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ATTILA DUDÁS[1]

Ranking of Legal Periodicals and Prerequisites for Academic Promotion in Serbian, Croatian, and Slovenian Law

ABSTRACT: *Scholars need to obtain a certain level of international recognition for academic progression. This is usually achieved by publishing articles in internationally recognized journals, books, and conference papers. The question is which journals should be considered of international relevance and how they should be ranked. For this purpose, a ranking system based on the Journal Citation Reports (JCR), combined with the leading research engine, the Web of Science (WoS), is used. While a ranking system based on the JCR is considered most suitable for natural and technical sciences, it has many shortcomings when considering social sciences and humanities, including legal science. This is observed when such a system is applied in countries that cannot claim to have a profound impact on the global development of legal thought and where scholarly legal production is almost exclusively conducted in the national language, such as in Central and Eastern European (CEE) countries.*

This study analyzes the general laws and rules regarding the qualification of journals in Serbia, Croatia, and Slovenia, and special laws pertaining to social sciences, especially legal science. Although there are many points of interest regarding different situations in which the national laws on the qualification of journals gain importance, this study focuses on the relevance of these laws in terms of the promotion of legal scholars to positions of university lecturers. It analyzes the requirements for the promotion to a full professor of law. It concludes that the laws of the three countries, through different forms, managed to find a delicate balance between the requirement of publishing articles in internationally recognized journals and the characteristics of legal science as it is predominantly conducted in the national language and addressed to a domestic audience.

KEYWORDS: ranking of legal journals, international legal journals, JCR, IF, WoS, Scopus, HeinOnline, ERIH PLUS.

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1. Introduction

One of the principal tasks of university lecturers is to publish research papers regularly. They are required to follow the global trends in their field of science and maintain a respectable scholarly work output in addition to their regular teaching activities. For these reasons, in all countries, scholars aspiring toward positions of university lecturers need to fulfill a set of requirements, including accomplishing a certain level of scholarly recognition in the form of publications in their respective field of science. With each university position, the requirements become gradually stricter. The general viewpoint is that publishing in internationally recognized journals is more important than publishing in domestic journals.

This is applicable to the field of legal science as well; publishing articles in internationally recognized journals is a requirement for legal scholars aspiring toward university lecturer positions. However, the question remains as to which journals in a given country are internationally recognized. Usually, the Web of Science (WoS), Scopus, or a similar globally functioning bibliometric system, based on the journal impact factor (JIF), determined by the Journal Citation Reports (JCR), is considered a primary criterion in the ranking of journals. Although such systems are generally considered objective and fair for many reasons, they have certain flaws or shortcomings. The shortcomings of a global bibliometric system based on the impact factor (IF) have been observed in social sciences, including the field of law, that is deeply anchored in the national traditions and language.[2]

This study aims to analyze the laws of Serbia, Croatia, and Slovenia regarding the requirement of publishing articles in legal journals that are recognized as international in the respective country as a condition for promotion of academics to a university lecturer position.[3] The basic laws on the requirements for the promotion of faculty members, and regarding the evaluation and qualification of their scholarly work are generally laid down in the statute regulating the field of higher education and scientific research. These are refined in more detail by ministerial decrees, acts of regulatory bodies, and independent regulations of universities. Therefore, the regulations may be considered bipolar; on the one hand, the state establishes basic minimal conditions that need to be observed, while on the other hand, it leaves a significant open space for professional regulatory bodies and universities to determine their own specific conditions for the appointments.[4]

2 For more details, see Hojnik, 2021, pp. 259–254.

3 By no means implies the author that the promotion of legal scholars to university lecturer positions is the only context in which the issue of national rules on the ranking of journals is relevant. On the contrary, it is relevant regarding many other issues as well, including the accreditation of universities and faculties, accreditation of study programs, financing of universities and faculties, financing research projects, conducting lectures at doctoral programs, habilitation of university lecturers, application of students to doctoral studies, proposing and submitting theses for defence, suitability of a university lecturer to be a thesis adviser.

4 Popović, Peković, and Matić, 2019, p. 60.

After reviewing the applicable rules, this study attempts to determine how these three countries managed to find a sensitive compromise between the state and university requirements regarding the promotion of legal scholars to university lecturer positions. In other words, similar to other fields of science, a legal scholar should have certain international recognition measured by publications in journals considered international, while considering the reality of legal science, including its orientation toward national audiences and publication in the national language.

2. Serbia

The Serbian Law on Higher Education warrants the autonomy of universities comprising, among others, the right to promote faculty members.[5] It mandates the establishment of the National Council for Higher Education (*Nacionalni Savet za visoko obrazovanje*), a regulatory body, which, inter alia, is delegated the responsibility of determining the minimal conditions of promotions of legal scholars to lecturer positions at institutions of higher education.[6] The National Council for Higher Education specified these conditions in an act named Minimal Requirements for Appointing Lecturers at Universities (hereinafter referred to as "Minimal Requirements"). In addition to the abovementioned Minimal Requirements, the following two relevant decrees of the Minister for Education regarding higher education and technological development, adopted at the end of 2020, play a major role: the Ministerial Decree on the Acquisition of Titles of Researchers and Scholars, and the Ministerial Decree on the Categorization and Ranking of Scientific Journals.

The Minimal Requirements set a range of conditions that a candidate needs to meet in order to be promoted to a specific university lecturer title. These conditions are supplemented and "fine-tuned" in the regulations of universities. Each university has its own set of rules regarding this subject. For the purpose of this study, the requirements established by the University of Novi Sad are considered (hereinafter referred to as "University Act").[7]

Both the Minimal Requirements and the University Act rely on the Ministerial Decree on the Acquisition of Titles of Researchers and Scholars regarding the categorization and evaluation of scholarly work. This decree specifies 10 categories into which a particular piece of scholarly or professional publication or achievement may be classified, indicated by M10–M120. For the present study, the categories of M10, M20, M30, M40, and M50 are relevant.[8] The M10 category refers to internationally recognized monographic publications, chapters in thematic collections, and editorial

5 Serbian Law on Higher Education, Art. 6. Sec. 1. (Point 5).

6 Serbian Law on Higher Education, Art. 12. Sec. 1. (Point 15).

7 For the analysis of the requirements for academic promotion in social sciences at the University of Novi Sad, in the light of the regulation effective before the two ministerial decrees adopted at the end of 2020, see Popović, Peković, and Matić, 2019, pp. 56–58.

8 Ministerial Decree on the Acquisition of Titles of Researchers and Scholars, Annex 3.

work in such publications. This category comprises nine subcategories, ranging from M11 to M19. The M20 category is divided into 13 subcategories, ranging from M21a to M29v, comprising articles, reviews, and other writings published in international scientific journals and the editorial work in such journals. According to the Ministerial Decree on the Categorization and Ranking of Scientific Journals, a journal is qualified as international if it is indexed by the international citation database WoS (Science Citation Index Expanded, Social Science Citation Index, Arts and Humanities Citation Index), according to the JCR. Journals are ranked into subcategories according to their IF as following[9]:

Category of the scientific journal	Designation of the category of the scientific journal	Definition of the category of the scientific journal
M21a	International journal of exceptional values	The journal is ranked according to JCR IF2 or IF5, in its own field of science as being among the top 10% of the journals in the relevant field.
M21	Outstanding international journal	The journal is ranked according to JCR IF2 or IF5, in its own field of science as being among the first 10%–30% of the journals in the relevant field.
M22	Distinguished international journal	The journal is ranked according to JCR IF2 or IF5, in its own field of science as being among the top 30%–60% of the journals in the relevant field.
M23	International journal	The journal is ranked by the JCR, but not among the top 60% of the journals belonging to the relevant field of science.
M24	National journal of international relevance	The journal is ranked according to the bibliometric indicators of the National Database of Scientific Journals in the top 10% of the journals in the relevant field of science.

All other journals not qualifying as international according to the abovementioned criteria are considered national journals, regardless of whether they are domestic or foreign—that is, whether they are published by a domestic or foreign publisher. They are classified in the category of M50, with four subcategories.

Category of the scientific journal	Designation of the category of the scientific journal	Definition of the category of the scientific journal
M51	Outstanding national journal	The journal is ranked according to the bibliometric indicators of the National Database of Scientific Journals in the top 30% of the journals in the given field of science.
M52	Distinguished national journal	The journal is ranked according to the abovementioned bibliometric indicators between the top 30%–60% of the journals in the given field of science.

9 Ministerial Decree on the Categorization and Ranking of Scientific Journals, Art. 6.

Category of the scientific journal	Designation of the category of the scientific journal	Definition of the category of the scientific journal
M53	National journal	According to the abovementioned bibliometric indicators, the journal is not ranked in the top 60% of the journals in the given branch of science.
M54	National journal that is categorized for the first time	The journal is indexed in the National Index of the National Database of Scientific Journals, meets the requirements prescribed for editing scientific journals, and is categorized for the first time.

Publishing a certain number of articles in journals classified in the subcategories of M20 is a priority for any university lecturer in Serbia, as it is one of the conditions for obtaining promotion to a higher position. For instance, considering the requirements regarding the number of articles published in international journals for the promotion to a position of a full professor at the University of Novi Sad in the field of social sciences, the University Act prescribes that a candidate must have published at least one article in the categories M21, M22, or M23, at least one article in the category M24, and at least five articles in the categories of M51 in the period of 5 years from appointment to the position of associate professor. This means that publishing an article in a national journal (domestic or foreign) that is not qualified as M51 (the highest in the category of national journals) provides no benefit for the candidate in terms of the fulfillment of the requirements prescribed by the University of Novi Sad. Publishing at least five articles in the category of M51 in a period of 5 years since the appointment to the position of associate professor for any lecturer applying for the position of a full professor should not be extraordinarily challenging, since more than a dozen Serbian domestic legal journals are categorized as M51.[10] Similarly, journals qualified in the category of M24 are reasonably accessible to legal scholars in Serbia. For instance, for the year 2020, eight journals were categorized as M24 in the field of law and politicology.[11] However, publishing at least one article in the categories M21, M22, or M23 might be challenging, since most of the journals ranked by the JCR and indexed by the WoS are predominantly oriented toward common law and are published mostly in English.[12] Only a small number of legal journals from continental Europe that harbor civil law traditions are indexed by the JCR and WoS[13], and no journal from Serbia belong to this category.

This difficulty faced by legal scholars is considered in Serbian rules regarding the evaluation and categorization of journals. The Minimal Requirements prescribe that in the fields of social sciences and humanities, for the purpose of scholars'

10 The ranking of domestic journals is published annually, usually in the second half of the year. According to the 2020 list, 15 journals are categorized as M51 in the field of law of politicology. http://www.mpn.gov.rs/wp-content/uploads/2021/01/Kategorizacija-naucnih-casopisa-2020–2712021.pdf (2021. 07.31).

11 Ibid.

12 Hojnik, 2021, pp. 260–261.

13 Hojnik, 2021, p. 262.

promotion to university lecturer positions, journals determined by the universities shall be considered equal to journals in the category of M21–M23. Initially, the application of this rule was valid until December 31, 2018; however, by the Amendments of the Minimal Requirements, it was prolonged to December 31, 2020.[14] In line with this rule, the University of Novi Sad's requirements prescribed that for the purpose of appointments in the branch of legal science, journals specified in the annex of the act shall be considered equal to the status of journals in the M23 category, even though they may not have been indexed in the JCR or WoS. This list included major European legal journals, not only in English but also in French and German. Moreover, all journals indexed by SCImago Journal & Country Rank (SJR) and HeinOnline have been considered as journals in the M23 category. However, the application of this rule of Minimal Requirements prescribing a special regime for the categorization of legal journals for the purpose of appointments has not been extended; hence, the application of the special regime envisaged by the University Act applicable to legal scholars also ceased on January 1, 2021. The reason behind this change in regulation is that the Ministerial Decree on the Categorization and Ranking of Scientific Journals has been adopted subsequently, that regulates the evaluation and categorization of journals specifically and in more detail.

