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BENJAMIN FLANDER*

State Sovereignty in the Trenches: Legal Aspects of Vigilantism in Slovenia

ABSTRACT: *This article addresses the legal aspects of vigilantism in Slovenia. It aims to present to an international audience how Slovenia and its legal system reacted to the sudden appearance of anti-migrant vigilante groups, which caused a considerable shock in a country unaccustomed to such phenomena. To this end, we first define and typologize vigilantism in general terms and identify its recent manifestations in Slovenia. Next, the article outlines the divergent state responses to vigilantism from a theoretical perspective, focusing on strategies premised on the legal prohibition—e.g., legal exclusion—and prosecution of—the activities of—vigilante groups on the one hand, and the tolerance toward them and authorities' cooperation with them, while performing official tasks, on the other. The author demonstrates how Slovenia resorted to the former. The author analyses the legislative amendments, which—according to the proponents and parliamentary majority that approved the amendments—were necessary to ensure an effective response of the state and its legal system to the threat posed to national security and sovereignty by the Styrian Guard and other anti-migrant vigilante groups. Finally, the author provides a brief analysis of the criminal conviction of the Styrian Guard leader, the key figure of vigilantism in Slovenia.*

KEYWORDS: state, legal system, sovereignty, vigilantism, Styrian Guard, Slovenia

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1. Introduction

At the beginning of September 2018, social networks and Slovenian mass media were flooded with photos of the formation and training of a masked and armed group of people. It was discovered that the scenes were filmed in the forests of Pohorje near Maribor, the second-largest city in Slovenia, that the group is called the Styrian Guard (*Štajerska varda*), and that it is led by Andrej Šiško, who is also the founder and president of the non-parliamentary political party United Slovenia (*Zedinjena Slovenija*). The reaction of many Slovenians was that it was either a joke or fake news, as most people believed that such events cannot happen in Slovenia.[1] Surprise quickly turned to shock as it became clear that the images were real and that they were filmed in the country, on the sunny side of the Alps. The common belief of most citizens of the country, often referred to as 'an oasis of peace and non-violence,' was that groups such as vigilantes and paramilitary factions are unacceptable and inadmissible in Slovenia. With rare exceptions, state officials shared these opinions of citizens. The then Minister of the Interior expressed the opinion that any creation of parallel armed structures was dangerous, inadmissible, and extremely problematic. Similarly, Borut Pahor, President of the Republic and Supreme Commander of the Slovenian Armed Forces, assessed the creation of the armed group, led by Andrej Šiško, as completely unacceptable. He publicly expressed the opinion that Slovenia is a safe country in which no one who is not authorized to do so is required or allowed to arbitrarily take care of the security of the country and its borders.[2]

News about masked and armed men saluting and marching in idyllic Slovenian forests was also published by some foreign media. The Hina, Jutranji list and other Croatian media outlets published headlines such as 'Panic in Slovenia due to the formation of a paramilitary group', 'Armed Styrian Guard marching in Pohorje,' and 'Images of a paramilitary formation of extreme rightists caused panic in Slovenia.' The American news agency AP and the New York Times published images of men in military uniforms holding axes and rifles. They wrote, *inter alia*, that 'the event caused concern in the small EU member state.' The EU Observer reported that anti-migrant militias are emerging in Central Europe. This journalist drew attention to the anti-immigrant rhetoric of politicians in Slovenia, where the far-right Slovenian Democratic Party (SDS) became the strongest party in the summer 2018 elections, but failed to form a government. Reuters and the BBC also reported unusual events from Slovenia. The journalist of this British media wrote that Šiško described himself as a patriot and a fighter for the Slovenian nation, but occasionally, his ideological struggles became violent. He pointed out that Šiško

1 Maribor24.si, 2018.
2 Rabuza and Atelšek, 2018.

had been in prison in the past and that the Slovenian public was indifferent to his activism, as his political party had only 0.6% voter support.[3]

A journalist from the tabloid Slovenian News (*Slovenske novice*), who visited the Styrian Guard's three-day military training camp, reported that everything at the camp is like in a real army. Members learn to handle weapons and that they must respect the group hierarchy and ranks; they also have their own ambulance service. Drinking alcohol is prohibited for the members of the guard, and nothing is allowed without a superior's order.[4] In his statements to the media, Šiško himself explained, among other things, that the Styrian Guard is a voluntary defense group of the region of Styria, that it has more than a thousand members, that they will not allow themselves to be disarmed, and that they will 'respond if the homeland and nation are at risk'.[5] Based on his statements, it could be concluded that the members of the Styrian Guard see illegal migrants as the most serious threat to Slovenia and its citizens. More particularly, in the eyes of members of the guard, the biggest and most serious threat to the security of the country and its inhabitants are asylum seekers; that is, migrants who illegally enter Slovenian territory—usually from Croatia—and then apply for asylum.

In response to the publication of videos, photos, and reports in the media, the Slovenian Ministry of the Interior and the Police confirmed that, with the increase in illegal migration and the simultaneous polarization of Slovenian society, the establishment of various groups, movements, initiatives, and other forms of security self-organization of citizens was becoming more frequent. Normally, these organizations call themselves guards (*varde*). According to the Ministry of the Interior, certain actions of members of the Styrian Guard and some other groups were a serious security risk for the state and citizens, as their hidden purpose—under the cover of the security self-organization—was to carry out duties including the protection of the state border that are the exclusive competence of state authorities. The foundation and activities of guards and other similar groups were considered a serious and direct threat to the sovereignty and integrity of the Republic of Slovenia.[6]

Throughout 2019, the Styrian Guard became increasingly active and present in public space and public discourse. Given that new similar groups appeared, the opinion that the situation was very serious and that immediate action was required prevailed among legal and security experts, as well as among officials and other politicians from the ruling liberal coalition.[7] They assessed that, while gathering in the state border area, the actions of members of these groups and

3 Rabuza, 2018.
4 N. Č., 2019.
5 Toplak, 2019.
6 Government of the Republic of Slovenia, 2019, p. 1.
7 In contrast, there was no consensus among the locals living along the border with Croatia. While some said that vigilantes were welcome, others asserted that they would rather not see them in their neighbourhood. See Cek, 2019.

the way they behave produce a feeling of performing official security and defense tasks. Moreover, according to the Ministry of the Interior and the Police,[8] some actions of members of the Styrian Guard and Village Guards[9] have had elements of minor offenses, under the provisions of the Protection of Public Order Act, the Weapons Act, the Public Assembly Act, and the Societies Act. Nevertheless, while the most objectionable behavior of vigilantes was their presence and training near the state border, wearing uniforms and imitation weapons, using symbols such as coats-of-arms and flags, and feeling that they actually performed official duties, members of the Styrian Guard and other groups could not be prosecuted for committing minor offenses, except in rare cases. As explained by the Ministry of the Interior and the Police, according to the legal regulation in force at the time, these acts could only be prosecuted as minor offenses if reported by the residents to the police—that the offender caused them to feel uncomfortable or threatened. With rare exceptions, the criminal prosecution of vigilante practices was also out of the question. While most excessive vigilantes' acts did have certain elements of criminal acts, they would only become a criminal offense if or when vigilantes would perform an act or several acts that only an official or a military person may perform according to the law, and if they are to be caught in the act and arrested.[10] It is assumed that, with the exception of the prosecution of the Styrian Guard's leader[11] the State Prosecutor's Office did not prosecute any of the members of the Styrian Guard upon receiving reports from the police. A consensus has therefore been reached in the government coalition and among experts that an adequate response by the police and other state authorities to the activities of vigilantes was impossible[12] and that legal regulation urgently needed amendments.

At the end of November 2019, the liberal government of Marjan Šarec submitted to the parliamentary procedure the proposals for amending the Protection of Public Order Act[13] (hereinafter the PPOA-1) and the State Border Control Act[14]

8 Government of the Republic of Slovenia, 2019, p. 1.

9 When the Styrian Guard consolidated its place in the public space, the locals of some villages and settlements near the border between Slovenia and Croatia established so-called Village Guards. Although these were not directly connected with the Styrian Guard, members of the latter occasionally patrolled together with the Village Guards along the green border with Croatia.

10 Government of the Republic of Slovenia, 2019, p. 1.

11 See Section 3.2.

12 The incident that received the most attention in the media occurred when approximately sixty members of the Styrian Guard visited the police station in Slovenska Bistrica. The members of the Guard came to ask the commander of the police station why the police visited private land of their member while he was with them in the training camp. Members of the Guard streamed the happening in front of the police station live on their Facebook profiles. See V. L., 2020.

13 The Protection of Public Order Act (*Zakon o varstvu javnega reda in miru* [PPOA-1]), Official Gazette of the Republic of Slovenia, Nos. 70/06 and 139/20.

14 The State Border Control Act (*Zakon o nadzoru državne meje* [SBCA-2]), Official Gazette of the Republic of Slovenia, Nos. 35/10 – officially consolidated text, 5/17, 68/17, 47/19, 139/20, 161/21, 29/22.

(hereinafter the SBCA-2). The National Assembly did not vote on this proposal, as Šarec's government resigned in February 2020. The unchanged composition of parliament elected the new Prime Minister, Janez Janša, with a slight majority. His conservative government abandoned the previous government's proposals to amend PPOA-1 and SBCA-2 and did not prepare its own proposals. Accusing Janša's government of not being interested in effectively prohibiting and sanctioning the activities of vigilante groups, new proposals to amend PPOA-1 and SBCA-2 were prepared and submitted by the parliamentary opposition. At the end of September 2020, the National Assembly adopted these proposals.

This article addresses the legal aspects of the operation of the Styrian Guard and other vigilante groups in Slovenia. It aims to present to an international audience the way Slovenia and its legal system reacted to the sudden appearance of vigilante groups, which caused considerable shock in a country unaccustomed to such phenomena. To this end, the author first defines and typologizes vigilantism in general—legal—terms and identifies its recent appearance in Slovenia. Next, the article outlines the divergent state responses to vigilantism, from a theoretical perspective, focusing on strategies premised on the legal prohibition—e.g., legal exclusion—and prosecution of—the activities of—vigilante groups on the one side, and tolerance toward them and cooperation with them by the authorities when these are performing official tasks on the other. The author demonstrates how Slovenia resorted to the former. In the core section, the author analyses the legislative amendments, which—according to their proponents and the parliamentary majority that approved them—were necessary for an effective response of the state and its legal system to the threat posed to national security and sovereignty by the Styrian Guard and other vigilante groups. Finally, a brief analysis is provided of the judicial process in which Andrej Šiško was convicted of the crime of Incitement to Violent Change of the Constitutional Order, according to Article 359 of the Criminal Code[15] (hereinafter CC-1).

2. On vigilantism

Often referred to as popular justice and defined as the concept of people taking the law into their own hands, vigilantism[16] is attributed both positive and negative connotations in different contexts. As its definitions depend largely on the space and time in which they appear and are used, it is impossible to resort to

15 The Criminal Code (*Kazenski zakonik* [CC-1]), Official Gazette of the Republic of Slovenia, Nos. 50/12 – officially consolidated text, 54/15, 38/16, 27/17, 23/20, 91/20, 95/21, 186/21.

16 Etymologically, the word vigilante is originally a Spanish adjective meaning watchful, and as a noun is mainly used to mean a watchman or guard. Its Latin root is the adjective vigilantem (nominative vigilans), which means watchful, anxious or careful. See Nel, 2016, p. 28.

a straightforward universal definition of the multifaceted and slippery social phenomenon that is vigilantism.[17]

Provisionally at least, vigilantism may be understood as an arbitrary act or a set of arbitrary acts of seemingly official nature committed by an individual or group in the belief that either an injustice has occurred that the state's official services do not want to correct, or that official services cannot correct it due to its incompetence, dishonesty, corruptibility, or its general inefficiency in the performance of official duties. For an individual or group of individuals and their actions to constitute vigilantism, the following criteria should be met: (a) the vigilante is a civilian—a vigilante group is made up of individuals who are civilians; (b) the operation of the vigilante or vigilante group is planned and coordinated; (c) the conduct that would justify vigilantism is illegal—i.e., it constitutes a crime or a minor offense; (d) vigilantism is directed against—real or imagined—perpetrators of crimes and misdemeanors; (e) vigilantes who operate in groups are hierarchically organized with a self-proclaimed or elected leader and a clear chain of command.[18]

As vigilantes conventionally perceive themselves to be filling the gap left by unsatisfactory state power—i.e., administrative power, law-enforcement, and/or the judiciary system—, certain manifestations of vigilantism may be understood as the unlawful and intentional conduct or use of force by private citizens to prevent or punish someone who is the perpetrator of real or perceived forms of deviance.[19] In other words, vigilantes who take the law into their own hands to prevent or punish deviance seemingly exemplify an instance where law and order are detached from each other for practical reasons, with vigilantes choosing order over law.[20] As such, vigilantism is aimed, at least in part, at offering guarantees of collective security and social order in circumstances where there is a real or perceived absence of effective formal guarantees of order and security.

In their work, Nel asserts that vigilantism exemplifies the insight that an ostensibly clear boundary between crime and punishment is often blurred and arbitrary. This is because of the twofold displacement of culpability inherent to vigilantism.[21] On the one hand, vigilantes view themselves as the purveyors of morally sanctimonious violence that must be meted out to evildoers in the absence of suitable formal remedies. On the other hand, the formal legal perspective on vigilantism obstinately ignores the underlying causes of vigilantism, with the state preferring simply to blame vigilantes for their acts and punish them for taking the law into their own hands. Occupying an awkward borderland between law and

17 Abrahams, 1998.

18 Abrahams, 1998; Hine, 1998; Haas, 2010.

19 Nel, 2016, pp. 3 and 165. See also Harris, 2001, pp. 22 and 27. Harris notes that vigilantism is sometimes justified as necessary and inevitable reaction to police lethargy – an attempt to awaken the police sleeping on the job – i.e., vigilantism's existence is explained as a way of filling the policing gap left by failing authorities.

20 Nel, 2016, p. 2. See also Stettner, 1976, p. 65.

21 Nel, 2016, p. 6. See also Sundar, 2010, pp. 113–114.

illegality, paradoxically breaking the law to thereby respect it, the phenomenon of vigilantism implies the uncertain and contested nature of the distinction between deviance and responses to deviance, including vigilantes' ambiguous status as perpetrators.[22]

Drawing from Rosenbaum and Sederberg, Haas[23] divided vigilantism into three types, which differ in their specific purposes: crime-control vigilantism,[24] social-group-control vigilantism, and social-regime-control vigilantism.[25] Another type is virtual vigilantism,[26] which has emerged with the development of information technologies and the Internet. In the context of this article, the most relevant type is vigilantism with the aim of controlling social groups. It is directed against groups that allegedly threaten society's values. Unlike crime-control vigilantism, this type of vigilantism does not require a criminal—i.e., a person who committed or allegedly committed a crime or misdemeanor—as a target. Vigilante groups of this type emphasize the importance of race, culture, and religion, and understand personal violence as a response to racial or cultural conflict. The goal is to intimidate or oppress members of certain social groups, such as minority social groups and migrants.

Most academic definitions of vigilantism assume that violence, or the threat thereof, is an essential component of vigilantism.[27] Even authors who do not concede that vigilantes necessarily engage in forceful action note that only groups who at least permit the use of force as part of their operational philosophy may qualify as vigilantes. The threat of violence is implicit in even the most peaceful forms of vigilantism, which makes it difficult to distinguish meaningfully between a non-violent and a restitutive form of popular justice. While violent force may

22 Nel, 2016, pp. 6–7. See also Abrahams, 1998, pp. 7 and 153 and Burrows, 1976, p. xv.

23 Haas, 2010. See also Keller, 2009.

24 This type of vigilantism involves violence against the people who break or appear to break the law. It coincides with the classic definition of vigilantism, where an individual or a group takes justice into their own hands. Crime-control vigilantism often appears in the entertainment industry's products, which represent a man who respects the laws, but breaks them the moment he realizes that he will not get satisfaction through them for the wrong that was done and needs to be repaired.

25 This type of vigilantism wants to control or change the existing social regime/order, due to dissatisfaction with the current conditions. In this type, vigilante groups seek ways and solutions to replace the dysfunctional state bodies with bodies that share the interests and values of society. While resorting to political assassinations and the establishment of paramilitary groups, the targets of this type of vigilantism are politicians and government representatives.

26 This new type can encompass all elements and types of vigilantism. Although it takes place in the virtual world, it can also affect people and society in reality. The Internet enables the rapid transfer of large amounts of data and ideas between users and connects users with similar views, regardless of where they live. At the same time, it provides anonymity and allows the user to create new identities and a sense of power, influence and freedom, which is difficult to achieve in the real world. Power, influence, freedom, and anonymity are the paramount motivators of Internet vigilantism. See also Chang and Poon, 2016.

27 Nel, 2016, p. 42.

not always be used, its future utilization is always implied.[28] The forceful acts potentially committed by vigilantes to achieve their crime-fighting objectives can be divided into two main categories: crimes against specific victims and crimes against wider community interests, including the interests of the state. The former category may again be sub-divided into crimes against the life and bodily integrity of the target of vigilantism and crimes against the vigilante victim's property. Regarding infringement against the interests of the community, it is likely that vigilantes also resort to public violence, which entails several people acting together in a manner that is serious enough to forcibly disturb public peace or security, or to invade the rights of others.[29]

Renowned historian Timothy Snyder argues that most governments seek to monopolize violence. If only the government can legitimately use force, and this use is constrained by law, then the forms of politics that we take for granted become possible. It is impossible to carry out democratic elections, try cases in court, design and enforce laws, or indeed manage any other business of government when agencies beyond the state also access violence. Therefore, according to Snyder, paramilitary groups are a threat to modern democratic states. People and parties who wish to undermine democracy and the rule of law create and fund violent organizations that involve themselves in politics. Such groups can take the form of a paramilitary wing of a political party, the personal bodyguard of a particular politician, or apparently spontaneous citizens' initiatives, which usually turn out to have been organized by a party or its leader. Such armed groups first degrade the political order and then transform it.[30]

Vigilantism occurs globally, in one form or another; however, it is more prevalent in certain places or countries. Just as cultures differ, so do forms of vigilantism.[31] In Slovenia, vigilantism was a virtually unknown phenomenon before the appearance of the Styrian Guard, Village Guards, and similar anti-migrant groups in 2018. In the past, however, the most prominent example of vigilantism was the Slovene Home-Guard (*Slovenska vaška straža*), which appeared during the Second World War. This group was an anti-communist and anti-partisan volunteer militia of collaborators organized under the Nazi command during the 1943–1945 German occupation. It was closely linked to Slovenian right-wing anti-communist political parties and organizations, which provided most of its membership. Perhaps vigilantism can also be attributed to the activities of Franc Guzej in 1862. Franc Guzej, known as the Slovenian Robin Hood, allegedly 'took from the rich and gave to the poor.' Guzej chose the vigilante path when he was wrongfully convicted

28 Nel, 2016, p. 42; Abrahams, 2002, p. 26; Johnston, 1996, p. 228; Lee and Seekings, 2003, p. 113; Rosenbaum and Sederberg, 1976, p. 28.

29 Nel, 2016, p. 43; Burchell Principles 755.

30 Snyder, 2017 (6–Be wary of paramilitaries).

31 On vigilantism in the United States, the United Kingdom, India, and Russia, for example, see Abrahams, 1998, Sundar, 2010, Sen and Pratten, 2007, Galeotti, 2007; and Brown, 1976.

and decided to take justice into his own hands.[32] On his marauding expeditions, which stretched across southern Styria and Croatia, he chose lords and priests to steal from. The police unsuccessfully hunted Guzej from Krško to Vienna. He was found and shot on September 10, 1880, in Košnica.[33] Franc Rihtarič, who after the Second World War acted with similar motives as Guzej, was also considered to be a vigilante. Rihtarič was sentenced to death, and his execution in 1957 is considered the last death sentence carried out in Slovenia.[34]

3. Legal aspects of vigilantism in Slovenia

In this section, the response of the state and the legal system to the sudden appearance of the Styrian Guard and other vigilante groups in Slovenia will be analyzed in more detail. The original version of the legislative amendments, unsuccessfully proposed by the liberal government of Marjan Šarec, will be compared with the amendments that were adopted after the appointment of the conservative government of Janez Janša, at the proposal of the liberal wing of the parliamentary opposition. The section concludes by shedding light on the criminal conviction of the leader of the Styrian Guard.

■ *3.1. The genesis and content of the amendments to the Protection of Public Order Act and the State Border Control Act*

As indicated in the introduction, at the end of November 2019, the government of Marjan Šarec submitted parliamentary procedure proposals for amending PPOA-1 and SBCA-2. Owing to the state's security interests, the government proposed an urgent procedure for consideration of the draft law in the National Assembly. According to the government, the typical activities of the Styrian Guard and similar groups posed security risks for the Republic of Slovenia. By referring to self-organization with the goal of ensuring security, such groups can unite, with the hidden purpose of protecting the state border and performing defense and security tasks that are the exclusive competence of state authorities. Considering that restricting and sanctioning the activities of the Styrian Guard and other vigilante groups is necessary to ensure the effective performance of the duties and tasks of the police—which are directly related to providing safety and security to individuals and the community—the government concluded that Article 11 of PPOA-1 and Article 4 of SBCA-2 shall be amended.[35]

For the reasons explained above, the Šarec government's proposals were not adopted. After the resignation of Šarec's government and the election of Janez

32 STA, 2012.
33 SAMA Navitas, 2022.
34 Rihtarič, 2021.
35 Government of the Republic of Slovenia, 2019, p. 1.

Janša's new conservative government, amendments with almost identical content were proposed – not by the government, but by the left wing of the parliamentary opposition. The Act Amending the Protection of Public Order Act[36] (PPOA-1A) and the Act Amending the State Boarder Control Act[37] (SBCA-2E) were adopted in September 2020, at a session where 84 deputies of the 90-member National Assembly were present. They passed 48 votes for and one against. In addition to the deputies from the parliamentary opposition, the amendments were also supported by deputies from the political parties of the government coalition. Members of the largest party in the conservative government coalition—i.e., the SDS—and members of one of the opposition parties—i.e., the Left—abstained from voting.[38]

The amended Article 11 of PPOA-1 stipulates that a fine of 500 to 1,000 Euros shall be imposed on an individual who carries, displays, or uses decorative weapons, imitation weapons, weapons intended for alarm, signaling, or other objects that look like weapons, in a manner that creates the feeling of performing the duties of the official or military persons. If the act is committed in a group of at least two people, the individual shall be fined between 1,000 and 2,000 Euros.

The amended PPOA-1 also had a new Article 11a, which is entitled 'Use of camouflage clothing, uniforms, or other clothing similar to uniforms.' According to this provision, a fine of 500 to 1,000 Euros shall be imposed on an individual who wears camouflage clothing, uniform, or clothing similar to the uniform of official or military personnel, and by their behavior, conduct, movement, and presence in a certain public or private place, or by the use of equipment or accessories, create the impression of performing the tasks of official or military personnel. If these acts are committed in a group of at least two people, each individual shall be fined between 1,000 and 2,000 Euros.

A fine of between 1,500 and 2,500 Euros will also be imposed on an individual who, in a group of at least two persons, wears camouflage clothing, a uniform, or clothing similar to the uniform of official or military personnel, and by their behavior, conduct, movement, and presence in a certain public or private place, and by using symbols, coats-of-arms, flags, or by creating the impression of a hierarchical organization of the group, or by using vehicles bearing recognizable marks, or by using equipment or accessories, create the impression of a police or military force, the operation of which has no basis in law.[39]

Similar additions were introduced by the amendments to SBCA-2. The new provisions of Article 4 prohibit and sanction any conduct by an individual or a

36 The Act Amending the Protection of Public Order Act (*Zakon o dopolnitvah Zakona o varstvu javnega reda in miru* [PPOA-1A]), Official Gazette of the Republic of Slovenia, No. 139/20.

37 The Act Amending the State Border Control Act (*Zakon o dopolnitvah Zakona o nadzoru državne meje* [SBCA-2E]), Official Gazette of the Republic of Slovenia, No. 139/20.

38 K. T., 2020. See also Pušnik, 2020.

39 PPOA-1, Art. 11.a.

group that, with the aim of controlling the state border, is carried out in a way that is identical or similar to the performance of police tasks in the implementation of state border control. They also prohibit and sanction any behavior that hinders the police from carrying out control of the state border. Any behavior by a legal entity or an individual encouraging, organizing, or facilitating the aforementioned actions is also prohibited. For these violations, a fine of at least 1,000 Euros shall be imposed on an individual and a fine of at least 1,500 Euros for an individual who commits such an act in a group of two or more people.

A comparison between the rejected and accepted proposals for legislative amendments reveals that the differences between the two are minimal. The PPOA-2E, compared to the failed proposal of Šarec's government, foresees a wider range of prohibited actions—i.e., the use of symbols, coats-of-arms, and vehicles with markings, etc.—by which an individual or a group wearing camouflage clothing, a uniform, or clothing similar to the uniform of official or military personnel, can create the impression of performing the duties of official or military personnel. In terms of the amounts of fines, there were no significant differences between the rejected proposal and adopted amendment. There were no significant differences between the rejected and accepted proposals for SBCA-2 either.

■ *3.2. Criminal persecution and conviction of the leader of the Styrian Guard*

On September 9, 2018, a few days after his speech on the formation and training of the Styrian Guard in Apače, the police arrested Andrej Šiško, the leader of the Styrian Guard. Šiško was detained on the suspicion of committing the crime of Incitement to Violent Change of the Constitutional Order, according to the first paragraph of Article 359. He was also charged with the Unauthorized Production and Trafficking of Weapons or Explosives, according to Article 307, and the Unauthorized Production and Trafficking of Illegal drugs, Illegal substances in sports, and Precursors for the Production of Illegal Drugs, according to Article 186 of the CC1.

Along with Šiško, Matej Lesjak, who at the time of the alleged crime was a member of the executive committee of the youth wing of the SDS, was also detained on suspicion of assisting Šiško. The police conducted searches of Styrian Guard members' homes at five locations, including the house of the leader of the Styrian Guard. Šiško was brought before the investigating judge, who ordered his detention on the remand. After the investigation was completed, the Maribor District Prosecutor's Office filed an indictment against Šiško, accusing him of the Criminal Act according to the first paragraph of Article 359. The allegations referred to his speech in Apače in front of approximately sixty members of the Styrian Guard. In this speech, he stated, *inter alia*, that the Republic of Slovenia is under threat, that the police and army are incapable of providing security, and that the current government must be removed. He also called the Prime Minister a traitor. The

indictment also referred to Šiško's other statements at public gatherings and in the media, both mainstream and social.

Šiško's defense was carried out in two hearings, which lasted almost 12 hours, in total.[40] At these hearings, he stated that he felt offended because the court addressed him as the leader of the Styrian Guard, instead of the elected president of the United Slovenia Movement (*Gibanje Zedinjena Slovenija*). He submitted the book 'Peace, Freedom, Victory' to the court file and emphasized that he did not destroy the constitutionality, but rather defended it. He maintained that the gathering at the Apače was only a provocation: 'I wanted to make people realize that we live in a country where nothing works. I did the provocation to get into the public eye.' In his defense, he also said that the Styrian Guard was part of the program of the United Slovenia Movement, and that it was confirmed by the Ministry of the Interior. In a statement to the media before the verdict was announced, Šiško's defense attorney said that the accusations in the indictment were too abstract for her client to present a more concrete defense. According to her, the prosecution filed the indictment against Šiško for political reasons, and the trial was a political construct.[41]

On March 29, 2019, the District Court in Maribor found Šiško guilty of the criminal act of Incitement to Violent Change of the Constitutional Order, under the first paragraph of Article 359 of the CC-1.[42] With the same verdict, Matej Lesak was convicted of helping the convicted Šiško. The higher court in Maribor rejected the appeals filed by both convicts, his counsel, and the state prosecutor, and confirmed the verdict of the court of first instance. The court sentenced the leader of the Styrian Guard to eight months in prison, while Lesjak was handed a suspended sentence. For both, the court added a time of deprivation of liberty and detention to the sentence.

The convicted Šiško and his legal counsel contested the final verdict before the Supreme Court of the Republic of Slovenia by filing a request for legal protection. His legal counsel claimed that the criminal act allegedly committed by her client was not appropriately specified; that is, the elements of the criminal offense, as stipulated in the CC-1, could not be discerned from the description of

40 Before the start of the trial, approximately fifty members of the Styrian Guard and Šiško supporters gathered in front of the Maribor District Court. At the pre-trial hearing, the defendant said that he called for the respect of the constitution, that he had never committed the crime that the prosecution accuses him of, and that he had no intention of doing so. He pleaded not guilty to the alleged crime. He replied to the judge that his actions were a provocation and that he had nothing to confess. He greeted his supporters in the courtroom with a raised hand and told them that he was grateful to the prosecution that he would be able to explain the reasons for his actions. See Maučec, 2019a.

41 Maučec, 2019b.

42 The provision of the first paragraph of Art. 359 of the CC-1 reads: 'Whoever, with the intention of threatening the existence, constitutional order or security of the Republic of Slovenia, incites or instigates the immediate execution of criminal offenses under Arts. 348 to 357 of this Penal Code, shall be sentenced to imprisonment for not more than five years.'

the criminal act in the reasoning of the judgment. She accused the court of the first instance of violating the provisions of the criminal procedure, because the court allegedly did not provide reasons related to the nature of the convict's guilt (*dolus coloratus*). In her opinion, the provisions of the criminal procedure were also violated because the reasoning of the judgment was based on the statements of persons recorded on websites or given on television shows, whereas the defendant did not have the opportunity to hear them.[43]

In the defense attorney's opinion, in its judgment, the court did not specify the key elements of the criminal act, because it did not describe the way the act was carried out and did not define the addressee—i.e., it did not define who was incited or instigated to execute criminal offenses by the convicted, and did not describe these acts. In the opinion of Šiško's counsel, referring only to the provision in CC-1 is not sufficient for the criminal act to be specified. She assessed that his statements were within the limits of political speech, which was protected by freedom of expression. She also posited that, with his conduct, her client did not fulfill the requirements of incrimination, according to Article 359 of CC-1. According to her, her client's behavior did not deviate from the normal forms of permitted association and freedom of expression – the courts wrongly concluded that with his statements, he was inciting a violent change to the constitutional system of the Republic of Slovenia or the overthrow of state authorities.[44]

In the reasoning behind its judgment, the Supreme Court first defined the constitutional and criminal law framework for assessing the case. It assessed, *inter alia*, that the crime in question belonged to a group of—pure—political crimes. A criminal act from the first paragraph of Article 359 of the CC-1 is committed by the person who only incites or instigates actions that may threaten the existence, constitutional order, or security of the Republic of Slovenia, without their execution actually taking place. Behaviors that constitute incitement or instigation include the use of texts, drawings, speeches, audio or visual messages, media, and the Internet. The provision in question should be understood as a normative concretization of the second paragraph of Article 63 of the constitution.[45] As it is a blanket norm, its substantive scope can only be recognized with the help of supplementary norms from Articles 348–357 of the CC-1, and with the help of a legal interpretation of the terms existence of the Republic of Slovenia, constitutional order of the Republic of Slovenia, and security of the Republic of Slovenia. These are the so-called indefinite legal terms that require special attention in criminal law. Even if their use in criminal law is not excluded, the requirements of the principle of legality in criminal law must be strictly followed when interpreting them. It is also crucial that the interpretation of the provision

43 See Judgment of the Supreme Court of the Republic of Slovenia, No. III K 40945/2018, dated 29 March 2019.

44 III K 40945/2018.

45 This provision stipulates that any incitement to violence is constitutionally prohibited.

strictly follows the constitutionally permissible limits of criminal law responses to actions with which an individual wishes to participate in the management of public affairs.[46]

Considering the above constitutional and criminal law starting points—due to limitations in the scope of this article, they could not be shown in more detail—, the Supreme Court disagreed with the statements of the convicted and his counsel and rejected their request for the protection of legality as unfounded. It was found that the examples of his expressions, as described by the court of first instance in the judgment, can undoubtedly be understood as concretization of incitement to violence in the form of incitement and instigation, as prescribed in the first paragraph of Article 259 of CC-1. According to the Supreme Court, Šiško's messages to his addressees had a single common thread: to convince them of the necessity of violent behavior—i.e., of the necessity of organizing an armed rebellion. More particularly, his messages, as described in the judgment of the court of first instance, clearly express the need to commit the crime of organizing an armed rebellion under the first paragraph of Article 355 CC-1. Šiško expressed this need by convincing the addressees that, for the security and defense of the Republic of Slovenia, an alternative to the regular armed forces—that is, the armed provincial guard—must be established. He continued that by demonstrating the use of force as the only possible way to achieve these goals—the security and defense of the Republic of Slovenia—was by establishing the illegal armed group called the Styrian Guard and by publicly displaying the military formations of its masked members. In his statements, while encouraging the establishment and operation of alternative armed forces, Šiško repeatedly and persistently denied the validity of the Republic of Slovenia's legal order.[47]

The Supreme Court ruled that the court of first instance correctly assessed that Šiško's conduct exceeded the limit of permitted political expression, and that a criminal law response is necessary, appropriate, and proportional, to ensure the pursued legitimate goal—i.e., the protection of the state and its democratic constitutional order. The Supreme Court also found that it is not possible to follow the applicant's allegations of violations by the court of the first instance of the provisions of the criminal procedure, neither from the point of view of the presumption of innocence, nor from the point of view of the right to judicial protection before an independent court.[48] The verdict was reached with the votes of the four judges. One judge voted against the majority's decision.

46 III K 40945/2018.
47 Ibid.
48 Ibid.

4. Discussion and conclusion

In their work, Nel critically observes that, despite its wider societal and political repercussions, which make vigilantism a fascinating and fertile topic for legal research, it has largely been overlooked as a topic.[49] Its legal neglect is unfortunate and inexplicable, as the fundamental issues of law, order, justice, and power that lie at the heart of vigilante activities have a myriad of significant legal implications. This seems to reflect the fact that in most legal systems, there has been no legislative attempt to consider vigilantism in depth, and define acts of vigilantes separately, as specific criminal and minor offenses. Similarly, vigilantism is only occasionally referred to in court judgments. While the courts and the executive acknowledge that vigilantism exists, they seem to share the reflexive—albeit unreflective—assumption of popular culture that vigilante violence deserves harsh condemnation. According to Nel, case law considering vigilantism, without exception, has something negative to say about it.[50]

What Nel asserts matches the situation in Slovenia. In the Slovenian legal system—i.e., in its criminal law and law on minor offenses—, vigilante acts are not defined as a separate category—i.e., acts typically committed by vigilantes are not determined as a special group of criminal acts and minor offenses—, which can be partly explained by the fact that Slovenia had almost no experience with vigilantism before 2018. With the 2020 amendments to PPOA-1 and ZNDM-2, the situation has not changed. Most of the typical activities carried out by members of the Styrian Guard and other vigilante groups on the so-called green border between Slovenia and Croatia shall be processed according to the general provisions of Article 11 of PPOA-1 on the Use of Dangerous Objects—see above. These provisions do not consider the specific nature of typical vigilante acts, and do not define them as special minor offenses. Similarly, Andrej Šiško, the leader of the Styrian Guard, was arrested, prosecuted, and convicted of the general crime of Incitement to Violent Change of the Constitutional Order, according to Article 359 of the Criminal Code, which is determined in the CC-1 as one of the Criminal Offenses against the Sovereignty of the Republic of Slovenia and its Democratic Constitutional Order. Similarly, Šiško was arrested, prosecuted, and convicted of

49 Nel, 2016, p. 2.

50 Nel, 2016, p. 8. Nel points out that their analyses of vigilantism aims to evaluate the feasibility of state efforts that encourage vigilantes to become legitimate criminal justice partners, including whether such incorporation might reverse the tendency of vigilante groups to degenerate into delinquency. In sharp contrast to Nel, Snyder maintains that mob justice is a threat to a modern democratic state. The paramilitary groups first degrade a political order, and then transform it. 'When the men with guns who have always claimed to be against the system start wearing uniforms and marching with torches and pictures of a leader the end is nigh. When the pro-leader paramilitary and the official police and military intermingle, the end has come.' Snyder, 2017 (6 Be wary of paramilitaries).

the crime of Incitement to Violent Change of the Constitutional Order, according to Article 359 of the Criminal Code, which is determined in CC-1 as one of the Criminal Offenses against the Sovereignty of the Republic of Slovenia and its Democratic Constitutional Order.

The amended legislation, which categorically prohibits and sanctions as minor offenses the most typical behavior of vigilantes, and the criminal conviction of the leader of the most notorious vigilante group in the country, may create the impression that Slovenia resorted to what Nel calls 'the popular culture's reflexive—albeit unreflective—assumption' that vigilante acts—and even more so, vigilante violence—deserve zero tolerance and harsh condemnation. However, our study shows that this impression may not be completely correct. In the reasoning of the final judgment in the criminal case against the leader of the Styrian Guard, the Supreme Court pointed to the constitutional aspects of the prosecution of criminal offenses against the state's security and sovereignty. In the Supreme Court's view, it is crucial that the interpretation of CC-1 provisions strictly follows the constitutionally permissible limits of the criminal law response to actions with which an individual wishes to participate in the management of public affairs. More specifically, the limits of the incrimination of Incitement to Violent Change of the Constitutional Order in the first paragraph of Article 359 of CC-1, which protects the constitutional order of the Republic of Slovenia and its existence as a democratic republic, must be sought in the constitutionally permissible limitations of freedom of expression and association. This incrimination should be understood as a normative concretization of the second paragraph of Article 63 of the Constitution[51] —the provision of this Article/paragraph prohibits any incitement to violence. When implementing this constitutional provision at the concrete level—e.g., in a court judgment—, the test of legitimacy and proportionality must be applied, and the court must proceed from the constitutional requirement that the restriction of freedom of expression—i.e., political speech—must pursue a legitimate goal, that such a restriction must be appropriate and necessary to achieve this goal, and that the official prohibition must also be proportionate – in the narrower sense. In other words, the categorical nature of the constitutional prohibition of any incitement to violence and the CC-1 incrimination does not free the court from assessing the proportionality of the authorities' restriction of freedom of—political—speech on a concrete level. In light of this requirement, the Supreme Court had applied both tests when deciding on the application for protection of legality, as filed by the leader of the Styrian Guard. It assessed whether, in this case, the elements of incrimination—according to the first paragraph of Article 359 of the CC-1—were specified in the judgment of the court of first instance

51 The Constitution of the Republic of Slovenia (*Ustava Republike Slovenije* [Constitution]), Official Gazette of the Republic of Slovenia Nos. 33/91, 42/97, 66/00, 24/03, 69/04, 68/06, 47/13, 47/13, 75/16, 92/21.

in such a way that it was possible to recognize in it a limitation of freedom of expression, which is in accordance with the CC-1 and the Constitution.[52]

In conclusion, we wish to refer again to Nel's excellent composition on vigilantism. They remarked that the advantage of theorizing about vigilantism in general terms, rather than focusing exclusively on specific vigilante incidents, is that the insights offered may be applicable in a range of practical contexts.[53] The purpose of this article is exactly the opposite; we did not want to engage in exploring vigilantism and its versatile forms theoretically and scientifically. Moreover, the focus of the article was not on exploring the extent to which vigilantism is a product of weak or eroded state legitimacy, or the extent to which it threatens state sovereignty. Instead, we wanted to address vigilantism at a concrete level; that is, in a specific Slovenian—legal—context, which is unique because this phenomenon practically did not exist in the independent Slovenia before 2018. The main motivation for undertaking the research, which was the basis for this article, was to evaluate and explain to international readers the Slovenian reaction—i.e., the reaction of the Slovenian state and legal system—to the sudden appearance of vigilantism, which brought great unrest to Slovenian society.

52 III K 40945/2018.
53 Nel, 2016, p. 8.

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Parental Responsibility – a Rose by any Other Name… Terminology and Content

ABSTRACT: *Parental responsibility is among the key questions in family law—what should it be called and how should it be approached? Considering various countries, there is evidently no clear consensus. Ultimately, regardless of the label attached—be it parental care, parental authority, parental responsibility, or parental rights and obligations—the driving principle must be the best interest of the child. Is it possible, or even feasible, to come to a terminological and systematic unity across different national legislations? Does it even matter how we refer to this concept, as long as the contents are up to par? The following study is devoted to a systematic and terminological problem concerning one of the most important types of family law relations—the rights and obligations of parents. In this field, Slovak family law shows a certain underdevelopment, especially in relation to European legislation.*

KEYWORDS: protection of families, family law, parental authority, parental responsibility, parental care, parental rights and obligations

1. Introduction

Parental responsibility, by its most generic definition, means all rights and obligations toward a child and their assets; it includes the whole panoply of parental rights and duties. If we consider various countries, or even only European Union (EU) member states, it is clear that the concept of parental responsibility varies greatly between countries; however, it usually covers custody and access rights. Even the term used to cover this area of family law is very diverse, with different legislations using various terms to refer to this concept, such as parental authority, parental responsibility, parental care,

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parental rights and obligations, and more. The following pages are devoted to a systematic and terminological problem concerning one of the most important types of family law relations—the rights and obligations of parents. In this field, Slovak family law shows a certain underdevelopment, especially in relation to European legislation.

Slovak family law currently stands at an imaginary crossroads of its development, which is, to a large extent, due to the diametrically contradictory influences that determine it and help shape its content. On the one hand, family law remains among the most traditional branches of law, whose changes are limited by the qualitative changes in the thinking and behavior of the majority of society. This rigidity of family law allows for only gradual and very rare legislative changes, which is the reason for its minimal unification, both in the Council of Europe and in other international structures. It could be argued that family law was the least suitable area of the legal system for harmonization, let alone unification. On the other hand, however, even family law cannot resist the influence of internationalization, also in light of Slovakia's membership of European structures and the obligations arising from our status as a signatory state to a number of international conventions. In the following sections, we explore the term, parental responsibility, and its place in Slovak family law, and compare and contrast the terminology and definitions used by select countries in the hope of finding a term for this concept that would unequivocally label the concept without bringing further confusion into legal theory.

This question is particularly important now, with the pending recodification of Slovak family law; thus, we have a unique opportunity to rename the concept and bring some much-needed logic into the set of rights and responsibilities that shall belong under this term. Currently, Slovak family law operates with the terms "Parental Rights and Obligations," which, on the surface, sound like an acceptable alternative to parental authority or parental responsibility—were it not for the fact that the current family act divides rights that belong under "Parental Rights and Obligations" and those that it labels "Other Rights and Obligations of Parents and Children" without any rhyme or reason for this distinction. Thus, the issue presented is not merely a terminological question, but also a systematic one—and while the naming is important, it is even more crucial to ensure that whatever the name is, it encompasses a unified set of rights and responsibilities toward the child in their best interest. In the following chapters, we consider the evolution of Slovak family law, and within it the term, parental responsibility (and its alternatives), as well as an overview of select countries' approaches to this key concept of family law.

2. Slovak family law – the past, present, and future

Family law relations in the Slovak legal system are regulated by our Act on the Family 36/2005 Coll.,[1] which entered into force on April 1, 2005. Since 1950, family law relations have been excluded from the scope of the Civil Code and are still regulated by a separate law. In the future, however, the regulation of family relations is to be returned to the Civil Code as a separate part thereof in the framework of the forthcoming codification of general private law in Slovakia. For the current relationship between family and civil law, the return to the dual structure of private and public law after 1989 means that the regulation of personal and property conditions in a family and marriage is closely linked to general civil law. The integration of both subsystems of private law is evident even now, especially in Article 111 of the family act, which provides for the general subsidiarity of the Civil Code for legal relations regulated by the family act. Thus, unless the family act provides otherwise, the provisions of the Civil Code shall apply to family relationships.

Until 1949, family law was not uniformly regulated and codified in the territory of the Slovak republic. Legal relations in the family, by their nature, were regulated by several civil law regulations. Following World War I, after the establishment of the Czechoslovak Republic, Act no. 11/1918[2] reciprocated, with some exceptions, the then Austro-Hungarian law. In Slovakia, the reception standard took over Hungarian civil law, which was mostly unwritten customary law. The Amending Act on Marriage (Act No. 320/1919 Coll.)[3] was undoubtedly the most important step on the path of independent Czechoslovak legislation during the first republic. The act uniformly regulated the formation of marriage, marital obstacles, and the dissolution of marriage. The Amending Act on Marriage introduced an optional civil marriage in addition to a valid church marriage. Exhaustively, it adjusted the reasons for the dissolution of a marriage. This act was revolutionary in a sense, because it unified matrimonial law in the sense that it applied to all citizens of the republic, regardless of religion.

The fundamental political changes in Czechoslovakia after February 1948 were quickly reflected in the entire legal order. The new communist government within the so-called biennial of legal proceedings launched a revision of legal regulations, which also affected the area of family law. The first act on Family Law

1 Act No. 36/2005 on Family and on amendment of some other acts.
2 Act No. 11/1918 Reception Act, Art. 2, stipulated that 'all existing regional and imperial laws and regulations shall continue to be in force temporarily' in order 'to avoid any confusion and to regulate an unobstructed transition to a new life of the State.'
3 Act No. 320/1919 Coll. Marriage Amendment.

No. 265/1949 Sb.,[4] which entered into force on January 1, 1950, became, among other things, a legislative expression of the ideological principles of the new socialist law—which abandoned the classification of public and private law. The dominant paternal power was transformed in the light of equality into parental power by the Family Law Act. The adoption of this act was a significant milestone in the historical development of the family and legal relationship between parents and children; it also led to the equalization of children irrespective of their origin, i.e., irrespective of whether they were born into a marriage or out of wedlock, thereby giving effect to the principles of the constitution of May 9 on the equal rights of women and protection of men, family, and motherhood.

The Act on Family Law did not survive for very long. In 1960, a new socialist constitution was adopted in Czechoslovakia. Under ideological influence, the victory of socialism and subsequent social development were mistakenly anticipated. These misconceptions were legally expressed in the new constitution, and shortly thereafter, the basic branches of law were recodified. Important changes in the legal order ensued, affecting all areas of law, including family law and matrimonial law. The result of the second wave of the socialist codification of law was the new Family Act No. 94/1963 Coll.[5] The new law entered into force on April 1, 1964 and was in force until April 1, 2005. The new family act followed the main principles of the regulation of individual institutes in the Family Law Act of 1949, with much greater emphasis on the paternalistic understanding of the relationship between the state and the family. Based on the family act, the family became the basic building block of society, in which parents were responsible for the mental and physical development of their children, with the state and other social organizations also being ascribed some responsibilities in terms of raising children and fulfilling their material needs.

The dissolution of the Czechoslovak federation simultaneously meant the birth of new successor states, Slovakia and the Czech Republic, on January 1, 1993. Following the establishment of the Slovak Republic, the Family Act of 1963, as amended, became the basis for the regulation of family law in Slovakia as stated in the reception norm contained in Article 152 of the Constitution of the Slovak Republic. The new and current Family Act No. 36/2005 Coll. was not originally included in the Plan of Legislative Tasks of the Slovak Republic. The plan required the Ministry of Justice of the Slovak Republic to prepare only an amendment to the Family Act No. 94/1963 Coll., as amended. However, the scope of the proposed changes exceeded the possibilities of direct amendment of the law and required not only a change in the system of the law, but also the adoption of completely new legislation. The previous legislation was modern at the time and was in force for

4 Czechoslovak statute on family law of December 7, 1949, No. 265 Sb.—commonly referred to as Act on Family Law No. 265/1949 Sb.

5 Family Act No. 94/1963 Coll., promulgated by the The National Assembly of the Czechoslovak Socialist Republic.

over 40 years. In the 21st century, however, it could not sufficiently respond to the dynamic development and fundamental changes that had taken place in society. The new legislation from 2005 already reacts to the Convention on the Rights of the Child as well as to the legislative intention to recodify the Civil Code, which will include the integration of family law into the Civil Code.[6]

The abolition of the Family Act of 1963 and its replacement by a completely new family act in 2005 was considered to be a rather radical intervention in the traditional concept of family law. Although hardly anyone expected this change and both the professional and lay public were prepared for a large-scale amendment of the original law, it can be stated that, after the initial confusion and theoretical upheaval, the judicial practice has contributed to the application of this act in a fairly uniform manner. Many problems were answered with the help of foreign (especially Czech, Hungarian, and Polish) theoretical background. Although the new family act has changed most of the original provisions and stripped family law of certain remnants of the pre-1989 ideology, it can be said that it maintains continuity with a piece of legislation that was created in completely different social and political conditions.

An example of this continuity between the legislations from 1963 and 2005 may be found in the name of the law itself. Both acts are called "Family Act" (or more precisely, in very direct translation, "Law on the Family") and have the family as the primary object of their regulation in their title—which stands in contrast to most other countries' naming of "Family Law Act." Thus, the naming of the family act is rather based on the preference of the interests of society (the family as the basic unit of society) at the expense of the interests of man—the individual, with their human rights and fundamental freedoms. This contradiction between public and private interests in family law relations is probably the most significant feature of the current stage of development of family law.

Although the 1963 family act was created in a very different political era, the continuity with the 2005 successor is not necessarily negative. The legislation from 1963 was modern for its time; it established the unequivocal equal status of both parents, irrespective of the existence of a decision to entrust a child to the personal care of only one of them. The fact that such a court decision does not interfere with the exercise of parental rights and obligations, but leaves them to both parents without restriction, has advanced Slovak family law by several decades compared to many jurisdictions. This remains the case today, as it was in 1963; the court decision to entrust a child to the personal care of one of the parents does not restrict the other parent from or deprive them of the exercise of parental rights and obligations; the other parent is still entitled and obliged to raise the child, represent them, and administer their property.

6 Act No. 40/1964 Coll. Civil Code.

Although one can agree with the view that rights in family law are the most private of all subjective private rights, there must nevertheless be limits placed on the exercise of those rights by public law. Thus, the purpose of family law is not only to protect the interests of the weakest party to family law relations (the child), but also to protect the interests of society. Ultimately, law has the task of regulating social relations in the most generally acceptable form. Another requirement for modern family law is that it shall provide a system that it is socially efficient. The social effectiveness of a norm means that it is either adhered to or non-adherence to it is sanctioned by the state. If the law did not set limits on the proper exercise of parental rights and responsibilities, the assessment in any particular case would depend solely on the legal opinion of the judge applying the law, making each party hostage to the judge's moral profile. It is true that judges co-create the law, unless the legal system gives an explicit or implicit answer to the question at issue, the so-called gaps in the law. Therefore, in practice, the same or similar situations are often dealt with by Slovak courts in diametrically different ways. However, several decisions of the Constitutional Court of the Slovak Republic, according to which the principle of legal certainty inherently belongs to the immanent features of the rule of law, testify against such an application of law. They include the requirement that a certain legally relevant question be answered in the same way when repeated in the same conditions. Decisions in family matters should also be predictable. It is a practical expression of the right to a fair trial guaranteed by the Constitution.

