law, as well as energy and economics, and analyses EU legislation and case law, as well as national court decisions. In the first part, a thorough literature review was carried out to explore and define the concept and objectives of the energy trilemma. The second part of the article examines the features of the relationship between renewable energy and the energy trilemma. As the understanding of the energy trilemma seems to be too general, simplistic and lacking practical applicability, the third part of the article focuses on enhancing the concept of the energy trilemma. Specific examples are used to expose internal contradictions within certain objectives of the energy trilemma, referred as renewable energy dilemmas. In general, these dilemmas have not been linked to the concept of the energy trilemma and have therefore not received sufficient attention in doctrine. The article discusses whether the energy trilemma should be used as a procedural principle of energy law. It also raises the question of whether application of the trilemma should involve the legal principle of energy solidarity.*

Key words: *Energy Trilemma; Energy Law; Renewable Energy Sources; Energy Security; Energy Solidarity Principle; European Union*

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1. CONCEPTUALISATION OF THE ENERGY TRILEMMA

The term 'energy trilemma' is a well-known concept that is frequently referenced in the energy policy literature (McCauley, 2018, p. 20). Legal doctrine emphasises the energy trilemma as a way of balancing competing aims and demands in energy law and policy (Heffron, McCauley and Sovacool, 2015; Maurin and Vivoda, 2016; Heffron and Talus 2016a; Moya Mose, 2018; Fleming, 2019). Some view the energy trilemma as an equilibrium (Kandpal et al., 2024, p. 299).

The energy trilemma is a method used to assess the performance of an energy system: the countries' energy trilemma index (Oliver, 2017, p. 10), proposition to develop an energy justice metric (Heffron, McCauley and Sovacool, 2015, p. 175). The academic literature points to the use of the energy trilemma by policy makers in all countries (Fleming, 2019, p. 174), legally it may be described as constitutional state objectives (Fleming, 2021, p. 38). While the concept of the energy trilemma is frequently referenced in academic literature, it is often presented in a superficial manner and lacks theoretical exploration and justification. This is also specific to energy law itself, not just the energy trilemma as it is acknowledged that energy law is lacking in a philosophical basis and a guiding narrative (Heffron and Talus, 2016b).

Although there is a general consensus in the academic literature that the energy trilemma seeks to reconcile competing objectives and needs, the formulation of these objectives varies (Table no. 1).

No.	Source	Objective 1	Objective 2	Objective 3
1.	Brundtland Report (WCED 1987)	safe	economically viable	environmentally sound
2.	World Energy Council (2024, 2)	energy security	energy equity	environmental sustainability of energy systems
3	Heffron, McCauley, and Sovacool (2015, 168)	politics	economics	environment
4	Heffron and Talus (2016a).	politics	economics	environment
5	de Llano Paz, Arévalo and Gómez (2023, 315)	energy security	energy equity	energy sustainability
6	Fleming (2021, 31)	energy security	competition/economic development and energy markets	environmental protection
7	Everts, Huber, and Blume-Werry (2016, 116)	security of supply	competitiveness	sustainability
8	del Guayo (2020, 32)	security	efficiency	sustainability
9	Liu et al. (2022, 6)	energy security	equity	sustainability
10	Kandpal et al. (2024, 299)	assurance of energy supply	cost-effectiveness	ecological sustainability
11	Ang, Choong, and Ng (2015, 1090)	energy security	economic competitiveness	environmental sustainability

Table no. 1: The objectives of the energy trilemma

The objectives of the energy trilemma, as set out in Table 1, lead to the following conclusions. Firstly, the majority of the authors analysed define the objectives of the energy trilemma more narrowly (covering specific characteristics of the energy sector, such as energy security), while others formulate objectives in the general terms of economics, politics and the environment (Table no. 1, No.: 3, 4). The economic, political and environmental objectives can be further elaborated, as "there are many other issues under each of the three issues" (Heffron, McCauley and Sovacool, 2015, p. 168). It should be noted that the energy trilemma, whether the objectives are formulated broadly or more narrowly, is linked to the concept of sustainability. The energy trilemma as a vector for sustainability in the energy sector is enshrined in the 1987 Brundtland Report on Sustainable Development (WCED 1987, para. 116, ch. 7). The broader objectives of the energy trilemma are based on the concept of sustainability itself, which is founded on social, economic and environmental pillars (Purvis, Mao and Robinson, 2019, p. 681).

Secondly, the objective of energy security is a key component of virtually all definitions of the energy trilemma (Objective 1, Table no. 1). The energy security is a subject that is frequently the focus of policy makers and scientific research and it is characterised by its complexity, multi-dimensionality and context-specific nature (Crossley, 2017, p. 470; Ang, Choong and Ng, 2015, p. 1081). The International Energy Agency defines energy security as the "uninterrupted availability of energy sources at an affordable price" (IEA). A number of other definitions of energy security are to be found in academic literature. For instance, Ang, Choong and Ng (2015, p. 1081) examined 83 definitions of energy security and have identified seven key dimensions of energy security: "energy availability, infrastructure, energy prices, societal effects, environment, governance, and energy efficiency" (Ang, Choong and Ng 2015, p. 1081). The popular characterisation of energy security in terms of the four perspectives: "Availability, Accessibility, Affordability and Acceptability" (Kruyt et al., 2009, p. 2166). The identification of four to eleven energy security themes and up to 300 indicators (Kruyt et al., 2009, p. 2166; Sovacool, 2013, p. 149) demonstrates the breadth of the term. Weg defines the three main aspects of energy security through the performance of its core functions (2019, p. 12).[1] Integrating robustness, sovereignty, and resilience perspectives, energy security is defined as the "low vulnerability of vital energy systems" (Cherp and Jewell, 2014, p. 415). Boute (2023) differentiates between long-term and short-term aspects of energy security. Moreover, the definition of energy security is not static; it has broadened over time in line with generalisation and integration trends (Jasiūnas, Lund and Mikkola, 2021).

The second objective of the energy trilemma illustrates the greatest disparity in terminology, including terms of energy equity, energy finance, competitiveness, efficiency, and cost-effectiveness. The diversity of concepts can be attributed to the fact that the social third (social) pillar was the latest to be added to the concept of sustainability (Barral, 2012, p. 379). This indicates that there are still many questions to be answered in defining this objective.

The third objective is quite clear, with variations on the terms 'environment' and 'sustainability'. The environmental sustainability aspect of the energy trilemma can be linked to the need to preserve the environment and to the concept of sustainability.

Despite the differences in the wording of the objectives of the energy trilemma, the author concludes that the following objectives best reflect the energy trilemma: energy security, cost-effectiveness and environmental sustainability. Energy security and environmental sustainability are widely accepted as objectives of the energy trilemma. The choice of cost-effectiveness as an objective, however, is more debatable, as this objective has a broad spectrum of definitions. The term cost-effectiveness was chosen because it is intended to cover both the objective of providing affordable energy to consumers and the overall cost of system solutions.

The theoretical foundations of the energy trilemma can be found in its fundamental link to the concept of sustainability. As sustainability is increasingly being incorporated into the legal framework, it is appropriate to further develop the concept of the energy trilemma. It is essential to explore the energy trilemma and renewable energies in greater depth.

[1] Continuity of supply (ensuring consumer access to the electricity grid), system security (maintaining a stable electricity grid) and security of supply on the electricity market (matching electricity generation to demand).

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2. RENEWABLE ENERGY AND THE ENERGY TRILEMMA: FEATURES AND ISSUES

Statistics demonstrate that the share of renewable energy in the EU is rising (Eurostat, 2024), but ambitions for even greater deployment of renewable energy are also increasing. Directive 2023/2413[2] has revised the EU's 2030 renewable energy target upwards from 32% to 42.5% (with an aim of further increase to 45%), representing an almost 20 pp increase from the current level. This indicates that EU countries must strengthen their collective efforts to achieve the new EU target for 2030 (Eurostat, 2024). This serves to reinforce the continued relevance of the deployment of renewable energy. Concurrently, it encourages the development of a scientific discourse that analyses the development of renewable energies within the framework of the energy trilemma.

The development of energy policy and law, including in the renewable energy area, raises the need to balance the objectives of the energy trilemma: energy security, cost-effectiveness and environmental sustainability. Moya Mose has proposed the use of the energy trilemma as a "methodological and normative tool" for the regulation of renewable energy (Moya Mose, 2018, p. 396).

Furthermore, the relationship between the energy trilemma and renewable energy is characterised by a few peculiarities. From a theoretical perspective, the energy trilemma itself originates from the concept of sustainability, with 'environmental sustainability' being one of its objectives. Renewable energy, especially solar and wind power, is strongly associated with sustainable energy because it is a cleaner alternative to traditional fossil fuels. This underscores the interconnected roots of both renewable energy and the energy trilemma, which allows to prioritise renewable energy within energy trilemma.

An important feature of renewable energy is its identification as an objective of energy policy in general. Renewable energy plays a multifaceted role, which must be balanced within the energy trilemma, while at the same time influencing the operation of the energy trilemma.

In accordance with Article 194 of the TFEU, the promoting renewable forms of energy is one of the objectives of Union energy policy. Article 194 of the TFEU does not set a priority between the different energy policy objectives (Huhta, 2022, p. 8), but functions as a balancing mechanism between them (Kaschny, 2023, p. 293). The promotion of renewable energy as an EU policy objective is at the centre of the renewable energy trilemma. However, this objective should be achieved through the balance with other objectives of energy policy. One such objective that needs to be addressed is energy security, which is also an objective of the energy trilemma.

The Renewable Electricity Production Directive[3] was first EU directive to promotes an increase in electricity production from RES in the energy production system with indicative targets. The Renewable Electricity Production Directive was replaced in 2009 by the Renewable Energy Directive.[4] The scope of the directive was expanded by including transport fuels, heating and cooling from RES and provisions were tightened (for example, mandatory national targets were introduced in place of national indicative

[2] Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652, OJ L, 2023/2413, 31.10.2023.
[3] Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market, OJ L 283, 27.10.2001, pp. 33–40.
[4] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ L 140, 5.6.2009, pp. 16–62.

target). Renewable Energy Directive 2018[5] establish a binding Union target of a share of at least 32 % of renewable energy in 2030. The Directive marks a shift away from the establishment of legally binding national targets at European level for Member States, with the requirement instead falling on them to collectively ensure the achievement of their contribution through the provisions of integrated national energy and climate plans. Directive 2023/2413 has raised collective target for renewable energy consumption across all sectors in Europe significantly to at least 42.5% in 2030 (European Commission). In parallel, renewable energy has been integrated into the single energy governance mechanism set out in the Governance Regulation.[6] Under this Regulation, procedural requirements are laid down for Member States, including the preparation of integrated national energy and climate plans, and the European Commission performs monitoring and assessment of progress (art. 29-36). These plans are designed to combine energy and climate objectives.

Renewable energy plays a significant role in the energy trilemma, due to its contribution to climate change mitigation and the transition to a sustainable energy system. As "climate protection is impossible without a sustainable energy policy" (Galbiatti Silveira, 2022, p. 9), renewables are considered to be "the cornerstone of a viable climate solution" (Perea-Moreno, 2021). The preamble to the Renewable Electricity Production Directive links its adoption to the climate change commitments accepted by the Community pursuant to the Kyoto Protocol to the UN Framework Convention on Climate Change. The preambles of the 2009, 2018 and 2023 Renewable Energy Directives emphasise the contribution of renewables to climate change targets. This is in line with the EU's Green Deal (European Commission, 2019), which aims to achieve climate neutrality by 2050, and with the EU's energy policy packages (Climate and Energy Package, Clean Energy Package for All Europeans, Fit for 55). The landmark Paris Agreement[7] has been instrumental in shaping this approach, with its overarching goal to keep "the increase in global average temperature well below 2°C above pre-industrial levels". References to "deployment of renewable energy" were included in the preamble to the Decision to adopt the Paris Agreement,[8] but not in the text of the Paris Agreement itself. Achieving Sustainable Development Goal 7 'Affordable and clean energy' necessitates an increase in the share of renewable energy in the world's energy mix (Bruce and Viñuales, 2022, p. 187).

At EU level, the energy trilemma needs to be considered in conjunction with the principle of energy solidarity. In the OPAL case,[9] energy solidarity principle was formulated as a legally binding principle, defining its main features and content. When the European Union and its Member States exercise their competences in the energy sector, they are obliged to "take into account the interests of all stakeholders liable to be affected" and to consider their interdependence.[10] Not only should security and

[5] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources, OJ L 328, 21.12.2018, pp. 82–209.
[6] 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 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, OJ L 328, 21.12.2018, pp. 1–77.
[7] Paris Agreement. 2015. United Nations, Treaty Series, vol. 3156, p. 79.
[8] UN, Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC), Decision 1/CP.21 Adoption of the Paris Agreement, FCCC/CP/2015/10/Add.1.
[9] CJEU, judgment of the Court (Grand Chamber) of 15 July 2021, Germany v. Poland, ECLI:EU:C:2021:598.
[10] *Ibid*., para. 71.

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diversification of energy supply be considered, but also economic and political viability. In this particular case, this principle is explicitly considered as "a criterion for assessing the legality of measures".[11] The Court's judgment references an approach that connects the principle of energy solidarity with certain procedural procedures as a form of 'solidarity test'. However, the aforementioned judgment does not provide detailed guidance as to how a 'solidarity test' should be applied in practice. Furthermore, it is unclear how and in what way a Member State must take the interests of all stakeholders potentially affected into account.

This energy 'solidarity test' should also be applied to the regulation of renewable energy. Legal scholarship has raised questions as to whether the 'solidarity test' can limit Member States' ambition to increase renewable energy generation due to the potential negative impact on other countries (Talus, 2021, p. 5), as well as how to deal with the increasing unpredictability of the market due to the growing number of renewable energy installations and peak load conditions (Iakovenko, 2021, p. 444). Despite the questions raised, it seems likely that the 'solidarity test' will be applied on a case-by-case basis when adopting renewable energy measures, unless efforts are made to develop procedures to ensure that the solidarity principle is respected. The 'solidarity test' should not be applied in isolation from the energy trilemma, which is the most developed way of reconciling energy law and policy objectives in the doctrine. The 'solidarity' test and the energy trilemma can supplement each other: the energy trilemma is more oriented towards decision-making from the perspective of the decision-maker, whereas the 'solidarity test' is more oriented towards the assessment of externalities.

3. RENEWABLE ENERGY DILEMMAS IN THE ENERGY TRILEMMA

The deployment of renewable energy therefore poses a number of different challenges: meeting different and often conflicting objectives, overcoming barriers and integrating into the existing energy system. Renewable energy deployment is affected by objectively existing barriers, such as financial barriers, carbon lock-in, characteristics of renewable energy sources (hereinafter referred to as '**RES**'), public acceptance (Woolley 2023). The International Energy Agency has identified three key challenges hindering the development of renewable energy capacity in Europe: the complexity and timing of permitting processes, the inadequacy of support schemes, and the lack of progress in upgrading transmission and distribution networks (IEA, 2022). The issues of intermittent renewable energy and high operating costs have contributed to concerns regarding energy security (Ang, Choong and Ng, 2015). Whether the structure of the energy system is based on the use of fossil fuels or renewable energies it is subject to different energy security concerns (Huhta, 2022, p. 5).

Understanding the energy trilemma as a tool for balancing three different energy policy objectives does not reflect the existing reality and seems too simplistic, as the existence of internal contradictions within a given objective is becoming more and more apparent.

Renewable energy has a positive impact on the environmental sustainability objective of the energy trilemma, as it helps to adapt to climate change and is considered less polluting than fossil fuels. However, the 'environment v environment' dilemma emerges when renewable energy, which is beneficial for climate change adaptation, creates pressure on other environmental values or is not accepted by local communities for these reasons. Lee (2014, p. 37) presented examples of the environmental impacts of

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

biofuel combustion and wind farms, demonstrating the potential for conflicting pressures between climate change mitigation and other environmental objectives. Wind farms and large hydroelectric power plants are considered to have a higher environmental impact than other sources of RES (Crossley, 2019, p. 10). In order to respond to the emerging tensions, Directive 2023/2413 proposed the concept of overriding public interest, which should be applicable until climate neutrality is achieved. Renewable energy plants and their related infrastructure benefit from a simplified assessment, when the presumptions of overriding public interest are implemented at national level in accordance with Article 16f of Renewable Energy Directive 2018 as amended by Directive 2023/2413.

Renewable energy is widely recognised as a means of achieving energy security within the energy trilemma, however the features of the 'security v security' dilemma are becoming clearer. Renewable energy contributes to energy security by diversifying fuel sources and promoting the reduction of fossil fuel use, and is often local (non-imported), making it less dependent on supply chains and less dependent on grid and transmission networks. A significant increase in the share of renewables reduces Europe's dependence on energy imports and its geopolitical vulnerability (Matsumoto et al., 2018, p. 1737; Huhta, 2022, p. 7). On the other hand, renewables introduce new security difficulties, which are driven by intermittency and high operating costs. For example, there is a need for alternatives to wind power during calm weather or the problem of overcapacity on cold windy nights (Barton et al., 2004, p. 469).

The practical existence of the dilemma 'security v security' at the level of national law is illustrated by the case of limitation of the total installed capacity of solar power plants, which was heard by the Constitutional Court of Lithuania (Constitutional Court, 2023). The case concerned the constitutionality of a provision that the total installed capacity of solar power plants may not exceed 2 GW, enshrined in Article 13(10) of the Law on Renewable Energy of the Republic of Lithuania (LRES). Moreover, the LRES established a set of procedures that needed to be followed in the event of exceeding the 2 GW threshold. The National Energy Regulatory Council (NERC) is responsible for determining the total installed capacity of solar power plants which are calculated not only in terms of installed capacity, but also in terms of planned capacity. Once this has been established, NERC is required to inform the Ministry of Energy and the electricity network operator in writing. From this date, electricity network operators are no longer required to issue preliminary connection conditions or sign letters of intent with producers. Upon reaching 2 GW of total installed capacity, the government-authorised institution shall conduct a techno-economic assessment of the development of solar power plants and present a proposal to the government for the further development of solar power plants.

By a ruling of 7 November 2023, the Constitutional Court recognised Article 13(10) of the LRES unconstitutional due to the absence of regulation concerning the economic activities of individuals who had initiated the installation of solar power plants but were subsequently unable to complete the process due to the imposed limitation on the total installed capacity of solar power plants. An important aspect of this ruling is that the Constitutional Court did not recognise the restriction as illegal per se, rather, it upheld the state's authority to impose limitations on RES capacities. It quite controversial, that the Constitutional Court found that the said limitation was enshrined in law when the total installed capacity of solar power plants had already exceeded the 2 GW limit. This created preconditions for violating the legitimate expectations of the persons who had already started the process of installing solar power plants.

In this case, the Constitutional Court has highlighted two critical energy security concerns and had to balance energy security dilemmas. Firstly, the utilisation of RES

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serves to enhance energy security by reducing dependence on fossil fuels. The Constitutional Court has recognised that development of electricity generation from RES contributes to the reduction of the use of fossil fuels (non-renewable natural resources) and the pollution of the environment and ensures the public interest. Secondly, the use of RES beyond their installed capacity may have a negative impact on energy security due to possible congestion of the electricity system. The Constitutional Court has held that legislature must establish the smooth functioning of electricity networks (compatibility of the development of electricity generation from various RES with the capacity of electricity networks) and the uninterrupted supply of electricity to all consumers. This means that legislature may impose limitations on electricity generation from different RES. The Constitutional Court decided that due to the unusually rapid growth of the estimated installed capacity of solar power plants in Lithuania and the risk that the Lithuanian electricity system would be overloaded with this technology, the legislature sought to ensure the public interest – to ensure the reliable and safe functioning of electricity networks and the uninterrupted supply of electricity.

In conclusion, in the present case, the option of ensuring the functioning of the energy system (by limiting the capacity of RES) has been given higher priority than the other aspect of energy security, which aims at increasing energy security in the long term by moving away from fossil fuels and contributing to climate change objectives. If this approach is applied consistently, there is a risk that energy security through fossil fuel reduction could become over-secured. Given the complexity and multifaceted nature of energy security, and the fact that its description is highly context-specific, it is to be expected that more dilemmas in the area of RES will emerge in the future.

4. CONCLUSIONS

While the concept of the energy trilemma is frequently referenced in academic literature as a way of balancing competing aims and demands in energy law and policy, it is often presented in a superficial manner and lacks theoretical exploration and justification. The paper analyses the concept of the energy trilemma and its objectives in detail and finds that the objectives are defined in two ways. The first group defines the objectives of the energy trilemma in narrow terms (covering specific characteristics of the energy sector, such as energy security), while the second group formulates the objectives in general terms of economics, politics and the environment. The theoretical foundations of the energy trilemma can be found in its fundamental link to the concept of sustainability. As sustainability is increasingly being incorporated into the legal framework, it is appropriate to further develop the concept of the energy trilemma. Given the importance of renewable energies, it is essential to explore the energy trilemma and renewable energies in greater depth. The development of energy policy and law, including in the renewable energy, raises the need to balance the objectives of the energy trilemma: energy security, cost-effectiveness and environmental sustainability.

The examples given in the article demonstrate that the three objectives of the energy trilemma are very broad and that, in practice, there are internal contradictions within these objectives. Such contradictions are referred to as renewable energy dilemmas in the energy trilemma.

The practical existence of the dilemma 'security v security' at the level of national law is illustrated by the case of limitation of the total installed capacity of solar power plants, which was heard by the Constitutional Court of Lithuania. An analysis of this decision reveals the internal contradiction in the objective of energy security. While the use of renewables contributes to energy security by reducing dependence on fossil fuels,

the use of renewables in excess of their installed capacity can have a negative impact on energy security by potentially overloading the electricity system.

It is therefore appropriate to develop a deeper understanding of the energy trilemma and to include in its scope the existence of internal dilemmas. This would ensure the energy trilemma is more relevant to the current state of the legal framework and case law. Furthermore, this extension of the energy trilemma concept would also have a positive impact on policy making and evaluation in other energy fields, such as nuclear energy.

This research could stimulate a wider examination of the energy trilemma and a debate on whether it is worth developing the energy trilemma as a procedural principle of energy law and how 'solidarity test' and the energy trilemma can supplement each other. However, this would require a deeper rationale for what the practical role of the energy trilemma should be and how it can be integrated into legal mechanisms.

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DISCUSSION PAPERS

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THE INSTITUTION OF SUPERVISION IN POLISH LOCAL GOVERNMENT IN THE LIGHT OF THE PRINCIPLE OF PROPORTIONALITY

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Abstract: *The idea of the proportionality principle is related to the application of appropriately moderate actions of public authorities and minimising their interference in the sphere of individual rights and freedoms. This principle, also known as the principle of commensurability, is essentially addressed to the legislator and to public administration bodies, including supervisory bodies. The purpose of this paper is to present the institution of supervision in Polish local self-governments in the light of the proportionality principle. Establishing the legal basis of this principle and its impact on the application of supervisory measures in the Polish supervisory procedure concerning the activities of local self-government units. This will, in the final assessment, allow conclusions to be drawn with regard to the legal issue considered.*

Keywords: *Proportionality Principle; Supervision of Local Self-Government Units' Activities; Local Self-government; Supervisory Measures*

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1. INTRODUCTION

The proportionality principle is an important element in the establishment and application of administrative law in the Polish legal order. This principle is increasingly used in the area of conflicts between certain values and goods, including in local self-government law. The doctrine indicates that this principle arose to protect individuals from the arbitrariness of power (Śledzińska-Simon, 2019, p. 29). According to Cz. Martysz, the essence of the proportionality principle may be summarised as "the need for relative equality between the inconvenience of interferences undertaken in the name of the public interest and the value of the objective pursued" (Martysz, 2010, p. 92).

The idea of the proportionality principle is related to the application of appropriately moderate actions of public authorities and minimising their interference in the sphere of individual rights and freedoms. This principle is also referred to as the principle of commensurability and adequacy (Kijowski, 1999, p. 59 et seq.). It is essentially addressed to the legislator and public administration bodies. It requires these actors to ensure that there is compatibility and a balance between the purpose of the legal regulation or individual administrative interference and the procedural measures applied.[1]

The proportionality principle is known to the Polish doctrine of constitutional law, in judicial decisions, as well as in international and European law (Saganek, 2008). It is

[1] Judgment of the Supreme Administrative Court of 17.05.2013. I FSK 435/13, LEX No. 1369482.

increasingly used in the jurisprudence of the Court of Justice of the European Union as well as the European Court of Human Rights (Mudrecki, 2020, p. 271 et seq.).

The purpose of this paper is to present the institution of supervision in Polish local self-governments in the light of the proportionality principle. Establishing the legal basis of this principle and its impact on the application of supervisory measures in the Polish supervisory procedure concerning the activities of local self-government units will, in the final assessment, allow conclusions to be drawn with regard to the legal issue considered.

The paper uses the dogmatic and legal method that involves analysis of the legal text. The views found in the doctrine, literature, as well as constitutional and administrative court in light of the conclusions are a recapitulation of the considerations presented in the text.

2. THE PROPORTIONALITY PRINCIPLE - LEGAL CONTEXT

The proportionality principle plays a very important role in administrative law. "It acquires great importance, given, in addition, the extensive scope and nature of the public authority granted to public administration bodies" (Duniewska, 2022, p. 23).

The proportionality principle in the Polish legal order is based on the Constitution of the Republic of Poland and on the provisions of the European Charter of Local Self-Government,[2] which is part of the Polish legal order.

The content of the proportionality principle is defined by Polish constitutional law doctrine and the jurisprudence of the Constitutional Tribunal. The regulations of the 1997 Constitution of the Republic of Poland[3] allow to derive this principle directly from Article 31 of the Constitution of the Republic of Poland and indirectly from Article 2 of the Constitution of the Republic of Poland. Pursuant to Article 31(3) of the Constitution of the Republic of Poland, "Restrictions on the exercise of constitutional freedoms and rights may be established only by law and only if they are necessary in a democratic state for its security or public order, or for the protection of the environment, health, and public morals, or the freedoms and rights of others. These restrictions must not affect the essence of freedoms and rights".

Already in the decision of 26 April 1995 (K 11/94), the Constitutional Tribunal[4] referred to the essential components of the proportionality principle, corresponding to the test of three questions (criteria) for the application of this principle: 1) whether the introduced legislative regulation is capable of producing the effects it intends; 2) whether the regulation is necessary for the protection of the public interest to which it is linked; 3) whether the effects of the introduced regulation remain in proportion to the burdens it imposes on the citizen".[5] By the time the 1997 Constitution entered into force, the proportionality principle had already been an established element of the democratic state of law (Garlicki and Wojtyczek, 2016).

Currently, the views expressed in the doctrine and in the jurisprudence of the Constitutional Tribunal on the grounds of the new Polish Constitution have made it possible to establish the content of the proportionality principle provided for in Article 31(3) of the Polish Constitution, indicating three important elements that define it:

[2] The European Charter of Local Self-Government was drawn up in Strasbourg on 15.10.1985 (OJ of 1994, No. 124, item 607, as amended - hereinafter referred to as the **ECLS**).
[3] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws of 1997, No. 78, item 483) - hereinafter referred to as the **Polish Constitution**.
[4] See decision of the Constitutional Tribunal of 26.04.1995, K 11/94, OTK 1995, No. 1, item 12.
[5] See decision of the Constitutional Tribunal of 26.04.1995, K 11/94, OTK 1995, No. 1, item 12.

- the suitability requirement - "is understood to mean that the measure of action provided for in the law that restricts the freedoms and rights of the individual is suitable for achieving the objectives pursued by the law" (Trzciński, 2023, p. 79);
- the necessity requirement - "puts emphasis on whether the legislator could have chosen a measure that is equally effective but less restrictive of the individual" (Zakolska, 2008, p. 25);
- the prohibition of excessive interference (requirement of proportionality *sensu stricto)* - "means the requirement to maintain a proportion between the restriction of a given constitutional right or freedom (...) and the intended purpose of a given regulation"[6]) (Zakolska, 2008, p. 27).

It is important to emphasise that a restriction on constitutional freedoms and rights is only permissible if the three criteria in question are met. Understood in this way, the proportionality principle is an important criterion for assessing the constitutionality and legality of public authority's actions.

The proportionality principle also derives from the standard of Article 2 of the Polish Constitution.[7] This provision states that "the Republic of Poland is a democratic state governed by the rule of law, implementing the principles of social justice". The need to refer to the principle of the democratic state governed by the rule of law as a more general source for the proportionality principle (referred to as the prohibition of excessive interference by the legislator) in the current jurisprudence of the Constitutional Tribunal is limited to:

- those situations where controlled regulation goes beyond the matter of constitutional rights and freedoms. This applies, in the first place, to regulations imposing obligations on the individual (similar entities), but without interfering with constitutional rights and freedoms;[8]
- where is also applicable in the institutional sphere, e.g., with regard to the relationship between the state and local self-government units or between the executive and the judiciary authority;
- to the violation of other constitutional principles closely linked to the proportionality principle, e.g. the principle of social justice (Trzciński, 2023, p. 65 and p. 81).

A separate legal basis for the proportionality principle is Article 8(3) of the European Charter of Local Self-Government (ECLS). The constitutional grounds for the proportionality principle and the fact that the ECLS has been ratified by the Republic of Poland entail an obligation to treat this principle as part of the national legal order and to apply it. These acts are a direct source for shaping patterns of normative regulations reflecting the provisions of the Charter. The ECLS is therefore an appropriate source of standards addressed to the national legislator[9] when establishing internal legal regulations.[10] The content of the ECLS regulations has been taken into account in the norms of constitutional and substantive administrative law as well as in administrative

[6] Judgment of the Constitutional Tribunal of 10.12.2013, U 5/13, OTK-A 2013, No. 9, item 136.
[7] See the judgment of the Constitutional Tribunal of 11.02.2014, P 24/12, OTK-A 2014, No. 2, item 9. The judgment in question indicates that in the jurisprudence of the Tribunal it is accepted that the proportionality principle, resulting from Article 2 of the Polish Constitution, is also of particular importance for the assessment of regulations providing for administrative liability - see also the judgment of the Constitutional Tribunal of 9.10.2012, P 27/11, OTK-A 2012, No. 9, item 104.
[8] See the judgment of the Constitutional Tribunal of 18.07.2013, SK 18/09, OTK-A 2013, No. 6, item 80 point III.6 - in the context of tax liabilities.
[9] Judgment of the Constitutional Tribunal of 20 March 2007, K 35/05, OTK ZU 2007, No. 3A, item 28.
[10] See judgment of the Constitutional Tribunal of 31 January 2013, OTK ZU 2013, No. 1A, item 7.