Similar to Minimal Requirements, the abovementioned ministerial decree considers a journal international only if it is indexed by the JCR and WoS (Science Citation Index Expanded, Social Science Citation Index, Arts and Humanities Citation Index).[15] However, it also takes into account that these rules might adversely affect scholars in the fields of social sciences and humanities. Therefore, it specifies that in addition to the journals indexed by the abovementioned two databases, in these fields, a journal shall be considered international if it is indexed in the SJR. Moreover, the scientific committee established for the respective field of science may qualify other journals (not satisfying the said conditions) as international, belonging to the M23 category.[16] According to the abovementioned ministerial decree, journals ranked as Q1 in the SJR are qualified as M23, journals ranked as Q2 and Q3 in the SJR are qualified as M24, while journals ranked as Q4 in the SJR are considered as M51 (the highest ranking in the category of national journals).[17] However, in this respect, the decree also considers that journals in some branches of social sciences and humanities may have fewer chances to be referenced in the SJR. For this reason, it further specifies special rules of categorization of journals in the fields of social sciences and humanities.[18] First, it prescribes that in certain branches of social sciences and humanities, explicitly mentioning legal science, the categorization shall not be based on the IF of the journal.[19] If

14 Minimal Requirements, Art. 7. Sec. 3.
15 The Ministerial Decree on the Categorization and Ranking of Scientific Journals, Art. 2, Sec. 2.
16 The Ministerial Decree on the Categorization and Ranking of Scientific Journals, Art. 2, Sec. 3.
17 The Ministerial Decree on the Categorization and Ranking of Scientific Journals, Art. 5, Sec. 2, last sentence.
18 The Ministerial Decree on the Categorization and Ranking of Scientific Journals, Art. 5, Sec. 4.
19 The Ministerial Decree on the Categorization and Ranking of Scientific Journals, Art. 9, Sec. 2.

a given journal has an IF in the relevant databases, it shall be taken into account, and the journal shall be ranked according to that criterion. However, if a journal does not have an IF, or if it is not indexed by the JCR or WoS, according to the decree, it will still be categorized as M23 if the journal is indexed by the ERIH PLUS database.[20]

The Serbian statutory and university regulation regarding the categorization of journals as international, as a precondition for the promotion of a scholar to a university lecturer position in a fair and proper manner takes into account legal scholars' difficulty in publishing articles in journals indexed by the WoS and JCR. If a journal is referenced by ERIH PLUS, it is automatically recognized as M23, by which candidates aspiring toward a specific lecturer position fulfill one of the most demanding requirements.[21] Additionally, based on the proposal of the scientific committee established for the field of law, other journals may be included in the list of journals that are equated with journals in the M23 category, regardless of whether the journal is not referenced by the JCR, WoS, or ERIH PLUS. Finally, the challenges faced by legal scholars concerning publishing articles in internationally recognized journals in terms of their promotions are further mitigated by the rule of the Act of the University of Novi Sad. This act specifies that in the branch of legal science, the requirement to publish at least one article in a journal categorized as M23 may be substituted by any other publication having the same or more points. The scholarly production of candidates required to obtain a promotion is precisely quantified. In the fields of social sciences and humanities, an article published in an M23 journal is quantified by 3 points. This means that it may be replaced by an outstanding international monographic publication (M11), international monographic publication (M12), monographic study/chapter in a monographic or thematic collection of studies in a publication ranked M11 or M12 (M13 and M14, respectively), outstanding monographic publication of national relevance (M41), and monographic publication of national relevance (M42), since they are all valued by more points than an article published in a journal ranked M23 (14, 10, 7, 5, 9, and 7 points, respectively).

3. Croatia

Under the Croatian law, the precondition for a scholar aspiring toward promotion to the position of a university lecturer is to obtain an appointment to a scholarly title.[22] According to the Law on Scholarly Activity and Higher Education, those who have been appointed to a scholarly title are considered scholars and are registered in the Register

20 The Ministerial Decree on the Categorization and Ranking of Scientific Journals, Art. 14, Sec. 2.

21 In course of the new rules of the Ministerial Decree on the Categorization and Ranking of Scientific Journals, the number of Serbian legal journals referenced by ERIH PLUS is constantly growing. At the moment of writing of this paper, 15 journals are referenced by ERIH PLUS in the category "Law."

22 Martinović, 2017, p. 72.

of Scholars.[23] The scholarly titles are research associate (*znanstveni suradnik*), senior research associate (*viši znanstveni suradnik*), research adviser (*znanstveni savjetnik*), and research adviser in a permanent position (*znanstveni savjetnik u trajnom zvanju*),[24] to which specific university lecturer positions correspond.[25] This means that a candidate for a given university lecturer position must first be appointed to the respective scholarly title. Regarding the appointment to scholarly titles, the key role is allotted to the National Council for Science, Higher Education, and Technological Development (*Nacionalno vijeće za znanost, visoko obrazovanje i tehnološki razvoj*), a regulatory body responsible for the development and quality of the entire scientific activity and the system of science, higher education, and technological development in the Republic of Croatia.[26] The council, among others, as a regulatory body, gives consent to the conditions set by the rectoral councils and councils of universities and colleges for the promotion of scholars to lecturer positions and regulates the conditions required for the appointments for scholarly titles.[27]

For the pursuit of the responsibilities[28] by the National Council for Science, Higher Education, and Technological Development, the Decree on the Conditions of Appointment to Scholarly Titles specifies different sets of requirements for the appointment of scholars to scholarly titles for different fields of science, regarding the assessment of scholarly production of the candidates. Subchapter 4 of the decree contains rules regarding the requirements for scholars to obtain promotion in the field of social sciences. It specifies that a candidate aspiring toward a scholarly title needs to publish a particular number of publications—these are categorized by the appointing committee into three groups: a1, a2, and a3. The most valued category is category a1, which includes articles published in journals referenced by the WoSCC (Web of Science Core Collection) or Scopus.[29] Within category a1, the decree differentiates four categories from Q1 to Q4, depending on which quartile the journal is ranked according to the JCR or SJR.[30] Category a2 includes journals indexed by the following databases: PsycINFO ProQuest Social Science Premium Collection, SocINDEX, Academic Search Complete, Education Research Complete, INSPEC, Westlaw, LexisNexis, and Library and Information Science Abstracts (LISA). Articles published in journals not indexed by any of the abovementioned databases are considered publications in category a3.[31] The decree further specifies that by publishing more articles in the same journal, a candidate may

23 Law on Scholarly Activity and Higher Education, Art. 31.
24 Law on Scholarly Activity and Higher Education, Art. 92. Sec. 1.
25 Assistant professor (*docent*) corresponds to research associate, associate professor (*izvanredni profesor*) to senior research associate, full professor (*redoviti profesor*) to scientific adviser, and full professor in a permanent position (*redoviti profesor u trajnom zvanju*) to scientific adviser in a permanent position. The Law on Scholarly Activity and Higher Education, Art. 91. Sec. 2.
26 Law on Scholarly Activity and Higher Education, Art. 6. Sec. 1.
27 Law on Scholarly Activity and Higher Education, Art. 6. Sec. 2. (Points 3 and 5).
28 Law on Scholarly Activity and Higher Education, Art. 32. Sec. 5.
29 Decree on the Conditions of Appointment to Scholarly Titles, Art. 17. Sec. 2.
30 Decree on the Conditions of Appointment to Scholarly Titles, Art. 17. Sec. 3.
31 Decree on the Conditions of Appointment to Scholarly Titles, Art. 17. Sec. 4.

accumulate not more than half of the required points in a specific category, except for the publications in the categories Q1 and Q2, under category a1, that are all taken into account.[32]

Similar rules are applied to articles published in international conference papers, monographic publications, chapters in books, and thematical monographic publications. For instance, the decree specifies that an article published in proceedings from an international conference held abroad or in Croatia is considered to belong to category a2, unless the proceedings are referenced in the WoSCC or Scopus, in which case it is categorized as a2. Articles published in proceedings from other conferences are categorized as a3.[33]

In addition to these general rules applicable to all social sciences, the decree lays down a few additional rules applicable only to legal science. The most notable is the rule prescribing that an article published in any journal referenced in the database HeinOnline shall be classified into category a1 in the subcategory Q4, unless the journal obtains a more favorable ranking in the WoSCC or Scopus. If the organizer or co-organizer of the conference is the Croatian Academy of Sciences and Arts, an article published in the proceedings shall also be categorized as a1 in the subcategory Q4.[34] This logic is similar regarding monographic publications and thematic collections of articles. If the publication is indexed by the WoSCC or Scopus or published by an internationally recognized scientific publisher, the book shall be valued as three articles in category a1 in the subcategory Q4, while a chapter in such a publication shall be valued as one article in the same category and subcategory. A book published by a university or by any other domestic or foreign recognized publisher shall be valued as three articles in the a2 category, while a chapter in such a publication shall be valued as one article in the same category. Other books are valued as three articles in the a3 category, while a chapter in such a publication is valued as one article in the a3 category. Publications in this wide range of categories yield different number of points.[35]

Category of the scientific publication	Number of points
Article in a journal categorized as a1 in the subcategory Q1 or Q2	2.00
Article in a journal categorized as a1 in the subcategory Q3 or Q4	1.00
Chapter in a book is categorized as a1	1.00
Book categorized as a1	3.00
Article in a journal categorized as a2 or a chapter in a book categorized as a2	0.75
Book categorized as a2	2.25
Article in a journal categorized as a3 or a chapter in a book categorized as a3	0.50
Book categorized as a3	1.50

32 Decree on the Conditions of Appointment to Scholarly Titles, Art. 17. Sec. 9.
33 Decree on the Conditions of Appointment to Scholarly Titles, Art. 17. Sec. 6.
34 Decree on the Conditions of Appointment to Scholarly Titles, Art. 17. Sec. 3.
35 Decree on the Conditions of Appointment to Scholarly Titles, Art. 17. Sec. 17.

Let us examine what these conditions actually mean to a candidate for the position of a university professor in permanent appointment. Regarding scientific production, a candidate must satisfy the minimal conditions for the appointment to a position of scientific adviser in permanent appointment, which is at least 8 points, from which at least 3 must be from category a1, 4 must be from category a2, and 1 from a3 category. These points must be accumulated during the period from the moment of the promotion to the previous position.[36] As they are ranked higher, the required points in the a2 category may be substituted by publications in a1 category, and publications in a3 category may be substituted by publications in a1 and a2 categories, respectively.[37] However, a restriction is imposed such that a candidate can accumulate up to half of the required points in a given category by publishing articles in the same journal. However, this rule does not apply to journals in categories Q1 and Q2. Articles published in the same journal in these two subcategories are considered by ascribing them full points.[38] Another restriction specifies that candidates can accumulate up to one-third of the points required in each category by publishing in a journal or any other publication in which they are the editor or member of the editorial board at the time of publication.[39] Considering the significance of the Croatian language in fostering social sciences in Croatia, the decree specifies that at least one scientific publication since the moment of the appointment to the previous position must be published in the standardized Croatian language.[40]

The analysis has demonstrated that the current Croatian legal framework duly considers the peculiarities of social sciences, especially legal science. Legal scholars may satisfy all requirements relating to their scientific production by means of, among others, publishing articles in journals indexed by HeinOnline. Numerous legal journals from Croatia are accessible in HeinOnline, including the journals of the four major law faculties in Zagreb, Split, Rijeka, and Osijek. Legal scholars in Croatia may therefore publish articles in a range of domestic journals in the Croatian language to achieve more than the necessary points in the highest a1 category.

The present state of regulation seems to have been profoundly influenced by the decision of the Constitutional Court from 2013 regarding the constitutionality of the previous Decree on the Conditions of Appointment to Scholarly Titles from 2013. While the Constitutional Court set aside the decree from 2013 primarily due to procedural reasons, it tackled several issues regarding the content of the regulation, some of which are of key relevance to this study. The court ruled that Article 68 of the Constitution guaranteeing the freedom of scientific, cultural, and artistic creativity is not merely the right of individuals, but a fundamental norm containing a value judgment on how the state's relationship to science should be regulated. The state is not allowed to favor

36 Decree on the Conditions of Appointment to Scholarly Titles, Art. 17. Sec. 18.
37 Decree on the Conditions of Appointment to Scholarly Titles, Art. 17. Sec. 8.
38 Decree on the Conditions of Appointment to Scholarly Titles, Art. 17. Sec. 9.
39 Decree on the Conditions of Appointment to Scholarly Titles, Art. 17. Sec. 10.
40 Decree on the Conditions of Appointment to Scholarly Titles, Art. 17. Sec. 14.

one scientific field over another in regulating relationships in science. It has a positive constitutional obligation to build and maintain the structure of the society, allowing the free development of scholarly work. Moreover, it has a positive constitutional obligation to protect scholarly activity because scientific production in the Republic of Croatia represents an intellectual national value of constitutional significance. The freedom of scientific creativity mandates that all streams of scientific opinion must be given an equal opportunity for development. The state must be and remain value-neutral toward different fields of science. According to the court, everyone engaged in scholarly work and scientific research and participating in higher education enjoys protection against any state violation and encroachment on their rights when it comes to discoveries and dissemination of knowledge. The field of higher (university) education is an area of personal and autonomous responsibility of each member of that community, in which the state must not impose coercive rules in order to promote one concept of teaching or one theory of science. Article 68 of the Constitution protects every form of educational and scholarly activity because it refers to everything that, in terms of content and form, can be considered as a serious and systematic effort to discover the truth.[41]

The court, however, stressed that it is not its task to mediate or arbitrate in the debate within the scientific community on issues regarding the position of science and scholars. These issues, including the minimal conditions for appointment to scholarly titles, are determined by the regulations of the National Council for Science. Its only task is to examine whether the way in which the criteria (conditions) for evaluating the work of scientists and their progress in their positions violate the constitution. The court emphasized that the freedom of scientific creativity has a special relevance in the fields of social sciences and humanities, where research is inextricably linked to the preservation of national heritage, the Croatian language, and cultural identity. Moreover, it plays a role in the function of the survival and development of the social community as a whole. Nevertheless, the decree linked the professional advancement of legal scholars to publishing in internationally recognized journals or by internationally recognized publishers. The most prestigious scientific production is the one published in journals with a high IF. Consequently, the decree attached great, if not crucial, importance to papers published in the fields of Croatian social sciences and humanities as compared to papers published in foreign languages in foreign journals and books published by foreign publishers. The court found the provisions of the decree, which in social sciences and humanities ranked the scientific production in foreign languages published by foreign publishers as more prestigious than the production in Croatian language published by domestic publishers, contrary to the right to freedom of scientific creativity vested by Article 68 of the Constitution.[42]