It is clear that the priority of contemporary family law scholarship must be precisely the search for the boundary between the protection of the interests of the individual and protection of the interests of society. On the one hand, the trend of European constitutionalism places at the forefront the requirement of consistent protection of fundamental rights and freedoms of the individual, which is furthermore supported by a number of other international conventions ratified by the Slovak Republic. The protection of human rights as such, particularly the protection of the rights of the child, is now taking on a new dimension. The importance of formulating an appropriate legal framework for these issues is clear, and Slovak family law is currently being recodified in the Civil Code. The ambition of the recodification is to present a modern code that respects fundamental human rights, the principles of a democratic society, a moral value system, and the principles of decency and humanity. The discussions on integrating family law under the umbrella of civil law started in the mid-1990s; expert opinions prevailed that understood the normative regulation of family law as an integral and natural part of the forthcoming recodification of the Civil Code. In other words, family law, together with other branches of private law, should be concentrated in the new Civil Code. As of today, this remains in the realm of the future evolution of family law—the recodification of the Civil Code, and with it new family law legislation—is underway. Although the issue of the rights and obligations of the parents

of a minor child is only a part of the subject of the regulation of family rights, its rigorous theoretical analysis can contribute to the creation of a legal regulation that will be the basis of the legal stability of family law in this century. It is in this era of external influences and the internal pressure to recodify the Slovak family law that a debate on parental responsibility arose—what should it be called and, most importantly, what should be included under the umbrella of this concept?

3. Parental responsibility under current Slovak legislation and in select countries

The legal relationship between parents and children is characterized by certain specific features that are not inherent in any other relationship, not even other family law relationships. The legal status of spouses is precisely defined in the law, which states that they are equal in rights and obligations[7] or that they are entitled to the same standard of living. However, regarding the parent-child relationship, their mutual status is nowhere explicitly defined, and it is a matter of interpretation and theoretical debate as to whether the private law principle of the equality of the parties is respected in this case. Moreover, if parent and child are not equal, whose position is more sovereign? The law entrusts parents with the right to raise their children in accordance with their own religious and philosophical convictions.[8] However, the interests of a minor child are considered to be the guiding principle for the entire regulation of family law relations. It is probably not important to determine in what mutual legal relationship the parent and child are. It is much more important to seek and find a limit to the contents of parental responsibility.

The core sources of Slovak family law are the Constitution of the Slovak Republic and the family act from 2005. Article 41 of the Constitution of the Slovak Republic, according to which marriage, parenthood, and the family are under the protection of the law, forms the basis of the national legislation.[9] Simultaneously, special protection is guaranteed to children and adolescents. The protection and interest of minor children are a priority throughout the legislation. In the context of the exercise of parental rights and obligations, it is significant that the care and upbringing of children is the right of parents; however, the fact that children have the right to parental education and care cannot be overlooked. The Constitution of the Slovak Republic also provides that these rights may be restricted and that minor children may be separated from their parents, even against their parents' wishes, but only by a court decision based on the law.

7 Art. 1 Act No. 36/2005 on Family and on amendment of some other acts.
8 Art. 4 Act No. 36/2005 on Family and on amendment of some other acts.
9 Art. 41 Constitution of the Slovak Republic 460/1992 Coll.

Under the Slovak family act and relevant case-law, parental responsibility represents a relatively complex set of rights and obligations, which include, in particular, the following: a. constant and consistent care for the upbringing, maintenance, and all-round development of the minor child, b. representation of the minor child, and c. the administration of the minor child's property.

It is important to note that Slovak legislation does not use the term "parental responsibility;" it operates with the phrase "parental rights and obligations," which are primarily derived from Section 28 of the family act. We conclude that, despite the legislative inclusion of maintenance obligations in the content of parental rights and obligations in the Slovak family act, maintenance obligations do not and should not belong to parental rights and obligations due to their specific characteristics, although, systematically, they are included under the term, parental rights and obligations, which should not be the case.

As mentioned in the introduction, the development of the family and family law relations has undergone many significant changes. The ancient concept of the family is characterized by polygamy and the dominance of the father, the so-called *pater familias*, while the medieval concept of the family preserved paternal power, the *patria potestas,* in which children were subordinate to the father. The social position of a man in a family was characterized by a set of rights and duties that flowed unidirectionally from the father to a child. The child was lawless, which was reflected in the fact that their survival was primarily decided by the father, who had the right over them over life and death – *ius vitae necisque*. The 18th century is sometimes referred to as the beginning of the family revolution, in which the child becomes the center of interest of the family and society. It is important to note that, in the course of the historical development of the family, a minor child went from being the object of a parent-child relationship, whether characterized by paternal power or, later, parental power, to becoming the subject of that relationship with equal status. The development of the legal regulation of the exercise of parental rights and obligations has, in this respect, had several significant milestones.

The original historical concept of parental power or paternal authority was replaced by the term, parental rights and obligations, in Slovak legislation. These are not fully synonymous, as parental power is a comprehensive legal institute, the content of which are the individual rights and obligations of parents and children. The move away from a terminologically unified institute to partial rights and obligations was brought about by the Family Act of 1963. There were several reasons why the legislator made such a change. However, the main reasoning was that there had been serious changes in relations between parents and children, with the social mission of parents and their role in raising children coming to the fore, rather than their sovereign position based on power and authority.[10] It

10 Haderka, 1971, p. 189.

is interesting to note that the same principle—to change the focus of the institute from power to another aspect of the parental relationship—was recommended by the Committee of Ministers of the Council of Europe under the Recommendations of the Committee of Ministers to member states: No. R (84) 4 on Parental Responsibilities. The Recommendation refers to parental responsibilities as a collection of duties and powers

> which aim at ensuring the moral and material welfare of the child, in particular by taking care of the person of the child, by maintaining personal relationships with him and by providing for his education, his maintenance, his legal representation and the administration of his property.[11]

Thus, although it shifts the focus from power to care, it does not fragment the content of parental responsibility into individual rights and obligations but preserves its entirety in terminological terms under the concept of "parental responsibility," which is also used, for example, in the Convention on the Rights of the Child.[12]

The English term "responsibility" does not mean responsibility alone, but rather a burden of responsibility, a function, a duty, an obligation, a commitment, and a task. The Slovak translation of this term has not been adopted in our family law. The unified institute has remained atomized into individual rights and obligations within Slovak family law. Most modern democratic legislations preserve this institute in its unity, unlike Slovak family law. This fragmentation of the parental responsibility has given rise to further legislative confusion, particularly with regard to the different categories of interference with parental rights and the distinction between the different nature of the rights previously understood as part of the parental authority and other rights that are outside it.[13]

In contrast to the Slovak legislation, the Czech legislation has reintroduced the single term, *rodičovská zodpovědnost*, for the former institute of parental authority, which in translation would mean parental responsibility, and then in 2014, introduced the term, *rodičovská odpovědnost*, which would probably be translated more as parental liability. A significant shift can be noted in the changes in the designation of the institute, which regulates the relations between parents and children (paternal power, parental power, parental responsibility, and parental liability), but also in the changes in the content, i.e., the set of obligations and

11 Committee of Ministers of the Council of Europe: Recommendations of the Committee of Ministers to member states: No. R (84) 4 on Parental Responsibilities, adopted by the Committee of Ministers on 28 February 1984 at the 367th meeting of the Ministers' Deputies.

12 UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

13 Haderka, 1994, p. 516.

rights that the legislator assigns to the said institute. The change in the terminology was caused by a shift of the focus of interest from parents to the child, as in Slovakia; however, the approach used was different. The 2014 change that introduced the term, parental liability, instead of the previously used concept of parental responsibility[14] was used by the legislator according to the Explanatory Memorandum only for the sake of terminological consistency, not because the legislator sought to take the existing concept of this institute in a new direction. The Czech literature states that the Civil Code does not link the concept of liability with a penalty for failure to fulfil an obligation but links it with proper (or responsible) performance obligations and the proper (or responsible) exercise of rights, consistent with the tradition of the civilization of the European continent, specified in particular by the generally accepted notion of Christian morality and the intentions of the Christian traditions of European legal culture.[15] Thus, it is clear that in Czech legislation, the rather new term, parental liability, should be interpreted as an injunction to be conscious of proper conduct while emphasizing good parenting.[16]

The above variety is also apparent in other countries' legislations. The legal terminology used in different countries distinguishes similar concepts and gives them different meanings. As discussed above, over time, the nature of parenthood has undergone a dramatic transformation globally. Gone are the days when parental authority vested exclusively in a child's father, the mother's only entitlement being reverence and respect. Paternal authority was gradually whittled down over the course of the last two centuries, and we can see this change reflected not only in the contents of this concept, but also in the terms used by different countries.

For example, in Germany, a distinction is made between the concept of *Verantwortung*, i.e., liability in the sense of responsible performance of a certain activity, and that of *Verantwortlichkeit*, i.e., liability associated with a penalty for non-performance of an obligation. Similarly, as mentioned above, the Czech legal order, until 2013, distinguished between the concept of responsibility and that of liability. The *Bundesgesetzblatt* (BGB), in its original version of 1896, used the term, *elterliche Gewalt* (parental authority). The change in terminology has been made in light of the principle of the best interests of the child and to consider the child's gradually increasing ability to act independently. Thus, the German legislation started to use the term, *elterliche Sorge* (parental care), to refer to the institution, which corresponds to the institute of parental responsibility.[17] However, the

14 Art. 31 of the Family Act No. 94/1963 Coll., replaced by the new Civil Code, in effect 1 January 2014.

15 Šmíd, 2014, p. 815.

16 Hrušáková and Westphalová, 2014, p. 877.

17 German Civil Code, BGB. Civil Code in the version promulgated on January 2, 2002 (Federal Law Gazette [Bundesgesetzblatt] I page 42, 2909; 2003 I page 738), last amended by Art. 4 para. 5 of the Act of October 1, 2013 (Federal Law Gazette I page 3719).

more recently adopted legislation uses the term, *elterliche Verantwortung* (parental liability), following the terminology used in Brussels IIbis and international treaties.[18]

The Austrian *Allgemeines bürgerliches Gesetzbuch* (ABGB) uses the term, *Obsorge* (care), to refer to a similar concept, which includes the care and upbringing of a child, the care of the child's property, and the representation of the child.[19] Until the 1989 reform, it used the term, *Elterliche Gewalt* (parental authority). The introduction of the term, *Obsorge*, was intended to emphasize the new view of a child's status as a recipient of parental care, not as an object of parental authority.[20] It should be added that the new term, *Obsorge*, was introduced into the ABGB before Austria became a signatory to the international treaties that used the English version of parental responsibility or parental responsibilities; thus, the use of *Obsorge* does not imply that the legislator intended to distinguish between those terms.

The French Code Civil currently uses the term, *autorité parentale* (parental authority, but more in the sense of responsibility), and until 1970, used the term, *puissance paternelle* (paternal power). The change in terminology was related to the elimination of differences between the status of the father and that of the mother, with the last advantage of the father regarding the administration of a child's estate being abolished by an amendment in 1985. The introduction of the concept of *autorité parentale* into the Code Civil therefore preceded the adoption of international treaties that used the concept of parental responsibility, and as in the case of Austria, it cannot be interpreted as an attempt to diverge from these treaties. However, since 1970, the Code Civil has been amended several times, while the concept of *autorité parentale* has been retained and is not negatively perceived by legal theory.[21] According to the provisions of Article 371-1 of the Code Civil, *autorité parentale* includes the care of the child, protection, upbringing, and development while respecting the person of the child. It is certainly worth noting that rights in the French concept precede duties.[22]

Another country that uses the term, authority, is Denmark. The Danish concept of *forældremyndighed* could be translated as parental authority. Even the name of the legislation reflects this: Act No. 148 of 1991 is titled the Act on parental authority (*Lov om forældremyndighed og samvær*). Danish legislators have considered, on several occasions, changing the terminology from parental authority to a concept that better reflects the responsibility of the holder of this responsibility. In the end, they decided to keep the term, while emphasizing that the concept of parental authority was not only a right to decide for the child, but also entailed

18 Dethloff and Martiny, 2015, p. 1.
19 Austrian Civil Code – Allgemeines bürgerliches Gesetzbuch (ABGB) § 144.
20 Roth, 2015, p. 1.
21 Ferrand, 2015, p. 1.
22 Wiederkehr, 2013, p. 597.

a duty to protect and care for the child. Under Danish law, the parents are the holders of parental authority; however, it can be transferred to a non-parent or to two non-parents (this can only be a married couple), but there can never be more than two simultaneous holders of parental authority.

As with French and Danish law, Polish law uses the term, *władza rodzicielska*, which translates into parental authority. The primary sources of Polish family law are the principles enshrined in the Polish Constitution of April 2, 1997 and the Polish Family and Guardianship Code (Kodeks rodzinny I opiekuńczy), which interprets parental authority as a set of parents' rights and obligations toward children, which is held by both parents. A minor child is under parental authority until the age of 18.

Lithuania also belongs amongst the states that use parental authority to refer to this concept, used in Lithuanian as *tėvų valdžia*. The Lithuanian Civil Code explicitly defines parental authority as follows:

> Until they attain majority or emancipation, children shall be cared for by their parents, i.e., a child is subject to the supervision of its parents until majority or emancipation. Parents have a right and a duty to properly educate and bring up their children, care for their health and, having regard to their physical and mental state, to create favourable conditions for their full and harmonious development so that the child will be able to live independently in society.

Interestingly, Lithuanian legislation extends beyond the standard definitions and content of parental authority used in other countries; in the constitution of 1992, it states that it is the duty of the parents to raise their children 'to be honest individuals and loyal citizens, as well as to support them until they reach the age of majority.' This clearly highlights the moral aspects of parental authority that exist alongside the legal aspects. Lithuanian legislation combines the personal interests of parents and children with those of the state. It highlights the state's responsibility alongside the parents' when exercising parental authority.

Spanish legislation on family law matters is not uniform; we must distinguish between the so-called common civil law, based on the Civil Code, and the laws of Navarra, Aragon, and Catalonia. The Spanish Civil Code uses the general concept of *patria potesta,*[23] which is the same in the legislation of Navarra and Aragon, whereas Catalan law uses the term, *potestad del pare i la mar*, emphasizing that this authority is usually jointly exercised by both the father and the mother.[24] When the Spanish Civil Code was reformed in 1981, a change of terminology was discussed. In the end, however, they decided to keep this term, because it was so deeply rooted in

23 Art. 154 The Civil Code of Spain (Código Civil), formally the Royal Decree of 24 July 1889.
24 Egea Fernández et al., 2000, p. 610.

society. Although they kept the term, the legislation does not explicitly define it anywhere. The Spanish Supreme Court has interpreted *patria potestad* as a function, established in the interests of children, whose contents consist more of duties than rights.[25] If parental responsibility is held by persons who are not the parents of the child, Spanish law uses the concept of guardianship, or tutela.[26]

Sweden does not use any of the terms outlined above, but rather operates with the terms, custody (*vårdnad*, Chapter 6 Swedish Children and Parents Code) and guardianship (*förmynderskap*, Chapters 9-15 in part Swedish Children and Parents Code). These concepts together constitute what parental authority or parental responsibility encompasses in other legislations. According to the Children and Parents Code, children have a right to care, security, and a good upbringing. Children must be treated with respect and cannot be subjected to physical punishment or any other humiliating treatment.[27]

Similarly, Hungary uses the term, *szülői felügyelet*, which can be translated as parental supervision or parental custody.[28] The Hungarian Civil Code states that parental supervision shall be exercised by the parents in collaboration with one another in the interest of the child's physical, intellectual, and moral development. In jointly exercising parental supervision, the rights and obligations of the parents shall be equal. According to Hungarian legislation, parental custody covers the right to select the minor child's name, to provide care, to determine the child's place of residence, to manage their financial affairs, including the right and obligation of representing the child in legal forums, and the right to exclude guardianship and other forms of social care.[29]

Greek legislation operates with the terms, parental care and guardianship. Parental care refers to the situation in which parents have parental responsibilities for their child. If, for any reason, parental care does not exist, the court will place the child under guardianship, meaning that it attributes parental responsibilities to a third person, the guardian, who is assisted and controlled by a supervisory council and the court, based on Article 1590 of the Greek Civil Code.[30] The concept of parental care and guardianship encompasses a set of rights and obligations, which have to be exercised in the child's best interests.

Finland uses the term, *lapsen huoltajuus*, which translates into child custody. This term includes the daily care and protection for the child and their general

25 The Supreme Court of Spain: Sentencias del Tribunal Supremo de 15 de julio de 1996, 27 de septiembre y 31 de diciembre de 1996 (Judgments of the Supreme Court of 15 July 1996, 27 September 1996 and 31 December 1996).

26 Lázaro González, 2002, p. 355.

27 Swedish Act on The Children and Parents Code (Lagen om Föräldrabalk), Swedish code of Statutes, SFS 1949:381, Promulgated 1 October 1998.

28 Both terms are used in the official English translation of the Hungarian Civil Code interchangeably.

29 Barzó, 2017, p. 565.

30 Georgiadis and Stathopoulos, 2003, pp. 259–260.

well-being. This concept encompasses the child's personal relationships to other persons close to them, especially their parents. The terminology is clear from the naming of the main source of the family law, which is the Finnish Child Custody and the Right of Access Act.[31]

The Commission on European Family Law uses the term, parental responsibilities (i.e., the term, responsibility, but in plural).[32] Finally, EU legislation uses the term, parental responsibility. The name of this single institute has already aroused considerable controversy and debate internationally. Thus, it can be considered a success that European legislation has already managed to unify the concept of parental responsibility.

English legislation, specifically Article 3(1) of the Children Act 1989, defines parental responsibility as 'all the rights, duties, powers, responsibilities and authority section which by law a parent of a child has in relation to the child and his property.' This legislation emphasizes that the duty to care for the child and to raise them to moral, physical, and emotional health is the fundamental task of parenthood and the 'only justification for the authority it confers.'[33] Parental rights and duties were simply subsumed under the unified term of parental responsibility in the Children Act of 1989.

Ireland follows the EU and Council of Europe recommendation and uses the term, *freagracht tuismitheoiri,* which equates to parental responsibility. Parental responsibility is defined in the Irish Child Care Act of 1991 as rights of custody, access, and guardianship.

The Netherlands also opted for the term, *ouderlijke verantwoordelijkheid* (parental responsibility), which is defined as the duty and right of parents to care for and raise their minor child. The Dutch Civil Code stresses that care and protection are crucial parts of parental responsibility, which includes the responsibility for the child's mental and physical wellbeing and fostering the development of their personality.[34] The Dutch Supreme Court also held that parents were free to raise their children in accordance with their own outlook on life, within the framework of the law.[35]

The Swiss Civil Code also uses the term, parental responsibility. In its Article 296, it explicitly states that 'Parental responsibility serves the best interests of the child. Until such time as they attain the age of majority, children remain the joint parental responsibility of their father and mother.' Parental responsibility under Swiss law means the right and obligation to raise and care for a child with

31 Finnish Act on Child Custody and Right of Access (361/1983; amendments up to 352/2019 included).

32 Boele-Woelki et al., 2007, p. 67.

33 Department of Health. An Introduction to the Children Act 1989 London: HMSO, 1989, para. 1.4.

34 Art. 1:247 Dutch Civil Code (Burgerlijk Wetboek).

35 Supreme Court of the Netherlands 25 September 1998, NJ 1999, 379.

their best interests in mind and to take all necessary decisions unless the child has capacity to act. Interestingly, the Swiss Civil Code also outlines the detailed responsibilities of the minor child. In its Article 301, it concludes that the child

> owes his or her parents obedience; according to how mature the child is, the parents shall allow the child the freedom to shape his or her own life and, wherever feasible, take due account of the child's opinion in important matters.

We can see this great variety and changes in terminology happening globally in the past few decades. It is clear that deriving the name of this concept from the word, power—regardless of the language—is becoming obsolete in the current changed conditions in the parent-child relationship. As opposed to the former emphasis on parental power, it is primarily the rights and duties of parents arising from their social mission and function—to raise their children—rather than from any sovereign position based on the power of the parents. Although modern legal theory frowns upon the use of this term, we believe it can still be used in modern family law, as long as we understand that the parental power to control a child exists not for the benefit of the parent but for the benefit of the child and in the child's best interest.

As a result of several important international conventions,[36] the view of a child's legal status in a family and in society has changed and, consequently, so has the view of parents' role and position in the child's upbringing and care. A child has ceased to be the object of the parents' sovereign power. Different countries adopted a different approach in changing their terminology, as we have explored this question above. As some authors put it, the change in the designation is not essential; what is essential is the content of the institute.[37] The different labels for the concept suggest different notions of the parent-child relationship (and also its historical development) rather than its factual content. This is possibly determined by the specific list of rights and obligations that the institute represents. By using the terms, power, authority, care, liability, or responsibility, the legislator expresses, among other things, what position a child has in this relationship, or what position the legislator grants them.

It is logical that more recent legislation, in view of the development to date and terminology used in the international treaties by which an individual country is bound, seeks to emphasize, as much as possible, a child's position as an active subject, not as a passive recipient, or even an object of action. In this

36 For example, Declaration of the Rights of the Child 1959; Convention on the Rights of the Child 104/1991; Recommendation No. 4/1984 of the Committee of Ministers on Parental Responsibility; RE Resolution No. 2/1988 on the Sovereignty of the Interests of the Child in Private Law, etc.

37 Králíčková, 2013, p. 811.

sense, therefore, the use of the concept of parental responsibility appears to be appropriate.

Unfortunately, the Slovak language does not provide as many suitable possibilities to name this institute as some other languages do, which was probably one of the reasons why the new family act preferred to maintain the fragmentation of an otherwise unified institute and used the rather vague term "parental rights and obligations." The fact remains, however, that European legislation has introduced and recommends the collective term, parental responsibility, as the name for an institute that encompasses those rights and obligations of parents toward minor children that were previously summarized by parental authority.

From a grammatical and logical viewpoint, it would indeed seem preferable to create a unifying legal institute in Slovak family law, to clarify, at first sight, that it is a set of parental rights and obligations that relate exclusively to a minor child, or the parents' rights and obligations in respect of the care of the child's person and property. The current statutory distinction between "parental rights and obligations" and "other rights and obligations of parents and children" in Slovak family law has no logical justification. Moreover, a division of the whole into parts without any apparent logical structure does not withstand scrutiny.

In Slovakia, the Family Act of 1963 had already stopped using the term parental authority and introduced the more fragmented parental rights and obligations. These contained all parents' and children's rights and obligations. Most of them were understood as mutual, i.e., where the rights and obligations of two subjects, parent and child, constituted the content of a legal relationship—e.g., a parent not only has a duty to raise a child, but it is also their right. Conversely, the child has the right to parental upbringing and the obligation to submit to parental upbringing, as long as it complies with the legal requirements. Thus, the Family Act of 1963 fragmented the terminologically unified institute of parental authority into parents' and children's rights and obligations, while only successively naming and regulating the individual rights and obligations, without any internal logical division. Subsequently, the breakdown was theoretically dealt with through interpretation. The new Family Act of 2005 has already proceeded to a certain sorting; however, it is still not the terminologically and logically soundest solution, as mentioned above. Thus, the period from 1963 to the present day is irrelevant for the search for a suitable name for a terminologically uniform institute, because the Slovak legislation has not logically approached this terminological question and has opted for individual rights and obligations. The current terminology does not comply with European trends, and the future of Slovak family law should see a return to a terminologically uniform institute rather than partial rights and obligations under the current arrangements. This solution is also favored by EU legislation. The Recommendation of the Committee of Ministers No. R (84) 4 on Parental Responsibilities interprets parental responsibilities as a collection of duties and powers

> which aim at ensuring the moral and material welfare of the child, in particular by taking care of the person of the child, by maintaining personal relationships with him and by providing for his education, his maintenance, his legal representation and the administration of his property.[38]

It also defines the terms, father, mother, and parents, to clarify who may exclusively be the bearer of these rights and obligations. The argument for naming the classical parental power as parental responsibility is its acceptance by European legislation. However, as we have seen above, not all countries have adopted this term.

Responsibility can be understood in several senses. The content of the term, responsibility, reflects the totality of the objective requirements of a social group and society toward their individual members in the form of moral principles and norms, thus expressing the interest of the wider public or human society. Responsibility is the assumption of the consequences of one's own actions, which one does based on their free decision. Responsibility can also act, in its subjective, psychological aspect, as a peculiar state of consciousness (in the form of consciousness and feeling of responsibility, duty, conscience, etc.). Responsibility can be understood in a moral and legal sense of the word. The content of the concept of moral responsibility characterizes the orientation toward specific, socially significant moral values, includes a moral evaluation of acts and ways of behavior, and requires a responsible attitude for the choice of motives and forms of action in accordance with the goal and means of achieving it. Moral responsibility manifests itself in the readiness and ability to voluntarily exert effort to realize socially significant goals recognized and evaluated as right or just. Moral responsibility is generally linked to legal responsibility, regulating the expression of the will of individuals and the interrelationships between people. Legal responsibility generally refers to the application of adverse legal consequences, established by a legal norm, to one who has violated a legal obligation.

Thus, it can be unequivocally stated that the legal relationships between parents and children, children and parents, as well as those between parents and the state and children and the state, are relationships of responsibility. However, this is rather a philosophical understanding of the concept of responsibility, because the law understands a much narrower concept under this label. It is precisely because of this well-established and rather strict legal understanding of responsibility as a secondary legal obligation that it seems more appropriate to seek another terminologically more appropriate legal designation for the totality

38 Committee of Ministers of the Council of Europe: Recommendations of the Committee of Ministers to member states: No. R (84) 4 on Parental Responsibilities, adopted by the Committee of Ministers on February 28, 1984 at the 367th meeting of the Ministers' Deputies.

of those parental rights and obligations that constitute the content of the institution of the former parental power.

Moreover, what is a new concept in Slovak legislation is the co-responsibility of a child for their own upbringing, which is no longer exclusively the responsibility of the parent (or society). It is manifested both in a broader definition of the child's obligations—irrespective of their age—and in the competences of the court, the child-welfare authority, or other persons in the event of the child's inappropriate behavior. The Family Act of 2005 describes this in Article 43, according to which

> the child is obliged to show appropriate respect and deference to his or her parents. If the child lives in the household with his or her parents, he or she shall be obliged to contribute by personal assistance to the common needs of the family and to contribute to the expenses of the family according to his abilities, possibilities and means. The child is further obliged to cooperate with his or her parents in the care and upbringing of the child, fulfil his or her educational obligations in a manner appropriate to his or her abilities and to avoid a way of life which may be harmful to him or her, in particular the use of substances harmful to his or her physical and mental health.[39]

Educational practices and methods are also changing significantly. A child is no longer the "property" of their parents; the parents cannot behave as they like in relation to the child. If we speak of a legal relationship between parents and children, this means that a child is not a passive object of the parents' action, but is, above all, depending on age and intellectual maturity, the subject of this legal relationship, with all the consequences that this entails.

The search for a uniform name for a legal institute that would express this new position of a child in family law relations, the roles of the parent in relation to the child and also in relation to society, and the responsibility of parents and children in relation to society is a serious issue with which European legislation is also trying to deal. Meanwhile, it uses the standard term, parental responsibility, which has not been implemented into Slovak legislation. As mentioned, some countries opted for the term, parental care (following the German model), which also does not express the social role and responsibility of a parent in relation to the upbringing of a child; thus, it is not the best term to use.

None of these concepts have succeeded in fully capturing the aforementioned responsibility aspect of the parent-child-society legal relationship, nor its specificity, which stems from the fact that the vast majority of parental rights are also parental duties and that those rights correlate with a child's duties in the same

39 Art. 43, Act No. 36/2005 on Family and on amendment of some other acts.

way as the child's rights correspond to the parents' duties, without the law having to highlight that fact in particular.

Parental authority is also used in some legislations; however, it has the slightly obsolete connotation of power in its content, and it mostly focuses on one aspect of the parent-child legal relationship. While parental power or parental authority has its critics in legal theory, it has certain advantages. It is certainly a better term than the current parental rights and obligations used in Slovak legislation.

Philosophically, authority is the ability to influence the actions of others. A parent's power is the totality of the legal means available to the parent in relation to their minor child; it is, in particular, an expression of the parent's power and duty to behave and act in a certain, legally qualified manner toward the minor in accordance with the minor's best interests. The concept of parental authority thus offers several indisputable advantages over other concepts. First, it is a comprehensive concept; it expresses well both the powers of a parent and their obligations in relation to the child. It is consistent with the international requirements imposed on our legal order. It also includes the aspect of responsibility in relation to society. It has no equivalent in private law that is different in content from that of parental responsibility (as it was in the case of the slightly confusing parental liability). The term, parental authority, could offer a terminological innovation to Slovak family law that could help to articulate the totality of the rights and obligations of parents more clearly under family law.

Although it can be agreed that the content of the institute is indeed more important, and although the inaccurate designation does not constitute a major shortcoming of the legislation, we believe that a more precise designation and differentiation of individual terms, where possible, would be preferable.

4. Conclusion

Based on this research, we can conclude that there is an immense jurisdictional diversity across Europe regarding matters related to parental responsibility. Parenthood always involves a relationship of responsibility, while parental rights are vested in parents to enable those responsibilities to be met. How we view parenthood has undergone significant changes globally in the past two centuries. The notion of parents enjoying individual rights over their children has faded, while the new term of parental responsibility has emerged, which exists in the best interest of the child and for the protection of the child. The term, parental responsibility, gained worldwide recognition from its use in the UN Convention on the Rights of the Child, and this label is now regularly used in international instruments concerning children. The term, parental responsibility, accords children a position of persons, to whom duties are owed and not possessions over which power is wielded. We can see this shift away from the concept of parental

power and expressions related to this, such as parental rights, parental authority, and parental power; however, as seen from our research above, many countries have opted to keep these terms and have not yet introduced the term, parental responsibility, into their domestic legislations.

This study discussed the shortcomings of Slovak legislation regarding the terminology used; primarily, the division of parental rights into "Parental Rights and Obligations" and the labels of "Other Rights and Obligations of Parents and Children," without much logic behind the distinction between these two categories. The upcoming recodification of family law into the new Civil Code will provide a great opportunity to rectify this situation and to find a sounder terminology. From a linguistic perspective, a direct translation of the term, parental responsibility, may be somewhat cumbersome, due to the limitations of the Slovak language regarding this term. A unified label is, however, definitely necessary. If the concept of parental responsibility were introduced into Slovak law under a unified name, it would better reflect the current reality of being a parent and emphasize the responsibility of all who were in that position. Reformulating parents' position in law as one of responsibility rather than rights and obligations would bring Slovak legislation in line with modern family law trends and the Recommendations on Parental Responsibility by the Committee of Ministers of the Council of Europe adopted in 1984.

Parental responsibility encapsulates two key ideas: first, the duty of parents toward the children, and that parents must behave dutifully toward their children; and second, the notion that the responsibility for childcare is vested with parents, not the state. This shows a weakening of the supervisory role of the state over the relationship between parents and children and possible further practical implications of this development. While the term is gaining increasing recognition globally as countries are changing their legislation, there remain many examples of other terms being used.

A great resource for the terminology and content of parental responsibility is the study titled 'Content of the right to parental responsibility in the legal orders of Central and Eastern Europe,' conducted within the framework of the Central European Professors' Network coordinated by the University of Miskolc – Central European Academy, which I would encourage the reader to visit because it provides a vast amount of insight into the legislations of Central and Eastern Europe focusing on the topic of parental responsibility.

Globally, parental responsibility, parental care, parental custody, parental rights, parental accountability, and many more terms are in use today, including in Europe. The question remains—is it indeed important, or even feasible, to unify our terminology? Or do we need to focus solely on the contents? After all, as the Bard once said, a rose by any other name would smell as sweet… It is clear that whatever we name this concept, the ultimate purpose is to highlight the responsibility to care for and raise a child to be a properly developed adult physically, mentally, and morally, consistent with the child's best interest.

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REBECCA LILLA HASSANOVA*

The Prohibition of Torture and its Implications in the European Legal Sphere

ABSTRACT: *The prohibition of torture as a human right is part of the ius cogens system of international law. Prohibition is derived from the necessity of maintaining the physical and mental integrity of persons, which is embedded in humanity itself. The following article analyses the prohibition of torture in the European human rights framework. The study analyses the universal United Nations Convention against torture, legislative framework of the Council of Europe with its European Convention on Human Rights, and framework established by the European Union, respectively.*

KEYWORDS: international human rights law, international criminal law, prohibition of torture

1. Introduction

There are remains of acts of torture found from ancient times through the Middle Ages to modern times, proving that torture has been regularly conducted throughout history. Torture was applied to a considerable extent against slaves and Christians in the Roman Empire, heretics and persons accused of witchcraft during the inquisition processes of the Catholic Church, and African slaves on the American continent. Later, medieval torture techniques became well-known in history books. Furthermore, known military conduct to gain confessions of committing treason or combating terrorism is not a secret. The issue has, therefore, been a topic of academic debate worldwide, including European and American scholars dealing with criminal and human rights law. The questions that arose

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through the debates dealt with the definition of torture, its scope, decree, and acceptance.[1]

The phenomenon of torture is observed using three different approaches. First, as a crime, in conjunction with questions of responsibility, jurisdiction, and principles of accountability. Second, in relation to the legal process, necessary evidence is obtained in trials. In such cases, torture disqualifies the evidence obtained. Additionally, regarding the procedural matter of the interpretation of torture, this notion greatly impacts cases dealing with mutual recognition and extradition issues as well as cases of asylum law. Third, it is important to distinguish between the concepts of torture, inhuman treatment, and degradation.[2]

This study aims to define some of the conceptual elements of the prohibition of torture and ill-treatment. Further, it aims to review what obligations states have in terms of fundamental rights protection against torture and ill-treatment. Therefore, this study provides an in-depth research on the international legislative framework of the prohibition of torture in relation to its nature, scope, and functions. This topic is strongly related to the protection of human rights, universally established after the Second World War (WWII). The Universal Declaration of Human Rights[3] (UDHR) is a milestone in European human rights. Through this document, states committed themselves to cooperate with the United Nations (UN) to ensure the general and effective respect of human rights and fundamental freedoms. Although the text of the UDHR per se was initially not enforceable over time, it reached the level of customary law, and today, the declaration's content is binding. However, the document was considered one of the most fundamental human rights documents, providing precedent for further binding conventions, such as the European Convention on Human Rights[4] (ECHR) or the Inter-American Convention on Human Rights.[5] Regarding the topic at hand, it is worth mentioning Article 5 of the UDHR: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'[6] This has a noteworthy influence on later treaties and their provisions dealing with the prohibition of torture.

The prohibition of torture, inhumanity, degrading treatment, and punishment can be found in many important international human rights law documents.

1 Langbein, 2004, p. 100.
2 Sonnevend and Bodnár, 2021, p. 41.
3 Universal Declaration of Human Rights proclaimed by the United Nations General Assembly in Paris on 10 December 1948, GA resolution 217 A.
4 European Convention on Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, E.T.S. No. 005, entered into force 3 September 1953. More rights are granted by additional protocols to the Convention (Protocols 1 (E.T.S. No. 009), 4 (E.T.S. No. 046), 6 (E.T.S. No. 114), 7 (E.T.S. No. 117), 12 (E.T.S. No. 177), 13 (E.T.S. No. 187), 14 (C.E.T.S. No. 194), 15 (C.E.T.S. No. 213) and 16 (C.E.T.S. No. 214)).
5 American Convention on Human Rights, opened for signature 22 November 1969, 1144 U.N.T.S. 123, entered into force 18 July 1978.
6 Universal Declaration of Human Rights, 1948, Art. 5.

At the UN, torture is prohibited primarily in the UDHR (Article 5), International Covenant on Civil and Political Rights[7] (ICCPR, Article 7), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and its optional protocol.

The provisions of the abovementioned treaties contain the explicit wording of the *ius cogens* rule of the prohibition of torture, which has an absolute and non-derogable character. The *ius cogens* character of the prohibition of torture was first stipulated in the Furundžija case by the International Criminal Tribunal for the former Yugoslavia.[8] As one of the most universally recognized human rights, prohibition is part of general international law, giving rise to *erga omnes* obligations. These obligations are specifically determined obligations that have states towards each other. In legal theory, the concept *erga omnes* derives from Latin, meaning 'in relation to everyone'. These rules enable international courts (the ICJ, ECtHR, and ICC) to reach further that traditional rights and duties arising from bilateral or multilateral treaties or international customs, developing international law by standards arising from natural law. These obligations, therefore, do not require the specific consent of states to be bound by the rules to which they adhere. Therefore, the prohibition of torture is a human right that must be abided by any state and other subject of international law, even though it lacks the process of signing and ratifying any treaty with such a provision.[9]

Generally, any person with limited personal freedom who is subject to surveillance by others is more vulnerable than others. Dealing with these situations is necessary because of the frequent occurrence of involuntary disappearances; that is, a person is threatened by the most severe forms of interference with his/her physical integrity. The traditional interpretation of torture reveals that the perpetrator of violent behaviour falling within the scope of ill-treatment must be a state official or person performing a public duty. Since an official or a person performing a public duty is not directly involved in the perpetration of ill-treatment in private relationships, the relationship between the state and the individual perpetrator is established by the fact that an official knew or should have known about the act but did not do anything to prevent it. The state has both preventive and repressive obligations to prevent torture and ill-treatment. Concretely, these obligations mean normative measures to ensure the prohibition of torture in the state legislature, to apply the requirements set by the law in circumstances where there is a risk of harm, and procedural measures to investigate properly and later sanction violations of the law.[10]

7 International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 U.N.T.S. 171 and 1057 U.N.T.S. 407, entered into force 23 March 1976.

8 See *Prosecutor v. Anto Furundžija*, (ICTY Case No. IT-95-17/1-T.), Trial Judgement, 10 December 1998, para. 144.

9 Nuhija and Memeti, 2013, p. 31.

10 Savnidze, 2014, p. 113.

A legislative framework was established, which should have been followed by effective enforcement measures. Although a monitoring mechanism has been established, there are gaps in effective control over proper enforcement and prevention. Many states still use torture as an interrogation or punishment technique and do not comply with the provisions of the binding documents, nor do they forget those states that are not just member states but also considered democratic and modern, like the United States, which also has cases of torturing accused persons. However, these governments often attempt to justify their opinions and actions by protecting national security. Therefore, one must assume that the implications of the prohibition of torture are insufficient, and the expansion of measures would be welcome. In the following text, I aim to provide an overview of the legislative framework for the prohibition of torture in the European regional human rights system, considering these inadequacies. The choice of case-law is based on its importance and interpretative clarity in presenting the notion of torture in relation to the analysed conventions.

The prohibition of torture and ill-treatment is a fundamental value of the international protection system for human rights and the domestic constitutional order of democratic states. The law provides a very high level of legislative protection against torture and ill-treatment at both international and national levels. However, as shown below, the requirements for the definition of torture have evolved with society. Over time, the law and its application have become stricter, and the interpretation of what constitutes torture has become more complicated. The following sections of this article will be devoted to outlining the most significant treaties and relevant case-law, which represent the framework of protection.

2. The UN Convention against torture and other cruel, inhuman or degrading treatment or punishment

According to CAT Article 1

> "Torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain

> or suffering arising only from, inherent in or incidental to lawful sanctions.[11]

The UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) was adopted in 1984. However, there were heavy debates during its creation based on Jean-Jacques Gautier's, a Swiss lawyer, banker, and founder of the Association for the Prevention of Torture, opinions on enhancing the text of a system that would help states adhere to the legal obligations stemming from the text, which were understood to be overly complex and controversial and were intentionally left out of the text. The implementation was left to the body of ten independent experts, known as the Committee against Torture, who ratified the text.[12] The CAT is divided into a preamble and three parts. The first is devoted to substantive law, including the definition of torture in its first article and the provision stipulating universal criminal jurisdiction over the crime of torture. The second part deals with certain implementation mechanisms. In this section, the CAT establishes the Committee against Torture under Article 17 and Article 24, which has the duty to monitor the implementation of the CAT in signatory states. The Committee overlooks not just the proper alterations of national legislation to the demands of the CAT but also the enforcement of these provisions. The Committee is formed by ten independent experts who conclude observations based on state parties' reports or *ex officio*. Members meet regularly in two sessions in Geneva: one in April or May and the other in November. The Committee receives reliable information about the ill-treatment practices of states, which may lead to confidential proceedings. However, the Committee's observations are in the form of findings, general comments, manuals, or guidelines, from which none have a binding effect.[13] Nevertheless, the Committee has the power to include its findings in its annual report to the UN General Assembly, which can result in certain actions. The third part is devoted to provisions concerning the life of a document, that is, ratification clauses, amendments, and entry into force.[14]

In accordance with the CAT, the prohibition of torture must be considered an absolute right that cannot be overridden by the protection of other rights contained in the Convention. Ill-treatment cannot be justified by exceptional circumstances, such as a state of war, the threat of war, or internal political unrest. A superior order does not exempt the perpetrator from responsibility. The

11 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, U.N.T.S. 1465, entered into force 26 June 1987, Art. 1.

12 Evans and Haenni-Dale, 2004, p. 24.

13 Fact Sheet Combating Torture. No. 04 of the United Nations Committee Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, 2002, p. 11.

14 Coccia, 1990, p. 316; Derckx et al., 2013, p. 8.

provision to prevent torture is established as a legal obligation in Article 2(1) of the Convention.[15]

According to the Convention, torture is a purposeful crime; severe pain or suffering must occur as a result, and the official capacity of the person acting as a public authority is necessary. Therefore, four pillars of the definition must be fulfilled to consider certain acts of torture under the CAT. The first pillar is the nature of the act that enhances both acts as well as omissions that result in serious suffering or pain for the victim. As in international case-law, pain can also be physical or mental.[16] The second pillar represents the subjective feature; that is, the intention of the perpetrator, who must be intentionally inflicted. Negligence is consequently ruled out. The third pillar states the necessity of a purpose when an act is committed. The purpose is usually to gain a confession, obtain information, punishment, intimidation, coercion, or discrimination. However, according to Article 1 of the CAT, the list is not exhaustive; therefore, other purposes cannot be excluded. The final pillar is the involvement of public officials. Although the last pillar is regularly clear, the recognition of a third person acting in an official capacity can cause uncertainty. For example, in the *HMHI* case,[17] the Committee on Civil and Political Rights recognized a Somali clan as a non-state actor but exercised authority over a certain territory; therefore, it is a de facto authority with similar duties and obligations as a public authority. Nonetheless, the Committee added that similar situations must be investigated on a case-by-case basis. Correspondingly, an issue can occur when prohibited acts are perpetrated not by an official but with consent or acquiescence.[18]

The CAT text does not explicitly interpret what constitutes cruel, inhuman, or degrading punishment or treatment. According to the recollections of the CAT drafting committee leaders, codifiers faced two elementary issues when creating the documents. On the one hand, while the notion of torture was rather clear to define, cruel, inhuman or degrading treatment or punishment could not be defined with proportionate precision.[19] On the other hand, since the document imposes several legal obligations on state parties, which must be reflected in their criminal substantive law and procedures, they could not be assigned vague concepts such

15 Art. 2(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment reads as follows: 'Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.'

16 See Joined Greek Case: *Denmark v. Greece*, (ECHR Application No. 3321/67), *Norway v. Greece*, (ECHR Application No. 3322/67), *Sweden v. Greece*, (ECHR Application No. 3323/67), *Netherlands v. Greece*, (ECHR Application No. 3344/67), Report of the Sub-Commission, 5 November 1969.

17 *H.M.H.I. v. Australia*, (Complaint No. 177/2001), Decision, 1 May 2002, para. 6.4.

18 Publication of the United Nations Human Rights Office about Interpretation of Torture in the Light of the Practice and jurisprudence of International Bodies, 2011, p. 5.

19 Burgers and Danelius, 1988, p. 149.

as cruel, inhuman, or degrading treatment or punishment. This also proves that the Committee Against Torture, which supervises the implementation of the CAT, declares that the definitional difference between cruel, inhuman, or degrading treatment or punishment and torture is often unclear.[20]

The CAT refers to ethical and moral values as principles promoting dignity, humanity, and other international human rights treaties. The preamble of the CAT refers to Article 5 of the Universal Declaration on Human Rights and Article 7 of the International Covenant on Civil and Political Rights. The preamble of the CAT stipulates that the most significant aim of the Convention is to make the struggle against torture and inhuman and degradation treatments more effective.[21]

Article 16 of the CAT provides

> undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

The activation of the state's positive obligation arises when a certain level of severity of interference with the fundamental rights in question is given. Nevertheless, when it comes to the right not to be tortured, the differentiation of cases when a positive obligation of the state arises and when, on the contrary, does not arise is more complicated because not all interventions in the physical integrity, that is, cases of causing harm to health, must have criminal law relevance. A very important criterion for distinguishing between interventions is whether they are caused by a public authority or private person. The basic purpose of an effective investigation in such a case is to ensure the effective implementation of national regulations if the violation is caused by a public authority that can act only on the basis and according to the law.[22]

The work and interpretation of the Committee in its general comments and case-law aids in completing the proper understanding of the CAT. Similarly, in national courts, the prohibition of torture is regularly interpreted in the context of the non-refoulment principle. In its General Comment no. 1, the Committee

20 General Comment of the Committee Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment No. 2, 2007, 10.

21 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987, Preamble.

22 Čentéš and Beleš, 2021, p. 4.

Against Torture stipulated that, when assessing relevant cases, the risk of torture must be considered based on evidence that goes beyond pure theory or suspicion.[23] Although the risk of torture does not have to fulfil the test of being certainly possible, it must be personal and actual. This interpretation was later broadened in the *Dadar v. Canada* case, with the aspect of foreseeable and real risk.[24] Additionally, it must be mentioned that the facts that are considered by the Committee are given by the organs of the state party concerned; however, the Committee has the right to assess this evidence and facts freely and upon the full set of circumstances in every case, as was interpreted in the NTW v. Switzerland case.[25]

Finally, we can conclude that despite the relatively decent quality of the CAT text and its worldwide ratification, the CAT[26] cannot be considered successful. The reasons are either the lack of enforcement by states, lack of UN enforcement bodies, or the fact that several states that ratified the CAT do not truly want to comply with its text and provisions. However, the regulation has fundamental importance because in the case-law of international courts, mainly ad hoc international tribunals (the International Criminal Tribunal for the former Yugoslavia or the International Criminal Tribunal for Rwanda), the starting point for defining the concept of torture was the definition of the concept provided by the CAT.[27] In the initial period of the tribunals' operation, adopting the concept without criticism was typical. However, the definitions read in later decisions testify to the fact that courts, pointing to the different natures of international humanitarian law and human rights law, are increasingly independent of the facts defined in the Convention.[28]

3. European Convention on Human Rights

Under ECHR Article 3 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'[29]

The most well-established international system for protecting human rights, with its connection to the prohibition of torture, is the European human

23 General Comment of the Committee Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment No. 2, 1997, 6.

24 *Mostafa Dadar v. Canada*, (Complaint No. 258/2004), Decision, 5 December 2005, para. 4.11.

25 *N.T.W. v. Switzerland*, (Communication No. 424/2010), Decision, 6 July 2012, para. 7.3.

26 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987, signatories: 83, parties: 173.

27 See *Prosecutor v. Delalić, Mucić, Delić and Landžo*, (ICTY Case No. IT-96-21-T), Trial Judgement, 16 November 1998; *Prosecutor v. Anto Furundžija*, (ICTY Case No. IT-95-17/1-T), Trial Judgement, 10 December 1998; *Prosecutor v. Kunarac, Kovac and Vukovic*, (ICTY Case No. IT-96-23-T& IT-96-23/1-T), Trial Judgement, 22 February 2001.

28 Burchard, 2008, p. 162.

29 European Convention on Human Rights, 1950, Art. 3.

rights system. This European system for protecting human rights was created within the Council of Europe (CoE) framework, an intergovernmental organization established in 1949 by a group of Western European states committed to protecting individual freedoms, democracy, and the rule of law. The member States of the CoE adopted the ECHR in 1950, and it came into force in 1953.[30]

The ECHR establishes the prohibition of torture under Article 3, giving it the position of one of the foremost important provisions of the Convention and highlighting its importance in the framework of the CoE. The essential aspect of the prohibition is the serious nature of pain and suffering. According to the case-law, some acts constitute the facts of torture. In these cases, the conduct of the offence necessarily presupposes and includes the cause of severe pain or suffering; therefore, it is sufficient for the prosecution to prove the conduct.[31]

As seen in the jurisprudence of Central European constitutional courts, there are different approaches to interpreting and implementing this provision. One possible method is to explain the scope of Article 3 by providing an exemplificatory enumeration, which can be understood as torture, which was the approach of the constitutional court in Czech Republic. The Czech Constitutional Court has, in its judicial activity, enumerated relevant consequences that sufficiently increase the intensity of the intervention, such as police intervention, a leg injury with tissue necrosis resulting in amputation, a gunshot wound to an internal organ without permanent consequences, a double fracture of the jaw, the knocking out of three teeth, an ear injury and bruises on a larger part of the body. According to the Czech Constitutional Court, these brutalities can easily be classified as torture.[32] However, the Hungarian Constitutional Court took a different approach when implementing the definition of the ECHR. As for the Hungarian Constitutional Court, the condition for establishing torture is the behaviour towards the victim causing a great degree of suffering to the person concerned, as well as an intentional behaviour that aims to cause pain, the purpose of which is, among other things, to obtain information and intimidate the person concerned.[33]

The prohibition of torture would only remain a formal postulate without content if it did not simultaneously impose on states the obligation to establish in substantive criminal law the criminality of such actions that correspond in content to killing, torture, inhuman treatment, or punishment. Additionally, states must establish an effective legal framework for criminal proceedings to clarify these criminal acts or the obligation to apply this legal regulation of criminal proceedings in practice. However, it is not enough to adopt national laws in accordance with the text of the ECHR; contracting states are also responsible for the practical realization of guaranteed rights. The provision of the prohibition of torture

30 Buergenthal, 2001, p. 89.
31 Kovács and Sánta, 2010, p. 23.
32 Decision no. Sp. Zn. III. ÚS 2012/18, [43].
33 Decision no. 32/2014. (XI.3.) [137]; Decision no. 6/1996, (VII. 12.) [34].

implicitly gives a positive obligation to the parties to the ECHR to investigate allegations of ill-treatment.[34] Otherwise, the prohibition would be theoretical and illusory, allowing perpetrators to act with impunity. This obligation is consistent with the absolute character of prohibition. To fulfil this obligation of proper investigation, a coherent legislative framework and enforcement mechanism ensure a proper response to credible accounts of torture. If these mechanisms fail to comply with the stipulated duties for proper investigation, the state must combat sanction impunity in different ways. However, this relates to the question of how to uphold the principles of the rule of law in the state's justice system. Nevertheless, the state can somehow, as a result, also fail to fulfil this positive obligation. In these cases, the mechanisms of the European human rights system arise, specifically the human rights system of the CoE, such as the application of victims to the European Court of Human Rights (ECtHR).[35] Hence, the jurisprudence of the ECtHR is the leading example on how to enforce and sanction the prohibition on torture.