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and judicial-administrative procedure. This also applies to the institution of supervision of the activities of local self-government units.

According to Article 8(1) and (2) of the ECLS, administrative control over the activities of local communities may only be exercised in the manner and in the cases provided for in the Constitution or by law, and any administrative control over the activities of local communities should in principle only be aimed at ensuring compliance with the law and constitutional principles. This control may, however, include control of purposefulness carried out by a higher-level body with regard to the tasks delegated to local communities.

In line with Article 8(1) and (2) of the ECLS, administrative control over the activities of local communities may only be exercised in the manner and in the cases provided for in the Constitution or by law, and any administrative control over the activities of local communities should in principle only be aimed at ensuring compliance with the law and constitutional principles. This control may, however, include control of purposefulness carried out by a higher-level body with regard to the tasks delegated to local communities.

The proportionality principle expressed in Article 8(3) of the ECLS dictates that, in assessing the degree of infringement, the bodies exercising such control should examine the extent and degree of the infringement of the proportion between the extent of the control body's intervention (i.e., the use of supervision instruments) and the importance of the interests it is intended to protect.[11]

The proportionality principle referred to in Article 8(3) of the ECLS is addressed to supervisory bodies and expresses the obligation to minimise supervisory interference and the gradation of supervisory measures. The purpose of its application is to ensure the existence of legal acts in legal transactions while respecting the autonomy of local self-government units (Chlipała, 2014, p. 27).

The proportionality principle is also expressed in the administrative procedure. According to Article 8 §1 of the Code of Administrative Procedure,[12] "Public administration bodies shall conduct proceedings in a manner that inspires confidence of their participants in public authority, guided by the principles of proportionality, impartiality, and equal treatment". It is the procedural duty of a public administration body to be guided by the principles mentioned *in fine* of this article. These principles are fully applicable to the assessment of procedural issues emerging in the course of administrative proceedings (Wróbel, 2023). In this case, the legislator limited itself to indicating the name of the proportionality principle only, without filling its content, due to the provisions of the Polish Constitution specifying its meaning. Thus, the regulations of the administrative procedure must be considered formal and not substantive in nature.

As Barak points out the term 'proportionality' is not mentioned in the constituent documents as the law of the European Union. The concept was developed by the European Court of Justice. The Court of Justice developed the concept both in matters relating to review of EU institutions and in matters where a member state court referred a legal question to the Court of Justice to be determined in accordance with the principles of European law.

This was done in light of the recognition by the Court of Justice - following the notion of French law - of general principles of law that exist alongside formal written texts.

[11] See the judgment of the Voivodeship Administrative Court in Kraków of 14.12.2017, II SA/Kr 1283/17, LEX No. 2427470.

[12] See the Act of 14 June 1960 - Code of Administrative Procedure (Journal of Laws 2023, item 775), hereinafter referred to as **Code of Administrative Procedure**.

Among those general principles are the protection of human rights, the fulfilment of legitimate expectations, the basic principles of natural justice, and the principles of the rule of law. The concept of proportionality was given a central place among those principles. According to most commentators, the concept was adopted by the European Court of Justice as influenced by German law" (Barak, 2012, pp.184 -185; see also Emiliou, 1996).

It should be pointed out that the principle of proportionality is set out in Article 5 of the Treaty on European Union[13] and is one of the most frequently applied general principles of Community law. It exists in three forms: '1) as a constitutional principle, it regulates the manner in which the Community exercises its competence under the Treaty establishing the European Community in so far as the relations between the Community and the Member States are concerned; 2) as a principle of Community administrative law, it sets limits on the discretion of Community bodies taking sovereign action against individuals; 3) as a principle serving to protect individuals against the actions of Member States, it is the final element in the test of the compatibility of national law with Community law when Member States make use of treaty derogations or when implementing Community law (...) In Community law, the proportionality test is also a three-element one' (Saganek, 2008) . In the system of European Union law, the principle of proportionality currently plays an important role.

The principle of proportionality sets out 'a kind of instrumental rationality which safeguards all subjects of law against excessive and unwarranted interference by both the Union and national legislatures, as well as interference by the legitimate entities forming part of the administrative apparatus. (...) This principle is therefore governed by the exercise of competence by the legitimate entities (...) This is done through the precise definition of the criteria to be applied in the selection of the appropriate means and instruments intended to achieve certain aims and objectives' (Wajda, 2016, p. 256).

3. THE INSTITUTION OF SUPERVISION OF LOCAL SELF-GOVERNMENT UNITS' ACTIVITIES IN LIGHT OF THE PROPORTIONALITY PRINCIPLE

In the theory of administrative law, supervision appears as a set of authority measures and powers (Jagielski, 1999, p. 12).[14] The institution of supervision makes it possible to apply, on the basis of the analysis of the controlled phenomena, certain supervisory measures (Dolnicki, 2009, p. 104), which can be divided into measures concerning:

- acts (e.g., approval, revocation, suspension of enforcement);
- persons (e.g., approval of the election, appointment from among the candidates presented, suspension from office);
- bodies (e.g., dissolution, establishment of a commission body) (Izdebski, 2008, p. 301).

Supervision is a broader term than control[15] and includes an element of control. Control, on the other hand, does not necessarily entail supervisory measures. Supervision

[13] Treaty on European Union (consolidated version: OJ EU L 202 of 2006, p. 13).

[14] The jurisprudence of the Constitutional Tribunal presents views that supervision is the embodiment of specific procedures creating the right for the relevant state bodies, equipped with the relevant competencies, to establish the state of affairs and to correct the activities of the supervised body (resolution of the Constitutional Tribunal of 5 October 1994, W 1/94, Wspólnota 1994, No. 48, p. 18).

[15] On the subject of control, see Augustyniak (2024, pp. 487 et seq.).

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is the right to issue orders, binding directives to change courses of action (Augustyniak, 2012, p. 274).

Supervision corresponds to the autonomy of local self-government units, which is, however, always relative, as autonomy results from the interrelationships between different entities and the division of tasks between the state and local self-government segments. The state should reserve for itself the legal possibility to take certain actions against a local self-government institution. This is intended to create guarantees that the actions of the local self-government will be within the framework of the state's legal order and the democratic rule of law.

In the Polish local self-government, verification-related supervision is based on the criterion of legality.[16] This type of supervision "is typical of structures of decentralised public administration, i.e. exercised autonomously under the rules laid down by law. At the same time, the intensity of supervision determines the limits of the autonomy of entities exercising public administration functions. It includes control measures and measures to correct the activities of supervised entities" (Dolnicki, 2005, p. 60).

Along with the restriction of self-government units' autonomy through the institution of supervision, judicial protection of their self-governance was granted to municipalities/communes/counties and voivodeship self-governments (under the Polish Constitution as well as laws). It is a consequence of their subjective nature. This thesis is also confirmed by court-administrative jurisprudence: the judgment of the Voivodeship Administrative Court in Gdańsk of 29 March 2018 indicates that "the autonomy of a municipality/commune is considered to be a fundamental, immanent feature of municipal/commune self-government and concerns both the legal-public and legal-private sphere of its activities. It is also a value protected by the Polish Constitution as one of the foundations of the State's territorial system. The municipality's/commune's public-law autonomy means that it is a decentralised entity of public authority, acting on the basis and within the limits of the legislation in force. Within these limits, the municipality/commune takes legal and actual measures guided solely by the law and its own will expressed in a statutory form by its elected bodies or by the will of the members of the municipal/commune community expressed in the form of a local referendum. This autonomy is subject to supervision by the State bodies from the perspective of lawfulness and in the forms prescribed by law. The correlate of the supervision of the autonomy of a municipal/commune self-government is the guarantee of its judicial protection contained in Article 165(2) of the Polish Constitution."[17] The aim of supervision will be both the need to maintain the uniform operation of all elements of the public administration and the autonomy of supervised entities. This includes defining the relationship between centralised and decentralised administration structures (Leoński, 2006, p. 182).

The supervisory measures are the entire competencies available to the supervisory bodies in relation to the local self-government bodies. Supervisory powers

[16] It is pointed out in the court-administrative jurisprudence that the activity of a local self-government unit is assessed by the supervisory body exclusively on the basis of the criterion of compliance with the law, *ergo* the body cannot make this assessment from other points of view, i.e. efficiency, purposefulness of activity, or cost-effectiveness. Despite the fact that the supervision exercised over the activities of a given local self-government unit by the voivode covers all aspects of the functioning of the local self-government, the supervisory body may intervene in the activities of the municipality/commune/county/voivodeship assembly only in cases specified in the law - see Judgment of the Voivodeship Administrative Court in Gdańsk of 22.03.2018, III SA/Gd 97/18, LEX No. 2474020.

[17] Judgment of the Voivodeship Administrative Court in Gdańsk of 29.03.2018, III SA/Gd 125/18, LEX No. 2473988.

are inextricably linked to the obligation to apply these measures if the relevant statutory grounds are found to exist (Izdebski, 2008, p. 304).

According to B. Dolnicki, the statutory supervisory measures concerning the tasks of the local self-government can be divided as follows: information and advisory measures, corrective measures, and personal measures (Dolnicki, 2012, p. 399 et seq.).

The **information and advisory measures** guarantee the supervisory bodies the right to request the necessary information and data concerning the organisation and functioning of the local self-government units (see Article 88 of the Act on the municipal/commune self-government, Article 77a of the Act on the county self-government and Article 80 of the Act on the voivodeship self-government). This broad access to information granted to supervisory bodies is consistent with the regulation corresponding to access to public information. These measures do not have the effect of changing the actual or legal situation. Without them, an appropriate response of the supervisory body is not possible. Further information obligations boil down to a requirement that the monocratic executive body of the municipality/commune, the starost or the voivodeship marshal, respectively, must submit to the voivode any resolution of the council/assembly within seven days of its adoption. At the voivodeship level, this obligation also applies to voivodeship management resolutions.

Corrective measures, on the other hand, aim to change the actual or legal situation. This interference in the activities of local self-government units' bodies ensures that they operate properly, by reviewing and amending supervised acts if they are found to be inadequate. This also applies to the issuing of substitute acts by the supervisory bodies in the event of the expiry of the time limit for issuance of supervised acts. Corrective measures include:

- approval, agreement, opinion. The provisions of Article 89(1) of the Act on the municipal/commune self-government, Article 77b of the Act on the county self-government and Article 80a of the Act on the voivodeship self-government provide for the possibility that special provisions may require the approval, agreement, or opinion of a decision of a local self-government body by another body as a *sine qua non* condition for the validity of such a decision (Dolnicki, 2015, p. 66). The criterion for distinguishing between these measures is the stage at which they are applied in the decision-making process of the local self-government unit;
- suspension of the implementation of the supervised act;
- declaration of the supervised act invalid. This measure should be applied in the case of unlawful acts (Dolnicki, 1997, p. 47). The deprivation of a given supervised act of its validity may concern both the whole act and its parts, and will be retroactive (*ex tunc*), which means that such an act will be invalid by operation of law from the moment of its adoption.[18] Depending on the type of infringement, a distinction can be made between a material infringement (which has the effect of depriving the supervised act of its validity) and a non-material infringement (which has the effect of indicating an infringement, but which does not have the absolute effect of depriving such an act of its validity).19 The declaration of invalidity takes the legal form of a supervisory

[18] See the judgment of the Supreme Administrative Court in Lublin of 12 October 1990 (SA/Lu 663/90, ONSA 1990, No. 4, item 6). Similarly, see the judgment of the Voivodeship Administrative Court in Gorzów Wielkopolski of 17 September 2009 (II SA/Go 514/09, LEX No. 569879.

[19] See the judgment of the Voivodeship Administrative Court in Gliwice of 1 October 2010 (III SA/Gl 2083/10, LEX No. 756684).

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decision, which should contain a statement of factual and legal reasons and a note on the possibility to file a complaint to the administrative court. The declaration of invalidity of a resolution of a local self-government body is the primary means of supervision;

- issue of a substitute act. Supervisory bodies may issue substitute supervisory acts in the event that a local self-government unit's body has failed to issue a particular act that it was obliged to issue within the relevant time limit (prescribed by law). Thus, if the municipal/commune council fails to adopt a resolution, contrary to the obligation arising from the provisions referred to in Article 98a of the Act on the municipal/commune self-government, Article 85a of the Act on the county self-government and Article 86a of the Act on the voivodeship self-government, the voivode requests the body to do so within 30 days. Upon the ineffective lapse of this period, the voivode, after notifying the minister responsible for public administration, will issue a substitute order. The legislator has allowed for the possibility of filing a complaint against a substitute order by a person (councillor) whose legal interest or right is affected by the order (Chlipała, 2005, p. 82 et seq.).

The personal measures concern the bodies, not directly the defectiveness of the acts issued by these bodies (Dolnicki, 2005, p. 133). Their use is a consequence of a repeated violation of the law in the form of failure to issue or issuing defective acts by local self-government units' bodies. A typical measure of a personal nature is the dismissal of such bodies. This should be done as a last resort when, despite a whole range of supervisory measures, the bodies are still malfunctioning.

When analysing the institution of supervision in light of the proportionality principle, it should be noted that Polish legal regulations related to supervision have been incorporated in the Polish Constitution and in local self-government system acts or other acts of administrative law (e.g., in the scope of supervision exercised by the voivode). Moreover, even at the level of the Polish Constitution (see Article 171(1) of the Constitution), as well as in individual local self-government system acts, the criterion for exercising supervision over the activities of local self-government units was regulated, clearly indicating the criterion of lawfulness.

In addition, the subjective scope of supervision has also been regulated under the Polish Constitution as well as by laws. Thus, the supervisory bodies for the activities of local self-government units are the President of the Council of Ministers and voivodes, and in the scope of financial matters - the regional chambers of auditors (see Article 171(2) of the Polish Constitution Article 85 of the Act on the municipal/commune self-government, Article 77 of the Act on the county self-government and Article 79 of the Act on the voivodeship self-government).[20] However, the catalogue of these entities has been expanded to include the Sejm of the Republic of Poland, which may dissolve a local self-government's decision-making body if that body grossly violates the Constitution or laws. This occurs at the request of the President of the Council of Ministers, who is also the supervisory body. Thus, it should be noted that, in formal terms, the Polish legislator, both at the level of the Constitution and at the level of laws, has regulated the issues of supervision to the extent and in the manner indicated in the provisions of Article 8(3) of the ECLS, although without direct reference to this legal basis. It should be emphasised that administrative courts deal with the judicial control of public

[20] See Article 85 of the Act of 8 March 1990 on the municipal/commune self-government (Journal of Laws 2023, item 40, as amended), Article 77 of the Act of 5 June 1998 *on* the *county self-government (*Dz.U.2024.107) and Article 79 of the Act of 5 June 1998 on the *voivodeship self-government (*Dz.U.2024.566).

administration, *ergo* they do not belong to the catalogue of supervisory entities. The enumerative identification of the supervisory entities in the regulations of the Polish Constitution and the local self-government system acts should be assessed positively. "This strict rationing of supervisory entities has the effect of limiting oversight and thus reinforces the independence of local self-governments" (Dąbek and Zimmermann, 2005, p. 23).

The substantive description of the proportionality principle encompasses the extent and degree of violation of the proportion between the intervention of the supervisory body and the importance of the interests it is intended to protect. This relationship has been preserved through the creation of a catalogue of supervisory measures by the Polish legislator and the possibility of declaring an act invalid in the event of a "material infringement". In the event of a non-material infringement, the supervisory body will not declare a resolution or order of a local self-government unit invalid. It will solely indicate that the resolution or order was issued in breach of the law. The concept of a "material infringement" has been defined in court-administrative jurisprudence and includes the infringement by the local self-government unit's body "that adopts a resolution concerning the provisions on competence, the adoption of such an act without a legal basis, the incorrect application of the legal norm constituting the legal basis for the adoption of the act, as well as the infringement of the provisions governing the procedure for the adoption of the resolution. In other words, a failure leading to consequences that cannot be tolerated in a democratic state under the rule of law is considered a <<material>> infringement of the law".[21] This therefore forces the elimination of defective legislation from the legal transactions.

The proportionality principle referred to in the ECLS obliges supervisory bodies to apply appropriately moderate supervisory measures through their gradation and minimising supervisory interference in order to respect the principle of local self-governments' autonomy. **The gradation of supervision measures involves several elements.** First, an assessment of the nature of the infringement (whether the infringement is material or non-material). This assessment entails certain mandatory legal consequences indicated in the local self-government system acts. Second, consideration of the extent and intensity of the supervisory interference under the supervisory measure in question (this includes the declaration of an act subject to the supervisory procedure as invalid in whole or in part). Third, an important element is the justification of supervisory decisions, which is part of the proof that the supervisory body has applied a proportionate supervisory measure. The application of the measure in question must be adequate to protect the interests that the supervision is intended to protect.

In the area of supervisory activities, a breach of the proportionality principle referred to in Article 8(3) of the ECLS may involve two situations:

- the application of a supervisory measure of excessive intensity when a more lenient measure could have been applied in the given situation;
- or the application of a supervisory measure while there were no grounds for doing so, i.e. no infringement occurred (Chlipala, 2014, p. 28).

The result of a breach of the proportionality principle in the application of the supervision institution is the revocation of the supervisory act.

[21] Judgment of the Voivodeship Administrative Court in Kraków of 22.04.2024, III SA/Kr 30/24, LEX No. 3710906. Similarly, see the judgment of the Voivodeship Administrative Court in Szczecin of 7.03.2024, II SA/Sz 1029/23, LEX No. 3705494.

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Local self-government units have been equipped with the possibility to lodge a complaint with an administrative court, e.g., against a supervisory decision as a supervisory measure. This creates safeguards to protect the autonomy of local self-government units against undue interference by supervisory bodies, while allowing public tasks to be carried out on the basis of the autonomy principle. Judicial control should include an examination of lawfulness of the supervisory act for any breach of this principle. It should be emphasised that "proportionality cannot take precedence over lawfulness, but the assessment of lawfulness should be made through the prism of proportionality" (Chlipala 2014, p. 33).

The supervisory measure in the form of a substitute order of the voivode is of an exceptional nature and should be subject to special attention with regard to the possible infringement of the proportionality principle. The court-administrative jurisprudence indicates that this measure should be applied with this very principle in mind[22].

The proportionality principle is applied in a variety of contexts, but in the system law of local self-governments, all of its applications relate to the protection of local self-government units and their autonomy against excessive and restrictive supervisory action.

The principle of proportionality in light of the institution of supervision thus encompasses two levels of action of the authorities: the objective and the subjective plane.

The object plane includes the gradation of supervisory measures by supervisory bodies. Three elements of it can be distinguished, influenced by the principle of proportionality:

- the supervisory authority's assessment of the nature of the infringement of the act issued by the local authority (material infringement / non-material infringement). This entails certain legal consequences indicated
- in the local government acts;
- the scope of intensity of supervisory interference under a given measure, which includes the declaration of invalidity of a given act in part or in whole;
- the justification of the supervisory acts (supervisory decisions), which is an element of persuasion that the supervisory authority has applied a proportionate supervisory measure.

The subjective plane includes the judicial review of supervisory acts in light of the principle of proportionality, which is a guarantee of the self-government's independence. Administrative courts are increasingly assessing the correctness of supervisory measures in light of the principle of proportionality, indicating its importance in the application of appropriate supervisory measures. A supervisory decision issued by a supervisory authority violates the principle of proportionality of supervisory measures when the supervisory sanction applied is inadequate to the extent of the alleged infringement of the law and is too far-reaching in relation to the purpose it was intended to serve. The principle of proportionality is the guideline for the administrative court in issuing a judgment involving the resolution of disputes between local government units and supervisory authorities. From a subjective (vertical) point of view, the institution of supervision is assessed on the basis of the principle of proportionality at the level of the supervisory authorities and the administrative court. This pattern should be assessed positively, as it creates the possibility of double verification of the correct action of the local self-government bodies.

[22] Judgment of the Voivodeship Administrative Court in Lublin of 25.04.2017, II SA/Lu 1291/16, LEX No. 2291389.

4. CONCLUSIONS

The doctrine indicates that this principle arose to protect individuals from the arbitrariness of power (Śledzińska-Simon, 2019, p. 29). The proportionality principle offers a type of protection against the actions of the state and public administration bodies, so that they interfere with citizens' rights in a reasonable and rational manner and do not abuse their measures and competencies, thereby harming the citizen. Its purpose is also to ensure that there is an appropriate balance between the objectives of the administration actions and the strictness of measures used to achieve those objectives[23]. Attention should be drawn to the conflict-related function of this principle, which is a tool for resolving conflicts of values and weighing rules (Wyrzykowski and Ziółkowski, 2012, pp. 42-45).

In the state legal order, we can distinguish several legal bases for the application of the proportionality principle. This principle is also explicitly expressed in Article 8(3) of the ECLS and has a direct impact on the shape of contemporary Polish local self-government. The proportionality principle defines the current shape of the supervision institution, protecting local self-government units against unjustified interference of supervisory bodies in their sphere of autonomy. This principle should apply as widely as possible to the triggering of individual supervisory measures by administrative supervision bodies. It should be concluded that, in formal and substantive terms, the Polish legislator, both at the level of the Constitution and at the level of laws, has regulated the issues of supervision over activities of local self-government units to the extent and in the manner indicated in the provisions of Article 8(3) of the ECLS. A *de lege ferenda* postulate is the widest possible application of the proportionality principle, explicitly expressed in the regulations of the European Charter of Local Self-Government in the field of supervision and in court-administrative control in the Polish legal order. The effectiveness of the implementation of the proportionality principle in local self-government regulations allows for a positive assessment of the functioning of the supervisory instrumentarium as a correlate of local self-governments (Dolnicki, 2015, p. 60) in the Polish legal order.

The principle of proportionality in the light of the institution of supervision covers two planes of action of the authorities: the objective and the subjective plane. The objective plane includes the grading of supervisory measures by the supervisory authorities (including the assessment of the nature of the breach of the act, the extent of the intensity of supervisory interference under the measure, and the justification of supervisory acts). The subjective (vertical) plane includes the judicial review of supervisory acts in light of the principle of proportionality. In vertical terms, the institution of supervision is assessed based on the principle of proportionality at the level of supervisory bodies and administrative judiciary, which creates the possibility of double verification of the correct action of the bodies of local self-government units. This clearly indicates the legitimacy of this supervisory pattern adopted in Polish local self-government.

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UNITED NATIONS SECURITY COUNCIL: REFORM (IM)POSSIBLE?

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Abstract: *It is beyond dispute that the current configuration of the UN Security Council represents a snapshot, or even a daguerreotype, of an international political and legal vision that has moved away from the one first consolidated at the end of the Cold War, under the banner of the US unipolarity. In the current context, this vision is more fragmented than multipolar, with a scenario of more than two or three poles and their respective spheres of influence. The international community has therefore been confronted with the issue of Security Council reform since the 1990s. This is due to two key factors: firstly, the dissolution of the socialist bloc; and secondly, the emergence of new powers and their alliances. These developments have made the need to redraw the balance of power within the Council, established in Yalta in 1945, even more urgent. Given that the necessity for reform remains unfulfilled, this paper seeks to reconstruct the various scenarios for achieving this enlargement. The only point on which most UN members agree is that the need to change the Council's representation should be met by increasing the number of states that make up the body entrusted with the power to act to maintain international peace and security. The extensive debate on this profile also encompasses the question of whether the new members should be granted the right of veto. In light of the challenges inherent in aligning these two trajectories, the conclusions put forth a de lege lata approach as a provisional measure, contingent upon the eventual realisation of a comprehensive reform of the Security Council.*

Key words: *Security Council; United Nations; Reform; Veto Power; International Public Law*

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1. INTRODUCTION

The recent spate of international crises has underscored the imperative for the Security Council to assume a more proactive and assertive stance in order to maintain or restore international peace and security. Nevertheless, while the diagnosis is clear, the cure is not. The system of cross-vetoes not only impedes the Council's action on specific cases, but also hinders reform hypotheses aimed at enhancing the procedural dynamics of the Council. Indeed, with regard to the functioning of the United Nations (UN) apex body, the underlying problem is the stalemate between the opposing positions of the reformers and the (potential) reformed, given that all reforms of substance necessarily entail the end of privileges. This paper will present a historical reconstruction of the composition of the Security Council and its implications for the procedures for the adoption of Chapter VII resolutions of the San Francisco Charter. Subsequently, the principal proposals for reforming the Council that have been formulated in recent decades will be elucidated, with a reconstruction of the various scenarios that were envisaged in the 1990s and 2000s. The conclusions will present an account of the most

procedural developments, with a particular focus on the so-called 'veto initiative' and the US self-restraint. While these developments may not represent the hoped-for renewal, they do contribute to the erosion of the rent-seeking position of those in the Security Council, which protects its manifestly anachronistic votes. Finally, potential strategies will be proposed to circumvent the paralysis of vetoes based on articles of the UN Charter that are somewhat neglected in practice, from a perspective that seeks to align with the reality principle.

2. HISTORICAL ORIGINS, COMPOSITION, AND DECISION-MAKING PROCEDURES OF THE SECURITY COUNCIL

On 1 January 1942, the twenty-six newly proclaimed United Nations (UN) members signed the Washington Declaration, thereby accepting the principles and objectives set forth in the Atlantic Charter. This document outlined a common programme for their respective national policies, with the common aim of building a better world. Subsequently, as a result of the negotiations conducted at Dumbarton Oaks and the Yalta Conference, the UN Charter was adopted by acclamation at the 9th plenary session of the San Francisco Conference on 26 June 1945. It delineated the objectives, tenets, and institutional framework of the global organisation that had formally superseded the League of Nations in 1939. In particular, the institutional structure was based on a binary system. The General Assembly, whose functions are defined in Chapter V according to the principle of 'one state, one vote', and the Security Council, which is set out in Chapter VII as a restricted body of eleven members, four of which are permanent members (China, the United Kingdom, Russia, and the United States), later joined by France, constitute the two principal organs of the UN. In essence, this system is designed to facilitate the contribution and active participation of all countries while ensuring that the Great Powers retain their decisive say, both *de jure* and *de facto* (Hurd, 2007). The paradox was thus outlined: an organisation that claims to be representative of the entire international *societas* but in fact centralises decision-making powers in a body paralysed by the veto power of five permanent members, not *primi inter pares*, but *primi super pares* (Bargiacchi, 2005).

The number of non-permanent members was increased to ten by an amendment to Article 23 of the Statute, which was adopted by the General Assembly on 17 December 1963 and entered into force on 31 August 1965. They are elected for a two-year term by the General Assembly by a two-thirds majority, considering, on the one hand, their contribution to the maintenance of international peace and security and to the other purposes of the Organisation and, on the other hand, the criterion of equitable geographical distribution.

However, the distinction between permanent and non-permanent members is mainly relevant for the voting procedure, which is governed by Article 27 of the Charter. Although the principle expressed in Art. 2(1) of the Charter that «the Organisation shall be founded on the principle of the sovereign equality of all its Members», *ex* Art. 27, each member of the Council has one vote. Article 27 is in fact the mere transposition of the so-called 'Yalta formula' into the San Francisco Charter: Protocol of Proceedings at the Yalta Conference, Yalta (Crimea), 11 February 1945 «C. Voting: […] 3. Decisions of the Security Council on all other matters should be made by an affirmative vote of seven members including the concurring votes of the permanent members; provided that, in decisions under Chapter VIII, Section A and under the second sentence of paragraph 1 of Chapter VIII. Section C, a party to a dispute should abstain from voting». However, while decisions of the body on procedural matters are taken by the affirmative vote of nine members,

decisions on «any other matter» require the affirmative vote of nine members, including the votes of the permanent members. Indeed, given the concrete modalities of participation in the work of the Security Council, the ten elected members of the Council say they feel like "tourists or short-term passengers on a long distance train" (Paul and Nahory, 2005, p. 5).

In fact, on the basis of the 'veto power' of the permanent members of the Security Council, a negative vote by one of these five countries can prevent a decision by the body. Even sometimes a silent veto (*i.e.,* the mere fear of opposition) is enough to restrain and silence the Council on matters that should otherwise have its firm and authoritative voice (the so-called 'prenatal effect of the veto') (Wilcox and Marcy, 1955). Although this phenomenon was particularly evident during the Cold War, mainly due to the obstructive attitude of the Soviet Union, its importance has not diminished since then: suffice it to think, on the one hand, of the 1999 intervention in Kosovo, which took place outside the United Nations without even a formal vote in the Council, due to the notorious opposition of Russia and China to interventions that can undermine national sovereignty, and, on the other hand, of the 2003 war in Iraq, where there was no vote in the Council due to the notorious opposition of France, China and Russia.

In any case, from a legal point of view, it should be noted that this is not a veto in the technical sense. Indeed, a *stricto sensu* veto consists of a formal act that prevents the carrying out of an administrative, legislative or political deliberation, *i.e*., it prevents a perfect deliberation from producing its legal effects. In the event of a silent veto it prevents the Security Council's will from being formed in the bud, blocking the completion of the collegial *voluntas*.