41 Decision of the Constitutional Court of the Republic of Croatia No. U-II-1304/2013, point 18.

42 Decision of the Constitutional Court of the Republic of Croatia No. U-II-1304/2013, points 19, 20, and 21.

4. Slovenia

The central role in the evaluation of publications in Slovenia belongs to the Slovenian Research Information System (*Informacijski sistem o raziskovalni dejavnosti v Sloveniji*) or SICRIS[43], administered by the Slovenian Research Agency (*Agencija za raziskovalno dejavnost republike Slovenije* – ARRS). The SICRIS adopted the bibliometric model in the evaluation of publications.[44] The evaluation of publications functions automatically.[45] The SICRIS is linked to the COBISS.SI system—Slovenia's virtual library.[46] The data on publications in the COBISS.SI system are not entered or uploaded by the researchers themselves but by designated librarians employed by the faculties or research organizations, who must pass a special exam to be entitled to access the COBISS database.[47] COBISS merges the data from libraries into a uniform information system of library entries with shared cataloguing, relying on the COBIB bibliographic database.[48] Data entered into the COBIB by the authorized librarians are supervised by specialized information centers (OSIC) organized for each field of science. The OSIC for social sciences is responsible for supervising the bibliographic entries by librarians in the field of legal science. The role of the OSIC is to confirm that a given entry relates to an academic (scholarly) and not professional publication by approving each entry made by the librarians.[49] The SICRIS system relying on the COBISS is considered a well-managed and transparent system for maintaining bibliographic data on scientific publications, operating through the library information system, and directly connected to the WoS and Scopus.[50]

The SICRIS assigns a specific number of points to publications, according to the ranking of the journal in the WoS or Scopus for social sciences, ranging from 40 to 300 points, depending on the JIF and the quartile it belongs to.[51] In social sciences, including law, a journal qualifies into this category if it is referenced in the Scopus (d) database.[52] The mathematical formula for determining the points that an article in this category yields is complicated. On average, however, depending on the JIF, a publication normally receives between 100 and 300 points if the journal is ranked in the first quartile, between 80 and 100 points, if the journal is ranked in the second quartile, between 60 and 80 if the journal is ranked in the third quartile, and between 40 and 60 if the journal is ranked in the last quartile.[53] If the journal is not ranked in the WoS or

43 See: www.sicris.si.
44 Hojnik, 2019, p. 344.
45 Hojnik, 2019, p. 346.
46 Hojnik, 2019, p. 346.
47 Hojnik, 2019, p. 347.
48 Curk, 2019, p. 73.
49 Hojnik, 2019, p. 347.
50 Curk, 2019, p. 82.
51 Hojnik, 2019, p. 347.
52 See: http://home.izum.si/COBISS/bibliografije/Kateg-medn-bibl-baze.html (19.08.2021).
53 Hojnik, 2019, p. 347.

Scopus in the fields of social sciences and humanities, but ranked in other databases approved by the ARRS, the publication receives 30 points.[54] This list of databases includes the ERIH PLUS, Index of Foreign Legal Periodicals, IBZ, IBSS, and Legal Trac, which seem relevant to the field of legal science.[55] If the journal is not ranked in any database approved by the ARRS, the publication receives no points. Hojnik notes that this affects European legal journals referenced by LexisNexis or Westlaw databases, as these are not indicated in the list of ARRS.[56] Additionally, HeinOnline is not included in the list of relevant databases, although most European legal journals, not referenced by the WoS or Scopus, are indexed by HeinOnline. The rule according to which the ARRS may individually approve journals not referenced by any database indicated in the list of databases, upon the request of the affected researcher, has some mitigating effect.[57] Similar rules for quantitative evaluation exist for conference papers and monographic publications.[58] Based on the scoring for individual publications, the SICRIS system automatically generates an overall scoring of a researcher's scientific production. The calculation is divided into three categories: Score A1, generated based on the scoring for individual publications in the last 5 years; Score C1, the impact of researchers' publications, measured by citations in the WoS and Scopus; and Score A3, measured by the research funds acquired from sources other than the ARRS.[59]

The Slovenian Quality Assurance Agency (*Nacionalna agencija Republike Slovenije za kakovost v visokem šolstvu* – NAKVIS) specifies the minimal conditions that must be met by a candidate to a university lecturer's position in order to be promoted. The universities are at liberty to introduce more stringent conditions, but they are not allowed to specify conditions more lenient than those prescribed by the minimal conditions of the NAKVIS.[60] The conditions of the promotion to the position of a full professor are scrutinized subsequently. The minimal conditions prescribe that candidates must have at least 14 publications in which they are the first or corresponding author (alternatively, they must prove in another way that their contribution to the publication is equivalent to the contribution of the first or corresponding author). From this number of publications, at least seven must have been published in the period from the appointment to the previous position. However, the most striking point from this number of 14 publications is that at least six must be articles published in journals indexed in SSCI, SCI with IF>0, or in AHCI.[61] However, the minimal conditions consider that publishing in journals indexed in the WoS may represent different challenges in different fields of science. Thus, it specifies that if the given field of science is characterized by the fact that

54 Hojnik, 2019, p. 347.
55 The latest list is for the year 2020. See: http://home.izum.si/COBISS/bibliografije/Kateg-medn-bibl-baze.html (19.08.2021).
56 Hojnik, 2019, p. 348.
57 Hojnik, 2019, p. 348.
58 See for more details. Hojnik, 2019, p. 348.
59 See for more details. Hojnik, 2019, p. 349–352.
60 Hojnik, 2019, p. 370.
61 Minimal Conditions of the NAKVIS, Art. 25. Sec. 3.

journals indexed in SSCI, SCI with IF> 0, or AHCI are not the only reliable criterion for checking the impact, journals that are comparable in quality and international impact with respect to the listed journals are considered. The list of such journals is prepared by the relevant higher education institution and approved by the senate of the higher education institution.[62] It has been pointed out in the literature that even though legal scholars often avail of this option, they normally cannot be promoted without any publications indexed in the WoS with IF.[63] Some of the number of articles to be published in journals may be replaced by other publications. The minimal conditions specify that a maximum of eight articles may be substituted with a scientific monograph, part of a scientific monograph, textbook, or professional achievement, in different ratios. However, this possibility of substitution does not apply to the mandatory requirement of publishing articles in journals indexed in SSCI or SCI with IF > 0, or in AHCI.[64]

For instance, let us see how these general rules have been implemented by the University of Maribor, in terms of a scholar's promotion to the position of a full professor. The act on the further conditions of the promotions at the University of Maribor for the law as a field of habilitation (hereinafter, Further Conditions) also state that candidates must publish at least 14 scientific publications, wherein they are the first or corresponding author, from which at least six articles must be published in a journal indexed in SSCI, SCI with IF>0, AHCI, Scopus, Scopus (D, H), Index to Foreign Legal Periodicals, LegalTrac, or Current Law Index.[65] This seems to be a great deal of mitigation of conditions for legal scholars, as the list of relevant indexing databases is considerably extended, including a greater number of European legal journals. Further relief of the conditions is envisaged by the rule pertaining to the substitution of articles in the mentioned category. The Further Conditions specify that each article may be replaced by two scientific articles published in a journal indexed in the following international bibliographic databases, recognized by the ARRS: IBZ (Internationale Bibliographie der Zeitschriftenliteratur), CSA Philosopher's Index, International Bibliography of the Social Sciences, CSA Sociological Abstracts, European Reference Index for the Humanities (A, B, or C), CSA PAIS International, CSA Worldwide Political Science Abstracts, International Political Science Abstracts, or the Directory of Open Access Journals (DOAJ). Furthermore, the substitution is possible by any two articles cited in the decision of the Constitutional Court of the Republic of Slovenia, the Supreme Court of the Republic of Slovenia, cited by a decision of an international court, the Court of Justice of the European Union, or referred to in an opinion of the General Advocate General at the Court of Justice of the European Union.[66] The Further Conditions contain special rules on the possibility of substituting the other eight mandatory articles by monographs of chapters in monographic publications.[67]

62 Minimal Conditions of the NAKVIS, Art. 25. Sec. 3.
63 Hojnik, 2019, p. 371.
64 Minimal Conditions of the NAKVIS, Art. 25. Sec. 4.
65 Further Conditions, Art. 7, Sec. 2. (point a).
66 Further Conditions, Art. 7, Sec. 2. (point b).
67 Further Conditions, Art. 7, Sec. 3.

5. Conclusions

In all three countries that were subject to analysis, the basic system of evaluation of scholarly production is the bibliometric system based on the ranking of journals by the JIF according to the JCR. A journal is considered international if it is indexed in a database in the WoS, whereby a difference is made based on whether or not a journal has an IF. Such a ranking system adversely affects the social sciences, especially legal science. The shortcomings of the ranking system are observed even more strongly in the laws of smaller European countries, such as Serbia, Croatia, and Slovenia.

The institutions of the countries analyzed in this paper offered different solutions for balancing two almost irreconcilable interests: to motivate legal scholars to achieve a certain level of international recognition on the one hand, and on the other hand, to facilitate their publishing papers primarily in their national language, to disseminate ideas relating to and solutions of problems emerging regarding national law, with the aim of reaching stakeholders in shaping the national law (i.e., other scholars from the same country, the political establishment, actors in legislative processes, the judiciary, attorneys, and others engaged in various legal professions). In all three countries, the conditions of the promotion of a scholar to the position of a full professor have been scrutinized with regard to the requirement of publishing articles in journals with certain recognition, either domestic or international.

In Serbia, more specifically at the University of Novi Sad, the conditions for a promotion of a scholar to the position of a full professor of law with regard to the requirement to publish a certain number of articles in journals qualified as international duly takes into account the difficulties faced by legal scholars while publishing articles in journals indexed by the WoS. For the promotion, the candidate must publish at least five articles in journals in the category of M51 (highest-ranking domestic legal journals), at least one article in journals in the category of M24 (domestic legal journals declared of international relevance), and at least one article in journals in the category of M23 (journal ranked by the JCR, but not in the top 60% in the same field of science). However, in social sciences and humanities, any other journal qualifies as M23 if indexed by the ERIH PLUS database. Presently, in the field of legal science, 14 journals from Serbia are indexed by the ERIH PLUS database. Furthermore, at the University of Novi Sad, the fulfilment of the requirement to publish at least one article in a journal categorized as M23 may be substituted by any other publication yielding the same or more points to the candidate. According to this rule, this requirement may be substituted by publishing a book of international or domestic relevance or by publishing a chapter in a monographic publication of international relevance.

In Croatia, regarding this issue, the decision of the Constitutional Court applicable from 2013 paved the way for a regulation that is the most favorable for legal scholars in comparison to the other two countries. The court ruled that the prescribing conditions for the progress of scholars in social sciences in their academic career that link their advancement primarily to publishing articles regularly in international journals in foreign languages infringe on the freedom of scholarly activity warranted by the

Constitution. Scholars in the field of social sciences, especially in legal science, should have equal chances for advancement in their careers, even by publishing in domestic journals in Croatian languages. It seems that the effective Croatian Decree on the Conditions of the Promotion to Scholarly Titles duly considered the Constitutional Court's decision. It specifies that social sciences articles published in any journal indexed by HeinOnline shall be qualified as the highest-ranking publication (category a1), though in the subcategory Q4. Nevertheless, legal scholars can satisfy the requirement of having a specific number of points accumulated in the category of a1 by publishing articles in any journal indexed by HeinOnline, whereby all major legal periodicals in Croatia, published in the Croatian language, are available in HeinOnline. In line with the decision of the Constitutional Court is also the rule of the decree specifying that in social sciences, at least one article of the candidate must be published in the Croatian language. However, in comparison to the Serbian regulation, in Croatia, publishing a book or chapter in a monographic publication may not substitute the requirement of publishing articles in the highest-ranking category (a1), but only articles in categories a2 and a3.

At first glance, the Slovenian system allows fewer exceptions in social sciences from the general requirement posed to scholars to publish articles in journals recognized as international according to the JCR as compared to other countries. The act of the regulatory body (NAKVIS) on the minimal conditions for the promotion of university lecturers specifies that a candidate must author a certain number of articles published in journals indexed by the WoS with an IF higher than zero. While this rule applies equally to social sciences, including law, the act of the regulatory body allows universities to enact different rules regarding equating other journals with those indexed by the WoS in the fields of science where the ranking system based on the JCR is not an appropriate indication of the quality of the journal. In this study, the rules of the University of Maribor pertaining to legal science have been analyzed. These rules specify a greater range of indexing databases that are relevant for determining whether a journal belongs to the group of highest-ranked journals. Additionally, the rules of the University of Maribor provide an extensive list of other indexing databases, whereby articles in journals indexed by these databases substitute articles in the top category (in a 2:1 ratio). Finally, the university rules contain a proviso that is not envisaged either in Serbian or Croatian regulation. They specify that the rule on the possibility of substitution of articles in the top category also applies to articles cited by the Slovenian Supreme Court, Constitutional Court, an international court, by the Court of Justice of the European Union, or referred to in the opinion of the Advocate General. This rule is commendable and supportable. The primary role of legal science should be to provide direction to the judiciary in the context of the application of the national law and in the national language in cases of legal lacunae or when the applicable rule is vague or susceptible to different interpretations. Acknowledging legal scholars in terms of their advancement in their academic career for their efforts in coping with such legal issues and providing useful assistance to the judiciary sends a clear message to them and provides them incentives to continue to tackle issues that are not merely of academic relevance but issues that contribute to the shaping of domestic law.