Therefore, the ECtHR's case-law is based on its interpretation of the scope and character of Article 3. The ECtHR first elaborated the concept of torture in the case of *Ireland v. the United Kingdom*, where it stipulated that for certain acts to fall under the term of torture, these require a minimum level of severity and seriousness that cannot be unjustifiable; that is, it is an aggravated form of treatment. This can be a degrading or humiliating treatment or a treatment that drives the victim to act against his will or conscience. However, the ECtHR does not explicitly clarify how minimum level threshold should be understood and applied. Nevertheless, the most important landmark in this case is the distinction between the notion of torture and the concept of inhuman or degrading treatment. The ECtHR divides the concept into two parts, deriving the difference from the intensity of the inflicted suffering. Torture is a deliberate act that requires serious and cruel suffering from the victim. When considering the distinction between the notions, the term torture must be attached to a special stigma in the treatment of severe harm.[36]

The ECtHR, in the pertinent case, has elaborated that acts as such fulfil all the requirements of Article 3. The concerned acts aimed to gain confessions, name other perpetrators, and obtain information. The acts were committed systematically while keeping in mind the aforementioned purpose; therefore, the negligence of the actors was excluded. Furthermore, the acts were perpetrated by official authorities, as the actors were officers of Northern Ireland's security forces.[37]

34 Čentéš and Beleš, 2021, p. 4.
35 Savnidze, 2014, p. 9.
36 *Ireland v. The United Kingdom*, (ECHR Application No. 5310/71), Judgement, 13 December 1977, para. 167.
37 Ibid, 166.

In this sense, the ECtHR has established that the only element that prohibits these acts from falling under the scope of torture as the absence of extreme intensity of suffering and pain. In this framework, the ECtHR also gave a wide margin of appreciation to the state concerned when it stated that the national authorities were in a better position than an international judge when deciding the scope of extreme pain and suffering. However, as is obvious, the aforementioned interpretation of the difference is narrow and unclear based on the vague wording of the ECtHR.[38] Additionally, it has to be mentioned that the case-law of the ECtHR has tried to elaborate the distinction of the concepts it has not exactly stipulated its concrete aspects. However, the ECtHR has confirmed this distinction many times, as stated in *Ireland v. the United Kingdom*, referring to the distinction already stipulated in Article 3.[39]

However, the current interpretation of the definition of torture and its aspects in the case-law of the ECtHR is very different from those applied in the early jurisprudence of the ECtHR. The current view of the prohibition has broadened and enhanced less strict and severe actions (albeit still demanding a cause of significant harm to the victim). However, many of these actions were not considered earlier torture crimes. The abovementioned short analysis of *Ireland v. the United Kingdom* presents a former interpretation that shifted the case-law of international courts over time.

The vaguely interpreted differentiation derived from the wording of a pertinent article has been subject to many significant ECtHR case-laws. This approach is divided into a vertical approach, representing three different concepts: torture, inhuman treatment, and degradation treatment. Different approaches have been presented based on the threshold of acts falling under these terms to define the elements of this study. The distinction between them is based on the severity of pain or suffering, with torture representing the most serious and degrading treatment as the least serious.[40] In *Selmouni v. France*, the ECtHR stated that the high requirements of human rights protection demand greater firmness in considering breaches of such fundamental values as integrity and the mental and physical well-being of a person.[41] Therefore, this case proves that the ECtHR should, in relation to the passage of time, reconsider its interpretation of Article 3 in previous cases when it is deemed necessary to differentiate the mentioned concepts based on the intensity of the harm caused.

Keenan v. The United Kingdom must be mentioned in connection with the issue of the concept threshold. In this case, the applicant's son, Mark Keenan, died by suicide in prison due to a failure by prison authorities, which was based on a lack of effective monitoring, psychiatric input, and treatment in conjunction

38 Cullen, 2003, p. 39.
39 *Aktaş v. Turkey*, (ECHR Application No. 24351/94), Judgement, 23 October 2003, para. 313.
40 Evans, 2002, p. 370.
41 *Selmouni v. France*, (ECHR Application No. 25803/94), Judgement, 28 July 1999, para. 101.

with the punishment of segregation. In 2001, the ECtHR explicitly stipulated that the severity of pain or suffering must be considered just one aspect of an increasingly complex matrix. Therefore, the ECtHR accepts that it is difficult to grasp the threshold when differentiating between these notions. In this sense, the ECtHR has had considerable flexibility in the application of its approach, enabling it to decide on a case-by-case basis.[42]

Finally, the interpretation of the ECtHR in the *Gäfgen* case[43] probably went straight to a broad understanding of the concept of torture and its determining aspects. The pertinent case concerned Mr Gäfgen, the kidnapper of the 11-year-old son of a German banker. He was later arrested after interrogations to obtain information on his whereabouts. Throughout the interrogation process, the police officer threatened the child with the considerable pain of gaining information and saving the child's life. The decision of the ECtHR declared that Gäfgen was a victim of inhuman treatment, as the threat was real and immediate and, therefore, may constitute mental distress and further mental consequences. The victim was in a vulnerable place where the interrogators had been abused. The police officer openly claimed that this technique was used to save the lives of the kidnapped children.[44] The ECtHR stated that the threat of physical pain is sufficient to fulfil the minimum level of severity required by Article 3, but not that required to be characterized as torture, but rather as inhuman treatment. The reasoning behind the ECtHR was based on social demands, protecting not only physical integrity but also the dignity of humans. This dignity is protected under Article 3.[45]

The *Gäfgen* case is interesting mainly for assessing the ECtHR, which includes some kind of balancing, even though Article 3 does not permit the balancing of rights. The question that it raised appeared to be about the balance between saving a child's life and protecting basic human rights arising from natural law and having *ius cogens* nature. In this matter, the ECtHR was firm and confirmed that even in extreme cases where saving the lives of innocent people was in danger, it could not justify the prohibition of ill-treatment. There were several reasons for this observation. The first reason is represented by Article 3 and 15 of the ECHR, which proves that derogation clauses do not apply to rights with peremptory character. The ECtHR, in this sense, added that not even the event of a public emergency threatening the life of a nation can serve as an exception for the prohibition of torture. Second, by protecting the proper sanctioning of the violation of Article 3, we are protecting the most fundamental values of democratic

42 *Keenan v. the United Kingdom*, (ECHR Application No. 27229/95), Judgement, 3 April 2001, para 112.

43 *Gäfgen v. Germany*, (ECHR Application No. 22978/05), Judgement, 1 June 2010.

44 The case has no happy ending, since Mr. Gafgen has suffocated the child previously of arresting him. The police officer investigating have, however, considered the child to be alive; hence, applying such methods as threat.

45 *Selmouni v. France*, (ECHR Application No. 25803/94), Judgement, 28 July 1999, para. 101. *Gäfgen v. Germany*, (ECHR Application No. 22978/05), Judgement, 1 June 2010, para.108.

societies that come together with the prohibition of torture. Finally, the decision to prohibit torture in every situation construes social demand, resulting in universal acceptance of the right in every situation. Therefore, this sends a signal to society that public authorities can, in no circumstances, justify acts of torture.[46]

As the last remark on the case, the author would like to reflect on and present certain criticisms of the wide understanding of Article 3, as presented above in the ECtHR decision. In the author's opinion, the ECtHR in the present case incorrectly dealt with the question of balancing the right to life and the prohibition of torture. The ECtHR supported its argument by considering that the threat of torture must be understood as torture itself. Nevertheless, these two notions should be considered separately for the situation at hand. First, it is not only important to investigate the negative mental consequences of such threats, but it is even more difficult to prove them. Second, the effects of detention, interrogation, and procedural measures have negative mental consequences. Of course, these measures have no purpose of gaining information or confession. However, as Article 3 explicitly mentions, the purpose of restricting persons' freedom for different reasons does not exclude these acts based on the aspect of purpose.[47] Third, the assumption that the threat of torture is worth more than the life of a nation is questionable. If the investigator, when balancing the right to life of a nation, decided that the threat of torture was worth more, he would be at least subject to criticism but probably even criminal procedure.

Furthermore, one dealing with the case-law of the ECtHR in relation to the analysis of the prohibition of torture must mention the most famous case regarding the topic, the *Soering* case (*Soering v. the United Kingdom*).[48] The case dealt with the extradition of an applicant to the United States to be judged as a crime punishable in the State of Virginia through capital punishment or imprisonment for life. However, based on an in-depth examination, the ECtHR concluded that the extradition of this person would result in a violation of Article 3. The decision was, therefore, a landmark for all future cases concerning the member states of the CoE regarding extradition.[49] Nonetheless, the question has affected far more than just criminal matters and the scope of Article 3; that is, it had a wide influence on aspects of state responsibility and human rights law in general. In most Central and Eastern European countries, a vast number of cases concerning the prohibition of torture are consequently mainly questions related to asylum law and considerations if sending the application to their home countries would be safe for them. However, the case was a landmark decision mostly known for its influence on asylum law and is, therefore, not the subject of the current article's research topic. Consequently, the author considers this issue.

46 Yiallourou, 2019.
47 The CAT in its Art. 1 also does not include exhaustive list of the element of purpose.
48 See *Soering v. the United Kingdom*, (ECHR Application No. 14038/88), Judgement, 7 July 1989.
49 Lillich, 1992, p. 128.

Lastly, worth mentioning in relation to progress regarding the scope of the notion of torture, explicitly what can be considered torture is the decision of *Aydin v. Turkey,* where, for the first time, the ECtHR recognized rape as an act that can constitute torture. In this decision, the ECtHR declared that the Act of Rape fulfilled the requirements stipulated in Article 3. The act was an especially grave form of ill-treatment, with deep mental harm to the victim lapsing for a long time; therefore, it was even more severe than physical scars from physical violence, healing quicker. The act of rape and its harm amounted to a series of terrifying and humiliating experiences, considering the circumstances under which the victim was deprived of her freedom. The Act was also implemented with a certain purpose, specifically, to gain information.[50] The decision should be considered a landmark in broadening the scope of the term torture. It is worth considering previous jurisprudence, which dismissed sanctioning rape under the term torture in similar previous cases. For example, in *Cyprus v. Turkey,* where there was sufficient evidence of mass rape by security forces, the European Commission did not consider such acts under the auspices of Article 3.[51] Naturally, the ECtHR in *Aydin v. Turkey* added that most rapes perpetrated by private individuals against another private individual cannot fall under the terms torture, lacking purpose, public authority, and deprivation of freedom in state detention.[52]

4. European Union policy

■ *4.1. Legislative framework*

The European Union (EU) expresses its commitment to human rights protection in its primary source, the Treaty on European Union[53] (TEU), under Article 2, which declares that the foundations of the EU were based on the values of human dignity, freedom, democracy, equality, rule of law, and respect for human rights.[54] The position of the article dealing with the topic of human rights protection emphasizes the importance of the issue for EU bodies. Another important document is the Charter of Fundamental Rights of the European Union,[55] also known as the Nice Charter. Since the Nice Charter has the same legal value as the Treaties of the EU (provided under Article 6 of the TEU), Article 4 prohibits torture, inhuman, or

50 *Aydin v. Turkey,* (ECHR Application No. 23178/94), Judgement, 25 September 1997, para. 83.
51 See *Cyprus v. Turkey,* (ECHR Application No. 25781/94), Judgement, 10 May 2001.
52 McGlynn, 2009, p. 2.
53 Treaty on European Union, Official Journal of the European Union no. C326/13, entered into force 26 December 2012.
54 Treaty on the European Union, 2012, Art. 2.
55 Charter of Fundamental Rights of the European Union, Official Journal of the European Union no. C364/1, entered into force 18 December 2000.

degrading treatment or punishment from binding all member states of the EU.[56] First, the author deems it necessary to appropriately mention the actions of the EU when combating torture, which is followed by an analysis of the interpretation of the prohibition of torture by the jurisprudence of the Court of Justice of the European Union (CJEU).

The EU's work in dealing with torture questions is divided into internal and external actions. Internal functions primarily concern judicial cooperation in criminal matters and rights related to asylum laws and refugee status. Judicial cooperation is a matter of harmonization and approximation of regulations concerning the prohibition of torture in member states. EU institutions may constitute rules that set up a legislative minimum for the crime of torture concerning its definition and sanctions. However, institutions impose the obligation to introduce the crime of torture into their laws as an obligation to adhere to the ECHR and CAT.[57]

Although the EU declares in its European Arrest Warrant that, in case of a serious and persistent breach by one of its member states, it permits suspension of the mechanisms of the arrest warrant, it does not explicitly permit the possibility of refusal to deliver an individual to a member state where there is serious concern that the person may be subject to ill-treatment. The refusal of delivery, according to Articles 3 and 4, is exhaustively listed as a mandatory and optional ground for the non-execution of the warrant. However, the list does not include words related to torture or other forms of ill-treatment. Nevertheless, when applying the aforementioned framework decision, it must always be read in accordance with the primary sources of the EU, which declare that fundamental legal principles and rights cannot be amended or avoided by either such a framework decision or by a decision by a judge who is applying such a framework. Therefore, when issuing a delivery of a person, both binding fundamental conventions: ECHR and Nice Charter must be abided by, which consequently means the application of Article 3 of the ECHR and Article 4 of the Nice Charter.[58]

As to Article 18 and Article 19 of the Charter, the right of asylum sets limits in situations of removal, expulsion, or extradition, as well as prohibits doing so when there is a serious risk of being subjected to the death penalty or ill-treatment. Emphasis is placed on the mechanism in member states when identifying the situation in the state to which a person would be sent. This refers to the number of criteria that aim to avoid the abuse of asylum claims to obtain protected status.

56 Art. 4 of the Charter of Fundamental Rights of the European Union reads as follows: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

57 Kotzur, 2015, p. 448.

58 See Reports from the Commission on the European arrest warrant and the surrender procedures between Member States, 2005 and 2006.

However, the mechanism is affected by the Dublin II Regulation[59] and the relevant case-law of the CJEU, which will be elaborated on further.[60]

In relation to the external actions of the EU in 2001, the General Affairs Council developed the Guidelines for EU policy towards third countries on torture and other cruel, inhuman, or degrading treatment or punishment, complementary to the EU Guidelines on the death penalty of 1998.[61] These guidelines try to provide instructions to EU institutions and member states in combatting ill-treatment in third countries. In this respect, the document attempts to protect international human rights outside of the EU application sphere. The guidelines also concern the activity of working groups reporting and analysing whenever and wherever torture appears outside the borders of the EU. These groups have attempted to identify and apply possible preventive mechanisms. The objective is to apply effective measures that ensure the enforcement of the prohibition of torture, as well as victims' access to rehabilitation services and legal support. As stipulated in the document, these tools have political and financial natures. The text later did not divide the exact tools into two categories. It mentions dialogue, monitoring, assessment and reporting, demarches and statements, visits, trial observation, cooperation with multilateral bodies and mechanisms, and bilateral and multilateral cooperation, including financial support. Additionally, a related Council Regulation from 2016[62] stipulated the possibility of applying a trade block as a tool to prevent and combat ill-treatment in certain countries.[63]

■ *4.2 Case-Law of the CJEU*

The case-law of the CJEU is significant in interpreting the provisions for the prohibition of torture with regard to the policies of the EU, even though it is in line with the case-law of the ECtHR. The CJEU has declared and emphasized that all member states enjoy a rebuttable, not an absolute presumption of respect for fundamental rights. However, this assumption is rebutted by contrary evidence.[64] This applies to the delivery of asylum seekers from one member state to another.

59 See Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, 2003.

60 Morgade-Gil, 2015, p. 437.

61 Guidelines on EU Policy Towards Third Countries on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2019, Revision of the Guidelines.

62 See Regulation of the European Parliament and of the Council concerning trade in certain goods which could be used for capital punishment, torture or other cruel inhuman or degrading treatment or punishment, 2016.

63 Picchi, 2017, p. 753.

64 See *N. S. v. Secretary of State for the Home Department* and *M. E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, (CJEU Joined Cases C-411/10 and C- 493/10), Judgement, 21 December 2011.

Furthermore, in line with and under the influence of the ECtHR's case-law,[65] this has to be understood as prohibiting the delivery of the person to a country where there are beyond doubt problems in the asylum procedures, even if that seeker would be subject to the risk of ill-treatment. In this case, the state where the seeker is at the moment is obliged to consider the application of the person to avoid violating the applicant's human rights. Regarding the question of asylum applicants, the CJEU declared that the applicant might challenge the asylum decision only in the country of first entry into the EU, where there proved to be systemic deficiencies.[66] Furthermore, in cases of subsidiary protection, it is not necessary to prove that the person is specifically targeted in a country where proven threats to life exist, such as dictatorship regimes, countries at war, or regimes under some sort of terrorist group. Even the existence of such a threat in a country fulfils the requirement of high risk to the life of a civilian returning to that country.[67]

The right to subsidiary protection in relation to fear of ill-treatment was a concern in most cases before the CJEU. In the case of M'Bodj and Abdida in 2014, the CJEU stated that asylum seekers suffering from serious health issues could not invoke a right for asylum or subsidiary protection based on qualification directives, although one of the backgrounds for the mentioned protection was dealing with the real possibility of acts of ill-treatment in the country sent back to. However, the aforementioned cases were well supported by the argument that such protection was established to protect applicants from harm caused by humans. However, in the aforementioned cases, the applicants claimed that under the notion of ill-treatment, inadequate medical treatment also falls, which proved to be insufficient reasoning.[68]

As presented in the previous subchapter, when issuing the European Arrest Warrant, the issuing authorities must consider the circumstances of its execution. The notion of torture in relation to the aforementioned arrest warrant was interpreted in the cases of Aranyosi and Caldararu, where the CJEU elaborated on the borders of mutual trust and the duty of the executing authority to investigate due diligence. This case dealt with prison conditions in Hungary and Romania. In the judgement, the Court stipulated that the authority executing the warrant has the obligation to seek additional information, and there is a risk of violation of rights;

65 See *MSS v. Belgium and Greece*, (ECHR Application No. 30696/09), Judgement, 21 January 2011.

66 See *Shamso Abdullahi v. Bundesasylamt*, (CJEU Case C-394/12), Judgement, 10 December 2013.

67 See *Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie*, (CJEU Case C-465/07), Judgement, 17 February 2009.

68 See *Mohamed M'Bodj v. État belge*; Case of Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v Moussa Abdida, (CJEU Case C-542/13), Judgement, 18 December 2014.

it should postpone the execution. Additionally, the Court emphasized the absolute nature of the prohibition declared in Article 4 of the Charter.[69]

The CJEU, in its current case-law, has applied an interesting broadening of the protection of asylum seekers based on the non-refoulment principle in the case of *NS v. UK and Ireland* from the year 2018 concerning a national of Sri Lanka who arrived as a student to the United Kingdom in 2005. The applicant in the mentioned case claimed that he had been a member of the Liberation Tigers of Tamil Eelam and had been detained and tortured by the security forces of Sri Lanka, and there was a real risk of similar ill-treatment in the case of his return. Additionally, the applicant submitted medical evidence that he was suffering from post-traumatic stress disorder and depression based on the crimes committed against him in Sri Lanka. The claim was, therefore, supplemented by evidence that in the case of his return, he would not receive appropriate care for his illness. In the pertinent case, the CJEU ruled that a person who has, in the past, been tortured in his country of origin is eligible for the already mentioned subsidiary protection if he faces the real risk of being intentionally deprived of appropriate physical and psychological health care in the given country.[70]

5. Conclusions

At first glance, it appears that the right to life is the most significant human right that cannot be derogated from under any circumstances. However, the prohibition of torture in many aspects overrules the right to life in aspects of its nature—being non-derogable and absolute—and in aspects of its origin in natural law and human dignity. In connection with the prohibition of torture, two debatable issues have regularly emerged: the question of the proportionality between saving human life or living and obtaining a statement through coercive means to acquire the information necessary to save these lives and the question of the consent of the victim.

The right is absolute; therefore, it applies to all persons without distinction, regardless of whether they have committed or are committing any serious criminal activity and the danger they pose to the country in which they reside. The prohibition of torture and subjection to inhuman and degrading treatment and punishment is, although not explicitly, unconditionally connected with the impossibility of the state extraditing foreigners into its country of origin. The fact that this applies to all people, regardless of whether they are citizens of

69 *Pál Aranyosi and Robert Caldararu v. Generalstaatsanwaltschaft Bremen,* (CJEU Joined Cases C-404/15 and C-659/15), Judgement, 5 April 2016.

70 See *N. S. v. Secretary of State for the Home Department* and *M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform,* (CJEU Joined Cases C-411/10 and C- 493/10), Judgement, 21 December 2011.

European countries, is a breakthrough in the human rights protection system. Consequently, most cases concerning provisions prohibiting torture deal with the non-refoulment principle.

The assessment of the kind of act that constitutes a violation of the right not to be tortured and subjected to cruel, inhuman, or degrading treatment or punishment is relative and depends on all aspects of the case. Generally, the European court system (both the ECtHR and CJEU) is based on the premise that ill-treatment must reach a minimum level of severity. In asylum proceedings, proving this minimum level of severity is mainly the responsibility of the applicant or asylum seeker for international protection in the form of asylum or supplementary protection. Proving for this form of serious injustice must be aimed at proving that a specific individual is at risk, considering his and the situation's specifics, in which he is or may be located in case of a return to the country of origin. Above all, this applies to cases in which the situation in the country of origin cannot be further evaluated as a situation in which any individual may be exposed to a real threat of torture, cruel, inhuman, or degrading treatment or punishment.

European human rights treaties regulate the prohibition of torture and ill-treatment as human rights to be ensured and protected by the state, similar to the provisions of the Universal UN Convention, CAT. The documents issued by international bodies monitor compliance with human rights conventions and therefore provide guidelines for interpreting these fundamental rights, including the prohibition of torture and ill-treatment and the determination and fulfilment of the state's fundamental rights protection obligations. Today, as a result of the activities of international bodies, we have at our disposal a very rich body of European case-law on the conceptual aspects of torture and ill-treatment, the definition of perpetrators, the criteria for the classification and delimitation of behaviours falling within the scope of the prohibition, and the recognition of the state's obligations to protect fundamental rights. Of these, the European system of human rights protection, even in terms of the prohibition of torture, is the most developed and influential in the world.

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GRZEGORZ OCIECZEK*

Combating Organised Economic Crime in Poland: Statistical and Organisational Aspects

ABSTRACT: *The subject of the article is to discuss the determinants of economic crime in Poland from a criminal law perspective. The author discusses the characteristics of the issue and the genesis of organized crime in Poland. He presents statistics that discuss the activities of criminal groups and the development of economic crime in Poland. The text discusses important issues from the perspective of the prosecution of the crimes in question and the role and position of selected legal protection authorities. The author points out the strengths and weaknesses of the Polish system for combating economic crime. The article provides guidelines and recommendations for changes in the Polish legal system to improve the prosecution and detection of economic crime.*

KEYWORDS: organized crime, economic crime, prosecution, criminal law, criminal procedure

This article highlights the problem of combating economic crime in Poland over the last 30 years. In this publication, statistical data are presented to illustrate the problem concerning both the number of economic crimes, including those of an economic nature, and the degree of efficiency of state authorities in combating them.

This publication aims to draw attention to the problem of serious economic crimes and identify the areas that belong to the most at-risk category for this type of crime.

At present, economic crime is one type of crime that has increased significantly since the mid-2000s. The state must effectively combat this type of criminal activity, or at least attempt to minimise it significantly. Economic crime is currently one of the predominant types of crime in our country, whereas typical

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criminal activity came to the fore during the 1989/1990 period of social and economic transition.

Today, organised economic crime has an international dimension. Therefore, it is important to undertake joint supranational initiatives to reduce the incidence of this crime.

Only international cooperation in combating economic crimes (tax crimes) can produce the expected results.[1]

At this point, to compare statistical data over the last 30 years, it is necessary to mention issues related to the causes of the development of organised crime in Poland, with particular emphasis on the economic crime of a group nature.

Proponents of the doctrine point to the following as the main reasons for the development of crime, including organised crime that is both criminal and economic in nature, after Poland regained its independence in 1989: a) Historical factors, concerning the long-term development of crime over many years; b) Social factors concerning, among other things, the decline of social values and authority; c) Economic factors; d) Legal factors concerning the lack of adequate legal regulations, total instability of the law, and ineffective use of relevant legal instruments; e) Organisational factors related to the reshaping of state body structures and the lack of qualified crime fighting staff; f) International factors related to the gradual opening of borders including Poland's entry into the European Union (EU), its geographical location, and the collapse of the USSR.[2]

One of the most important roles of the state, and in particular of the bodies in charge of overseeing public security and order, is to take action to combat and prevent crime, especially the most serious kind, that is, group crime, including organised crime. Immediately after the transformation of the political system, Poland became an arena for so-called "economic scandals", where criminals took advantage of legal loopholes to maximize their profits in the shortest possible time.

Among the characteristics that make it largely difficult to identify and bring to justice the perpetrators of economic scandals are 1) difficulties in accessing reliable sources of information; 2) social and political links between perpetrators; 3) secrecy of the perpetrators' actions (camouflage); 4) deliberate disinformation; 5) complexity of affirmative ventures.[3]

The most serious economic scandals of the period of systemic transformation in Poland were 1) Afera ARTICLE-B, where it was estimated that the banks' losses as a result of the tax oscillator amounted to approximately PLN 4.2 trillion[4]; 2) FOZZ scandal, where the State's losses were estimated at USD 100 million;[5]

1 Turksen et al., 2023.
2 See e.g. Laskowska, 2011, pp. 152–169; Hołyst, 2004, pp. 1009 et seq.; Zybertowicz, 2005, pp. 299 et seq.
3 Sokołowicz, Gurtowski and Pietrowicz, 2009, p. 815.
4 Solska, 2011; Sokolska, 2020; Kaczyńska, 2021.
5 P. Wysocki, 1992; Małachowski, 1992.

3) The Inter Arms scandal, as a result of which a small and unknown computer company received huge support and government contracts;[6] 4) Cantor scandal allegedly involving a leading politician;[7] 5) Holding Kolmer scandal, related to Value Added Tax (VAT) fraud and the death of one of the judges from the Rzeszow District Court.[8]

In light of the "economic scandals," an important issue from a sociological perspective is the presence of structural gaps in the social network, which consist of interconnections of an "exclusive" nature.[9]

"Scandalous" economic crime, which resembles group crime, was characterised by elements such as a) the offence was directed against an institution and not a specific person; b) the offender was generally not a professional criminal; c) committed crimes by taking advantage of opportunities; d) such an act was generally carried out from behind a desk; e) criminals had ways of disguising their acts; f) the public did not feel victimised.[10]

Such links are reminiscent of mafia-type links, or at least links from the area of organised crime. By way of comparison, H. J. Schwind, a prominent expert on organised crime, describes the characteristics of organised crime as follows: a) the presence of a durable relationship, constantly cooperating with individuals with a dominant role for professional offenders, b) a hierarchical organisational structure characterised by absolute discipline, c) the rational, planned, and task-based pursuit of objectives, d) adapting activities to the current needs of the population, e) matching the methods and means of activity to the conditions and types of objectives pursued, f) internal conspiracy and sealing of the organisation, g) international mobility, h) providing assistance to members of a criminal organisation.[11]

Most authors, both domestic and foreign, agree that the period of socio-economic change in Poland triggered the process of state capture.[12] The same process was observed, especially among the former communist bloc. It was possible to observe the influence of the economic policy of states on the second economic circuit, which remained under the control of economic organised crime.[13]

I should add the EU provisions (Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime in Article 1, points 1 and 2) define a criminal organisation and an organised criminal association, respectively. According to Article 1, point 1, a "criminal organisation"

6 Sikora, 2022.
7 Kania, Targalski and Marosz, 2019.
8 Malek, 2002.
9 Burt, 1995, p. 18.
10 See, for example, Sokołowicz, Gurtowski and Pietrowicz, 2009, p. 815; Marx,1989, pp. 142–212; Wójcik, 1998, pp. 142–212; Górniok, 1994, p. 10.
11 Szwind, 1987, pp. 17–18.
12 Hellman Kaufmann, 2001.
13 Shapland, Ponaers, 2009.

> means a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit.

Conversely, "structured association" 'means an association that is not randomly formed for the immediate commission of an offence, nor does it need to have formally defined roles for its members, continuity of its membership, or a developed structure.'[14]

In Poland, it is assumed that organised crime is the activity of organised criminal associations with a desire to profit from a variety of crimes, both economic and criminal in nature, involving the use of force, blackmail, and corruption, the aim of which, according to the organisers' intentions, is to introduce illegal profits into official economic turnover.[15] The EU has adopted the same concept of "organised crime."[16]

The table below shows the number of organised criminal groups of interest to the CBŚ KGP and CBŚP in the period from 2002 to 2020.

Table 1. Number of organised criminal groups of interest to the CBŚ KGP and CBŚP.

Year	Polish criminal groups	International criminal groups	Ethnic criminal groups	Russian-speaking criminal groups	Criminal groups of foreigners
2002	417	86	10	9	no data
2003	289	49	8	5	no data
2004	289	49	8	5	no data
2005	258	38	no data	no data	no data
2006	217	28	no data	1	no data
2007	326	19	no data	3	no data
2008	385	32	no data	5	3
2009	448	38	no data	10	4
2010	501	36	no data	7	3
2011	551	39	no data	4	1
2012	708	54	no data	6	4
2013	757	111	no data	6	5
2014	803	106	no data	3	8

14 Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime.

15 Rapacki,1996, p. 194.

16 Banach, 1999, pp. 31–32.

Year	Polish criminal groups	International criminal groups	Ethnic criminal groups	Russian-speaking criminal groups	Criminal groups of foreigners
2015	725	83	no data	2	2
2016	739	126	no data	3	6
2017	735	113	no data	5	5
2018	742	128	no data	5	5
2019	666	130	no data	9	6
2020	150	24	no data	1	no data

Source: Own compilation on the basis of the reports of the National Police Headquarters (CBŚ KGP) and the CBŚP.

The above data show that between 2013 and 2019, there was a significant increase in the activity of international criminal groups. In 2009, the largest number of organised Russian-speaking criminal groups operated in Poland.

In both the planning and execution of the "economic scandal" activity, there must certainly be a significant number of people involved, who can be called "protectors." These constitute the protective buffers. These people come mainly from politics and are part of the judiciary and law enforcement agencies, including broader tax authorities.

To better illustrate the scale of the problem in Poland in terms of combating organised crimes of an economic nature, it is necessary to present selected statistical data over the last 20 years.

The table below illustrates the absolute number of economic crimes between 2004 and 2019, including economic fraud, economic counterfeiting, and fiscal crime.[17]

Table 2. Economic crimes (in absolute numbers) 2004–2019.

Year	Economic fraud (including against business turnover)	Economic counterfeiting	Fiscal offences
2004	52.918 (11.959)	23.737	3829
2005	45.627 (12.751)	19.363	2837
2006	44.807 (12.877)	23.839	1863
2007	38.618 (12.069)	21.988	1929
2008	40.488 (13.511)	16.681	1701
2009	49.137 (13.422)	15.921	1881
2010	54.524 (14.046)	20.218	2048
2011	55.501 (11.255)	20.870	2586

17 Ocieczek, 2022, p. 9.

Year	Economic fraud (including against business turnover)	Economic counterfeiting	Fiscal offences
2012	54.785 (9.895)	16.768	2101
2013	61.255 (9.180)	20.375	2085
2014	71.578 (11.409)	22.020	1725
2015	87.685 (8.881)	22.474	1822
2016	73.309 (7.044)	27.014	2008
2017	92.192 (6.494)	38.604	2446
2018	85.275 (6.077)	34.274	2399
2019	103.556 (6.450)	32.200	3035

Source: Own compilation based on police data.

It is clear from the above data that there has been a significant increase in economic fraud in Poland in recent years. In 2019, more than 103,000 of these cases were recorded, almost twice as many as those in 2004. The situation was different regarding economic fraud, which fluctuated at an average of 25,000 over the last 15 years. In contrast, the highest number of fiscal crimes was recorded in 2004, whereas the lowest was recorded in 2008.

According to A. Baladinovich, economic crimes fall into two main categories, namely a) crimes related to both the production and distribution of illegal services and goods, of which smuggling, drug offences, and gambling play a predominant role; b) tax crimes.[18]

At this point, it should be noted that in the field of organised crime of an economic nature, the activity of criminal groups primarily consists of undertaking the following criminal activity: a) derecognition of the assets of state-owned companies, agencies, and foundations (including the acquisition of shareholdings from National Investment Funds), b) the deliberate bankruptcy of companies and the removal of their assets, c) setting up companies with no activities other than providing signboards and bank accounts as criminal structures (and targets).

In terms of trading in goods, the activity in turn consisted of: a) VAT fraud (e.g. through fictitious exports, trafficking and falsified invoices), b) extortion of goods and seizure of property based on false documents and deferred payment, c) excise smuggling and fraud (including illegal fuel trade, fictitious re-export, and transit of excise goods), d) underestimation of customs values and income tax due.[19]

In comparison, prior to the period associated with socio-political changes in Poland in 1989/1990, the economic crime of a group nature was primarily focused on: a) seizure of property, mainly of a social nature (Article 199 of the Penal Code); b) foreign exchange-related offences; c) speculative crime related to

18 Bałądynowicz, 1998, pp. 187–188.
19 Ocieczek, Samiczak, 2022, pp. 5 et seq.

the lack of commodities on the market; d) smuggling of goods (alcohol, tobacco, jewellery, and gold).[20]

It should be noted that changes in economic crime occur much faster than in other types of crime. This is because economic crime exploits, among other things, legal loopholes and seamlessly adapts to the current economic conditions prevailing in a given area. As E. Pływaczewski rightly indicates

> organised criminal groups are increasingly taking advantage of domestic international trade to commit offences of VAT extortion and other customs and tax evasion to the detriment of the State Treasury (...) perpetrators are making use of ever newer tools offered by the financial market: factoring, letters of credit, revolving credits.[21]

To illustrate the issues concerning rebranding and the smooth adaptation of crime in Poland over the last 16 years to the prevailing socio-economic situation, it is necessary to present statistical data to illustrate the number of criminal groups by individual categories, particularly those of criminal and economic nature.

Table 3. Number of criminal groups (by category) which were of interest to the CBŚ KGP and CBŚP in the period from 2004 to 2021.

Year	Criminal groups	Economic groups
2004	144 (number of cases)	152 (number of cases)
2005	66	109
2006	49	88
2007	74	118
2008	103	131
2009	107	164
2010	90	177
2011	113	209
2012	181	277
2013	148	344
2014	155	388
2015	190	320
2016	143	341
2017	136	305
2018	122	292
2019	130	317

20 Sklepkowski, Woźniak, 1997, p. 96; Karaźniewicz, 2005, p. 193; Majewski, 1975, p. 771.
21 Pływaczewski, 2011, p. 59; Pływaczewski, 2007, p. 9 et seq.

Year	Criminal groups	Economic groups
2020	n.a.	n.a.
2021	n.a.	n.a.

Source: Own elaboration based on statistical data of the CBŚ KGP and CBŚP.

Statistics show a significant increase in economic crime since 2010 compared with the activities of criminal groups. The increase doubled since 2013.

Between 2004 and 2006, the numbers of criminal and economic crime groups did not differ significantly. It should be noted that police statistics do not consider criminal groups with a typical drug profile, where the highest number of groups (374) was recorded in 2018, and in a year 2017 (336). The smallest number of groups of this type occurred in 2005 (84) and 2006 (86).[22]

Some representatives of the doctrine, including H. Kołecki, tried to outline the characteristic of contemporary economic criminals.

Thus, according to H. Kołecki, this is a person: a) of living intelligence; b) of great wit and personal charm, as well as equally impeccable appearance and manners; c) who is fluent in several languages; d) with exceptionally efficient and well-organised staff, including, above all, a secretariat; e) with a well-organised communication network, able to move quickly over long distances; f) disposing of their own personal protection service, often drawn from former police and secret service officers; g) who usually does not abuse alcohol; h) disposing of significant financial resources and providing opportunities for corruption among public officials; i) disposing of advisors who often come from academic backgrounds; j) with links to the political, administrative, and cultural world; k) who avoids so-called eye-catching.[23]

In my opinion, the above features are characteristic of the early period of socio-economic transformation in the 1990s.[24].Criminals take advantage of legal loopholes and corrupt officials, including those from the economic and financial sectors, as well as representatives of the judiciary and law enforcement agencies.

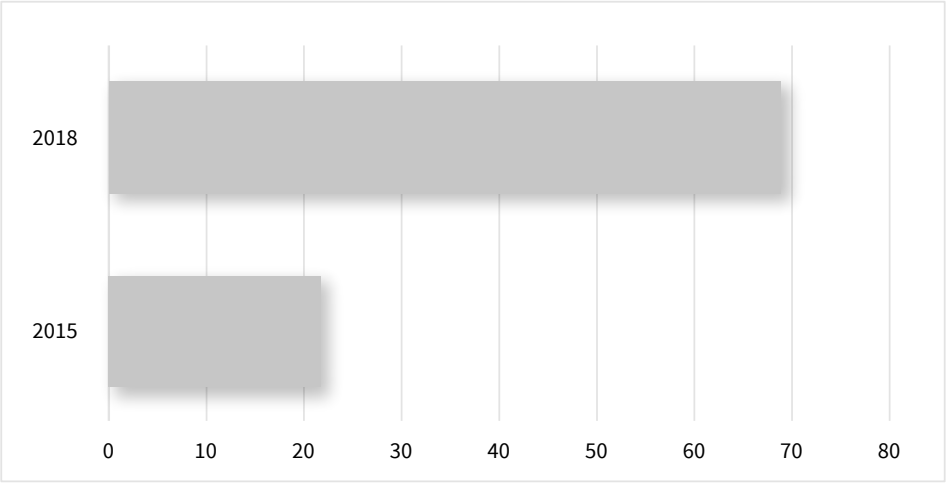
An exceptionally important aspect of organised economic crime is the bodies that combat it, both nationally and internationally. The police, public prosecution services, and secret services play special roles in this respect.

In 2016, significant organisational changes were introduced into the prosecution service. The most important systemic reform was the merger of the functions of the Prosecutor General with the office of the Minister of Justice, with the aim of streamlining the operation of the prosecution service and making the Prosecutor General truly accountable for the functioning of the prosecution service. In addition,

22 CBŚP statistics.
23 Kołecki, 1994, nr. 2–3.
24 Bir, 2022.

several significant organisational changes were made to intensify the prosecution of crimes, including those characterised by significant gravity. In the National Public Prosecutor's Office, which replaced the General Public Prosecutor's Office, inter alia, Local Divisions of the Department for Organised Crime and Corruption were established, which dealt with the most serious preparatory proceedings involving finance, terrorism, corruption and the economy. At the lower organisational level of the public prosecutor's office, that is, at the Regional Public Prosecutor's Offices (which replaced the Appellate Public Prosecutor's Offices), 11 departments for economic crime and six departments for financial and fiscal crime were established. Conversely, in the Regional Public Prosecutor's Offices, 32 divisions for economic crime and 13 divisions for financial and fiscal crime were created. An important element of the reform of the prosecutor's office was the abolition of pre-trial supervision departments, which were solely concerned with conducting visits, vetting, and supervising pre-trial proceedings. In terms of combating organised economic crime, an important development from the perspective of the public prosecutor's office (in addition to the establishment of the Local Divisions of the Department for Organised Crime and Corruption) was the establishment of the Department for Economic Crime in the National Public Prosecutor's Office, whose primary objective is to supervise and coordinate the prosecution of economic and financial and fiscal crime, in particular, VAT extortion. In addition, coordination in the field of cybercrime is also crucial. To better illustrate the organisational changes that have been made, Figure 1 presents data on the number of economic and financial crime organisational units in the Regional and District Public Prosecutor's Offices.

Chart 1. Number of organisational units for economic and financial-treasury crime in Regional and District Public Prosecutors' Offices.

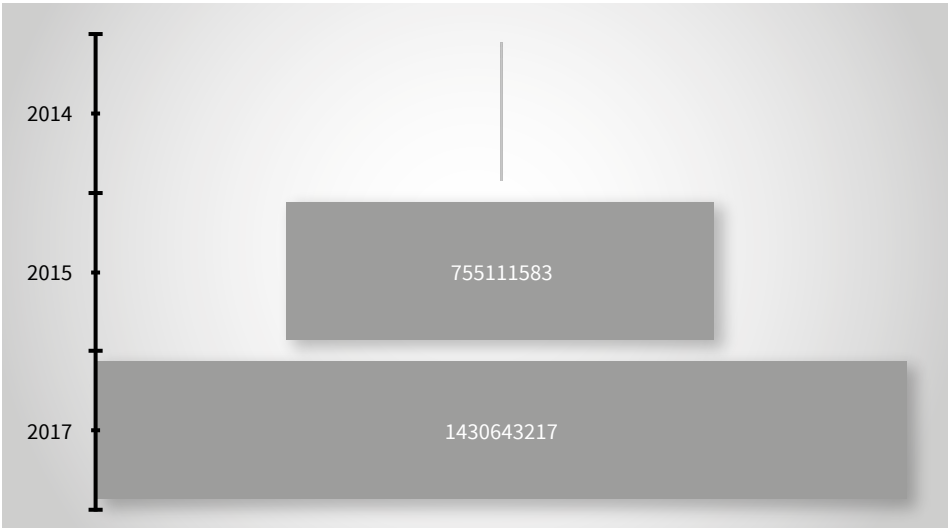


Source: Statistical data of the National Prosecutor's Office.

Organisational changes in the functioning of the public prosecutor's office have contributed to an increase in combating the most serious economic crimes. For example, in 2014–2015, 7,847 cases were registered in the prosecutor's office in the area of economic-financial crime, while in 2016–2017 there were already 12,542 cases. Thus, the number of registered cases almost doubled. This approach also resulted in several completed cases. In 2014–2015, 5896 cases were completed, while an incomplete two years later, that is, in 2016–2017, 6839 completed cases were recorded.

The chart below shows the number of cases involving the most serious crime of VAT extortion.

Chart 2. Number of ongoing preparatory proceedings meeting the criteria for the most serious cases of VAT extortion.



Source: Statistical data of the National Prosecutor's Office.

As can be seen, in 2017, the number of VAT crime cases handled increased by as much as 47% compared with 2014.

Of course, it is not only the number of ongoing or registered cases that indicate an improvement in the quality of the work of prosecutors, but above all, their effectiveness, which is measured, among other things, by the number of indictments filed and subsequent final convictions. In terms of the number of pre-trial proceedings concluded with a bill of indictment for the most serious VAT crime, there was an almost two-fold increase in 2017 compared to 2014. In 2017,

196 bills of indictment were filed in the abovementioned area, whereas in 2014, there were only 103.[25]

An extremely important aspect concerning the prosecution of organised economic crimes is the issue of secured property. There has been noticeable improvement in this area. Certainly, as the data also show, an important circumstance in this regard was the introduction of a new legal instrument, extended confiscation.

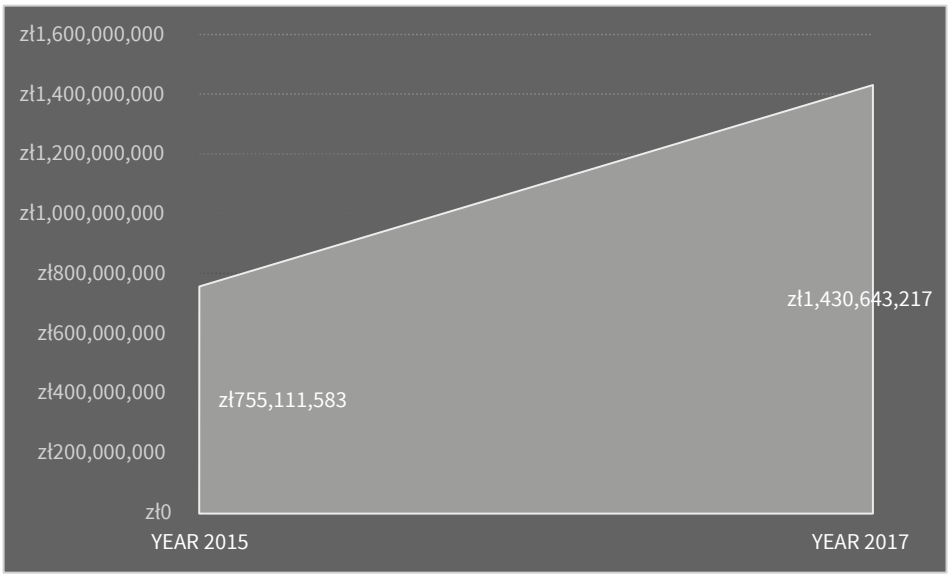
The Council Framework Decision 2005/212/JHA of 24 February 2005 required EU Member States to introduce the institution of extended confiscation in relation to the offences described in the decisions and committed within the framework of criminal organisations. Although the above-mentioned Framework Decision did not explicitly use the term "extended confiscation," it referred to "extended powers of confiscation." Extended confiscation was already explicitly referred to in European Parliament Directive 2014/42/EU of 3 April 2014. This Act indicated the need to apply extended confiscation to group crimes and cybercrimes.

Pursuant to Article 45(2) of the Penal Code, in the event of a conviction for an offence from the commission of which financial gain, even indirectly, was obtained, punishable by imprisonment, the maximum term of which is not less than 5 years, or committed in an organised group or in association with the aim of committing a crime, the gain from the commission of the offence is considered to be the property that the perpetrator took possession of or obtained any title to in the period of 5 years prior to the commission of the offence until the moment of delivery of a sentence, even if not final unless the perpetrator or other interested person presents evidence to the contrary. In addition, Paragraph 3 specifies that 'if property constituting an advantage obtained from the commission of the offence referred to in § 2 has been transferred to a natural person, legal person or organisational unit without legal personality, in fact or under any legal title, it shall be deemed that the property in the spontaneous possession of such person or unit and the property rights vested in it belong to the perpetrator, unless, on the basis of the circumstances surrounding their acquisition, it could not be assumed that such property, even indirectly, originated from an offence'. Pursuant to Paragraph 5 of Article 45 of the Code of Criminal Procedure, in the event of joint ownership, the forfeiture of the share belonging to the perpetrator or the forfeiture of the equivalent of that share shall be ordered.

The chart below illustrates the value of the property secured in 2015 and 2017.

25 National Prosecutor's Office Statistics.

Chart 3. Value of property actually confiscated in 2015 and 2017.



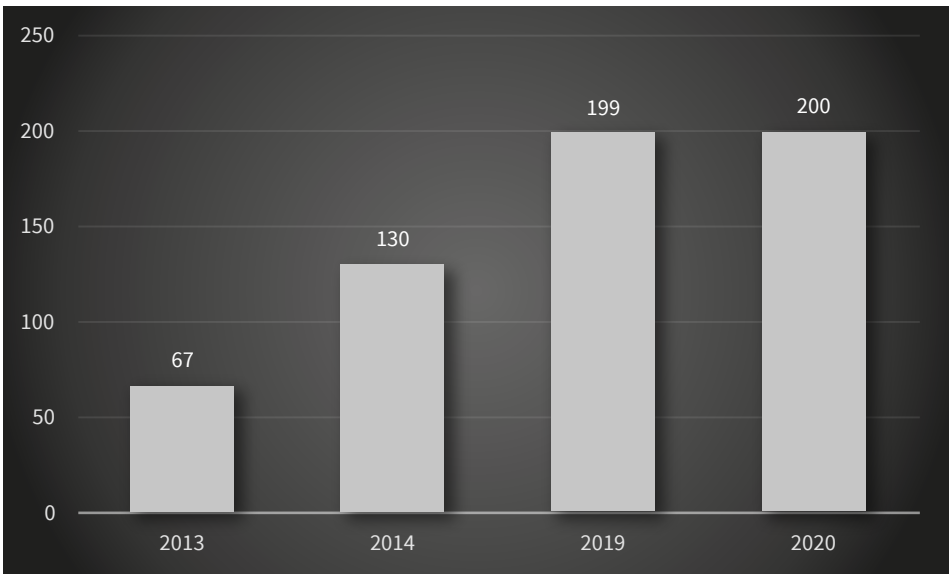
Source: Statistical data of the National Prosecutor's Office

The chart above clearly illustrates the upward trend in the actual property secured, which was as high as 89% in 2017 compared to 2015. In addition to the domestic currency, a foreign currency in the form of the euro was secured. Thus, the value of the euro secured in 2015 amounted to €176,428,173, while in 2017 it was €334,262,433.

It should be noted that the changing modus operandi of organised economic crime groups has forced law enforcement agencies to seek new legal and, in particular, organisational solutions aimed at effectively combating this type of criminal activity. One example is the establishment of a separate unit within the Polish Economic Crime Department by Order of State Prosecutor No. 8/2020 of 17 January 2020. This cell became part of the Fiscal Crime Division. The establishment of the Division in question is in line with § 21(1) of the Regulation of the Minister of Justice of 7 April 2016, Rules of Procedure for the Internal Office of the Common Organisational Units of the Public Prosecutor's Office (Journal of Laws of 2017, item 1206) and has become necessary in connection with the implementation of the department's other tasks related to combating fiscal crime. Within this department, the coordination of pretrial proceedings related to VAT offences in which a tax receivable of at least PLN 1,000,000 (approximately EUR 240,000) was compromised is carried out. In 2020, there was a 27% increase in the number of VAT extortion proceedings compared to 2018. In addition, 394 VAT extortion proceedings were completed in 2020, an increase of 185% compared with 2015. As previously mentioned, the importance

of the effectiveness of the prosecution's work on VAT crimes is the number of convictions. The graph below illustrates the number of convictions for VAT offences in the period 2014–2020.