From a statistical point of view, it is also important to emphasise that the veto has in fact been used mainly not to protect the vital interests of the five powers, as they had assured the small countries in San Francisco, but for heterogeneous reasons. The range of cases spans from preventing the accession of undesirable countries to preventing the election of an undesirable Secretary General, from blocking the accession of a country to the Statute of the International Court of Justice to opposing the expulsion of a country from the Organisation, according to the propaganda and hegemonic logic typical of the Cold War.[1]

It is also important to note that the UN Charter does not provide any clarification to distinguish between questions of procedure and other types of questions. The distinction between procedural decisions and decisions of the Council on matters involving measures that could potentially lead the Security Council to consider action under Chapter VII of the Charter is only made in the Declaration of 7 June 1945, which was adopted in San Francisco by the four inviting powers (to which France was associated). The Declaration eliminates any ambiguity regarding the procedure to be followed on matters of great importance by enshrining the principle of the double veto. In cases of doubt, the preliminary question is to be decided by a qualified majority, including the vote of the permanent members. Despite the growing practice of *consensus*, which has developed on the basis of negotiations between members with the aim of avoiding a formal vote, the veto power of the permanent members remains firmly anchored in the primary peacekeeping responsibilities of these states, particularly in light of the events of the Second World War. The current configuration of the UN Security Council thus represents a snapshot of an international legal and political vision that is different both from that consolidated at the end of the Cold War under the banner of US

[1] The list of vetoes can be found at: https://research.un.org/en/docs/sc/quick.

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unipolarism and from that which characterises the current context, which is in fact more fragmented than multipolar, reflecting a scenario in which there are more than two or three poles and their respective spheres of influence.

In light of the shifts in the international order, it is evident that there are mounting calls from various quarters for a review, if not the complete overhaul, of the current system that has become a *de facto* hegemonic privilege of the five powers. Such calls are further reinforced when, as in the case of the conflict in Ukraine, the veto of one of the permanent members prevents the United Nations from intervening in a manner that many on the international stage would prefer.

The international community has thus been confronted with the question of reforming the Security Council since the 1990s. This has been a period of significant geopolitical change, marked by the dissolution of the bloc of socialist countries and the emergence of new powers and their alliances, as evidenced by the formation of the BRICS. This urgency remains unfulfilled, as the only point on which there is consensus among UN members is that the Council's representation deficit must be addressed by increasing the number of members of the body entrusted with the power to act to maintain international peace and security. Nevertheless, the question of how this enlargement should be conducted is a topic of considerable debate, which coincides with the issue of whether new members should be granted the right of veto. Furthermore, it is notable that Article 5 of the UN Charter does not provide for a veto, which serves to further undermine the democratic nature of the Security Council. Additionally, it is important to consider that Article 23 of the Charter, which outlines the criteria for identifying the ten other members of the United Nations as non-permanent members of the Security Council, refers to an equitable geographical distribution rather than an equitable representation. This further contributes to the perceived weakness in the democratic nature of the Security Council. The first term denotes a purely geographical distribution of seats, whereas the second suggests that those elected to the Council are selected by the various groupings to represent them and safeguard their interests. Consequently, it can be inferred that the groups express a commonality of interests, if not a common identity. This compartmentalisation and fragmentation of the non-permanent members, whose decision-making autonomy is already questionable, serve to reinforce and impoverish the gentlemen's agreements that determine the electoral groups to which seats are allocated. Furthermore, it hinders the development of a process of regionalisation at the social level and regionalism at the political level. Specifically, the 1946 Gentlemen's Agreement originally allocated two seats to Latin America and one each to the British Commonwealth, Eastern Europe, the Middle East and Western Europe; the 1965 Gentlemen's Agreement allocated three. Seats were allocated to the African Group, two to the Asian Group, two to the Latin American and Caribbean Group, two to the Western European and Other Group, and one to the Eastern European Group (Geiger, 2002).

3. THE REFORM HYPOTHESES

3.1 The 1990s

Despite the fact that countries such as the Philippines and India had already expressed their discontent at Asia's under-representation in the Security Council during

the San Francisco Conference,[2] the positive development of demands for reform began in 1992 with the acceptance of the proposal by India and other 'non-aligned' countries to place the 'issue of equitable representation in the Security Council and the increase of its membership' on the provisional agenda of the General Assembly.[3] Consequently, an *ad hoc* working group, the so-called 'Open-Ended Working Group',[4] was established in 1993 with the objective of examining the various proposals for increasing the membership of the Council and the Council's working methods, with particular reference to the interaction between its members and those of the General Assembly.

Early speculation has focused on the 'quick fix' request by Japan and Germany for a permanent seat with veto power in view of their involvement in the Gulf War and increased contributions to the UN budget, a request supported by both the United States, interested in its greater political and financial involvement in the management of international security, and the proposal by the Group of Eight,[5] which, favouring the demands of economic and geopolitical power, supports their entry as permanent members, together with three other countries from Asia, Africa and Latin America, with a parallel expansion of the list of non-permanent members. Despite the support of the UK and France, this proposal is opposed by most member States.[6]

Concurrently, India, on account of its considerable population size and active participation in UN peacekeeping operations, Brazil, in view of its pivotal economic position within the South American context, and a number of African countries (Nigeria, South Africa and Egypt), were similarly pursuing the objective of obtaining permanent membership.

A second proposal is that of the so-called Coffee Club, created on the initiative of Italy, together with Pakistan, Mexico, and Egypt. This proposal opposes the hypothesis of extending permanent membership and instead supports the extension of non-permanent seats. The group, which will gain the support of other states over time until it includes approximately 50 countries in Asia, Africa, and Latin America, proposes the creation of a new category of ten semi-permanent seats, which would be reserved for a group of thirty states. These states would be selected based on objective parameters, including geographical area of membership, demographic level, participation in peacekeeping activities, economic development, and protection of human rights. It is proposed that each group would be reviewed every ten or fifteen years to avoid the creation of new privileged statuses. In accordance with this proposal, each seat would be apportioned to three states, which would assume the role in rotation for a period of six years.

[2] Francis Orlando Wilcox and Carl M. Marcy (1955, at 303) recall how Philippine Ambassador Carlos Romulo, who was not present in San Francisco because his Country was not invited, would prove to be the most tenacious challenger to the Council's balances that marginalised the Asian continent. For a reconstruction of the role and aspirations of India see Akbaruddin (2023).

[3] A/RES/47/62, December 11, 1992. The initiative was launched on November 23, 1992 (A/47/L.26), when India, together with 23 Countries of the Non-Aligned Movement, sponsored a draft resolution on equitable representation in the Security Council. In particular, the Countries involved in the initiative are Algeria, Bhutan, Brazil, Egypt, Guyana, Honduras, Indonesia, Japan, Liberia, Libyan Arab Jamahiriya, Lebanon, Lithuania, Malaysia, Mali, Mauritius, Mexico, Nepal, Nigeria, Paraguay, Senegal, Tunisia, Venezuela, Vietnam, Zimbabwe. In December, the partially revised proposal (A/47/L.26/Rev.1) was put forward with the support of 35 States: the new Countries associated with the initiative were Barbados, Chile, Colombia, Cuba, Gabon, Jamaica, Jordan, Nicaragua, Pakistan, Peru, Togo, Uganda.

[4] Full name is 'Open-Ended Working Group on the Question of Equitable Representation on and increase in the membership of the Security Council and other matters related to the Security Council': UN General Assembly, A/RES/48/26, December 3, 1993.

[5] Austria, Belgium, Czech Republic, Estonia, Hungary, Ireland, Portugal, Slovenia.

[6] A/48/264, July 20, 1993.

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The initial reform hypotheses can be identified in the Third Report of the Open-ended Working Group of 1996, which provided a systematic overview of the issues pertaining to membership and the regulation of the veto.

In regard to the first profile, which excluded mixed models and ideas that had not yet been incorporated into the political process but which had not yet been rejected by the academic community either, the proposed scenarios included the following: 1) 'status quo' proposals, also known as 'zero models' (referring to the positions of Italy, Turkey and Mexico), 2) 'plus models': parallel enlargement solutions, 3) 'regional models': modified parallel enlargement projects.

With regard to the second profile, namely the regulation of the veto power, this can be further subdivided into two distinct categories: firstly, the veto area, which concerns the potential amendments to the manner in which the power is exercised by the states that currently hold it; and secondly, the extension of the veto to the new permanent members. In particular, in the event that the power would also be extended to the new permanent members, the various alternatives that have been put forth include the following: 1) unanimity in the Council to define the subjects excluded from the veto, also known as the "double veto"; 2) a reduction in the scope of the veto; 3) an increase in the number of vetoes required to block a UN action (at least two, according to the Italian proposal); 4) the suspension of the veto on certain occasions defined by a qualified majority of the General Assembly.

In 1997, the plan, subsequently designated the 'Razali Plan', was first proposed. The 'Razali Plan', devised by the then President of the Assembly, Ambassador Ismail Razali of Malaysia, was presented as a draft resolution but was never put to a vote. It proposed an increase in the number of members of the Security Council to 24 (with the addition of five permanent and four non-permanent members) on the basis of a fair geographical distribution. Furthermore, it included the important clarification that the right of veto would be limited exclusively to resolutions to be adopted under Chapter VII and would not be extended to the new permanent members.[7]

In addition to its intrinsic material content, Razali's proposal was notably innovative (and potentially pernicious) from a procedural standpoint. Indeed, the proposal outlined three distinct stages for its implementation. The initial stage would have entailed the General Assembly passing, by a simple majority, a resolution delineating the particulars of the proposed reform, based on Razali's recommendations. In the second phase, a new resolution would have been passed by a two-thirds majority of the members present and voting in the General Assembly, thereby identifying the names of the countries involved. Ultimately, a third resolution would be required to enact the preceding two resolutions as formal amendments to the UN Charter. In accordance with Article 108 of the Charter, the resolution would have had to be passed by two-thirds of the UN membership. Subsequently, it would have been subject to the requisite ratifications by two-thirds of the members, including those of the five permanent members. By taking these three steps, with increasingly narrow majorities, but beginning with a simple majority, Razali sought to create a cumulative effect that, through successive steps, would result in the 124 affirmative votes required to pass the reform.

This domino effect would have exploited the so-called 'lavatory factor', whereby countries wishing to support a proposal or another country, without openly taking sides, go to the toilet before the roll-call vote, thus reducing the *quorum*. Indeed, the provision of a two-thirds majority of those present and voting for the second stage, as set forth in Article 18 of the Charter for 'important matters', would reduce the *quorum* required for

[7] A/AC.247/1997/crp.1, A/51/47 Annex II.

approval, effectively circumventing the exclusion of this route in the case of Statutory amendments, which require a two-thirds majority of the members (as expressly provided for in Article 108), despite the fact that Razali has reserved this only for the third and final stage, with mere ratification functions. The Razali plan, which was met with controversy both in terms of its merits and its methodology, ultimately failed after a lengthy and complex diplomatic and procedural battle spearheaded by Italy. Many parties considered the proposed role of the President of the Assembly, which would have seen them shift from a primarily impartial referee-like position to a more active and involved player, to be untenable and implausible. In particular, Resolution A/52/L.7 established that any decision by the Security Council, even if only preparatory to a real structural reform, even on marginal aspects, must be subject to the procedure laid down in Article 108 of the Charter. This decision, which was taken in order to circumvent any potential undue influence, has, in fact, according to a heterogenesis of ends, ultimately served to impede the prospects of success for any proposed reform of the Security Council.

3.2 The 2000s

The new millennium commenced with a growing awareness of the necessity for a novel paradigm of values to inform the conduct of international relations. This awareness was catalysed by the 2001 report of the International Commission on State Intervention and Sovereignty, entitled 'The Responsibility to Protect',[8] which denounced «the capricious use of the veto»,[9] and called for the establishment of a gentlemen's agreement to prohibit its use in matters of vital interest. Furthermore, it recommended the convening of an emergency special session of the General Assembly, to be conducted in accordance with the 'Uniting for Peace' procedure.[10]

The responsibility was subsequently assumed by the then-Secretary-General, Kofi Annan, who constituted a new working group, the High-Level Panel on Threats, Challenges and Change, comprising 16 distinguished personalities. The panel was tasked with, *inter alia*, reforming the functioning of the 'largest organ of the United Nations'. In the report, entitled 'A Safer World: Our Shared Responsibility', was presented to the Secretary-General on December 2, 2004, marking the conclusion of the Working Group's work. It proposed two models for making the Security Council more 'proactive' through greater involvement of the states most closely involved in the UN budget, volunteering and/or sending troops for peacekeeping missions. In both models, the seats would be distributed among the four principal regional groups, *i.e.,* Africa, Asia and the Pacific,

[8] *The Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty*, Published by the International Development Research Centre, Canada, 2001 Available at: https://walterdorn.net/pdf/Responsibility-to-Protect_ICISS-Report_Dec2001.pdf (accessed on 25.06.2025).
[9] *Ivi*, p. 51.
[10] *Ivi*, § 6.7: «The Security Council has the "primary" but not the sole or exclusive responsibility under the Charter for peace and security matters. Article 10 gives a general responsibility to the UN General Assembly with regard to any matter within the scope of UN authority, and Article 11 gives the General Assembly a fallback responsibility with regard specifically to the maintenance of international peace and security – albeit only to make recommendations, not binding decisions. The only caveat, meant to prevent a split between the UN's two major organs, is that the Security Council must not be discussing that issue at the same time (Article 12). To these Charter bases for General Assembly action must be added the 'Uniting for Peace' resolution of 1950, creating an Emergency Special Session procedure that was used as the basis for operations in Korea that year and subsequently in Egypt in 1956 and the Congo in 1960. It is evident that, even in the absence of Security Council endorsement and with the General Assembly's power only recommendatory, an intervention which took place with the backing of a two-thirds vote in the General Assembly would clearly have powerful moral and political support».

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Europe and the Americas. In particular, «Model A provides for six new permanent seats, with no veto, and three new non-permanent seats with a two-year term, divided among the major regional areas...» and «Model B provides for no new permanent seats, but creates a new category of eight four-year renewable seats and one new non-permanent (and non-renewable) two-year seat, divided among the major regional areas...».[11]

In the (utopian) aspirations of the report 'In larger freedom: towards development, security and human rights for all', published by Secretary General Kofi Annan in March 2005,[12] the Security Council renewal issue was to be addressed at the New York Summit scheduled for September of that same year, which was to be the largest gathering of world leaders ever. However, the only outcome of the meeting was the confirmation of the impasse between the three main groups, each with distinct positions:

- The G4 (comprising Japan, Germany, Brazil and India) sought to expand the Security Council from 15 to 25 members, creating six new permanent seats and four non-renewable, non-permanent seats (distributed as follows: Africa: two permanent seats and one non-permanent seat; Asia: two permanent seats and one non-permanent seat; Latin America: one permanent seat and one non-permanent seat; Western Europe: one permanent seat and Eastern Europe: one non-permanent seat);[13]
- The African Group, comprising 53 countries, expressed concern about their under-representation, despite being sought after for the majority of the Council's work. They also highlighted that they were the only continent without permanent representation. They hoped to play a leading role in the Security Council through the allocation of two permanent seats and three new non-permanent seats, as agreed in the 'Ezulwini Consensus' and the 'Sirte Declaration;[14]
- The Uniting for Consensus (UfC) group, established in 2005 by the Italian initiative to unite members of the Coffee Club, while maintaining opposition to the enlargement of the permanent membership, proposed an alternative plan. The proposal entails the addition of 20 non-permanent members to the existing five permanent members of the Security Council, with a two-year mandate. The distribution of these members is as follows: six for Africa, four for Latin America and the Caribbean, three for Western Europe, and two for Eastern Europe.[15] In truth, there were a plethora of disparate positions within the UfC group, each resulting from its own position on the geopolitical chessboard. In particular, the following countries held opposing views:
- Argentina, Colombia, Mexico: against Brazil's seat,
- Italy, San Marino, Malta, the Netherlands, and Spain: against Germany's seat,
- South Korea: against Japan's seat,
- Pakistan: against India's seat,
- Canada and Turkey: against the principle of increasing the number of permanent members of the Council (Fassbender, 2005).

As previously stated, the summit ultimately failed due to two primary factors. Firstly, internal conflicts within the African continent contributed to the failure, with Egypt, Nigeria and South Africa each seeking a permanent seat on the Council. Secondly,

[11] *Ivi*, at 81.
[12] A/59/2005/Add.1.
[13] A/59/L.64.
[14] A/59/L.67. In a critical sense see Mbara, Gopal, Ehiane and Olayiwola Patrick (2021).
[15] A/59/L.68.

tensions between the United States and Germany over the 2003 Iraq War further complicated the situation.

Apart from a few informal meetings and a proposal by the group of the so-called 'Small Five' (S5: Switzerland, Singapore, Jordan, Costa Rica and Liechtenstein) to improve the Council's working methods through the double requirement that the Council consult all member states of the organisation on its resolutions and that the five permanent members justify any vetoes in the General Assembly,[16] official work on Security Council reform resumed in 2007. Earlier that year, in fact, a round of consultations initiated by the President of the General Assembly, Bahraini lawyer and diplomat Sheikha Haya Rashed Al Khalifa, commenced. Countries were invited to participate in discussions on five key issues: the size of an enlarged Security Council; membership categories; the issue of regional representation; the veto issue; and the Security Council's working methods and the relationship between the Security Council and the General Assembly.[17]

The conclusions reached by the five permanent representatives appointed by the President, in their personal capacity as facilitators, were summarised in the report 'Notions on the Way Forward'.[18] Based on the assumption that the way out of the impasse would have to pass through interim and temporary solutions, a four-pronged transitional approach was outlined: «1. Extended seats that could be allocated for the full duration of the intermediary arrangement, including the possibility of recall. 2. Extended seats, which would be for a longer period than the regular two-year term, but with the possibility of re-election. The length of the terms as well as the re-election modalities should be decided in negotiations. 3. Extended seats, which would be for a longer period than the regular two-year term, but without the possibility of re-election. The length of the term should be decided in the negotiations. 4. Non-permanent two-year seats with the possibility of immediate re-election».[19] In order to further develop the reform process, two additional facilitators were appointed in May 2007.

In light of the assumption that negotiations should be initiated on the basis of a text delineating all the elements under consideration and introducing beneficial reforms for the involvement of non-permanent members in the decision-making process without revising the Charter, intergovernmental negotiations on Security Council reform resumed in New York on 15 September 2008. This occurred within the context of the 62nd session of the General Assembly, which addressed the subject of 'Question of equitable representation in the Security Council, increase in the membership of the Security Council and related matters'.[20]

The two pivotal issues of enlargement and the right of veto were thus placed on the agenda. In attempting to synthesise the positions articulated during the intergovernmental negotiations, which bear resemblance to those presented at the 2005

[16] A/60/L.49.

[17] Letter regarding the meeting of the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council, January 24, 2007. Available at: https://www.un.org/en/ga/president/61/pdf/letters/20070124-seccouncil.pdf (accessed on 25.06.2025).

[18] Letter regarding the Report of the Facilitators on the consultations regarding the Question of Equitable Representation on and Increase in the Membership of the Security Council and other matters related to the Security Council, A/61/47, SUP-Annex I, April 20, 2007. Available at: https://www.un.org/en/ga/president/61/pdf/letters/20070420-seccouncil.pdf (accessed on 25.06.2025).

[19] *Ivi*, § 9, at 7.

[20] General Assembly Decision 62/557 'To commence intergovernmental negotiations (IGN) in informal plenary of the General Assembly', available at: https://www.securitycouncilreport.org/un-documents/document/decision-62-557.php (accessed on 25.06.2025).

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New York Summit, we can delineate them as follows, with respect to the two primary issues, namely (a) enlargement and (b) the right of veto:

- G4:
    a) Enlargement: envisaged for both categories of membership (permanent and non-permanent);
    b) Right of veto: limited to permanent members for a period of at least 15 years, after which an extension could be considered;
- African Group:
    a) Enlargement: The Group supports an increase in the number of members of the Security Council to 26, including 11 permanent and 15 non-permanent members, with distribution on a regional basis.
    b) Right of veto: The Group is not in favour of the veto but is willing to consider a compromise that would allow each of the permanent members to have a veto.
- P5 (Group of 5 Permanent Members):
    a) Enlargement: The United States has indicated its support for the allocation of one or two permanent seats. France has proposed enlargement to the G4, with the temporary creation of non-permanent seats, particularly for the benefit of African countries. The United Kingdom has advocated a gradual approach. China has identified three key priorities: strengthening the efficiency of the Security Council, achieving the widest possible consensus, and including currently under-represented countries. The Russian Federation has proposed limited enlargement, with a maximum of 20 members.
    b) Right of veto: The United States has proposed the convening of a subsequent *ad hoc* conference for the purpose of discussing the right of veto with regard to the new permanent members. In contrast, the Russian Federation has also postponed consideration of the extension of the right of veto until after enlargement, and has categorically ruled out the abolition of the power in the hands of the current permanent members.
- UfC:
    a) Enlargement: greater regional representation, but clear opposition to the creation of new permanent seats;
    b) Right of veto: gradual restriction along several lines, as follows:
        1. Exclude it in the case of a "double veto" on the admission of new members, humanitarian interventions and actions under Chapter VI of the Statute (i.e., peaceful settlement of disputes).
        2. Make it effective only when exercised by two permanent members.
        3. Justify its use on specific issues to both the Security Council and the General Assembly.
        4. In light of the practice of the so-called "hidden veto," where the veto is not formally exercised because it is effectively prevented before an issue is placed on the agenda, it is recommended that an immediate moratorium on the use of the veto be put in place, allowing all states sitting in the General Assembly to express their views on the reform of the Security Council.

- L69 (Group of UN members from developing regions):[21]
    a) Enlargement: It is proposed that the number of seats be increased to at least 27, with two permanent and two non-permanent seats allocated to Africa, two permanent and one non-permanent seat to Asia, one permanent and one non-permanent seat to the Latin American and Caribbean group, one permanent seat to the Western European and other group, one non-permanent seat to Eastern Europe, and one non-permanent seat to the 'small island developing States of all regions'.
    b) Right of veto: Each new permanent seat would be endowed with veto power.

Subsequently, based on the 2008 negotiations, and precisely to circumvent the complex web of prescribed voting percentages, the General Assembly, as early as September 2015, planned cycles of intergovernmental negotiations and placed the 'Question of equitable representation on and increase in the membership of the Security Council and related matters',[22] on the agenda, with the convening of an Open-ended Working Group.[23]

In a recent resolution, the Assembly resolved to pursue further intergovernmental negotiations on Security Council reform through the Assembly's informal plenary at its seventy-seventh session. This decision is a consequence of the preceding informal meetings held during the seventy-sixth session of the Assembly, as evidenced in the Co-Chairs' letter dated 16 May. Furthermore, the document entitled 'Revised Elements Document of the Co-Chairs on Convergences and Divergences on the Issue of Equal Representation and Increased Membership of the Security Council and Related Matters', which was distributed on 19 May 2022,[24] was also considered. This document authorised the convening of the Open-Ended Working Group on the question of equitable representation and the enlargement of the membership of the Security Council and other issues related to the Security Council during the seventy-seventh session of the Assembly. It also authorised the General Assembly to provide real-time updates on the debate and information on informal plenary meetings on intergovernmental negotiations on the question of equitable representation and the enlargement of the membership of the Security Council and other issues related to the Council through an *ad hoc* website, starting in March 2023.[25] This recent innovation has undoubtedly facilitated maximum transparency of the ongoing debate, allowing smaller Permanent Missions and all interested parties to participate. However, an examination of the published documents

[21] Originally composed of 25 members from Africa, Asia and the Pacific, Latin America, and the Caribbean, it now has more than 40 members and the support of more than 80 States. The proposal is contained in Document A/61/L69 of September 14, 2007, from which the group takes its name.

[22] Question of equitable representation on and increase in the membership of the Security Council and related matters: draft decision / submitted by the President of the General Assembly, A/69/L.92. Available at: https://digitallibrary.un.org/record/802160 (accessed on 25.06.2025).

[23] After intergovernmental negotiations, the General Assembly has taken a decision at each session (decisions 63/565 B, 64/568, 65/554, 66/566, 67/561, 68/557, 69/560, 70/559, 71/553, 72/557, 73/554, 74/569, 75/569 and 76/572). The summary of positions can be found in the text that forms the basis for the Intergovernmental Negotiations on Security Council reform, which is the result of a consultative, inclusive and transparent process, the product of Member States' submissions and discussions in the IGN during the 69th session, July 31, 2015. Available at: https://www.un.org/en/ga/screform/pdf/2015-07-31-screform-ign.pdf (accessed on 25.06.2025).

[24] Letter from the President of the General Assembly – IGN Co-Chairs' Letter. Available at: https://www.un.org/pga/76/2022/05/18/letter-from-the-president-of-the-general-assembly-ign-co-chairs-letter/ (accessed on 25.06.2025).

[25] Available at: https://www.un.org/en/ga/screform/ (accessed on 25.06.2025).

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shows that the positions of the various groups of members of the Organisation, with the exception of minor nuances, have been consolidated as those clearly expressed for decades, as summarised in the preceding paragraphs.

4. CURRENT DEVELOPMENTS AND CONCLUDING REMARKS

In this context of stagnation, two recent procedural innovations appear to have introduced a certain degree of dynamism.

Firstly, on 26 April 2022, in response to Russia's aggression against Ukraine two months earlier, the UN General Assembly adopted the so-called 'veto initiative'.[26] Resolution GA 262/76, which was co-sponsored by 83 countries, including the three Western permanent members of the Security Council, establishes that the President of the General Assembly shall «convene a formal meeting of the General Assembly within 10 working days of the casting of a veto by one or more permanent members of the Security Council, to hold a debate on the situation as to which the veto was cast, provided that the Assembly does not meet in an emergency special session on the same situation».[27] In accordance with the established procedure, the member holding the veto power will have the initial opportunity to speak during the forthcoming debate in the General Assembly.[28]

Moreover, the General Assembly requests that the Security Council submit a special report on the use of the veto in question to the General Assembly at least 72 hours before the relevant discussion in the Assembly. This is contingent upon the subsequent meeting of the General Assembly[29] including a provisional agenda item entitled 'Use of the veto',[30] as stipulated in the resolution. In essence, this resolution effectively grants a permanent mandate to all Member States to engage in public discourse and critique of any veto in the pertinent forum, namely the General Assembly.

Secondly, on 8 September 2022, the United States, reacting to the Russian invasion, pledged to «refrain from the use of the veto except in rare, extraordinary situations».[31] This self-restraint evinces an awareness of, though does not explicitly mention, two earlier initiatives to limit the veto power of permanent members. On the one hand, the Code of Conduct of the Accountability, Coherence and Transparency Group, signed by 121 UN countries, including the two permanent members France and the United Kingdom, in which the signatories «pledge in particular not to vote against a credible draft resolution before the Security Council on timely and decisive action to end the commission of genocide, crimes against humanity or war crimes, or to prevent such crimes».[32] On the other hand, the Franco-Mexican initiative was initially proposed by

[26] A/RES/76/262, 'Standing mandate for a General Assembly debate when a veto is cast in the Security Council', April 26, 2022, adopted by consensus. See Barber (2023) and Peters (2023, pp. 87-93).
[27] *Ivi*, n 16, para 1.
[28] *Ibid*., para 2.
[29] *Ibid*., para 3.
[30] *Ibid.*, para 4.
[31] Remarks by ambassador Linda Thomas-Greenfield on the future of the United Nations, September 8, 2022 Available at: https://usun.usmission.gov/remarks-by-ambassador-linda-thomas-greenfield-on-the-future-of-the-united-nations/ (accessed on 25.06.2025); comment by Raphael Schäfer (2022).
[32] Accountability, Coherence and Transparency Group, Submission to the United Nations, 'Code of Conduct regarding Security Council action against genocide, crimes against humanity or war crimes' of October 23, 2015, Annex I to the letter dated December 14, 2015 from the Permanent Representative of Liechtenstein to the United Nations addressed to the Secretary-General (A/70/621-S/2015/978).

French state representatives in the press in 2013[33] and subsequently presented at the 70th General Assembly in 2015 as the 'Political Declaration on the Suspension of the Veto in Cases of Mass Atrocities'.[34] This Declaration was signed by 104 UN member states and two observers, but only by France among the permanent members.[35] In particular, the Declaration proposed «a collective and voluntary agreement among the permanent members of the Security Council to the effect that the permanent members would refrain from using the veto in case of mass atrocities».[36]

From a legal standpoint, it is important to note that the new mechanism established by Resolution GA 262/76 has already been activated on three occasions. In addition, the new mechanism has been activated in response to the vetoes by Russia and China of a draft Security Council resolution condemning intercontinental ballistic missile launches and nuclear tests by the Democratic People's Republic of Korea; [37] the Russian veto against cross-border humanitarian assistance in Syria;[38] and the Russian veto of 30 September 2022 on the draft resolution introduced by Albania and the United States condemning and invalidating the referendums held at the end of that month in the occupied territories of Donetsk, Luhansk, Kherson and Zaporizhzhya.[39] In all three cases, the debate in the General Assembly demonstrated, with the exception of a few isolated voices, that this development towards greater transparency of the UN's actions (and omissions) is a step in the right direction.

With regard to the self-imposed limitations on vetoes, it is accurate to conclude that these self-restraints do not constitute a legally binding commitment. This is because the titles of the documents in which they are set forth (code of conduct, declaration, observations) precisely reproduce the terminology of soft law acts. It is also accurate to note that both the Franco-Mexican initiative and the United States' observations include a form of self-defence clause. The former provides for an exception for "vital national interests", while the latter allows for "rare and exceptional situations", which are, however, rather undefined. Nevertheless, it is possible to posit that the legal terms of these acts fall within the scope of the aforementioned promise, which possesses binding value as a commitment made to the international community. Furthermore, it is essential to acknowledge that consistent behaviour over time, driven by a conviction in its necessity, the aforementioned provisions could thus be transformed from an act of performance

[33] Statement by Mr. François Hollande, President of the Republic, 24 September 2013 (Opening of the 68th Session of the United Nations General Assembly, available at: https://gadebate.un.org/sites/default/files/gastatements/68/FR_en.pdf (accessed on 25.06.2025); Laurent Fabius, Foreign Minister of France, 'A Call for Self-Restraint at the U.N.', New York Times of October 4, 2013. Available at: https://www.nytimes.com/2013/10/04/opinion/a-call-for-self-restraint-at-the-un.html (accessed on 25.06.2025).