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Intergenerational Transfer of Family-Run Enterprises in Slovenia in Comparison with German Law

ABSTRACT: *After the Republic of Slovenia declared its independence in 1991 and adopted a new constitution, business in the country began to increasingly develop. Now, 30 years since declaring independence and the start of business development, we are witnessing the retirement of the first generation of business owners, and it is reasonable to expect the rise of such examples in the following years. With the change in generation and retirement of the first generation of business owners, the question arises as to how to legally regulate the transition of family companies to younger generations, with the objective of keeping the company within the family circle and avoiding fragmentation of the company because of a higher number of potential heirs. This article presents information on the transfer of a family company to the next generation with sole traders, personal companies, and companies with share capital in comparison to German law.*

KEYWORDS: Slovenia, family company, sole trader, personal companies, companies with share capital, inheritance.

1. Introduction

After the Republic of Slovenia declared its independence in 1991 and adopted a new constitution, business in the country began to increasingly develop. Now, 30 years since declaring independence and the start of business development, we are witnessing the retirement of the first generation of business owners, and it is reasonable to expect the rise of such examples in the following years. Many of these businesses are family companies in which other family members participate or are employed in. With the change in generation and retirement of the first generation of business owners, the question arises as to how to legally regulate the transition of family companies to younger generations, with the objective of keeping the company within the family circle and avoid

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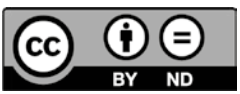

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fragmentation thereof because of a higher number of potential heirs. The transition of a family business to the next generation requires appropriate advance planning long before it is transferred to the next generation. Planning the transition of the company to the next generation is not only needed when planning retirement, but also in the event of possible unexpected death (crisis scenario).[2] Advance agreement regarding the transition of a family business to the next generation is especially recommended in the event of unexpected death, as otherwise, the transition would take place based on the rules of inheritance law, which could lead to fragmentation of the company and cause a step back or failure of the family business. Therefore, we need to distinguish between cases when the business owner wished to transfer the company to the younger generation during his life and those when this was done in the event of death.

With the transition of a family business to the next generation, the rules of inheritance law and corporate law are both considered. The basic rules of inheritance law in Slovenia are regulated by the Inheritance Act (*Slovenian: Zakon o dedovanju, hereinafter ZD*).[3] The basic legal source for Slovenian corporate law is the Companies Act (*Slovenian Zakon o gospodarskih družbah, hereinafter ZGD-1*).[4] It defines the basic rules of incorporation and operation of companies, sole traders, affiliated entities, commercial associations, and foreign subsidiaries, as well as changes to their status.[5] When composing ZGD-1, the Slovenian legislator referred to German corporate legislation as a framework.[6]

Slovenian legislation companies are divided into companies with shared capital (Slovenian. *kapitalske družbe*) and personal companies (Slovenian. *osebne družbe*). According to ZGD-1, limited companies can be a public limited company (PLC; Sln. *delniška družba*, d.d.), European public limited company (Societas Europea; Sln. *evropska delniška družba*), limited partnerships with share capital (Sln. *komanditna delniška družba*, k.d.d.), and a limited liability company (LLC; Sln. *družba z omejeno odgovornostjo*, d.o.o.) Unlimited companies are unlimited liability companies (Sln. *družba z neomejeno odgovornostjo*, d.n.o.) and limited partnerships (Sln. *komanditna družba* k.d.)[7] Possible solutions for the transition of family businesses to younger generations depend on the legal form of the company, as the corporate rules of transition differ depending on the legal form in which the company is organised. This article addresses the transition of the company business to the next generation with sole traders, personal companies, and companies with share capital.

2 Lorz, Kirchdörfer, 2011, p. 5.

3 Uradni list Socialistične Republike Slovenija (Official Journal of the Socialist Republic of Slovenia), no. 15/76, 23/78, Uradni list Republike Slovenije (Official Journal of the Republic of Slovenia), no. 13/94, 40/94, 117/00, 67/01, 83/01, 73/04, 31/13, 63/16.

4 Uradni list Republike Slovenije (Official Journal of the Republic of Slovenia), no. 65/09, 33/11, 91/11, 32/12, 57/12, 44/13, 82/13, 55/15, 15/17, 22/19.

5 Art. 1 of the ZGD-1.

6 Ivanjko, Kocbek, Prelič, 2009, p. 869.

7 Para. 3 Art. 3 of the ZGD-1.

2. Intergenerational transfer of family-run enterprises in the case of sole traders

A sole trader is a natural person who performs profitable activities independently on the market within an organised business.[8] The basic features of sole traders' businesses are the same as those of companies. Sole traders perform activities on the market for their own benefits and risks to make a profit. Compared to companies, they do not have the status of a legal entity and neither does their business. Thus, they participate in legal transactions as natural persons who are liable for their business with all their assets including personal assets.[9] A sole trader business does not require start-up capital.[10] Only a physical person can be a sole trader and act as a physical person in a legal transaction. A sole trader can only be an individual and not multiple individuals, and multiple individuals can act together only in the form of a company. Slovenian sole traders can be compared with merchants in German law (German: Kaufmann; § 1 HGB).[11]

Slovenian ZGD-1 has a special provision that enables a sole trader to transfer the company to another person during his/her life. Based on Para. 1 Art. 72.a of the ZGD-1, a sole trader during his life can transfer his/her business to another natural person (hereinafter: transferee sole trader), meaning that the sole trader can transfer the business to another family member as a successor of the family company.[12] The transfer of such business can be done only to a physical person, as Slovenian company law does not allow more individuals to have sole trader status. For the transfer of the company business, this means that the sole trader needs to choose one family member he wishes to pass the family business to. Upon the transfer, the sole trader's business and all rights and obligations associated with that business are transferred to the transferee sole trader. The transferee sole trader will enter into all legal relations of the sole traders' business as a universal legal successor (Para. 1 Art. 72.a of the ZGD-1).

If a sole trader does not decide to transfer its business during his/her lifetime, the transfer in the event of death is considered. In this event, the rules of inheritance laws need to be considered, together with the rules of corporate law under ZGD-1. Slovenian inheritance law recognises two legal bases for inheritance, namely legal succession and succession according to will. In the event of a sole trader's death and

8 Para. 6 Art. 3 of the ZGD-1.
9 Zabel, 2014a, p. 497.
10 Ivanjko, Kocbek, Prelič, 2009, p. 324.
11 Zabel, 2014a, p. 499.
12 It is interesting that until the acceptance of amendment of ZGD-1I in 2015 (Uradni list Republike Slovenije (Official Journal of the Republic of Slovenia), no. 55/15), ZGD-1 allowed the transfer of the sole trader's business based on the first paragraph of Article 72.a only to the sole traders' spouse; unmarried partner with a duly attested long-term relationship, which has the same consequences as a marriage according to the law regulating marriage and family relations; or to a person living in a registered partnership with the sole trader, his children, adopted children, parents, adoptive parents, grandchildren, brothers, and sisters.

transfer of his/her family business to the heirs based on legal succession or on the sole trader's will, we must distinguish between situations in which there is only one heir or when there are more heirs.

If one heir inherits the sole trader's business, there is no collision with the provision of corporate law. ZGD-1 enables the sole trader to determine that in the case of his/her death, the heir who continues the business of the deceased may continue to use the deceased's full name in the business name of their business (first paragraph of 72. Article ZGD-1). The heir of the sole trader shall enter into all legal relations in connection with the transferred business as a universal legal successor at the moment of the death of the deceased/sole trader.[13] German law has the same provision and determines that the heir who becomes the legal successor and owner of the business at the time of the death of the sole trader, can continue to use the business of the deceased (first paragraph § 22 HGB).[14] If the heir does not fulfil the legally specified conditions needed for the business of the deceased (e.g. he does not have a license), the heir cannot conduct this business.[15]

When the person chosen to continue the family business is determined through will, the question arises whether the deceased can determine a condition in which the heir needs to continue carrying out the sole trader's business. In this case, a collision occurs between the constitutional right to inheritance (Art. 33 and Para. 2 Art. 67 of Constitution RS) and the constitutional right to Free Enterprise (Art. 74 of the Constitution), which determines that no one can be forced to carry out an enterprise. Considering these two rights, the literature on inheritance law provides an advantage to the right to inheritance and considers that the appointment of the heir under such conditions is valid. The argument presented in the inheritance law literature is that the freedom of inheritance is a specific form of private anatomy in civil law, which grants an individual the right to form its property regime in the event of his/her death as well. Therefore, this is an expression of the right to free enterprise with a sole trader that should be in force following his/her death.[16] The literature on corporate law, however, believes that the right to free enterprise has an advantage over the right to inheritance, and therefore claims that the condition given in the will opposes the constitution right of free enterprise and thus, threats this condition as not existing in the will (Para. 3 Art. 82 ZD).[17] A similar view is presented in the German literature, which determines that the long-term limitation of free enterprise, determined by the deceased in his will, is not admissible.[18]

When rules of inheritance law determine that the business of the sole trader should be inherited by multiple heirs, this presents a problem, as based on corporate law, multiple individuals cannot jointly have the status of the sole trader. If the

13 Zupančič, Žnidaršič Skubic, 2009, p. 346.
14 Lorz, Kirchdörfer, 2011, p. 111.
15 Zupančič, Žnidaršič Skubic, 2009, p. 347.
16 Zupančič, Žnidaršič Skubic, 2009, p. 347.
17 Zabel, 2014b, p. 507, 508.
18 Otte, 2002, cited in Zupančič, Žnidaršič Skubic, 2009, p. 347.

deceased did not determine the transferee of his business, and if the heirs did not reach agreement on the continuance of the business, the rules of inheritance law and corporate law do not prevent the fragmentation of the business. In this event, a community of heirs is formed between coheirs at the moment of the death of the deceased, which lasts until the division of the inheritance.[19] All heirs together are holders of the rights and obligations of the inheritance, meaning that all heirs together are holders of the rights and obligations of the inherited company.[20] Slovenian ZD has shaped the so-called union of heirs based on German regulation (Gesamthandsgemeinschaft, § 2032 and next BGB). Based on the prevailing belief of German theory and court practice, the union of heirs can be the holder of an inherited company; however, such rights can only be inherited and cannot be obtained based on a legal transaction between the living. The argument in favour of this position that the union of heirs can be the holder of an inherited company is that the company cannot exist without a holder. [21] However, both the Slovenian and German literature believe that the union of heirs is not appropriate for the governance of the company.[22] The Slovenian literature holds the position that the union of heirs can exist for a limited period—a maximum of three months—following the finality of the procedural decision on inheritance (applicable use of third paragraph of 75 Article ZGD-1). However, the prevailing contention in the German literature is that the union of heirs can manage inherited companies for an unlimited period, although it recommends that coheirs should reshape the union of heirs so that they would enter into the agreement and form a company.[23] Based on the prevailing opinion of the German literature, the union of heirs is not an ipso facto restructured in a personal company.[24] The same view prevails in the Slovenian literature, namely that the union of heirs is not an ipso facto restructured into the company.[25]

Note, however, that the Slovenian corporate law rules know a special institute of representative for the event of death (Para. 8 Art. 72 ZGD-1). Sole traders can appoint representatives for the event of death, and such representatives are authorised to carry out all legal transactions within the scope of the sole trader's regular operations as of the moment of the sole trader's death. In so doing, the sole trader assures that his/her company shall not remain without governance and representation following his/her death.[26] Such authorisation may be revoked at any time by the sole trader's heir or heirs.

19 Decision of the Higher Court in Ljubljana, no. II Cp 1497/2016, 22 August 2016.
20 Para. 1 Art. 145. člena ZD; Zupančič, Žnidaršič Skubic, 2009, p. 348.
21 Schmidt, 1985, p. 2785, 2786.
22 Zupančič, Žnidaršič Skubic, 2009, p. 349; Ebenroth, 1992, p. 563.
23 Lorz, Kirchdörfer, 2011, p. 112.
24 Schmidt, 1985, p. 2786.
25 Zupančič, Žnidaršič Skubic, 2009, p. 353.
26 Zupančič, Žnidaršič Skubic, 2009, p. 350.

3. Intergenerational transfer of family-run enterprises in personal companies

Personal companies are those in which several people come together for ongoing gain in the form of a joint company, and mutual trust and cooperation between them is essential.[27] Under Slovenian law, personal companies include unlimited liability companies and limited partnerships.[28] For limited partnerships, the provisions of ZGD-1 that apply to unlimited companies shall apply *mutatis mutandis*, unless the law determines otherwise (Para. 2 Art. 135 ZGD-1). From the ZGD-1G novel, Slovenian corporate law no longer regulates silent partnerships (ger. stille Gesellschaft).[29]

Even though the Slovenian regulation of personal companies follows the German ones, multiple differences exist between both. For example, Slovenian unlimited companies differ from similar German ones (offene Handelsgesellschaft, OHG) in that a legal person, and therefore its shareholders, are responsible for solidarity for the obligation of the company. The company is the primary bearer of liability, in which it is liable for its debts with all its assets. If it fails to meet its obligations, its partners carry a subsidiary liability for the debts.[30] The same applies for a Slovenian limited partnership, which in the German legal system corresponds to Kommanditgesselschaft (KG).