Chart 4. Number of cases concluded with a final conviction in VAT crime in the period 2014–2020.



Source: Statistical data of the National Prosecutor's Office.

In recent years, special attention should be paid to economic crime of an organised nature involving the mechanism of the "reverse drug distribution chain." In this regard, statistics from the National Public Prosecutor's Office show that from 1 January 2013 to 30 June 2016 there were only 95 pre-trial investigations into the "reverse drug distribution chain," of which: 25 were discontinued, in 4 the initiation of proceedings was refused and in 24 cases a bill of indictment was filed. Only 9 proceedings ended with convictions. In comparison, in 2020, at least 70 proceedings in this regard were still pending, and as many as 77 suspects were presented with decisions to file charges while questioning a transaction amounting to PLN 180,000,000 (EUR 40,000,000). Considering the scale of this dangerous phenomenon, changes were introduced in the Polish legislation, consisting primarily of the following: a) criminalised all actors involved in the reverse drug distribution chain structure; b) administrative orders and prohibitions relating to the constituent elements of the offence have been adapted by clearly setting out the rules of correct behaviour; c) criminalised the export or sale of medicines without complying with the administrative anti-export procedure; d) a more severe sanction for the basic offence and the introduction of qualified types (significant value

and type of drugs at risk of not being available in the Republic of Poland) were adopted.[26]

Finally, it is worth noting issues concerning errors made by law enforcement agents when conducting serious preliminary investigations into economic crimes. These errors result in the following circumstances: a) misinterpretation of the law, including fiscal regulations; b) lack of knowledge of the realities of economic life; c) lack of knowledge of basic accounting and accounting for business transactions; d) drawing erroneous conclusions after inspecting secured accounting records.

In addition, there is a lack of specialisation among judges.[27] While in the general organisational units of the prosecutor's office, there are separate departments and divisions dedicated to the investigation of serious economic crimes, such specialisation does not exist in the courts.

Conclusion

Reducing the most serious economic crimes is certainly a challenge for national law enforcement agencies. To effectively combat this type of crime, it is necessary to make use of the latest technological developments. It is important to realise that the legal system does not have the ideal tools to effectively combat this type of threat. Today, in the field of economic crime, criminals are increasingly using cyberspace to carry out illegal activities, prioritising the possibility of making substantial illegal profits over legitimate businesses. An important aspect that can improve the prosecution of organised economic crime is the stability of the law and its unambiguous interpretation. This is because there have been situations where courts have interpreted similar facts in completely different ways. An example of this is the issue concerning the perfect concurrence of criminal and fiscal criminal offences.[28] An important circumstance which may improve the fight against this type of crime is the close cooperation of law enforcement authorities, including, first and foremost, the police and the prosecutor's office with the treasury apparatus and, in particular, the General Inspector of Financial Information. Only a rapid exchange of information between these offices can contribute to the protection of extorted amounts. Another circumstance which contributes to the lengthiness of proceedings is the frequent and unnecessary use of an expert's institution, whose activity is often limited to accounting for calculations of defrauded amounts. Certainly, both the prosecutor and the tax authorities are able to deal with this aspect, and the use of the institution of an expert in this respect is a kind of "protective screen" and an attempt to relieve the

26 Act of 6 September 2001, Pharmaceutical Law, Dz. U. 2001 No. 126 item 1381 (changes came into force on 6 June 2019).

27 Duży, 2013, p. 253.

28 See e.g. Resolution of seven judges of the Supreme Court of 24 January 2013 ref. I KZP 19/12.

burden, or a circumstance justifying the possibility of suspending the preparatory proceedings for the time of its obtaining. At the beginning of the 1990s, experts from police headquarters in the field of preventive measures against economic fraud developed a program entitled "know your customer." According to this program, the following elements received attention: a) the need to develop a procedure related to the buyer of goods; b) creating or using business intelligence to assess reliability of the recipient of goods; c) the need to limit the use of multiple commercial intermediaries; d) eliminating the use of copies of documents instead of original documents.[29]

In my opinion, special attention should be paid to issues related to privatisation processes, which are particularly exposed to the activities of economic criminal groups. In this context, the transparency of actions on the part of both the buyer and seller is important.

The complex matter of organised economic crime should remain under the vigilant attention and control of law enforcement officials, who must take swift and efficient action in terms of both general and specific prevention. The rapid change in organised economic crime (rapid rebranding) involves smooth adaptation to both legal loopholes and technological developments.

29 Wójcik, 2001, pp. 62–63; Jasiński, 1998, p. 5.

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BARTŁOMIEJ ORĘZIAK*

The Image of the Right to Privacy in Selected Polish Constitutional Court Cases

ABSTRACT: *This research article aims to present an image of the right to privacy in selected Polish constitutional court cases. The paper starts with a concise introduction indicating the scope of the study, the justification for undertaking the analysis, and the methodology used. As part of the introduction, the current structure of the judiciary in Poland will also be presented. The court cases related to the right to privacy heard by the Polish Constitutional Tribunal will then be presented with a focus on considerations related to the understanding of the concept of the right to privacy, its content, scope, and elements, and the legally justified premises limiting this human right. Such judgments are based on the Constitution of the Republic of Poland. This will be done on the basis of three judgments of the Polish Constitutional Tribunal of significant importance to the title issue. As part of these considerations, reference will also be made to numerous other judgments of the Polish Constitutional Tribunal, so that the presented discourse has the broadest possible context. The paper ends with a concise summary containing original observations related to the matter being discussed.*

KEYWORDS: the right to privacy, Poland, jurisprudence, the Polish Constitutional Tribunal, the Constitution of the Republic of Poland

1. Introduction

As part of this study, an image of the right to privacy in selected Polish court cases is presented. This will not cover all court cases concerning the right to privacy but rather, carefully selected decisions of the Polish judicature holding

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the most importance. The scope of the study is therefore the level of application of law, where it is possible to decode the meaning, scope, content, and elements of the right to privacy in Poland in terms of the law in action. However, this scope should be narrowed down to the most important body of the judiciary in Poland, which has the greatest impact on the understanding of law in practice. Poland has a continental law system that shows many differences from Anglo-Saxon law, including the effects of issuing court decisions.[1] This is an extremely interesting issue; however, it is beyond the scope of the present study. This is sufficient to indicate that there is no case law in Poland. This does not mean, however, that some judgments issued by Polish judicial authorities do not have an impact wider than that between the parties to court proceedings. This applies particularly to one body of the Polish judiciary. Pursuant to Article 190 of the Constitution of the Republic of Poland of April 2, 1997 (CRP),[2] judgments of the Constitutional Tribunal shall be of universally binding application and shall be final. For this reason, the scope of this study includes the jurisprudence of the Polish Constitutional Tribunal. There is one more Tribunal in Poland, the Polish Tribunal of State. Nevertheless, it does not issue any decisions that would be relevant from the perspective of the title issue. The Tribunal of State is a judicial authority whose task, in light of Article 198 of the Constitution of the Republic of Poland, is to issue judgments in cases of violation of the Constitution of the Republic of Poland or laws by strictly defined persons in connection with the position held or within the scope of their office. Constitutional liability before the Tribunal of State is borne by the President of the Republic, the Prime Minister and members of the Council of Ministers, the President of the National Bank of Poland, the President of the Supreme Audit Office, members of the National Broadcasting Council, persons entrusted by the Prime Minister to run a ministry, the Supreme Commander of the Armed Forces, and, in the scope specified in Article 107 of the Polish Constitution, deputies and senators.[3]

There are many reasons for undertaking research on the image of the right to privacy in selected Polish constitutional court cases. The most significant, however, is the fact that the content of statutory law often does not reflect the specificity of its functioning in practice. Legal researchers must be careful not to rely solely on theoretical sources, disregarding the real effects of interpreting

1 Stein, 1991, pp. 1594–1598; Tetley, 1999, pp. 701–712; Pejovic, 2001, pp. 818–841; Algero, 2005, pp. 782–807.

2 The Constitution of the Republic of Poland of April 2, 1997, adopted by the National Assembly on April 2, 1997, adopted by the Nation in a constitutional referendum on May 25, 1997, signed by the President of the Republic of Poland on July 16, 1997 (Journal U. 1997 No. 78, item 483).

3 See Barański, 2015, pp. 39–40.

and applying the law.[4] This order is not accidental, for first the interpretation is made and only then is the law applied. This means that the application of the law is an activity secondary to interpretation, as it determines the manner of application of the law, which in turn determines the practical image of the law. We are talking here about how the law is understood, what results from it, and what implications it has in the outside world; we are thus talking about law in action. Legal theorists can conduct research on law in isolation from this practical aspect of law. In science, no one can forbid this. Developing theories, making original divisions, creating new concepts, or trying to explain the law based on literature is very valuable. Nevertheless, it should be held that the study of law in action and the effects of its operation in practice are no less valuable. This is what the analysis of jurisprudence serves regarding the act of applying it, to determine the interpretations of the law that it implies. This makes the examination of court cases an extremely valuable resource for understanding the practical image of the law. This justifies the analysis of the title issue undertaken herein.

This article will use the research method typical of the legal sciences, which is the linguistic and logical method constituting the exegesis of the content of legal documents. The subject analysis will be supplemented with the use of linguistic hermeneutics and the views of the representatives of the doctrine (theoretical and legal methods). An axiological method is also used, referring to commonly accepted values as the subject of the implementation of law.[5] Nevertheless, the most important method that will be applied in this study is the case study method through the analysis of selected Polish constitutional court cases concerning the right to privacy. The subject of the case-study analysis will be the rulings of one of the highest judicial authorities in Poland, containing interpretations of the concept of the right to privacy, its content, scope, and elements, and the legally justified premises limiting this human right. Importantly, although it is important to define an appropriate methodological approach by selecting appropriate methods when conducting scientific research, it is no less important for the quality of legal analysis to be open to what is unfamiliar and unexplored, and to maintain objectivity and reliability. The logical reasoning in this article is mainly based on the deductive method. However, the inductive method was not excluded, depending on the needs of the research problem. The cognitive and interpretative functions and, as a subsidiary, the didactic function, were considered the purpose of the application of the research instruments described above.

4 Examples of studies that pay attention to both theoretical and practical aspects of the problems raised in the field of legal sciences, for example, are: Wielec, 2017a, pp. 111–124; Wielec, 2010 r., pp. 39–44; Wielec and Oręziak, 2018b, pp. 50–65; Wielec and Oręziak, 2018a, pp. 76–90; Wielec, 2020a, p. 76–87; Wielec, 2012, pp. 243–255; Wielec and Szymczykiewicz, 2011, pp. 155–163; Wielec and Szymczykiewicz, 2010, pp. 123–133; Wielec, 2020b, pp. 193–207; Wielec, 2021a, pp. 241–255; Wielec, 2021b, pp. 179–192.

5 In the field of axiology, see Wielec, 2017b, pp. 1–407.

In Poland, the judicial system results directly from the provisions of the Polish Constitution. According to Article 173, the courts and tribunals shall constitute a separate power and shall be independent of other branches of power. This is the case with the judiciary in Poland. Pursuant to Article 174 of the Polish Constitution, courts and tribunals issue judgments on behalf of the Republic of Poland. This means that only the courts and tribunals have the power to issue a judgment on behalf of the Polish state. Pursuant to Article 175(1) of the Constitution of the Republic of Poland, the administration of justice in the Republic of Poland shall be implemented by the Supreme Court, the common courts, administrative courts, and military courts. Additionally, in light of Article 175(2) of the Polish Constitution, extraordinary courts or summary procedures may be established only during times of war. Contrarily, reference is made to ordinary legislation in Article 176(2) of the Constitution of the Republic of Poland, pursuant to which the organizational structure, jurisdiction, and procedure of the courts shall be specified by statute. To sum up this part of the argument, there are tribunals and courts in Poland. There are two tribunals, the Constitutional Tribunal, whose jurisprudence will be analyzed in this study, and the Tribunal of State, whose scope of activity has been outlined above and is considered irrelevant for this analysis. Courts in Poland are divided into the Supreme Court, common courts, administrative courts, and military courts. Relevant laws in Poland define this system.[6] Common courts are categorized into three types: district, regional, and appellate courts. Military courts are divided into military garrisons and district courts. Pursuant to Article 183 of the Polish Constitution, the Supreme Court shall exercise supervision over common and military courts regarding judgments that also perform other activities specified in the Constitution and statutes specified in the Constitution of the Republic of Poland and relevant laws. An example of another activity is, in light of Article 1 clause 3 of the Act of December 8, 2017, on the Supreme Court, recognition of election protests and validation of elections to the Sejm and the Senate, election of the President of the Republic of Poland, elections to the European Parliament, examination of protests against the validity of a nationwide referendum or a constitutional referendum, and confirmation of the validity of the referendum. In turn, administrative courts are divided into Supreme Administrative Courts and voivodeship administrative courts. Pursuant to Article 3(2) of the Act of July 25, 2002, Law on the System of Administrative Courts, the Supreme Administrative Court supervises the activity of voivodeship administrative courts in the scope of adjudication in the manner specified by statutes, and in particular, hears appeals against the judgments of these courts, adopts

6 See Act of December 8, 2017, on the Supreme Court (i.e., Journal of Laws of 2022, item 480, as amended); Act of August 21, 1997, Law on the System of Military Courts (i.e., Journal of Laws of 2022, item 655, as amended); the Act of July 25, 2002, Law on the System of Administrative Courts (i.e., Journal of Laws of 2022, item 1259); Act of 27 July 2001, Law on the System of Common Courts (i.e., Journal of Laws of 2022, item 655, as amended).

resolutions clarifying legal issues, and recognizes other cases falling within the jurisdiction of the Supreme Administrative Court under other laws. Another act is, for example, the Act of August 30, 2002, Law on Proceedings before Administrative Courts.[7] According to Article 15 § 1(4), the Supreme Administrative Court shall settle disputes over jurisdiction between the bodies of local government units and between local government appeal boards, unless a separate act provides otherwise, and disputes over powers between the bodies of these units and government administration bodies. Complementing this brief outline of the judiciary in Poland is the clarification of the Constitutional Tribunal's role. The Constitutional Tribunal is a separate body from the Supreme Court, common, administrative, and military courts, and under Article 188 of the Constitution of the Republic of Poland, it adjudicates on: compliance of laws and international agreements with the Constitution of the Republic of Poland; compliance of statutes with ratified international treaties, the ratification of which required prior consent expressed in the statute; compliance of legal provisions issued by central state organs with the Constitution of the Republic of Poland, ratified international agreements, and statutes; compliance with the Constitution of the Republic of Poland of the goals or activities of political parties; and constitutional complaints.[8] Additionally, pursuant to Article 189 of the Constitution of the Republic of Poland, the Constitutional Tribunal resolves disputes over powers between the central constitutional organs of the state. Importantly, as has already been emphasized, under Article 190(1) of the Polish Constitution, the judgments of the Constitutional Tribunal are binding and final. This is a normatively provided exception, as in Poland, court judgments are binding only between the parties to court proceedings. In summary, this short outline of the structure of the Polish judiciary, it would appear, constitutes another justification for the choice of the selected jurisprudence of the Polish Constitutional Tribunal as the subject of the analysis of this study.

2. Selected Polish constitutional jurisprudence

■ *2.1. Regulatory environment*

The Polish Constitution recognizes a normatively defined right to privacy. Pursuant to Article 47 of the Polish Constitution, everyone shall have the right to legal protection of his private and family life and of his honor and good reputation,

7 Act of August 30, 2002, Law on Proceedings before Administrative Courts (i.e., Journal of Laws of 2022, item 329, as amended).

8 Pursuant to Art. 79(1) of the Polish Constitution: 'In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution.'

and to make decisions about his personal life. Pursuant to Article 48 of the Polish Constitution, parents shall have the right to rear their children in accordance with their own convictions. Such upbringing shall respect the degree of maturity of a child, as well as his freedom of conscience and belief and his convictions. The limitation or deprivation of parental rights may be effected only in the instances specified by the statute and only on the basis of a final court judgment. Pursuant to Article 49 of the Polish Constitution, the freedom and privacy of communication shall be ensured. Any limitations thereon may be imposed only in cases and in a manner specified by the statute. Pursuant to Article 50 of the Polish Constitution, the inviolability of the home shall be ensured. Any search of a home, premises, or vehicles may be made only in cases and in a manner specified by statute. Pursuant to Article 51 of the Polish Constitution, no one may be obliged, except on the basis of a statute, to disclose information concerning his person. Public authorities shall not acquire, collect, or make accessible information on citizens other than that which is necessary in a democratic state ruled by law. Everyone shall have the right of access to official documents and data collections concerning himself. Limitations on such rights may be established by statutes. Everyone shall have the right to demand the correction or deletion of untrue or incomplete information, or information acquired by means contrary to a statute. Principles and procedures for the collection of and access to information shall be specified by the statute. Additionally, pursuant to Article 31(3) of the Polish Constitution, any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations should not violate the essence of freedom and rights.

■ *2.2. Judgment of the Constitutional Tribunal dated December 12, 2005, file ref. act K 32/04*[9]

On December 12, 2005, the Polish Constitutional Tribunal issued a judgment in the case of a conflict that may occur between the operational activities of the police and the fundamental rights of an individual. The case concerned the questioning of several provisions of the Police Act[10] and the entire order of the Police Commander in Chief on April 6, 1990,[11] with regard to the acquisition and storage of this information through operational activities carried out by the police. It should

9 Judgment of the Constitutional Tribunal of December 12, 2005, K 32/04, OTK–A 2005, No. 132.

10 Act of April 6, 1990, on the Police (Journal of Laws of 2002, No. 7, item 58, as amended).

11 Regulation No. 6 of the Police Commander in Chief of May 16, 2002, on obtaining, processing and using information by the Police and methods of establishing and maintaining collections of such information (Journal of Laws of the Police Headquarters of 2002 No. 8, item 44, as amended).

be emphasized that these provisions concerned various aspects and methods of the authority's interference with the privacy of an individual through the exercise of powers related to operational and intelligence activities by the police. Here, we talk primarily about the constitutionally regulated freedom of communication and protection related to the private sphere. The Constitutional Tribunal noted that the operational activity of the police, which is based on ordinary legislation and carried out naturally under secret conditions, is in clear conflict with certain fundamental rights of an individual. The Constitutional Tribunal emphasized that this applies in particular to the individual's right to privacy, the constitutional freedom of communication and the related protection of the secret of communication, the protection of information autonomy (Articles 49 and 51 of the Polish Constitution), and the constitutional guarantee of the judicial protection of individual's rights. In this case, the Constitutional Tribunal pointed to one very important aspect of Poland's right to privacy. It should be stated that some of the rights and freedoms provided for in the Constitution of the Republic of Poland contain reference to ordinary legislation, which may define the limitations of these rights and freedoms. This is the case with Articles 49, 50, 51(3) of the Polish Constitution. Other legal regulations, such as Article 47 (generalized right to privacy) or Article 51(3) of the Polish Constitution, do not provide for the possibility of introducing a statutory limitation on these constitutional powers. It can be concluded that if a specific provision of the Constitution of the Republic of Poland does not in itself provide for the possibility of limitations, ordinary legislation cannot directly limit the rights and freedoms guaranteed by that provision of the Constitution of the Republic of Poland. Nevertheless, in Poland, there is a regulation of Article 31(3) of the Constitution of the Republic of Poland, constituting the general principle of maintaining proportionality of a possible restriction of constitutional liberty or rights in the event that they were to be subject to limitations in ordinary legislation, irrespective of their subject matter. The Constitutional Tribunal noted in this case that this principle applies both to the situation where the Constitution of the Republic of Poland provides for the creation of exceptions by statutes and the situation where the ordinary legislator, regulating another matter, and not exercising constitutional authorization to co-define a certain sphere, somehow accidentally falls into collision with constitutional freedoms and rights of the individual. This observation also applies to the rights and freedoms provided for in the Constitution of the Republic of Poland, which have been rigorously formulated, that is, similar to the generalized right to privacy specified in Article 47 of the Polish Constitution. We are discussing a situation in which the Constitution of the Republic of Poland itself does not provide that the law may limit a specific right or freedom. In this context, if the law interferes with such rights or freedoms, it is necessary to maintain proportion, and going beyond this proportionality of the restriction will be decisive for the conclusion that interference by the ordinary legislator took place in an excessive and therefore unconstitutional manner. In

this case, we deal with the weighing of goods that are important to the state and citizens, namely, on the one hand, public security, and on the other hand, the right to privacy with all its elements. Therefore, a compromise between these goods is necessary, in accordance with the content of Article 31(3) of the Polish Constitution. The Constitutional Tribunal believes that the legal instruments that enable the balancing of an appropriate compromise include two premises. First, it is a substantive legal premise that sets the limits set by the legal system on the interference of the authorities with individual spheres of privacy of an individual. Second, it is a premise of procedural guarantees related to the intrusion in question. Such procedural guarantees may include, for example, the necessity to report an inspection to a non-police authority and the legalization by this authority of interference with a given right or constitutional freedom. Additionally, it should be related to the premises and procedures of legalization performed by an external body, the procedure of making the interested party aware of the control and its results, and control measures in the event of an excess of the body conducting control. Having examined case No. K 32/04, the Constitutional Tribunal ruled that selected provisions of the Police Act were inconsistent with Article 51(4) in connection with Article 31(3) of the Polish Constitution, Article 49 in connection with Article 31(3) of the Polish Constitution, and Article 51(2) in connection with Article 31(3) of the Polish Constitution. Additionally, the Constitutional Tribunal ruled that the order of the Police Commander in Chief on April 6, 1990, was inconsistent with Article 51(5) and Article 93(2) of the Polish Constitution.

2.3. Judgment of the Constitutional Tribunal of 5 March 2013, file ref. act U 2/11[12]

On March 5, 2013, the Constitutional Tribunal issued a judgment in the case of § 5 par. 1 and 2 and § 10 sec. 1 of the Regulation of the Minister of Justice of February 23, 2005, on the subject of examination or performance of activities involving the accused and the suspect (hereinafter: the Regulation of the Minister of Justice of February 23, 2005).[13] The case was initiated by Ombudsman's submission of a request underlining that, in light of the provisions of the Regulation, in certain situations the examination of the accused person (suspect) may be carried out in the presence of third parties, and in order to conduct the examination, direct coercive measures may be used. In terms of relevance to the title issue, the Ombudsman stated that § 5 par. 1 of the Regulation of the Minister of Justice of February 23, 2005, is inconsistent with the generalized right to privacy provided for in Article 47 in connection with Article 31(3) of the Polish Constitution. This objection was supported by the Public Prosecutor General, stating that the right to

12 Judgment of the Constitutional Tribunal of March 5, 2013, U 2/11, OTK–A 2013, No. 3, item 24.

13 Ordinance of the Minister of Justice of February 23, 2005, on the subject of examination or performance of activities involving the accused and the suspect (Journal of Laws No. 33, item 299).

privacy guarantees individual protection against actions of public authority, which limits his freedom to decide about himself, and orders the introduction of positive mechanisms of effective protection of privacy. In this context, the standard of protection of the intimacy of the person undergoing medical intervention[14] serves to implement the constitutional right to privacy of the individual. Importantly, according to the Public Prosecutor General, the Act of June 6, 1997, the Code of Criminal Procedure (CCP)[15] does not define other standards in the context of treatments and examinations. The aforementioned standard of protection of the intimacy of a person undergoing medical intervention, as defined in the Act of November 6, 2008, on Patient Rights and Patient's Rights Ombudsman, is general and applies both to a patient voluntarily reporting to a healthcare facility and to any other case of providing health services in a different form, including against the will of the examined person. This fact was pointed out by the Public Prosecutor General and, taking it into account, he noted that, in his opinion, the questioned § 5 par. 1 of the ordinance of the Minister of Justice of February 23, 2005, restricts the privacy of an individual by ordering assistance when there is a need to use direct coercion or at the request of the examiner or performing the activity, because the said "assistance" threatens the intimacy of the examined person. Because this provision enters the sphere reserved only by statute, the Public Prosecutor General suggested that it is inconsistent with Article 47 in connection with Article 31(3) of the Polish Constitution. In the opinion of the Constitutional Tribunal, Article 47 of the Polish Constitution defines two separate human rights. First, the right of an individual to legal protection of the spheres of life is indicated in the first part of this provision, that is, private life, family life, honor, and good name. Second, we are talking about the freedom to decide on one's personal life. The Constitutional Tribunal took the position that the first right of an individual must be accompanied by a statutory regulation allowing the protection of privacy, family life, honor, and good name. The second, on the other hand, means that it is forbidden to interfere with the freedom of an individual to shape his or her personal life. It should be noted that, on the one hand, the freedom to decide about one's personal life is one of the aspects of the general freedom of a human being defined in Article 31(1) of the Polish Constitution,[16] and, on the other hand, personal freedom in the

14 This standard in Poland is defined in Art. 20(1) in connection with Art. 22(2) of the Act of November 6, 2008, on the Rights of the Patient and the Patient's Rights Ombudsman (i.e., Journal of Laws of 2020, item 849, as amended). Pursuant to Art. 20(1) of the aforementioned Act, the patient has the right to respect for intimacy and dignity, in particular when providing health services. On the other hand, according to Art. 22(2) of the aforementioned act, in order to implement the right referred to in Art. 20(1) of the aforementioned act, a medical practitioner is obliged to act in a manner ensuring respect for the intimacy and dignity of the patient.

15 Act of June 6, 1997, Code of Criminal Procedure (i.e., Journal of Laws of 2022, item 1375).

16 Pursuant to Art. 31(1) of the Polish Constitution, human freedom is subject to legal protection.

strict sense provided for in Article 41(1) of the Polish Constitution.[17] Importantly, in these circumstances, the Constitutional Tribunal stated that the two powers provided for in Article 47 of the Polish Constitution should be defined jointly as the right to privacy. The Constitutional Tribunal also drew attention to the fact that the Constitution of the Republic of Poland emphasizes the importance of the right to privacy in the system of constitutional protection of rights and freedoms. This is because pursuant to Article 233(1) of the Polish Constitution,[18] the right to privacy in Poland is inviolable even in the event of a state of emergency or martial law. Therefore, it should be emphasized that even such exceptional circumstances cannot constitute a justification for the ordinary legislator to mitigate the premises legitimizing entering the sphere of private life without risking the accusation of unconstitutional arbitrariness.[19] Based on this, the Constitutional Tribunal rightly concluded that the norms limiting the right to privacy with all its elements should be regulated at the statutory level, particularly when it comes to the realities of criminal proceedings, which is closely related to the deepest interference of the legislator with constitutional rights and civil liberties. Referring to the elements of the right to privacy, the Constitutional Tribunal noted that Poland's right to privacy was protected in many ways. The multifaceted nature of this right is manifested in the fact that it is protected by several constitutional rights and freedoms, and is closely related to the constitutional order to protect the human dignity provided for in Article 30 of the Polish Constitution.[20] These constitutional rights and freedoms are contained in the section from Article 47 to Article 51 of the Polish Constitution. The Constitutional Tribunal also emphasized that the preservation of human dignity requires respect for the purely personal sphere, so that no one is exposed to the necessity of communing with other people or sharing their experiences or intimate experiences with others. It should be emphasized that the private sphere of a person is constructed from the ceilings legally open, to a greater or lesser extent, to external influences. At the same

17 Pursuant to Art. 41(1) of the Polish Constitution, everyone is guaranteed personal inviolability and freedom. Deprivation or restriction of liberty may take place only on the principles and in the manner specified in the Act.

18 Pursuant to Art. 233(1) of the Constitution of the Republic of Poland, the act specifying the scope of limitations of human and civil freedoms and rights during martial law and emergency may not limit the freedoms and rights specified in Art. 30 (human dignity), Art. 34 and Art. 36 (citizenship), Art. 38 (protection of life), Art. 39, Art. 40 and Art. 41 (4) (humane treatment), Art. 42 (incurring criminal liability), Art. 45 (access to court), Art. 47 (personal rights), Art. 53 (conscience and religion), Art. 63 (petitions) and Art. 48 and Art. 72 of the Polish Constitution (family and child).

19 See also: Judgment of the Constitutional Tribunal of June 20, 2005, K 4/04, OTK–A 2005, no. 6, item 64; Judgment of the Constitutional Tribunal dated November 20, 2002, file ref. K 41/02, OTK ZU No. 6 / A / 2002, item 83.

20 Pursuant to Art. 30 of the Constitution of the Republic of Poland, the inherent and inalienable dignity of a human being is a source of freedom and human and civil rights. It is inviolable, and its respect and protection is the responsibility of public authorities.

time, as can be seen from the considerations already presented, the approval of the imperious encroachment of public authority into constitutional rights and freedoms is not the same.[21] In these circumstances and taking into account the arguments presented, the Constitutional Tribunal decided, inter alia, that § 5 par. 1 of the Regulation of the Minister of Justice of February 23, 2005, is inconsistent with Article 74 § 4 of the Code of Criminal Procedure[22] and Article 92(1), Article 41(1), and Article 47 in connection with Article 31(3) of the Polish Constitution.

2.4. Judgment of the Constitutional Tribunal of November 25, 2021, file ref. act Kp 2/19[23]

On November 25, 2021, the Constitutional Tribunal issued a judgment on the declaration of the property status of public officials and relatives. The subject of the considerations in this judgment was the application of the President of the Republic of Poland (hereinafter, the President of RP) submitted pursuant to Article 122(3) of the Polish Constitution.[24] In his application of October 18, 2019, the President of the Republic of Poland requested that the provisions of the Act of September 11, 2019, Amending the Act on the Exercise of the Mandate of a Deputy and Senator and Some Other Acts be examined for compliance with the Constitution of the Republic of Poland (hereinafter, the Act of September 11, 2019).[25] The President of RP questioned the provision of Article 1 point 1 of the Act of September 11, 2019, which amends Article 35 of the Act of May 9, 1996, on the Exercise of the Mandate of Deputy and Senator (hereinafter: the Act on the Exercise of the Mandate of Deputy and Senator),[26] and Article 1 point 2 of the Act of September 11, 2019, amending the Annex to the Act on the Exercise of the Mandate of a Deputy and Senator, to the extent that they concern their own children, children of the spouse, and adopted

21 Judgment of the Constitutional Tribunal of December 12, 2005, file ref. K 32/04, OTK ZU No. 11/A/2005, item 132.

22 Pursuant to Art. 74(4) of the Code of Criminal Procedure, the Minister of Justice, in consultation with the minister competent for health matters, shall define, by way of a regulation, the detailed conditions and manner of subjecting the accused and the suspect to examination, as well as performing the activities referred to in § 2 point 1 and 3 and § 3, bearing in mind that the collection, recording, and analysis of the evidence should be carried out in accordance with the current knowledge in the field of forensics and forensics.

23 Judgment of the Constitutional Tribunal of November 25, 2021, file ref. no. Kp 2/19, OTK Series A 2022, item 6.

24 Pursuant to Art. 122(3) of the Constitution of the Republic of Poland, 3. prior to the signing of the act, the President of the Republic may submit a motion to the Constitutional Tribunal regarding the compliance of the act with the Constitution. The President of the Republic may not refuse to sign a bill that has been recognized by the Constitutional Tribunal as conforming to the Constitution.

25 Act of September 11, 2019, amending the Act on the Performance of the Mandate of a Deputy and Senator and Some Other Acts, Available at: https://orka.sejm.gov.pl/proc8.nsf/ustawy/3795_u.htm#_ftn1 (Accessed date: 24 August 2022).

26 Act of May 9, 1996, on the Performance of the Mandate of a Deputy and Senator (i.e., Journal of Laws of 2022, item 1339).

children of a deputy or senator. The President of the Republic of Poland made Article 47 and Article 51(2) in connection with Article 2, Article 31(3), and Article 18 of the Polish Constitution and Article 32(1) in connection with Article 47, Article 51(2), and Article 18 of the Polish Constitution. In the justification of his application, the President of the Republic of Poland explained that the act of September 11, 2019, submitted to him for signature by the Marshal of the Sejm, extended the scope of asset declarations submitted by persons holding public functions to include information on the financial situation of their relatives (spouse, own children, children of a spouse, adopted children, and a person living together). In this context, it is important that the statements in question have been defined as non-confidential, except, for example, for information such as address details, the location of the property, and information enabling the identification of movable property, as well as personal data of the persons closest to the person making the declaration. In his application, the President of the Republic of Poland emphasized that he fully supported the goals that the Act of September 11, 2019, was generally intended to achieve. In particular, we refer to support for undertakings related to the fight against corruption[27] and ensuring the transparency of public life.[28] It is worth quoting the position of the President of the Republic of Poland expressed in the justification to the application of October 18, 2019, according to which,

> Despite the fact that the project promoters had commendable intentions, the analysis of constitutional aspects shows that in this case there was a conflict of constitutionally protected values—the right of citizens to obtain information about the activities of public authorities and persons discharging public functions, as expressed in Article 61(1) of the Constitution, with the right to legal protection of private life, regulated in Article 47 of the Constitution, guaranteed in terms of personal data protection by Article 51(2) of the Constitution.[29]

The President of the Republic of Poland emphasized that regardless of whether the norm that the ordinary legislator wanted to implement was Article 61(1) of the Polish Constitution,[30] the constitutionally protected value is the right to privacy,

27 In this context, see Matejuk, 2004, pp. 28–30; Szyc, 2015, pp. 37–53; Kaczmarek, 2021, pp. 65–76; Dzietczyk, 2016, pp. 111–121.

28 In this context, see Opaliński, 2019, pp. 35–43; Jabłoński, 2018, pp. 107–120; Chałubińska-Jentkiewicz, 2020, pp. 299–314.

29 Application of the President of the Republic of Poland of October 18, 2019, pp. 5–6.

30 Pursuant to Art. 61(1) of the Constitution of the Republic of Poland, a citizen has the right to obtain information about the activities of public authorities and persons discharging public functions. This right also covers obtaining information on the activities of economic and professional self-government bodies as well as other persons and organizational units to the extent that they perform tasks of public authority and manage municipal property or the property of the State Treasury.

the general guarantees of which are derived from Article 47 of the Polish Constitution and Article 51 of the Polish Constitution.[31] It is also worth paying attention to the discourse of the President of the Republic of Poland, largely based on the previous jurisprudence of the Constitutional Tribunal. First, the President of the Republic of Poland indicated that Article 47 of the Constitution of the Republic of Poland implies the prohibition of presuming the competence of public authority in the field of interference with privacy, the order to refrain from interference by both public authorities and entities of private law, and the obligation for the state to create conditions in which an individual may freely and safely use their constitutional rights.[32] Second, the President of the Republic of Poland noted that the special importance of the right to privacy in the system of constitutional protection of rights and freedoms is demonstrated by the fact that, pursuant to Article 233(1) of the Polish Constitution, even conditions such as martial law and a state of emergency do not allow ordinary legislators to relax the conditions under which it is possible to enter the sphere of private life without risking the accusation of unconstitutional arbitrariness.[33] Third, the President of the Republic of Poland emphasized that in the sphere of information autonomy, constitutional norms guarantee individual protection against obtaining, processing, storing, and disclosing, in a way that violates the rules of usefulness, necessity, and proportionality in the strict sense, of information such as a) health,[34] b) financial situation,[35] c) family situation,[36] d) name or image, or e) other information necessary for the activities of public authorities.[37] Fourth, the President of the Republic of Poland pointed out that in the sphere of decision-making autonomy, constitutional norms guarantee individual protection against interference with: a) one's own life or health,[38] b) shaping one's family life,[39] c) bringing up children

31 See Judgment of the Constitutional Tribunal dated November 20, 2002, file ref. act K 41/02; Judgment of the Constitutional Tribunal dated December 13, 2011, file ref. act K 33/08.

32 Judgment of the Constitutional Tribunal dated July 30, 2014, file ref. K 23/11, OTK–A 2014, No. 7, item 80.

33 Judgment of the Constitutional Tribunal of November 20, 2002, K 41/02, OTK–A 2002, No. 83.

34 Judgment of the Constitutional Tribunal of May 19, 1998, U 5/97, OTK 1998, No. 4, item 46; Judgment of the Constitutional Tribunal of February 19, 2002, U 3/01, OTK–A 2002, No. 1, item 3.

35 Judgment of the Constitutional Tribunal of June 24, 1997, K 21/96, OTK 1997, No. 2, item 23; Judgment of the Constitutional Tribunal of November 20, 2002, K 41/02, OTK–A 2002, No. 83.

36 Judgment of the Constitutional Tribunal of November 12, 2002, SK 40/01, OTK–A 2002, No. 6, item 81; Judgment of the Constitutional Tribunal of July 13, 2004, K 20/03, OTK–A 2004, No. 63.

37 Judgment of the Constitutional Tribunal of June 23, 2009, K 54/07, OTK–A 2009, No. 86; Judgment of the Constitutional Tribunal of December 13, 2011, K 33/08, OTK–A 2011, No. 10, item 116.

38 Judgment of the Constitutional Tribunal of July 9, 2009, SK 48/05, OTK–A 2009, No. 7, item 108; Judgment of the Constitutional Tribunal of October 11, 2011, K 16/10, OTK–A 2011, No. 80.

39 Judgment of the Constitutional Tribunal of January 27, 1999, K 1/98, OTK 1999, No. 1, item 3; Judgment of the Constitutional Tribunal of April 28, 2003, K 18/02, OTK–A 2003, No. 4, item 32.

in accordance with one's own convictions,[40] and d) giving birth to a child.[41] In light of the above remarks and after analyzing all the arguments, the factual and legal status of the Constitutional Tribunal noted that in its latest jurisprudence, it had already pointed out that the constitution-maker established the privacy of an individual, not as a constitutionally granted subjective right, but as a constitutionally protected freedom with all the resulting consequences.[42] Such a construction of the right to privacy means

> the freedom of individuals to act within the framework of freedom up to the limits established by law. Only an unambiguous statutory regulation may impose restrictions on undertaking specific behaviors within the framework of specific freedom. It is unacceptable to presume that the competence of public authorities interferes with individual freedom. An inherent element of all constitutional human freedoms is the state's obligation to respect and protect them by law, as well as to refrain from interfering with freedom by both the state and private entities.[43]

This is important because, in the case of a subjective right, an individual should have an appropriate entitlement resulting from a legal norm that defines the content and scope of this right. It is important that in the event of a conflict between the constitutional freedom of one individual and the subjective right of another, the subjective right should give way to freedom, at least until the legislator resolves the conflict in favor of the subjective right, while respecting the principle of proportionality. The Constitutional Court also noted that privacy relates primarily to personal, family, and social life and is sometimes defined as the right to be left alone.[44] However, it should be emphasized that privacy also refers to the protection of information about a person and guarantees a certain state of independence within which an individual can decide on the scope and range of sharing and communicating information about his life to other people.[45] Privacy also has a special relationship with human dignity, since the inviolability of human dignity requires, above all, respect for the purely personal sphere in which one is not exposed to the necessity of being with others or sharing one's

40 Judgment of the Constitutional Tribunal of December 2, 2009, U 10/07, OTK–A 2009, No. 163
41 Judgment of the Constitutional Tribunal of May 28, 1997, K 26/96, OTK 1997, No. 2, item 19.
42 Judgment of the Constitutional Tribunal dated July 30, 2014, file ref. K 23/11, OTK ZU No. 7 / A / 2014, item 80.
43 Ibid.
44 Braxton, 1976, pp. 699–720; Cope, 1978, pp. 671–773.
45 Judgment of the Constitutional Tribunal of June 24, 1997, K 21/96, OTK 1997, No. 2, item 23; Judgment of the Constitutional Tribunal of November 20, 2002, K 41/02, OTK–A 2002, no. 83.

experiences or sensations of an intimate nature.[46] The Constitutional Tribunal also recalled that the importance of the right to privacy in the system of constitutional protection of rights and freedoms is demonstrated, inter alia, by the fact that this right is, pursuant to Article 233(1) of the Polish Constitution, inviolable even in acts limiting other rights, issued under martial law and under the state of emergency. In this regard, it is also important that, despite the fact that Article 47 of the Polish Constitution does not directly indicate permissible limitations, there is a possibility of limiting the sphere of the right to privacy, due to, inter alia, the rights and freedoms of other individuals or the need to live in a community. However, these restrictions must be justified in Article 31(3) of the Polish Constitution. Additionally, the Constitutional Tribunal indicated that a special breach in the sphere of the right to privacy is created by Article 61 of the Polish Constitution and the right of access to public information guaranteed therein. However, this provision, also in the opinion of the Constitutional Tribunal, only concerns the privacy of persons discharging public functions. The interference of public authorities with the private lives of individuals not performing public functions is subject to much more restrictive restrictions. In this regard, the Constitutional Tribunal expressed the view that 'obtaining information about the private life of individuals by public authorities, especially covertly, must be limited to necessary situations, permissible in a democratic state only for the protection of constitutionally recognized values and in accordance with the principle of proportionality.'[47] In light of all the above remarks and legal and factual arguments, the Constitutional Tribunal in the present case, with regard to all challenged legal regulations, ruled that they were inconsistent with Article 18, Article 47, and Article 51(2) in connection with Article 31(3) of the Polish Constitution.

3. Summary

Briefly summarizing the analysis carried out as part of this paper on the selected Polish constitutional jurisprudence in terms of the right to privacy, the most important and final conclusions resulting from the above scientific discourse outlining the image of the right to privacy within the scope of the study should be presented.

First, Article 47 of the Polish Constitution defines two separate human rights. First, the right of an individual to legal protection of the spheres of life is indicated in the first part of this provision, that is, private life, family life, honor, and good name. Second, there is the freedom to decide one's own personal life.

46 Judgment of the Constitutional Tribunal dated December 12, 2005, file ref. K 32/04, OTK ZU No. 11 / A / 2005, item 132.

47 Judgment of the Constitutional Tribunal dated July 30, 2014, file ref. K 23/11, OTK ZU No. 7 / A / 2014, item 80.

The first right of the individual must be accompanied by statutory regulations to defend privacy, family life, honor, and good name. The second, means that it is forbidden to interfere with the freedom of an individual to shape his or her personal life. These two powers provided for in Article 47 of the Polish Constitution should be defined jointly as the right to privacy.

Second, in the sphere of informational autonomy, constitutional norms guarantee individual protection against obtaining, processing, storing, and disclosing, in a way that violates the rules of usefulness, necessity, and proportionality in the strict sense, information, for example about a person's: a) health condition, b) financial situation, c) family situation, d) name or image, or e) other information necessary for the activities of public authorities.

Third, in the sphere of decision-making autonomy, constitutional norms guarantee individual protection against interference with the individual's decisions, including those about: a) one's own life or health, b) shaping family life, c) raising children in accordance with one's own convictions, and d) giving birth to a child.

Fourth, the Polish constitution-maker defined the privacy of an individual not as a constitutionally granted subjective right but as constitutionally protected freedom with all the ensuing consequences. In the case of a subjective right, an individual should have an appropriate entitlement resulting from a legal norm that defines the content and scope of this right. It is important that in the event of a conflict between the constitutional freedom of one individual and the subjective right of another, the subjective right should give way to freedom, at least until the legislator resolves the conflict in favor of the subjective right while respecting the principle of proportionality.

Fifth, Article 47 of the Polish Constitution, constituting a generalized right to privacy, or Article 51(3) of the Polish Constitution, does not provide for the possibility of introducing a statutory limitation of their scope. Article 47 of the Constitution of the Republic of Poland implies a prohibition on presuming the competence of public authority to interfere with privacy, an order to refrain from constitutionally unacceptable interference by both public authorities and private law entities, and an order for the state to create conditions under which individuals can freely and safely exercise their constitutional rights. However, there is a regulation of Article 31(3) of the Constitution of the Republic of Poland constituting the general principle of maintaining the proportionality of a possible restriction of constitutional liberty or rights in the event that they were subject to limitations in ordinary legislation, irrespective of their subject matter. This also applies to the rights and freedoms provided for in the Constitution of the Republic of Poland, which have been rigorously formulated, such as the generalized right to privacy specified in Article 47 of the Polish Constitution. In this context, if the Act interferes with the rights or freedoms defined in this way, it is necessary to maintain proportion, and going beyond this proportionality of the restriction will be

decisive for the conclusion that interference by the ordinary legislator took place in an excessive and therefore unconstitutional manner. This means that a certain compromise is necessary in line with the content of Article 31(3) of the Polish Constitution. Legal instruments that make it possible to balance an appropriate compromise include two premises. First is a substantive legal premise that sets the limits set by the legal system on the interference of the authorities with individual spheres of privacy of an individual; second is a premise of procedural guarantees related to the intrusion in question.

Sixth, a special breach in the sphere of the right to privacy is created by Article 61 of the Polish Constitution and the right of access to public information guaranteed therein. However, this provision applies only to the privacy of people discharging public functions. The interference of public authorities with the private lives of individuals not performing public functions is subject to much more restrictive restrictions.

Seventh, the Constitution of the Republic of Poland emphasizes the importance of the right to privacy in the constitutional protection of rights and freedoms. This is because pursuant to Article 233(1) of the Polish Constitution, the right to privacy is inviolable even in the event of a state of emergency or martial law. Therefore, it should be emphasized that even such exceptional circumstances cannot constitute a justification for the ordinary legislator to mitigate the premises legitimizing entering the sphere of private life without risking the accusation of unconstitutional arbitrariness. Norms limiting the right to privacy with all their elements should be regulated at the statutory level.

Eighth, Poland's right to privacy is protected in many respects. The multifaceted nature of this right is manifested in the fact that it is protected by several constitutional rights and freedoms (Articles 47 to 51 of the Polish Constitution) and is closely related to the constitutional order to protect human dignity provided for in Article 30 of the Polish Constitution. Maintaining a person's dignity requires respecting his purely personal sphere, so that no one is exposed to the need to associate with other people or share his or her experiences of an intimate nature with others. A person's private sphere is constructed from the ceilings that are, to a greater or lesser extent, legally open to external influence.

Concluding the analysis, it should be noted that the image of the right to privacy in the jurisprudence of the Polish Constitutional Tribunal is a significant and indeed key element of the protection of rights and freedoms in Poland. The scope, meaning, and elements of the right to privacy affect the life of every human being and should be effectively protected in proportion to emerging threats. Human privacy is one of the aspects of human life currently under attack and whose defense is in the interests of the autonomy or even sovereignty of every human being.

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Sharenting and Children's Privacy Protection in International, EU, and Czech Law: Parents, Stop Sharing! Thank You, Your Children

ABSTRACT: *The digitalization of social relations has brought some new and hitherto unknown phenomena. Real life has been extended, into the world of cyberspace. This world is often referred to as the virtual world, but in reality, by its consequences for our lives and the legal sphere, it is no less real than the physical world.*

A significant part of family life has been affected by this phenomenon. Photos, videos and other information that used to be available only to immediate family members are now shared publicly on the internet through social networks.

Young children are particularly affected, with parents publicly sharing information from their private lives. This practice is referred to as sharenting.

As a result of sharenting, children in the Internet environment often effectively lose their status as subjects and become mere objects. This object is then handled by the child's closest relatives – parents, i.e. the people who should naturally look after and defend the child's best interests.

The problem is that parents are not aware of both the legal framework and the possible factual negative consequences that sharenting can have for a child's life and childhood.

The key question that I seek to answer in this article is to what extent the current legal framework can respond to sharenting. The aim is also to assess to what extent is such sharing information about children legal and where the boundaries of permissible or justifiable disclosure of information about a child on the Internet lie. Finally, the question is also how the child affected by sharing can defend him/herself against its negative consequences.

Sharenting is addressed by the EU, international and national law. As far as national law is concerned, in my article I focus primarily on Czech civil and family law. Sharenting concerns the protection of privacy as a fundamental

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human right, but also freedom of expression, which is why the European Convention and the Convention on the Rights of the Child (international dimension), the EU Charter of Fundamental Rights (EU dimension) and the Czech Charter of Fundamental Rights and Freedoms (national constitutional dimension) are explored as well.

■ **KEYWORDS:** sharenting, child's best interest, privacy protection, social networks, parental responsibility, representation of the child in cyberspace

1. Introduction

The digitization and "internetization" of social relations has created new phenomena and challenges with the transfer or extension of real life into the world of cyberspace. This world is often referred to as the virtual world, but in reality, by its nature and consequences for our lives and the legal sphere, it is no less real than the physical world in which we live. We have become accustomed to the fact that these consequences are not necessarily positive.

A certain specificity of cyberspace is that direct access to it is effectively and often legally forbidden to certain groups of people. These people include, among others, the youngest (and also the most vulnerable) of us – children. However, they are routinely and unfortunately also increasingly present in cyberspace vicariously through their parents. Therefore, children do not have full control over how they are presented in cyberspace. They cannot influence the information published about them on the Internet, not only in terms of what they do or say but also in terms of photographs or videos of their likeness. Their parents are in full control and do not seek their children's opinions, and in many cases, given their young age, this is not even possible.

Consequently, children in the Internet environment often effectively lose their status as subjects and become mere objects. This object is then handled by the child's closest relatives, that is, the people who have the closest ties to them and who should naturally look after and defend the child's best interests. It may be legitimately asked whether this is indeed the case.

The phenomenon about which I am writing has already acquired its own name–professional literature refers to it as "sharenting" from a combination of the words sharing and parenting. It is understood as a situation in which a parent shares information about his or her child, typically photos or videos. From

the point of view of public law,[1] the information shared typically belongs to the category of personal data, and, given the fact that it concerns a child, even to the category of sensitive personal data.

The key question that I seek to answer in this article is to what extent the current legal framework is able to respond to this still relatively new social phenomenon. I not only cover extreme examples, but also situations of ordinary, "everyday" sharenting. The aim is to assess the extent to which such sharing of information about children is legal and where the boundaries of permissible or justifiable disclosure of information about a child on the Internet lie. The ultimate question is how children affected by sharing can defend themselves against its negative consequences.