[34] Signatory list, status of 13 July 2022 (not updated as of 1 April 2023), available at: https://www.globalr2p.org/resources/list-of-supporters-of-the-political-declaration-on-suspension-of-veto/ (accessed on 25.06.2025).

[35] 70th General Assembly of the United Nations, 'Political statement on the suspension of the veto in case of mass atrocities', Presented by France and Mexico. Open to signature to the members of the United Nations', 2015. Available at: https://www.globalr2p.org/wp-content/uploads/2020/01/2015-Political-Declaration-on-the-Suspension-of-the-Veto-En.pdf (accessed on 25.06.2025).

[36] *Ibid*.

[37] Draft resolution of the Security Council proposed by the US on 26 May 2022 (UN Doc S/2022/431); vetoes by Russia and China (UN SC, 9048th meeting, May 26, 2022, S/PV.9048, 3).

[38] The Russian Veto was cast on July 8, 2022, in 9087th meeting of the Security Council under agenda item 'The Situation in Middle East' (UN Doc. S/PV.9087) on the Security Council draft resolution sponsored by Ireland and Norway (UN Doc. S/2022/538) of July 8, 2022.

[39] Draft Security Council resolution 'Maintenance of Peace and Security of Ukraine' (UN Doc. No. S/2022/720) of September 30, 2022.

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and voluntary adhesion into a proper and obligatory behaviour, as a result of the classic elements of *diuturnitas et repetictio facti* and *opinio iuris ac sive necessitatis*. In light of these considerations and the potential reputational consequences of any breach of such self-restraint, it is encouraging to observe a shift in stance among the three permanent members of the Western bloc.

In conclusion, it seems that if the principal avenue for a substantial reform of the Security Council appears to be obstructed, procedural innovations may offer a viable alternative, in accordance with a rationale that duly considers the principle of reality. Indeed, recent initiatives in this direction appear to offer partial and imperfect solutions to the legitimacy issues of the Security Council, including its lack of representativeness and transparency, as well as the lack of a uniform standard of action, which results in similar situations being treated inconsistently and, in some cases, not at all. Additionally, the perverse dynamic of crossed vetoes, which often prevents the Security Council from intervening and turns it into a gendarme with blunt weapons, contributes to the Council's lack of efficiency. In the event that the requisite votes cannot be obtained for genuine reform, it is nevertheless possible to challenge the undivided authority of the veto, which is still exercised by the permanent members with the same absolute power as that of an absolute monarch.

The most convincing hypothesis is therefore to eschew utopian reform proposals (with the exception of the outcome of the 'Future Summit' scheduled for 2024, concerning the anticipated political and legal advances on the issue of representation), and instead utilise existing instruments that can circumvent the substantive obstacles through procedural approaches. In this sense, articles of the Charter that have been somewhat neglected in practice could be employed, if not indeed should be employed, such as Article 27(3) (on the compulsory abstention of a member that is a party to a decision to be taken by the Council under Chapter VI); Article 94 (allowing any party to refer the matter to the Council if a party to a case before the International Court of Justice fails to comply with a judgment); Article 99 (allowing the Secretary-General to bring to the attention of the Council any matter that he considers may threaten the maintenance of international peace and security). The full operation of these somewhat neglected articles could prompt the Security Council to reconsider its stance and provide an account of its positions to the international community and civil society at large.

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ACCESS TO MODERN ENERGY SERVICES IN UKRAINE DURING THE WARTIME: LEGAL CHALLENGES AND SOLUTIONS FOR PUBLIC ADMINISTRATION

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Abstract: *The right to access to modern energy services is a crucial precondition for the realisation of the majority of human rights and freedoms. The energy sector is one of the strategic sectors of each country. Currently, the energy sector of Ukraine is among the key military targets during the full-scale aggression of the Russian Federation in Ukraine. Disconnections in energy services caused by the military attacks (both cyber and physical) negatively influence the life of the peoples in Ukraine. Therefore, the protection of the right to access to modern energy services at all levels is among the key tasks of the public administration in Ukraine. This paper aims at the analysis of the legal issues of the encouragement of the right to access to modern energy services in Ukraine under the war of aggression conditions and elaboration of the possible solutions for the public administration.*

Key words: *Energy Sector in Ukraine; Access to Modern Energy Services; Energy Efficiency; Energy Poverty; Armed Conflict; Energy Law*

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1. INTRODUCTION

The right to access to modern energy services is a crucial precondition for the realisation of the majority of human rights and freedoms. The energy sector is one of the strategic sectors of each country. Currently, the energy sector of Ukraine is among the key military targets during the full-scale aggression of the Russian Federation in Ukraine. The critical infrastructure of the energy sector is vulnerable to both cyber and physical attacks from the aggressor. Experts pay attention to the damage caused by military attacks in Ukraine (Golovko, 2023). During the autumn and winter periods, these attacks were seriously intensified, leading to significant damage to the energy sector as a whole, but especially to the power sector (Prokip, 2023). Starting from 22 March 2024, the military attacks on the power and heating sectors have become increasingly intensive. Disconnections in energy services negatively influence the life of people in Ukraine (e.g., inability to participate in normal economic and social life actively, health diseases caused by lack of heating and lighting (especially among children, elderly, and other vulnerable categories of people), incidents happened due to uncontrolled use of alternative sources of energy (e.g., those based on open fire technologies). Russia's war has become a major resilience test not only in Ukraine itself but in the entire Europe (Jermalavičius et al., 2023).

In recent years, important steps regarding the implementation of the requirements of the EU energy legislation in Ukraine have been taken in the framework of

the Energy Community[1] and the EU-Ukraine Association Agreement.[2] In particular, special laws and respective by-laws related to the legal status of the energy regulator in Ukraine, energy efficiency, energy performance of buildings, electricity, and gas markets, and protection of critical infrastructure in the energy sector were adopted. However, the challenges posed by the war of aggression in Ukraine require adequate solutions aimed at protecting the right to access to modern energy services for all categories of energy consumers.

Modern legal research devoted to the right to access to modern energy services is mostly focused on the issues within the framework of international public law – international human rights law and international humanitarian law. As demonstrated by the experience of the previous and current armed conflicts, the energy infrastructure is subject to military attacks. This paper aims to explore administrative legal issues of the promotion of the right to access to energy services under the war of aggression in Ukraine and to develop appropriate legal solutions to improve the legal framework for effective decisions of the public administration entities in Ukraine necessary to meet the energy needs. Where possible, the study also aims to derive general recommendations for the promotion of the right to access to energy services in emergency situations for other countries.

The hypothesis of this study is the insufficiency of the legal framework for the promotion of the right to access to modern energy services by public administration in Ukraine under conditions of the war of aggression and the need for its enhancement.

Several research methods have been used for the purpose of this research. In particular, the system-functional method, the methods of analysis and synthesis, and the method of theoretical generalisation were applied in order to examine current legal regulation on public governance in the field of protection and fulfilment of the right to access to modern energy services and to elaborate possible solutions of its improvement. The comparative legal research method was used to some extent to analyse the issues of promotion of the right to energy services in other countries under conditions of armed conflicts [e.g., former Yugoslavia (Scholl, 2009), Yemen (Al-Saidi et al., 2020)]. Although this research is mainly focused on the administrative law issues of the access to modern energy services, the outcomes of research of other legal issues (first of all public international law), as well as research outcomes related to energy access in frames of other fields of science (in particular, public administration science) were used. The analysis of legal issues promoting the right to energy services during the war of aggression in Ukraine as a responsibility of public administration entities was conducted based on the commonly accepted approach to the core features of the right to access to modern energy services (e.g., accessibility, affordability, environmental friendliness, and health safety).

This paper is based on the analysis of the modern scholarly literature, legal acts, case law, and official data presented by the public authorities on their websites or made publicly available via media sources.

While the paper focuses mainly on the Ukrainian context, it provides important information on challenges and offers general solutions for the promotion of the right to

[1] Energy Community (established in 2005) is an international organisation aimed at extending the rules and principles of the EU internal energy market to Southern and Eastern European countries, the Black Sea region and beyond on the basis of a legally binding framework. Available at: https://www.energy-community.org/ (accessed on 25.09.2024). Ukraine has been a full-fledged member of the Energy Community since 1 February 2011.

[2] Association Agreement between the European Union and its Member States, on the one part, and Ukraine, on the other part of 27 June 2014. OJ L 161, 29.5.2014, pp. 3–2137.

access to modern energy services in crises that can be useful for public governance aimed at protecting and fulfilling the right to access to modern energy services in other countries.

The structure of the paper is as follows. In the first part of this paper, the current approaches to the right to access to modern energy services during armed conflicts presented in modern literature have been analysed. In the second part of this paper, certain challenges in the promotion of the right to access to modern energy services in Ukraine under the war of aggression have been detected and the possible mechanisms for their resolving by the public administration entities have been outlined in order to encourage the right to access to energy services for people in Ukraine. Finally, the key results and recommendations have been summarised in the conclusions of this paper.

2. RIGHT TO ACCESS TO ENERGY SERVICES DURING ARMED CONFLICTS IN MODERN LITERATURE

The right to access to modern energy services has mostly been analysed in the modern literature along two main lines:

- the right to access to modern energy services as a human right;
- the right to access to energy services during an armed conflict.

Access to modern energy services is a crucial precondition for the full enjoyment of the majority of human rights and freedoms (e.g., the right to life, the right to health, the right to work, the right to education, and the right to an adequate standard of living). Nevertheless, many people around the world still lack access to sustainable, reliable, environmentally friendly, and affordable energy services, with adverse consequences for the quality of their lives (Vashchenko, 2021). Ensuring access to affordable, reliable, sustainable, and modern energy for all is also enshrined in the United Nations Sustainable Development Goals (Goal 7).[3] In addition, the rights of energy consumers are a distinct focus in the Energy Law literature (Vrabko et al., 2023).

It should be noticed that the contemporary legal research on the right to access to modern energy services is primarily focused on issues within the framework of international public law – particularly international human rights law and international humanitarian law.

Many legal scholars, especially those specialising in energy law issues, have already contributed to research related to the right to access to modern energy services within the context of human rights. Considering the importance of energy supply for people's life, the right to access to modern energy services has been considered as a human right by scholars (see, e.g., Bradbrook et. al., 2015; Tully, 2006; Huhta, 2023). Bradbrook, A. and Judith, G., in particular, argue for the recognition of the right to access to energy services as a human right and elaborate its key elements, explore the link between the access to modern energy services and poverty, emphasise the importance of international cooperation on this matter, and offer the statement of principles for achieving universal access to modern energy services (Bradbrook et al., 2015). According to them, the major role of national government is to use their best endeavours "to move progressively and as expeditiously as possible towards the achievement of universal access to modern energy services" (Bradbrook et al., 2015). The importance of considering the access to modern energy services via the prism of the human rights

[3] Resolution adopted by the General Assembly on 25 September 2015 "Transforming our world: the 2030 Agenda for Sustainable Development". Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/291/89/PDF/N1529189.pdf?OpenElement (accessed on 22.11.2023).

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concept is emphasised by Tully, S. In particular, the scholar concludes with a proposal for a General Comment as an essential first step towards recognising a human right to electricity access (Tully, 2006). Energy justice in the context of human rights law has been explored by Huhta, K. Drawing on modern approaches that consider the right to access to modern energy services as a human right, the author focuses her efforts on the real-life legal application of the human right approach in the sphere of energy justice. According to the scholar, "To find synergies between the rich bodies of research conducted in the spheres of both energy justice and human rights law, the overlap between the two research traditions should be acknowledged in energy research and energy law scholarship." (Huhta, 2023).

The issues of energy during the armed conflict have been mostly examined by scholars along the following lines:

- energy resources as a driver for conflicts (e.g., Månsson, 2014);
- critical energy infrastructure as a military target (e.g., Gardam, 1997);
- the energy sector's conflict resilience (e.g., Al-Saidi et al., 2020; Roach and Al-Saidi, 2021);
- energy poverty and armed conflicts (e.g., Omar et al., 2023; Shettima et al., 2023).

In particular, Månsson concludes that "examples of energy system characteristic that can affect the risk of conflicts include geographical concentration of primary resources, the number and diversity of exporters on the international energy market, vulnerability of infrastructure to attacks, vulnerability of users to disruptions and externalities related to interconnections with other systems." (Månsson, 2014, p. 106).

The energy infrastructure has historically been, and continues to be, subject to military attacks in former and current armed conflicts. Scholl, B. pays attention to the damage to the energy sector of Bosnia and Herzegovina caused by conflicts in the former Yugoslavia from 1991 to 1995. He points out that "prior to the dissolution of the former Yugoslavia (SFRY), the Bosnian republic was a key component of the energy supply for "Yugoslavia and the region"" (Scholl, 2009, p. 50). He stresses that the generation facilities and transmission infrastructure were directly targeted by competing forces. By 1996, significant damage was made to generation facilities, transmission, and distribution infrastructure (Scholl, 2009, p. 51).

Al-Saidi, M., Roach, E.L, and Al-Saeedi, B.A.H. (Al-Saidi et al., 2020) observe that the energy infrastructure has been subjected to damage, capacity deterioration, and the bankruptcy of public providers during political instability and conflicts across the Middle East. Drawing on the Yemen case during the armed conflict since the onset of conflict in 2015, the scholars pay attention to the necessity to strengthen conflict resilience of water and energy supply infrastructure. They emphasise "the remarkable adaptive capacities of communities during conflicts and the importance of incorporating community-level adaptation responses into larger efforts to enhance the conflict resilience of infrastructure systems" (Al-Saidi et al., 2020, p. 1). For the purposes of this research, it is worth mentioning that the scholars found that only approximately half of the population depended on the public grid, while the other half gained access through private sources such as diesel generators, kerosene, and liquefied petroleum gas (LPG). Due to the conflict, consumers of the public power grid were "left in the dark" and the users of diesel-run generators were unable to afford their operation after the fuel tariffs were hiked. Responses to adaptation in Yemen were characterised by decentralisation and the increased role of communities and the private sector. The authors draw an important conclusion that "the infrastructure-related responses to the current conflict in Yemen represent an interesting case of community-driven and self-organisation-based

adaptation, but they do not illustrate a best case of conflict resilient infrastructure" (Al-Saidi et al., 2020, p. 18). The microscale adaptation efforts are necessary for weathering the crisis but are unlikely to effectively strengthen the resilience of the overall system. According to scholars, public regulatory or coordination interventions are needed. They suggest the integration of neighbourhood-based solutions, such as water kiosks or district-level generators for emergencies, into the public utilities operators (Al-Saidi et al., 2020, p. 19).

Most scholars who have analysed the issues of the energy sector in armed conflicts mentioned the direct or indirect negative impact on the population. Damaged energy infrastructure and electricity tariffs hikes have contributed to increased levels of energy poverty. In particular, scholars note that during the war in Syria, most of the electricity infrastructure was destroyed (Omar et al., 2023). They witnessed how people started to break things in their house to use them as fuel. The scholars analysed the issue of energy poverty in Syria caused by a decrease in available energy sources and an increase in their prices for people with limited incomes. They paid attention to the difficulties in assessing the energy poverty during the armed conflicts, and therefore, the adoption of appropriate governmental decisions regarding its tackling (Omar et al., 2023).

Energy as a human right in armed conflict was specifically addressed by Jenny Sing-hang Ngai (2012), who examined the issues related to energy access within the framework of international humanitarian law and human rights law, and emerging international practice to support the case for establishing energy rights. The scholar stresses that the lack of energy security during an armed conflict can significantly undermine the chances of survival of civilians who, in their vulnerable position, are most in need of protection. The researcher drew a very important conclusion: "Hence, the question of energy access becomes one of survival in times of armed conflict, where the denial of energy needs almost certainly leads to the denial of human survival needs. A real need has emerged for the individual's legal entitlement to energy access in armed conflict to be the formally recognised." (Sing-hang Ngai, 2012, p. 584).

Thus, the issues of energy access have been analysed by scholars from different perspectives: legal, social, political, and economic. A multidisciplinary approach plays a crucial role in this field, and contributions of the representatives of different disciplines are very important. However, legal issues of energy access during armed conflicts have been explored mainly within international human rights law and international humanitarian law. Recognising access to energy as a human right, and the necessity to join efforts at the international level to protect this right, in times of peace and during armed conflicts, are vital preconditions for ensuring normal life for people all over the world. Nevertheless, the obligations to respect, protect, and fulfil this right at the national level lies with the national authorities that should consider all national energy sector-related peculiarities and concrete circumstances when elaborating the appropriate solutions.

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3. RIGHT TO ACCESS TO MODERN ENERGY SERVICES UNDER THE WAR OF AGGRESSION IN UKRAINE: KEY CHALLENGES FOR PUBLIC ADMINISTRATION AND POSSIBLE WAYS FOR THEIR RESOLUTION

3.1 The Right to Access to Modern Energy Services under the War of Aggression in Ukraine: A Brief Overview of a Problem and an Outline of Possible Solutions for the Public Administration

The energy sector in Ukraine has become one of the primary military targets during the full-scale aggression launched by the Russian Federation in Ukraine on 24 February 2022. The first massive military attack on critical energy infrastructure took place on 10 October 2022. Since this date, continued attacks on the energy sector in Ukraine have caused significant damage to the critical infrastructure. The autumn and winter of 2022 were extremely difficult for energy consumers in Ukraine due to utility disruptions, including energy services, caused by military attacks. In response, public administration entities, businesses, and households had to seek alternative sources of electricity and heat supply and faced different obstacles (in particular, related to funding, technical capacity, availability, etc.).

Since 22 March 2024, the massive military attacks on the energy critical infrastructure have been intensified again. Kudrytskyj, V., head of the national power company "Ukrenergo", told that it was "the largest assault on Ukraine's energy infrastructure since the full-scale war has begun" (Arhirova, 2024). The last events confirm the old thesis that Russia transforms energy into a weapon (Batozsky, 2024).

Disruptions in energy services have had a severe impact on the lives of people in Ukraine (e.g., lead to inability to actively participate in normal economic and social activities, health diseases caused by lack of heating and lighting (especially among children, elderly, and other vulnerable categories of people), incidents happened due to uncontrolled use of alternative sources of energy (e.g., those based on open-flame technologies).

The core features of the right to access to modern energy services, such as accessibility, affordability, health, safety, and environmental sustainability, are severely compromised under war conditions. Thus, the damage to the energy infrastructure by the military attacks lead to the lack of accessibility. Tariff hikes caused by the necessity to fund repairs and reconstruction of destroyed energy infrastructure resulted in the lack of affordability. Pollutions caused by open-flame technologies and fossil fuel powered by numerous portable power generators contribute to environmental degradation. The lack of access to energy services and other basic services depended on electricity supply (e.g., water supply and sanitation, elevators, etc.), as well as inappropriate use of independent energy solutions lead to health diseases.

The mitigation of negative consequences mentioned above requires adequate governmental action. The public administration shall search for effective solutions for promoting access to energy services for all categories of energy consumers, first of all, for the population.

The experience of more than two years of the full-scale aggression of the Russian Federation in Ukraine and the experience of other countries that struggled from armed conflicts demonstrated that the promotion of access to energy services requires joint efforts of the state, municipalities, the energy sector, and energy consumers – households and businesses. The financial and technical support in this sphere of international partners is crucial for Ukraine.

There are temporary (emergency) solutions (e.g., the use of portable and open-flame equipment) and long-term solutions (e.g., energy efficiency mechanisms, like solar panels, wind turbines, heat pumps).

The balance of centralised and decentralised (distributed) energy infrastructure is needed in Ukraine. It should be stressed that decentralised (distributed) energy infrastructure should not be confused with a reserved energy infrastructure. The first one is one of the permanent solutions that can also contribute to the energy sector's resilience during crises, while the reserved energy infrastructure is a temporary mechanism intended for use in emergency situations when the permanent solutions are temporarily unavailable.

The establishment of so-called points of invincibility, the deployment of onsite backup energy options, such as generators, as well as the continuous improvement of energy efficiency are usually identified as key solutions for the protection of energy consumers towards readiness for emergency disconnections of energy services due to hostile attacks (Webster et al., 2023).

The implementation of the above-mentioned measures in Ukraine (in particular, those related to the establishment of the points of invincibility, transitioning from district heating to individual heat solutions, the installation and use of independent power solutions, and the adoption of energy efficiency measures in households) faces difficulties connected with the drawbacks in the current legislation.

Energy poverty is another important issue that shall be tackled by public administration entities. Recovery of damages to the energy infrastructure caused by military attacks requires significant investments that have led to an increase in utility tariffs. However, many people in Ukraine are in vulnerable situations now and cannot afford utility payments. Protection of vulnerable energy consumers is among the key requirements under the EU legislation. Therefore, the mechanisms of protection of the right to access to modern energy services for vulnerable categories of citizens are among the key tasks of public administration entities in Ukraine.

Possible legal solutions aimed at improving the regulatory framework to support the implementation of the above-mentioned measures in Ukraine and to promote the right to access to modern energy services are presented below.

3.2 Mechanisms for the Promotion of the Right to Access to Modern Energy Services during the War of Aggression in Ukraine

3.2.1 Points of Invincibility

In November 2022, the President of Ukraine launched the project of support to people "Points of Invincibility" (President of Ukraine, 2022) in response to the massive attacks on the energy infrastructure. As part of this project, free, round-the-clock units equipped with electricity, mobile communications, Internet, heat, water, and a first-aid kit were established in buildings of military public authorities, local self-government authorities, educational institutions, etc. in order to help citizens during the disconnections from basic services caused by the military attacks (Punkt nezlamnosti).

Points of invincibility play a significant role in ensuring access to basic services for the population, especially during the autumn and winter months. However, their implementation has been connected with certain difficulties. In particular, when the points of invincibility are established within the buildings of educational institutions (in particular, schools, universities, etc.) the following problems have arisen: difficulties in simultaneous operating points of invincibility and organisation of studies (especially if studies are conducted on-site), ensuring the safety of pupils and students (since points

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of invincibility are open for all), and the involvement of the personnel and students in the functioning of the points (labour law issues), etc. The Educational Ombudsman paid attention to the problems of operation of the points of invincibility and the necessity of adequate legal regulation (Osvitnij ombudsman, 2022). It should be noted that the educational institutions have played a significant role in the protection of civilians since the beginning of the war of aggression in Ukraine. In particular, their dormitories have been used to provide temporary accommodation for internally displaced persons and individuals whose homes were destroyed, while their shelters have served as protection during military attacks. The establishment of points of invincibility in the premises of the educational institutions was a necessary and effective solution. However, it should be considered as a temporary measure, given that the main function of the educational institution is to ensure the full realisation of the right to education. As stated in the Safe Schools Declaration (Safe Schools Declaration, 2015) signed by Ukraine on 20 November 2019 *"education can help to protect children and youth from death, injury, and exploitation; it can alleviate the psychological impact of armed conflict by offering routine and stability and can provide links to other vital services."* (Ministry of Education and Science of Ukraine, 2019, p. 1). Parties to the Declaration agreed on the necessity of ensuring the continuity of education during an armed conflict. Therefore, public administration entities shall gradually relocate the points of invincibility from educational institutions to alternative premises (e.g., shelters) specially equipped for these purposes.

These recommendations mentioned above may be useful for the use of public buildings (e.g., buildings of educational institutions) as temporary shelters during emergencies (e.g., caused by natural disasters, such as flood disasters).

3.2.2 Switch from the District Heating and Hot Water Supply to the Individual Heating and Hot Water Systems

District heating supply is generally recognised as the most environmentally friendly, economically efficient, and safe method of heat supply. However, by the beginning of the full-scale aggression in Ukraine, the district heating supply systems were estimated to be 70-80% worn out (Olijnyk, S., 2022). Frequent emergency disconnections and low heat temperature led to inadequate quality of district heating supply and compelled people to switch to individual heating systems (at a minimum, by installing hot water boilers).

It should be noted that the approach of public authorities to the disconnections of households from the district heating and hot water supply systems has evolved over time. According to the Procedure on Disconnection of Certain Residential Buildings from Networks of District Heating and Hot Water Supply in Case of the Customer's Withdrawal from the District Heating (approved by the Order No. 4 of the Ministry of Construction, Architecture, Housing, and Utilities Economy of Ukraine dated 22 November 2005) (hereinafter: **the Procedure**),[4] it was possible to disconnect individual flats, sections, riser block of flats or the whole multifamily houses from the district heating and hot water supply systems. The decision on disconnection was to be made by a special commission upon the application of owners/co-owners. A negative decision could be issued if the disconnection of the separate premises from the district heating and hot water supply systems was found to negatively influence the stable operation of the utility equipment

[4] Procedure on the disconnection of certain residential buildings from the networks of district heating and hot water supply in case of the customer's withdrawal from the district heating (approved by Order of the Ministry of Construction, Architecture, and Housing and Utilities Economy of Ukraine of 22.11.2005 No 4). Available at: https://zakon.rada.gov.ua/laws/show/z1478-05#Text (accessed on 18.03.2024).

of the premises or the house as a whole. After the changes of 7 November 2007[5] to the above-mentioned Procedure on disconnection, the possibility of switching from the district heating and hot water supply systems to individual systems was limited only for entire houses (not for separate flats).

The case law of Ukrainian courts confirmed this conclusion. In particular, the Supreme Court, in its judgement of 5 November 2020 in case No229/4116/17, affirmed that permission for disconnection can be provided just for the whole residential building (not for the separate flats) and only in case if all co-owners supported this decision unanimously.[6]

In 2017, the Law of Ukraine "On Housing and Communal Services" No2189-VIII[7] was adopted. This law (Point 12, Part. 1, Art. 7) stipulates the right of utility consumers to disconnect from the systems of district heating and hot water supply according to the procedure prescribed by law (currently – Procedure on disconnection of consumers from networks (systems) of district heating (heat and hot water supply approved by Order of the Ministry for Regional Development, Construction, Housing and Communal Economy of Ukraine of 26 July 2019 No. 169 that replaced the previously mentioned Procedure). However, according to the above-mentioned legislation, there are only two possible scenarios under which consumers may exercise this right. First, the owners of the flats or non-residential premises in a multi-family residential building connected to the district heating and hot water supply have the right to disconnect their flats or non-residential premises from the district heating and hot water supply only if by the date of entering into force of the Law of Ukraine "On Housing and Communal Services" not less than a half of the flats and non-residential premises of this house was separated (disconnected) from district heat and hot water supply. Otherwise, only the second option is possible: if 100% of the owners of the house are for the disconnection of the whole house from the district heating and hot water supply.

It is undisputable that district heating and hot water supply systems are more environmentally friendly and energy efficient. Mass disconnections can undermine the operation of the systems of district heating and hot water supply. Moreover, on some territories, due to their local peculiarities, the mass transition to individual systems of heating and hot water supply can cause damage to the environment. Therefore, the efforts of the public administration to restrict the possibilities of mass disconnections from district heating and hot water supply systems are understandable and justified. However, current legislation only imposes common restrictions and fails to consider any specific factors (e.g., technical or environmental issues).

Therefore, in our opinion, it is time to reconsider the legislative restrictions on the possibility of disconnections of the flats or non-residential premises in the multi-family residential premises from the systems of district heating and hot water supply towards expanding the cases when it is possible without 50% previously disconnected flats or non-residential premises.

[5] Order of the Ministry for Housing and Communal Economy of Ukraine No 169 of 06.11.2007 "On Approval of Changes to Order of Misconstruction of 22.11.2005 No 4. Available at: https://zakon.rada.gov.ua/laws/show/z1320-07/ed20071209#Text (accessed on 26.03.2024).

[6] Judgement of the Supreme Court of 05.11.2020 No 229/4116/17. Available at: https://reyestr.court.gov.ua/Review/92661430 (accessed on 18.03.2024).

[7] Law of Ukraine "On Housing and Communal Services" No 2189-VIII of 09.11.2017. *Vidomosti Verkhovnoji Rady Ukrajiny,* 2018, No1, St. 1. Available at: https://zakon.rada.gov.ua/laws/show/2189-19#Text (accessed on 29.09.2024).

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3.2.3 Independent Power Sources for Households

Risks of possible blackouts caused by massive military attacks have prompted energy consumers to seek alternative options and independent power solutions.

After the first massive attacks on strategic energy infrastructure, public authorities and energy experts issued warnings about the necessity to be prepared for the cold season and possible disconnections. People began stockpiling wood, candles, flashlights, power banks, etc. Among these, exactly the portable power generators became the most desirable equipment and "the sound of a generator – a sound of well-being" (Chepurko, 2022). However, the installation and use of the generators by people have been connected with many difficulties. First, most people lack special technical knowledge about generators (what type of generator best suits their needs, how to install them correctly, how to operate them properly, etc.). Second, a generator is expensive equipment that is not affordable for many people. Third, the generators quickly became scarce, even for those who could afford them. Fourth, lack of regular control of the conditions of the generators poses risks of harm to health, property, and the environment. Finally, the noise from generators created disturbances for other people around. All these issues require special attention from respective public authorities.

During the period of martial law, individuals are not required to obtain special permissions to install power generators. Different public authorities (e.g., the State Inspectorate for Energy Supervision (StateEnergySupervision, 2022), State Emergency Service of Ukraine (State Emergency Service of Ukraine, 2022), the Main Department of the State Service of Ukraine on Food Safety and Consumer Protection in Kyiv city (The Main Department of the State Service of Ukraine on Food Safety and Consumer Protection, 2023), projects of international technical support to Ukraine (e.g., USAID Program "Dobre", 2023) provided guidelines on proper installation and use of generators on their websites. Undoubtedly, these recommendations are valuable; however, in our view, they are not easily accessible to a wide audience of citizens. Therefore, it is recommended to provide them in the buildings of local public administration entities / local self-government authorities, schools, hospitals, and other public buildings frequently visited by people in a visible place.

Also, it should be considered that average consumers lack special technical knowledge required for the proper installation of generators. Therefore, the above-mentioned guidelines advise using installation services rendered by qualified professionals. However, these services are offered by many private individuals and legal entities, which raises a concern: how to be sure that they are professionals? In our opinion, it is the task of respective public authorities and local self-government bodies to help people make an informed decision regarding the providers of generator installation works, in particular, through municipal utility companies or by providing the recommended list of specialists/legal entities specialised in the installation of power generators. As a good example, a case of the town Chernivtsi can be provided, where the municipal company "Mistoservis" carries out the installation of generators (Olijnyk, G., 2022).