As personal companies have the status of a legal entity in Slovenian law, shareholders have company shares in such companies. ZGD-1 considers that the company members are tightly connected in this type of personal company; therefore, ZGD-1 determines for such a personal company that a company member may not dispose of their company share without the consent of the other company members (Art. 97 ZGD-1). The same applies for general partners in limited partnerships, which are liable for the obligations of the limited partnership with all their assets (135. člen ZGD-1). A company member who wishes to retire and during his lifetime, transfers his share in a personal company to his successor, must obtain consent from other company members.

In contrast to German law, Slovenian corporate law determines as a rule that personal companies end with the death of their company members.[31] Unlimited companies are dissolved with the death of a company member, unless otherwise provided in the Articles of Associations (Para 4 Art. 104 of the ZGD-1). The same applies to limited partnerships in the event of the death of a general partner. However, a limited partnership shall not be dissolved as a result of the death of a limited partner (Art. 151 ZGD-1). Therefore, the death of a company member in a personal company means that the company is dissolved, unless the company members agree otherwise in the partnership contract. The reasoning behind such a regulatory framework is the personal nature

27 Pretnar, 1990, p. 12.
28 Line 1 Para. 3 Art. 3 of the ZGD-1.
29 Uradni list Republike Slovenije (Official Journal of the Republic of Slovenia), no. 57/12.
30 If the company fails to fulfil the creditor's written request to pay his debts, all partners are jointly liable for the debts; para. 1 Art. 100 of the ZGD-1.
31 Brox, Walker, 2010, str. 435.

of personal companies. Compared with companies limited by shares, it is typical for company members in personal companies to be more personally connected, and a higher level of trust exists between company members. Although the deceased has the intention that his/her heirs enter into his/her position in the company, the personal nature and connection between the family members of personal companies means their interest is that this does not happen. This means there is a conflict between corporate and inheritance law, as the rules of corporate law determine that the company share generally does not pass to the heir or heirs of the deceased, while the rule of inheritance law establishes such a transition.[32]

If the company members specify in the articles of association that following the death of one of its members, the company shall continue to exist with the remaining company members, this agreement is called a continuation clause, reasonably the same as Fortsetzungsklausel in the German literature. However, such an agreement between company members leads to a collision between inheritance and corporate law. This means that the deceased has a company member managing and transacting with the property he will have following his death. Contrary to German law (§§ 1941, 2347 and following BGB), such transactions are not valid according to Slovenian law, in which succession agreements are not valid (Art. 103 ZD). The Slovenian literature resolves the stated collision between inheritance and corporate law in favour of the continued existence of unlimited partnerships, with the explanation that the regulation under the corporate law is *lex specialis* in relation to inheritance law. Therefore, in this case, the inheritance law prohibition of contractual transactions of company share does not apply.[33] The consequence of the other family members continuing with the company is that the settlement of assets is carried out with the heir or heirs of the deceased (112. Article ZGD-1). The heirs are entitled to receive payment in the amount equal to the amount the company member would receive with the settlements if the company would be dissolved at the time of his/her death.[34]

Company members of a personal company can prevent the dissolvement of the company due to the deaths of a company member if this is agreed upon in the Articles of Association (Line 4 Para 1. Art. 105 ZGD-1). When considering various legal positions that may occur in such events, the same clauses regarding the continuance of the company with heirs shaped in German theory and practice are to be considered in Slovenian regulation.[35]

The continuance clause (ger. Nachfolgeklausel) is a provision in the Articles of Association, which determines that in the event of the death of the deceased, his/her heirs automatically enter the position of the deceased in the company.[36] The German literature delineates between simple and qualified clauses depending on whether the

32 Zupančič, Žnidaršič Skubic, 2009, p. 362.
33 Zupančič, Žnidaršič Skubic, 2009, p. 364.
34 Zupančič, Žnidaršič Skubic, 2009, p. 366.
35 Zupančič, Žnidaršič Skubic, 2009, p. 377.
36 Brox, Walker, p. 440.

company is to continue with all heirs, one heir, or some heirs. The company continues with all heirs based on the simple clause of succession. If only one heir inherits after the death of a company member, the company share passes onto the heir, and the heir enters the position of the deceased company member.[37] If multiple heirs inherit the company share of the deceased, a conflict arises between the rules of inheritance and corporate law. The majority opinion in this example is that the union of heirs cannot be a company member in an unlimited company, as this would oppose the core principle of the personal work connection of company members in personal companies. Therefore, succession clauses mean that every coheir becomes indirectly and automatically heir in the company share of the deceased, which equals the size of his inherited share.[38] With qualified clauses about succession, company members determine that the share of the deceased does not pass to all, but only to one or a few heirs. The intention of this clause is to prevent fragmentation of the company share of the deceased. The heir to whom the clause applies enters directly and automatically in the legal position of the deceased within the company. If the heir gains more than his heritage share, he is required to pay the difference to an equal value of the share to his coheirs.[39]

The entrance clause (Eintrittsklausel) is an agreement between the company members based on which, following the death of the company member, his/her heir or appointed third person obtains the right to enter the company. The position of the deceased in the company does not automatically pass to his/her heir or appointed third person, as in the event of the succession clause. The successor does not become heir based on inheritance, but on the basis of new membership according to the legal transaction between the living. With the entrance clause, company members agree to enter into an agreement with the heir or appointed person of the deceased company member. This type of heir obtained a claim towards other company members to enter into the agreement with him/her regarding his/her entrance into the company; however, such heirs are not obligated to enter into such an agreement.[40] The difference between the clause of entrance and of succession is that the clause of entrance means that the person entering the company can also be a person who is not the heir of the deceased family member.[41]

4. Intergenerational transfer of family-run enterprises in companies limited by shares

According to ZGD-1, companies limited by shares can be a public limited company (PLC; Sln. *delniška družba*, d.d.), European public limited company (Societas Europea; Sln. *evropska delniška družba*), limited partnerships with share capital (Sln. *komanditna*

37 Zupančič, Žnidaršič Skubic, 2009, p. 373.
38 Ebenroth, 1992, p. 577; Zupančič, Žnidaršič Skubic, 2009, p. 377.
39 Lorz, Kirchdörfer, 2011, p. 122.
40 Lorz, Kirchdörfer, 2011, p. 129.
41 Ebenroth, 1992, p. 591.

delniška družba, k.d.d.), and a limited liability company (LLC; Sln. *družba z omejeno odgovornostjo*, d.o.o.) All companies limited by shares are legal persons (Art. 4 of ZGD-1).

Participation in companies limited by shares is generally transferable in all societies between the living and in the event of death. As in Slovenia, family companies are in most cases, organised in the form of limited liability companies. I will address the transition of the company share of limited liability companies in the continuance of this article.

Slovenian corporate law enables the transfer of company shares in limited liability companies among the living and in the event of death (Para. 1 Art. 481 of the ZGD-1). However, it considers that the company members decide to cooperate in such a form of the company based on mutual trust among specific company members. This is why ZGD-1 addresses the transfer of the company share in the special provision and protects the interests of company members and the company itself, as it protects company members from the entrance of other persons into the company.[42]

With the transfer of the company share in limited liability companies among the living, note that ZGD-1 determines that the existing company member has priority over other persons regarding the purchase of a business share, unless articles of association exclude such rights in the Articles of Association (Para 4 Art. 481 of the ZGD-1). If company members want to transfer their company share to a successor with the Purchase Agreement and there are other company members within the company, they need to consider the pre-emption rights of other company members. The drastic limitation of legal transactions of the business share among the living is included in Para. 7 Art. 481 of the ZGD-1. Based on this, the Articles of Association may determine that the disposal of the company share to persons other than the company members shall require the consent of the majority or all company members and determine the conditions for the issue of such consent. If such limitations are included in the Articles of Association, the company member in the family company, where other members have company shares as well, must obtain consent from other family members for the disposal of his/her company share to the successor.

An applicable view in the event of disposal of the company share in the event of death is that the Articles of Association can neither prohibit nor exclude the inheritance of the company share. The German literature has the predominant view that the inheritance of the company share cannot be excluded with the Articles of Association in a manner that the death of a company member would cause automatic withdrawal of the business share.[43] Determining the position of the heirs in the queue is not possible, and neither is excluding a person from inheritance. However, the article of association can determine the further destiny of inheritance share, for example, that the heir is required to transfer the inheritance share to the company or specific company member of another person. The transfer can be done only with the consent of the acquirer;

42 Zabel, 2014c, p. 850.
43 Ebenroth, 1992, p. 600.

otherwise, agreement on the burden of the third party would be prohibited.[44] The Slovenian literature accepts this solution in the German law for Slovenian law as well.[45] In the event of multiple heirs, company share is passed to the union of heirs. Similar to the German regulations, company share in such events is passed to the union of heirs. Coheirs manage and dispose of the company share in a consensual and joint way until the inheritance is divided (Para 1. Art. 145 of the ZD).

5. Conclusion

Transfer of the family company or share therein to the next generation can be done during the lifetime or in the event of death. A possible solution to the transition of the family company to the younger generation first depends on the corporate form of the family company, as the corporate rules regarding the transition of the company vary depending on its corporate structure. If the family company is passed to the next generation with the death of the previous business owner, the rules of inheritance law must be considered together with the rules of corporate law. The transition of the family company to the next generation in the event of death can be problematic if the deceased does not arrange the transition thereof or its share in his/her will prior to his/her death. In the event of multiple heirs, this would lead to fragmentation of the family business or family share, which can jeopardise the existence of the family company. Therefore, it is recommended that the company owner organise the transition of the family company to the next generation in time, either in a way that this is done during his lifetime or that the transition is addressed in his will and aligned with corporate laws rules.

44 Ebenroth, 1992, p. 606.
45 Zupančič, Žnidaršič Skubic, 2009, p. 386.

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Recent Changes in the German Investment Screening Mechanism in Light of the EU Screening Regulation

ABSTRACT: *In 2020 and 2021, the German investment screening laws, namely Außenwirtschaftsgesetz (AWG) and Außenwirtschaftsverordnung (AWV) were again subject to considerable reform induced by new legislation at the European level and a reshaped industry policy agenda at the national level. This article critically reviews the most significant changes brought about by one law (Erstes Gesetz zur Änderung des Außenwirtschaftsgesetzes und anderer Gesetze) and three ordinances (Fünfzehnte, Sechzehnte und Siebzente Verordnung zur Änderung der Außenwirtschaftsverordnung) and provides an overview of the reformed screening procedure. Although claims in this direction have been made, neither the reform nor the underlying Screening Regulation (EU) 2019/452 have altered the objective of review – the protection of public order or security – or bar for governmental intervention – actual and sufficiently serious danger. Both these were not 'overwritten' by secondary law and continue to be determined by the pertinent jurisprudence of the Court of Justice of the European Union. Notwithstanding this, the reform has considerably widened the 'sensitive sectors' in which pertinent investments must be notified to and cleared by the authorities. 'Gun jumping' is prohibited and parties moving forward nonetheless risk criminal prosecution. Reform has also standardised the deadlines for governmental intervention and brought about procedural clarity. What the many and frequent changes reveal on a more fundamental level is a progressing politicisation and securitisation of investment screening law.*

KEYWORDS: Außenwirtschaftsgesetz (AWG), Außenwirtschaftsverordnung (AWV), Germany, investment screening, EU Screening Regulation, investment control, public order or security, ordre public.

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1. Introduction

Although the Roman proverb *pecunia non olet* originally referred to 'unpleasantly' sourced tax revenue, its logic can be transferred to the realm of foreign investment; where capital is in demand, its geographical provenience is typically not relevant, at least from an economic perspective.[3] While the underlying motivation is complex (if eventually self-serving),[4] the Member States of the European Union (EU or Union) have embraced this thinking and have accordingly pledged that 'all restrictions on the movement of capital between [...] Member States and third countries' (art. 63 (1) Treaty on the Functioning of the European Union (TFEU)) shall be prohibited. Decades later, it seems that the Member States have grown unsure of their pledge. Foreign investments are increasingly being subject to scrutiny by investment screening and control mechanisms (ISCMs). Existing ISCMs have recently been broadened in scope, and new ones have been enacted in the EU and its Member States.[5] Looming concerns regarding (especially, but not exclusively) Chinese investment, or more precisely, the intentions and actors behind it, intensified with the economic fallout of the COVID-19 pandemic.[6] Fears of foreign buyout and technology drain joined those of vulnerability and dependence regarding medical products. Additional worry around the deflated value of many pandemic-stricken businesses vis-à-vis a swiftly recovering Chinese economy and buying power began to spread.[7]

In light of the above, perhaps (some) *pecunia olet* after all? Even if so, while the guarantee of free movement of capital in the TFEU is not unlimited, neither are the grounds that justify restricting it:[8] 'The provisions of [art.] 63 [TFEU] shall be without prejudice to the right of Member States: [...] to take measures which are justified on grounds of public policy or public security' (art. 65 (1) (b) TFEU). Being one of the main driving forces behind the changing attitude towards foreign investment at the EU level, Germany took (additional) steps to fend off certain investments should the need arise, in 2020 and 2021. The challenge the German legislature had to meet was to effectively protect public policy or security without creating exuberant restrictions on foreign

3 This is at least true for foreign direct investment (FDI) – the 'Mother Teresa of foreign capital' (Chang, 2007, p. 88), which is believed to be less volatile than portfolio investment (Griffith-Jones and Tobin, 2001, pp. 38–39). If capital can travel unrestrictedly, it will typically seek and settle where highest returns are to be expected (Obstfeld and Taylor, 1998, p. 356; Viterbo, 2012, p. 189).