Legislation regulating sharenting is multilayered and is contained in EU, international, and national law. As far as national law is concerned, I focus primarily on Czech law. Sharenting concerns the protection of privacy as a fundamental human right, but also freedom of expression, which is why the European Convention and the Convention on the Rights of the Child (international dimension), the EU Charter of Fundamental Rights (EU dimension), and the Czech Charter of Fundamental Rights and Freedoms (national constitutional dimension) are relevant. At the same time, sharenting is an issue that is regulated by the GDPR (the EU dimension) and the protection of privacy or, more broadly, the protection of personality rights in national law, that is, the Czech Civil Code in the case of the Czech Republic. Equally important is the regulation of the relationship between parents and children by family law, which defines the extent to which a parent can act on behalf of a child. This issue is also regulated by the Civil Code of Czech law. As the scope of this article is limited, I do not address legal regulation-related issues, such as the issue of contractual relations between information society service providers on the one hand and parents or children on the other.

2. Definition of sharenting

Sharenting is typically associated with the dissemination of information on children through social networks. However, information about children can also be shared by parents in other, more traditional means of data transmission. The fact that the dissemination of this information takes place electronically via the Internet is not in my opinion what defines sharenting. However, the Internet and social networks have brought this phenomenon to existence; without them, it could not exist to the present extent.

1 The issue is regulated by GDPR, which has been supplemented and implemented in the Czech Republic by Act No. 110/2019 Coll., the Act on the Processing of Personal Data (zákon č. 110/2019 Sb. Zákon o zpracování osobních údajů).

What defines sharenting as a phenomenon is precisely the fact that information about children is shared by their parents. The form in which the information is transmitted is, in my opinion, secondary, or directly irrelevant. I have therefore deliberately left out the Internet and social networks from the definition of sharenting I use in this article so that the definition is technologically neutral.

The essence of sharenting involves the public sharing of information about a child. Therefore, it is necessary to distinguish the private sphere from the public sphere. There are three possible ways of examining this distinction depending on whether the dividing criterion is (1) territorial, (2) personal, or (3) one that makes distinctions according to the nature of the information shared, that is, whether it is private or public.

Territoriality usually fails when sharing. Therefore, this is not a suitable dividing criterion. I have noted above that while sharenting is by definition not tied to the Internet, it *de facto* in most cases happens through it. The Internet is in this case merely a "tool" and due to its characteristics, it makes little sense to distinguish between private and public spaces in the environment of the Internet – it is ubiquitous. Rather than a place, it is possible to talk about the fact that the information it contains is only available to certain people. Therefore, a more appropriate criterion is the personal one. [2]

Nevertheless, the territorial aspect has some relevance. There is a qualitative difference if a parent shares, for example, a photo taken in a public place (e.g., a picture of a child on the podium after winning a race) or at school, from a situation in which a parent shares a photo of a child together with, for example, the child's room. In the latter case, the parent reveals another layer of the child's privacy by showing the conditions under which the child lives. The physical private world meets the virtual public world.

Definitions of sharenting do not usually work with the target group, that is, with people who are the actual or potential recipients of information about children that has been shared by their parents. Yet, this personal perspective seems to me the most appropriate for defining sharenting. Information dissemination usually occurs within several circles. First, this sharing is most intense within

2 The limits of this distinction are also highlighted by the case law of the Czech Constitutional Court and the ECtHR. Although it does not concern sharenting, it is relevant to the case at hand. See the reasoning of the Czech Constitutional Court in Pl. Constitutional Court 3/09, in which the Court stated that 'in today's times, when the autonomous fulfilment of private life and work or leisure activities are closely related, it is not possible to make a sharp spatial separation of privacy in places used for living from privacy created in places and environments used for work or business activities or for satisfying one's own needs or leisure activities, even if the activities take place in areas open to the public, respectively. Such activities, which are not enclosed, such as business activities, may be subject to certain restrictions which may constitute a certain interference with the right to privacy.' The Constitutional Court drew inspiration from the case law of the ECtHR. See, for example, the ECtHR's reasoning in *Niemietz v. Germany* (Application no. 13710/88), Judgement, 16 December 1992.

the family in the atomic sense, that is, between the partners/parents themselves. Second, the target group may be a wider family. Third, information may be shared not only with the family but also with a varyingly broadly defined circle of friends. Fourth, information may be shared directly with the public, that is, people who do not fall into any of the previous categories. As a rule, the first and second variants of sharing information about a child are not considered sharenting in the true sense. The third and fourth variants, however, usually are.

Regardless of the variant described above, the crucial problem with the Internet and information sharing through social networks is the limited ability to control further dissemination of the information shared. Thus, the information may initially be shared by the parent within a narrow circle of recipients, but this circle may later be expanded by secondary sharing by another person to new, unintended, and unwanted recipients not originally intended by the parent. This form of sharing is no longer considered sharenting, but is a secondary consequence of sharenting.

The third aspect, which is based on the nature of the information, also does not represent an optimal criterion for defining sharenting. In particular, the fact that information may be publicly available (regardless of whether we define it as public geographically or personally) does not necessarily mean that it is public information; it may still be private.[3]

Sharenting is understood as a situation in which a parent shares information about their child. According to Czech law, only biological[4] or adoptive parent exercise parental responsibility. Thus, a step-parent, foster parent, spouse, or anyone else (e.g., a grandparent) to whom the child has been entrusted by the parent are not holders of obligations and rights arising out of parental responsibility.[5] I believe that sharenting is not an issue in this case, as these people represent third parties and not the legal representative of the child.

In terms of time, sharenting is a phenomenon that is typical of a relationship between a parent and their minor child. The legal quality of the relationship between the child and parent changes as soon as the child acquires full legal capacity.[6] The essence of this change lies in the fact that the child is able, not only *de facto* but also *de jure*, to make decisions about their rights and obligations and to defend themselves if others interfere with their rights. The issue of the majority will be addressed later in this article. Regarding lower age limits, the first solution is to link the beginning of life to the moment of birth. In reality, however, sharenting can occur even earlier – from the moment of conception. Indeed, parents

3 See Bónová, 2022, p. 178.

4 I use the term "biological parent" here for simplicity. In fact, a parent in this sense may not only be a biological parent, but also one to whom one of the legal presumptions of parenthood applies.

5 Králíčková, 2021, p. 102.

6 The exception may be applied to infrequent cases of people with limited legal capacity.

can and frequently do share visual information about the fetus.[7] The difference between a situation that concerns the fetus and the child lies in the fact that the fetus does not yet exist as a subject of Czech law until birth. Legislation does not provide for or protect the fetus in relation to sharenting.[8] However, this does not preclude the possibility that children may defends themselves legally against the disclosure of such information in the future.[9]

Sharenting, if done to a reasonable extent and if the content of the information is also reasonable, is not necessarily a negative social phenomenon. However, it can easily become one. Typically, the systematic and excessive sharing of information or the sharing of potentially problematic and sensitive information that directly interferes with a child's personal rights is problematic. Such a phenomenon is referred to as oversharenting[10] and its negative impact on the child is obvious.[11]

At first glance, it may seem that the problem of sharenting is artificially exaggerated. After all, it is normal for parents to be proud of their children, share information about their children, and show them in photos or other means of transmitting information. No visible harm is done in such situations. However, the problem can be viewed differently from different perspectives. Fortunately, I do not have personal experience with sharenting, as I grew up at a time when the Internet was not available to the public and we did not use it in my family. However, this was not the case with social networking. I ask myself how I would feel if someone else shared information about me. The fact that this other person was one of my parents would be irrelevant to me at that moment. Nor is social convention, and thus the fact that it is basically common on social media, relevant. What is relevant is the fact that I am not (the child is not) the master of my privacy as the law presumes. The fact that I do not know or feel it at the time is also irrelevant. It will or may happen one day, and I will feel the consequences of such an action.

I also feel it is necessary to stress that social convention is a dynamic concept that evolves over time. Something that was "normal" at a certain time may seem bizarre decades later. This is in the best case. In the worst case, because of shifting social standards, what was once normal becomes forbidden. An example involving children is the successful Czech film "S tebou mne baví svět," which contains scenes of naked children bathing. It would be impossible to film a similar scene today, and I personally would not allow it with my children as a parent.

7 That this problem indeed exists is confirmed, for example, by this article Karlík, 2019.
8 See Zuklínová, 2014.
9 Karlík, 2019.
10 Choi and Lewallen, 2018, p. 5.
11 Concerning harm, Cordeiro distinguishes between tangible harm, children's rights, digital citizenship violations, and intangible harm. See Cordeiro, 2021.

Sharenting (including oversharenting) has not received the attention it deserves in the literature. This is surprising given how common the phenomenon is. It is also surprising in view of the consequences that sharenting can have on a child's psychological development and their later personal and professional life. Let us not forget that the downside of the Internet is that its content is eternal. Despite the existence of the right to be forgotten, the real possibility of deleting something once it is on the Internet is rather theoretical.

There are many practical examples of sharenting. It can take the form of sharing photos or videos of a child, or it can be a situation in which funny stories from a child's life, or a child's misspoken words, humorous catchphrases, or accidents are shared.

Some parents often do not share anything of their own private lives on their social network profiles. However, they systematically publish details of their child's life, as if the child's privacy is something that does not deserve protection.

As a rule, sharenting is not performed for profit. Nevertheless, cases in which the motive for sharenting is financial gain are no exception. In an example of such a situation, in which a child was systematically exploited economically on the Internet, is the pair Misha and Methadone. Two siblings, one aged nine and the other aged twenty-two, became famous YouTubers with the knowledge and support of their parents.[12] Their fame crossed the borders of the Czech Republic, as a result of which their work included both Czech and English production. They became famous mainly because they produced very bizarre songs, often containing vulgarity, where not only the lyrics were often "crazy" but also the way in which they were performed. In their production, they also revealed a part of their private life – the household in which they lived. The main performer was the younger of the brothers, the older one created and directed the content. The extent to which the nine-year-old Misha was able to assess the implications that his actions might have on his future life and professional career is highly questionable. However, at his age, he was undoubtedly already able to read, so he could have read the hateful comments on the Internet from users who found his work too unconventional.[13]

An example of a similar situation in which the child's activity is organized by the parents and is most likely also for profit, but in which none of the negative signs of sharenting appear, is the YouTube channel of Karolina Protsenko, whose violin performances are broadcast without revealing the sphere of her home or anything that is not related to her musical performances.[14] In this case, the

12 See Mishovy šílenosti [Online]. Available at: https://cs.wikipedia.org/wiki/Mishovy_š%C3%ADlenosti (Accessed: 8 June 2022).

13 Misha z Kuřimi je youtuberským fenoménem. Jeho videa sledují miliony lidí [Online]. Available at: https://www.impuls.cz/regiony/jihomoravsky-kraj/michal-florian-kurim-youtuber-metadon-misha-mishovy-silenosti.A161105_080205_imp-jihomoravsky_kov/tisk (Accessed: 8 June 2022).

14 Karolina Protsenko Violin [Online]. Available at: https://www.youtube.com/c/KarolinaProtsenkoViolin. (Accessed: 8 June 2022).

Internet serves as a medium similar to TV or radio. However, the same can no longer be said of her other videos on another YouTube channel that she shares with a friend.[15]

The above examples illustrate that sharenting is a diverse practice. I would like to stress that the issue of sharenting cannot be reduced to the Internet alone. Exposing a child's privacy to other multimedia may have the same negative consequences. Therefore, we can talk about sharenting in narrow or broad senses. Prime examples of the broader concept are reality television shows such as "*Výměna manželek*" (Wife Swap), which allow the public to see into the home and family relationships of a child who is a passive participant in such a program.[16] From the child's point of view, the voluntary and conscious involvement of parents in such an activity cannot be considered reasonable. The parents' aim is profit or to solve their private problems. The child's interests and benefits are completely secondary.[17] Another example might be the "modern" services offered to parents by kindergartens that allow parents to monitor online what children are doing in the nursery. Strangers can thus gain access not only to the child's image and video data (with the trivial possibility of saving it) but also to information about how the child reacts within the collective.

If we systematize this phenomenon, the following variants of sharenting are typical: 1) Direct sharenting under the identity of the parent. 2) Direct sharenting is implemented by the parent under the identity of the child. The child therefore has no access to his profile and the information disseminated, and the parent acts essentially as his manager. 3) Indirect sharenting in which parents actively create the conditions for the child to share information about themselves and actively collaborate with the child on this sharing. 4) Indirect sharing in which the parent does not intend to disseminate information about the child but creates conditions under which this de facto occurs.

Sharenting does not apply, however, if the child shares the information without the parents' knowledge, even though he or she is not yet contractually entitled to use the relevant social network, nor is it possible because the child may not yet have the necessary degree of legal capacity under Czech law.

15 Barvina Show [Online]. Available at: https://www.youtube.com/c/BarvinaShow (Accessed: 8 June 2022).

16 In this show, two families participate in each episode for a fee of CZK 100,000 (app. EUR 4,200). The wives of the two families are exchanged for ten days. The camera documents their cohabitation in the new environment. At the end of the show, the performing couples confront each other and exchange their views. Výměna manželek [Online]. Available at: https://cs.wikipedia.org/wiki/Výměna_manželek (Accessed: 8 June 2022).

17 The child may benefit from the correction of a pathological condition in their family, but such a gain is speculative and unlikely, the price paid for this hypothetical benefit in the area of privacy is too high, and the help can be implemented through traditional counseling methods.

There is no difference in principle between the first and second options.[18] However, the first option, if established appropriately, may lead to less interference with a child's personal rights.[19] This assumes that the parent is restrained and shares the data, for example, in such a way that it is not possible to trivially link the child's name to the shared image and sound material. In the latter case, the child is identified and relatively easy to trace. The third option may be legally different from previous options. The child participates; therefore, it is clear that he or she is aware of the situation and provides consent. This situation is further discussed later in the article, as the factor of the child's informed consent (in relation to his age) is legally significant. The fourth option is just as dangerous as the first two. This can be demonstrated by the example of the aforementioned Wife Swap. In the case of this program (which, incidentally, is available online), children are not the primary concern, but they are part of the program.

3. Aspects of national sub-constitutional regulation – privacy protection, parental responsibility, and representation of the child

Two main areas of regulation in civil law address the issue of sharing. The first is the protection of personality, which includes the protection of likeness and privacy. Czech law provides for Sections 81 et seq. of the Civil Code.[20] The addressees of this regulation are all people, regardless of their age. Therefore, the protection of image and privacy is also granted to children.

It is essential that the protection of image and privacy be conceptually based on the fact that any interference, such as in the form of the dissemination

18 These are not the same: it always depends on the contractual conditions of the service the parent uses. The first option usually corresponds to the expectations of the operators of these services – the profile belongs to the person who is presented through it. The second case, from this point of view, may represent a breach of contractual terms.

19 This option can be practical in situations in which the child him or herself has the intention to be active on social networks for profit or for artistic reasons. In this way, the parent has the advantage of being able to control and filter what the child shares. At the same time, this option is in line with the contractual terms of social network providers, as the profile belongs to the parent. See Heitner, 2018.

20 The protection of privacy is ensured in Czech private law by means of the general clause of protection of personality rights and the specific provisions of the Civil Code. Key provisions are contained in Section 81 of the Civil Code. This provision serves as a general clause according to which 'the personality of a person, including all his natural rights, is protected. Everyone is obliged to respect a person's free decision to live according to his own.' This general provision is followed in the same clause by a demonstrative enumeration of human values, according to which 'the life and dignity of the human being, his health and right to live in a favorable environment, his dignity, honor, privacy and his expressions of his personal nature shall, in particular, enjoy protection.' Human privacy is specified among these values in that a violation of any other value that is protected by the cited provision will also result in an invasion of privacy. See Ondřejová, 2016, p. 199.

of a person's image or interference with their privacy by making an audio or visual recording of them, which is subsequently disseminated, presupposes either the existence of the consent of the person concerned (that is, the person disseminates the information himself or herself, or a third party does so with his or her consent) or justification based on a statutory license.

As previously discussed, the essence of sharenting is the dissemination of information about a child. This information may include both the child's image and other information that concerns their privacy. The legislation in the Civil Code reflects the reality and fact that children are only capable of making limited decisions about their own affairs. Until a certain age, children are *de facto* unable to act on their own and share information about their privacy. Similarly, they are not able to give consent envisaged by the legislation protecting image and privacy. [21]

The answer to the question of who can act and under what conditions, and if necessary, grant consent, is given by the second relevant area of regulation. This area is the regulation of the relationship between parents and children under Czech law, contained in Sections 855 et seq. of the Civil Code. The provision of Section 858 of the Civil Code is particularly crucial, as it regulates parental responsibility as follows:

> Parental responsibility includes rights and duties of parents consisting in caring for the child, including, without limitation, care for his health, his physical, emotional, intellectual and moral development, the protection of the child, maintaining personal contact with the child, ensuring his upbringing and education, determining the place of his residence, representing him and administering his assets and liabilities; it is created upon the child's birth and extinguished upon the child acquiring full legal capacity. The duration and extent of parental responsibility may only be changed by a court.

An important fact follows from this regulation. Regarding sharenting, in most cases, the parent does not need the child's consent under Czech law. Parents disseminate information about the child in their capacity as 'representatives of the child;' therefore, consent to such actions is already given by law, namely the above-quoted Section 858 of the Civil Code. However, this does not lead to the conclusion that sharenting is permissible, which would be an oversimplification.

From the perspective of sharenting, the quality of the relationship between parents and children, as provided for in the Civil Code, is of particular importance. This legislation has historically evolved to place increasing emphasis on

21 In the Czech legal system, children acquires legal capacity gradually, at the latest when they reach the age of 18.

the legal status, benefits, and interests of the child. This development has been completed since the adoption of the current Civil Code, which came into force in 2014. In defining the role of parents in the exercise of parental responsibility, the current Czech legislation emphasizes that they should care for the child, which means, inter alia, taking care of the child's health, emotional, intellectual, and moral development, and protecting the child.[22]

The use of the term "care" affects the quality of the relationship and suggests that the parent does not have the position of an absolutist ruler over the child.[23] On the contrary, the wording of the law makes it clear that rights and duties are reciprocal and, above all, that 'the purpose of duties and rights towards the child is to ensure the moral and material well-being of the child.'[24] These premises materialize in the legislation in the provision of Section 875(1), according to which 'Parents exercise parental responsibility in the best interests of the child.' I believe that this is the area in which parents most frequently make mistakes when sharing information about their children on the Internet. They fail to understand the quality of their relationship with the child and the fact that the child is not an object, not their property, and therefore cannot be arranged, photographed, and shared publicly in the same way that they photograph and share lunches in restaurants, a new car, or snapshots from an exotic holiday.

The Civil Code also provides that, to the extent that the child is not competent, parents represent the child either jointly or separately.[25] Therefore, the consent to a third party (typically the provider of the relevant social network service) with the invasion of privacy provided for in the above-mentioned legislation is not given by the child but by the parent (or both of them) parents until the child acquires the capacity to act independently. Even in the case of sharenting, there is no *a priori* conflict between the interests of the child and the parent. It would therefore be absurd to suggest that it is necessary for the court to appoint a guardian for the child that has been potentially or actually affected by sharenting.[26] When considering whether to disclose information about the child and whether to grant consent to third parties to share that information, the parent is bound by the above considerations, which are in the best interests of the child. I emphasize that the mere posting of information about a child on social media indicates that the parent has consented on behalf of the child to the further use of the child's information by a third party. In fact, the parent has given consent as part of the contract they have entered into to use the service in the first place.

22 See Sec. 858 of the Civil Code.
23 Neither parent has the status of *pater familias* anymore, with a very broad, even unlimited *patria potestas*.
24 See Sec. 855(2) of the Civil Code.
25 Sec. 892 of the Civil Code.
26 See Sec. 892(3) of the Civil Code.

To summarize, the regulations contained in the Civil Code imply that a parent can decide that certain information about their child, for example, photographs of the child or a video of the child, can be shared publicly. However, the limitation here is the best interest of the child. A parent may only share information consistent with the child's interests.[27] I question whether situations exist in which sharing information about a child on the Internet is in accordance with the child's interests. Claire Bessant provides an answer to this question in her article.[28] She lists a number of benefits, which I would personally divide into two groups. The first category includes those who directly benefit the child. Second, I would include benefits for the parents, which also indirectly benefit the child. The first group includes motivating children by broadcasting their achievements; sharenting can help children develop positive networks of family and friends and learn about themselves.[29] Sharenting thus allows parents to build a positive social media image for children and counteract negative behaviors they might themselves engage in as teenagers.

The second group includes avoiding isolation; obtaining emotional, practical, and social support;[30] and sharing parenting advice. Sharenting enables parents to enact and validate their parenting style.[31]

The intensity of sharenting also matters. "Moderate" sharenting will not be problematic. This refers to situations in which sharing information about a child is neutral, meaning that it does not harm the child in any way. This would include, for example, the sharing of shared family photos with minimal informational value about the child within a limited circle of friends or sharing a photo from school reporting some success the child has achieved. Here too, however, restraint and caution are appropriate, as the problem is time. Something that was standard at one time may be laughable at another – we can think here of the proliferation of photographs from the 1980s. Hair or dress styles from this era look bizarre nowadays and are often the subject of ridicule on social media.

Even in situations in which the consequences of sharenting are harmless or even beneficial, it is necessary to respect the child's opinion within the scope of Czech law if they are already capable of formulating and expressing it reasonably. The Czech Civil Code provides that

> before making a decision that affects the interests of the child, parents shall inform the child of everything that is necessary for the child to form his own opinion on a given matter and communicate it to the parents; this does not apply if the child is unable to properly

27 See Sec. 875 of the Civil Code.
28 Bessant, 2018.
29 Ibidem.
30 Ibidem.
31 Ibidem.

> receive the message, or form his own opinion or communicate it to his parents. Parents shall pay due attention to the child's opinion and take the child's opinion into account when making a decision.[32]

It is crucial to determine the age at which the obligation to consult the child arises, though the law does not explicitly set such an age. The determination of a specific age will be individual and will always depend on the maturity of the individual child. In any event, the age limit of thirteen years, at which many social networks allow children to engage, is too high, as children become aware of the existence of social networks much earlier. Therefore, the age of eight or nine seems more realistic from this point of view. Parents should obtain the child's consent with skepticism. As the Misha case mentioned in the Introduction demonstrates, children at young ages may not be able to fully appreciate the consequences of their actions in the future. Therefore, refusal to share information should be respected and consent should be subjected to critical evaluation.

In the previous paragraph, I discussed the child's consent implied by the exercise of parental responsibility. It is necessary to distinguish from this consent: (1) the consent given to third parties (typically social network operators), on the basis of which these parties may, in private law, interfere with the child's privacy, and (2) the consent provided for by EU public law, contained in the GDPR, on the basis of which personal data may be processed.

I will start with the latter, which is more systematic and the interpretation of which will be clearer. The specific legislation on this issue is not contained in the GDPR but in the national implementing legislation. In the Czech Republic, Act No. 110/2019 Coll. Act on personal data processing provides in Section 7 that 'A child shall enjoy capacity to grant consent to personal data processing in relation to an offer of information society services addressed directly to the child from fifteen years of age.' Thus, public consent is clearly established.

The situation is more complicated in the case of the first option because there is no explicit regulation. Under Czech law, a person acquires legal capacity gradually. However, I am convinced that Act No. 110/2019 Coll. Act on personal data processing can be used here and consider the age of fifteen years to be a general threshold in a broader sense at which parents should not disclose anything that may interfere with their child's privacy without the child's consent. However, in practice, parents should also respect the wills of younger children. Depending on the mental and physical development of the child, this age limit may be higher or lower in individual cases.

Parents' views on sharing information about their children can vary considerably. The Civil Code presumes that parents exercise responsibility in mutual

32 See Sec. 875(2) of the Civil Code.

accord.[33] In Czech law, the positions of the father and mother are comparable; neither is preferred. In the absence of an agreement between the two, the interests of the child should be given priority. Unless there is a clear and compelling reason for sharing information, in my opinion, a rather restrictive approach should prevail in the event of a difference in opinion between parents.

I have stated that children are the subject of privacy law. Parents can deal with their privacy but are limited by law in this possibility. However, many parents do not consider the consequences of their actions on the Internet. They are clearly unaware of their role as the child's legal representative and act for themselves. It is not uncommon for a parent to set up a profile on social media on which all of the posts are about their children, with the parent not even appearing in posts. This may be because the parent does not want to disrupt the parent's own privacy because they value it, or are uncomfortable with it, or out of simple modesty. These are understandable and relevant reasons. However, the paradox is that the parent in question strictly protects their own privacy but does so at the expense of the immediate family member, the child, who often has no way of defending him or herself. In doing so, the parent receives the benefits of joining the social network in question but pays for it not with his or her own data but with the child's.

4. Human rights dimension – protection of privacy, freedom of expression, and the best interests of the child

The legislation contained in the Civil Code must be interpreted and applied in a broader context. The human rights standard influences its value and also limits it. The relevant factors were 1. protection of privacy, 2. freedom of expression, and 3. the rights of the child, particularly their best interests.

The protection of privacy is ensured in Czech constitutional law primarily in Article 10 of the Charter of Fundamental Rights and Freedoms, which states that

> 1) Everybody is entitled to protection of his or her human dignity, personal integrity, good reputation, and his or her name. 2) Everybody is entitled to protection against unauthorized interference in his or her personal and family life. 3) Everybody is entitled to protection against unauthorized gathering, publication or other misuse of his or her personal data.

Similarly, the European Convention in Article 8 provides for the right to respect private and family life, and the EU Charter of Fundamental Rights in Article 7

33 Sec. 876(2) of the Civil Code.

provides for the same in matters falling within the scope of EU law. Beyond the protection of privacy, the EU Charter provides protection for personal data.

In the case of sharenting, parents may be entitled to the right to freedom of expression guaranteed by Article 11 of the EU Charter, Article 17 of the Charter of Fundamental Rights and Freedoms, and Article 10 of the European Convention. However, this right is not absolute and may be limited both on grounds relating to expression as such and on grounds of conflict with other rights that take precedence in the value balance. In the case of sharenting, conflict with the child's right to privacy is obvious.

From the perspective of the right to freedom of expression, sharenting could be permissible if it falls within the concept of citizen journalism. Within the framework of freedom of expression, protection is granted to all persons who are active in the field of journalism (journalistic exception). Journalism is broadly understood in the case law of the CJEU.[34] It is likely that Czech courts would respect the opinion of the CJEU when interpreting the Charter of Fundamental Rights and Freedoms, even if it were an issue falling outside the framework of EU law.[35] Nevertheless, in my opinion, journalistic exceptions are inapplicable in most cases of sharenting. Information about a child is typically not in the nature of journalistic material or information that would previously have been published elsewhere. However, I can imagine that this exception could be testified by a third party who further disseminates information about a child that was previously shared by that child's parent.

Therefore, in practice, the right to freedom of expression clashes with the right to privacy. The child is the addressee of this provision and should therefore be protected from sharenting, since the very nature of sharenting is that it reveals something that is and should be private. However, the matter is more complicated. Earlier in this article, in analyzing the sub-constitutional provision, I described the role parents play with respect to the child in the exercise of parental responsibility. Unsurprisingly, the mechanism is similar when it comes to protecting children's privacy at the human rights level. For example, the UK Court of Appeal, in interpreting the European Convention in the Weller case,[36] concluded that

> it is parents who usually exercise this decision-making for young children. Thus, if parents choose to bring a young child onto the red carpet at a premiere or awards night, it would be difficult to see how the child would have a reasonable expectation of privacy or Article 8 would be engaged. In such circumstances, the parents have made a choice about the child's family life and the types of interactions

34 See case C-73/07 Satamedia Oy.
35 See Sehnálek, 2021, p. 276.
36 Weller v Associated Newspapers [2015] EWCA Civ 1176.

> that it will involve. A child's reasonable expectation of privacy must be seen in the light of the way in which his family life is conducted. "Professor Bessant refers to this decision as" a striking example of the judiciary's acceptance that parents are entitled to decide what happens to their children's information (especially but not necessarily when they are young).[37]

The Czech national legislation described above fully corresponds to this concept. If we consider that, in the case of sharenting, children need protection from their own parents, then we can unfortunately conclude that in light of the above decision, the provisions protecting children's privacy will not in themselves be of much help to children in defending themselves. However, that conclusion is not sufficient, and, in fact, I do not find it satisfactory.

At the human rights level, children are further protected by the Convention on the Rights of the Child, which enshrines the principle of the best interests of children in Article 3.[38] According to this Convention, 'the best interests of the child shall be a primary consideration.' This can be understood in several ways. First, children's best interests are a substantive right,[39] which stands on its own alongside the aforementioned rights to privacy and freedom of expression. Any conflicts between these rights would have to be resolved by balancing them against each other using the principle of proportionality.[40]

However, this is typically not necessary in the case of sharenting. The child's best interests is also 'a fundamental, interpretative legal principle: If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen.'[41] Therefore, I consider that the best interests of the child must already be considered in the interpretation of the other fundamental rights concerned, regardless of whether the child or the parent is the direct addressee of these provisions. This interpretation occurs before there is a conflict with the best interests of the child as a substantive right.

I am therefore of the opinion that when interpreted correctly, the needs of the child should be directly considered. This means, therefore, that a parent, in representing a child in matters relating to the protection of the child's privacy, must have regard for the child's interests, and those interests must take precedence over

37 Bessant, 2018.

38 In EU law, this principle is enshrined in Art. 24 of the EU Charter, but the Czech Charter lacks an equivalent.

39 General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art. 3 para. 1), p. 4 [Online]. Available at: https://www2.ohchr.org/english/bodies/crc/docs/gc/crc_c_gc_14_eng.pdf (Accessed: 21 August 2022).

40 For a more in-depth analysis of the application of the proportionality principle, including an assessment of the legal situation in the Czech Republic, see Hofschneiderová, 2017.

41 Ibid.

any conflicting interests of the parent or third parties.[42] The degree of freedom that parents enjoy under privacy provisions is therefore different when they make decisions for themselves than when they make decisions for children. The implications for the possibilities of sharing information on the Internet are obvious. The scope of information that parents are entitled to share about themselves is not the same as the scope of information that they are entitled to share about their children.

It follows from the above that a parent is, after all, sometimes entitled to invade a child's privacy by sharing information. As noted above, in certain cases, sharenting can be beneficial to the child, either directly or indirectly. However, more often, it will have a neutral or even harmful impact. In fact, empirical data suggest that the top ten reasons for using social networking sites include: 1. to stay in touch with friends (42%), 2. to stay up-to-date with news and current events (41%), 3. to fill spare time (39%), 4. to find funny or entertaining content (37%), 5. general networking with other people (34%), 6. because friends were already on such sites (33%), 7. to share photos or videos with others (32%); 8. to share opinions (30%); 9. to research new products to buy (29%), and 10. meeting new people (27%).[43] It is also important to consider that social networking use is typically unpaid. It is not free, however, as the 'payment' is made with the user's own data.[44] This is how networks are built. Thus, sharenting allows parents to 'pay' with someone else's data.

An overview of the individual reasons clearly shows that the child's interest is not one of the main reasons for using social networks. On the contrary, the predominant reasons are those oriented towards the parent's own ego or needs, that is, essentially selfish reasons. Therefore, if I start from the premise that the privacy of the individual, and therefore of the child, is to be protected *a priori*, and that the international standard contained in the Convention on the Rights of the Child requires the state to reflect the best interests of the child in its actions, I conclude that standard cases of sharenting on the basis of the parent's freedom of expression will not be defensible, and in most cases, without the need to carry out a proportionality test to resolve the conflict between the two rights.

Nevertheless, there are cases in which sharenting can indeed be useful and beneficial. For example, this can occur in situations in which sharenting represents a way for disabled children who have no other contact with the world due to their physical or mental conditions to use this form of interaction. However, these are likely to be exceptions.

42 Including the state. 'The principle is designed to ensure that decision-making for children is not captured by the interests of others (such as the parents and the State) but undertaken from a child-centred point of view.' See Cowden, 2016.

43 Desreumaux 2018. I stress that this source is not a scientific study, yet it is suggestive of the intentions of social network users, with the results of the study being broadly in line with what I myself assumed on entry.

44 Polčák, 2018.

5. Child defense options

The nature of sharenting *de facto* excludes the possibility that children can defend themselves against this phenomenon. This conclusion is all the more true when children are younger. Therefore, a third party must be involved in their protection. However, the question is who this third person should be. The second parent is obviously an option, as their influence can be invaluable to the child. The traditional statutory defenses against the invasion of the right of privacy therefore fail and cannot satisfactorily fulfil their function in this case.

In borderline cases in which the other parent fails in their role as a protector of the child's best interests, we must look elsewhere for protection. The State seems to be a primary option.

The protection of the interests of the child in the Czech Republic is primarily ensured by the State through its own bodies, referred to by the abbreviation "OSPOD" – 'Body for Social and Legal Protection of Children.' Municipal and regional authorities perform this role. OSPOD has extensive competences, which conceptually include the problem of sharenting. I believe, however, that in practice, this authority is not able to fulfil the role of a child's protector against the publication of data on his or her person.

Paradoxically, the disadvantage of municipal authorities as child protection bodies is that they operate at the local level. While knowledge of the local environment (which is illusory in larger municipalities anyways) is a potential benefit in dealing with "traditional" children's problems, the clear disadvantage is the considerable decentralization of protection and, as a result, the low possibility of specialization and the chance that real expert help will be provided. It is therefore unlikely that these bodies will be able to identify the problem, and even if they do, they will not be professionally prepared to deal with it satisfactorily.

In some countries, the interests of the child are promoted and protected by a "children's ombudsman."[45] Slovak law, which is closest to Czech law, has established such an office.[46] However, a closer look at the regulations of this body's competencies shows that it has considerable limits. This is understandable since the task of the ombudsman has traditionally not been to act in private law relations. Similarly, the Children's Ombudsman in Slovakia serves to protect the

45 Wikipedia lists under the heading "Children's ombudsman" approximately four dozen countries in which children's interests are protected by special bodies [Online]. Available at: https://en.wikipedia.org/wiki/Children%27s_ombudsman#Slovakia (Accessed: 31 August 2022).

46 Act No. 176/2015 Coll., the Act on the Commissioner for Children and the Commissioner for Persons with Disabilities and on Amendments to Certain Acts (Zákon č. 176/2015 Z. z. Zákon o komisárovi pre deti a komisárovi pre osoby so zdravotným postihnutím a o zmene a doplnení niektorých zákonov).

interests of children in the public sector.[47] While it can deal with all complaints, it has no power of injunction against parents or social network operators.

I therefore do not see a child's ombudsman as a solution to the problem, although there is no doubt that it could at least contribute to the cultivation of relations in society.

Should such an institution be established, it would in principle be irrelevant whether it would be a completely independent office or whether the competences of the existing ombudsman would be extended. Between the two, I consider the first option preferable from the child's point of view. Indeed, the protection of a child's interests and the tendency to expand its own activities to achieve the objective pursued would be part of the genetic make-up of such a new office.[48] It is precisely this activity that justifies its existence.

In my opinion, however, this problem should not be solved by the state. It is costly and potentially damaging, as it weakens the role of parents within the family. Indeed, solutions can be provided in other manners, without an outside authority inappropriately entering into the relationship between the parent and child. Defining standards of behavior for stakeholders – in this case, the social network operators through which sharenting is implemented – offers a solution. In fact, codes of conduct can define socially and legally acceptable standards for sharenting. Technically, it should no longer be a problem for these networks to filter shared content and warn of possible excesses or actively prevent them by making the problematic account in question inaccessible online. These standards can easily be legally addressed privately in the contracts that users of these networks enter. If the system detects a problem, it can automatically warn the user that they are sharing potentially problematic content and explain why. Indeed, I believe that in most cases, sharenting and oversharenting simply involve a failure to think through the implications they may have for the child.

6. Conclusion

The aim of this article was to determine the extent to which the current legal framework responds to the problem of sharenting. I believe that the legal framework is sufficient for defining the rights of the child. It emphasizes the child's interest and does not place the child in the role of a subordinate object of parents. This applies to all areas of legislation examined – Czech statutory law, constitutional law, and international public law. The problem lies outside of the content of the legislation:

47 See the definition of competence in Section 3 of Act No. 176/2015 Coll.

48 It can be assumed that the newly established body (this applies to anybody) will want to establish itself among the existing institutions and define its competences, so a proactive approach can be expected. The downside, however, is the further expansion of an already "big state" that employs more and more people in the non-productive sphere.

the essence of the problem is parents' low awareness of children's rights. Parents often seem to be unaware of the risks that their actions may pose to their children. This is surprising, because if there was an element of decency in the relationship with the child – and it is indeed decent to treat the other person with respect and to respect their privacy – then there would be no problem in the area of law. Therefore, I believe that the solution to sharenting should lie at the private law level through codes of conduct that social network operators voluntarily commit to respect. The solution also lies in the gradual education of children and parents.

Another goal of the article was to identify possible defenses against sharenting. In the article, I deliberately avoided addressing the issue of the statute of limitations on the child's potential claims – the question of when they are time-barred. In fact, I believe that sharenting (especially oversharenting) should be prevented in light of its possible consequences on children's development and health. Prevention is therefore crucial, as the harm that may be caused to the child may be irreversible. Moreover, empirical experience from advocacy shows that in the Czech legal system, it is difficult to address issues of compensation for non-material damages. In the case of sharenting, the situation is further complicated by the fact that it would presuppose a long-lasting judicial dispute between parents and children. Therefore, it is difficult to defend a child against sharenting under the current circumstances. At the same time, I do not think that the state should actively intervene in the issue by establishing new institutions. In contrast, the office of the Children's Ombudsman, if established, could be useful by providing a platform for the formulation of standards for the treatment of children and for education.

The last objective was to assess the extent to which instances of sharenting are legal and where the boundaries of the permissible disclosure of information about a child lie. In formulating this goal, I had not expected that in the course of writing this article I would reach such a radical change in my own perspective. If the defining standard is the best interests of the child, then in my personal opinion, there are not many situations in which sharing information about a child could be beneficial to that child. Such a stark conclusion does not apply to the traditional exchange of information within a close family circle. Similarly, sharing a child's success in sports is not problematic. However, there is no support in the law for the systematic sharing of information about a child's inner life.

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PAWEŁ SOBCZYK*

Parental Rights to Shape the Model and Curriculum in Public Schools in Poland

ABSTRACT: *Parents' have constitutional rights to raise children in accordance with their self-beliefs and religious beliefs, and thus have an impact on their education. The legislature has created specific mechanisms for the influence of parents on public schools, including a model of education and classes. Unfortunately, the implementation of this right has encountered numerous problems. Therefore, it is necessary to analyze the applicable regulations and formulate postulates de lege ferenda.*

KEYWORDS: parents, children, school, upbringing, education

1. Introduction

Guarantees regarding the title rights of parents to shape the model and curriculum in public schools in Poland have not been explicitly formulated in the current Constitution of the Republic of Poland, adopted on April 2, 1997.[1] These should be decoded from several constitutional provisions devoted to the guarantees of parents' rights to raise children in accordance with their own beliefs, as well as the broadly understood protection and care of public authorities over family and parenthood.[2]

1 Journal Of Laws No. 78, item 483 as amended.

2 This study is of a constitutional and legal nature. Lulek wrote about the perspective of theoretical and empirical determinants of the relationship between parents and teachers, i.e., parental obligations in the process of cooperation with teachers, the appearance of parents' co-decision at school, and initiating actions by parents, by Lulek, 2017, pp. 198–215. Contrarily, the perspective of the Catholic school was described synthetically by, inter alia, Krajczyński, 2006, pp. 99–117; Domaszk, 2009, pp. 305–320.

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Among the constitutionally confirmed freedoms and rights of an individual, from the point of view of these considerations, Article 48 of the Polish Constitution states that:

> 1. Parents shall have the right to rear their children in accordance with their convictions. Such upbringing shall respect the degree of maturity of a child, as well as his freedom of conscience and belief and also his convictions. 2. Limitation or deprivation of parental rights may be effected only in the instances specified by statute and only on the basis of a final court judgment.

From the perspective of parents' right to shape the model and curriculum in public schools in Poland, Article 70 of the Polish Constitution, regarding the right to education, in paragraph 3 mentions:

> Parents shall have the right to choose schools other than public for their children. Citizens and institutions shall have the right to establish primary and secondary schools and institutions of higher education and educational development institutions. The conditions for establishing and operating non-public schools, the participation of public authorities in their financing, as well as the principles of educational supervision of such schools and educational development institutions, shall be specified by statute.

Apart from the above-mentioned constitutional provisions, it is necessary to specify the general systemic principle, formulated after a long and stormy constitutional debate that:[3] 'Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland.'[4] This provision was placed among the most important principles concerning the state system in chapter one of the Constitution. In this way, both the importance of the issue and the fundamental role of the family and parenthood in the functioning of the state were indicated, while simultaneously obliging its authorities to protect and care for it.

Obligations of the state to help raise children are also stipulated in Article 71 of the Polish Constitution, of which Par. 1 confirms:

> The State, in its social and economic policy, shall take into account the good of the family. Families, finding themselves in difficult material and social circumstances—particularly those with many

3 Work on the Constitution lasted in 1989–1997.
4 Art. 18 of the Polish Constitution.

> children or a single parent—shall have the right to special assistance from public authorities.[5]

The aim of this study is to indicate how systemic solutions in the field of parents' right to moral and religious upbringing of children are implemented at the level of statutes and their implementing acts, after 25 years of the Polish Constitution being in existence. The dogmatic and legal analysis will consider the constitutional foundations in this regard and the resulting guarantees in terms of the organized (parents' council) and unorganized interaction of parents with schools and other institutions, as well as the latest legal tendencies in this area, reflecting the so-called education law policy. This scientific article has been written considering that its readers will be primarily non-Polish-speakers for whom the basic Polish legal solutions in this area may be unknown.

2. The constitutional foundations of the parents' right to moral and religious upbringing of their children

Moving on to indicating the most important elements of Article 48 of the Polish Constitution, it should be noted at the outset that Paragraph 1 sentence 1 of this provision guarantees parents 'have the right to rear their children in accordance with their own convictions.' In addition to this seemingly fundamental guarantee to parents, this provision contains equally important guarantees for children. The constitution-maker states, in the second sentence, that 'Such upbringing shall respect the degree of maturity of a child as well as his freedom of conscience and belief and also his convictions.' Moreover—which unfortunately, is often omitted in the comments—since parents have the right to raise their children, children have the right to be brought up by their parents.[6]

The Polish legislators included Article 48 in the constitutional catalogue of personal freedoms and rights. The common feature of these freedoms and rights is that by their very nature they do not apply to other subjects of legal relations. Only selected aspects of the freedoms and rights set out in Article 45 Section 1, Article 50 sentence 2, and Article 51 section 1, 3, and 4 extend to certain categories of entities other than natural persons.[7]

5 Art. 71 sec. 1 of the Polish Constitution.

6 In comments on the status of an individual, attention is drawn to the right-obligation correlation. However, in the case of many freedoms and rights, there is one more correlation: law-law. Incidentally, it is worth asking what the correlation is in the case of the so-called "Abortion rights." The fundamental right to life is not mentioned then.

7 See Judgment of the Constitutional Tribunal of October 30, 2006, P 10/06, OTK-A 2006, No. 9, item 128.

Paragraph 2 of Article 48 of the constitution of the Republic of Poland protects the rights of children within the limits specified by statutes and on the basis of a court judgment. This results from the phrase: 'Limitation or deprivation of parental rights may be effected only in the instances specified by statute and only on the basis of a final court judgment.' Thus understood, parental rights—according to the Constitutional Tribunal—'in the subjective sense have not been defined *expressis verbis,* although there is no doubt that they include the right to raise a child, as provided for in para. 1 of this provision.'[8] The constitutional concept of "parental rights" should be distinguished from the concept of "parental law" in the meaning of the subject, which denotes a set of norms regulating the legal relations between parents and children. The term "parental law" in the material sense is equivalent to French *droit de filiation* and German *Kindschaftsrecht*.

The above-mentioned court judgment of April 28, 2003, shows that Article 48 Section 2 of the Polish Constitution protects existing rights. This is the meaning of the provision, referring to the deprivation and limitations of parental rights. 'Celem tej normy jest więc zapewnienie ochrony konstytucyjnej praw rodziców przed dowolną, arbitralną ingerencją władzy publicznej.'

The purpose of this norm is therefore to ensure the protection of the constitutional rights of parents against any arbitrary interference of public authority. Therefore, the purpose of this provision is to ensure constitutional protection of parents' rights against any arbitrary interference by public authorities. At the level of this provision, all regulations that provide for the application of supervisory measures over the exercise of parental authority[9] can be assessed, not the very basics of shaping family relations, which is related to filiation issues.[10]

As indicated in the "Introduction" Paragraph 3 of Article 70 of the Constitution contains guarantees regarding the right to education, including the freedom for parents to choose schools other than public for their children and establish schools and educational institutions.

Contrarily, the constitutional norm contained in Article 71 of the Polish Constitution complements the general principle formulated in Article 18.[11] It orders the state to 'conduct such a social and economic policy that takes into account the welfare of the family and grants families in a difficult financial and social situation the right to special assistance from public authorities.'[12] In this regard, the constitutional order for the state to consider the good of the family in its social and economic policy is a program norm addressed primarily to public

8 The judgment of the Constitutional Tribunal of April 28, 2003, K 18/02.
9 Art. 109 of Family and Guardianship Code.
10 The judgment of the Constitutional Tribunal of April 28, 2003, K 18/02.
11 See Judgment of the Constitutional Tribunal of May 8, 2001, P 15/00 and the judgment of May 4, 2004, K 08/03.
12 The judgment of the Constitutional Tribunal of May 18, 2005, K 16/04.

authorities.[13] The beneficiaries of the assistance provided by the state are family members, as they are primarily entitled to be the subject of constitutional law. Financial assistance provided by public authorities cannot only apply to parts of families, which are separated on the basis of criteria inconsistent with Article 71 Section 1 of the Polish Constitution.

3. The role of the parents' council in the upbringing and education of children

Article 18 of the European Convention on Human Rights states that the state is obliged to ensure that parents are able to exercise their right to the moral and religious education of their children. The state, or more precisely its organs, have the task—in accordance with the principle of subsidiarity—to help parents in the implementation of their rights through guarantee and organizational activities.[14] In line with the hierarchical structure of the legal system, the general constitutional and international legal obligations of the Republic of Poland, in this respect, are implemented at the level of acts and implementing acts thereto, that is, regulations. Among the legal acts of statutory rank, the Act of December 14, 2016 on Education Law is of fundamental importance in this respect.[15] It specified, inter alia, the legal bases of activities and competences of parents' councils, which represent all parents of pupils. Under the current legal status, parents' councils are obligatory bodies, and because they represent all parents, they have the attributes of a real social body.[16] Nevertheless, regarding this, the position of Mateusz Pilich should be shared, who stated that

> the Polish education system is so centralized and constrained by standards, the implementation of which is supervised by a specialized state administration apparatus (education boards) and local government (managing bodies) that, realistically speaking, there is not much space for the "supervisory" and "ownership" role of parents.[17]

13 Judgment of the Constitutional Tribunal of September 18, 2006, SK 15/05, OTK-A 2006, No. 8, item 106. The fact that the constitutional norm has the character of a program norm, inter alia obliges the complainant to indicate in the complaint the arguments that would allow it to be assumed that this provision was violated by the challenged provision.

14 See Warchałowski, 2007, pp. 204–205.

15 Journal Of Laws of 2021, item 1082 as amended.

16 Balicki and Pyter, 2017. The rules of operation of parents' councils were changed by the Act of April 11, 2007 amending the act on the education system and some other acts (Journal of Laws No. 80, item 542). The fundamental change consisted in replacing the optional creation of parents' councils with their obligatory nature.

17 Pilich, 2021.

Thus, the change of the status of parents' councils from "optional" to "obligatory" has changed little in this respect, and the current education system still suffers from a deficit of active citizenship. Contrastingly, parents' councils play a difficult to overestimate role in building relationships between parents and teachers (more broadly, schools).[18]

Pursuant to Article 83 Section 2 of the Education Law, the composition of the Parents' Council has been relatively rigidly defined. In schools, parents' councils are joined by one representative of the branch councils, elected in secret elections by a meeting of parents of students of a given branch. In the case of institutions,[19] at least seven representatives are selected in secret elections by parents of the students of a given facility. Moreover, in art schools, representatives in the number specified in the school statute are elected in secret elections by parents of students of a given school. The internal structure and work of the parents' council are defined in the regulations of the parents' council.[20] It is worth noting that the legislator does not indicate what should be included in the content of this normative act. This leads to a pluralism of solutions and concepts, although with Article 84 Section 6 of the Education Law, it may indirectly result from the fact that such a matter may be, for example, the principle of collecting and managing funds.

The parents' council, which represents all parents of pupils, 'may apply to the headmaster and other bodies of the school or facility, the body running the school or facility and the body exercising pedagogical supervision with motions and opinions on all matters related to the school or facility.'[21] In this way, the legislator defines the filing and opinion-making powers of the parents' councils.

The second group consists of constitutive and opinion-making tasks. The following are the competences of the parents' council mentioned by the legislator: 1) adopting, in consultation with the pedagogical council, the educational and preventive program of the school or facility referred to in Article 26; 2) giving opinions on the program and schedule to improve the effectiveness of education or upbringing of the school or facility referred to in Article 56 Section 2; 3) giving opinions on the draft financial plan submitted by the school head.[22]

It follows from the provisions of the Education Law that the participation of the parents' council in the management of a public school is legally binding, and its participation in the management of a public school is part of the possibility of taking co-responsibility for the education process within a specific educational unit.[23]

18 See Lulek, 2016, p. 26.
19 In polish law *placówka*.
20 Art. 83 sec. 4 point 1 of the Education Law.
21 Art. 84 sec. 1 of the Educational Law.
22 Art. 84 sec. 2 of the Educational Law.
23 J. Pierzchała, *Social participation* ..., p. 463 et seq.

Of key importance, from the point of view of the subject of this study, is the educational and preventive program of the school or institution, which—in accordance with Article 26 of the Educational Law—includes educational content and activities aimed at students, as well as preventive content and activities aimed at students, teachers, and parents.[24] In the event of a disagreement between the parents' council and the teachers' council on this program, the program is determined by the headmaster of the school or facility in agreement with the pedagogical supervisory authority. Simultaneously, the program established by the headmaster of the school or facility is valid until it has been adopted by the parents' council in consultation with the teachers' council. This means that in the current legal framework, the substantive role of the parents' council has been strengthened, and thus indirectly, so has the role and rights of parents.[25]

From a practical perspective, an interesting issue is fundraising through voluntary contributions from parents and other sources. Article 84 Section 6 and 7 of the Education Law stipulate that

> in order to support the statutory activities of a school or facility, the parents' council may collect funds from voluntary contributions from parents and other sources. The rules of spending the parents' council funds are set out in the regulations referred to in Article 83 Section 4. The funds referred to in paragraph 6 may be kept on a separate bank account of the parents' council. Persons with a written authorization granted by the parents' council are entitled to open and liquidate this bank account and administer the funds in this account.