The inappropriate use of generators in residential buildings may cause health injuries and property damage (GALINFO, 2023). In our opinion, the installation of generators and the future monitoring of the safety of their exploitation should be carried out by qualified specialists. For the purposes of their inspections, the mechanism of the regular inspections of heating systems, ventilation systems and air-conditioning systems in buildings stipulated by the Directive 2024/1275 of the European Parliament and of the

Council of 24 April 2024 "On the Energy Performance of Buildings"[8] (Art. 23-24) (recasts the Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings) can serve as a relevant model. In order to implement the Directive's 2010/31/EU requirements, EU Member States adopted special legislation. In particular, in the Slovak Republic the Law "On the Regular Control of Heating and Air-conditioning Systems and on Amendments to Law No. 455/1991 on Entrepreneurship (Entrepreneurship Law) as amended"[9] was adopted. In Ukraine, the legislative framework for regular inspections of heating and air-conditioning systems has been established, in particular, by Law of Ukraine "On Energy Efficiency of Buildings"[10] (Art. 13), Methodology on Inspections of Engineering Systems of a Building.[11]

In light of the above, it is recommended to gradually introduce the procedure of inspections of portable power generators in households similar to the procedure of inspections of heating, ventilation and air-conditioning systems under the EU Directive "On Energy Performance of Buildings", and to encourage the conduct of generator installation works in households by municipal utility companies or the provision the recommended list of specialists/legal entities specialised in the installation of power generators.

3.2.4 Energy Efficiency Measures for Households

According to the United Nations Sustainable Development Goals (goal 7 "Affordable and clean energy") several key targets are set to be achieved by 2030. These include: doubling the global rate of improvement in energy efficiency, enhancing international cooperation to facilitate access to clean energy research and technology, including renewable energy, energy efficiency, and advanced and cleaner fossil-fuel technology, and promoting investment in energy infrastructure and clean energy technology.[12]

In the European Union (EU), the Clean Energy Package puts consumers at the centre of the EU energy policy and introduces a wide range of initiatives to engage consumers in the transition to clean energy (Hrynkiv and Lavrijssen, 2024).

In recent years, significant steps towards European integration in the sphere of energy efficiency were made by Ukraine. The necessary legal framework for energy efficiency, and in particular, for energy efficiency of buildings, has been developed in

[8] Directive (EU) 2024/1275 of the European Parliament and of the Council of 24 April 2024 "On Energy Performance of Buildings". *OJ L,* 2024/1275, 8.5.2024. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202401275 (accessed on 29.09.2024).

[9] Zákon č. 314/2012 Z. z. z 18.09.2012 o pravidelnej kontrole vykurovacích systémov a klimatizačných systémov a o zmene zákona č.455/1991 Zb. O živnostenskom podnikaní (živnostenský zákon) v znení neskorších predpisov. [Law on the Regular Control of Heating and Air-conditioning Systems and on amendments to Law No. 455/1991 on Entrepreneurship (Entrepreneurship Law) as amended"]. Available at: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2012/314/ (accessed on 30.03.2024).

[10] Law of Ukraine "On Energy Performance of Buildings" of 22.06.2017 No2118-VIII. *Vidomosti Verkhovnoi Rady (VVR),* 2017, No33, St. 359. Available at: https://zakon.rada.gov.ua/laws/show/2118-19#n199 (accessed on 29.03.2024).

[11] Methodology of Inspections of Engineering Systems of a Building (approved by Order of the Ministry for Regional Development, Construction and Housing and Communal Economy of Ukraine of 11.07.2018 No173). Available at: https://zakon.rada.gov.ua/laws/show/z0826-18#Text (accessed on 29.03.2024).

[12] Resolution adopted by the General Assembly on 25 September 2015 Transforming our world: the 2030 Agenda for Sustainable Development. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/291/89/PDF/N1529189.pdf?OpenElement (accessed on 22.11.2023).

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Ukraine. In particular, laws on Ukraine "On Energy Efficiency",[13] "On Energy Performance of Buildings", "On Energy Efficiency Fund",[14] as well as necessary regulations on their basis have been adopted, and the procedure of energy efficiency certification of buildings has been launched.

Under wartime conditions in Ukraine, energy efficiency measures can contribute to the decrease of consumption of energy from conventional sources and to improve public access to energy services. It is therefore recommended, where appropriate, to consider the implementation of energy efficiency measures during the renovation of buildings (including multifamily houses) damaged by military attacks, and the encouragement of the construction of "zero" energy consumption buildings during the construction of residential buildings for those who lost their houses during the war.

Ukrainian households have already started the installation of energy efficiency technologies such as solar panels, wind generators, and heat pumps. Public administration entities shall encourage the introduction of energy efficiency measures in households, in particular, by introducing financial compensation, tax incentives, and soft loan support schemes. The Energy Efficiency Fund[15] has launched several programmes aimed to financially support households for the installation of energy efficiency measures (e.g., GreenDIM Program (Energy Efficiency Fund, 2024)). In some Ukrainian cities (e.g., Odesa, Lviv, Kyiv), special programmes have already been introduced by local authorities for the compensation of costs invested by households into the energy efficiency measures and portable energy solutions. A notable example is found in Kyiv city, where the Procedure of Partial Compensation of Price of Independent Powers Sources Purchased by the Associations of Co-owners of Multifamily Houses, Housing Cooperatives, and Managers of Multifamily Residential Buildings in 2022-2025 years (adopted by Decision of Kyiv City Council No 5586/5627 on 10 November 2022)[16] offers up to 75% compensation for the costs of purchased independent power sources (with approved maximum limits based on the categories of multi-family houses). However, the majority of existing programmes are available only for multi-family residential buildings with associations of co-owners, housing cooperatives, or house management companies. The public administration shall find a solution for the support of co-owners of multifamily houses in case of the absence of the above-mentioned organisational forms of their cooperation in the installation of independent energy sources. It is recommended to consider the introduction to the Tax Code of Ukraine of tax incentives in the framework of income tax, similar to the incentives for mortgage loans.

It should be emphasised that the governance in the field of energy efficiency required significant improvement, especially at the local level. By 2015, the State Agency

[13] Law of Ukraine "On Energy Efficiency" of 21.10.2021 No.1818-IX. *Vidomosti Verkhovnoi Rady Ukrajiny (VVR),* 2022, № 2, ст.8. Available at: https://zakon.rada.gov.ua/laws/show/1818-20#Text (accessed on 29.03.2024).
[14] Law of Ukraine "On Energy Efficiency Fund" of 08.06.2017 No2095-VIII. *Vidomosti Verkhovnoi Rady Ukrajiny (VVR),* 2017, No. 32, St. 344. Available at: https://zakon.rada.gov.ua/laws/show/2095-19#Text (accessed on 29.03.2024).
[15] Energy Efficiency Fund, a public institution that offers instruments for thermal modernisation and renovation of multifamily houses with co-owner associations. Available at: www.eefund.org.ua (accessed on 24.09.2024).
[16] Procedure of partial compensation of price of independent powers sources purchased by the associations of co-owners of multifamily houses, housing cooperatives and managers of multifamily residential buildings in 2022-2025 years (Appendix 2 to Decision of Kyiv City Council No. 5586/5627 of 10 November 2022). Available at: https://ips.ligazakon.net/document/mr221276?utm_source=biz.ligazakon.net&utm_medium=news&utm_content=bizpress01&_ga=2.92837533.143564300.1727208115-724289601.1727208115#_gl=1*d0f6l0*_gcl_au*NTUwODgzNTIyLjE3MjcyMDgxMTU (accessed on 24.09.2024).

on Energy Efficiency and Energy Saving of Ukraine[17] (hereinafter: **StateEnergyEfficiency**) maintained a wide network of its territorial authorities (24 territorial authorities in regions, the city of Kyiv, and the Autonomous Republic of Crimea) with allocated premises, adequate material, and qualified human resources. However, in 2015, the Cabinet of Ministers of Ukraine (Regulation No. 4 of 14 January 2015)[18], upon the proposal of the StateEnergyEfficiency, liquidated the territorial authorities of the StateEnergyEfficiency as structural bodies of the apparatus of the StateEnergyEfficiency. All provisions regarding the territorial authorities were excluded from the Regulation on the StateEnergyEfficiency.[19] At the same time, the maximum number of staff of the apparatus of the StateEnergyEfficiency was almost doubled (the general number of staff was increased from 116 to 224; the number of civil servants was increased from 109 to 219). Thus, the centralisation of public governance in the field of energy efficiency took place.

In our opinion, such a governmental decision was neither reasonable nor aligned with the general principle of decentralisation of public administration in Ukraine. The recent steps of the government support this opinion. In 2023, the StateEnergyEfficiency announced the establishment of offices dedicated to decarbonisation and energy efficient transformation in two oblasts – Kirovogradska oblast and Dnipropetrovska oblast. According to the publicly available information (StateEnergyEfficiency, 2023a, 2023b), such offices were created on the basis of the memoranda concluded by the StateEnergyEfficiency and the local authorities – the local bodies of self-government and the local state administrations (the Kirovogradska oblast council (local self-government body) and the Kirovogradska oblast state administration (the local body of executive power) – for the office in the Kirovogradska oblast; the Dnipropetrovska oblast council (local self-government body) and the Kirovogradska oblast state administration (the local body of executive power). These offices are intended to serve as platforms for the cooperation between the StateEnergyEfficiency and local authorities in the following key areas:

- energy consumption management, including the introduction of energy management systems, the elaboration of local energy plans, the conduction of energy certification of buildings and energy audits;
- establishment of the "energy safety bag" of the region (definition and use of the transition capacity from conventional types of fuel, alternative heat supply, highly efficient cogeneration, biogas, and biomethane production);
- mobilisation of financial resources for energy-efficient transformation of regions (via further National decarbonisation platform, ESCOs, municipal green funds, international financial aid, etc.);
- energy efficiency awareness and popularisation.

In 2024, the practice of establishing offices for decarbonisation and energy efficient transformation has continued. In particular, such offices were established in

[17] State Agency on Energy Efficiency and Energy Saving of Ukraine – a public authority responsible for the implementation of energy efficiency policy in Ukraine. Available at: www. saee.gov.ua (accessed on 24.09.2024).

[18] Regulation of the Cabinet of Ministers of Ukraine of 14.01.2015 No. 4 on the Certain Issues of the Activity of the Central Bodies of Executive Power. Available at: https://zakon.rada.gov.ua/laws/show/4-2015-%D0%BF#Text (accessed on 25.01.2024).

[19] Regulation on the State Energy Efficiency and Energy Savings Agency of Ukraine approved by the Regulation of the Cabinet of Ministers of Ukraine of 26.11.2014 No. 676. Available at: https://zakon.rada.gov.ua/laws/show/676-2014-%D0%BF#Text. (accessed on 13.06.2024).

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Kharkivska oblast, the cities of Zhytomyr, Vynnytsia, Rivne (Ukrajinska Energetyka, 2024), and Mykolaiv (Mykolajivska oblasna rada, 2024).

The promotion of energy efficiency at the regional level is an important direction, and in this aspect, the cooperation between the StateEnergyEfficiency and local authorities shall be considered a crucial and positive step. However, in our view, to ensure principles of good governance–with respect to accountability and oversight–these functions should be implemented via the territorial authorities of the StateEnergyEfficiency. Achieving this will require the respective decision of the Cabinet of Ministers of Ukraine (in particular, amendments to the Regulation on the StateEnergyEfficiency regarding its territorial bodies).

3.2.5 Tackling Energy Poverty

The number of energy consumers in vulnerable situations has increased since the onset of the full-scale aggression. Many individuals have lost their jobs or experienced substantial reductions of their salaries. According to findings by the World Bank (The World Bank, 2023), "the proportion of Ukrainians living in poverty increased from 5.5 percent to 24.1 percent in 2022, pushing an additional 7.1 million people into poverty and reversing 15 years of progress". It should be emphasised that the tariffs on utilities for households, first of all on electricity, were significantly revised upward since 1 June 2023 (see the table below).

Tariff on electricity for categories of households	Before **01.06.2023**[20] fixed price in UAH for 1 kWh	**01.06.2023-30.04.2024**[21] fixed price in UAH for 1 kWh
Individual consumers - up to and including 250 kWh - above 250 kWh (for the entire amount of consumption)	1,44 1,68	2,64
Collective consumers, excluding dormitories (for the entire amount of consumption)	1,68	2,64
Dormitories (for the entire amount of consumption)	1,68	2,64

Table 1. Tariffs on electricity for households

This has led to an increase in citizens' debts for housing and communal services. The problem of energy poverty requires adequate governmental decisions.

The official statistical data on citizens' debts for housing and communal services, including energy services, is provided by the competent public authority – the

[20] Appendix 3 to the Regulation on imposing of special obligations to the electricity market participants for the encouragement of public interest in the process of functioning of the electricity market (in the reduction of the Regulation of the Cabinet of Ministers of Ukraine of 11.08.2021 No. 859). Available at: https://zakon.rada.gov.ua/laws/show/483-2019-%D0%BF/ed20230427#Text (accessed on 26.03.2024).

[21] Regulation of the Cabinet of Ministers of Ukraine of 30.05.2023 No544 "On Changes to Regulation of the Cabinet of Ministers of Ukraine of 05.06.2019 No. 483". Available at: https://zakon.rada.gov.ua/laws/show/544-2023-%D0%BF#Text (accessed on 26.03.2024); Regulation of the Cabinet of Ministers of Ukraine of 27.12.2023 No1375 "On Changes to Regulation of the Cabinet of Ministers of Ukraine of 05.06.2019 No. 483". Available at: https://zakon.rada.gov.ua/laws/show/1375-2023-%D0%BF#Text (accessed on 26.03.2024).

State Statistic Service of Ukraine. However, the most recent data available on its official website pertains to the year of 2021 (Derzhavna sluzhba statystyky Ukrajiny, 2021). This information has not been made publicly available since the imposition of martial law. Currently, data regarding citizens' debts for housing and communal services is disseminated through media reports based on figures provided by specific public authorities, in particular, the Ministry for Communities, Territories and Infrastructure Development of Ukraine (Ministry of Infrastructure), National Energy and Utilities Regulatory Commission (NEURC), and the local authorities (local state administrations). For example, according to Ushchapovskyi, K., the former Chairman of the NEURC, the citizens' debts for the electricity consumed increased by 41% compared to pre-war times (Ilchenko, 2024). However, the publicly available data on utility debts is rather sporadic and does not provide a comprehensive overview of the situation. The governmental decision-making should be grounded in official statistical data provided by the State Statistics Service.

When the full-scale aggression began, many Ukrainians were forced to flee their homes and were unable to pay for utility services on time. To support the population, the Ukrainian government introduced a moratorium on the disconnection of utility services and the imposition of fines for non-payment of their bills (Regulation of the Cabinet of Ministers of Ukraine of 5 March 2022 No. 206 "On Certain Issues of Payments for Utilities during the State of Martial Law").[22] However, this moratorium was applied not only to vulnerable citizens, but also to individuals who could afford the utility payments. According to experts' opinions (Barbu, 2024), this legislative gap also contributed to a rise in utility debts.

Utility debt poses challenges not only for the energy companies. Costs are needed to repair the objects of critical energy infrastructure destroyed by military attacks. To solve the problem with citizens' utility debts, the Government of Ukraine decided to abolish the above-mentioned moratorium (Regulation of the Cabinet of Ministers of Ukraine "On Changes to Certain Regulations of the Cabinet of Ministers of Ukraine Regarding the Utility Payments" of 29.12.2023 No1405).[23] Under this new regulation, citizens may face restrictions in access to utility services in cases of unpaid energy bills: energy services can be interrupted, fines can be imposed, and debts can be recovered in court. As referred to in Art. 26 of the Law of Ukraine "On Housing and Communal Services" if utility services are not paid on time, the consumer shall pay a fine in the sum stipulated by the contract that shall not exceed 0,01 per cent of the sum of the debt for each day of the payment delay. The total sum of the paid fine shall not exceed 100 per cent of the total sum of the debt.[24]

According to media reports, some energy service providers began implementing the aforementioned measures as of January 2024. For instance, the energy company "Yasno" informed about electricity disconnections for consumers with utility debts starting from 29 January. Customers are to be informed in advance, not less than 10 working days before the day of disconnection, in a written form which shall include the

[22] Regulation of the Cabinet of Ministers of Ukraine "On Certain Issues of Utility Payments in the Period of the State of Martial Law of 05.03.2022 No. 206. Available at: https://zakon.rada.gov.ua/laws/show/206-2022-%D0%BF#Text (accessed on 29.02.2024).

[23] Regulation of Cabinet of Ministers of Ukraine "On Changes to Certain Regulations of the Cabinet of Ministers of Ukraine Regarding Utility Payments" of 29.12.2023 No. 1405. Available at: https://zakon.rada.gov.ua/laws/show/1405-2023-%D0%BF#Text (accessed on 29.02.2024).

[24] Law of Ukraine "On Housing and Communal Services" No. 2189-VIII of 09.11.2017. *Vidomosti Verkhovnoji Rady Ukrajiny,* 2018, No. 1, St. 1. Available at: https://zakon.rada.gov.ua/laws/show/2189-19#Text (accessed on 29.09.2024).

grounds for disconnection, the sum of debts under the contract, and the period during which the debt accrued (Lysenko, 2024). Similarly, the energy company "Vinnytsiaoblenergo" informed on 29 January about the initiation of disconnections for non-paying consumers. Rivneoblenergo disconnected from the electricity supply 215 consumers on 25 January (Chaika, 2024). Experts reasonably argue that this decision seems to be premature and may negatively influence the most vulnerable categories of energy consumers. In our opinion, such measures should be implemented gradually and include protection mechanisms for vulnerable categories of citizens.

In addition, many individuals have been forced to leave their places of residence and relocate to another place within Ukraine or abroad. Despite their absence, they still remain responsible for paying their utility bills, but in some cases face difficulties that also lead to the accumulation of utility debts. In particular, in the case of metering the utility services (primarily, electricity and gas supply), the utility bills are formed on the basis of data submitted by the consumers to the energy service providers. If they are unable to submit the data meter readings for gas, water, or electricity, the utility providers issue bills based on average consumption. Many displaced individuals believed these charges were erroneous and postponed resolution until their return. In such situations, professionals recommended submitting approximate data readings. However, in some cases, some utility companies rejected these estimates and requested instead a formal metering control (a procedure that requires the owner/ a tenant (or their representatives) to be physically present). The above-mentioned Regulation of the CMU No. 1405 includes special provisions related to the situation when people are temporarily absent from their real estate properties. It is stated that the consumers are exempt from utility charges if they informed the service provider about the temporary absence in the residential premises (other real estate property) for more than 30 calendar days (in premises without meters); if consumers and other residents are absent for more than six months, to be exempted from the obligation to pay utility bills, they must resubmit an application to the service provider with supporting documentation in electronic or paper format within one month of the end of every six months. However, it should be emphasised that this mechanism applies only to cold and hot water supply and not to electricity and gas supply. Furthermore, questions have arisen regarding the nature and requirements of the supporting documentation. According to the regulation mentioned above, such supporting documentation can include references from the places of temporary residence, work, rehabilitation, studies, military service (in particular, issued in a foreign country). However, it remains unclear if the application and supporting documents can be submitted via any possible electronic means (e.g., via electronic cabinet of the consumer, official e-mail, or messengers of the service provider), and if a digital signature is required. In case of supporting documentation issued in a foreign country, it is unclear whether the official translation and any form of legalisation are needed. Considering the above-mentioned, the right not to pay for utility bills in case of temporary absence of the consumer will be difficult to realise in practice.

Subsidies for vulnerable citizens are provided under the Laws of Ukraine "On State Social Standards and State Social Guaranties" (Art. 9),[25] "On Housing and Communal Services of Ukraine", and the Procedure on provision of housing subsidies approved by Regulation of the Cabinet of Ministers of Ukraine of 21.10.1995 No. 848 (in

[25] Law of Ukraine "On State Social Standards and State Social Guaranties" of 05.10.2000 No. 2017-III. *Vidomosti Verkhovnoji Rady Ukrajiny,* 2000, No. 48, st. 409. Available at: https://zakon.rada.gov.ua/laws/show/2017-14#Text (accessed on 29.09.2024).

the wording of Regulation of the Cabinet of Ministers of Ukraine of 14.08.2019 No. 807)[26] still remain the main form of state support. Some amendments to the procedure for subsidy provision have been introduced to better assist internally displaced persons. Notably, citizens may apply for subsidies to any territorial bodies of the Pension Fund of Ukraine (Voronkova, 2023). However, access to subsidies is restricted for many people in difficult life circumstances due to the established legislative restrictions. In particular, subsidies are not granted to households with utility debts exceeding the threshold established in the aforementioned Procedure on provision of housing subsidies (para. 5, point 14). Other state support schemes for vulnerable categories of energy consumers may be applied in accordance with the current legislation (e.g., Art. 61 of the Law of Ukraine "On Electricity Market",[27] Art. 16 of the Law of Ukraine "On Natural Gas Market").[28] Nonetheless, the criteria defining vulnerable categories of energy consumers, as well as the corresponding protection procedures, which are to be determined by the Government of Ukraine, are still in the development stage.[29]

The most recent changes to electricity tariffs effective from 1 June 2024 demonstrate that the tendency of hikes in electricity tariffs is likely to continue. Therefore, according to the Regulation of the Cabinet of Ministers of Ukraine of 31.05.2024 No. 632 "On changes to Regulation of the Cabinet of Ministers of Ukraine" of 05.06.2019 No. 483 the fixed electricity tariff for individual and collective household consumers has been introduced. Regardless of the volume of energy consumed, the tariff is set at 4,32 UAH for 1 kWh (including VAT). For individual and collective households residing in residential buildings (including hotel-type residential buildings and flats) equipped with electric heating units, the electricity tariff depends on the time of year and the volume of consumption (during the period from 01.06 to 30.09 – 4,32 UAH for 1 kWh (including VAT) regardless of the volume of consumption; during the period from 01.10 to 30.04 (inclusive) for consumers who consumed up to 2000 kW h (inclusive) – 2,64 UAH for 1 kWh (including VAT), while for consumers who consumed more than 2000 kW h for the whole period of consumption – 4,32 UAH for 1 kWh (including VAT).

Therefore, the issues described above are expected to persist and require appropriate decisions from public administration entities. In our opinion, a moratorium on requests for metering control should be introduced until the end of the state of martial law. Additionally, the introduction of smart metering systems (with the opportunity to collect data remotely) should be considered as a solution for this problem.

Also, according to CMU Regulation No. 1405 mentioned above, fines for non-payment of utility bills cannot be imposed on citizens living in territories where hostilities are (or were) conducted, or which are temporary occupied by the Russian Federation according to the list approved by the order of the Ministry of Reintegration of Temporally

[26] Procedure on provision of housing subsidies approved by Regulation of the Cabinet of Ministers of Ukraine of 21.10.1995 No. 848 (in the wording of Regulation of the Cabinet of Ministers of Ukraine of 14.08.2019 No807]. Available at: https://zakon.rada.gov.ua/laws/show/848-95-%D0%BF#Text (accessed on 04.03.2024).
[27]Law of Ukraine "On Electricity Market" of 13.04.2017 No. 2019-VIII. Available at: https://zakon.rada.gov.ua/laws/show/329-19#Texthttps://zakon.rada.gov.ua/laws/show/2019-19#Text (accessed on 04.03.2024).
[28] Law of Ukraine "On Natural Gas Market" of 09.04.2015 No. 329-VIII. Available at: https://zakon.rada.gov.ua/laws/show/329-19#Text (accessed on 05.03.2024).
[29] Draft Procedure on Use of Special Additional Protection Actions for Vulnerable Categories of Electricity Consumers updated by 01.11.2023 was presented by the Ministry of Social Policy of Ukraine. Available at: https://www.msp.gov.ua/projects/838/ (accessed on 04.03.2024); Draft National Energy and Climate Plan of Ukraine 2025-2030. Available at: https://www.me.gov.ua/Documents/Detail?lang=uk-UA&id=f7088035-142e-4912-9aa0-6fe2def80c1b&title=ProektNatsionalnogoPlanuZEnergetikiTaKlimatuUkraini2025-2030 (accessed on 05.03.2024).

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Occupied Territories of Ukraine (hereinafter: **the MinReintegration**). This list was established by Order No. 309 of 22 December 2022.[30] Experts warn that there are territories that are suffering from frequent missile attacks (e.g., Odesa city); however, such territories are not included in the list mentioned above (Barbu, 2024). The MinRegintegration regularly updates this list in accordance with the criteria stipulated by the Cabinet of Ministers of Ukraine in Regulation "On certain issues of formation of the list of territories where hostilities are (were) conducted or temporarily occupied by the Russian Federation" No1364 of 6 December 2022.[31] Therefore, it is recommended to update these criteria to include the territories that are subject to regular missile attacks.

4. CONCLUSIONS

To promote sustainable access to energy services in Ukraine during wartime, the following measures should be distinguished: ordinary public governance measures and crisis public governance measures. In turn, public governance measures for crisis should include short-term (emergency situation/temporary) measures and long-term (resilience building) measures for crisis.

A balanced approach to centralised and decentralised (distributed) energy infrastructure is needed in Ukraine. It is important to clarify that decentralised (distributed) energy infrastructure should not be confused with reserved energy infrastructure. The first systems represent permanent solutions that can also contribute to long-term crisis resilience of the energy sector, while the reserved energy infrastructure serves as a temporary mechanism that should be employed in emergencies when permanent solutions are temporarily unavailable.

The crisis resilience measures implemented by the public administration in the energy sector should be systematically categorised into the following:

- measures before the war/crisis phase (*ex-ante* measures);
- measures during the war/crisis phase (*ad hoc* measures);
- measures after the end of the war/crisis (*ex post* measures).

Ex-ante and *ex-post* measures are long-term measures. The difference between the two of them is that ex-post measures shall consider the weaknesses revealed during the war/crisis.

Crisis resilience measures shall be undertaken at the following levels:

- national;
- regional;
- local;
- household/neighbourhood.

The concrete crisis resilience measures shall be specified in the national, regional, and local programmes and action plans approved by respective public authorities.

The crisis public governance measures should encompass, in particular, measures aimed at protecting critical infrastructure from both physical and cyber-

[30] Order of Ministry of Reintegration, of Temporally Occupied Territories of Ukraine "On Approval of the List of territories where military actions are in place (were in place) or temporary occupied by the Russian Federation" No. 309 of 22.12.2022. Available at: https://zakon.rada.gov.ua/laws/show/z1668-22#Text (accessed on 06.02.2024).

[31] Regulation of the Cabinet of Ministers of Ukraine "On certain issues of formation of the list of territories where hostilities are (were) conducted or temporally occupied by the Russian Federation" No. 1364 of 06.12.2002. Available at: https://www.kmu.gov.ua/npas/deiaki-pytannia-formuvannia-pereliku-terytorii-na-iakykh-vedutsia-velysia-boiovi-dii-abo-tymchasovo-t61222 (accessed on 09.02.2024).

attacks. These measures include the establishment of public units equipped with heating and electricity, water, installation of portable energy sources for civilian use, and the provision of alternative power and heating sources in the event of disconnection from district systems.

The establishment of points of invincibility, the use of power generators, and the implementation of energy efficiency measures represent key strategies for ensuring public access to modern energy services during disconnections from utilities caused by military attacks, which should be the focus of public administration. All of them require appropriate legal framework and control.

The organisation of points of invincibility by the public authorities (designated premises equipped with electricity, heat, water, and a first aid kit for people) should be considered as a permanent crisis resilience measure and proactively supported. The establishment of points of invincibility in public buildings with other purposes of use (e.g., educational institutions) should be considered temporary as crisis public governance measures, and such points should be replaced with units specifically equipped for such purposes as soon as possible. The national legislation in Ukraine should include provisions related to the temporary use of the public buildings in case of emergencies (e.g., like shelters, points of invincibility) to ensure continuity of services, safety of the stakeholders (e.g., pupils and students in case of buildings of educational institutions), and labour law implications (in case of involving the personnel and other stakeholders in the operation of the points, etc.).

The legal regulation governing the transition from district heating to individual heating options in Ukraine requires further improvement, particularly, towards expanding the cases when it is possible without the prerequisite of 50% previously disconnected flats/non-residential premises.

The installation of power generators in residential households must be carried out by qualified professionals. The respective public authorities and local self-government bodies should play an active role in assisting citizens to make informed decisions, in particular, via the provision of such services by municipal utility companies or via the provision of the recommended list of specialists/legal entities specialised in the installation of power generators. Moreover, the power generators installed in households should be subject to regular inspections by professionals, similar to regular inspections of heating and air-conditioning systems in the EU.

The implementation of energy efficiency measures during the renovation of buildings (including multifamily houses) damaged by military attacks and the construction of "zero" energy consumption buildings for those people who lost their homes during the war should be prioritised. The installation of solar panels, wind turbines, and heat pumps by households should be actively encouraged, in particular, by tax incentives within the income tax framework (similar to tax incentives for mortgage loans).

Drawing on the experiences of other countries in the world that have faced challenges in ensuring access to energy during armed conflicts, it is very important to join the efforts of public administration entities, energy companies, and energy consumers supported by appropriate legal regulations to effectively navigate such crises.

For the purposes of good governance (in particular, in terms of accountability and control), it is recommended to establish territorial authorities of the State Energy Efficiency.

Tackling energy poverty remains a crucial task of public administration in Ukraine. It is suggested that the law enforcement procedures regarding utility debts should incorporate protective mechanisms for vulnerable categories of citizens. Moreover, it is advisable to introduce a moratorium on metering control requests until the

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end of the state of martial law. Additionally, the implementation of smart metering systems (which allow for remote data collection) should be considered a viable solution to address the problem of the temporary inability of the energy consumer to provide the metering data to the energy service supplier.