4 Cf. Hindelang, 2009, pp. 18–31.

5 For the EU, see the list at https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf (accessed 2 May 2021); more broadly OECD, 2020, pp. 113 et seqq. In detail see the chapters on Germany, France, Italy, Spain, Portugal, Greece, Poland, Lithuania, Latvia, Hungary, Romania, Finland, Norway, Sweden, and Denmark in Hindelang and Moberg (2021). For central European countries, see also Poljanec and Jaksic, 2020, pp. 126 et seqq., 134 et seqq. and Juhart, 2020, p. 87.

6 Annweiler, 2019, p. 528; Lippert, 2021, p. 194.

7 Sahin, 2020, p. 192; see also Braun and Röhling, 2020, FAZ; Breyton, 2020, Welt.

8 In detail Hindelang, 2009, pp. 214 et seqq.

investment. Its most recent legislative efforts to reinforce its ISCM against 'undesired' foreign investment are discussed in the following sections.

In Part 2, this article outlines the historical and political background of the recent amendments to the German ISCM, which is enshrined in the Foreign Trade and Payments Act (*Außenwirtschaftsgesetz* (AWG)), a piece of parliamentary legislation, and the Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung* (AWV)), an administrative decree.[9] Part 3 provides a detailed and critical account of the changes made in the course of the 2020/21 reform.[10] Part 4 shows how these changes shape the screening procedure. This contribution comes to a close by offering, in Part 5, some conclusions.

2. Background of the 2020/21 Reform

When Germany first expanded the scope of its ISCM, which was originally limited to the defence sector, to investments into all sectors of the economy in 2009,[11] it was expected that only a handful of investments would be subject to screening each year.[12] Little more than a decade later, the legislature expects over a hundred screening procedures annually, and this number is increasing.[13] This increase was accompanied by constant legislative changes at ever shorter intervals especially in recent years: In 2017, the legislature introduced an exemplary list of sectors with high relevance for security[14] ('sensitive sectors') in which foreign takeovers may pose a threat to public order and security, and established a corresponding notification obligation.[15] 2018 saw Chinese attempts to invest in 50Hertz, a company operating the electricity transmission system in north and east Germany, and in Leifeld, a mechanical engineering company.[16] The latter investment was the first to be blocked by the German ISCM. The same year, these experiences prompted a drop in the notification threshold from 25 to 10 per cent of the voting rights with respect to takeovers in the sensitive and defence sectors.[17]

9 Cf. art. 80 (1) art. 103 (2) Basic Law for the Federal Republic of Germany.

10 This article focusses on the reform of the cross-sectoral review (details below Part 4).

11 *Dreizehntes Gesetz zur Änderung des Außenwirtschaftsgesetzes und der Außenwirtschaftsverordnung* of 14 April 2009 (German Federal Law Gazette [*Bundesgesetzblatt – BGBl.*] I, p. 770); see Traugott and Strümpell, 2009, p. 187; Germelmann, 2009, p. 78.

12 BT-Drucks. 16/10730, pp. 1-2 (with no estimate of voluntary notifications).

13 BT-Drucks. 19/18700, p. 3. Between 2010 and 2020, the BMWi recorded around 600 investment reviews (BT-Drucks. 19/18929, p. 4). 2017 saw 66 cases; 2018: 78 cases; 2019: 106 cases; 2020: 159 cases (plus 31 cases from the EU cooperation mechanism); 2021 (until 12 April): 76 cases (plus 66 cases from the EU cooperation mechanism), see *Siebzehnte Verordnung zur Änderung der Außenwirtschaftsverordnung (Kabinettsfassung)*, https://www.bmwi.de/Redaktion/DE/Downloads/J-L/kabinettsfassung-siebzehnte-verordnung-zur-aenderung-der-aussenwirtschaftsverordnung.pdf?__blob=publicationFile&v=6 (accessed 30 April 2021), p. 23.

14 BT-Drucks. 18/13417, p. 13.

15 In detail Hindelang and Hagemeyer, 2017, p. 882.

16 Mohamed, 2019, pp. 766-767; Annweiler, 2019, p. 528.

17 *Zwölfte Verordnung zur Änderung der Außenwirtschaftsverordnung* of 19 December 2018, German Federal Gazette (*Bundesanzeiger – BAnz*) Official Part (*Amtlicher Teil – AT*) of 28 December 2018, V1.

In 2020 and 2021, Germany's ISCM was subject to significant overhaul, again. No less than four reforms[18] in quick succession made significant amendments, amounting to a turning point and putting (the previously largely neglected) law on investment screening on the map alongside the merger review and antitrust laws.[19] These reforms were: the First Law Amending the AWG and Other Laws of 10 July 2020 (*Erstes Gesetz zur Änderung des Außenwirtschaftsgesetzes und anderer Gesetze* – First Law)[20] as well as the Fifteenth, Sixteenth and Seventeenth Ordinance Amending the AWV of 25 May 2020, 26 October 2020, and 27 April 2021 (*Fünfzehnte, Sechzehnte und Siebzente Verordnung zur Änderung der Außenwirtschaftsverordnung* – 15th, 16th and 17th Amendment Ordinance).[21]

These reforms should be read as a single effort to incorporate the EU's Screening Regulation[22] (below Part 2.1), pursue Germany's industrial policy strategy *Nationale Industriestrategie 2030* (below Part 2.2), and fend off perils to the health system and economic crisis related to the pandemic.[23] Consequently, this article refers to the amendments jointly as the '2020/21 reform'.

■ *2.1. The EU's Screening Regulation*

Central provisions in the AWG and AWV on investment review were either added or significantly revised to take into account the Union's investment screening framework established by the Screening Regulation. The legislative changes took place a little more than three years after France, Germany, and Italy expressed their concerns regarding a sell-out of European technology to non-EU investors and voiced their criticism on the lack of reciprocity for EU investors in the home states of these non-EU investors.[24] These concerns resulted in the adoption of the Screening Regulation, which entered into force on 11 April 2019[25] and was based on the Union's exclusive competence (cf. art. 2 (1) TFEU) for the common commercial policy (art. 207 (2), 3 (1) (e) TFEU).[26]

Art. 1 (1) of the Screening Regulation states its purposes as follows: to establish 'a framework for the screening by Member States of foreign direct investments into the Union on the grounds of security or public order' and a 'mechanism for cooperation

18 Some reforms only brought changes to the ordinance (AWV), which does not require formal laws passed by parliament.

19 Haak et al., 2020, p. 357; Mohamed, JZ 2019, 766.

20 BGBl I, p. 1637.

21 BAnz AT of 2 June 2020, V1; BAnz AT of 28 October 2020, V1; and BAnz AT of 30 April 2021, V1.

22 Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, OJ L 79 I, 21 March 2019, pp. 1–14.

23 On the latter point, which will not be pursued here, see Jungkind and Bormann, 2020, p. 620.

24 Letter available at https://www.bmwi.de/Redaktion/DE/Downloads/S-T/schreiben-de-fr-it-an-malmstroem.pdf?__blob=publicationFile&v=5 (accessed 3 April 2021).

25 Art. 17 Screening Regulation. On the remarkably swift legislative process, see Hindelang and Moberg, 2020, pp. 1432–1435; Maillo, 2020, pp. 184-185.

26 Preamble sentence 2 and recital (6) of the Screening Regulation; in detail Hindelang and Moberg, 2020, pp. 1435–1445 (arguing for art. 64 (2) TFEU as equally suitable legal basis); similarly Korte, 2019, pp. 91-106. See also Herrmann, 2019, p. 437.

between Member States, and between Member States and the Commission, with regard to foreign direct investments likely to affect security or public order'.[27] In essence, the substantive portions of the Screening Regulation define standards for Member State ISCMs (art. 3, 4), put in place a cooperation mechanism between the Member States' ISCMs that is coordinated by the Commission (art. 6, 7, 11), also giving the Commission the right to issue opinions regarding investments in projects or programmes of Union interest (art. 8), and establish reporting and information obligations (art. 5, 9, 15).[28] The projects and programmes of Union interest are listed in the regulation's Annex.[29] These are projects and programmes heavily funded by the Union or fall under Union law regarding critical infrastructure, critical technologies or critical inputs which are essential for security or public order (art. 8 (3) Screening Regulation). Perhaps most surprising, the Screening Regulation does not oblige Member States to entertain an ISCM. [30] If a Member State chooses to do so, however, it needs to conform to certain standards set out in the Screening Regulation.

With a declared view to align its ISCM[31] with the European framework[32] and protect public order or security of the Federal Republic of Germany more effectively by closing certain loopholes in the existing legislation, Germany passed the First Law.[33] Even before the First Law, the German administration reacted to the COVID-19 pandemic by adding the manufacturers and developers of certain medical products (such as masks and vaccines) to the list of sensitive (and thus in the case of third country takeover: notifiable) sectors and took on certain portions of the Screening Regulation (especially the inclusion of investor-based factors in the list of review criteria) in the 15th Amendment Ordinance.[34] After these legislative reforms, the 16th Amendment Ordinance provided for the consideration of other Member States and the Union's interests for the first time in the screening procedure, in addition to public order or security concerns with respect to the Federal Republic of Germany.[35] The decisive adjustment of the AWV to the Screening Regulation's text was brought into effect by the 17th Amendment Ordinance, which specified some of the broadly defined investment-related factors in

27 Hindelang and Moberg, 2020, pp. 1445 et seqq.
28 See generally Bismuth, 2018; Maillo, 2020, p. 180; Klamert and Bucher, 2021, pp. 336-337.
29 As amended by Commission Delegated Regulation (EU) 2020/1298 of 13 July 2020 amending the Annex to Regulation (EU) 2019/452 of the European Parliament and of the Council establishing a framework for the screening of foreign direct investments into the Union C/2020/4721, OJ L 304, 18 September 2020, pp. 1–3.
30 Poljanec and Jaksic, 2020, p. 125; Herrmann, 2019, p. 467; Korte, 2019, p. 85; but in order to meet the notification requirements, Member States have to entertain a FDI monitoring mechanism (Hindelang and Moberg, 2020, p. 1457; Bismuth, 2018, pp. 51-53).
31 The German ISCM qualifies as a 'screening mechanism' in line with art. 2 (4) of the Screening Regulation.
32 The Screening Regulation, as any EU law, would call for reforming national rules if the latter are not in line with the former. The mere repetition of EU law content in national law is not an issue in terms of EU law (Herrmann, 2019, p. 468).
33 BT-Drucks. 19/18700, p. 1.
34 BAnz AT of 2 June 2020, B2, p. 1.
35 BAnz AT of 29 October 2020, B2, pp. 1-2.

art. 4 (1) of the Screening Regulation, which may be considered by the EU Member States when determining a likely effect on security and public order.[36] For example, the broad terms 'artificial intelligence', 'robotics', 'semiconductors', 'cybersecurity', 'aerospace', and 'quantum and nuclear technologies' (art. 4 (1) (b) Screening Regulation) have been fleshed out in sec. 55a (1) no. 13, 15, 16 (a), 17 to 20 AWV.

■ *2.2. National Industrial Strategy 2030*

The second driving force behind the 2020/21 reform is the *Nationale Industriestrategie 2030* (National Industrial Strategy 2030), an industrial policy that formulates, *inter alia*, the goal to secure and regain economic and technological competence, competitiveness, and industry leadership at the national, European, and global levels.[37] Whereas Germany's commitment to open (capital) markets is renewed, the policy white paper also implies that state intervention (proactively by participation or repressively by blocking) could be justified (if in exceptional cases) even to secure technological leadership.[38] Although this strategy may not be footed in sound economic reasoning, it is in line with the proliferated understanding of the global economy as a 'geoeconomic'[39] zero-sum struggle between nations, in which investment is seen as one weapon in the armoury of economic warfare.[40]

3. The 2020/21 Reform

In the following section, the amendments made to the German ISCM by virtue of the 2020/21 reform are critically reviewed in detail, differentiated by central (Part 3.1) and minor elements (Part 3.2). Changes to the sector-specific review procedure, which are applicable to the defence and military sectors alone, are only considered to demonstrate the convergence of the sector-specific and cross-sectoral review procedures.[41]

■ *3.1. Central Amendments*

The most prominent changes following the 2020/21 reform are the expansion of the object of protection of the German ISCM (Part 3.1.1), the lowered bar for administrative intervention (Part 3.1.2), and the prohibition on 'gun jumping' (Part 3.1.3).