As noted in the comments, this provision

> is unclear and even controversial. According to the ruling of the Provincial Administrative Court in Olsztyn, it is the school complex, not the parents' council, that is the VAT taxpayer. The parents' council cannot be considered an entity registered in the REGON system, as well as a taxpayer, because it cannot be considered an organizational unit.[26]

24 See Art. 26 sec. 1 of the Educational Law. The next section of this article shows that the educational and preventive program is developed on the basis of the results of the annual diagnosis in terms of the developmental needs of students in the school environment, including protective and risk factors, with particular emphasis on the risks associated with the use of psychotropic substances, substitute agents and new psychoactive substances. See Art. 26 sec. 2 of the Educational Law.

25 Pilich, 2021.

26 Educational law. Commentary 2017, in this context, reference is made to the judgment of the Provincial Administrative Court of February 24, 2010, I SA / Ol 13/10, Legalis.

De lege ferenda, it should be postulated that the issue of collecting and spending funds by parents' councils be clarified, the more so as it has an interdisciplinary character, including, inter alia, public finance law.[27]

Significant legal guarantees regarding the competence of the parents' council are also included in the regulation of the Minister of National Education of February 28, 2019, on the detailed organization of public schools and public kindergartens.[28]

First, these concern the naming of the school, and Par. 2 clause 1 of the regulation states that: '1. The school is named by the school authority at the request of the school council, and in the absence of the school council at the joint request of the pedagogical council, parents' council and students' self-government.' In the absence of one of the indicated authorities, the following applies: 'In a school where the parents' council is not established, the name is given by the governing body at the joint request of the pedagogical council and the students' self-government.'[29] In turn, 'In a school where there is no student self-government, the name is given by the governing body at the joint request of the pedagogical council and the parents' council.'[30] Additionally, 'In a school where the parents' council and the students' council are not established, the name is given by the governing body at the request of the pedagogical council.'[31] In the case of a kindergarten, the name is given by the body running the kindergarten at the request of the kindergarten council, and in the absence of a kindergarten council, at the joint request of the pedagogical council and the parents' council, as provided for in par. 2 clause 8 of the Detailed Organization Regulation.

The parents' council was also indicated in the ordinance as the co-deciding body with regard to the scheduling of breaks in the operation of the kindergarten,[32] and as an opinion body on the education of students six days a week in a school providing vocational training or organizing practical vocational training outside the school.[33]

The research carried out by B. Lulek shows that the framework for the activities of parents' councils outlined by the legislator allows for undertaking a wide range of activities 'based on cooperation with environmental entities, which will be conducive to combining school and out-of-school experiences of students.' As the author of the research points out, three types of environmental activities undertaken by the parents' council can be identified: 'A. 'From a healthy breakfast to a talent contest'—action and theme; B. Parental support activities; C. 'Plan and

27 A different position on this issue is presented, for example, by Z. Ofiarski. Cf. Ofiarski et al, 2010, pp. 24–25.
28 Journal Of Laws of 2019, item 502.
29 Para. 2 clause 2 of the Detailed Organization Regulation.
30 Para. 2 clause 3 of the Detailed Organization Regulation.
31 Para. 2 clause 4 of the Detailed Organization Regulation.
32 Para. 12 sec. 1 of the Detailed Organization Regulation.
33 Para. 21 sec. 3 of the Detailed Organization Ordinance.

creativity'—towards building an educational space.'[34] The common features characterizing the activity of the surveyed parents' councils include their 'action' and intervention character, rather than planned and systematic. [35]

4. Parents' cooperation with the school

Apart from the organized form of parents 'influence on the upbringing and education process of children and adolescents in the form of parents' councils, the regulations in force in Poland indicate specific rights of parents, which are an extension and specification of constitutional guarantees in this respect.

Among the executive acts regarding the Act on Educational Law, the Regulation of the Minister of National Education of February 14, 2017 should be mentioned, which covers the core curriculum for pre-school education and that for general education for primary schools, including students with moderate or severe intellectual disabilities, general education for the first-level industry schools, general education for a special schools preparing for work, and general education for post-secondary schools.[36]

According to the regulation, the task of the kindergarten is, inter alia, 'Collaboration with parents, various environments, organizations and institutions, recognized by parents as the source of essential values, to create conditions enabling the development of the child's identity.'[37] In addition, the task of the kindergarten is, with the consent of the parents, to systematically supplement the 'implemented educational content with new issues resulting from the emergence of changes and phenomena in the child's environment essential for their safety and harmonious development.'[38]

The minister responsible for education, specifying the conditions and manner of carrying out the tasks of the kindergarten, indicated, inter alia, that

> Teachers systematically inform parents about the progress in their child's development, encourage cooperation in the implementation of the pre-school education program and prepare a diagnosis of school maturity for those children who in the given year are supposed to start education at school.[39]

34 Lulek, 2016, pp. 27–30.
35 See Ibid, p. 30.
36 Journal Of Laws of 2017, item 356 as amended.
37 Kindergarten tasks, point 12.
38 Kindergarten tasks, point 14.
39 Conditions and method of implementation of point 9.

Moreover, in relation to general education in primary school, indicating the importance of the project method for the development of a young person and their success in adult life, it was noted that the projects 'allow the cooperation of the school with the local environment and the involvement of parents of students.'

The passage of regulations concerning the educational activity of the school should be considered extremely important from the point of view of the subject matter. It was emphasized that 'The educational activity of the school is one of the basic goals of the state educational policy.' The upbringing of the young generation is the task of the family and the school, which in its activities must take into account the will of parents, but also the state, whose duties include creating appropriate conditions for upbringing."[40] It is thus difficult to overestimate the indication of the family as the entity carrying out the task of upbringing in the first place. In this manner, the legislator confirmed both the constitutional guarantees in this respect and the provisions of the Education Law.

In the case of early childhood education (grades 1–3), the tasks of the school specified in the above-mentioned regulation include, inter alia, 'Cooperation with parents, various environments, organizations and institutions, recognized by parents as the source of important values, to create conditions enabling the development of the child's identity"[41] and

> systematic supplementation, with the consent of parents, of the implemented educational content with new issues resulting from the emergence of changes and phenomena important for the child's safety and harmonious development in the child's environment. As can be seen from the above-mentioned provisions, they are similar to those relating to pre-school education.[42]

The Minister emphasized the special role of parents in the upbringing and education in relation to the subject of education, which includes 'Upbringing for family life.' It was indicated that by carrying out classes on this subject, teachers support parents' responsibilities.[43] Simultaneously, the tasks of the school in the field of

40 Regulation on the core curriculum.

41 The regulation on the core curriculum, education stage I: grades I-III.

42 The regulation on the core curriculum, education stage I: grades I-III.

43 The regulation states that 'Teachers, by carrying out classes on education for family life, supporting parents' duties in this respect, should aim at ensuring that students: 1) find an environment of comprehensive development at school; 2) are aware of the process of psychosexual development; 3) appreciate the value of the family and know its tasks; 4) recognize human dignity; 5) searching, discovering and striving to achieve life goals and values important for finding one's own place in the family and in the world; 6) learn to respect the common good as the basis of social life; 6) developed an attitude of dialogue, the ability to listen to others and understand their views, were able to cooperate and co-create mature personal ties.'

education for family life include, inter alia, cooperation with parents regarding the upkeep of proper relations between them and the child.[44]

For students with moderate or severe intellectual disabilities, 'parents of the students have the right to participate in team meetings concerning their child and to carry out, if possible, parts of the individual educational and therapeutic program at home.'[45] As it results from Annex 3 to the regulation on the core curriculum, cooperation with the family of a student with a moderate or severe intellectual disability is necessary, and the inclusion of the family in the activities carried out at the school, as well as, if possible, the continuation of certain elements of this activity by parents at the pupil's home and the joint implementation of priority goals in the education of their child. It is also assumed that parents will participate in consultations on the student's functioning, and the school will support their efforts in working with the student—in accordance with the specificity of the family, its values, and cultivated tradition.

Additionally, it should be noted that teachers are obliged to inform parents about the effects of children's education, especially about the level of achievement/progress of the student, in terms of specific language skills and artistic education.

The cooperation of parents and schools in various areas of task implementation, especially educational and educational tasks, is indicated in the regulation of the Minister of National Education of February 28, 2019, on the detailed organization of public schools and public kindergartens (hereinafter: the regulation on the detailed organization).[46]

In accordance with paragraph 6 section 2 of the regulation on the detailed organization;

> If a child attending a division of an integrated kindergarten or an integration section in a mainstream kindergarten, or a student attending an integration school section or an integration section in a mainstream school, obtains a special education certificate issued due to a disability during the school year, the headmaster kindergartens or schools may increase the number of children or students with disabilities in a given division, above the number specified in par. 1, but not more than by 2, with the consent of the leading authority and after consulting the parents of the children or students attending this department.

44 Similar to these general assumptions were found with regard to general education for the first-cycle industry school. Appendix No. 4. The core curriculum of general education to the 1st degree industry school.

45 Regulation on the core curriculum. Appendix No. 3. The core curriculum for general education for students with moderate or severe intellectual disability in primary schools.

46 Journal of Laws of 2019, item 502.

Cooperation in the implementation of the educational and preventive tasks of the boarding school have been articulated in paragraph 8 section 4 of this regulation.

Considering the proposals of parents of children of a given class, it is necessary for the head of the kindergarten to entrust the care to one or two teachers, depending on the working time of the ward and the tasks performed by it.[47] Moreover, the expectations of parents are one of the necessary elements (apart from the principles of health and hygiene of teaching; upbringing and care; the needs, interests, and talents of children; and the type of disability) with the framework schedule set by the headmaster at the request of the pedagogical council.[48]

Furthermore, in the case of the establishment of a work-training unit in a primary school, with the consent of the parents, the head of the primary school

> admits the student to the work-training unit, taking into account the opinion issued by a doctor and the opinion of a psychological and pedagogical counselling centre, including a specialist clinic from which it follows legitimacy of learning by a student in a unit preparing for work.[49]

5. The implementation of the parents' right to bring up their children on the example of teaching religion and ethics in public schools

Articles 48 and 53 of the Constitution of the Republic of Poland of April 2, 1997, and international agreements in force for the Republic of Poland—including in particular the Concordat between the Holy See and the Republic of Poland signed in Warsaw on July 28, 1993[50]—indicate that teaching religion in public schools is related to the natural positive right of parents to religious and moral education of their children and to the freedom of conscience and religion.[51] Constitutional and statutory guarantees confirm that religion is equal to other subjects in public education. Moreover, the special position of religion in public education is that it is the only subject in public education whose status has been defined at the constitutional level. The grammatical interpretation of the cited constitutional provision indicates parents and children as entities entitled to teach religion in public schools and state bodies obliged to organize religious education in churches and other religious associations with a regulated legal situation at public schools.

47 Para. 12 sec. 2 of the Detailed Organization Regulation.
48 Para. 12 sec. 4 of the Detailed Organization Regulation.
49 Para. 16 sec. 2 of the Detailed Organization Regulation.
50 Journal Of Laws 1998, No. 51, item 318.
51 On the topic Shaping the legal position of religion as an object in public education, I wrote in the Book 'Religion and ethics in public education', cf. Krukowski, et. al, 2014, pp. 121–141.

From the constitutional guarantees regarding the teaching of religion to the Church or other religious association with a regulated legal situation, it is possible to recreate the general principle, which states, first of all, that religion 'may be taught at school.'[52] As A. Mezglewski rightly pointed out, 'Since the study of religion is a subject of education, it is the same subject as any other subject. Any other interpretation would imply unlawful discrimination.'[53] Thus, the constitution-maker adopted the principle of equal treatment of religion as a school subject. *A contrario*, potential differences in the status of religion as an object in public education should result only from its specificity.[54]

Consequently, teaching religion in public schools is mentioned in the Concordat between the Holy See and the Republic of Poland, which was signed on July 28, 1993, four years before the adoption of the Constitution of the Republic of Poland. In Article 12 Section 1, contracting parties stated:

> Recognizing the parents' right to religious upbringing of children and the principle of tolerance, the State guarantees that public primary and secondary schools and kindergartens, run by state and local administration bodies, organize, in accordance with the will of those interested, religion lessons within the school and kindergarten schedule.[55]

Thus, the following principles follow from the provisions of the Concordat: recognition of the parents' right to religious education of children; teaching religion in schools in accordance with the will of those interested; covering with the guarantee of religious education kindergartens and primary and secondary schools run by state and local administration bodies; and the separation of the powers of the state and church authorities regarding attitudes to religious education, programs, and teachers.[56] These principles, due to the nature of the concordat agreement, apply to members of the Catholic Church; however, the constitutional principle of equality and equality of churches and other religious associations obliges the

52 On the rigor of teaching religion in public schools Zieliński, 2009, pp. 508–511. It is difficult to agree with his position that the indifference of the educational authorities to the situation of a minority group who was not provided with adequate school activities during religion lessons is 'a notorious offense to the key constitutional value, which is freedom of conscience and religion'. Rather, it is to be thought that this is the ineptitude of the legislator, which for many years has failed to provide adequate guarantees.

53 Mezglewski, 2009, p. 79.

54 Ibid.

55 It is worth noting that the provisions of the Concordat do not impose quantitative restrictions on the organization of religion lessons. The educational institution is obliged to organize a religion lesson regardless of the number of interested students. Meanwhile, § 2 para. 1 and 2 of the Regulation of the Minister of National Education of April 14, 1992, introduces such limitations, which may be assessed as inconsistent with Art. 12 sec. 1 of the Concordat. He wrote more on this subject, among others Borecki, 2008a, p. 67.

56 Krukowski, 1995, pp. 196–197; Góralski and Pieńdyk, 2000, pp. 37–41.

competent organs of public authority to extend it to members and other religious entities interested in teaching religion in public schools.[57]

In the Act of September 7, 1991 on the Education System[58] the issue of teaching religion was devoted to Article 12 from which it follows that

> 1. Public kindergartens and primary schools organize religious education at the request of parents, public secondary schools at the request of either parents or pupils themselves; after reaching the age of majority, students decide to study religion. 2. The minister responsible for education, in consultation with the authorities of the Catholic Church and the Polish Autocephalous Orthodox Church and other churches and religious associations, determines, by way of an ordinance, the conditions and manner of performing the tasks referred to in para. 1.

Article 12 Section 2 of the Act on the Education System contains a delegation to determine, by means of an ordinance, the conditions and manner of performing the tasks provided for in the act by schools. Moreover, regarding teaching religion, the legislator obliged the minister in charge of education and upbringing to act in consultation with the authorities of churches and other religious associations when issuing an ordinance that would define the conditions and manner of performing tasks by schools resulting from the organization of teaching religion. On the basis of this act, the Minister of National Education issued an ordinance of April 14, 1992 on the conditions and manner of organizing religious education in public kindergartens and schools.[59] It specifies, in accordance with the title, the conditions and methods of organizing religious education in public kindergartens and schools, including the rights of students and their parents (§ 1), the obligations of kindergartens and schools (§ 2–3), issues relating to curricula (§ 4), the status of religious teachers (§ 5–7), the weekly number of teaching hours (§ 8), grades in religion or ethics (§ 9), exemption from school for the purpose of Lenten retreats (§ 10), and visiting and pedagogical supervision over teaching religion and ethics (§ 11). The regulation also allows for the possibility of placing the cross in school rooms and saying prayers before and after classes (§ 12).[60]

57 It was written on this subject, among others by Krukowski, 1996, p. 41.

58 Journal Of Laws 2004, No. 256, item 2572 as amended.

59 Journal Of Laws No. 36, item 155 as amended.

60 The regulation of the Minister of National Education of April 14, 1992 was the subject of the judgment of the Constitutional Tribunal of April 20, 1993, file ref. act U 12/92. He considers that the legitimate and possible subsequent analysis of the constitutionality of some provisions of the regulation is, among others, P. Borecki, arguing this with new control models, which are the norms of the Constitution of the Republic of Poland of April 2, 1997 and the Concordat between the Holy See and the Republic of Poland of July 28, 1993. He indicates the necessity to review § 1 para. 2, § 2 sec. 1-2, § 3 sec. 2 in connection with § 2, § 6, § 10 sec. 1 and § 12 sentence 1 of the regulation. Borecki, 2008b, pp. 31–40.

Article 12 Section 1 of the Act of September 7, 1991, on the education system, states that religious education is organized by kindergartens and primary schools that have the status of public schools, that is, they are universal schools.[61] *A contrario,* in the case of non-public schools, religious education can be freely decided by the body running the school, which in practice means that non-public schools may be denominational schools, that is, those with obligatory religious formation of pupils, as well as secular ones in which religion will not be taught.[62] The entities authorized to teach religion in public kindergartens and schools are students and parents, on whose request such education is organized.[63] In this way, on the statutory level, freedom of thought, conscience, and religion are realized, as well as the parents' right to moral and religious upbringing of their children, guaranteed both in the acts of international law and in the provisions of the Polish constitution.[64] Therefore, the Polish model of religious education in public schools is described as optional.[65]

It should be noted, however, that in terms of the organization of religious education, gradual changes are planned, aimed at introducing an alternative to the students' choice to study religion or ethics, which means that there will be—as before—the third option, that is, a situation where the student does not take part in religion or ethics classes. The Ministry of Education and Science intends to spread this change out over several years, and its implementation will begin on September 1, 2023.[66]

The Minister of National Education, implementing the instruction set out in Article 12 Section 2 of the Act on the Education System,[67] issued the ordinance of April 14, 1992, on the conditions and methods of organizing religious education in

61 Art. 12 sec. 1 of the act on the education system: 'Public kindergartens, primary schools and lower secondary schools organize religious education at the request of parents, public upper secondary schools at the request of either parents or students themselves; after reaching the age of majority, students decide to study religion.'

62 See Król, Kuzior, and Łyszczarz, 2009, p. 129; Pilich, 2009, p. 205.

63 It is worth noting that in Art. 12 sec. 1, next to the wording concerning the "wishes" of parents or parents or the students themselves, there is also the wording concerning "making decision" by the students themselves, after reaching the age of majority, about receiving religious education. This discrepancy was negatively assessed, among others, by Pilich, 2009, p. 211.

64 See Sokołowski, 1999, p. 262.

65 For example, in the works of Warchałowski, 2004.

66 The process of implementing the new solutions has been planned for the years 2023–2027 and is to cover gradual individual classes of students, starting from grades IV of primary schools and grades I of post-primary schools of all types September 1, 2023 [Online]. Available at: https://www.prawo.pl/oswiata/obowiazkowa-religia-lub-etyka-mein,513521.html (Accessed: 12 August 2022).

67 Art. 12 sec. 2: 'The minister competent for education, in consultation with the authorities of the Catholic Church and the Polish Autocephalous Orthodox Church, and other churches and religious associations, determines, by regulation, the conditions and manner of performing the tasks referred to in para. 1.'

public kindergartens and schools.[68] In it, he specified, inter alia, the school's obligation to organize religious lessons if there are at least seven students of a given religion in the class. In the case of a smaller number, classes can be organized into inter-class and inter-department groups. If the number of students of a given denomination does not reach the designated minimum of seven people, then the body running the kindergarten or school, in consultation with the parents and the relevant Church or other religious association, organizes religious instruction in an interschool group or in an out-of-school catechetical study. In this case, the number of students should not be less than three.[69]

The introduction by the Minister of National Education, by way of an ordinance, of quantitative restrictions on the organization of religious lessons for a given religious association makes it difficult—especially for parents belonging to the so-called minority churches and other religious associations—the implementation of their right to moral and religious education of children. This is pointed out by the Court of Human Rights in Strasbourg, the Ombudsman, and the doctrine[70] and Government Plenipotentiary for Equal Treatment. In the judgment Grzelak v. Poland, the Tribunal admonished the authorities of the Republic of Poland that they did not fulfill the obligations imposed on them in this regard.[71] T. J. Zieliński even formulated the view that the indifference of the educational authorities to the situation of a minority group that was not provided with adequate school activities during religious lessons is 'a notorious offense to the key constitutional value, which is freedom of conscience and religion.'[72] In my opinion, it is rather due to the ineptitude of the legislator, who for many years has not created adequate guarantees; the problem of financial resources allocated to education; and the 'powerlessness' of school authorities.

According to international and constitutional guarantees, parents have the possibility of exercising their rights and obligations regarding religious and moral education of their children through the freedom to choose schools, which may be achieved by the right to establish their own schools or send their children to public and private schools.[73] Due to the demographic decline and migration from rural areas and small towns to large urban centers, this right encounters increasingly

68 See Journal of Laws of 1992, No. 36, item 155; d. Journal Of Laws of 1993, No. 83, item 390.

69 See Regulation on the conditions and methods, § 2.

70 Although the regulation was subject to review by the Constitutional Tribunal (the judgment of the Constitutional Tribunal of April 20, 1993, reference number U 12/92), P. Borecki, due to the possibility of applying new benchmarks of control, such as the norms of the Constitution of the Republic of Poland of April 2, 1997 and the Concordat between the Holy See and the Republic of Poland of July 28, 1993, indicates the need to control parish 1 clause 2, par. 2 sec. 1–2, par. 3 sec. 2 in connection with par. 2, par. 6, par. 10 sec. 1 and par. 12 sentence 1 of the regulation. Borecki, 2008b, pp. 31–40.

71 See, for example, Łącki, 2011, pp. 194–204.

72 Zieliński, 2009, pp. 508–511.

73 See Declaration on Christian Education Gravissimum educationis, No. 6, 7 in Second Vatican Council, Constitutions, Decrees, Declarations, Polish Text. New translation, Poznań 2002.

serious obstacles. In the situation of liquidation of public schools in rural areas, dismissal of teachers, or reduction of expenses for extracurricular activities, it is difficult to implement such demands.

6. Proposing new legal solutions regarding the influence of parents on the activities of associations and other organizations in schools and institutions

In the last few years, legislative attempts have been made to strengthen parents' influence on school activities. This was the direction of, among others, the government bill amending the Act, that is, the Education Law and certain other acts.[74] *In genere,* the project concerned strengthening the role of the pedagogical supervision authority, in particular the educational superintendent.[75]

In the draft, which was submitted to the Sejm on November 30, 2021,[76] there was a provision according to which

> associations and other organizations whose statutory purpose is to educate or expand and enrich the forms of teaching, educational, care, and innovative activities of a school or facility. Pursuant to the draft act, the headmaster of the school or institution will be required to obtain a positive opinion from the education superintendent, and in the case of an art school and institution, and the institution referred to in Article 2 point 8 of the Act of December 14, 2016. – Educational law, for students of art schools – a specialized supervision unit referred to in Article 53 Section 1 of this Act, before the start of classes and provide the parents of the student or an adult student with information about the objectives and content of the curriculum,

74 See The Sejm of the Republic of Poland, 9th Term of Office, Print no. 458, The draft act on the amendment to the Act – Education Law presented by the President.

75 According to the draft, 'Positive opinions of the curator will be required, inter alia, in the case when the authority managing the school or facility appoints a person who is not a teacher for the position of the headmaster of the school or facility; in a situation where, in justified cases, the authority managing the school or facility wants to entrust the position of the headmaster of the school or facility for a period shorter than 5 school years, but not shorter than one school year; in a situation where the competition for the position of the director has not been resolved; in a situation where the body which entrusted the teacher with a managerial position in a school or institution, wishes to recall the teacher from this position during the school year without notice in particularly justified cases; in order to enable the functioning of an association or other organization on the premises of the school or institution providing for conducting classes with students.' Karolczak, 2021.

76 Rządowy projekt ustawy o zmianie ustawy – Prawo oświatowe oraz niektórych innych ustaw [Online]. Available at: https://www.sejm.gov.pl/sejm9.nsf/PrzebiegProc.xsp?nr=1812 (Accessed: 9 August 2022).

> a positive opinion of the school superintendent and positive opinions of the school board or institution and parents' council, and at the request of a parent or an adult student – also materials used for implementation program of activities.[77]

In the opinion of the project promoter, this procedure aims to increase the awareness of students and parents about the content of the proposed programs. The parent should have the right to decide on the child's participation in the classes, as well as to obtain information, e.g., on the professional experience, competences and skills of the teachers, in the scope covered by the classes [underlined by P.S.].[78] The project initiator assumed that in the case of organizing and conducting classes as part of the tasks commissioned in the field of government administration, the opinions of the body exercising pedagogical supervision will not be required.

It is worth noting that the indicated proposed regulations did not decide whether the consent of one of the parents or both would suffice. Moreover, it is unclear what happens if the views of a child's parents are divergent.

Ultimately, as a result of legislative work, in Article 86 of the Education Law Act, after paragraph 2, the legislator added sections 2a–2g. Of key importance here is Paragraph 2a. that states:

> If the agreed conditions of activity referred to in Section 2 provide for the conduct of classes with students, the organization and conduct of these classes require a positive opinion of the education superintendent, and in the case of art schools and institutions, and the facility referred to in Article 1. 2, paragraph 8, for students of art schools – a specialized supervision unit, referred to in Article 1. 53 Section 1, concerning the compliance of the program of these classes with the provisions of law, in particular with the tasks listed in Article 1 points 1-3, 5, 14 and 21.[79]

The act did not enter into force because pursuant to Article 122 Section 5 of the Constitution of the Republic of Poland, the President of the Republic of Poland forwarded the bill to the Sejm with a motivated request for reconsideration.[80]

77 Justification, p. 6.

78 Justification, p. 6.

79 Act amending the Act – Education Law [Online]. Available at: https://www.sejm.gov.pl/sejm9.nsf/PrzebiegProc.xsp?nr=1812 (Accessed: 9 August 2022).

80 The President of the Republic of Poland, at the meeting of the National Security Council on March 2, 2022, said, inter alia: 'You – representatives of the opposition and various circles – appealed to me for a veto to the Education Law. And because I am appealing to you for unity, for the lack of political disputes, I have decided to refer this law for reconsideration.' [Online]. Available at: https://www.prezydent.pl/prawo/zawetowane/prezydent-wetuje-nowelizacje-prawa-oswiatowego,%2049737 (Accessed: 9 August 2022).

The President's veto did not complete the legislative process required to introduce this amendment to the Educational Law, as the Sejm did not use the procedure of re-enacting the law by a majority of 3/5 votes in the presence of at least half of the statutory number of deputies until August 2022.[81] Moreover, on July 3, 2020, a draft act amending the Education Law, presented by the President of the Republic of Poland, was submitted to the Sejm.[82] The aim of the proposed changes is

> to provide all parents with the possibility to co-decide on the types, content, and methods of conducting additional classes organized in schools or educational institutions attended by their children, by associations and other organizations whose statutory purpose is educational activity or expanding and enriching forms of education. didactic, educational, caring, and innovative activities of the school or institution.[83]

As a result of the justification of the project,

> The proposed regulation introduces a solution that allows parents to have a real influence on the shape and the very fact of organizing extra-curricular activities. In this way, it realizes the parents' right to raise a child in accordance with their own convictions, as expressed in Article 48 Section 1 sentence of the Constitution of the Republic of Poland.[84]

The draft act on the amendment to the Education Law presented by the President of the Republic of Poland was referred to the first reading in committees, that is, the Education, Science and Youth Committee. For two years, it is being processed at the same stage.[85] The main assumption is that the project—as in the case of the law vetoed by the President of the Republic of Poland—is going to provide all parents with the possibility of co-deciding on the types of content and the way of conducting additional activities organized in schools or educational institutions attended by their children. This will be achieved by associations and other organizations whose statutory goal is educational activity or expanding and enriching the forms of teaching, educational, care, and innovative activities of a school or institution.

81 Art. 122 sec. 5 of the Polish Constitution.
82 The Sejm of the 9th term of office, Print No. 458 [Online]. Available at: https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=458 (Accessed: 10 August 2022).
83 Print no 458, Justification [Online]. Available at: https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=458 (Accessed: 10 August 2022).
84 Print no 458, Justification [Online]. Available at: https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=458 (Accessed: 10 August 2022).
85 The course of the legislative process [Online]. Available at: https://www.sejm.gov.pl/Sejm9.nsf/PrzebiegProc.xsp?nr=458 (Accessed: 10 August 2022).

7. Summary

The framework of this study allowed for a dogmatic and legal analysis of only some legal provisions related to the title subject matter. Nevertheless, they allow for the formulation of several conclusions, and even *de lege ferenda* postulates, more so as the process of changes in Polish education has been ongoing for over 30 years (since 1991), and the constitutional provisions indicated in the article have been in force for 25 years (since 1997).

An analysis of the educational regulations in force in Poland, also in the field of parents' rights, may—at first glance—lead to the conclusion that public authorities perceive the need for cooperation between schools and parents in creating and implementing the so-called 'School educational and educative program.' Such a program must consider the needs of parents in terms of raising their children. Parents should be involved in building the educational program; they should also have the opportunity to express their opinions on the plan proposed by the school, as well as express their opinions on what content they accept or would like to implement.

Although the existence of parents' councils in certain types of schools and institutions is now compulsory, empirical studies confirm that it is extremely important and desirable that the councils should be more active, so that the 'parenting factor' would have a greater impact on what happens in schools and around them. Through such councils, parents can participate in the current and long-term programming of the school's work, help in the improvement of the organization and conditions, and participate in the implementation of teaching and education programs and school care tasks, by organizing activities aimed at improving the pedagogical culture in the family, school, and local environment.[86]

Parental activity in areas indicated by laws and regulations is extremely desirable. Certainly, legal regulations will not solve all contemporary educational, social, and upbringing problems, but the constant and increasing activity of parents is a sine qua non condition for the efficient operation of schools. Public institutions—at the state and local government levels—will not replace parents in exercising their right to upbringing their children, or controlling activities with regard to the process of upbringing and education. Public authorities, as entities are obliged to help parents, and should not impose a specific education system, contrary to their moral and religious convictions. Therefore, a manifestation of respect for parents' right to religious and moral education of children is the refraining of public authorities from forcing their children to attend school classes that do not correspond to the religious beliefs of their parents. The increasing activity of non-governmental organizations in proposing different programs that

86 See Król and Pielachowski, 1992, p. 65.

are sometimes questionable in terms of quality and content should be legally regulated, with respect to the fundamental role of parents in the upbringing process. Therefore, despite some legislative weaknesses, the amendments to the Education Law presented in this study by the Council of Ministers and the President of the Republic of Poland, which unfortunately have not been finalized in the form of the enactment of the act, should be positively assessed.

Fortunately, in Poland, actions inconsistent with the idea of respecting the freedom of conscience and religion of parents and children by imposing one model of upbringing that completely excludes religious formation are not yet present.[87] Nevertheless, changes regarding the political scene, despite general constitutional and international guarantees in this respect, may result in an increasing role of public authorities and schools in creating a model of upbringing at the expense of parents. One reason for this is the relatively low social activity of this group of citizens.

87 See Declaration on Religious Freedom Dignitatis Humanae, No. 5 in Second Vatican Council, Constitutions, Decrees, Declarations, Polish Text. New translation, Poznań 2002.

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The State Anthem as a Subject of Review in Proceedings Before the Constitutional Tribunal in Poland?

ABSTRACT: *The national anthem is regulated in Poland at the constitutional and statutory levels. The legislature has determined which song is to be the anthem and in this way has bound other legislative bodies. However, the details of the anthem were left to the legislature. This gives room to consider the possibility of assessing the compatibility of the statutory arrangements for the anthem, including its content, with the Constitution. Although the issue prima facie seems to be purely hypothetical and may be treated as a mere curiosity, the analysis of the problem shows that the findings may affect both the perception of the scope of control of the constitutionality of the law and the degree of protection of national and state symbols, including the anthem. This article thus aims to determine whether the anthem can be subject to scrutiny in proceedings before the Constitutional Tribunal, and if so, what the framework of tribunal adjudication is.*

KEYWORDS: national symbols, state symbols, anthem, constitutional review, Constitutional Tribunal

1. Introduction

The model of constitutional review of the law in Poland is based on the Kelsen concept. This refers to centralised control carried out by a body appointed specifically for this purpose, which is the Constitutional Tribunal. It is an organ of the judiciary, although separate from the courts, as indicated by both Article 10(2) of the Constitution and Article 173 of the Constitution of the Republic of Poland.[1] It

1 Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 482 as amended).

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is no coincidence that the Polish legislator distinguished two divisions of bodies within the judicial authority: courts and tribunals.[2]

The Constitutional Tribunal has jurisdiction to rule on the hierarchical compatibility of law within its specific sources—laws, international agreements, and regulations adopted by central state bodies.[3] A special case is a control initiated by a constitutional complaint[4] and the legal question;[5] in these two cases, a normative act may be subject to review, which means a wider range of cognition than in the case of cases initiated by applications of authorised entities.[6]

Article 28(4) of the Constitution of the Republic of Poland provides that 'The emblem, colours, and anthem of the Republic of Poland shall be subject to legal protection'. Paragraph 5 of this Article clarifies that 'The details of the emblem, colours, and anthem shall be laid down by law (statute)'. Therefore, the question arises as to whether the national anthem can be reviewed in proceedings before the Constitutional Tribunal. This is important from the point of view of the implementation of constitutional values and principles. The Constitution of the Republic of Poland sets the permissible limits of the legislator's activity, including those concerning the regulation of the national anthem.

Therefore, this study will examine and seek to answer whether the Constitutional Tribunal can review the constitutionality of the Polish anthem and, if so, what the scope of any possible activity of the Tribunal could be in this respect.

2. The national anthem as an object of legal protection in the Republic of Poland

The national anthem is undoubtedly a national symbol and at the same time a state symbol. In Polish doctrine, state symbols are understood as national symbols that have obtained legal legitimacy. Thus, they affect the manifestation of the state's legal personality,[7] as they serve to distinguish the state from other states and to confirm its identity. State symbols are also an important element of patriotic education.[8] Therefore, they are a value which, from the perspective of public authority, is important and worthy of protection and the creation of legal regulations. This relates to the fact that the national anthem is recognised as intangible national

2 Syryt, 2019, pp. 312–315.
3 Art. 188(1–3) of the Constitution of the Republic of Poland.
4 Art. 79(1) of the Constitution of the Republic of Poland.
5 Art. 193 of the Constitution of the Republic of Poland.
6 Art. 122(3); Art. 133(2); Art. 191 of the Constitution of the Republic of Poland.
7 Komarnicki, 2008, p. 236.
8 Wiszowaty, 2011, p. 31.

heritage[9] whose protection is provided in Articles 5 and 6 of the Constitution of the Republic of Poland. The first of these provisions defines the protection of national heritage as one of the objectives of the state. Article 6 of the Constitution confirms the existence of the state's obligation to make cultural goods that are a source of Polish national identity available.[10]

The consequence of granting the national anthem special legal protection is the possibility for an individual to implement cultural law, which is the right to cultural identity. In this sense, the anthem is a cultural element on which the individual builds his identity.[11] Sarnecki states that state symbols confirm Polish identity. Placing the provisions on state symbols in Chapter I of the Constitution is a reference to a fragment of the Preamble of the Constitution that the Polish people are 'grateful to our ancestors for their work, for the struggle for independence paid for by huge sacrifices, for culture rooted in the Christian heritage of the Nation' and it is also a direct reference to the national heritage.

The national anthem in Poland was covered by legal protection only recently. Hymnic songs were composed and performed regardless of their legal regulation. The lack of clear legal provisions regarding the anthem meant that there was no clarity as to which of the hymn songs was the official anthem and, therefore, which should be performed in certain circumstances of a state nature.[12]

Several relatively low-ranking documents contributed to the recognition of *Mazurek Dąbrowskiego* as the official anthem.[13] In particular, the following should be mentioned: an order of the Minister of Military Affairs of 22 March 1921 to render military honours during the performance of this work and the anthems of the Allied states, thus equating them as regards to military ceremonial;[14] an order of the Minister of Military Affairs on 2 November 1921 concerning the performance of the national anthem during military ceremonies;[15] a circular of the Ministry of Religious Denominations and Public Enlightenment of 15 October 1926 concerning the national anthem in force during school ceremonies;[16] and a circular of the Ministry of Internal Affairs of 26 February 1927 announcing the text of *Mazurek Dąbrowskiego* as the only binding national anthem.[17]

9 K. Zeidler states that: 'The values that make up the heritage of Polish culture also include songs carrying patriotic content which, also on a legal level, do not have the same rank as the national anthem. These include, for example, Bogurodzica or Rota' (Zeidler, 2007, p. 31).
10 Banaszak, 2009, p. 55.
11 Kosińska, 2014, p. 121.
12 For more on the Polish anthem, see Rychlik, 2016, pp. 125–139.
13 For more on the history of the Polish anthem, see Syryt, 2022, pp. 202–205; Szeleszczuk, 2020, pp. 147–164.
14 Kijowski, 2004, p. 123.
15 Ibid.
16 Panek,1996, p. 31.
17 Kijowski, 2004, p. 124.

Any issues concerning the national anthem were regulated in normative acts of higher rank in the 1970s. In this context, an important act was the resolution of the Council of State on 8 March 1973 on the principles of national and local state celebrations.[18]

The national anthem was given constitutional status under an amendment to the Constitution of the Polish People's Republic in 1976.[19] To Article 89 of the Constitution of the People's Republic of Poland paragraph 3 was added, under which *Mazurek Dąbrowskiego* became the anthem of the Polish People's Republic. After the publication of the consolidated text of the Constitution of the People's Republic of Poland, the numbering of some articles was changed, and the provision regulating the issue of the anthem is included in Article 103(3).

The constitutional provisions on the anthem are developed in Articles 12–14 of the Act of 31 January 1980 on the Emblem, Colours, and Anthem of the Polish People's Republic. Annexe 4 to the Act specified the text of the anthem and its musical notation.[20]

The Constitution of the Republic of Poland of 1997 regulated the issues concerning the anthem in Article 28(3–5). After entry in force of the Constitution of the Republic of Poland,[21] no new law was passed regarding national and state symbols, including the anthem. Therefore, the Act of 31 January 1980 on the Emblem, Colours, and Anthem of the Republic of Poland and on State Seals remains in force, although after numerous amendments and an amended title.[22]

Therefore, the provisions governing the Polish legal system on the national anthem before the Constitution entered into force. Importantly, the anthem itself was mentioned directly in the Constitution of the Republic of Poland,[23] and its text is an element of a normative act.[24]

If we suppose that the national anthem, including its text, is regulated by law—the annexe is an element of the law—, then it is possible to consider—ignoring the desirability of this action—a possible control of the national anthem from the point of view of its compliance with the Constitution.[25]

18 The Polish Monitor of 1973 No. 13, item 78.
19 Act of 10 February 1976 on amendments to the Constitution of the Polish People's Republic, Journal of Laws 1976 No. 5, item 29.
20 Journal of Laws 1980, No. 7, item 18 (the original version of the text of the Act).
21 The amendments did not concern the matter of the national anthem.
22 Journal of Laws 2019, item 1509.
23 Art. 28(3) of the Constitution of the Republic of Poland.
24 Annexe 4 to the Act of 31 January 1980 on the Emblem, Colours, and Anthem of the Republic of Poland and on State Seals; Szeleszczuk, 2020, pp. 147–164.
25 This issue is not only of academic value, but may be considered in connection with public discussion of making changes to the text of the national anthem by amending the Act.

3. The jurisdiction of the Polish Constitutional Tribunal to rule on the hierarchical compatibility of the law – general remarks

The examination of legality consists in assessing the behaviours of public authorities which, acting contrary to the standard of conduct set out in the relevant provision of competence or procedure, will lead to illegal consequences. The illegality of a law-making act of a public authority may be the basis for its annulment. In the case of law-making behaviour related to the establishment of legal acts of a certain hierarchical rank in the legal system, the reference points verifying their legality are the relevant provisions contained in higher-ranking legal acts.[26]

According to Article 188 points 1–3 of the Constitution of the Republic of Poland, the Tribunal adjudicates the compatibility of certain normative acts or parts thereof with the acts of a higher order indicated in that provision. The same applies to handling constitutional complaints,[27] legal questions,[28] or applications for preventive control.[29] Therefore, the Constitutional Tribunal decides on certain normative acts or legal provisions. Although literally the Constitution of the Republic of Poland allows the Constitutional Tribunal to rule on the compatibility of certain normative acts—laws and international agreements—, in practice the subject of the review before the Constitutional Tribunal may be presented in different ways. This means that it is not always necessary to complain about the entire act—this would be rather inadvisable from the point of view of the objectives of the inspection. Usually, the subject of the audit is a specific part of the normative act expressed in the form of a legal provision(s) and in a substantive form, including legal norms. The actual subject of control in proceedings before the Constitutional Tribunal is legal norms when the Tribunal decides on the relationship between the content of the audit subject and the constitutional model. A legal norm is reconstructed based on a specific legal provision contained in a specific normative act. It should be noted that the decisions of the Constitutional Tribunal always refer to a specific provision, and the subject of the letter-initiating proceedings before the Constitutional Tribunal are the provisions from which certain norms result. In reviewing the content of a normative act or part of it, the objection of unconstitutionality must relate to a norm related to a specific and precise provision of law.[30]

Law provides for the development of constitutional norms concerning the rules of procedure before the Constitutional Tribunal under Article 197 of the

26 Wronkowska and Ziembiński, 2001, pp. 243–244.
27 Art. 79(1) of the Constitution of Poland.
28 Art. 193 of the Constitution of Poland.
29 Art. 122(3) and Art. 133(2) of the Constitution of Poland.
30 Syryt, 2014, p. 63; Kustra, 2012, pp. 13–34; Federczyk and Syryt, 2017, pp. 71–72; Mączyński and Podkowik, para. 77; the judgment of Constitutional Tribunal of 10 March 2022, ref. no. K 7/21, OTK A/2022, item 24; decision of Constitutional Tribunal of 19 November 2014, ref. no. P 15/13, OTK ZU no 10/A/2014, item 115.

Constitution of the Republic of Poland. Currently, this is governed by the Act of 30 November 2016 on the organisation and procedure before the Constitutional Tribunal.[31] According to Article 67(1) of the Constitutional Tribunal Act, the Tribunal is bound by the scope of the appeal indicated in the application, legal question, or constitutional complaint. The scope of the appeal includes the indication of the challenged normative act or its part—determination of the subject of the review—and the formulation of a plea of unconstitutionality, a ratified international agreement, or a law—indication of the standard of review; Article 67(2) of the Constitutional Tribunal Act. This regulation is complemented by Article 69 paragraphs 1 and 3 of the Constitutional Tribunal Act, from which it follows that in the course of the proceedings, it should examine all relevant circumstances in order to clarify the case comprehensively and is not bound by the evidentiary conclusions of the participants in the proceedings, and may also admit of its motion the evidence which it considers reasonable to clarify the case.

Binding the Constitutional Tribunal to the scope of the appeal does not preclude the possibility of its reconstruction based on the *petitum* and justification of the letter initiating the proceedings. The Constitutional Tribunal has explained in its previous case-law that regardless of whether a given editorial unit of a normative act has been challenged or the appeal is within the appropriate scope, in the case of assessing the conformity of the indicated content with the Constitution, the Tribunal reconstructs the subject of the appeal and extracts the normative content that was challenged by the initiator of the proceedings. It confirms whether the norm indicated in the application—legal question or constitutional complaint—has a specific content.[32]

At the same time, it can be considered whether the subject of control may be part of an act that does not contain normative content—i.e. one from which the rules of conduct do not result. This finding is important for answering the question of whether the national anthem can be subject to review by the Constitutional Tribunal.

4. Normativity as a feature of an act assessed by the Constitutional Tribunal

Article 188 of the Constitution of the Republic of Poland lists the cases which the Tribunal adjudicates. Its cognition is referred to normative acts or legal provisions derived from a specific group of state bodies. Both in case law and in the legal doctrine, the importance of normativity was emphasised as a feature determining

31 Journal of Laws 2019, item 2393; the Constitutional Tribunal Act.

32 See the judgment of Constitutional Tribunal of 10 March 2022, ref, K 7/21 and the case law cited therein.

the admissibility of examining the act by the Constitutional Tribunal.[33] The Constitutional Tribunal pointed out that the features that distinguish legal norms from other social rules are, in particular, their general and, at the same time, abstract character. The feature of generality refers to the construction of a standard in which the wording of the addressee and the circumstances of application of the standard are determined by the type and not individually. The addressee should be defined as an element of a class of separate entities by virtue of a specific feature or characteristic. This abstractness refers to the object of the norm and determines the due conduct of the addressee. The subject of a legal norm should be a class of behaviour and not the specific behaviour of the addressee. The consequence of the abstractness of a norm is its repeatability.[34]

In the decision of 7 January 2016 ref. no. U 8/15, the Tribunal, referring to its acquis, indicated two criteria for qualifying specific legal acts as normative acts that will decide the possibility of their control by the Constitutional Tribunal. The first is the formal criterion, which means that a normative act is an act regardless of its content and is qualified as a source of law by the Constitution of the Republic of Poland. The second criterion allows the recognition of all acts as normative, which include legal norms—general or abstract, regardless of how they are named. In material terms, therefore, these may not only be recognised as sources of law by the constitution-maker, but also other legal acts containing legal norms, which are also legal acts. Article 188(3) of the Constitution is defined as "provisions of law." In the opinion of the Constitutional Tribunal, it may examine an act that meets at least one of the above criteria —formal or substantive. As a rule, the Constitutional Tribunal examines acts that meet these criteria jointly.[35]

According to the above findings, it should be noted that they are particularly important in cases where the initiator of the proceedings challenges acts other than laws or international agreements. Article 188(1) of the Constitution of the Republic of Poland expressly confers on the Constitutional Tribunal the power to rule on the conformity of laws and international agreements with the Constitution. This means that in this case, a review of these acts cannot be refused *a priori*.

If it turned out that the law or part of it that was challenged before the Tribunal had normativity features, it would be necessary to consider the criteria for reviewing such an act.

33 Federczyk and Syryt, 2017, pp. 75–83 and the literature and case law cited therein.

34 See e.g. decision of the Constitutional Tribunal of 6 December 1994, ref. no. U 5/94, OTK 1994, part II, item 4; decisions of 24 March 1998, ref. no. U 22/97, OTK ZU No. 2/1988, item 16; 14 December 1999, ref. no. U 7/99, OTK ZU No. 7/1999, item 70; 29 March 2000, ref. no. P 13/99, OTK ZU No 2/2000, item 68.

35 See OTK ZU A/2016, item 1. See also the explanation of P. Radziewicz in: Radziewicz, 2016, pp. 45–65; Federczyk and Syryt, 2017, p. 77.

5. The control of the anthem of the Republic of Poland by the Constitutional Tribunal

The above findings allow us to conclude that from the formal point of view, the anthem of the Republic of Poland may be subject to constitutional review by the Constitutional Tribunal. The anthem's text is one of the annexes to the Act on the Emblem, Colours, and Anthem of the Republic of Poland and State Seals. If the Constitutional Tribunal decides on the conformity of laws with the Constitution and the annexe to the Act is its element, it may be subject to tribunal review. The point of reference in this case is Article 28(3) of the Constitution of the Republic of Poland, according to which the anthem of the Republic of Poland is *Mazurek Dąbrowskiego*.

Under Article 68 of the Constitutional Tribunal Act, when ruling on the conformity of a normative act or a ratified international agreement with the Constitution, the Tribunal examines both the content of such an act or agreement and the competence and observance of the procedure required by law to issue an act or to conclude and ratify an agreement. Thus, even without analysing the content of the anthem, the Tribunal could verify the legislator's competence to adopt the anthem's text and the legislative procedure whereby the anthem became part of the law.[36]

Annexe 4 to the Act on the Emblem, Colours, and Anthem of the Republic of Poland and on State Seals, therefore, defines only the legally correct version of the anthem in terms of content and melody, including the key in which it should be performed. This is further confirmed by Article 13(1) of the Act on the Emblem, Colours, and Anthem of the Republic of Poland and on State Seals, which constitutes an order for the public performance or performance of the anthem in the arrangements resulting from the Annexe. Modifications in this area may be subject to legal liability. Therefore, the solutions to the Act on the Anthem contained in the Annexe are informative and constitute an element for reconstructing the legal norm.[37] Thus, because it is possible to attribute the value of normativity to Annexe 4, it would be possible to consider the possibility of reviewing the constitutionality of the content of the anthem.

It seems that among all the modes of initiating the hierarchical review of the constitutionality of the law—i.e. the application procedure, constitutional complaint, and legal question—, the indicated possibility would be primarily justified in the first of the modes. This gives the initiator of the proceedings a wide range of possibilities to challenge a provision, norm, or normative act, and

36 For more on the review of the mode of enactment of the law by the Constitutional Tribunal, see Syryt, 2014 and the literature cited therein.

37 See a case of Jaś Kapela: Siedlecka, 2019.

indicates various control models. This also allows for a greater field of action for the Constitutional Tribunal.

In the case of an application that is a form of abstract initiation of review, the Constitutional Tribunal does not have to show that it rules on a given norm that was the basis for the final decision in the applicant's case[38] or that the resolution of the case pending before the questioning court depends on its decision.[39] Therefore, it has a wider possibility of determining the appropriate scope of appeal than in cases initiated by constitutional complaints or legal questions.[40]

The application to the Constitutional Tribunal provides not only greater freedom in formulating an accusation of unconstitutionality but also as regards the model of control. Of course, the nature of the allegation will result in restrictions on this model, but they are factual and not legal.

The constitution-maker limited the legislator to a song that could be an anthem. In this respect, the adjudication of constitutionality must not lead to eliminating the current anthem from the legal system. If there were a will to change the anthem because it could violate constitutional norms expressing certain principles and values, it would be necessary to change the Constitution of the Republic of Poland.

It seems that it would be hypothetically possible—although the question is to what extent it would be expedient—to subject the content of the anthem or a part of it to constitutional review. In this case, the point of reference could be the provisions concerning the principles of the state system and the status of the individual in the state—i.e. the provisions contained primarily in Chapters I[41] and II[42] of the Constitution of the Republic of Poland. By examining the content of the anthem, the Constitutional Tribunal can assess the extent to which the content contained therein corresponds to the constitutional values and principles on which the system of the Republic of Poland is based. It cannot be excluded that when assessing compliance with the Constitution, it would be necessary to consult on the genesis and interpretation of the anthem and its stanzas so that control would be as reliable as possible and achieve the objective of protecting the constitutionality of the law and the values expressed in the Constitution of the Republic of Poland.