An important task of public administration is to properly communicate their decisions related to the right to access to energy resources (in particular, regarding tariff hikes and scheduled disconnections) to citizens. The population is more likely to support the government's decisions if they are duly informed about the underlying reasons for them (e.g., lack of investments for restoring damaged energy infrastructure). Additionally, supporting the population's adaptation to difficulties in accessing energy resources during wartime is another important task for the public administration. This includes promoting changes in energy consumption behaviour, such as reducing electricity use, organising energy consumption according to the schedule of planned interruptions, and being prepared for service disruptions in utility supplies caused by military attacks.

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COMMENTARIES

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ECtHR: KULÁK v. SLOVAKIA (Application no. 57748/21, 3 April 2025): Exposing Structural Flaws in the Slovak Code of Criminal Procedure on Legal Professional Privilege

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The paper presents an output of the research project APVV No. APVV-23-0252.

Abstract: *The European Court of Human Rights (ECtHR) judgment in Kulák v. Slovakia addresses critical deficiencies in the Slovak criminal procedure, namely the protection of legal professional privilege during searches and seizures of electronic data. The case arose from a 2020 warrantless search of a lawyer's office, where authorities seized the applicant's entire work computer under an emergency provision. The ECtHR ruled that Slovakia's reliance on prosecutorial oversight – rather than independent judicial review –failed to meet standards under Article 8 ECHR. This commentary begins by examining the factual background of the case and legal findings of the ECtHR. Subsequently, it evaluates the broader impact of the Kulák judgment and identifies remaining gaps and potential implications for other Council of Europe member states, advocating for independent oversight, and timely judicial remedies to uphold the rule of law.*

Key words: *Article 8 ECHR; Private Life; Search of Law Firm; Seizure of Computer Data; Professional Privilege; Ex Post Factum Judicial Review; Digital Evidence*

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1. INTRODUCTION

Slovakia faces a range of human rights concerns – some well documented (Máčaj, 2023),[1] others still largely overlooked. One of the yet unexplored challenges which are addressed in this commentary are the seizure of computer data containing communications subject to legal professional privilege (attorney-client privilege). It is

[1] Slovak National Centre for Human Rights. (2023). Individual submission – SNCHR UPR 4th cycle. Available at: https://www.snslp.sk/wp-content/uploads/Individual-submission-SNCHR_UPR-4th-cycle.pdf (accessed on 20.04.2025); Amnesty International. (2024). Amnesty International Report 2024: The State of the World's Human Rights. Available at: https://www.amnesty.org/en/documents/pol10/7200/2024/en/ (accessed on 20.04.2025); U.S. Department of State. (2023). 2023 Country Reports on Human Rights Practices: Slovakia. Available at: https://www.state.gov/reports/2023-country-reports-on-human-rights-practices/slovakia/ (accessed on 20.04.2025).

widely recognised as the oldest of the privileges for confidential communications in common law[2] and deemed as the basis of the relationship of confidence between lawyer and client in the major legal systems (Winter and Thaman, 2020, p. 40).

As of April 2025, Slovakia faced several communicated applications before the European Court of Human Rights (**ECtHR**).[3] Although these rights may appear insignificant to some onlookers, their significance is highlighted by the fact that lawyers play a critical role in promoting democratic values and preserving human rights.[4] The ECtHR repeatedly ruled that persecution and harassment of members of the legal profession strikes at the very heart of the Convention (**ECHR**) system.[5] From a comparative perspective, the importance of this topic is highlighted by a separate annotated key themes case-list focusing exactly on the rights of lawyers in the ECtHR's case-law as well as a separate chapter of the Guide on Article 8 published at the ECHR Knowledge Sharing platform.[6] The exponential increase in the amount of data collected and saved on a daily basis adds to the gravity of the situation, lawyers being no exception.[7] It is not surprising that lawyers might be viewed as 'treasure troves' being in possession of potentially incriminating evidence. Therefore, this topic gains also scholar attention (Franssen and Tosza, 2025).

While the confidentiality is also linked to the right to a fair trial,[8] the issue at hand is primarily covered by the right to privacy which is firmly rooted at the international as well as regional level. The relevant provisions include Article 17 ICCPR, as construed by the UN Human Rights Committee,[9] Article 7 of the EU Charter of Fundamental Rights, as interpreted by the CJEU[10] and Article 8 ECHR.

This topic is highly relevant also from the perspective of tools for protecting the legal profession and current developments within the Council of Europe, as the Convention for the Protection of the Profession of Lawyer is opened for signature since May 2025.[11] It is precisely in this context that the ECtHR judgment in Kulák v. Slovakia, published on 3 April 2025, fits in.[12]

Against this background the aim of this commentary is threefold. First, it examines the factual background and procedural developments in the Kulák case, highlighting the specific deficiencies in Slovak law regarding safeguards for professional privilege. Secondly, it aims to assess the legal standards and procedural safeguards

[2] U.S. Supreme Court, Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).
[3] App. no. 9427/21 joined in the ruling Cviková v. Slovakia, app. nos. 615/21, 9427/21 and 36765/21, 13 June 2024 (Article 8 claim declared inadmissible, see § 114); Kulák v. Slovakia, app. no. 57748/21, communicated on 10 July 2023; Kavečanský v. Slovakia, app. no. 49617/22, communicated on 10 July 2023, not yet decided.
[4] United Nations Congress on the Prevention of Crime and the Treatment of Offenders. (1990). Basic Principles on the Role of Lawyers, § 14.
[5] ECtHR, Kruglov and Others v. Russia, app. nos. 11264/04 and 15 others, 4 February 2020, § 125.
[6] ECHR KS. (2024). The rights of lawyers in the Court's case law. Available at: https://ks.echr.coe.int/documents/d/echr-ks/the-rights-of-lawyers-in-the-court_s-case-law (accessed on 20.04.2025).; ECHR-KS, ECHR KS. (2024). Guide on Article 8 of the European Convention on Human Rights. Available at: https://ks.echr.coe.int/documents/d/echr-ks/guide_art_8_eng (accessed on 20.04.2025).
[7] Statista. (2023). Volume of data/information created, captured, copied, and consumed worldwide from 2010 to 2023, with forecasts from 2024 to 2028. Available at: https://www.statista.com/statistics/871513/worldwide-data-created/ (accessed on 21.01.2024).
[8] ECtHR, Khodorkovskiy v. Russia, app. no. 5829/04, 31 May 2011, § 232.
[9] CCPR, Antonius Cornelis Van Hulst v. Netherlands, U.N. Doc. CCPR/C/82/D/903/1999, 15 November 2004, § 4.6; CCPR, Concluding Observations: Portugal, U.N. Doc. CCPR/CO/78/PRT, 17 August 2003, § 18.
[10] CJEU, Orde van Vlaamse Balies and Others v Vlaamse Regering, C-694/20, 8 December 2022, ECLI:EU:C:2022:963, § 28.
[11] For further details see: European Committee on Legal Co-operation (CDCJ), Council of Europe Convention for the Protection of the Profession of Lawyer Explanatory Report, CM(2024)191-add2final, 12 March 2025.
[12] The case was communicated on 10 July 2023. ECtHR, Kulák v. Slovakia, app. no. 57748/21, 3 April 2025.

required by Article 8 ECHR, as interpreted by the ECtHR, with a focus on the necessity of judicial oversight and effective remedies. Thirdly, it evaluates the broader impact of the Kulák judgment and identifies remaining gaps.

2. LEGAL PROFESSIONAL PRIVILEGE UNDER THE ECHR

The ECtHR arguably has the most developed case law among these bodies. Within its jurisprudence it is widely acknowledged that the legal professional privilege is a fundamental component of the rights protected under Article 8 ECHR, which guarantees respect for private and family life, home, and correspondence. Thus, the searches of lawyers' offices, and seizures of data stored therein, constitute a serious interference with these rights and must be accompanied by extensive safeguards.

This line of jurisprudence has been developed since the landmark case of *Niemietz* under the autonomous concept of 'home' which was extended to searches and seizures of electronic devices in lawyer's offices.[13] Furthermore, the protection also falls within the concept of 'correspondence' in Article 8 ECHR which aims to protect the confidentiality of communications, including data.[14] Such interference arises merely as a result of possessing the confiscated data.[15] This protection is based on the overarching idea that individuals who consult a lawyer can reasonably expect that their communication is private and confidential.[16]

Yet, such protection is not absolute, and the ECtHR does not categorically forbid searches of law offices. More recently, in *Särgava*, the ECtHR reaffirmed the safeguards that must be present during such a search, *inter alia* that it must be based on reasonable suspicion, narrowly tailored in scope, and supervised by an independent judicial authority (*ex ante* or *ex post* judicial review), with the participation of bar association representatives with meaningful authority, and mechanisms to prevent authorities from accessing privileged material prior to judicial determination[17] (see also Schaunig, 2025, pp. 31-38). These factors will be analysed more in depth below in the factual circumstances of the Kulák case.

3. OVERVIEW OF THE SLOVAK LEGAL FRAMEWORK ON SEARCHES AND LEGAL PROFESSIONAL PRIVILEGE

At the time of the events underlying the Kulák case, Slovak law included some safeguards for legal professional privilege during criminal investigation. The key provisions utilised in practice governing searches and seizures concerning the law offices were found in the Code of Criminal Procedure (CCrP), namely:

Article 90 § 1 CCrP:

[13] Niemietz v. Germany, app. no. 13710/88, 16 December 1992, §§ 29-31; ECtHR, Buck v. Germany, app. no. 41604/98, 28 April 2005, §§ 31-32; ECtHR, Kruglov and Others v. Russia, app. nos. 11264/04 and 15 others, 4 February 2020, § 123.
[14] ECtHR, Särgava v. Estonia, app. no. 698/19, 16 November 2021, § 85; ECtHR, Saber v. Norway, app. no. 459/18, 17 December 2020, § 48; ECtHR, Vinci Construction and GTM Génie Civil et Services v. France, app. nos. 63629/10 and 60567/10, 2 April 2015, § 63; ECtHR, Copland v. the United Kingdom, app. no. 62617/00, 3 April 2007, § 41; ECtHR, Petri Sallinen and Others v. Finland, app. no. 50882/99, 27 September 2005, § 71.
[15] ECtHR, Kirdök and Others v. Turkey, app. no. 14704/12, 3 December 2019, § 3 and §§ 36-37.
[16] ECtHR, Saber v. Norway, app. no. 459/18, 17 December 2020, § 51; ECtHR, Altay v. Turkey (No. 2), app. no. 11236/09, 9 April 2019, §§ 49-51.
[17] ECtHR, Särgava v. Estonia, app. no. 698/19, 16 November 2021, §§ 88-109.

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> *If it is necessary for clarifying facts significant for criminal proceedings to preserve stored computer data, including operational data stored via a computer system, the presiding judge) or the prosecutor (during the pre-trial phase) may issue an order. This order must be justified by factual circumstances and directed to the person/entity possessing or controlling such data, or to the service provider, requiring them to:*
> *a) Preserve and maintain the integrity of such data,*
> *b) Allow the creation and retention of a copy of the data,*
> *c) Prevent access to the data,*
> *d) Remove the data from the computer system,*
> *e) Release the data for criminal proceedings purposes.*
>
> Article 101 § 1 CCrP:
> *A search of other premises or a search of land may be ordered by the presiding judge, or, before the commencement of criminal prosecution or during the pre-trial phase, by the prosecutor or, with the prosecutor's consent, by a police officer. The order must be issued in writing and must be justified. It shall be delivered to the owner or user of the premises or land, or to their employee at the time of the search, and if this is not possible, then no later than 24 hours after the obstacle preventing delivery has ceased.*
>
> Article 101 § 3 CCrP:
> *Without an order or consent pursuant to paragraph 1, a police officer may conduct a search of other premises or land only if it is not possible to obtain the order or consent in advance and the matter cannot be delayed, or if it concerns a person caught in the act of committing a crime, a person for whom an arrest warrant has been issued, or a pursued person who is hiding in such premises. However, the authority empowered to issue the order or consent under paragraph 1 must be notified of the action taken without delay.*

As it is evident from these provisions of the CCrP, the judicial oversight over the search and seizure operations was limited merely to a trial phase. However, in the pre-trial phase, where arguably most of the searches are being executed, neither of the abovementioned provisions mandated either prior or *ex post* judicial review, meaning prosecutors alone could authorise such data collection. Notably, the provisions did not include any guidance for the law-enforcement authorities how to proceed when faced with a challenge of seizing material potentially including data falling within the scope of legal professional privilege.

4. BACKGROUND OF THE CASE AND LITIGATION AT THE DOMESTIC LEVEL

Following the outline provided above, the Kulák case arose from a search conducted against the applicant who was a practicing attorney charged by a prosecutor of the former Office of Special Prosecutions of the Prosecutor General's Office on 27 October 2020 with the crime of interfering with the independence of the judiciary

pursuant to Article 342 § 1, § 2 letter b) of the Criminal Code.[18] The search was related to the "Vodári case," which involved serious allegations of manipulation of court proceedings and corruption in the judiciary.[19]

The search of the applicant's law office was carried out on the day after the charges were brought by the National Crime Agency (NAKA) officers.[20] The search of the law office premises was carried out by police officers without a written warrant to search other premises and land pursuant to Article 101 § 1 of the CCrP, stating that they had telephone consent from the supervising prosecutor for conducting the search.[21] The record of the search of the applicant's law office stated that the police proceeded according to Article 101 § 3 of the CCrP, i.e., conducted a search without a prior written prosecutor's warrant under the cumulative fulfilment of conditions that the order cannot be obtained in advance and the matter cannot be delayed.[22]

The authorities relied on a prosecutor's warrant for securing and surrendering computer data issued pursuant to Article 90 § 1 (b) and (e) of the CCrP, according to which the police were to obtain from the seized computer exclusively documents that contained a match with five predefined keywords.[23] During the search, the applicant's entire work computer was seized, despite the fact that the purpose was to secure specific computer data based on predefined keywords.[24]

According to the applicant, the search of the law office premises was, due to the absence of a written prosecutor's order, in violation of the provisions of the CCrP for the search of other premises pursuant to Article 101 § 1 of the CCrP, and the conditions for the procedure under Article 101 § 3 of the CCrP were not met. This was objected to directly during the search by the applicant, the applicant's legal representative, and the representative of the Slovak Bar Association who was present during the search. However, they had limited ability to effectively challenge the procedure, with their objections merely noted as the search continued.[25]

After the search on 2 November 2020, the applicant objected to the conduct of the law-enforcement authorities in a complaint against the charges brought against him. At the same time, on 5 November 2020,[26] the applicant filed a request for review pursuant to Article 210 of the CCrP (review of police officers' actions by a prosecutor), while with this submission he also requested the return of his seized work computer, which at that time had been in authorities' possession for seven days, despite the fact that the applicant was promised its return within three days at the latest. In both submissions, the applicant objected that the seized computer contained data subject to the professional

[18] ECtHR, Kulák v. Slovakia, app. no. 57748/21, 3 April 2025, § 10. At the domestic level, the charges are available under no. ČVS: VII/3 Gv 76/19/1000 – 374.
[19] Background of the case, as well as further context to the events under discussion might be found in ECtHR, Kulák v. Slovakia, app. no. 57748/21, 3 April 2025, § 10. On 10 February 2025, the applicant was acquitted of the charges by a judgment of the Specialized Criminal Court, case no. 6T/3/2023 (the decision is not yet final).
[20] *Ibid.*, § 11.
[21] *Ibid.*, § 30.
[22] *Ibid.*, § 15.
[23] Warrant of the prosecutor of the Office of Special Prosecutions of 21 October 2020, VII/3 Gv 76/19/1000-373 (*príkaz na uchovanie a vydanie počítačových údajov*); ECtHR, Kulák v. Slovakia, app. no. 57748/21, 3 April 2025, § 9.
[24] *Ibid.*, §§ 9, 32.
[25] *Ibid.*, §§ 19, 24. In this context, it is necessary to point out that the CCrP in force at that time did not grant the applicant or the representative of the Slovak Bar Association any powers, other than recording objections in the minutes, that would effectively prevent potentially unlawful conduct of law-enforcement officers during the search of a law office and that would contribute to the effective protection of the complainant's privacy as well as the protection of professional privilege.
[26] *Ibid.*, § 32.

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privilege, which are in no way related to the criminal proceedings against the applicant, and the conduct of the authorities directly interfered with the rights of third parties (the applicant's clients).

The applicant subsequently sought protection at the Slovak Constitutional Court (SCC) through a constitutional complaint, in which he argued that the police procedure had interfered with his right to private and family life under Article 8 ECHR. At that time, the applicant's computer had been seized for almost two months. The constitutional complaint was rejected as premature on the grounds that, in the opinion of the SCC, the applicant should first challenge the failings of the criminal justice authorities in criminal proceedings before general courts and only after its conclusion turn to the SCC.[27]

After the rejection of the complaint against the charges,[28] the applicant unsuccessfully sought the protection of his rights pursuant to Article 363 of the CCrP,[29] wherein he also objected to the unlawfulness of the procedure in conducting the search of the law office and seizing the work computer, as well as the length of the ongoing seizure of the computer and insufficient guarantees serving to protect data subject to the protection of professional privilege.

The work computer was finally returned to the applicant only on 21 January 2022, fifteen months after its seizure, which was justified by the alleged workload of the expert.[30] The expert examination in relation to the seized computer was carried out beyond the scope of the prosecutor's warrant for securing and surrendering of computer data.[31] The scope of five keywords defined by the warrant so as to capture only documents relevant to the applicant's criminal case was arbitrarily expanded to 176 words, including the applicant's surname. This resulted in the capture of 4,562 documents containing precisely the applicant's surname, while these documents were in no way related to his criminal case but rather concerned the applicant's routine legal agenda. In the indictment dated 30 March 2023, filed by the former Special Prosecutor's Office, it was stated in relation to the results of this expert examination, that it did not yield any relevant findings.[32]

To this day, the applicant has no information on how the captured data from his work computer was handled and whether these data were destroyed.

5. THE COURT'S DECISION AND LEGAL QUESTIONS

In the case at hand, the central issue before the ECtHR was whether the search and seizure complied with the requirements of Article 8 ECHR. For an interference with this right to be justified, it must, among other things, be "in accordance with the law".[33]

In terms of negative obligations, the ECtHR has stressed that domestic law must provide protection to the individual against arbitrary interference with Article 8 rights[34] and highlighted the importance of specific procedural guarantees when it comes to

[27] SCC, I. ÚS 226/2021-26, 25 May 2021; ECtHR, Kulák v. Slovakia, app. no. 57748/21, 3 April 2025, § 37.
[28] Decision of the former Special Prosecutor's Office, 25 November 2020, VII/3 Gv 76/19/1000-458.
[29] An extraordinary remedy granting the General Prosecutor the power to annul certain unlawful decisions made by law-enforcement authorities during pre-trial phase.
[30] ECtHR, Kulák v. Slovakia, app. no. 57748/21, 3 April 2025, § 42.
[31] *Ibid.*, § 40.
[32] Indictment of the former Special Prosecutor's Office, VII/3 Gv 76/19/1000-130, p. 111.
[33] Article 8 § 2 ECHR.
[34] ECtHR, Gutsanovi v. Bulgaria, app. no. 34529/10, 15 October 2013, § 220; ECtHR, Brazzi v. Italy, app. no. 57278/11, 27 September 2018, § 41; ECtHR, DELTA PEKÁRNY A.S. v. the Czech Republic, app. no. 97/11, 2 October 2014, § 83.

protecting the confidentiality of exchanges between lawyers and their clients.[35] In its jurisprudence, the ECtHR pays particular attention to the importance of these safeguards, as it is the principle that is grounded in the essential role lawyers play in the administration of justice.[36] As was highlighted above, the well-established case-law of the ECtHR contains several elements that are taken into consideration whether effective safeguards are available under domestic law. Among these are the severity of the offence in connection with which the search and seizure were effected; whether they were carried out pursuant to an order issued by a judge or a judicial officer or subjected to *ex post* judicial scrutiny; whether the order was based on reasonable suspicion, and whether its scope was reasonably limited; whether it was carried out in the presence of an independent observer; or whether other special safeguards were available.[37] Such review must be immediate[38] and in cases where professional privilege is disputed, the seized data should not be made available to the investigative authorities before the domestic courts have had a chance to conduct a specific and detailed analysis of the matter, and – if necessary – order the return or destruction of seized data carriers and/or their copied content.[39]

At the same time, the ECtHR has regularly highlighted that "*the Convention does not prohibit the imposition on lawyers of certain obligations likely to concern their relationships with their clients. This is the case in particular where credible evidence is found of the participation of a lawyer in an offence, or in connection with efforts to combat certain practices*."[40] Apart from these criteria, the ECtHR takes into account also the extent of the possible repercussions on the work and reputation of the person searched.[41]

In the present case, the ECtHR acknowledged that the search had some formal basis in Slovak law through the urgency exception listed under Article 101 § 3 of the CCrP.[42] However, it emphasised that when domestic legislation does not provide for prior judicial scrutiny[43] of investigative measures, "*other safeguards have to be in place*".[44] Specifically, the ECtHR noted that "*the absence of a prior warrant may be counterbalanced by the availability of an effective and diligently conducted ex post factum judicial review of the lawfulness of, and justification for, the search warrant*".[45]

The practice of Slovakia certainly meets some of these criteria (e.g., presence of a lawyer) but under the well-established case-law they are insufficient *per se*.[46] What casts serious doubts on the availability of procedural safeguards is a fact that a warrant in a pre-trial stage was issued by a prosecutor – not a judge.

It was the position of the applicant[47] and also the conclusion of the ECtHR that the search in the present case was accompanied by certain formal procedural safeguards, including the presence of the applicant himself, his legal representative and

[35] ECtHR, Kulák v. Slovakia, app. no. 57748/21, 3 April 2025, § 74; ECtHR, Särgava v. Estonia, app. no. 698/19, 16 November 2021, §§ 87-88; ECtHR, Saber v. Norway, app. no. 459/18, 17 December 2020, § 50-51.
[36] ECtHR, Kulák v. Slovakia, app. no. 57748/21, 3 April 2025, § 75.
[37] ECtHR, Agora and Others v. Russia, app. no. 28539/10, 13 October 2022, § 8; ECtHR, Kruglov and Others v. Russia, app. nos. 11264/04 and 15 others, 4 February 2020, § 125.
[38] ECtHR, Modestou v. Greece, app. no. 51693/13, 16 March 2017, § 50.
[39] ECtHR, Särgava v. Estonia, app. no. 698/19, 16 November 2021, § 107.
[40] ECtHR, Kulák v. Slovakia, app. no. 57748/21, 3 April 2025, § 76.
[41] *Ibid.*, § 77.
[42] *Ibid.*, § 81.
[43] As it was the case of the Slovak Republic.
[44] *Ibid.*, § 82.
[45] *Ibid.*, § 82.
[46] ECtHR, Gutsanovi v. Bulgaria, app. no. 34529/10, 15 October 2013, § 225.
[47] ECtHR, Kulák v. Slovakia, app. no. 57748/21, 3 April 2025, § 56.

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a representative of the Slovak Bar Association.[48] Nevertheless, the presence of these persons, without additional safeguards, were found by the ECtHR to be insufficient to balance the need to secure evidence for criminal proceedings. As noted above, any remedy through which the applicant sought protection of his rights under Article 210 of the CCrP was incapable of ensuring an adequate review of the authorities' interference, since the prosecutor, according to the ECtHR, failed to mention any relevant circumstances justifying the urgency of the search.[49]

In light of the abovementioned principles, the domestic law must provide for a post factual review by a judicial authority. However, the only immediately available remedy is a request for review under Article 210 of the CCrP which raises serious concerns in connection with the requisite standards of independence.[50] More specifically, as was the situation in the present case, the same prosecutor who issues the warrant is deciding on that request.

Not only is there a lack of automatic judicial review, but the SCC has developed a practice of deferring the victims of overly broad seizures to trial phase of criminal procedure, where they have the possibility to argue that the evidence shall be declared inadmissible.[51]

Finally, taking these circumstances into account as well, the ECtHR found that at the relevant time, Slovak law failed to provide for such immediate judicial review for searches of non-residential premises like law firms. It also noted that the supervision was instead conducted by the prosecutor, who "*does not have an independent status comparable to that of an independent tribunal within the meaning of Article 6 of the Convention*." [52] In this respect, the only judicial review that could be carried out at the time of the intervention was by a court only after an indictment had been filed.[53]

Furthermore, the ECtHR noted, that any challenge to the legality of the search during subsequent criminal proceedings would primarily protect the applicant's right to a fair trial rather than directly address the separate rights protected under Article 8.[54]

Another relevant aspect in the present case, as compared to other cases in similar situations was the fact that the ECtHR was particularly critical of the presence of the representative of the Slovak Bar Association, who, although undeniably adequately qualified, had a purely symbolic and formal role, as under Slovak law at the time, this representative "*was not entitled to interfere in any way with the search of the law firm and seizure of the applicant's work computer*."[55]

The ECtHR was also critical of the authorities' decision to seize the applicant's entire work computer, despite the stated purpose being to secure specific data under the warrant of 21 October 2020. It rejected the government's attempt to shift responsibility onto the applicant by arguing that he had insisted on having the computer sealed and handed over, implying that he should bear the consequences of that choice, emphasising that "*it is for the State to ensure a strict framework for such searches to be carried out*".[56]

[48] *Ibid.*, § 83.
[49] *Ibid.*, § 83.
[50] ECtHR, Avanesyan v. Russia, app. no. 41152/06, 18 September 2014, § 32.
[51] SCC, I. ÚS 226/2021-26, 25 May 2021, §§ 29-30; SCC, IV. ÚS 565/2021-17, 9 November 2021, § 25. Compare ECtHR, Kulák v. Slovakia, app. no. 57748/21, 3 April 2025, § 38.
[52] *Ibid.*, § 84. Compare also ECtHR, Kaliňák and Fico (dec.), app. nos. 40734/22, 40803/22, 28 February 2023, § 16.
[53] ECtHR, Kulák v. Slovakia, app. no. 57748/21, 3 April 2025, § 84.
[54] *Ibid.*
[55] *Ibid.*, § 85.
[56] *Ibid.*, § 86.

The judgment highlighted the absence of adequate procedures for protecting privileged materials during and after the seizure. The ECtHR observed that "*domestic law did not provide for any procedure to ensure that material unrelated to ongoing criminal proceedings and subject to legal professional privilege be preserved*".[57] This contrasted with safeguards in other jurisdictions, such as those examined in Wieser and Bicos Beteiligungen GmbH v. Austria and Wolland v. Norway.[58]

The ECtHR also expressed concern about the excessive duration of the retention of the seized computer—almost fifteen months—noting that this "*inevitably had negative repercussions on his work as a lawyer*".[59] This part was ultimately also related to the error in the expert examination (the excessive use of key words), which, according to the government, could not be remedied and the consequences of which had to be borne exclusively by the applicant, which inevitably had negative repercussions on his work as a lawyer.[60]

Based on these considerations, the ECtHR concluded that "*even though there existed a general basis in Slovakian law for the impugned measure, the applicant in the present case was not offered sufficient guarantees for his right to respect of his private life and home before or after the search-and-seizure operation*".[61] As a result, the interference was not "in accordance with the law" as required by Article 8 § 2 ECHR, constituting a violation of the applicant's rights.

6. KEY TAKEAWAYS AND CORE LEGAL MESSAGE

The Kulák judgment has profound implications for Slovak law, highlighting several systemic deficiencies in the legal framework governing searches of lawyers' premises and the protection of legal professional privilege effective at the time of the search.

First, it exposed the inadequacy of relying solely on prosecutorial supervision, without judicial review, to protect against arbitrary interference with lawyers' professional secrecy. This is particularly significant in the Slovak context, where the past decades have seen complex changes in the legal system amid broader political shifts and the establishment of solid foundations for fundamental rights remains an ongoing process. The ECtHR's criticism of the lack of procedures for protecting privileged materials during keyword searches reflects growing awareness of these challenges.

In relation to the Slovak system, it is essential to bring the attention to the established practice (also evident from the decisions rejecting the applicant's constitutional complaints).[62] It is important to recall the arguments raised by the SCC that the applicant should have waited for the lodging of the indictment and consequently claimed the inadmissibility of evidence at the trial hearing. In other words, the constitutional complaints were deemed premature and framed in light of the admissibility of evidence. Virtually the same arguments as in the present case have been used by the Slovak government and the SCC in different circumstances under Article 8 ECHR submitting that "*the applicant could have challenged the admissibility of any such*

[57] *Ibid.*, § 87.
[58] ECtHR, Wieser and Bicos Beteiligungen GmbH v. Austria, app. no. 74336/01, 16 October 2007, §§ 62-63; ECtHR, Wolland v. Norway, app. no. 39731/12, 17 May 2018, §§ 38, 63.
[59] ECtHR, Kulák v. Slovakia, app. no. 57748/21, 3 April 2025, § 88.
[60] *Ibid.*
[61] *Ibid.*, § 89.
[62] SCC, I. ÚS 226/2021-26, 25 May 2021; SCC, IV. ÚS 565/2021-17, 9 November 2021.

evidence."[63] This argument proves to be logical and even of a benefit for the defence if the computer data obtained could potentially lead to the incrimination of the charged person. However, a particular issue arises when the applicant does not seek the exclusion of the evidence due to its unlawfulness, precisely because it is not incriminating – i.e. the situation in the present case where the evidence speaks clearly in favour of the applicant. It is therefore legitimate to assume that victims will not want to exclude evidence that speaks in their favour. As per the finding of the ECtHR in Särgava v. Estonia, the mere fact that the applicant has decided not to challenge the admissibility of the evidence, but rather decided that it spoke in his favour, cannot be held against him when assessing whether he had exhausted domestic remedies in the context of the ECHR proceedings.[64] Even if the criminal courts could consider questions of the fairness of admitting evidence in the criminal proceedings, the ECtHR has found that they were not capable of providing an effective remedy where it was not open to them to deal with the substance of the Article 8 complaint that the interference was not "in accordance with the law" or not "necessary in a democratic society", or to grant appropriate relief in connection with that complaint.[65] Accordingly, the Kulák judgment builds upon previous and still relatively recent rulings against Slovakia that underscore this specific aspect.[66]

Secondly, the Kulák ruling emphasises several procedural safeguards that should be in place when searching lawyers' premises, which can be usefully compared with practices across different jurisdictions. While some urgency exceptions may be certainly justified, the ECtHR's emphasis on either prior judicial approval or effective post-search judicial review aligns with practices in many European states that were scrutinised by the ECtHR. Apart from these, the ECtHR highlighted the inadequacy of the Bar Association representative's purely formal role in Slovakia. These issues cannot be considered without discussing further legislative changes also acknowledged by the ECtHR.[67] This matter is relevant because the violation of the applicant's rights is tied to the legal framework in place at the time of the intervention. That framework has since changed, and Article 101 of the CCrP now provides for a system of prior as well as *ex post factum* judicial review.[68] A notable amendment is also Article 106a of the CCrP, which specifically pertains to searches of lawyers.[69] Under this legal framework, a higher degree of involvement is required from both the Slovak Bar Association and the pre-trial judge, who would make a decision in the matter. The law-enforcement authorities are not entitled – without the consent of the Bar Association representative or the pre-trial judge – to access or seize documents containing information covered by the legal professional privilege. If the Bar Association representative refuses to grant consent under Article 106a § 1 of the CCrP, the pre-trial judge shall decide by issuing an order on the spot, and in case of justified necessity, shall issue an order with a brief reasoning without undue delay after the search has been completed.