3.1.1. Object of Protection

Expanding the scope of protection of the German ISCM, the First Law enables investment review and regulatory intervention to guarantee the public order or security *of*

36 BAnz AT of 30 April 2021, B2, pp. 1-2.
37 BMWi, 2019, p. 4. In detail (and critical) Schnellenbach and Schwuchow, 2019.
38 BMWi, 2019, pp. 13-14.
39 The term is expressly used by the state officials, cf. BAnz AT of 30 April 2021, B2, p. 1.
40 In further detail, see Hagemeyer-Witzleb, 2021, Chapter 1.2.2.2 with further references, Chapter 4.
41 Details on these procedures are found in below, in Part 4.

other EU Member States and *relating to projects or programmes of Union interest* within the meaning of art. 8 of the Screening Regulation (sec. 4 (1) no. 4 and 4a AWG).[42] Prior to the 2020/21 reform, the only objects of protection were the public order or security of *the Federal Republic of Germany*, as already indicated above.[43] Different, however, from the typical approach in German law, pre-First Law AWG and AWV meant the public order or security of the Federal Republic of Germany within the meaning of art. 36, 52 (1), 65 (1) TFEU and the interpretation of the Court of Justice of the European Union (CJEU or Court).[44]

While such reference to primary Union law legal bases for justification of regulatory intervention is unorthodox for the German lawmaker,[45] the pre-First Law AWG even *verbatim* transposed the CJEU's language into national law, requiring 'a *fundamental interest of society*' to be affected.[46] The highlighted requirement clarified that any possible interest forming a part of domestic *ordre public* did not suffice to justify administrative intervention, but that the pertinent legally protected interest had to be of paramount societal importance as defined by the CJEU. This qualifier was dropped by the First Law.[47]

This raises the question of substance of the object of protection, namely public order or security,[48] after the 2020/21 reform (Part 3.1.1.1). In answering this question, the effects of the numerous examples of potential dangers to the *ordre public* provided in the AWV by the German lawmaker, partly resting on language in the Screening Regulation, must be considered (Part 3.1.1.2). Finally, the question of whether economic motives justify regulatory encroachments upon the relevant EU fundamental freedoms is addressed (Part 3.1.1.3).

3.1.1.1. Public Order or Security

Union law does not define the term 'public order and security' exhaustively.[49] The Court has emphasised that the Member States individually and discretionally determine what constitutes public order and security. They must, however, observe the boundaries of Union law.[50] The CJEU, on a case-by-case basis, decides whether or not restrictive

42 BT-Drucks. 19/18700, p. 11.
43 Sec. 4 (1) no. 4 AWG of 6 June 2013 (BGBl. I, p. 1482), as last amended by art. 4 of the Act of 20 July 2017 (BGBl. I, p. 2789) (AWG 2017).
44 BT-Drucks. 16/10730, 10 f.; Kollmann, 2009, p. 208; Mohamed, 2019, p. 771.
45 Böhm, 2019, p. 120.
46 Judgement of the Court of 14 March 2000, C-54/99, Association Église de scientologie de Paris, ECLI:EU:C:2000:124, para 17 (emphasis added) and sec. 5 (2) sentence 2 AWG 2017.
47 Art. 1, no. 4 of the First Law.
48 The terms are not used distinctively by the CJEU, cf. Tiedje, 2015, para 19.
49 Böhm, 2019, pp. 119-120 (also with an attempt at a definition).
50 Judgements of the Court of 4 December 1974, case 41/74, van Duyn, ECLI:EU:C:1974:133, para 18; of 27 October 1977, case 30/77, Boucherau, ECLI:EU:C:1977:172, para 35; of 10 July 1984, case 72/83, Campus Oil Limited, ECLI:EU:C:1984:256, para 34; of 14 October 2004, C-36/04, Omega, ECLI:EU:C:2004:614, para 3.

Member State measures do so.[51] This makes the concept dynamic and malleable, especially with respect to future developments.

The Court's case law – which, noteworthily, has so far involved only intra-EU constellations[52] – includes the safeguarding of supplies of products and services such as petroleum products, telecommunications, and electricity in the event of a crisis.[53] This strand of case law has been interpreted to extend to safeguarding the supply of 'services of general economic interest' (cf. art. 106 (2) TFEU).[54] A red line was drawn by the Court for measures pursuing economic or financial interests of the Member States or 'an interest in generally strengthening the competitive structure of the market in question'.[55] In short, *ordre public* is no basis for protectionism or the hidden promotion of a Member State's economy.[56]

It is this 'policed deference approach' that EU and Member State legislatures relied on when concretising the grounds for investment screening:[57] art. 4 of the Screening Regulation contains a catalogue of factors that 'Member States [...] may consider' or 'may also take into account', many of which have never been evaluated by the Court and whose qualification as services of general interest is questionable (e.g. artificial intelligence; whatever its exact meaning). Similarly, some of the items in sec. 55a (1) of the AWV, a provision created by the 17th Amendment Ordinance, seem to exceed what the Court has qualified thus far as public order and security (e.g. provision of cloud computing services or certain software).[58] Investor-based factors, first introduced by the 15th Amendment Ordinance and moved to sec. 55a (3) of the AWV by the 17th Amendment Ordinance, have not been considered by the Court to date, either.

With these catalogues in the Screening Regulation, some say, the EU legislature left the footing of the Court's case law and further specified by secondary law the *ordre public* exception provided for in EU primary law.[59] While this is, in principle, possible under EU law, it should be noted that the catalogue items in art. 4 of the Screening Regulation are only of a non-binding, exemplary character. Further, both the factors in art. 4 of the Screening Regulation[60] and the items in its German equivalent, in sec. 55a (1) and (3) of the AWV[61], are non-exhaustive and non-barring. A threat to public order

51 Haferkamp, 2003, p. 136.
52 Herrmann, 2019, p. 447.
53 Judgments of the Court of 10 July 1984, case 72/83, Campus Oil Limited, ECLI:EU:C:1984:256, para 34; of 13 May 2003, C-463/00, Commission v Spain, ECLI:EU:C:2003:272, para 71; of 2 June 2005, C-174/04, Commission v Italy, ECLI:EU:C:2005:350, para 40; of EuGH, 11 November 2010, C-543/08, Commission v Portugal, ECLI:EU:C:2010:669, para 84; of 8 November 2012, C- 244/11, Commission v Greece, paras 65 et seqq.
54 Herrmann, 2019, p. 445; Hindelang and Hagemeyer, 2017, p. 887.
55 Judgments of the Court of 4 June 2002, C-367/98, Commission v Portugal, ECLI:EU:C:2002:326, para 52; of 2 June 2005, C-174/04, Commission v Italy, ECLI:EU:C:2005:350, para 37.
56 Martini, 2008, p. 319; Thoms, 2020, para 9.
57 For Germany see BT-Drucks. 19/18700, p. 18.
58 Cf. Hindelang and Hagemeyer, 2017, p. 890.
59 Herrmann, 2019, p. 465.
60 Brauneck, 2018, 194; Maillo, 2020, p. 206.
61 Hindelang and Hagemeyer, 2017, pp. 883-884.

or security is not *necessarily* prevalent if one or several of the catalogue factors or items apply. The consideration of other factors in the assessment of a threat to public order or security is not *barred*, either. Pertinently, the German legislature expressly stated that items under sec. 55a of the AWV are to be understood as 'especially *relevant* to investment review', 'especially safety-*relevant*', or 'cases in which an effect on public order or security is particularly *likely*'.[62]

In light of the above, it is difficult to perceive the non-binding, exemplary guidance of the Screening Regulation as harmonisation *stricto sensu* via EU secondary law with concretising effects on EU primary law.[63] Thus, the criteria formulated by the Court's rulings on the scope of the EU public order exception to the fundamental freedoms, including especially the *fundamental interest of society* requirement, remains unchanged by the Screening Regulation. Claiming to be a transposition of the latter, the First Law and the 17th Amendment Ordinance can go no further since, despite their discretion, the Member States have to keep within the boundaries of EU law with respect to public order or security.[64] An extension of the boundaries of the *ordre public*, and thus, the restrictive powers of the Member States in this field can thus not be observed. The Court may consider the catalogue factors (in the Screening Regulation) in further developing the – by its own account *dynamic* – concept of public order and security and these factors may raise awareness of the growing political sensitivity of expanding the scope of ISCMs, but by no means is it a 'carte blanche' to deviate from the pertinent fundamental freedoms to the detriment of protected investors.[65] A Member State authority (still) has to carefully determine and weigh the relevant facts of the individual case in its assessment (as it was administrative practice prior to the reform).[66] This process may prove to be particularly delicate and politically sensitive in cases where the BMWi is confronted solely with other Member State's public order or security concerns in the balancing process.

3.1.1.2. Catalogue Items

With the 2020/21 reform, the number of sensitive sectors under sec. 55a (1) of the AWV has grown considerably, to a total of 27 fields of operation of potential target companies. If a target company falls under any of the enumerated items, the legal consequences for the acquirer are twofold. First, any transaction above the relevant threshold must be notified to the Federal Ministry for Economic Affairs and Energy (*Bundesministerium für Wirtschaft und Energie* – BMWi or Ministry) (sec. 55a (4) AWV). The relevant threshold

62 BAnz AT of 30 April 2021, B2, p. 4 (emphasis added).

63 Hindelang and Moberg, 2020, pp. 1451–1454; different views Herrmann, 2019, p. 465; Klamert and Bucher, 2021, p. 338.

64 It would seem that this is also recognized by the legislature (cf. BT-Drucks. 19/18700, p. 18: 'The amendments leave the actual criterion of review – public order or security – untouched' (translation from German original by authors).

65 Hindelang and Moberg, 2020, p. 1452; on the question of the applicable fundamental freedom, see Klamert and Bucher, 2021, pp. 338-341.

66 For Germany: Stein and Schwander, 2020, p. 257; BAnz AT of 30 April 2021, B2, p. 4.

triggering review and the notification obligation is lowered to an acquisition of 10 or 20 per cent of voting rights, depending on the sector (sec. 56 (1) AWV). Second, an execution prohibition applies, which means that the transaction cannot go forward without approval (sec. 15 (3) and (4) AWG; in detail below Part 3.1.3).

The number of businesses captured by the catalogue in sec. 55a (1) of the AWV is significant. It can roughly be categorised by operators and developers of critical infrastructure including (digital) telecommunications, and producers of critical raw materials (no. 1-5, 7, 24-25); media companies (no. 6); developers and manufacturers of certain medical goods (no. 8-11); high-tech software and hardware developers and manufacturers (no. 12-18 first alternative, 20-23, 26); users, modifiers, developers, or manufacturers of dual use goods (no. 18 second alternative, 19); and certain agricultural operations (no. 27). Especially the technology-oriented items in no. 13-22 are described as critical by the legislature to the sustainability and resilience of the German economy in the future, either as key technologies for other industries or formative innovations for German and EU public welfare.[67] Further, a number of items intend to specify the broad language in art. 4 (1) of the Screening Regulation.[68] However, not all items in art. 4 (1) of the Screening Regulation were included in sec. 55a (1) of the AWV, either because the aforementioned legal consequences were deemed too far-reaching or because the items were already sufficiently reflected in the (pre-reform) law.[69] In any case, even the factors included only in art. 4 (1) of the Screening Regulation, for instance, the 'potential effects on [...] access to sensitive information, including personal data, or the ability to control such information' (item (d)), are perceived by the German legislature as indicative of a potential effect on public order or security.[70]

While sec. 55a (1) of the AWV is oriented towards the target company, the provision's third paragraph contains investor-related factors based on the model of art. 4 (2) of the Screening Regulation.[71]

Apart from serving as a trigger for the legal consequences mentioned above, the value and significance of the items provided in sec. 55a (1) and (3) of the AWV is sometimes doubtful. A third country investor, for example, acquiring a 25 per cent stake in a 10,000-hectare poultry farm does not have to notify the BMWi, but may be subject to an investment review (cf. sec. 55, 56 (1) no. 3 AWV). Curiously, the acquisition of less than 25 per cent would not even trigger a review. Now, an additional square centimetre would result in such notification obligation (and review, obviously) (sec. 55a (1) no. 27, (4) AWV), remarkably even if only a 20 per cent stake were acquired. Whether either

67 BAnz AT of 30 April 2021, B2, p. 5.

68 For instance, sec. 55a (1) no. 13, 15, 16 (a), 17, 20 concretize the parts of art. 4 (1) (b) of the Screening Regulation dealing with critical technologies like artificial intelligence, robotics, cybersecurity, aerospace, and quantum and nuclear technologies; sec. 55a (1) 14, 16 (b), 21, and 22 claim to concretize further critical technologies that are not expressly mentioned under art. 4 (1) (b) of the Screening Regulation.

69 BAnz AT of 30 April 2021, B2, p. 4.

70 BAnz AT of 30 April 2021, B2, p. 4.

71 BAnz AT of 2 June 2020, B2, p. 3.

acquisition scenario poses a threat to public order or security, perhaps the security of supply with foodstuffs, cannot be answered with reference to the catalogue item but only on an individual basis. The additional square centimetre can impossibly have a bearing for this assessment.

3.1.1.3. Economic Security?

The argument made above does not support government interventions based on economic or financial policies. Safeguarding an economy's 'crown jewels' from foreign ownership or grooming 'national champions' finds no footing in the – still valid – doctrine of the Court.