Standards from Article 1 (the Republic as a common good), Article 2 (the principle of a democratic state ruled by law) and Article 5 of the Constitution (state

38 As is the case with cases initiated under Art. 79(1) of the Polish Constitution by way of a constitutional complaint.

39 As is the case when a court refers a legal question to the Constitutional Tribunal under Art. 193 of the Polish Constitution.

40 Cf. the Constitutional Tribunal's reasoning in the judgement of 10 March 2022, OTK ZU A/2022, item 24.

41 Chapter I, 'The Republic', concerning the principles of the state system and definition of state symbols.

42 Chapter II 'Freedoms, rights and duties of man and citizen'.

goals) could particularly apply in this case. However, this is not a closed catalogue. Undoubtedly, the preamble to the Constitution of the Republic of Poland could also be helpful in assessing constitutionality.[43]

Although there is a dispute in Polish law as to whether it can be a pattern of control in the proceedings of the Constitutional Tribunal, its value is indisputable in the process of interpreting the act with the highest legal force in the state, especially in the context of indicating the values on which the state system is based—constitutional axiology.[44] In addition, the entities initiating the proceedings in front of the Constitutional Tribunal sometimes indicate the preamble as a pattern of control, and the Tribunal uses this when assessing constitutionality to strengthen the arguments in favour of the adopted direction of the ruling[45] and even makes the preamble an element of the operative part of the judgment.[46]

In the justification of their decisions, courts sometimes refer as well to certain elements of the preamble, in particular, to the principle of subsidiarity,[47] the principle of justice and strengthening of the rights of citizens,[48] and the duty of integrity and efficiency in the actions of public authorities.[49] Due to the clear reference to the values in the preamble to the Constitution of the Republic of Poland and the reference to structural experience, it seems that the possible control of the national anthem could be related to the reference to the content of the preamble to the Constitution of the Republic of Poland.

Hypothetically, it can be assumed that if the Constitutional Tribunal found that some contents of the national anthem stood in contradiction to the

43 It should be noted, however, that as to the normative character of the preamble, opinions in the doctrine are divided, and it is normativity that is a feature that easily allows for the formulation of a reference compact for the control of the constitutionality of the law. Neither jurisprudence nor legal doctrine has indicated which parts of the preamble contain elements of legal norms and which can serve as a guideline for the interpretation of constitutional norms (Cf. Banaszak, 2018, pp. 51–52 and the author's review of the views on the nature of the preamble). However, it should be noted that since the preamble is part of the normative act and the Constitution is the pattern of control in the light of the constitutional provisions, the possibility of making the preamble or the content derived from it the pattern of control cannot be excluded.

44 On the role of the preamble and its normative significance see Banaszak, 2018, pp. 49–56. For a more extensive discussion of the preamble in the monograph, see also Strzępek, 2013.

45 Płowiec, 2010, p. 20. The Preamble is used to interpret the Constitution (see e.g. the judgment of Constitutional Tribunal in its full composition of 18 February 2003, ref. no. K 24/04, OTK ZU No 2/A/2003, item 11).

46 See e.g. the judgments of the Constitutional Tribunal in its full composition of 11 May 2005, ref. no. K 18/04, OTK ZU No. 5/A/2005, item 49; 16 December 2009, ref. no. Kp 5/08, OTK ZU No 11/A/2009, item 170.

47 See e.g. the judgment of the Voivodship Administrative Court in Poznań of 18 July 2012, ref. no. IV SA/Po 304/12, and the judgment of the Supreme Court of 5 March 2008, ref. no. III UK 93/07.

48 See e.g. the judgment of the Voivodship Administrative Court in Lublin of 19 April 2012, II SA/Lu 86/12.

49 See e.g. the judgment of the Supreme Administrative Court of 16 May 2012, I GSK 375/11.

Constitution, its verdict—after being published in the Journal of Laws—would result in the derogation of these contents from the Annexe to the Act. A new anthem text should then be considered depending on how serious the allegations seem and how broad the derogation would be. In an extreme case, it would be necessary to consider changing Article 28(3) of the Polish Constitution, which rigidly defines which song could be the national anthem.

However, a fundamental doubt arises in the discussion of the effects of the constitutional control of the national anthem. In the case of a partial derogation of the text of the anthem by the judgment of the Constitutional Tribunal, there is the question of whether it would be the same song referred to in Article 28(3) of the Constitution, which is an element of the intangible national heritage protected by both Article 5 and Article 6 of the Polish Constitution. Thus, a possible tribunal control would have to consider this context of the assessment of the constitutionality of the law containing the text of the national anthem as well.

6. A few comparative legal remarks

Aside from the considerations mentioned above regarding Polish law, it should be noted that the issue of the anthem as a category falling within constitutional law is not present only in Poland. First, one should mention the issue of the German anthem.

The provisions of the law and jurisprudence of a foreign country cannot be transferred directly to legislative decisions and the sphere of law application, especially since the legal systems and structures of the states of individual countries differ from each other. However, it is worth researching and analysing foreign laws for cognitive purposes. By observing the functioning of certain institutions in other countries, one can consider arguments for or against implementing certain legal structures in Poland.

As far as the German anthem is concerned, it is part of the Song of the Germans (*Das Lied der Deutschen*), also known as the Song of Germany (*Das Deutschlandlied*). The text of the German national anthem, and more precisely, the Song of Germany, was written in 1841 by A. H. Hoffmann von Fallersleben. Because the song was written during the period of fragmentation in Germany, the first stanza calls for considering the interests of the entire country and abandoning the care of only specific regions. During the German Empire, the song was very popular, but in some circles it was criticised for overemphasising the ideas of equality and democracy. The song was first recognised as an anthem in 1922 by F. Ebert, the first president of the Weimar Republic. Later, Nazi propaganda used the first stanza to spread its ideas; therefore, after World War II this stanza was discontinued in public. This stanza is also outdated because the geographical features mentioned in this part of the song are no longer located in Germany.

Later, for some time, 'Ode to Joy' was performed as the German anthem with a melody by L. v. Beethoven. In 1950, attempts were made to establish national anthem. However, this failed. Although 'Song of the Germans' was treated as an anthem, the legal status of the work has not been fully clarified. In 1952, K. Adenauer, the Chancellor of the Federal Republic of Germany, proposed in a letter to President Th. Heuss that only the third stanza of 'Song of Germany' should be the anthem. The second was considered too prosaic and inappropriate for a national anthem. Heuss accepted this proposal, and the letters were published in the Journal of Laws. After the reunification of Germany in 1990, other proposals for a national anthem continued to appear. The official acceptance of the anthem was confirmed in letters by Chancellor H. Kohl and President R. von Weizsacker.[50]

On 7 March 1990 the Federal Constitutional Tribunal ruled that the third stanza of 'Songs of Germany' was the anthem of Germany.[51] The case was settled as follows: The applicant objected to the penalty imposed on him for disregarding the national anthem of the Federal Republic of Germany.[52] At the end of August 1986, the text *Deutschlandlied '86* containing the modified text of the anthem was published in the Nuremberg municipal magazine, whose editor-in-chief was the applicant. As a result of this publication, the District Court confiscated the issue of the magazine. The applicant used this fact as an opportunity to print a "press release"—a leaflet in which he alleged a violation of artistic freedom, particularly the freedom to present artistic works. In the leaflet, he described and commented on the confiscation and the facts on which it was based. He used the words of the anthem.

The court sentenced the applicant to four months' imprisonment for disregarding the symbols of the state. The applicant filed an appeal against this judgment which was dismissed as unfounded. The court found that in *Deutschlandlied '86*, the words and terms had been used consciously and deliberately. The author embedded some words in the text of the anthem that the Federal Republic of Germany was a state whose basic features were the brutal use of state power, disease, and primitive sexuality. In the opinion of the Court, the aim of the modification of the anthem was to attack and slander the anthem of the Federal Republic of Germany and thus the Federal Republic of Germany itself. The court considered that the right to freedom of art did not prevent the applicant from being punished. The Court referred to the definition of art derived by the Federal Constitutional Court.

It stated that *Deutschlandlied '86* could qualify as art. However, artistic freedom is subject to restrictions according to the principles set out in the constitution. Among the protected values and goods are the existence of the Federal

50 See also Koch, 2021; Enders, 2022.
51 BVerfGE 81, 298.
52 Art. 90a section 1 point 2 of the German Criminal Code.

Republic of Germany and its free democratic order. In the case of the respective publication, the Federal Republic and its state system were deliberately slandered and ridiculed through the accumulation of negative metaphors. These efforts aimed to ridicule the sense of the state of citizens who declared loyalty to the country. Undermining the state consciousness of citizens could threaten the free democratic order of the state.

The Bavarian Higher National Court unanimously dismissed the applicant's appeal as unfounded. Accordingly, the applicant lodged a constitutional complaint with the Federal Constitutional Court. He stated that by publishing *Deutschlandlied '86,* he did not exceed the permissible limits of artistic freedom. According to the applicant, making an anthem funny cannot upset the existence of a free democratic fundamental order. The applicant's actions did not call into question the state consciousness of the citizens of the Federal Republic of Germany, and did not constitute a threat to the free democratic fundamental order.

The applicant considered that the court decisions violated Article 103 sec. of the Basic Law of the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland),[53] as *Deutschlandlied* did not comply with the statutory reservation. There are no legal solutions as to which stanzas should be considered the national anthem, and this issue is not regulated by law.

The Federal Minister of Justice stated that the constitutional complaint was unfounded. In the minister's opinion, the national anthem became binding in the correspondence between Chancellor Adenauer and federal president Heuss on 29 April and 3 May 1952. The content of the correspondence implied that *Deutschlandlied,* consisting of three stanzas, constituted the national anthem. This circumstance must be distinguished from the limitation that only the third verse may be sung at state ceremonies. The Federal Minister of Justice also questioned whether the text *Deutschlandlied '86* could be considered art protected within an individual's fundamental rights. In his opinion, the description of the Federal Republic of Germany expressed in the modified text of the anthem violates the general personal rights of its citizens and their sense of citizenship: The national anthem, which, like the federal flag, has an identity meaning, had been the subject of a clumsy mockery. The motif, form, and external framework of discredit are so serious that the expression of artistic freedom has been exceeded.

The Bavarian Ministry of Justice also found that there had been no violation of the applicant's constitutional rights.

Despite the participants' objections to the proceedings, the Federal Constitutional Court recognised the constitutional complaint as justified. It claimed that the impugned decisions violated the applicant's fundamental rights under Article 5 section 3 sentence 1 GG (artistic freedom).

53 Grundgesetz für die Bundesrepublik Deutschland of 23 May 1949 (GG).

The Federal Constitutional Court recognised that the adaptation of *Deutschlandlied* is art within the meaning of this fundamental right and a form of poetry. The author used the formal language of the poem to convey his experiences and impressions of certain life processes, which can be summarised under the slogan 'German everyday life'.

The Tribunal pointed out that the state's intervention in this kind of freedom had to be measured against the requirements of the guarantee of artistic freedom. The penalty imposed on the applicant was not related to the entire leaflet containing the work and the opinion given therein, and was directed only against the *Deutschlandlied '86* print. The court should consider that the applicant intended to use the leaflet to fight for the freedom to communicate a work of art. If in this context he uses the work of art itself to achieve this goal, the activity is also meant to make it available to the public. If the state measures in such cases are specifically and exclusively directed against the work of art disseminated in such a way, the responsible person acts as its mediator.

In connection with the examined case, the Federal Constitutional Court clarified that when it comes to the question of which song is the 'Anthem of the Federal Republic of Germany', these requirements are only met in the case of the third stanza of *Deutschlandlied*. The correspondence between Federal Chancellor Adenauer and Federal President Heuss in 1952 remains unclear. It is not explicitly stated that that song should only be announced as the anthem with the third stanza. However, it was clearly stated that the third verse should be sung at state ceremonies, which has been common practice for decades. The Court found that only the third stanza of *Deutschlandlied* was protected as a state symbol and by law.

The case mentioned above indicates that in the context of the execution of artistic freedom the FCC—although indirectly—considered the compliance with constitutional values of the song recognised as the anthem.

However, due to the differences in competencies and character between the Polish Constitutional Tribunal and the FCC, German solutions cannot be directly applied in Polish law. However, some interpretative guidelines regarding constitutional values may be considered when analysing the constitutionality of national and state symbols, including the national anthem. This will not constitute a formal and legal analysis, but rather will provide support to the interpretation of phenomena that go beyond the legal context.

7. Conclusions

The analysis of the admissibility of the control of the constitutionality of the national anthem has both cognitive value and constitutes a certain scientific puzzle. However, it may also influence a broader view of the possibility of examining the hierarchical compliance of the law, especially in those areas and in relation

to those acts that are strongly connected with systemic and social values and that build the identity of the nation.

Therefore, in the study's conclusion, it should be stated that, from a formal point of view, the text of the Polish anthem could be the subject of control before the Constitutional Tribunal. The Tribunal adjudicates the compliance of laws with the Constitution. Since the content of the anthem is contained in an annexe to the Act, the Tribunal may adjudicate on it regardless of the assessment of the normativity of this act fragment. This indicated approach is in line with the Tribunal's previous findings on the admissibility of the Tribunal's adjudication in cases of assessment of the hierarchical compliance of laws.

In performing its review, the Tribunal could verify whether the anthem's text corresponds to the values and principles expressed in constitutional norms, particularly those that relate to the principles of the political and social system of the state. In doing so, it could refer not only to the articulated part of the Constitution but also to its preamble.

However, the control of the constitutionality of the state anthem has limits that the Constitution itself sets. First, a judgment of the Constitutional Tribunal could not lead to the derogation of the entire anthem, as the anthem is mentioned by name in the provisions of the Constitution. Changing the anthem—that is, replacing it with another song (a piece of music) —would require an amendment to the Constitution, which is not easy under Article 235 of the Constitution.

Second, when considering the control of the constitutionality of the anthem, it would be necessary to consider whether the elimination of some of its fragments—stanzas or parts thereof—from the legal system would not cause the remainder of the work to lose its coherence and constitute a different work. Meanwhile, the hymn is constitutionally protected and constitutes an element of intangible national heritage. For specific reasons, the song in question was recognised as an anthem and was an element in strengthening the sense of belonging to a particular state and nation. It should be noted that in the national consciousness, the *Dabrowski Mazurka* appears as a piece that shapes Polish patriotism and expresses devotion to the homeland.[54]

Therefore, the possible initiation of proceedings before the Constitutional Tribunal concerning the anthem should be preceded by profound reflection.

Irrespective of the above remarks, it should be emphasised that the possibility of controlling the constitutionality of the national anthem in Poland is a tool that paradoxically constitutes additional protection of the anthem and is, therefore, an instrument protecting national symbols.

54 See the resolution of the Sejm of the Republic of Poland of 1 March 2007 on the celebration of the 80th anniversary of the promulgation of *Mazurek Dąbrowskiego* as the Polish national anthem (*Monitor Polski* of 2007, No. 16, item 178).

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Theories on Sovereignty

ABSTRACT: *The notion of sovereignty has been invented in the 16th century. This concept is traditionally linked to Jean Bodin, who first used the term to describe modern statehood in his work 'Six Books of the Commonwealth,' written in 1576. The concept itself was originally conceived to define the characteristics of the absolute monarchy, but was later used to describe the rule of other sovereigns as well; thus, it was created as one of the most prolific concepts in political theory. Although sovereignty was an object of intense interest to political philosophers mainly until the middle of the 20th century, it is still not an out-of-date concept. While it is true that modern international law, recent political practice, and the chiselled concepts of law and state have diminished the importance of this notion until now, it has not disappeared. In fact, even the recent international policy and the modern constitutional practice are not able to do without the paradigm of state sovereignty. Like all concepts, it has been inflated, yet, its core political theoretical content remained almost the same. In the present paper I am going to attempt to introduce the types of sovereignty, mainly on the basis of who the sovereign can be.*

KEYWORDS: sovereignty, political philosophy, ideological history, parliamentarism, government, social contract, *volonté générale*

1. The concept of sovereignty

Today, sovereignty has become a partially burdened concept – just like democracy,[1] rule of law,[2] or even utopia[3]—and arises sometimes in dissimilar contexts and

1 Cf. e.g., Tóth, 2019a, pp. 302–317.
2 Tóth, 2019b, pp. 197–212.
3 Tóth, 2019c, pp. 67–83.

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with several differing contents. The term is even used in common parlance. For example, sovereign decisions are mentioned to indicate one's own, independent decisions, or decisions free from undue influence; we talk about sovereign rights instead of individual rights; and the possession of the right to give instructions is described as one's sovereign position, etc. However, even though the concept of sovereignty has been overused, its use in state theory remains acceptable and even justified. There is no better or more adequate term to describe the modern state[4], although the practical realization of the opportunities deriving from sovereignty is determined by the power relations between states.

Sovereignty, in essence, is the supreme authority over a specific territory and a permanent population. The subject of sovereignty is the sovereign, who, in principle, holds unlimited power over the population of a given territory, where individuals are bound to obey the sovereign but the sovereign is not bound to obey anyone.

Thus, the concept of sovereignty has three components. Supreme power indicates that the holder of power exercises it exclusively, and that they do not have to share it with anyone else. The sovereign is an individual, a body, or a group of individuals that holds all state powers and to whom everyone subject to their power is obliged to obey – this definition is sometimes supplemented by the fact that not only is it the case that everybody is obliged to obey but that, in most cases, people do actually obey. It is plain to see that territory is a *sine qua non* of the concept; the effect of the commands must always be realized in a physical space, without which no state or state sovereignty exists. Thus, for example, subjects of international law, where there is no territory involved but where everyone is obliged to obey orders, have no sovereignty—even if they may have other rights, such as the right to enter into an international treaty as in the case of the Order of Malta. Finally, the population is also an indispensable element of the concept of sovereignty: if there is no psychophysical entity with a will to whom the regulations of the supreme power apply, then there can neither be supreme power nor power in general.

The existence of supreme power results in territorial sovereignty over the territory covered by its authority and personal sovereignty over individuals subject to its power. On that basis, the sovereign is entitled on the one hand, to the normative and individual assessment—e.g. sanctioning or prohibiting—of all actions, events, and facts that have occurred in the given territory apart from

4 The concept of sovereignty is inseparable from the modern state; its development is related to the first historical form of the modern state, the absolute monarchy. For the concept of the term state as the indication of the modern state cf. e.g., Paczolay, 1998, pp. 113–146; Paczolay, 1996, pp. 447–463; and Takács, 2012, pp. 108–113. As opposed to the foregoing, the concept of state used by us encompasses, *inter alia*, the ancient despotic states of Asia, the Greek polis, Rome, or even the feudal monarchies – as regards that concept of state, cf. e.g., Szilágyi, 2011, pp. 73–142. When speaking of the modern state, we do not use that term as a synonym of the state in general, but only as one of the modern types of the state.

the exemptions of international law recognized by the sovereign itself—e.g. for individuals with immunity, the sovereign without the permission or request of the other state concerned may not investigate or assess crimes or other incidents committed by diplomats, or in the embassy buildings of other states. On the other hand, the sovereign is entitled to assess the acts of individuals under its personal sovereignty—its own citizens—even if those acts were not carried out in the sovereign's territory if a criminal offense, or any other act that is unlawful under the law of the state, is committed by a citizen of a given state, the police or other authorized body of that state may conduct an investigation, the prosecution may file charges, the court may render a decision, and the enforcement authorities may then enforce the court's decisions.

The exercise of sovereignty presupposes the existence of a government. The government exercises supreme power and other prerogatives deriving from it. However, this does not mean that the government is a conceptual element of sovereignty, merely that the exercise of supreme power is pursued through this organization.

Sovereignty has two aspects or two sides: an internal and an external side. The classic perception of sovereignty belongs to its internal side, according to which the subject of sovereignty—the sovereign—has exclusive and supreme power over a given territory and the population living there, which is not limited by any other power. The independence and immunity of the subject of sovereignty,[5] resulting from inner sovereignty as a condition, belongs to the external side of sovereignty, along with the option to be on equal footing with other sovereigns holding supreme power over other territories and populations; that is, to participate in international relations as an equal party with equal rights to declare war, make peace, enter into international treaties, accede to international organizations, etc.

Understandably, such equality is relative depending on the actual political, economic, and military power—the rights, which are equal in principle, are in fact combined with very different opportunities for international action. This is why many believe today that sovereignty is an obsolete concept, since no state, not even the largest has complete and perfect sovereignty; even the most powerful states must consider other states without the freedom to do whatever they please, even on their own territory or vis-á-vis their own population.

Besides external and internal sovereignty, another major theoretical issue related to the phenomenon of sovereignty is the conceptual nature of sovereignty. Based on the different perceptions of that nature, we can speak of legal and political sovereignty.

5 It is therefore inherent in the external aspect of sovereignty that the sovereign exercising state power is not subjected to other sovereigns, it is not obliged to obey the norms or orders of other sovereigns, and the state–against its own will and without its prior consent–cannot be held liable by other states.

The approach of legal sovereignty is based on the idea that sovereignty is a legal concept: the scope of the exercise of supreme power is thus limited by the framework of law. Based on this approach, it is not true that the sovereign may do whatever they wish, as they are bound, at least, by the laws created by themselves. Therefore, legal sovereignty determines the requirement of a state bound by law—the formal rule of law, which is to be described in detail below—, perceiving the concept of sovereignty as a normative, prescriptive one.

Political sovereignty, on the other hand, considers sovereignty a factual issue: according to this approach, the concept of sovereignty—as a descriptive concept—indicates the existence of power and the sovereign exercising such power, regardless of whether the exercise of power is sound legally or otherwise whether it is ethical, fair, complies with certain legal principles, etc.

2. Types of sovereignty – with respect to the subjects of sovereignty

The types of sovereignty can be distinguished based on who the sovereign is.[6] Accordingly, the following types of sovereignty exist: 1) sovereignty of monarchs (rulers); 2) parliamentary sovereignty; 3) popular sovereignty; 4) state sovereignty; 5) national sovereignty.[7]

6 In addition to these types which are distinguished based on the subjects of sovereignty, Carl Schmitt's concept is also worth mentioning. Although this concept, on the one hand, does not define the specific subject of sovereignty more precisely, it indicates several such subjects – parallel to one another – having regard to the legal system of the German Reich of its age, but it does not link sovereignty in general to any state, sociological, or political entity. On the other hand, it lacked the significance related to the history of ideas that the abovesaid types had, but it is worth being briefly discussed since it is a rather interesting concept. In his 1922 work titled 'Political Theology', Schmitt defined the sovereign as an entity who decides on the state of exception. It cannot be generally defined who decides in particular on the state of exception in a political and legal system, but whoever has the power to make this decision qualifies as the sovereign. Accordingly, the sovereign is inside and outside the law – foreruns the law – at the same time, as it can determine both the law itself and its boundaries the cases when it can be suspended and the provisions to comply with in such cases, namely not on a normative but on an individual basis. András Karácsony points out that, accordingly, '[t]he power of the sovereign derives from itself, which means that it is not derivative or deduced from any norm. […] The position of the sovereign is paradoxical. On the one hand, it is outside the legal order, but, on the other hand, it belongs to the legal order, since it has a decision-making competence with respect to the suspension of the law and the constitution, as well as to the foundation of a new kind of legal order.' (Karácsony, 2019, p. 70.) The state of exception is identical neither to the state of emergency nor to the state of war, as those are also regulated by norms; the state of exception refers to a situation where life is not governed by norms but decisions – that is, the decisions of the sovereign. In that sense, the action of the sovereign is of a political nature (not bound by law) – that is what makes it sovereign action. 'The state of exception is a phenomenon in which life and law become tense, and the decision-making sphere of law and of politics get separated.' (Karácsony, 2019, p. 73.)

7 The so-called legal sovereignty is not discussed in the present framework but in relation (or rather, as opposed) to the concept of political sovereignty.

■ *2.1. Sovereignty of monarchs (rulers)*

The sovereignty of monarchs is historically—with respect to both the history of ideas and political history—the first type of sovereignty. The sovereignty of monarchs is a product of the practice of absolute monarchy, which served as a (ex-post) theoretical justification for the absolute power that was used to characterize the modern state. In other words—as opposed to, for example, the idea of popular sovereignty emerging later –, the practice was developed first and was followed by the theory.

2.1.1. Antecedents of the modern absolute monarchy

Understanding state theory and the practical/theoretical aspects of the modern age requires an understanding of medieval conditions since the practical framework of absolute monarchy as a theoretical framework of sovereignty was developed to overcome those conditions.

In the Middle Ages, the significance of state theory diminished even compared to that in the Roman era, and theoretical debates were determined primarily by pragmatic considerations, namely the need to resolve any current power conflicts or to justify the position of one side. Among such conflicts, a prominent place was occupied by the ideological and power struggle of the papacy and the empire, as well as the political and legal struggle of the emperor and the local monarchs emerging from the organization of tribes and clans, and such conflicts were not separate from one another. This struggle, as well as the political thought as a whole and the everyday life of European societies, was permeated by the Christian faith and worldview, which was the be-all and end-all of every political philosophical thought and state theory. All ideas and opinions were expressed in relation to this worldview and were to be interpreted only within this paradigm.

The root of the struggle between the empire and the papacy (*imperium et sacerdotium*) was twofold: while, on the one hand, regarding the ideological question of finding the truth (that is, first, in terms of the ontological question of whether the truth originates from the human mind or divine will, and, second, the epistemological question of how the truth can be recognized; that is, for example, whether there are any authentic sources of truth apart from Biblical revelations—such as Council resolutions or any secular (particularly ancient) sources), an actual consensus had developed that the Bible and its explanations were binding and authentic sources of knowledge and that the human mind can at most recognize such knowledge, but it cannot change or override it; on the other hand, no consensus had been reached regarding the issue of who may lawfully exercise power. The supporters of the pope, who were also supporters of the pope's secular – and not merely spiritual – power, believed that the pope was entitled to exercise not only religious but also secular power, while the supporters of the emperor believed that secular power in its entirety belonged to the emperor – whom they considered the heir and head of the Roman Empire (*imperator*), and

the pope had competence in matters of faith at most. Since religious power meant a very significant secular influence – e.g., anyone had the right to capture or kill a person excommunicated by the pope –, and by refusing certain religious services: marriage, baptism, and administering the last rites, the bishops could cause serious harm even to those who held secular powers, a struggle developed in relation to the right of holding the positions of bishops, which was originally an internal affair of the Church. The so-called Investiture Controversy continued with varying intensity under the reign of several emperors and popes, and its results were no less varying; however, the emperor's attempts to intervene in the nomination or appointment of certain bishops were many times successful as the emperor successfully intervened in ecclesiastical matters, while the papacy was able to build secular power beyond its religious influence culminating in and symbolized by an independent papal state extending around the city of Rome from the eighth century. The power of the pope was also enhanced by the exclusive papal duty and privilege according to which the kings and the emperor himself could only be crowned by the pope.

Since there could be many kings but only one emperor who was the heir of the Roman Empire, the overlord of all monarchs, the "king of kings," the respective emperor – who had been elected king of Germany first and then formally king of Italy – was above every king. The kings, of course, had no intention to allow a real say to the emperor in the affairs of the territory they ruled, so conflicts of power occurred regularly between the kingdom and the empire (*regnum et imperium*). For this reason, the popes often supported the kings' actual aspiration for power, and the kings, to be able to assert their best self-interest, supported the pope.

From the middle of the Middle Ages onwards, various autonomies: guilds, universities, and cities were established; these autonomous communities won themselves the right to be exempt from the power of the king or the prince, and received several privileges and immunities, partly from the monarchs and partly from the pope. Thus, for example, guilds were entitled to adopt binding rules for their members and to decide who could work in a certain profession; universities originated in twelfth-century Italy and spread across Europe, defined as the community of teachers and students (*universitas magistrorum et scholarium*), in addition to determining the means of education and scientific research, which were then closely interlinked, exercised criminal jurisdiction over university citizens; in other words, they set their own criminal norms and enforced those norms themselves. Cities had the right to adjudication over their residents, based on their own rules.

This was a multifaceted and ever-changing constellation of power where the ideas on the nature, rights, and obligations of the state – the political community – were formulated and debated. Such debates concerned the following main issues.

1) Who or what is the actual, ultimate source of power? The majority answer – in that age, of course – was that God is the direct or indirect source of all power. Even then, however, the idea arose, represented with the greatest influence and consistency by Marsilius of Padua, that power derives from the people or the political community as a whole.

2) Which is the best way to exercise power? In this respect, different answers were given based on the Platonic and Aristotelian divisions; thus, for example, the aforementioned Marsilius, as an exception, considered the exercise of communal power to be ideal. Nonetheless, the typical answer was the proclamation of the monopoly of power, that is, the primacy of the kingdom.

3–4) Is lawful acquisition and/or lawful exercise of power a condition for the legitimate exercise of power? Theologians, in particular, tended to legitimize undue power that oppressed people – tyrannical power – or power that was actually possessed but unlawfully acquired, on the grounds that it is a consequence of the deterioration of the community; that is, that the subjects deserve to be oppressed as a result of their sins, which means that tyranny is a form of God's punishment against people. Secular representatives of political thought, however, typically opposed tyranny, which they did not consider a legitimate form of rule.

5) A controversy follows from this, namely that there is a right of resistance (*ius resistendi*) against the one exercising autocracy – provided that tyranny is considered illegitimate. Some who did not consider tyranny legitimate nevertheless argued that despite the lack of legitimacy, tyranny cannot be defied – either because tyranny is God's punishment or because resistance is not appropriate for practical reasons, as everyone draws the line elsewhere in terms of autocracy, so it cannot be expected from people to recognize whether a ruler is a tyrant or not –; and some of them argued that there actually is a right of resistance that can be exercised in practice by the people against a manifestly unjust ruler e.g., one who openly opposes divine ordinances. As a combination of these two approaches, Thomas Aquinas considered that there is a right of resistance but that no individual is in the position to exercise it themselves, for no one could think that God specifically sent them to bring down the tyrant and no one can logically think that, Aquinas considered that the theoretical possibility of tyrannicide was emptied.

6) There were also lively debates over the issue of superiority; that is, whether the emperor or the pope was superior or whether the pope had secular power. The question was theoretically addressed by Pope Saint Gelasuis's fifth-century doctrine of two swords governing the world, according to which secular power belongs to the emperor and the kings in their own territory, while spiritual power belongs to the pope, and the world is ruled by these two authorities (*auctoritas sacra pontificum et regalis potestas*: the sacred authority of the pope and the royal power). However, according to Pope Gelasius, while the clergy is subject

to secular regulation, the pope's guidance in religious matters is exclusive and covers not only clergymen but also the emperor himself what amounts to a matter of religion is, of course, determined by the pope who is infallible in religious and moral affairs and speaks *ex cathedra*.

7–8) Finally, differing answers were also given to the question of whether the symbolic superiority of the emperor represented a direct practical supremacy over individual kings; in fact, even the actual power of the pope remained did not remain undisputed, as there were power struggles between the Council and the pope over the right to decide matters of faith. Regarding the former issue, a solution was finally proposed by the theory of Bartolus who, based on the laws of Justinian, held that the emperor – the Roman princeps, who was the Holy Roman Emperor in the medieval interpretation – was the ruler (*dominus mundi*) of the entire Christian world (*res publica christiana*). Nonetheless, Bartolus also distinguished between areas that were *de facto* under the emperor's authority, and areas that were ruled by him *de jure* only but not in practice, as each king is 'emperor in his own territory' (*rex est imperator in regno suo*) – this doctrine successfully resolved the contradiction between the emperor's power and the factual independence of kingdoms.

2.1.2. Development and characteristics of the modern absolute monarchy

The absolute monarchy and thus, the modern state was developed by the end of the fifteenth or the beginning of the sixteenth century, while its heyday was in the sixteenth-eighteenth centuries; its classic pattern is considered by most to be the French absolutism although absolutism prevailed across Europe in the sixteenth-eighteenth centuries. A specific feature of the absolute monarchy that distinguished it from earlier types of political community is that a given area is under centralized and hierarchical control; ultimately, all relevant issues are decided by a single, undivided, and legally unrestricted central power. In absolute monarchies, this undivided and unrestricted central power is vested in the king as a sovereign that is, a monarch. This meant, on the one hand, that the (Holy Roman) emperor ceased to be a nominal and fictitious ruler of Europe and became no more than the ruler of the territories under his effective and personal control, and, on the other hand, that local and corporate autonomies ceased to exist in the estate monarchy, or that their decision-making power vanished. Neither the estates, nor the cities, the local landlords, and the various corporations – e.g., guilds, universities – were entitled to adopt rules that did not comply with the central power although particularism of customary law – not positive law – remained, on the ideological basis that as long as the application of these customary laws were not prohibited by the ruler, he tacitly approved their existence and functioning. However, it also follows that a new rule can be adopted instead of customary norms at any time, depending solely on the ruler's will.

Centralization entails the organization of state governance, that is, the establishment of modern administration and apparatus – offices consisting of persons who attend to such affairs professionally. Both the provision of central tax revenues necessary for the operation of the enlarged state (levying, inspecting, and collecting taxes), and the performance of other state functions require an extensive stratum of civil servants who are paid for their activities which are regulated in detail and who, in turn, can be held accountable for their work. This centrally organized state of an administrative nature, which placed the exercise of all public authority under its own jurisdiction, was called the police state (*Polizeistaat*) – which might sound somewhat deceptive today. In addition to bureaucracy, the main support of the power of this centralized state was an army of soldiers performing their work on a professional basis in return for their salary – this could have been an army consisting of soldiers recruited from among the subjects of the given country, or foreign soldiers (mercenaries).

As a result of the mercantilism which developed in France by the seventeenth century, economic policy was already centrally organized and managed by the state: trade balance played a key role in this, according to which revenues generated by foreign trade from products sold abroad by domestic traders should exceed such expenditures amounts payable for products imported from abroad as much as possible. The goal was to achieve as much export and as little import as possible, with domestic production of goods for domestic consumption or at least the procurement of such products from their own colonies. All this must be achieved by the state; to do this, it must take various measures – e.g., imposing safeguard duties on imports from abroad on products that are also produced domestically, subsidizing domestic companies with public loans, exceptionally setting central pricing for key commodities by determining minimum prices, price caps or mandatory official prices, etc.

This kind of centralized state only works if the scope of its power can be clearly established, both in territorial and personal terms; that is, if it is known exactly which territory and persons are covered by the right of command, control, and punishment/sanctioning by the central will. Thus, for unlimited and undivided power, it is necessary to define the subject to that power and the territory on which its commands are enforceable; that is, the concept of the modern state necessarily includes the territory in which the holder of state power can exercise its exclusive power, as well as persons – the subjects in the absolute monarchy, and later the citizens – over whom that power can be exercised from whom unlimited obedience may be demanded.

This is the way the concept of sovereignty emerged, encompassing both the fact of the supreme power of the modern state – limitless power that cannot be restricted – and the subjects over which/whom power is exercised the subjected territory and population. Two important correlations follow from all this: first, states are the entities that have sovereignty – all entities referred to as states have

sovereignty, as that is a *sine qua non* of being a state –, and second, only the states can have sovereignty.[8]

2.1.3. The theory of the sovereignty of monarchs

The groundwork for the doctrine of the sovereignty of monarchs was laid down by Jean Bodin (1530–1596). The state-theory and political philosophical approach of sovereignty appeared for the first time in his 1576 work titled 'Six books of the Commonwealth.' According to Bodin, 'sovereignty is the most high, absolute, and perpetual power over the citizens and subjects in a Commonwealth,'[9] characterized by the legislative power, the right of declaration of war and peace, the appointment of senior officials, the supreme judicial forum, the power to give pardon, receive homage, issue money, determine weights and measures, and levy taxes.

Bodin considered sovereignty to be vested in the absolute monarch, who gained their power directly from God to be his vicar and representative of his will.[10] Therefore, no man can stand above them, and the enforcement of their will cannot depend on other(s), otherwise, they would not be sovereign. If the enforcement of the ruler's will depends on the consent of someone "greater than them", then such a ruler is nothing more than a subject – e.g., a governor or regent; if it depends on the consent of someone equal, then such a ruler is not more than a partner; and if it depends on the consent of something lesser – e.g., the senate or

8 However, this statement is by no means unanimously accepted: Péter Takács considers that the interconnection between the concepts of state and sovereignty follows from the concept of state sovereignty; however, according to him and other proponents of this view the specific feature of the state should rather be expressed with the term state power. As Takács puts it: 'According to many, creating a connection between sovereignty and state was a mistake, resulting from the doctrine of state sovereignty. This doctrine suggested that the state is necessarily sovereign which means that if an entity is not sovereign, then it is not a state, and, indirectly, also that only a state can be sovereign which means that if an entity is not a state, then it is not sovereign. Again, the doctrine of state sovereignty was the reason why it was forgotten that the debates were originally about a sovereign body within the state. This doctrine, as was pointed out by C. F. Gerber and G. Jellinek, identified state power with sovereignty, while forgetting that sovereignty is not state power itself but, in their words, only one of the features of the whole (*vollkommen*) state power. [...] The point is that the state has no significant feature that cannot be described by the term independent and lawful state power. Although not relevant at this point, it is typical that supporters of this view (those who believe that the concepts of the state and state power are not necessarily connected – Z.J.T.) also say, or at least find acceptable, that there may be and there are both sovereign and non-sovereign states. If we intend to distinguish them, then the basis of such distinction must be the fact of whether or not they can organize themselves. This means that the state power's ability for self-organization is the feature based on which those two big categories of states can be distinguished. This, nonetheless, is merely a consequence of the main issue: the relevant feature of the state is not sovereignty but state power. (Takács, 2011, p. 158.)

9 Bodin, 1955, p. 24.

10 These views are based on the Calvinian doctrine; all this is not surprising since Bodin himself sympathized with the Reformation for this reason, the Holy Inquisition added several works to the Index of Forbidden Books.

the people, then the ruler is not sovereign thus, if we consider the actual Bodinian content of the concept of sovereignty, then the first two cases cannot be deemed sovereign. Consequently, a sovereign is someone who is only answerable to God, above whose authority there is only God's power.

For the rulers to be able to fulfill their mission and perform the task entrusted to them by God – governing the people and protecting the community –, they must gain almost limitless power, the elements, and also manifestations of which correspond to the aforementioned characteristics of sovereignty. The most important of these are the rights of legislation and abolition of laws,[11] from which all other rights and powers derive. According to Bodin, the sovereign is not even bound by their own laws, and they are limited by only three things: natural and divine laws, and the international treaties entered into by the sovereign.[12]

Based on these ideas, Bodin himself considered the kingdom to be the best form of state; he considered aristocracy to be tolerable although fallible due to the necessary debates between leaders,[13] and democracy to be disagreeable. Regarding the latter, he argued that artificial equalization does not work because people are inherently unequal: '[by nature] some are wiser and more inventive than others, some formed to govern and others to obey, some wise and discreet others foolish and obstinate';[14] 'but democracy is hostile to men of reputation'.[15]

Thomas Hobbes (1588–1679) was also an ideologist of the absolute monarchy: with his contract theory (explained in his major work, 'Leviathan' which was published in 1651 he sought to legitimize the rulers' unlimited power that cannot be restricted.

According to Hobbes, in the natural state, all people are equal, as there is little difference between them in terms of physical strength ('for as to the strength of the body, the weakest has strength enough to kill the strongest'),[16] and their mental abilities are even less different from one another. This implies that they share the same hope of achieving their goals because 'during the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war, as is of every man against every man.'[17] To keep everyone safe that situation must be prevented because it would be impossible to achieve social coexistence and any resulting benefits. It is, therefore, necessary to create a power that is capable of controlling human selfishness for the benefit of all, by adopting and upholding laws that are binding for and enforced upon everyone. There is no statute law in the natural state, which means that nothing

11 This includes the right to amend and promulgate laws.
12 Bodin, 1955, 32–33.
13 Ibid, p. 206.
14 Ibid, p. 199.
15 Ibid, p. 200.
16 Hobbes, 1997, p. 140.
17 Ibid, p. 143.

can be unjust. Although natural law exists, it is not a real law but merely means the freedom for each person to use their own strength in an unlimited way to protect their own life so they can do whatever they think is most appropriate to protect it. Natural law is nothing more than a general rule deriving from common sense, prohibiting us from doing anything that might sacrifice our lives or relinquishing the means by which we can protect our lives.

Due to the fear of violent death and loss of goods, people moved on from the natural state – a condition of war of every man against every man (*bellum omnium contra omnes*) –, which was incapable of warranting their safety, to the civil state to enjoy the safety and the consequent comfort guaranteed by the state. Thus, they created the state and the sovereign by waiving their rights—except the right to life and physical integrity—by transferring them to the sovereign. The right to life and physical integrity, however, are natural rights that cannot be transferred by contract to anyone; therefore, even though the ruler may have the right to order his subjects to fight the enemy and, if they refuse to do so, to even punish them by death, they cannot be compelled to obey that order or to face death sentence without resistance.

In the civil state, everyone must be satisfied with as much freedom as given to others; otherwise, based on natural reasons, no human being would consent to a unilateral restriction of their rights by which they would only submit themselves to the arbitrariness of others, without any safeguards for themselves. In turn, others can expect the same consideration based on reciprocity. Thus, the golden rule of Christ applies: '*quod tibi fieri non vis, alteri ne feceris* (do not do unto others what you do not want done to yourself).'[18] This mutual transfer of rights is called a contract, which requires someone to enforce it. There is an obligation arising from the principle of human reason which means that it is neither legal nor moral, 'by which we are obliged to transfer to another, such rights, as being retained, hinder the peace of mankind,'[19] and from that follows the law that everyone must fulfill the covenants they have made. The guarantor of the fulfillment of this obligation is the state – the sovereign –, since even though the observance of the golden rule of Christ is reasonable in itself, it is contrary to our instincts that urge us to violate this contract, such that it can only be enforced by an external coercive power above us all, and its effectuation depends on whether that power has actual authority to enforce it.

The parties to the contract, that is, the people who wish to move from the natural state to the civil state, entitle the public authority to everything necessary to protect their lives and provide safety from one another and any external enemy, while irrevocably waiving the right to resist that authority.[20] The sovereign is not

18 Ibid, p. 149.

19 Ibid, p. 161.

20 'This done, the multitude so united in one person is called a COMMONWEALTH, in Latin CIVITAS. This is the … great LEVIATHAN, … the immortal God, our peace and defence.' (Hobbes, 1997, p. 191.)

a party to, but the result of the social contract, that is, the sovereign did not enter into the contract, and so by definition cannot violate it. In Hobbes's theory, sovereignty is absolute and unrestricted and there may only be a difference in those who exercise it however, he considers any of them legitimate if the contracting people endowed them with absolute power. Thus, sovereignty can be exercised by a single person (monarchy), by several persons (aristocracy), or by all citizens (democracy); in practice, however, the theory of absolute sovereignty legitimizes only absolute monarchy, and not aristocracy or democracy; that is, the justification that the power of a king that cannot be restricted. Nonetheless, that power covers only the public sphere; in private relationships – not regulated by the state – the freedom of actions, that is, the freedom of trade, acquisition of property, and decisions of private life – as long as they do not jeopardize social peace – also prevail in Hobbes's theory whether or not something has social relevance, will ultimately be decided by the state due to its absolute sovereignty. For this reason, Hobbes's interpretation is not uniform either: some consider Hobbes's contract theory to be one of the first liberal theories on the basis that he considers the rights to life, physical integrity, and personal safety – as the real essence of the social contract – to be unrestricted in principle; others highlight the authoritarian features of the theory of absolute sovereignty, and some – e.g., Carl Schmitt – see it as an early theoretical foreshadowing of the totalitarian state.

■ *2.2. Parliamentary sovereignty*

The principle and practice of parliamentary sovereignty are products of the development of the English state and law. As in the case of the sovereignty of monarchs, the practice developed first, and the theoretical justification was established subsequently or, at most, in parallel.

In England, parliamentary sovereignty came into being as a result of the English Civil Wars of the seventeenth century and became firmly established in the eighteenth century. Today's so-called parliamentary monarchy was historically preceded by a transition period, the era of constitutional monarchy where the monarch exercised the same or nearly the same rights as the parliament – In a term derived from John Locke, the age of "King-in-Parliament," or neutrally referred to as 'Crown-in-Parliament'. In the nineteenth century, Albert Venn Dicey, a true master of the history of English constitutional law, wrote that the pillars of English constitutional law are the principle of parliamentary sovereignty and the rule of law.[21] Although the original content of parliamentary sovereignty has changed or been somewhat refined since the eighteenth and the nineteenth centuries, it can still be considered a part of English political practice.

21 'The principle of Parliamentary sovereignty means [...] that Parliament [...] has [...] the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law of England as having the right to override or set aside a legislation of Parliament.' (Dicey, 1885, p. 36.)

Parliamentary sovereignty – just like the sovereignty of monarchs – denies the division of power. According to this theory, state power is vested solely in the parliament and any state body can participate in the exercise of power only with the authorization of the parliament. One of the clearest theoretical formulations of this was provided by John Austin, who even perceived the existence of the judiciary and, thus, – due to the common law and equity case law – the actual legislative power of courts to function with the tacit approval of parliament according to this view, the parliament may also take that legislative power back from the courts at any time by changing the rules of common law and equity. This happened in part in the nineteenth, and mainly in the twentieth century, when the so-called statute law, that is, acts of parliament and the lower-level central regulatory legislation based on statutory authorization, gained ground. On a similar theoretical basis, Jeremy Bentham argued that the courts cannot even interpret the statutes, and if they consider the application of a certain statute dubious – If it can be interpreted in more than one way – then they cannot rectify it but must return it to the parliament for clarification.

In the era of pure parliamentary sovereignty, courts themselves were integrated into the parliament; in addition to the fact that any judge could be (legally) removed by the joint initiative of the lower and upper house, in England – and in the United Kingdom, except the Scottish criminal cases –, the supreme judicial forum was the upper house of the parliament, that is, the House of Lords acting as a judicial forum a court consisting of twelve persons functioning as a part of the House of Lords. This situation ceased to exist only in 2009 when the Constitutional Reform Act, adopted in 2005, came into effect, establishing the Supreme Court which is independent of the parliament.[22] As a matter of fact, the government is still not independent from the parliament. Traditionally, and even today, members of the government can only come from among those members of the election-winning party – the party acquiring seats necessary for governance – who won entry into the lower house of the parliament, that is, those who were elected as members of the House of Commons noting that the right of appointment formally belongs to the king/queen. The secretaries of the state as well as the prime minister have a strong responsibility to the parliament, which can dismiss the government at any time and decide to form a new one by electing a new prime minister. Therefore, the English Parliament is no longer able to do anything even in the context of public law its opportunities, even if not restricted by positive law, have

22 The first 12 members of the Supreme Court were the 12 law lords who held the position of Lord Chief Justice in the House of Lords at the start of the Supreme Court. After the expiration of their office, they may return to the House of Lords but until then their membership in the House of Lords is suspended, and they may not participate in its work or deliberations, and they may not vote. The judges following them are no longer selected from the House of Lords, so the personal interlinks between the upper house of the Parliament have now been phased out.

always been limited by customs and traditions deriving from legal and political culture, that is, practically the principles of the rule of law itself. The judiciary, in particular, has been completely separated from the parliament but the right to exercise sovereignty is still vested mostly in the parliament. This consequence of the doctrine of parliamentary sovereignty, the priority of the effectuation of the parliamentary will, is called the supremacy of the parliament. As articulated, with some sarcasm, by the Swiss-British author and political essay writer Jean-Louis de Lolme in 1771 (which maxim is erroneously credited sometimes to Walter Bagehot, and sometimes to Albert Venn Dicey who actually made this *bon mot* famous in the heyday of parliamentary sovereignty): 'Parliament can do everything but make a woman a man and a man a woman'.[23]

Thus, according to the doctrine of parliamentary sovereignty, the operation of the institutions of power is focused on a single hand; although based on the supremacy of this single body – that is, the parliament –, this doctrine does not recognize the division of power, it considers parliamentarism – the parliamentary system – as a whole to be subjected to the principle of representation. This means that the parliament is not for itself but for those who elected its members; as voters cannot decide all matters themselves, they delegate representatives in their stead, who – for them and on their behalf – make the important decisions. It also follows that the quality of parliamentarism depends on who can elect the representatives: if all citizens – every citizen except those not eligible to vote for obvious reasons (minority, being subject to a criminal conviction, etc.) – are entitled to do so, then parliamentary sovereignty is a type of popular sovereignty that implements indirect exercise of power – indirect democracy – in addition to popular sovereignty of Rousseauan origin that entails the direct participation of people. However, since the idea of parliamentarism has not meant the realization of universal suffrage for a long time, we should, in principle, separate parliamentary sovereignty from popular sovereignty, and consider it an independent type of sovereignty.

■ *2.3. Popular sovereignty*

Popular sovereignty is the invention of the French Enlightenment and its theoretical foundation is traditionally linked to Rousseau. Although the idea of power constituted by the people and exercised directly by them had already emerged in the Middle Ages, the first modern appearance of this theory in the history of ideas can indeed be linked to Rousseau. As we saw at the end of the previous subsection, parliamentary sovereignty or the representation-based, indirect exercise of power by the people can be perceived as a part of popular sovereignty in a broader sense – at least in the case of general suffrage –, while popular sovereignty in

23 'De Lolme has summed up the matter in a grotesque expression which has become almost proverbial. >>It is a fundamental principle with English lawyers, that Parliament can do everything but make a woman a man, and a man a woman.<<' Dicey, 1885, p. 39.

a narrower sense means that people exercise their power directly, without the interposition of representatives. The conceptual clarification is hampered by the fact that both concepts of popular sovereignty are used in today's scientific literature of political, legal and constitutional theory, and written constitutions often do not differentiate between these forms either. Even Rousseau, the father of the modern form of popular sovereignty acknowledged that indirect exercise of power is a possible way to implement popular sovereignty, not least due to the recognition that, for practical reasons, a larger state – such as Poland, where the drafting of the constitution was assisted by Rousseau – cannot be operated through direct decision-making.

Like many of the philosophers of his age, Jean-Jacques Rousseau (1712–1778) relied on the contract paradigm regarding the development of a form of government representing the people as a whole and regulated by law.[24] In order to unite their strength and overcome the disadvantages necessarily present in the natural state – particularly to protect their own lives –, people conceived of the social contract through which they established the state. According to Rousseau, the essence of the social contract is the following: 'Each of us puts in common his person and his whole power under the supreme direction of the general will; and in return, we receive every member as an indivisible part of the whole.'[25] This newly created moral and collective body is the republic, which is called state when it is passive, and sovereign when it is active. The persons who enter into the social contract are called citizens – who participate in the sovereign power –, and subjects – individuals subjected to the law of the state. Since the people have not waived their rights, only decisions in the interests of the people can be made. If that principle is violated, the people may resist; but as long as the people do not declare their will to the contrary, the laws are to be considered for the benefit of the people as a whole – even by those who do not agree with these laws.