The documents must be secured in such a manner – under the supervision of the authority carrying out the search, the legal representative, and the Bar Association representative – that no one can access their contents or destroy or damage them. Immediately afterward, the relevant documents must be handed over to the court. The

[63] ECtHR, Potoczká and Adamčo v. Slovakia, app. no. 7286/16, 12 January 2023, § 26 and § 53.
[64] ECtHR, Särgava v. Estonia, app. no. 698/19, 16 November 2021, § 70.
[65] ECtHR, Hambardzumyan v. Armenia, app. no. 43478/11, 5 December 2019, §§ 40-44.
[66] ECtHR, Potoczká and Adamčo v. Slovakia, app. no. 7286/16, 12 January 2023, § 61; ECtHR, Plechlo v. Slovakia, app. no. 18593/19, 26 October 2023, § 46.
[67] ECtHR, Kulák v. Slovakia, app. no. 57748/21, 3 April 2025, § 84.
[68] Introduced by Law no. 40/2024, which entered into force on 15 March 2024.
[69] Introduced by Law no. 111/2023, which entered into force on 1 May 2023.

court shall ensure that the documents are protected from unauthorised access to their contents.

These amendments, adopted before the publication of the Kulák judgment, address many of the aspects criticised in this judgment, as well as in similar situations examined by the ECtHR.[70] Nevertheless, several aspects of this legal framework remain open and potentially in conflict with the ECHR. Similarly to the case of Särgava v. Estonia,[71] the domestic law does not provide any guidance on how the potential disputes between the investigative authorities and the lawyer concerned over the keywords to be used or any other methods of filtering the electronic content should be resolved.

Article 106a of the CCrP represents a progress, but risks falling short of Särgava's requirements without stricter technical safeguards and client-centric protections. While judicial oversight combined with the active engagement of the Bar Association representative reduces arbitrary seizures, the absence of independent digital filtering and clear data-handling timelines leaves the professional privilege vulnerable to systemic overreach.

Alongside this issue stands the problem of the former warrant under Article 90 CCrP (now re-numbered as Article 91 of the CCrP), which concerns exclusively the seizure of computer data, where the prosecutor remains still the sole authority involved during the pre-trial phase without any judicial scrutiny. Strikingly, no source of law makes it clear that data falling within the scope of professional privilege, but unrelated to the investigation, must be destroyed at all.[72]

Thirdly, the ECtHR's criticism of the extended retention of the seized computer (fifteen months) suggests that the abovementioned criterion of the extent of the "*possible repercussions on the work*"[73] includes not just the scope but also the duration of interferences with legal professional privilege considered under Article 8 ECHR.[74] Based on these principles, the rights under the ECHR were not violated when the image of the seized disk has been produced and the computer has been returned to the lawyer in a due course (2 days).[75] Contrary to that, a violation has been found in cases where a computer has been retained for 2 months,[76] or 9 months.[77] With the Kulák ruling it now seems that this criterion is a well-established part of the ECtHR's jurisprudence. It has therefore relevance beyond Slovakia, offering guidance to all Council of Europe member states on the minimum safeguards required when authorities search law firms and seize lawyers' data.

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[70] Namely ECtHR, Särgava v. Estonia, app. no. 698/19, 16 November 2021, §§ 92-110; but also recently in ECtHR, Reznik v. Ukraine, no. 31175/14, 23 January 2025, § 70, where even after legislative amendments, "*serious doubts still persist as to the quality of procedural safeguards for the protection of legal professional privilege in the context of search operations in general and, in particular, in the context of such operations affecting the electronic data carriers.*"

[71] ECtHR, Särgava v. Estonia, app. no. 698/19, 16 November 2021, § 107.

[72] Compare with a recent case ECtHR, Grande Oriente d'Italia v. Italy, app. no. 29550/17, 19 December 2024, § 145 (not yet final).

[73] ECtHR, Kruglov and Others v. Russia, app. nos. 11264/04 and 15 others, 4 February 2020, § 125.

[74] Usually, the temporal aspect is assessed in connection to claims concerning A1P1 (protection of property). See for example: ECtHR, Kruglov and Others v. Russia, app. nos. 11264/04 and 15 others, 4 February 2020, §§ 144-146; ECtHR, Iliya Stefanov v. Bulgaria, app. no. 65755/01, 22 May 2008, §§ 41-42; Močuļskis v. Latvia, app. no. 71064/12, 17 December 2020, §§ 57-58; but also ECtHR, Smirnov v. Russia, app. no. 71362/01, 7 June 2007, §§ 57-59; ECtHR, BENet Praha, spol. s r.o. v. the Czech Republic, app. nos. 33908/04, 7937/05, 25249/05, 29402/05 and 33571/06, 24 February 2011, § 100-101; ECtHR, Pendov v. Bulgaria, app. no. 44229/11, 26 March 2020, § 50.

[75] ECtHR, Wolland v. Norway, app. no. 39731/12, 17 May 2018, §§ 55-80.

[76] ECtHR, Iliya Stefanov v. Bulgaria, app. no. 65755/01, 22 May 2008, §§ 41-42.

[77] ECtHR, Kruglov and Others v. Russia, app. nos. 11264/04 and 15 others, 4 February 2020, § 146.

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Thus, the case at hand offers reassurance that the ECtHR remains vigilant in protecting this essential component of the rule of law, even as it acknowledges legitimate law enforcement needs (emphasis added).[78] The ongoing concerns about the rule of law in various European states, make the principles affirmed in Kulák particularly timely. As digital evidence becomes increasingly central to investigations, the principles reaffirmed in this case regarding the handling of seized electronic data will likely grow in importance. By requiring safeguards before state authorities can interfere with the lawyer-client relationship, the judgment helps ensure that legal professional privilege remains an effective protection in modern democratic societies, rather than a merely theoretical right.

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[78] ECtHR, Kulák v. Slovakia, app. no. 57748/21, 3 April 2025, § 76.

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REVIEWS

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HODULÍK, JAKUB: ÚSTAVNÍ ZÁKAZ CENZURY V TEORII A PRAXI [CONSTITUTIONAL PROHIBITION OF CENSORSHIP IN THEORY AND PRACTICE]. WOLTERS KLUWER, 2024

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1. INTRODUCTION

"After years and years of illegal and unconstitutional federal efforts to restrict free expression, I also will sign an executive order to immediately stop all government censorship and bring back free speech to America." These words were spoken by the new United States President Donald J. Trump (2025) during his inauguration speech that was broadcast around the world. The concept of censorship is clearly used widely and frequently by politicians, but it is also at the heart of modern legal debates relating to the freedom of expression of individuals on social media. But what is censorship? Do legal scholars and politicians use the term correctly or are there instances when the term censorship is used too broadly and without a relevant legal basis?

2. STRUCTURE

The book is divided into seven chapters, with J. Hodulík devoting the first two to a general introduction and methodology, where he specifies that this is a work that falls within the doctrinal analysis of law, providing an analysis not only of legal literature, but also of case law, laws, and by-laws.

The third chapter is devoted to the prohibition of censorship in positive law and the prohibition of censorship in applied practice. I personally consider this part to be one of the most important. Indeed, the term censorship is often used (some might say overused), so it is important to look for a definition of constitutionally prohibited censorship in particular. The situation is more complicated by the different conceptions of censorship around the world, where some states have a prohibition of censorship in their constitutions, some derive it implicitly, and some states promote a close but not identical concept of the doctrine of *prior restraint*.

The fourth chapter then turns to the absoluteness of the prohibition on censorship. The absolute prohibition of censorship is not universally accepted, but J. Hodulík points out that, at least in the Czech Republic, there is a consensus on the absoluteness of the prohibition not only in legal scholarship, but also among the various branches of public authorities, including the Ministry of the Interior. The absoluteness of the prohibition of censorship, however, also entails the complication that the entire content of the prohibition of censorship is perceived narrowly, so that various exceptions to it do not arise.

The comprehensive fifth chapter then turns to one of the fundamental features of censorship - the pre-emptive nature of intervention. Even though this criterion may seem trivial on the surface, it contains many interesting nooks and crannies, which J. Hodulík brings to light with specific historical and modern examples. It is here that J. Hodulík also addresses the important problem of how to define or even imagine censorship on the Internet. He presents a wide range of possible approaches, but he himself sticks to a more restrictive interpretation. This section in particular may be a catalyst for further doctrinal work in the area of content restriction on the Internet and the relationship of such restriction to the prohibition of censorship. In theory, it would certainly be possible to devise complex situations where even a restrictive interpretation of prohibition of censorship would result in Internet content being restricted, but these are specific topics related to IT law.

The next chapter, chapter six, is devoted to the second necessary criteria for constitutionally prohibited censorship – the origin from public authority. Again, this is a criterion that, on closer examination, presents many complexities. In particular, J. Hodulík points out the problem of delegation of some public powers to private companies. That is to say, 'circumventing' the constitutional prohibition on censorship by delegating certain responsibilities to private actors. In many cases, he indicates that in the modern era, public authorities have a wide range of possibilities to avoid the constitutional prohibition of censorship while still achieving a similar effect, i.e. limiting the right to information by other means.

He then concludes his book by summarizing his research and mentions many other unclear terms that he has shed a light on in the book – self-censorship, the constitutional dimension of media owners influencing the media, issues of automatic content filtering, and much more.

3. HIGHLIGHTS

I see the book's contribution to the Central European debate on the prohibition of censorship as twofold– one important dimension is the clarification of all the usually very emotionally tinged notions *sine ira et studio*, which may help not only in rationalizing the public debate but also in further research on these notions.

The second important part of the book is undoubtedly a certain courage to venture into the complex technological issues related to the prohibition of censorship. I believe that reading the book may lead many legal scholars to reflect on the future role of the concept of (absolute) prohibition of censorship, its potential expansion or redefinition. While the book quite admittedly did not have this ambition, I think it can be a great start to many rational debates about the concept of censorship in the 21st century.

4. CONCLUSION

J. Hodulík's book *Ústavní zákaz cenzury v teorii a praxi* (The Constitutional Prohibition of Censorship in Theory and Practice) is an important stepping stone for all those researching freedom of expression and its limitations, technological issues related to the regulation of content on the Internet, as well as for all authors engaged in broader comparative human rights studies. The book is enriched by a large number of examples from near and distant history, and thus also guarantees an engaging read, which is not always the norm in legal scholarship.

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REZEVSKA, DAIGA: GENERAL PRINCIPLES OF LAW - NATURAL RIGHTS, LEGAL METHODS, AND SYSTEM PRINCIPLES. BRILL/NIJHOFF, 2024

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In recent years, legal scholars from Central and Eastern Europe have significantly contributed to the development of the conceptual foundations of jurisprudence. Their research broadly covers various aspects of legal sociology, legal philosophy, and contemporary challenges to the rule of law – ranging from the restoration of legal systems following the collapse of socialist regimes to a detailed examination of emerging illiberal democracies. For instance, the work of András Sajó, Jiří Přibáň, and Wojciech Sadurski is internationally renowned and has helped establish the academic reputation of the entire region.

Despite the wide array of theoretical contributions, it remains relatively rare for legal scholars from Central and Eastern Europe to offer perspectives on the application of legal norms, legal reasoning, and the practical aspects of legal theory – fields commonly known in Germany as *juristische Methodenlehre*. Notably, one of the most prominent works in this area was published over a decade ago in 2011: *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* by Zdeněk Kühn (2011).

More recently, in 2024, Brill/Nijhoff published Daiga Rezevska's new book, *General Principles of Law: Natural Rights, Legal Methods, and System Principles*, which focuses on the theoretical and practical aspects of legal methodology and legal reasoning (Rezevska, 2024). The book draws on the Latvian legal system's experience – restoring the rule of law and reintegrating into the Western legal tradition after Soviet occupation, joining the European Union, and developing into a stable democracy that upholds the rule of law.

Rezevska is a leading authority in legal theory within the Latvian legal system, playing a key role in shaping both the theoretical and practical understanding of the application of legal norms. The development of legal theory in Latvia in the 21st century has been profoundly influenced by her scholarly work. In addition to her academic contributions, Rezevska is an accomplished legal practitioner. She served as a member of the Constitutional Law Commission – an expert advisory body established by the

President of Latvia for the development of constitutional doctrine – from 2007 to 2012. From 2016 to 2022, she held office as a judge at the Constitutional Court of Latvia.

In her research, Rezevska has emphasised the critical role of unwritten general principles of law in legal systems grounded in democracy and the rule of law. She argues that these principles are not merely interpretive guidelines but binding legal norms with the highest legal force – applicable directly and prevailing even over conflicting constitutional provisions. According to this view, legislators must ensure that statutory norms, including those enshrined in the constitution, conform to these general principles. Judges, in turn, are mandated to verify and enforce this compatibility, applying general principles in situations of normative conflict (Rezevska, 2024, p. 66).

Rezevska's approach places a strong responsibility on judges and other appliers of legal norms. They are not only expected to resolve individual cases in a just and methodologically sound manner, but also to act as guardians of the legal system's foundational values. Their task includes assessing the consistency of written legal norms with unwritten general principles and applying the latter where necessary. In such a legal framework, it is not the legislator, but the legal practitioner – particularly the judge – who has the final say in complex cases. The legitimacy of legal outcomes thus hinges not on legislative intent, but on fidelity to the unwritten general principles of law that underpin the legal order. This approach effectively supports the protection of the fundamental values of a democratic state – namely, the rule of law, fundamental human rights, and human dignity – within both legal and social reality. In today's uncertain times, where democracies and the rule of law face a variety of internal and external threats, the framework proposed by Rezevska offers both a solid theoretical foundation and practical legal tools for judges and other legal practitioners to defend democracy and counter democratic backsliding. It provides a genuine toolkit for implementing the principles of a self-defending democracy. This is not merely theoretical rhetoric, but a thoroughly developed strategy and set of tactics for concrete legal action. This also strengthens public trust in the legal system and the state. If legal practitioners can ensure justice in every case, legal certainty and trust in the legal system will follow.

An important consequence of this theory is the development of the principle of good legislation. If general principles of law are binding on the legislator, then the legislature is no longer a sovereign body with unrestricted authority to create statutory norms or independently determine legislative procedures. According to the principle of good legislation, the legislator is bound by a number of general principles of law that must be observed and integrated into the law-making process. A failure to uphold these principles or to meet the standards of good legislation may constitute grounds for declaring a legal norm null and void – unconstitutional on procedural grounds (Rezevska, 2024, pp. 67-69). Judges and other appliers of legal norms must therefore examine not only the substantive compatibility of legal provisions with the constitution and general principles of law, but also the procedural integrity of the legislative process. In many respects, this approach imposes meaningful limits on the legislature, enabling early intervention against potential violations of the fundamental values of the legal system.

General principles of law are not determined by the subjective views or discretionary will of judges and other appliers of legal norms. Those applying legal norms do not function as legislators who are free to define the content of general principles of law. According to Rezevska, general principles of law derive their authority from the basic norm (*Grundnorm*) of the Latvian legal system. She employs Hans Kelsen's concept of the *Grundnorm* (Kelsen, 2002, pp. 59-61) to establish the ultimate source and highest authority for all general principles of law, as well as for the coherence of the legal system as a whole. In Rezevska's interpretation, the basic norm is neither content-neutral nor

value-free. She argues that, in the context of the Latvian legal system, the basic norm presupposes a democratic state based on the rule of law (Rezevska, 2024, pp. 27-32). This implies that both legislators and those applying legal norms are under an obligation to implement all relevant values, principles, and norms in legal and social reality in order to preserve Latvia's identity as a democratic rule-of-law state.

In this context, Rezevska skilfully bridges two major legal traditions. She combines the strengths of the continental European school of legal theory, with its emphasis on legal methodology and legal reasoning, with the Anglo-American tradition of legal philosophy, which insists on continuous reflection on the nature and purpose of law – even in the practical details of daily legal work. Rezevska is both a legal philosopher and a practicing legal professional, making her book equally relevant for both scholars and practitioners.

With her new book, Rezevska offers a robust theoretical foundation for legal professionals operating within contemporary legal systems marked by growing complexity and uncertainty. The 20th century premise that most legal questions are straightforward and capable of yielding clear-cut answers has become obsolete. Today's legal practitioners regularly confront hard cases that demand not only correct application of the law but also the active pursuit of justice. Modern legal systems therefore expect practitioners to possess not only technical competence but also a deep conceptual understanding of the legal system's foundations, as well as the ability to develop legal norms and craft new solutions to emerging societal challenges.

Rezevska's work views the legal system from the perspective of legal practitioners and equips them with the intellectual tools needed to ensure both justice and systemic coherence in an increasingly complex environment. Moreover, the book serves as a timely reminder that, perhaps more than ever before, the responsibility of legal practitioners in upholding the rule of law is paramount. Faced with threats to democracy and the erosion of the rule of law, practitioners must recognise that the defence of these core values largely depends on their actions (Sajó and Uitz, 2017, pp. 52-54). They can fulfil this role only if they understand their position within the legal system and are equipped with the conceptual tools required to act effectively.

In this regard, Rezevska's theory is particularly valuable: it does not separate legal practice from legal philosophy but instead encourages practitioners to approach every act of legal interpretation through the lens of fundamental legal principles. The future will not bring simplicity; rather, complexity will deepen. For this reason, legal theory – and Rezevska's book in particular – will become an indispensable companion in the daily work of legal professionals.

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REPORTS

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CONSTITUTIONAL-POLITICAL CRISES IN A PARLIAMENTARY FORMS OF GOVERNMENT AND LEGAL OPTIONS FOR RESOLUTION (BRATISLAVA, 21 MARCH 2025)

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On March 21, 2025, an international scientific conference titled "Constitutional-Political Crises in a Parliamentary Forms of Government and Legal Options for Resolution" was held at the Faculty of Law of Comenius University Bratislava. The conference was organised by the Department of Constitutional Law as one of the outputs of a scientific project under the title of "Constitutional-political crises caused by the loss of confidence of parliament in the government and possibilities for their resolution", which was supported by VEGA grant No. 1/0331/24.

The main objective of the scientific conference was to provide a space for the presentation and exchange of knowledge related to systematic (functional) shortcomings of constitutional systems based on the principles of parliamentary government, particularly with regard to the mutual relations between the government, the head of state, and parliament. The conference also aimed to present and exchange knowledge leading to possible solutions to constitutional crises caused by the loss of confidence of parliament in the government, with an emphasis on possible constitutional changes.

The opening session commenced with an introductory speech by one of the conference guarantors and head of the research team, Assoc. Prof. JUDr. Marek Domin, PhD., who particularly highlighted the participation of distinguished guests from Slovakia and the Czech Republic. One of them was Prof. JUDr. Ladislav Orosz CSc., who opened the first panel with his paper titled "Legal Instruments for Resolving the Constitutional and Political Crisis in the Slovak Republic (Do They Need to Be Changed or Supplemented?)." In it, the author analysed, among other things, the characteristic features of the constitutional political crisis and, at the *de lege lata* level, assessed the ability of the Slovak constitutional system to respond to them. The program then continued with presentations by three other speakers. The second speaker was the head of the Department of Constitutional Law at the Faculty of Law of Comenius University Bratislava, and also the second guarantor of the conference – Prof. JUDr. Marián Giba, PhD. – who analysed the issue of the functioning of the government under a regime of limited powers. In the next contribution, Assoc. Prof. JUDr. Marek Domin, PhD. focused on a comparative analysis of cases and conditions under which the head of state can dissolve parliament (or one of its chambers) in selected European countries, with an emphasis on the possibility of streamlining the powers of the President of the Slovak Republic to dissolve the National Council of the Slovak Republic. The first section concluded with a presentation by Assoc. Prof. Milan Hodás, PhD., on the impact of EU membership on interinstitutional relations.

The second panel, consisting exclusively of foreign guests, was opened by Assoc. Prof. JUDr. Zdeněk Koudelka, PhD. from the Faculty of Law at Masaryk University in Brno, who examined the position of a government without confidence in Bohemia, Moravia, and Silesia, with an emphasis on practical examples from the recent Czech past. He was followed by Assoc. Prof. JUDr. Robert Zbíral, PhD., also from the Faculty of Law at Masaryk University in Brno, who directed his contribution toward the impact of the insufficient agenda-setting role of the executive in parliament, or rather the state of the government circumventing the government in the conditions of the Czech parliament. The third speaker, Prof. JUDr. Karel Klíma, CSc., Dr. hab. from the Faculty of Law at Metropolitan University Prague, addressed the topic of "Dilemmas of the parliamentary form of government and the role of constitutionality as a guarantor of its stability." The second panel concluded with a presentation by Assoc. Prof. JUDr. Jiří Jirásek, CSc. from the Faculty of Law, Palacký University in Olomouc, who analysed the problem of governments whose personnel consists of experts instead of elected representatives.

The third panel was opened by Assoc. Prof. JUDr. PhDr. Pavel Maršálek, PhD. from the Faculty of Law, Charles University in Prague, who discussed the topic "Czechoslovak Parliamentarism in 1938-1948: between doom and salvation." Then Assoc. Prof. Marek Káčer, PhD. from the Institute of State and Law of the Slovak Academy of Sciences discussed the constitutional aspects of the case of the donated Mig fighter jets to Ukraine, which has stirred up the waters of Slovak constitutionalism (and also Slovak society as such) in recent years. The third speaker, Mgr. Vincent Bujňák, PhD. from the Faculty of Law of Comenius University Bratislava, discussed the possibilities of the material core of the constitution to act as a saviour of the dismissed government (functioning in a limited scope of powers), through the procedure of judicial review, reflecting the recent conclusions of the Slovak Constitutional Court, as well as constitutional changes. The third panel discussion was concluded with the contribution of JUDr. Eva Čelková, PhD. and Prof. JUDr. Lívia Trellová, PhD. (both from the Faculty of Law, Comenius University Bratislava) on the effectiveness of the competences of constitutional bodies in the Slovak Republic after mistrust pronounced towards government.

The fourth block of contributions followed. The first speaker was JUDr. Stanislav Gaňa, PhD., from the Faculty of Law of Comenius University Bratislava, who reflected on the possibilities of solving the situation when the government loses the trust of the Parliament, which is the primary source of its legitimacy in the Slovak Republic. Afterwards, JUDr. František Pažitný, PhD. from the Institute of State and Law of the Slovak Academy of Sciences, presented a reflection on the appropriateness of the constitutional practice of withdrawing the credentials of the members of the dismissed government as well as the subsequent granting of credentials in the conditions of the dismissed government by the President. As the third, Mgr. Samuel Cibik, PhD., also from the Institute of State and Law of the Slovak Academy of Sciences, discussed the topic "Restricting participation in political life as a solution to the instability of the parliamentary form of government". JUDr. Peter Matuška, PhD., LL.M. from the Faculty of Law of Comenius University Bratislava followed with a contribution on the legal aspects related to the declaration of invalidity of the elections to the National Council. The fourth and last panel was concluded by the doctoral student Mgr. Martin Búran with a contribution on the impact of constitutional crises on human rights.

The conference was closed with a speech by Assoc. Prof. JUDr. Marek Domin, PhD., in which he warmly thanked all participants, appreciated the significant discussion that arose after several contributions and pointed out the desirability of further dealing with the issue - also because of the diversity of views that were expressed at this conference. Primarily, however, because the parliamentary form of government is highly sensitive to constitutional crises.

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CURRENT CHALLENGES, OPPORTUNITIES AND GLOBAL PERSPECTIVES OF CRIMINAL LAW; MILESTONES OF LAW IN CENTRAL EUROPE (ČASTÁ, 10 – 12 APRIL 2025)

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From April 10 to 12, 2025, the 19th edition of the international scientific conference ***Milestones of Law in the Central European Area 2025*** took place in Častá – Papiernička. The event was held under the auspices of the Dean of the Faculty of Law of Comenius University Bratislava, prof. JUDr. Eduard Burda, PhD.

On April 10, 2025, the conference was attended by a team from the Department for Scientific and University Cooperation of the French Embassy in Slovakia, led by Dr. Thomas Perrin, Attaché for Scientific and University Cooperation. The participants were welcomed by prof. JUDr. Jozef Čentéš, DrSc., Head of the Department of Criminal Law, Criminology, and Criminalistics at the Faculty of Law of Comenius University Bratislava,

who received a word of thanks from the French diplomats for the invitation. Dr. Perrin particularly praised the importance of the conference focused on young researchers and highlighted the event's contribution to strengthening scientific and academic relations between France and the Slovak Republic.

The Criminal Law Section focused on the latest trends and challenges in criminal law in a global context. The section emphasised knowledge exchange on the application of criminal law institutions, practical challenges in enforcement, and legislative changes. Global developments influencing the future of criminal law were also discussed. The section was professionally supervised by prof. JUDr. Jozef Čentéš, DrSc., and prof. JUDr. Margita Prokeinová, PhD. On the second day, a practical workshop led by JUDr. Daniel Petričko, PhD., was held to present the Electronic Monitoring System (ESMO). Various types of electronic monitoring were introduced, including house arrest monitoring, restraining orders, alcohol bans, voice monitoring, and discreet surveillance.

A total of 43 active contributions were presented within the Criminal Law Section, making it the most extensive part of the entire conference. The diversity and academic quality of the presentations offered a thorough insight into contemporary issues in criminal law from both national and international perspectives. To provide a clearer structure, the presented topics have been grouped into the following thematic areas, which capture the core directions and professional priorities of the section:

I. Legislative Changes and Reforms: Several contributions addressed the impact of the amendment to the Criminal Code No. 40/2024 Coll., which fundamentally changed approaches to the evaluation of damage, the statute of limitations, sentencing, and protective measures. There was significant discussion about the need to humanise penalties, support restorative justice and its legal framework, and emphasise individualised sanctions. Questions were raised regarding the proportionality of penalties for legal entities and tools for ensuring alignment between criminal policy and the principle of justice. New rules sparked debate about the boundaries of state interference with personal freedom and property. Participants stressed the need for continuous assessment of the amendment's effectiveness in light of judicial decisions and practical application.
II. Criminal Policy and Enforcement Practice: Numerous presentations focused on problems identified in applying the amended Criminal Code in daily practice. Topics included the importance of damage amount as a key criterion for criminal liability, asset seizure, and jurisdiction of criminal justice authorities. Issues of evidence collection were addressed, including specifics of tax evasion and public procurement fraud. Several legislative shortcomings were highlighted for their impact on legal certainty and the effectiveness of crime prosecution. The presentations demonstrated that practical enforcement is a living laboratory that tests the limits and potential of legal norms.
III. Technology and Criminal Law: A highly relevant theme was the interaction between modern technologies and criminal law. Presentations focused on the use of artificial intelligence in evidence gathering, credibility assessment of testimonies, and digital evidence analysis. Speakers warned of ethical, procedural, and evidentiary risks arising from increasing digitalisation of forensic tools. Constitutional limits on surveillance and electronic communication monitoring were also examined. Participants emphasised the urgent need for legal adaptation to technological developments while maintaining fundamental rights and freedoms. It was noted that Slovak

criminal legislation does not yet reflect the need for legal regulation in areas such as cybersecurity.

IV. **Protection of Fundamental Rights and International Dimension:** Several contributions addressed criminal law challenges in the context of human rights protection and international law. Topics included criminal liability for social media speech, the interpretation of freedom of expression, and the impact of European Court of Human Rights case law on domestic rulings. Special attention was given to the protection of children from sexual abuse and the significance of upcoming European directives in this area. Hybrid threats, armed conflicts, and their implications under international criminal law were also discussed. These contributions highlighted the deepening interconnection between national and transnational legal frameworks in criminal law.

V. **Ethical and Criminological Reflections**: Some authors focused on deeper value and philosophical questions in criminal law. Their contributions addressed offender resocialisation, possibilities for rehabilitation, and the role of punishment as a societal tool. Discussions explored the phenomenon of "victim blaming" and its effect on court decisions, particularly in sexual crime cases. Reflections on the development of criminology as a scientific discipline and the need to maintain ethical balance when introducing new tools into criminal proceedings enriched the section with a crucial humanising perspective and supported debate on long-term criminal policy trends.

Throughout the presentations, space was created for constructive discussion, which served as a stimulus for developing new perspectives on current challenges in criminal law.

The Criminal Law Section confirmed its prominent role within the conference, not only in terms of the number of contributions but especially through their high academic quality and thematic diversity. By reflecting on practical problems stemming from the amended Criminal Code and offering solutions, the section contributed significantly to seeking answers to challenges in legal practice. In this sense, the section can be considered an important contribution not only to the systematic development of criminal law science but also to the academic dialogue on the direction of modern criminal justice in a dynamically changing legal and social environment.

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INTERDISCIPLINARY PERSPECTIVES ON SELF-DETERMINATION AND AUTONOMY: A CONFERENCE REPORT (BRATISLAVA, 30 MAY 2025)

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Who decides who we are – ourselves, or the society we are a part of? This was one of the questions posed by the organisers of the conference *"**Self-Determination and Autonomy: Interdisciplinary Perspectives**"* when they decided to hold this international academic event on 30 May 2025, under the auspices of the Faculty of Law at Comenius University Bratislava, as part of the APVV-23-0252 project "*Self-Determination of Intersex, Transgender, and Non-Binary Persons*".

The organisers aimed to encourage the widest possible discussion on this topic — not only from a legal perspective but also from the viewpoints of other professions and academic disciplines. Thanks to the contributions of both speakers and participants, the conference took place in a professional and interdisciplinary, yet welcoming and inclusive atmosphere, bringing together individuals from the fields of law, medicine, sociology, philosophy, ethics, and theology in the same room. Among those present were not only academics and students, but also practitioners working in areas related to the issues under discussion.

A distinctive feature of the conference was the topicality of its subjects — many of the presentations addressed very recent cases, some of them only a few months old. This gave participants the opportunity not only to witness but also to actively contribute to the formation of an emerging professional and academic discourse. Moreover, the current relevance of the topics under discussion allowed for a dynamic and lively debate, as many of these issues strongly resonate within society at this very moment.

The conference was opened by the project leader, prof. Mgr. **Ľubomír Batka**, Dr. theol., who in his presentation highlighted the tension between the liberal understanding of autonomy and the Christian-personalist conception of dignity, which emphasises human nature and objective good. In his view, it is important for law to present a legal image of a person and to avoid theological, metaphysical, and philosophical interpretations of dignity. To illustrate his point, he also analysed the *Dignitas infinita* Declaration, in which the Magisterium of the Catholic Church definitively rejects an understanding of dignity based solely on rationality or free will, as this would exclude certain groups. The Magisterium likewise rejects autonomy understood as radical individualistic arbitrariness, unconditioned by the common good or human nature. Prof. Batka went on to examine the positions of the national ethics councils of Germany and Austria on intersexuality, which are grounded in respect for the dignity, autonomy, and bodily integrity of intersex children. In conclusion, he emphasised the need for respect, protection, and a careful balance between dignity and freedom — particularly in relation to vulnerable groups such as intersex persons. [1]

The next speaker was Mgr. **Martin Fafejta**, Ph.D., a sociologist from the Faculty of Arts at Palacký University in Olomouc, who, among other things, presented a monograph co-authored with Šárka Dušková and Zdeněk Sloboda titled *Trampoty s pohlavím: Sociální a právní aspekty života intersex lidí* (*Gender Troubles: Social and Legal Aspects of Intersex People's Lives,* 2023). In his presentation, he focused primarily on the terminology used in connection with intersex persons. He distinguished between the terms "intersex person", "person with a disorder of sex development", and "person with a variation of sex characteristics", pointing out the meaning of each as well as their advantages and disadvantages. He personally prefers the last term, as "variation" (compared to "disorder") is not stigmatising and does not describe the person as existing "between sexes."[2] In the context of medical interventions performed on intersex persons, he also posed several provocative questions: "To what extent does an individual have bodily autonomy? To what extent does one have an obligation to conform to socio-

[1] Batka has also critically engaged with the position of the Evangelical Church. In his article, he observes that: *„It is legitimate to ask whether, in this Statement, the Evangelical Church of the Augsburg Confession has truly found its evangelical identity, and whether its stance toward transgender individuals is genuinely biblical. Rather, it appears that the adopted position — opposing homosexual behaviour and the ordination of transgender persons — endorses a fundamentalist hermeneutic and aligns with Roman Catholic sexual morality."* See Batka (2025, p. 74).

[2] This existence „between sexes" (in legal terms) poses a difficult challenge for intersex persons, particularly within legal systems structured grounded in binary normativity. As Meteňkanyč says: *„It is now a well-established fact that not all intersex and trans individuals (including non-binary persons) experience a desire to change or legally reassign their gender/sex to its binary opposite (i.e., male-to-female or female-to-male). As a result, many societies that continue to uphold a predominantly binary understanding of both society and law place a substantial portion of the trans and intersex community in the difficult position of having to choose which legal gender/sex to align with. In this context, the introduction of an additional gender/sex marker (such as the "X" marker), already adopted by several countries, appears to be a more inclusive solution—one that, according to many, better reflects the diversity within the trans community (including non-binary persons) as well as intersex individuals."* See Meteňkanyč (2023, p. 56).

cultural expectations?" These questions suggested that if we want to change the approach of medicine, we must first change society's approach.[3]

The next section of presentations was opened by Mgr. **Nikolas Sabján**, PhD., LL.M., and Mgr. **Olexij M. Meteňkanyč**, PhD., who, in their contribution titled *Sex =/≠ Gender (?) and Law*, somewhat provocatively raised the question of the relationship between the categories of sex and gender. They pointed out that legal theory and practice still tend to approach these concepts uncritically, often treating them as self-evident categories (with sex, in particular, frequently regarded as an unquestionable truth).[4] In the Central European context, the relationship between sex and gender has traditionally been explained through two dominant perspectives: either viewing them as identical categories (sex = gender) or contrasting them through a dichotomy of nature/biology versus culture/socialisation (sex ≠ gender). They raised two key questions: is it truly sufficient to limit ourselves to these perspectives?[5] And is the distinction between sex and gender as clear-cut as it is often assumed to be? These issues were also discussed in light of a recent decision by the Supreme Court of the United Kingdom in *For Women Scotland Ltd v The Scottish Ministers*, Case ID UKSC/2024/0042, which they critically evaluated, highlighting the value of a different, contextual approach - the basic features of which they outlined in their contribution.[6]

Mgr. **Igor Hron**, PhD., also addressed the recent British court decision discussed in the previous contribution, but rather than focusing on its interpretation or its potential implications for future developments, he examined the decision from a systematic and comparative perspective. He first clarified the relevant legal framework applied in the proceedings and distinguished between the regimes arising from the Gender Recognition Act and the Equality Act. He then contrasted the particularities of decision-making within the Continental legal system and the Anglo-American system, emphasising that judges in the Anglo-American system do not use the same interpretative methods familiar to those in our jurisdiction. This distinction allowed him to assess and individually evaluate the court's methods of argumentation. Among other critiques, he noted that the court did not address the interpretation through the Human Rights Act, which in the UK implements the European Convention on Human Rights. Through his analysis of the nature of the arguments underpinning the court's decision, he provided a strong critical assessment of the ruling.

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[3] In a legal context, Lenka Dufalová (2024, p. 55) points out the following *„It is undisputed that the need to protect these* (intersex - authors' note) *individuals is essential, particularly in the context of providing healthcare primarily involving normalising surgeries, especially for minors, to whom legal systems generally grant only limited rights to decide on interventions affecting their bodily integrity."*

[4] As Sabján already pointed out in his previous conference paper: *„…contemporary scientific research increasingly shows that sex is a far more complex category than it may seem at first glance. The idea of a strict sex binary appears to be primarily a cultural and social construct, which stands in contrast to current scientific findings."* See Sabján (2023, p. 121).

[5] The attempt to draw a distinction between gender and sex *„…was characteristic of the second wave of feminism in the 1960s and 1970s. Particularly significant were studies in the fields of sexology and anthropology, which demonstrated the distinction between gender—as a social construct—and sex, which was, by contrast, regarded as a biological category."* See Sabján (2022, p. 223).

[6] The case in question reflects a broader conflict between trans-exclusionary (or trans-skeptic) feminists and trans-inclusive feminists. As Meteňkanyč says: *„Contemporary trans-skeptical feminist positions most commonly raise objections and express concerns related specifically to the concept of trans identity and the principle of gender self-determination (self-declaration). The argument goes that if the process of legal gender recognition is left unregulated and reduced to a mere written declaration by the individual, such a legal framework has the potential to encroach upon spaces traditionally reserved for women, threaten their socio-political status, and simultaneously undermine—or even distort—the set of fundamental rights and freedoms that women have fought hard to secure over the past centuries."* See Meteňkanyč (2022, p. 114).

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Moving geographically closer, Mgr. **Olexij M. Meteňkanyč**, PhD., and Mgr. **Ema Mikulová** focused in their presentation on a recent decision by the Court of Justice of the European Union (CJEU) concerning a transgender refugee whose request to update their gender marker was denied by Hungarian authorities because the applicant had not undergone gender reassignment surgery. This case was particularly interesting due to its resolution — the CJEU, applying the GDPR and its principles of accuracy and the right to rectification, rejected the administrative practice requiring surgical intervention before the gender marker could be changed. According to the authors, however, this ruling is not revolutionary but rather a natural continuation of the CJEU's case law, as well as a development in the case law of the ECtHR and the legal systems of EU member states. At the same time, the authors offered some criticism of the decision, noting, among other things, that the CJEU did not provide detailed guidance on what constitutes "relevant and sufficient evidence" for making changes in official documents, which may lead to divergent interpretations across member states.[7]

Prof. JUDr. **Alexandra Löwy**, PhD., focused on trans and non-binary persons, specifically minors, in her presentation.[8] In the first part, she identified legal regulations within the Slovak legal system that could potentially be applied to protect the right to self-determination of these individuals, primarily provisions from the Family Act,[9] the Civil Code,[10] and the Anti-Discrimination Act. She then applied these to specific case scenarios: in the first scenario, a child is born in a country other than Slovakia where sex identification at birth is not a requirement (e.g., Germany, Norway, etc.); in the second, the parents or the child, or both parents and the child, wish to identify the child as non-

[7] In Slovak academic sphere increasing emphasis is being placed to case law of CJEU and ECtHR. In the conclusion of his article, Horvat specifically underscores the importance of the ECtHR case law in the context of rights of trans persons : "*It is therefore beyond doubt that the Slovak Republic still has significant progress to make in this area. A clear path forward is indicated by the jurisprudence of the European Court of Human Rights (ECtHR), as well as by other Council of Europe documents and instruments specifically focused on the rights of the trans community.*" See Horvat (2021, p. 135).

[8] The presence of minors in such cases necessarily brings into question the legal and ethical considerations surrounding their informed consent in the context of medical interventions. According to Čipková,: „*The absence of an explicit legal provision regarding a minor's capacity to give informed consent cannot be interpreted as excluding the child from the decision-making process concerning the healthcare to be provided. At the very least, the child must be allowed to express their opinion, and that opinion should be duly taken into account. Disregarding the views of a minor patient may result in a violation of their fundamental rights—even in cases where informed consent has been granted by the legal representative.*" See Čipková (2022, p. 199).

[9] Even if legal recognition were granted to non-binary individuals, the question of determining parenthood would remain complex. A similar situation arises in the case of transgender persons, with Dufalová noting that: „*...how should parenthood be determined in such cases: should it be based on the natural conception model (that is, on biological reality, whereby only a person of the female sex can become pregnant and give birth), or rather on the legal model (i.e., according to the legal status of the parent, as registered in legally relevant documents)? This issue may become less problematic in countries that allow for the designation of a child's parents in birth certificates using the gender-neutral term 'parent' instead of the binary categories 'mother' and 'father'.*" See Dufalová (2023, p. 116).

[10] In connection with the Civil Code, the issue of inheritance rights of transgender persons also presents an interesting area of study. Raková analysed the Slovak legal framework and concluded that: „*A specific situation arises due to the absence of clear legal regulation in cases where a transgender person, following the completion of their transition, lives in a de facto partnership and passes away during the existence of such a partnership. Given the current legal regulation (or lack thereof), the partner of such a person, provided they meet the conditions of a cohabiting person under Section 474(1) of the Civil Code, will inherit as a member of the second inheritance group, together with the deceased's parents. This situation places them at a disadvantage compared to the spouse or registered partner of the deceased, who, in legal systems where such regulation exists, inherit as members of the first inheritance group, together with the descendants of the deceased.*" See Raková (2022, p. 188).

binary.[11] She concludes that autonomy must include a person's right to live and present themselves in society in accordance with how they truly and demonstrably feel, i.e., how they subjectively perceive their gender. On the other hand, both the parents and the non-binary child are constrained by the Slovak legal system, which only recognises binary gender identification. As a result, there is no possibility for non-binary legal recognition, leaving self-identification limited solely to the individual's subjective experience and the social sphere. She also notes that this legal framework restricts the possibility of asserting claims related to the Anti-Discrimination Act or protection of personal rights.

The international conference "***Self-Determination and Autonomy: Interdisciplinary Perspectives***" demonstrated the importance of open and expert dialogue on topics that touch upon the very essence of human identity, freedom, and dignity. It became one of the successful scientific events thanks to stimulating contributions and providing space for discussion from many professional perspectives, building on previous events organised by the team led by Prof. Batka at the Faculty of Law of Comenius University Bratislava (see these reports: Batka and Meteňkanyč, 2022, 2023). The themes of autonomy and self-determination showed that they cannot be approached from a single viewpoint but require a holistic, interdisciplinary approach.[12] A significant contribution of the experts was that they highlighted truly current and resonant scientific topics, while also outlining possible directions for further development in individual scientific fields.

We are glad that the presenters' contributions, as well as the discussions among participants and audience, created an exceptional space for exchanging knowledge and experience, with even difficult topics discussed in a stimulating and constructive spirit. It was an honour for us to be part of this event, and we already anticipate that in the near future, the Faculty of Law at Comenius University Bratislava will host further professional and scientific events organised by members of the project *APVV-23-0252 Self-Determination of Intersex, Transgender, and Non-Binary Persons*.

We look forward to these and to more inspiring discussions.

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[11] This potential conflict between the will of the minor and that of the parents may be resolved in various ways. In this context, Hamřik argues that: *„Parental paternalism—in the form of making decisions regarding the personal rights of minors or interfering with those rights—must be limited by the need to protect the interests of the minor, while at the same time allowing for the highest possible degree of the minor's autonomy. Such paternalism should be reduced to only those acts and restrictions that are objectively in the best interests of the child."* See Hamřik (2023, p. 19).

[12] As Renáta Kišoňová aptly pointed out (referring to the story of award-winning author Susan Faludi): *„When (…) Faludi learns that her seventy-six-year-old father has undergone gender reassignment surgery, she embarks on an unusual journey to find a sense of identity in the modern world. The author's effort to face her father's metamorphosis takes her beyond the borders: historical, political, religious, sexual, until she finds herself face to face with the question of today's time: Is identity something you choose or is it rather something you can't escape?"* (Kišoňová, 2024, p. 232).

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1ST CZECHO-SLOVAK SYMPOSIUM ON CHALLENGES OF AI FOR ADMINISTRATIVE LAW: "WHAT WE DON'T LET ROBOTS DECIDE?" (PRAHA, 7 MARCH 2025)

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The application of artificial intelligence (AI) in the decision-making of administrative authorities is a topic that is currently being discussed across Europe (Cavallo Perin and Galetta, 2025). This is also the case for the Czech Republic. The National Strategy for Artificial Intelligence 2030, approved by the Czech government, includes the following vision in relation to public administration: *"AI can make work more efficient and simpler, from automating routine tasks to assisting with more complex decision-making. Its use, therefore, makes sense both in public administration and in public services, where it can improve the quality, accessibility and efficiency of the services provided. The aim is to ensure quality data and a modern digital infrastructure while training employees and ensuring compliance with ethical and security standards. Actions under the strategy include digitisation and automation of public services, training of public administration staff, implementation of ethical and security standards and support for sharing good practice. These measures will lead to faster and more accurate public administration, fairer access to public services, higher quality services and greater citizen trust through the transparent and ethical use of AI*." This strategy is in line with the developments in other countries of Europe. Very recently, an amendment to the Code of Administrative Procedure has been discussed in the Parliament of the Czech Republic. This amendment provides for a new § 15a, which will open the doors for the use of AI in administrative decision-making. It reads as follows: *"If the nature of the matter under consideration, the protection of the rights of the persons concerned or the protection of the public interest does not require that an official person perform an act in the proceedings, the act may be performed automatically without the participation of an official person. The act may not be carried out in this way, in particular if it requires the use of administrative discretion or if it concerns a decision on an appeal."*

All these recent developments led the Department of Administrative Law at the Faculty of Law, Charles University, to organise the 1st Czecho-Slovak Symposium on Challenges for AI in Administrative Law, which was given the under title *What We Don't Let Robots Decide?* The symposium was held at the Faculty of Law, Charles University on 7 March 2025.

The symposium was opened by the Dean of the Faculty of Law, Professor Radim Boháč, who in his speech highlighted the topicality of the issue and appreciated the broad interest of the academic and professional legal community in the symposium. Vít Stehlík, managing partner of the Prague office of the law firm White & Case, which supported the symposium with its financial donation, agreed with the topicality of the issue. He emphasised the importance of AI for the current legal discourse and appreciated that the Faculty of Law is intensively devoted to this topic. Tomáš Rychlý, a judge at the Supreme Administrative Court, highlighted the importance of academic discourse for jurisprudential practice. The symposium introduction was concluded with a short contribution by Professor Jakub Handrlica (Faculty of Law, Charles University), who emphasised that the theme of the symposium is currently resonating in the academic discourse abroad – in Italy, Germany and Spain. However, the topic is not purely scholarly but very practical, as the current legislative proposal clearly reveals. Also, the topic represents a salient opportunity for a meeting of scholars from both the Czech Republic and Slovakia with the aim of discussing very recent developments in administrative law.

The symposium was divided into three panels. The first panel, entitled *Limits to the Use of AI in Public Administration*, was devoted to the limits of AI deployment in administrative law and was divided into theoretical and practical parts. The panel was moderated by Pavlína Hubková (Faculty of Law, Maastricht University). The first presentation, which was dedicated to the topic *What We Don't Let Robots Decide according to Council of Europe*, was made by Professor Jakub Handrlica (Faculty of Law, Charles University) who analysed the currently proposed amendment to the Code of Administrative Procedure in the light of the documents, as recently published by the Council of Europe (Council of Europe, 2024). In this respect, he argues that the recently proposed amendment does not represent an isolated phenomenon. On the contrary, the newly proposed legislation was heavily influenced by both German and Spanish legislation and by the recommendations published by the Council of Europe. In this respect, these recommendations must be considered in case the amendment is adopted. This concerns human control over the deployment of AI in administrative decision-making, and particularly the possibility of a judicial review. Professor Handrlica also stressed that we live in quite turbulent times. The deployment of AI into public administration seems to be inevitable. This underlines the need to identify limits for such deployment. The symposium was continued by Associate Professor Radomír Jakab (Faculty of Law, P. J. Šafárik University of Košice). In his presentation, *Artificial intelligence and administrative discretion*, he classified three stages of AI (weak, strong and super). With respect to the existing recommendations, as made by the Council of Europe, the speaker posed the question of whether more advanced stages of AI would be more appropriate for future deployment in administrative discretion. In his presentation, *Artificial intelligence and the Concept of Good Governance,* Josef Staša (Faculty of Law, Charles University) highlighted the importance of a *translation* between people involved in IT on one hand and lawyers on the other. At the same time, he stressed the public's expectations concerning the deployment of AI in public administration. He also highlighted the importance of transparency and inclusiveness in the use of AI in administrative processes and the possible synergy between AI and the concept of good deeds. The final speech of the theoretical part was the presentation by Associate Professor Zuzana Hamuľáková (Faculty of Law, Comenius University Bratislava). In her presentation, *Artificial Intelligence and Administrative Sanctions*, she drew attention to the potential of AI for efficiency, speed and reduction of errors caused by human factors. On the other hand, she also identifies problems that currently persist in this field, in particular, the lack of transparency and understanding of how AI reaches its decisions. In her

speech, she identified specific fields where AI could be currently deployed in the field of administrative criminal law. The cases are limited, and more advanced AI may be used much more broadly in the near future. In the practical part, Jan Strakoš (Ministry of Industry and Trade) presented the *Implementation of the chatbot into the Trade Business Portal*. Following the first panel, legal experts expressed their opinions on the presented ideas. Here, Zdeněk Kučera (Faculty of Law, Charles University), Jana Soukupová (Faculty of Law, Charles University) and Andrea Škopková (Ministry of Foreign Affairs) presented their comments.

The second panel, entitled *AI in the Administrative Proceedings*, was moderated by Tomáš Rychlý (Supreme Administrative Court). The panel was dedicated to both the procedural aspects of using AI in public administration and to the potential that AI can bring to savings in public administration. The panel was opened by Associate Professor Olga Pouperová (Faculty of Law, Palacký University in Olomouc) with her speech on *AI and individual procedural rights*. She emphasised the risks of using AI without humans in administrative decision-making and highlighted the need for strengthened judicial review in these matters. Also, the speaker discussed special requirements for civil servants, such as education and experience in the use of AI. Associate Professor Pouperová also addressed the issues of data protection when AI accesses personal data. While the first presentation of this panel was devoted to the perspective of the individual and his procedural rights, the second presentation addressed the perspective of administrative authorities and the potential of AI for savings and increased efficiency. In her presentation, *AI as a Tool for Optimising Administrative Proceedings,* Eliška Klimentová (Faculty of Law, Charles University) highlighted the potential of AI for the modernisation of public administration. Here, the speaker addressed the importance of chatbots and online assistants in public administration. She also presented various schemes of AI deployment from abroad, such as the Estonian project KrattAI, the Danish project Property Valuation, the French project SyRI (System Risk Indication), the German project Signale, and the French project Tax Fraud Detection. She also addressed the state of AI use in the Czech Republic and spoke about local and national projects. Comments on the second panel were provided by Simona Demková (Leiden Law School, Leiden University) and Associate Professor Miroslav Sedláček (Faculty of Law, Charles University).

The third panel was devoted to the problems of judicial review and liability for damages regarding the deployment of AI in public administration. It was moderated by Lenka Vostrá (Institute of State and Law, Czech Academy of Sciences). The problems of liability for damages with respect to the use of AI in public administration were addressed by Associate Professor Marianna Novotná, Zuzana Adamová, and Associate Professor Michal Maslen (all from the Faculty of Law, University of Trnava). In their presentation, entitled *The Liability of Public Administration for the Deployment of Artificial Intelligence*, they focused their attention on the challenges arising from the general framework for liability of the State for damages occurring from illegal acts from the AI deployment. They discussed the question of how far this general framework may cover issues related to the use of AI and to what extent the rules of the Civil Code may be applicable. The final presentation was delivered by Professor Richard Pomahač (Faculty of Law, Charles University). The title of his presentation was *Artificial Intelligence and Judicial Review*. Professor Pomahač discussed the features of *smart courts* and *judicial cobots.* At the same time, he highlighted the need for training administrative judges in the use and understanding of AI. This is an essential part of any AI deployment in public administration. As courts must efficiently review each use of AI, judges must gain a deep knowledge of how AI works and how it decides. In this respect, Professor Pomahač argued that the deployment of AI in public administration can not be limited purely to an

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amendment of the Code of Administrative Procedure. On the contrary, AI represents a grave paradigmatical change in the law and practice of public administration. The third panel was concluded by comments made by Pavlína Hubková (Faculty of Law, Maastricht University) and Tomáš Rychlý (Supreme Administrative Court).

Closing remarks were given by Professor Jakub Handrlica (Faculty of Law, Charles University) and Associate Professor Radomír Jakab (Faculty of Law, P. J. Šafárik University of Košice).

The symposium was met with keen interest from the legal community. Its Czecho-Slovak character was supported by the fact that the symposium was attended not only by academics from Prague but also from the Law Faculties of Bratislava, Brno, Košice, Olomouc and Trnava. Also, researchers from the Institute of the State and Law at the Czech Academy of Sciences took an active part in the symposium. Also, a number of lawyers from both the private and public spheres attended the symposium. Given this broad interest of the legal community in the issues discussed, written versions of the papers presented - for the rigorous review process - will be published in the journal *AUC Iuridica* in a special section of issue 1/2026. Like other issues of *AUC Iuridica*, this issue will be available in both print and electronic versions with full access to all texts.

The scientific committee of the symposium has called this symposium a *first* in the hope that some of the other law schools will take up the follow-up. The fact that the issue of AI is highly topical was confirmed by the fact that colleagues from the Department of Constitutional and Administrative Law in Košice took the initiative to organise the 2nd symposium. The 2nd Czecho-Slovak Symposium on the Challenges of AI for Administrative Law will be held in the Tokaj Wine Region in eastern Slovakia in autumn 2025. At the same time, the topic of the 3rd symposium has already been announced. It will address challenges arising from the use of AI in transport. It will be organised in cooperation with the Faculty of Law in Prague and the Institute of the State and Law at the Czech Academy of Sciences in 2026.

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TRANSNATIONAL PERVASION OF LAW IN HISTORICAL DEVELOPMENT; MILESTONES OF LAW IN CENTRAL EUROPE (ČASTÁ, 10 – 12 APRIL 2025)

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The 19th International Scientific Conference *Milestones of Law in the Central European Space* took place under the auspices of the Faculty of Law of Comenius University Bratislava from 10 to 12 April 2025. Held in the traditional setting of the special-purpose facility of the National Council of the Slovak Republic in Častá–Papiernička, the conference offered not only a high-level academic programme but also a unique and collegial environment fostering scholarly exchange and interdisciplinary dialogue.

This long-standing academic event has established itself as a key platform for young legal scholars, doctoral candidates, and academic professionals across Central Europe. It continues to fulfil its primary mission of supporting early-career researchers in presenting their work, developing presentation and critical thinking skills, and engaging in discussions that transcend national borders and legal traditions. The emphasis on international participation and diverse methodological approaches makes this event particularly valuable within the academic legal community.

The 2025 edition was held under the theme *"The Rule of Law in the 21st Century: Challenges, Opportunities, and Global Perspectives,"* a topic of growing urgency in the contemporary legal and political landscape. The conference programme reflected this theme through thirteen carefully curated thematic sessions, each exploring a distinct facet of the rule of law—from constitutional and administrative law to legal theory, history, and practical applications. With more than 150 papers presented in three working languages, the conference once again demonstrated its inclusive and international nature.

Due to the large number of submissions, the sessions were distributed across a two-day period, with presentations taking place in parallel panels. This year's programme was further enhanced by the introduction of thematic workshops, which provided participants with hands-on, practice-oriented experiences in areas critical for the future of the legal profession. The workshops addressed topics such as environmental law and climate justice, the development of legal skills and competencies, and practical pathways for internships in institutions of the European Union. Importantly, they were held in both

Slovak and English, ensuring accessibility to all participants and supporting the integration of international attendees. This format created opportunities not only for academic learning but also for practical networking, professional mentoring, and the strengthening of cross-border academic ties.

Among the diverse sessions, one of the most anticipated and intellectually rich was the session dedicated to legal history, Roman law, comparative law, and ecclesiastical and canon law. This session, held on the second day of the conference, bore the title "*Transnational Pervasion of Law in Historical Development*". It offered a broad and interdisciplinary perspective on how legal norms have historically been shaped, adapted, or distorted across various legal systems and sociopolitical contexts. The session was opened with remarks from its academic patrons, prof. JUDr. Matúš Nemec, PhD., doc. Mgr. Mgr. Ondrej Podolec, PhD., and prof. doc. JUDr. Mgr. Vojtech Vladár, PhD., who emphasised the importance of historical understanding in contemporary legal reasoning.

The thirteen papers presented in this session were grouped into thematic blocks and followed by moderated discussions, which allowed for interactive exchange among speakers and attendees. Contributions came from scholars based in Slovakia, the Czech Republic, and Hungary, underscoring the session's cross-border and multilingual character. The first block of presentations addressed both private and public law dimensions from a historical perspective. Mgr. Július Palaj presented comparative research on marriage dissolution across Austria, Hungary, Poland, and Czechoslovakia in the early twentieth century, shedding light on the evolution of family law in different legal traditions. Mgr. Frederika Vešelényiová examined the influence of Soviet ideology on Czechoslovak legal frameworks for the protection of minors during the 1950s and 1960s, contributing valuable insights into the interplay between politics and law.

In the area of public law, Mgr. Jakub Jankovič delivered an engaging presentation on cultural censorship during the interwar period in Slovakia, particularly the suppression of Hungarian-language books and music. His use of archival audio materials added a unique interactive element to the session. Mgr. Marie Sádlová from Charles University in Prague presented findings from her archival research on state arbitration in socialist Czechoslovakia, offering a deeper understanding of the legal regulation of the economy during that era.

Later contributions extended the temporal scope of the session to the nineteenth century and classical antiquity. Dr. Imre Képpesy, PhD., discussed the function of provisional court rules in press law during the 1860s, a period of significant legal reform in the Habsburg territories. Roman law was represented by the contributions of Mgr. et Mgr. Valéria Terézia Dančiaková, PhD., who examined the legal implications of Roman citizenship acquired by birth, and Bc. Veronika Blatnická, who focused on the dowry system in the Roman provinces of Egypt and Arabia.

Canon law was addressed by JUDr. ICLic. Mgr. Veronika Pétiová, PhD. et PhD., whose presentation analysed the development of the legal regulation of reserved offences, with a focus on cases involving sexual abuse and offences against minors. Her analysis included a critical reflection on the application of canon law in the Slovak context, particularly the challenges stemming from outdated interpretative materials. Mgr. Peter Príbelský, LL.M., provided a complementary contribution on the particular issues concerning property within the canon law of the Latin Church in Slovakia.

The conference concluded with a strong affirmation of its mission: to support the academic growth of young legal scholars, encourage critical discourse, and promote regional and international cooperation in legal research. Over the course of nearly two decades, *Milestones of Law in the Central European Space* has become a symbol of

academic excellence and a catalyst for innovation in legal scholarship. The successful integration of thematic workshops, a multilingual and multidisciplinary programme, and a focus on both traditional and emerging legal issues ensured that the 2025 edition continued this legacy with strength and vision.

As legal systems across Europe and beyond face new and evolving challenges, platforms such as this conference serve as a vital forum for reflection, learning, and collaborative problem-solving. The organisers, under the leadership of the Faculty of Law of Comenius University Bratislava, once again delivered an event that enriched the academic and professional community and set the tone for further cooperation in years to come.

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