There are only two requirements regarding the manner in which laws are established: that they should be made by the people and applied to them as a whole. That is, the disposing will and the subject of the disposition must be the same, and the will must be directed to itself. This, however, also means that everyone is involved in the life of the state in two positions: on the one hand, as a person in whom the general will is vested, that is, a part of the supreme power, and, on the other hand, as a person who is the subject of, and obliged by, the laws. It follows that everyone submits themselves to themselves as opposed to the will of others, since, on the one hand, as one of the people who exercise supreme power, they are subjected to laws while also being sources of the law, and, on the other

24 The thoughts described in this section can mostly be found in the 1762 work titled 'The Social Contract'. See Rousseau, 1998.

25 Rousseau, 1998, p. 37.

hand, everyone can be obliged by others by the way of laws as much as they can oblige others by the way of laws.

The fact that laws must be made by the people as a whole means that positive law must be the declaration of the general will (*volonté générale*), but it does not mean that unanimity is required for the validity of laws. Only two requirements are set: first, everyone who has entered the social contract and is considered to be part of the state should have the right – at least indirectly – to vote on the law and chooses to vote in favor of it.[26] According to Rousseau, the latter requirement is also met if the laws adopted by the body established for legislation are acknowledged by the majority of people and they do not rebel against them. The second requirement is that no person may be given rights or burdened by obligations, except in a normative way, by the stipulation of specific features of the subjects.

General will or public will is thus qualitatively different from the totality of individual wills; indeed, individuals are biased toward themselves so their private interest may outweigh the public interest. However, if everyone followed their specific private interests, the state – which was created in everyone's interest – would disintegrate, so the subjects must be obliged to follow the public interest. Every single member of the people is obliged to obey the people, which is essentially themselves, even if the direct individual interest of a citizen would otherwise be contrary to the interest of the community as a whole; if they fail to do so, the representative of the community who enforces the will of the supreme power (the court) can impose a penalty on the citizen who disobeys the law. Thus, the right of punishment is not arbitrary but is based on the will of the parties to the social contract because the actual intent of the contracting parties was to give effect to the real interests, which are those of the people as a whole instead of any *ad hoc*, particular interest.

So, Rousseau traces back the general will to the social contract conceived for the common good, based on their free will, which has to be accepted by every subject. However, only the state and the – conceptually integrated, indivisible, and inalienable – supreme power effectuated in the state derives from that; nonetheless, to exercise the supreme power, an entity separate from that power can – and should – be established, which is called government. Certain functions of the supreme power can be carried out by separate bodies, such as legislative and executive bodies. The forms of the latter differ based on how many people are involved in the execution: if the majority of the people are involved, then we talk about democracy, if a minority of the people – but more than one person – are involved, then we talk about aristocracy, and if only one person is involved, then it is a monarchy. Thus, Rousseau did not define democracy, aristocracy, and monarchy as forms of state but as forms of government, each of which may be established for the exercise of the supreme power created by the social contract.

26 Rousseau called a republic any state governed by law, regardless of its form of government. Cf. Rousseau, 1998, p. 66.

■ *2.4. State sovereignty*

The concept of state sovereignty is used in a number of ways. First, it refers to the fact that the subject of sovereignty is the state, as a separate entity in its entirety; second, this concept is also used for the state bound by law – the latter is a synonym for the concept of legal sovereignty. We use it in the former sense – distinguishing it from the sovereignty of monarchs, as well as from parliamentary, popular, and national sovereignty – as a type of sovereignty that serves to emphasize that the subject of sovereignty is not an organ or component of the state but that the state itself is an impersonal institutional system as a whole. In this way, the concept of state sovereignty can be distinguished from popular sovereignty – according to the latter concept, it is not the state but the entirety of citizens that is sovereign –, from the sovereignty of monarchs and parliamentary sovereignty – where, respectively, the absolute monarch or the elected parliament is the subject of sovereignty –, as well as from national sovereignty which will be presented in the next subsection. In this sense, state sovereignty is closely linked to the idea of the division of power; ultimately it expresses the principle that no organ, part, or component of the state can be exclusively sovereign in itself.

For example, Hans Kelsen wrote the following on state sovereignty in response to criticism of his own theory. He believed that parliamentary sovereignty is only a sub-type of the principle of popular sovereignty – which is preferred by many –; since the goal is not to trace back just one branch of state power to the will of the people but the functioning of the state order as a whole, popular sovereignty is not realized by parliamentary sovereignty, but, essentially, by state sovereignty; that is, by the functioning of the branches of state power as a whole, deriving from the will of the people,[27] where no single organ can have an exceptional position compared to the other state organs.[28]

27 An important theoretical problem related to the concept and phenomenon of sovereignty is the nature of the concept itself. Based on the different assessments of this nature, we can talk about legal and political sovereignty. The concept of legal sovereignty as Kelsen himself conceived the concept of sovereignty, stems from the fact that sovereignty is a legal concept: the scope of the exercise of supreme power is therefore limited by legal frameworks. Based on this, the holder of the main power cannot actually do everything, as he is bound – at least – by the laws created by himself. The legal concept of sovereignty thus defines the requirement of a state bound by law – the formal rule of law, ie., *Rechtstaat* –, considering the concept of sovereignty as a normative – prescriptive – concept. On the other hand, political sovereignty considers it to be a matter of facts: according to this concept, sovereignty – as a descriptive term – denotes the existence of power – and its exerciser –, without affecting the legal or other correctness of the actual exercise of power – morality, justice, compliance with certain legal principles, etc.

28 Kelsen gave this explanation in defense of the constitutional court as an independent state organ that is entitled to annul the norms adopted by the legislature – parliament. According to him, the function of the constitutional court is to limit any possible violation of popular sovereignty by the parliament: just like the courts and the administration is subjected to the laws, the parliament is subjected to the constitution, and may only exercise its legislative function in their framework. Thus, based on popular sovereignty

■ *2.5. National sovereignty*

The concept of national sovereignty is linked to the concept of the nation and since we can use the term nation in two senses, national sovereignty also has two possible definitions: we can distinguish the political nation on the one hand, and the cultural nation on the other. The concept of the political nation is the result of the monarchical form of state – which, almost without exception, prevailed at the time of the appearance of the modern concept of a nation –, since in these monarchies, a new community-forming force emerged and spread for the voluntary pursuit of the goals of the central power – so much so that many states, which had not existed before and had only just developed, also adopted this centralized, monarchical form of government.[29] On the other hand, the concept of the cultural nation developed in regions – and from there spread to other regions – where the so-called titular nation only had a narrow majority – or even only a minority – in its own state, or where certain nations could not have a country of their own or a significant part of their members remained outside their homeland. That occurred, for example, in Eastern and South-Eastern Europe. Also, the concept of the cultural nation was exploited in newly unified states whose people had belonged to separate states for a long time, but the memory of the common past was still preserved and gained new meaning – e.g., Italy, Germany.

A Political nation is nothing but the people itself, that is, the totality of people who are the citizens of and live in the same state – i.e., live in a specific territory, under the same sovereign (nation-state). Accordingly, to pursue political unity, everyone belongs to the nation on whose territory they live. Such a concept of nation has been developed and applies to this day in France and in the United States, where everyone is French or American, regardless of their origin, color, religion, mother tongue, etc.

In the case of a cultural nation, sharing the same ethnicity, culture, traditions, and language defines the identity of the people. This is the situation in most European countries. The identity of a cultural nation may develop spontaneously, in an organic manner (e.g., England), or in an artificial way, from top to bottom (e.g., Italy). Thus, the cultural nation does not include every citizen of a given country – only those who belong to the titular nation, with the same cultural identity –, but does include those who are not members of the titular nation but

and democracy – the essence of which is to make a compromise between the majority and the minorities, and, thus, to promote social peace –, the procedure of the legislative organ is bound by the constitution and the constitutional court ensuring the effectuation of the regulations enshrined in it, and whose function, in addition to give effect to the provisions of the constitution against statutes and decrees – to annul the norms violating the constitution –, is to resolve disputes over authority – also based on the constitution –, and to protect minorities, that is, to prevent the tyranny of the majority. Cf. Paczolay, 2003, pp. 9–31; Favoreu, 2003, pp. 52–113.

29 Such as Belgium or Romania.

share the same language, culture, and tradition, due to which they bear a common identity.[30]

Of course, these two concepts of the nation are not mutually exclusive but exist in parallel; however, one may be deemed dominant over the other in a given country. For example, in France, some support the concept of cultural nation and consider every non-French citizen French, who has French roots and identity, while they do not consider French those citizens whose traditions and customs are different from French traditions and customs. These two concepts of the nation compete with each other everywhere.

Therefore, due to the twofold nature of the concept of nation, national sovereignty has two meanings. In the eighteenth century when the concept of the political nation was developed, national sovereignty was basically used as a synonym for popular sovereignty. From the nineteenth century, when the concept of the cultural nation developed in addition to the concept of the political nation, national sovereignty was used more and more often to express this cultural identity. In the former sense, it expresses a fact, namely, that the actual subject of sovereignty is the totality of citizens – with any cultural identity – as a political community; in the latter sense, it formulated a political goal to be achieved – the goal that people with the same identity should, as far as possible, live in and be citizens of the same state, the so-called nation-state. In this latter sense, the national nature of sovereignty is an orthogonal dimension, which can connect to any other type of sovereignty. Thus, in this sense, we can talk about national parliamentary sovereignty and national state sovereignty. Today both meanings of national sovereignty are used, so it can be either a synonym for popular sovereignty or simply a desire for the political unification of members of a cultural nation.

3. Conclusion

It can be seen that the concept of sovereignty can be traced back to Bodin's approach to the concept of state, and it was originally embodied in the doctrine of the sovereignty of monarchs, but from the late Middle Ages, this doctrine was replaced by the different approaches of the subjects of sovereignty. The idea of popular sovereignty, from which the modern requirement of democratic legitimacy also emerged, proved to be the most defining and fruitful in terms of political practice and substantive constitutional regulations. Accordingly, all decisions of public authorities must be directly or indirectly traceable back to the will of the people. This is one of the most significant requirements resulting from today's modern rule of law, without which we cannot talk about either democracy or the effectuation of constitutionality in a material sense.

30 Furthermore, there are nations – in a cultural sense – that have no country of their own at all.

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NORBERT TRIBL*

Identity Questions and National Symbols: The Role of National Symbols in the Formation of National and Constitutional Identity

ABSTRACT: *Recent decades have seen numerous identity debates around the European Union and its integration process. The protection of national and constitutional identities and their underlying values is at the root of these identity disputes. Each nation has its own constitutional identity, national identity, and constitutional values. This identity and sense of identity and values are reflected and expressed through a system of symbols. National and state symbols serve to both form and shape national and constitutional identity.*

KEYWORDS: national symbols, state symbols, national identity, constitutional identity

1. Introduction

In its most basic sense, identity refers to self-determination or essential sameness. From a philosophical point of view, it is the logical continuity according to which every concept must be identical to itself in a given time and in a given relation. It also implies a sense of identification with oneself or with a group.[1] Identity or self-determination is inherently a sociopsychological concept that examines issues of an individual's self-definition in relation to society.[2] Symbols, on the other hand, express a basic human need. They serve as a means of reinforcing communication and group cohesion, and as such, they help to maintain the group's identity and

1 Pusztai, 2014, p. 553.
2 Cf. Pataki, 1997, pp. 321–330.

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stability.[3] Symbols are therefore both a means of expressing identity to outsiders as well as strengthening it. The need to use symbols is inherent in human nature and has accompanied the development of human civilization. Accordingly, symbols are intrinsically linked to the history of nations and states.[4] The identity of a nation or state, a basic unit of human society, is shaped by the identity of the individuals who make up society, and *vice versa*: the identity of the individuals who make up society is shaped by the nation's identity and the memories of the nation's past. Therefore, national symbols are expressions of the sense of identity derived from belonging to a nation, and through these symbols, the sense of national identity can be deepened. When considering the role of symbols at the level of the nation or the state from the point of view of identity, we must distinguish between national identity and national symbols, as well as between constitutional identity and state symbols, although these cannot, of course, be sharply separated from one another but rather defined in terms of their part-to-part relationship.

In the study of identity, we might discuss understanding identity as both a given and a dynamic, interactive process. According to this view, identity is never a fully formed and final determination. Identity is an individual's attempt to assert his or her sense of self in the culture, i.e., to identify the factors by which he or she differs from or is identical with other persons.[5] Identity, therefore, cannot be a given; everyone must constantly and continuously construct their identity.[6] Individual identity is, however, made up of various partial identities. Thus, national identity, based on national consciousness, is just as much a part of individual identity as religious or minority identity. Each of these partial identities usually has its own system of symbols that expresses and deepens the sense of identity.

However, identity is not merely linked to who someone is as an individual. A group of people who are organized according to a structure may also behave as an autonomous entity in relation to the outside world and, as such, may have a collective identity.[7] Consequently, identity elements can be identified for individual, separate members of the community, and due to the homogeneity of the members of the community in terms of a certain characteristic, model-like identity patterns can also be identified that are not just based solely on the individual experiences of the individuals who make up the collective. The identity of the community is the product of its collective experiences and collective identity formation.[8] On the basis of this phenomenon, we can speak of religious, cultural, constitutional,[9]

3 Pál, 2013, pp. 689–711.
4 Halász and Schweitzer, 2020, [1]–[2].
5 Bodó, 2004, p. 13.
6 Ibid, p. 15. Identity-building in interaction with others (dialogically) clearly resonates with the connections between constitutional dialogue and constitutional identity.
7 Pataki, 1997, p. 326.
8 Ibid.
9 E.g., Orbán, 2020.

and national identities.[10] The essence of identity is unity in the face of the outside world, usually expressed through a common system of symbols.

2. National and constitutional identity

According to Habermas, in the case of collective identities, there is a phenomenon of universalization of the self-structures that constitute them, and of the collective identity becoming more dominant.[11] From this, it can be said that collective identities, which are created by the unified will of the entities—individuals, communities—, reflect the self-determination of the entities that create them; that is, they necessarily shape them.[12] According to Habermas, the collective identity of the future cannot be anything other than a consensus on the formal conditions of identity construction produced through continuous and communicative structures.[13] In the case of collective identity formation, the identity-bearing entity is the collective subject, which is nothing other than a collective that emerges as an expression of the common characteristics of the individuals who make up the group, whose members form a unit and whose identity emerges from the social conditions of the group, historical development, and the unified socialization of the individuals making up the group in this specific and concrete context,[14] and, as such ,has its own symbolism that represents and embodies the community's belonging and value system, as well as the common past.

American legal scholar Gery J. Jacobsohn sees constitutional identity as a defining feature of the constitutional system,[15] without which it would be transformed into something quite different.[16] According to his theory of constitutional disharmony,[17] constitutional identity is determined by the 'final' outcome of the tension generated by the conflict between the constitution, as created by the constitutional authority endowed with social legitimacy, and the social and political forces that define it.[18] The "interaction" of these factors is a process, the result of which is the "projection" of certain features of constitutional identity. This also means that the elements of constitutional identity cannot be understood

10 Which, of course, may also have religious, cultural, and national elements, to name a few.
11 Cf. Habermas, 1994, pp. 141–182.
12 Cf. Ibid, pp. 145–148; 149–154.
13 Bodó and Toró, 2011.
14 See Pataki, 1997, p. 305.
15 For a detailed analysis of constitutional identity according to the different constitutional models, see Rosenfeld, 2010, pp. 149–209.
16 Jacobsohn, 2013, pp. 5–16.
17 The theory developed by Jacobsohn presents the concept of constitutional identity in a very practical way by illustrating constitutional phenomena from individual examples, but his method of investigation undeniably reflects Anglo-Saxon legal thought, using as a starting point the constitutional 'moments' and identity traits of the United States and India.
18 For more on constitutional disharmony theory, see Jacobsohn, 2010.

in isolation, "in itself," solely in the light of the past, present, and future of the state and/or nation that created it.[19] The identity of the constitutional system is therefore changeable; it can change, for example, in its value system, but the social cohesion on which it is based must remain constant and, as such, it needs a cohesive instrument, a constant and shared symbolism that is either completely insensitive to or only less sensitive to social change.

Rosenfeld argues that we are not only talking about the likelihood that constitutional identity will change over time, but also that it would become deeply immersed in complex and contradictory relationships with other defining identities, such as national, ethnic, religious, or cultural identity, and to create an identity that transcends time, it is essential to weave together the past of its creators, our own present, and the future of generations yet unborn.[20] In order to weave together the past, present, and future of a community, and to do so within a common, though not entirely immutable, set of values, we need to create a bond that transcends time and expresses that bond to the outside world; that is to say, we need a common system of symbols.

Jacobsohn refers to constitutional identity as a phenomenon that is constantly evolving in the courts and the legislature, as a mixture of many aspirations and opinions expressing the nation's past.[21] In his view, the phenomenon of constitutional identity cannot be interpreted in terms of a timeline, i.e., as a static set of factors that characterize a given constitutional system in the present. In the Anglo-Saxon legal literature, identity theorists see constitutional identity as a dynamic interaction between the constitutional community, the constitution-making power, and the confrontational relationship between the constitution and society.[22] Accordingly, the identity of society determines the constitution, and *vice versa*: the constitution influences social identity.[23] Constitutional identity is usually compared to the theory of constitutional patriotism[24] associated with Habermas,[25] which argues that communities should be defined by their commitment to constitutional norms.[26] However, in order for the bond between society, community members, and the constitutional order to develop, the constitutional system's values must correspond, at least in part, to those of the constitutional community, and there must be tangible symbols, a system of symbols that can be displayed to the outside world, that facilitate the expression of a sense of belonging among members of society and through which individuals can express their agreement or disagreement with a value system in a simple way, often through a single symbol.

19 Cf. Martonyi, 2018, p. 21.
20 Rosenfeld, 1995, pp. 1049–1111.
21 Jacobsohn, 2013, p. 5.
22 Jacobsohn, 2010, pp. 1–35; Jacobsohn, 2013, p. 5.
23 Polzin, 2017, pp. 1599–1606.
24 Jacobsohn, 2010, pp. 2–6.
25 Polzin, 2017, pp. 1600–1601.
26 Cf. Müller, 2008.

Behind the symbols, then, we find values and value systems, which are both part of and embodiments of the expression of the identity or sense of identity that is associated with them.

In the process of identity formation, identity is thus an attempt by the entity that thinks about itself to name the factors by which it differs from or is identical to other entities.[27] According to Habermas, in the case of collective identities, there is a phenomenon of universalization of the self-structures that constitute them and of the dominance of collective identity.[28] This collective identity, which is created by the unified will of the entities—be they individuals, communities, or nations—, has an effect on the identity of the entities that create it and necessarily shape it, in which process symbols play a decisive role. It is through symbols that individuals and communities are able to identify with the sense of identity of the community, its sense of belonging to the community, and its values.[29]

Anglo-Saxon—mainly American—jurisprudence builds on the formulation of the regularities derived from identity theories and considers constitutional identity as the starting point of constitutional theory, a system of regularities derived from the nature of constitutional systems.[30] Identity theories focus on the relationship between society and the constitution, as well as the requirements characterizing the constitution itself.[31] Consequently, constitutional identity involves the symbolism of the constitutional system, a system of state symbols, which, according to Habermas' theory of constitutional patriotism, also reflects back on society and shapes its collective identity and national consciousness.

The concept of constitutional identity[32] and its conception[33] and interpretation[34] is currently changing, or rather evolving, and is likely to continue to do so in the future, but the significance and protection of state and national symbols has been unquestioned practically since the emergence of states, while the identity-forming role of these symbols is still a less developed area, at least in the state theoretical and constitutional dimensions.

According to Jacobsohn's theory of constitutional disharmony,[35] constitutional identity is created through the interaction of three factors identifiable in the constitutional system.[36] These are the constitutional community that gives life

27 Bodó, 2004, p. 13.
28 Cf. Habermas, 1994, pp. 154–168.
29 Consequently, deepening respect for national symbols can also be a means of deepening national identity.
30 Jacobsohn, 2010, p. 3.
31 Minimum standards? See Drinóczi, 2016a, pp. 112–223.
32 E.g., Chronowski and Vincze, 2017, pp. 93–127.
33 Blutman, 2017, pp. 1–14; Drinóczi, 2016b.
34 E.g., Polzin, 2017, 1604–1615.
35 Cf. Pavone, 2014.
36 Jacobsohn, 2013, p. 5.

to the constitution, the constitutional power, and the constitution.[37] In his view, it is the confrontational relationship between these three factors that makes the constitution more than a mere document—it makes it alive—and it is the cornerstones of this confrontational relationship that constitute the identity elements of the constitutional system.[38] When we want to separate national symbols from state symbols, if there is a need to do so, this triple distinction can help us in the process of distancing: the identity of the community or communities that make up the constitutional system can be defined as national identity,[39] while the symbols enshrined in the constitution—which are usually prominent among national symbols—and embodying state power, sovereignty, or the continuity of the state can be called state symbols.

Rosenfeld's theory of plural constitutionalism[40] can be interpreted as a quasi-complement to Jacobsohn's theory of disharmony: the constitutional system in Rosenfeld's interpretation appears as a constitutional subject, which, through the confrontational interaction of three factors—constitutional community, constitutional power, and constitution—develops and defines itself through specific characteristics, a quasi-pattern of behavior.[41] In this process, a value system is formed, which can also be reflected through a system of national/state symbols.[42] Jacobsohn situates constitutional identity in the process of the organic development of the constitution and examines the extent to which the constitution can be changed without the change damaging the identity of the constitutional system. In other words, where is the limit when, through amendments, the constitution no longer fits into the constitutional system that gave rise to it, causing the constitutional system to be destabilized by the amendments[43] and lose its identity[44] as a result.

On this basis, constitutional identity describes the process of organic development of the constitutional system, in the course of which a symbolism of the constitutional system is formed that expresses the sovereignty of the state on the one hand, and at the same time embodies the connection of the members of society to the state, and in the case of nation states, the national consciousness. This symbolism is also capable of reflecting social and constitutional values. One

37 Cf. Tribl, 2018, pp. 151–164.
38 Rosenfeld, 2010, p. 4.
39 The question of nation states is referred to in these lines only by the singular or plural formulation.
40 Cf. Rosenfeld, 2010, pp. 15–71.
41 Tribl, 2018, pp. 155–158.
42 The question of value–based and value-neutral constitutions. Cf. Bulmer, 2014.
43 A thorough analysis of the stability of the constitution is beyond the scope of this paper, and we will only point out here that eternity clauses can in principle strengthen the stability of the constitution, if they are used for such a purpose.
44 Jacobsohn, 2010, pp. 34–82.

of the defining characteristics of constitutional identity is therefore continuity,[45] i.e., the identity of the constitutional system cannot be satisfactorily defined in a single moment in time with a closed catalog of values,[46] whereas the catalog of state and national symbols is relatively stable, but the underlying value system may change.

If, at a given moment in time, we wish to name the elements of the identity of a constitutional system, they are embodied in the provisions of the constitution as a result of the confrontational relationship between the factors constituting the constitutional system—constitutional community, constitutional power, constitution—, as constitutional values[47] and institutions, constitutional principles, as well as state and national symbols.[48]

3. Identity and national symbols in the EU

In respect to the Central and Eastern European regions, it is worth briefly touching on the issue of European integration.[49] The source for the application of constitutional identity in the European Union legal system is Article 4(2) of Treaty of European Union, which states that

> the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.

This is confirmed in practice by the Charter of Fundamental Rights of the EU, whose preamble states that

> the Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organization of their public authorities at national, regional, and local levels... [50]

45 Cf. Rosenfeld, 2010, p. 41.
46 Cf. Rosenfeld, 1995, pp. 1049–1111, 1049.
47 The Hungarian Constitutional Court, in its evolving jurisprudence, has, in my view, defined certain elements of Hungary's constitutional identity too broadly, when it has defined it, inter alia, by listing constitutional values in an exemplary manner but without providing reasons for each element. Cf. CC Decision no. 22/2016 (XII. 5.), [64]–[65].
48 Cf. Majtényi, 2017.
49 Cf. Faraguna, 2017.
50 Cf. Martinico, 2013, pp. 95–112.

These provisions do not mention the technical term constitutional identity, a phenomenon which is due to a number of reasons, but which also creates conceptual uncertainty. In his Opinion of Advocate General Poiares Maduro AG, the Advocate General writes about national and constitutional identity:

> It is true that the European Union is obliged to respect the constitutional identity of the Member States. That obligation has existed from the outset. It indeed forms part of the very essence of the European project initiated at the beginning of the 1950s, which consists of following the path of integration whilst maintaining the political existence of the States. That is shown by the fact that the obligation was explicitly stated for the first time upon a revision of the treaties, a reminder of the obligation being regarded as necessary by the Member States in view of the further integration provided for. Thus, Article F(1) of the Maastricht Treaty, now Article 6(3) of the Treaty on European Union, provides that 'the Union shall respect the national identities of its Member States.' The national identity concerned clearly includes the constitutional identity of the Member State. That is confirmed, if such was necessary, by the explanation of the aspects of national identity put forward in Article I-5 of the Treaty establishing a Constitution for Europe and Article 4(2) of the Treaty on European Union as amended by the Treaty of Lisbon. It appears, indeed, from the identical wording of those two instruments that the Union respects the 'national identities [of Member States], inherent in their fundamental structures, political and constitutional.[51]

The Advocate General's position therefore focuses on national identity, which, in the context of the EU, describes the role of constitutional identity within the EU from a functional point of view.[52] Regardless of whether this is correct, it is national identity, and not constitutional identity, that is established in EU law. However, as discussed earlier, national identity, as the identity of the constitutional community, also includes characteristics that are not necessarily embedded in the identity of the constitutional order, i.e., that define the nation but do not have a defining counterpart that shapes the constitutional order. Conversely, there may be elements of constitutional identity that have emerged from national identity into the sphere of constitutional identity, i.e., some elements of national identity may be transformed into constitutional identity. It is precisely for this reason that I do not agree with the Advocate General's statement that constitutional identity is

51 Case C-213/07 Michaniki AE v Ethhniko Symvoulio Radiotileorasis and Ypourgos Epikrateias.

52 Paras. 32 and 33 of the Advocate General's Opinion also discuss the role of constitutional identity in integration, with national identity being presented in the context of the normative text.

part of national identity, if only because, as Trócsányi points out, national identity is a political rather than a legal concept.[53] That is to say, starting from the previous conceptual distinctions, the correct approach, in my view, is for constitutional identity to encompass elements of national identity, and certainly not the other way round,[54] as the Advocate General's position states.[55] As Pavel Rychetsky writes, constitutional identity derives from national identity but is not synonymous with it.[56] If we were to approach this from the perspective of state or national symbols, the boundaries may not be that sharply blurred. In the international relations of the state, state symbols as symbols of sovereignty are dominant in any case. However, if we approach the question from the perspective of the members of society or of individual social groups, it is likely that in the eyes of citizens, state and national symbols, or constitutional and national identity, will not be that sharply separated. From the point of view of the members of society, it will be a sense of identity, of self-determination, that will be decisive, and this is probably the reason why the treaties establishing the European Union do not use the concept of constitutional identity. The European Union does not seek to respect the identity of Member States but rather the identity of the peoples of the Member States, i.e., the nations, so that national identities do not clash with a growing, integrating European system of organization.

At this point, I consider it necessary to point out again that the concept of national identity as interpreted in social science and outside the context of the European Union must be distinguished from the concept of national identity as applied by the CJEU; this may at first sight seem self-contradictory, but in the absence of a definite and exhaustive interpretative practice of the CJEU, and in the light of the divergent practices of constitutional courts, only by making this distinction can a consistent interpretation be established.

4. Conclusions

Rosenfeld analyzes the notion of national identity based on Anderson's theory[57] and concludes that constitutional identity is necessarily separated from other identities, in particular national identity,[58] but that this separation is not necessarily evident in the system of national/state symbols and that the separation is closely irrelevant for members of society.

53 Trócsányi, 2014, p. 72.
54 Rosenfeld, 2010, p. 10.
55 All the more so, since, as Trócsányi writes in his already quoted reflection, national identity is a difficult category for constitutional law to interpret.
56 Rychetsky, 2017, p. 95.
57 Anderson, 2006.
58 Cf. Körtvélyesi, 2013, pp. 115–120.

Applying what has been said in the analysis of identity, the subject with a collective identity in the definition of national identity is the constitutional community—nation,[59] which we need to consider in its own continuity.[60] Since, in order to determine certain features of identity, we must take into account the factors that have defined the subject since the beginning of its existence and interpret them from the present, national identity in relation to political nations does not merely include those defining factors that distinguish one nation from another in the present, such as those events in the present that have shaped the collective self-definition of a nation and which give meaning to the system of symbols. More precisely, it is not the events in the history of a given nation, but rather the way in which these events relate to them from the present—i.e., national memory, confrontation with the past—that constitutes an element of national identity, that is the fact of how a particular pivotal event has shaped the self-definition of the nation or of the individuals who make up the nation. Many elements of these processes are reflected, for example, in the preambles of national constitutions[61] and in the system of national symbols.

If a 'stimulus' or event that affects a nation is significant enough to affect the nation's self-definition and thus shape the collective identity of the community, the event and the reaction to it will be incorporated into the nation's consciousness, i.e., it will become part of the national identity. The collective identity is created and defined by the identity of the individuals who created the community, but when it behaves as an 'entity in its own right', changes in the collective identity will have repercussions on the identity of the individuals who created it.

National identity is therefore necessarily linked to the community that created the constitutional system, but it also includes characteristics that define the nation but are not embedded in its constitutional system.[62] While it is true that elements of national identity may be protected in the constitution, in my view, national identity and constitutional identity are separated at a fundamental level, at the level of the subject bearing the identity: while the subject bearing the national identity is the constitutional community, the nation, and the subject of constitutional identity is the constitutional system itself—the constitutional subject—, of which the political nation is only one defining component. In view of this, it is true that a sharp separation of the two concepts does not necessarily lead to the correct conclusion, and they are therefore better understood in relation to each other in their part-to-part relationship. This distinction between

59 However, we should not forget the inseparable relationship between the notions of cultural nation and political nation, since the 'national identity' of the political nation is in fact filled with content by cultural identity.

60 The identity of a political nation is made up of various "other identities" such as cultural, religious, historical. Cf. Hanák, 1997, pp. 4–7.

61 Cf. Sulyok and Trócsányi, 2009, pp. 81–106.

62 For example, in the case of national traditions not enshrined in the Constitution.

constitutional and national identity can be read, inter alia, in the practice of the Polish Constitutional Court, where constitutional and national identity are explicitly distinguished but are closely linked, as stated above. According to Polish practice, tradition and culture are referred to as elements of national identity.[63] This separation of constitutional and national identity, although not necessarily significant for individuals, is reflected in the system of separation of state-recognized and non state-recognized symbols.[64]

As has been repeatedly pointed out, for the law, state and national symbols express the independence and sovereignty of the state and the solidarity of citizens with the state through their national feeling.[65] State symbols tend to fulfill the former function, while national symbols fulfill the latter function, in that a very strong common intersection of symbols can be identified. The recognition, designation, and delineation of state symbols are generally provided for in the constitution,[66] while their protection and use may be provided for in specific acts,[67] but their use and protection, regardless of the source of law used, is a matter for the legislature or the constitutional power.

An excellent example of the link between constitutional identity and national symbols at the constitutional level is the Latvian Constitution and the Constitutional Court practices based on it. The Latvian Constitutional Court has extensive experience in the field of constitutional identity.[68] The constitutional interpreter considers Articles 1-4 of the Constitution (*Satversme*) as 'the core of the Constitution of Latvia', on the basis of which it considers the provisions on an independent and democratic republic, popular sovereignty, protection of state territory, respect for the Latvian language and national flag, and the basic rules

63 Cf. Drinóczi, 2016b, pp. 9–10.

64 Halász and Schweitzer, 2020, [1]–[2].

65 Ibid, [1].

66 In Hungary, for instance, we can find the coat of arms, the flag, the national anthem, the national holidays, Hungarian language and the Hungarian Sign Language and the currency in the Fundamental Law. Cf. Tóth, 2022.

67 For instance, in the Hungarian legal system, there are five sources of law for the use and protection of national symbols, but there is no comprehensive regulation. The Fundamental Law of Hungary enshrines state symbols of sovereignty, like the coat of arms, the flag, and the national anthem. The use and protection of these symbols are regulated in detail in various legal sources, as follows: (i) Act CCII of 2011 on the Use of the Coat of Arms and Flag of Hungary and State Decorations, (ii) Art. 334 of the Hungarian Criminal Code on the Defamation of national symbols, (iii) Government Decree No. 132/2000 (VII. 14.) on certain aspects of flag hoisting on public buildings, (iv) Decree No. 37/2012 (VIII. 22.) KIM on the authorisation required for the grant of protection of trademarks and designs containing the coat of arms or the flag, and finally (v) Act I of 2000 on the Commemoration of the Foundation of the State of Saint Stephen and the Holy Crown which is more a solemn commemoration than a law laying down precise legal rules for the protection of national symbols. In the following, the most important provisions of these legal sources will be used to present the most important rules on the protection of national and state symbols in the Hungarian legal system.

68 For a summary of the Latvian constitutional identity, see Ziemele, 2017.

for parliamentary elections as implicit, quasi eternity clauses. Based on point 15.2 of the Decision of the Constitutional Interpreter of 01-01-2015[69] and point 16 of the Decision of 01-01-2017[70], the Constitutional Court identifies sovereignty, national independence, territorial integrity of Latvia, the principle of democratic exercise of power, respect for the Latvian language, fundamental human and Christian values, and respect for the Latvian national flag and national symbols as values included in the scope of constitutional identity.[71]

As Iván Halász puts it, state and national symbols essentially have a dual function: outward representation and inward integration; in international relations, the former is dominant, while in internal relations, the latter.[72] In terms of identity-forming and identity-expressing functions, community-created internal integration can also play an important role for diaspora members living abroad.[73] State and national symbols, as specific cultural and psychological boundary markers, can at the same time express both belonging and separation from others,[74] as discussed earlier.

The classic state symbols used today—the anthem, the flag, and the coat of arms as symbols of sovereignty—generally have a long history and are usually enshrined in constitutions.[75] However, the catalog of national symbols is much broader than the catalog of symbols enshrined in constitutions, as almost any event, circumstance, or even place that affects the nation as a whole can become a defining factor of a community's identity, which, after undergoing a process of consolidation, can itself become a symbol with a specific value. The degree to which state and national symbols are respected and their identity-shaping role is strong may vary from state to state or nation to nation and depend on the state's national or identity policy—if we can talk about these categories.

69 'The Latvian national flag as the symbol of the state is also an integral element in the constitutional and international identity of the Latvian state.'

70 'The Latvian language as the official language is an indispensable part of the constitutional identity of the state of Latvia. The Latvian language as the official language bestows upon the state of Latvia a particular—and exactly Latvian—national cultural identity.'

71 It should be noted that the Constitutional Court identifies the preamble to the text of the *Satversme* as the constitutional source of constitutional identity, when it was amended in 2014. The full text of the Latvian Constitution is available in English [Online]. Available at: http://www.satv.tiesa.gov.lv/en/2016/02/04/the-constitution-of-the-republic-of-latvia/ (Accessed: 30 November 2022).

72 Halász and Schweitzer, 2020, [2].

73 Ibid, [1].

74 Ibid, [2].

75 Cf. Tóth, 2022.

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REVIEWS

MIKLÓS VILMOS MÁDL*

Conference report: International Scientific Conference on 'Theoretical and Practical Aspects of Constitutional Identity'

ABSTRACT: *One of the most significant questions in Europe is constitutional identity. The progression of globalisation and the federalisation of the European Union (EU), hindered sovereignty of the member states. In this climate, the notion of constitutional identity, which is a component of national identity enshrined in constitutions, has become one of the key tools for regaining autonomy. Many conflicting opinions have emerged in the scholarly world regarding the application of constitutional identity. One view is that it is just a vague instrument that aims to obstruct European integration, while another group of experts states that it is the last resort to stop the enforcement of an ideologically filled common identity generated by judicial organs, which is often contrary to national identities. To discuss this topic, a research group titled 'Constitutional Identity and Relations Between the EU Law and the Domestic Law of the Member States' was established. The group of renowned experts from France, Germany, the Czech Republic, Croatia, Hungary, Poland, Romania, Italy, and the Slovak Republic led by Professor András Zs. Varga conducted structured scientific research using a common questionnaire. The first outcome of their work was the International Scientific Conference on the 'Theoretical and Practical Aspects of Constitutional Identity' presented at the Faculty of Law and Political Sciences of the Pázmány Péter Catholic University in Budapest. The event served as an extraordinary opportunity to observe the meaning of constitutional identity in member countries, how it is protected, and the similarities and differences between member states. In this short report, I summarised the fundamental points of each presentation to provide key themes and messages.*

KEYWORDS: constitutional identity, federalisation, sovereignty, national identity, Constitutional Court, CJEU, principle of primacy

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1. About the event

On the 13th of December 2022, in the Ceremonial Hall of the Faculty of Law and Political Sciences of the Pázmány Péter Catholic University, the findings of one of the Central European Professors Network research groups were presented regarding the theoretical and practical aspects of constitutional identity. The event was jointly organized by the University of Miskolc and the Central European Academy. The Pázmány Péter Catholic University, the Ferenc Mádl Institute of Comparative Law, and the Central-European Association for Comparative Law contributed as partners to the success of the conference.

2. Introductory speech

Professor János Ede Szilágyi, Director of the Ferenc Mádl Institute of Comparative Law and Head of the Department of Labour and Agricultural Law at the University of Miskolc, opened the conference. In his opening speech, he elaborated on the role of the Central European Academy and the Central European Professors Network. Professor Szilágyi explained that the Central European Academy is an institution established within the framework of the University of Miskolc, focusing on Central European research projects. In pursuit of this objective, the Academy operates the Central European Professors Network which gathers 47 senior researchers, mainly from seven countries in the Central European region, to undertake joint research that results in numerous publications, books, and conferences. This year, five separate scientific groups are researching the following topics: Constitutional Protection of National Symbols, Right to Privacy, Content of the Right to Parental Responsibility, Constitutional Framework for the Protection of Future Generations and the Environment, and Constitutional Identity and Relations between EU Law and the Domestic Law of Member States. In addition to the network of established researchers, the Central European Academy also operates the Central European Junior Program that comprises a joint four-year comparative law-focused Doctorate of Philosophy at the Deák Ferenc Doctoral School of the University of Miskolc and an internship program at the Central European Academy. Currently, there are two grades with 19 students from Hungary, Slovakia, Poland, Romania, Serbia, Croatia, and the Czech Republic. Finally, Professor Szilágyi introduced the third branch of the Academy, Central European Academy Publishing, which provides an opportunity for researchers from the Central European region to publish in books and journals.

3. Presentations of the research group

Following Professor Szilágyi's introduction, Professor András Zs. Varga, Member of the Venice Convention, Head of the Department of Administrative Law at Pázmány Péter Catholic University, and the leader of the research group on 'Constitutional Identity and Relations Between the EU Law and the Domestic Law of the Member States' introduced the research group and its members. He explained that as a result of their activities he is convinced that one of the most important issues in the coming years is the relationship between common European and national values. He further pointed out that the research focused on whether there are similar patterns regarding EU law's primacy, the EU's competencies, and member states' constitutional identity. In his opinion, this research facilitates a better understanding of the current tendencies and directions of EU institutions and law. Moreover, this research helps in better understanding the nature of the guiding principles. Regarding the research methodology, he stated that it followed a comparative approach, and its methodology was based on a questionnaire.

■ *3.1. France*

The first researcher to present on constitutional identity and relations between the EU law and the domestic law of the member states was Professor Bertrand Mathieu, a member of the Venice Convention and a Professor à l'École de droit de la Sorbonne.[1] Due to his other obligations, he was unable to be present at the conference; therefore, his speech was delivered by Dr. Lilla Berkes. In his presentation, he explained that fundamental and human rights were born within a national framework, although their current development questions these state frameworks. He elaborated that currently in the EU there is no recognition of a dualist system where, on the one hand, there are shared values and, on the other, there are individual values specific to each country. Furthermore, he explained that the Charter of the Fundamental Rights of the EU defines common values in extensive terms. However, these new arbitrary values are disconnected from the national melting pot, which, combined with judges' broad interpretations, can result in judgments of conflicting national values. He further expanded on this through the example of the rule of law, which, when interpreted as respecting an individual and protecting against arbitrary action, is part of the common heritage; however, it can also be used to introduce ideological concepts. To combat this, he mentioned that the relationship between national and EU competencies must be redefined and that constructive dialogue must be established between the EU and national courts.

1 See more Bertrand, 2022, pp. 21–39; Bertrand, 2007, pp. 977–987; Viala, 2011, pp. 7–24.

■ *3.2. Germany*

Professor Alexander Graser from Regensburg University gave the next presentation titled 'Quite Entrenched, But Still Generic: The Concept of Constitutional Identity in the Jurisprudence of the German Federal Constitutional Court.'[2] First, he briefly explained how supranationality was entrenched in German Basic Law and outlined the importance of the eternity clause. Subsequently, he answered the questions of the common questionnaire. The Professor described how the German Federal Constitutional Court assumed its authority to check the legal actions of the EU. It repeatedly expressed concerns about fundamental rights issues, democratic legitimacy, principles of conferral, and budgetary sovereignty. However, it has only held a legal measure of the EU contrary to the Basic Law once—the "PSPP decision." Regarding the academic position of EU law from accession to the present, he stated that currently the remaining battleground is not substantive and mainly revolves around the role of the German Federal Constitutional Court. In his conclusion, he explained that the position of the German Federal Constitutional Court in this regard might not be related to the German Constitutional identity, but it acts as a "supervisor" of the European Court of Justice and the EU institutions concerning democracy and the rule of law.

■ *3.3. Czech Republic*

The fourth presenter was Professor Michal Petr, Head of the Department of International and European Law at the Palacky University Olomouc, who talked about the 'Constitutional identity in Czech jurisprudence.'[3] First, he said that uniquely in the Czech Republic the term constitutional identity is not used by the Court itself; instead, it refers to the core of the Constitution, which is actively protected. Thereafter, Professor Petr introduced the audience to the "core" protecting jurisprudence of the Czech Constitutional Court. Regarding the relationship between Czech law and EU law, the Professor mentioned that in the "Sugar Quotas III judgment", the Court declared that the primacy of EU law is not limitless. Nevertheless, he explained that the Czech Constitutional Court is pro-European and applies a European-friendly interpretation. The only case in which the Czech Constitutional Court opposed the ruling of the European Court of Justice was the Slovak pension case, but this was not reasoned on protecting the Czech Constitutional identity. In closing he posed the following theoretical question: If the Czech Constitutional Court is aligned with the EU, is there anything that could be considered part of the Czech Constitutional identity? He answered this by saying the principle of not applying today's criteria to a situation over a century old, enshrined in the "Benes decrets" case, – can be considered a part of the Czech Constitutional identity.

2 See more Calliess, 2019, pp. 153–181; Simon, 2021, pp. 185–205; Polzin, 2016, pp. 411–438.
3 See more Knob, 2017, pp. 325–337; Belling, 2016, pp. 641–662; Baroš, 2013, pp. 1–10.

■ *3.4. Croatia*

The closing speech in the first phase of the conference was delivered by Professor Peter Bačić, Head of the Department of Constitutional and Political Sciences at the University of Split, on the topic of 'Croatian Constitutional Identity and European Integration.'[4] He began his speech by stating that, until now, constitutional identity has rarely been discussed in Croatia, only in exceptional cases, such as the right of national minorities. He explained that in general, the term constitutional identity lacks clarity in Croatia. Following the introduction, he briefly familiarised the audience with the Constitution of Croatia, with a particular focus on EU accession amendments. Subsequently, he highlighted the parts of the Constitution that could be considered for the basis of constitutional identity. According to the Professor, among other provisions, the Preamble of the 1990 constitution, especially the part that defines Croatia as a 'state of Croatians and of its national minorities,' and Article 1, which defines Croatia as a 'unitary indivisible democratic welfare state in which the power derives from the people and rests in the people' can be regarded as a part of Croatian Constitutional identity. He followed with detailed examples of cases in which the Constitutional Court referred to constitutional identity. Concluding his presentation, Professor explained that until now, the Croatian Constitutional Court had only once declared its general legal standpoint regarding EU law in the 2015 monetisation of motorways case, where the Court eventually declared the supremacy of the Constitution.

■ *3.5. Hungary*

The second part of the conference began with a joint presentation by Dr. Lilla Berkes, a professor at Péter Pázmány Catholic University, and Professor András Zs. Varga titled 'The Constitutional Court's uneven road from EU accession to sovereignty control.'[5] First, Professor Berkes elaborated on the constitutional amendment that, on the one hand, determined the division of competencies between the EU and Hungary, and on the other, served as the basis for the integration of EU law. This was followed by insights into the practice of the Constitutional Court, which she explained that initially the Constitutional Court only examined the constitutionality of the legislation implementing EU Law and not the EU Law itself. However, this approach started to change with the adoption of the Fundamental Law of Hungary in 2012. Professor Varga first explained the provisions of the Fundamental Law that resulted in the non-acceptance of the absolute and unconditional primacy of EU Law and then the relevant case law of the court. The 32/2022 (XII. 20.) decision was highlighted, which silently created Hungary's eternity clause through its interpretation of the Fundamental law.

4 See more Smerdel, 2014, pp. 513–534; Brajković, 2021, pp. 269–289; Čičak and Žuškić, 2013, pp. 97–103; Vujević, 2007, pp. 379–404.

5 See more Trócsányi, 2014, pp. 1–280; Trócsányi, 2019, pp. 31–41; Varga, 2021, pp. 155–178; Tribl, 2022, pp. 491–500.

■ *3.6. Poland*

The second presentation titled 'Determining and Reclaiming of the Constitutional Identity in the Case Law of the Polish Constitutional Tribunal' was delivered by Professor Aleksander Stępkowski from the University of Warsaw. He spoke of two landmark cases of the Constitutional Tribunal, the first defined constitutional identity and the latter tried to implement this concept.[6] In the first case the constitutionality of certain provisions of the Lisbon Treaty was reviewed. He explained that in its judgment the Polish Constitutional Tribunal declared that limiting sovereignty does not result in its abolition, and in their view, constitutional identity consists of a range of state powers that are not transferable. As mentioned by Professor Stępkowski, these include human dignity, democracy, and the rule of law. As further explained the most significant outcome of the case was the declaration of the constitutional principle of the protection of sovereignty in the European integration process, which set constraints on integration. Regarding the second case, the Professor explained that the Constitutional Tribunal, in its judgment, declared that the integration had reached a point where certain legal solutions were outside

■ *3.7. Romania*

The next speaker was Professor Marieta Safta from the Titu Maiorescu University in Bucharest, who presented a joint paper with Professor Tudorel Toader from the Alexandru Ioan Cuza University titled 'Romanian Constitutional Identity.'[7] In her presentation, Professor Safta summarised their research by following the structure of the questionnaire. She first elaborated on the provisions of the Constitution that reference EU law and the conferral of competencies. Subsequently, she talked about cases where the Constitutional Court acted in defence of the national law and concluded that the integration clause of the Constitution allows for this as it declares the supremacy of the Constitution. The Professor also explained that the eternity clause and other provisions of the Constitution gave birth to the concept of constitutional identity. Further elaborating on the concept of constitutional identity, Professor Safta mentioned that the concept is becoming more dynamic in the court's practice, and she talked about the cases where Constitution was enshrined.

■ *3.8. Italy*

The penultimate speaker was Professor Giacinto della Cananea from the Bocconi University of Milano, who delivered a lecture titled 'EU law and domestic law in Italy: from separation to integration.'[8] Professor Cananea provided a brief

6 See more Florczak-Wątor and Krzemiński, 2022; Sobczak, 2018, pp. 165–174; Muszyński, 2023, pp. 5–40.

7 See more Guțan, 2022, pp. 109–128; Cochinţu and Titirişcă, 2019, pp. 62–68.

8 See more Fabbrini and Pollicino, 2019, pp. 201–221; Faraguna, 2019, pp. 329–344; Piccirilli, 2022, pp. 261–273.

overview of European integration, with a particular focus on Italy's contribution to the process. He followed by introducing the most critical cases of the Italian Constitutional Court and emphasised that the doctrine of Italian and EU legal orders being separated changed over time. First, the new doctrine regarded them as autonomous but coordinated; this later changed again and regarded them as coordinated and communicating. Dr. Cananea then explained how Italy's European community funding position and the practice of the Constitutional Court shaped the relationship between the EU and Italy. In conclusion, he mentioned that the building of the Italian national identity is not separate from the integration process and, ultimately, from European identity.

■ *3.9. Slovak Republic*

Professor Alena Krunková from Pavol Jozef Safárik University gave the conference's final presentation titled 'Identity and Authority of the Constitution of the Slovak Republic.'[9] She began with a theoretical consideration reading the factors that influence the constitution's authority and whether authority influences identity or the other way around. This was followed by distinguishing between authority and power where Professor Krunková explained that the essence of authority is that it is lined with legitimacy and can increase and decrease the power of the Constitution. In the latter part of the presentation, Dr. Krunková discussed issues such as the turbulent creation of the constitution and its amendments and how accession to the EU has influenced its development. In conclusion, she highlighted the relationship between EU Law and the provisions of the Constitution.

4. Conclusion

After the last presentation, a short discussion took place that focused on how conflicts between the EU and member states concerning national identity can be prevented and resolved.

Overall, the conference provided an impressive opportunity to see how constitutional identity is formulated in member countries, the differences and similarities in the protection of constitutional identity, and the reactions of member states when the European Union threatens their constitutional identity. Distinguished speakers presented interesting examples from which valuable conclusions could be drawn regarding constitutional identity. For anyone interested in the topic, I would highly suggest visiting the YouTube channel of the Central European Academy as the full recording of the conference is available there.

9 See more Hamuľák, 2013, pp. 222–239; Hodás, 2018, pp. 108–127; Miháliková, 2018, pp. 39–52.

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