State-sponsored or even State-led investment schemes like Made in China 2025, a heavily funded industrial policy plan to update the Chinese manufacturing sector and establish China's self-sufficiency and technological leadership,[72] has raised the question of whether the defence against such foreign (economic) policies may justify encroachments upon fundamental freedoms. With a view to the Union's aims to 'work for [...] a highly competitive social market economy' and to 'contribute to [...] free and fair trade' (art. 3 (3) and (5) TEU) as well as the inclusion of 'a system ensuring that competition is not distorted' in the internal market (Protocol No. 27 on the internal market and competition), it has been argued that in a third-state context such defensive measures, based on (also) economic considerations, could – in contrast to the intra-EU context – be qualified by the Court as forming a part of public order or security.[73] Others have gone further and embraced the concept of national *economic* security as part of the EU's 'strategic autonomy',[74] allegedly also forming an exception to the freedom of capital movement in a third country context.

Whereas nations like the United States (US) have openly geared their ISCM towards State-led investment schemes,[75] the Union's approach is indirect. Instead of making it a review factor under art. 4 of the Screening Regulation, the EU has dedicated a mere recital to the issue: 'In [determining whether a foreign direct investment may affect security or public order], it should also be possible for Member States and the Commission to take into account the context and circumstances of the foreign direct investment, in particular whether a foreign investor [...] is pursuing State-led outward projects or programmes' (recital (13) sentence 2 Screening Regulation). This phrase is neither reflected in art. 4 of the Screening Regulation nor found in the AWV. While the

72 Wübbeke et al., 2016; Jungbluth, 2018.

73 Herrmann, 2019, p. 448.

74 Poljanec and Jaksic, 2020, p. 130. On the concept of strategic autonomy, see Sahin, 2021, pp. 349-351.

75 Cf. 50 U.S.C. § 4565 (m) (3) (A): '[T]he President [...] shall include in the annual report [...] an evaluation of whether there is credible evidence of a coordinated strategy by 1 or more countries or companies to acquire [US] companies involved in research, development, or production of critical technologies for which the [US] is a leading producer; [...]'. Whether the list of investment review factors in 50 U.S.C. § 4565 (f) will be read to capture 'national economic security' remains to be seen (cf. Bonnitcha, 2019, p. 647).

non-exhaustive language of both provisions would technically allow the consideration of this factor, it does not seem justifiable to let the mere existence of a state-sponsored investment regime suffice to void the foreign investor's fundamental freedom (if applicable). As suggested by the language of the Screening Regulation, the investor would at least have to 'pursue' the State-led program. In any case, in addition hereto, a specific and concrete risk to public order or security emanating from this particular investor and transaction would have to exist. To return to the abovementioned example, it is not clear how the acquisition of a 10,000-hectare (plus one square centimetre) poultry farm by a Chinese investor imperils Germany's public order or security for the sole reason that the Made in China 2025 framework exists.

In summary, even after the 2020/21 reform and despite the allusions of the National Industrial Strategy 2030, economic security in itself is still not a sanctioned motivation for administrative encroachments. Only individual and concrete dangers to public order or security can justify it. And although the differentiated catalogue of industries under sec. 55a (1) of the AWV may be suspected to – contra the Court's reasoning – generally strengthen the competitive structure of some of the listed sectors (namely those that do not qualify as 'services of general economic interest'), the non-binding and indicative character of the items as investment review criteria makes them *a priori* unsuitable to achieve this protective effect. For now, it seems that the German ISCM cannot be commissioned to pursue industrial policies.[76]

3.1.2. Bar on Administrative Intervention

In addition to the above, the First Law changed the standard of review from an *actual and sufficiently serious danger* to public order or security affecting a fundamental interest of society, to a test of *'likely to affect'* security or public order (sec. 5 (2) sentence 1 AWG, sec. 55 (1) AWV). This amendment too is inspired by the Screening Regulation, namely its art. 4. It aims at emphasising the forward-looking approach that is inherent in the investment review: an impairment of public order and security that has not yet occurred but is possible in the future because of an investment to be prevented.[77]

However, it does much more than that. The bar on government intervention – not only on initiating a screening procedure – is lowered in two respects: vis-à-vis the severity of threat, 'affect' takes the place of 'endanger'; and, simultaneously, vis-à-vis the likelihood of threat, a 'likely' rather than an 'actual danger' suffices. This ('downward') deviation from the Court's requirement of '*an actual and sufficiently serious danger*'[78] is problematic considering the grave implications for pertinent fundamental freedoms in case of a blocked or conditioned transaction. Considering the lack

76 The fact that the takeover of 50Hertz (above Part 2) was not blocked by the ISCM but by the acquisition of the shares in question by the *Kreditanstalt für Wiederaufbau*, a state-owned development bank (cf. Johannsen, 2018, p. 225), may be seen as evidence of the mechanism's resilience to usurpation.

77 BT-Drucks. 19/18700, p. 18.

78 Judgement of the Court of 14 March 2000, C-54/99, Association Église de scientologie de Paris, ECLI:EU:C:2000:124, para 17 (italics added).

of harmonisation by the Screening Regulation (Part 3.1.1.1), the significance of the 'likely-to-affect-standard' has to be limited to the relevant threshold for the activation of the coordination mechanism and the notification obligation therein,[79] because only the cooperation mechanism is established by the binding language of the Screening Regulation, so that '[i]t is important to provide *legal certainty* for Member States' screening mechanisms on the grounds of security and public order, and to ensure Union-wide coordination and cooperation'.[80] In contrast, the language concerning Member State ISCMs and especially the factors and criteria in art. 4 of the Screening Regulation are non-exhaustive, inspirational, and merely provided thus: 'to *guide* Member States and the Commission in the application of this Regulation' with 'a list of factors that *could* be taken into consideration'.[81] Against this background, it is doubtful whether the Court will accept undercutting its requirement for an *actual and sufficiently serious danger* as a bar on administrative intervention into the free movement of capital and freedom of establishment. In contrast, a lower bar on notification requirements and intra-EU administrative information exchange seems less invasive and proportionate in light of the threats and is thus not objectionable.

3.1.3. Prohibition of Execution

Stirring palpable upheaval among transaction counsel,[82] the 2020/21 reform made it illegal to consummate agreements between seller and acquirer (sale and purchase agreements – SPAs) that fall under the notification obligation and investment review according to the AWG/AWV, prior to the Ministry's clearance or lapse of the deadline to initiate a screening procedure (sec. 15 (4) sentence 1 AWG).[83] This prohibition extends both to transactions under sector-specific review and *notifiable* transactions under cross-sectoral review. The range of activities that qualify as consummation is extensive and *inter alia* includes the disclosure of information on the target company to the acquirer. To reinforce the prohibition, violations are criminalised (sec. 18 (1b) AWG).[84] By doing so, the prohibition needs to conform to constitutional standards for criminal law, especially the *nulla poena sine lege certa* principle.[85] Given the width of the prohibited actions under the first sentence in sec. 15 (4) of the AWG as well as the need to exchange certain company-related information in pre-signing stages, it remains

79 Hindelang and Moberg, 2020, p. 1453.
80 Recital (7) of the Screening Regulation (italics added).
81 Recital (12) of the Screening Regulation (italics added).
82 See, for instance, Besen and Slobodenjuk, 2020, p. 445.
83 Any agreement to consummate the SPA is provisionally invalid (sec. 15 (3) sentence 1 AWG). The SPA itself is, irrespective of a notification obligation, subject to a condition subsequent (sec. 158 (2) German Civil Code): Upon the timely decision to block the transaction by the BMWi, the SPA is invalidated (sec. 15 (2) AWG). The dichotomy between the SPA and its consummation is a consequence of the so-called separation principle (*Trennungsprinzip*, in detail see Füller, 2008, pp. 199 et seqq.).
84 Negligent violations are punished as an administrative offence under sec. 19 (1) no. 2 AWG.
85 Cf. art. 103 (2) Basic Law for the Federal Republic of Germany.

to be seen whether these standards are fully met by the reformed provisions.[86] The background for these rules are fears around 'gun jumping',[87] wherein the acquirer may, despite obligations to notify and stand still, extract information and technology from the target, thus possibly affecting public order or security.[88] In view of the legislature, the potential risk to public order or security emanating from transactions that must be notified is high enough to put them on hold during the screening procedure.[89]

■ *3.2. Other Changes*

The three main pillars in the reform as mentioned above were accompanied by minor amendments of the types of transactions falling within the ambit of the AWV (below Part 3.2.1), the procedural deadlines the Ministry has to comply with (below Part 3.2.2), and the roles attributed to the Ministry in the screening process (below Part 3.2.3).

3.2.1. Captured Transactions: Thresholds and Stake Expansions

Once again,[90] the acquisition thresholds triggering review and notification obligation were amended. For the cross-sectoral review,[91] the legislature tied the applicable threshold to the sector of the target company: those in the fields listed in sec. 55a (1) no. 1-7 of the AWV, namely sectors of critical infrastructure and media, are subject to a 10 per cent threshold; items no. 8-28, namely the rest of the sensitive sectors, are subject to a 20 per cent threshold; and all other acquisitions only come under the scope of application in case of a 25 per cent acquisition of voting rights (sec. 56 (1) AWV). Worth noting is also the new power of the BMWi to grant the approval of an acquisition subject to the condition to notify further below-threshold acquisitions (sec. 58a (3) AWV). By tying the scope of application of the ISCM primarily[92] to (in some cases, relatively low) percentage thresholds (to which even intermediately held voting rights are added in accordance with sec. 56 (4) and (5) of the AWV), the German lawmaker brought both third country non-controlling portfolio and controlling direct investment within the scope of the ISCM.[93] In turn, this places the legislation within reach and subjects it to the requirements of the freedom of capital movement (art. 63 (1) TFEU).[94]

86 Dammann de Chapto and Brüggemann, 2020, pp. 376-377; Barth and dos Santos Goncalves, 2020, p. 2510 remark that the obligation to notify (and thereby, the prohibition) could be triggered by memoranda of understanding preceding the signing of the SPA.

87 Dammann de Chapto and Brüggemann, 2020, p. 376.

88 BT-Drucks. 19/18700, p. 19-20.

89 BT-Drucks. 19/18700, p. 19.

90 The threshold was lowered before from 25 to 10 per cent in 2018 (see above fn. 15 and Mohamed, 2019, p. 770).

91 The uniform threshold is 10 per cent in the sector-specific review (sec. 60a (1) AWV).

92 Sec. 56 (3) of the AWV covers constellations in which foreign investors gain control over the target without acquiring above-threshold stakes.

93 Klamert and Bucher, 2021, p. 341. Critical on the attribution of indirectly held stakes is Böhm, 2019, pp. 117-118.

94 Cf. Hindelang and Moberg, 2020, p. 1450. On the notion of '(foreign) direct investment' see Hindelang, 2009, pp. 82-88.

Putting an end to a lively debate among practitioners,[95] the 17th Amendment Ordinance inserted sec. 56 (2) of the AWV, which captures the additional acquisition of voting rights by acquirers that already have an above-threshold stake. Additional acquisitions leading to or exceeding certain voting rights thresholds[96] have also to be notified (sec. 55a (4) sentence 1 AWV). The question was disputed because the acquirer had already, in the course of the first acquisition surpassing the respective threshold, fallen within the scope of application of the ISCM. Without picking up this debate, the lawmaker labelled this amendment as mere clarification.[97]

3.2.2. Standardised and Simplified Deadlines

The many deadlines and timeframes regarding (cross-sectoral and sector-specific) screening procedures have been simplified, standardised, and moved from provisions scattered in the AWV to a central one in sec. 14a of the AWG. Notifications and applications for a certificate of non-objection trigger a two-month deadline for the BMWi to act (i.e. to open up an investment review procedure).[98] In principle, the procedure can take up to four months.[99] Remarkably, the 2020/21 reform does not adjust the German ISCM, especially its deadlines, to suit the cooperation mechanism established by the Screening Regulation. Whereas practitioners are still somewhat concerned about the maximum duration of the screening procedure, the standardised deadlines have been welcomed for their transparency and legal certainty.[100]

3.2.3. Role of the BMWi

Another element of the 2020/21 reform subtly rebalanced the powers of the BMWi. Before the reform, the BMWi could block or condition transactions under cross-sectoral review only with the consent of the Federal Government.[101] Now, the Ministry requires this consent only to prohibit transactions, whereas conditions require the agreement of three federal ministries and the hearing of a fourth.[102] All interfering measures in

95 See Traugott and Strümpell, 2009, p. 191; Marquardt and Pluskat, 2009, p. 1316; Besen/Slobodenjuk, 2012, p. 2390; Hensel and Pohl, 2013, p. 854; Pottmeyer, 2013, para 22; Becker and Sachs, 2017, p. 1338.

96 20, 25, 40, 50, or 75 per cent in case of sec. 55a (1) no. 1-7 AWV; 25, 40, 50 or 75 per cent in cases falling under no. 8-27; and 40, 50 or 75 per cent in all other cases (sec. 56 (2) AWV).

97 BAnz AT of 30 April 2021, B2, p. 10.

98 Details below Part 4.1.

99 Details below Part 4.3.

100 Lippert, 2021, pp. 199-200; Barth and dos Santos Goncalves, 2020, p. 2511.

101 Sec. 59 (1) sentence 2 of the AWV of 2 August 2013 (BGBl. I, p. 2865), as last amended by art. 1 of the Ordinance of 19 December 2018 (BAnz AT 28 December 2018, V1).

102 See sec. 13 (3) in conjunction with (2) no. 2 (c), 4 (1) no. 4 and 4a of the AWG (Federal Foreign Office; Federal Ministry of the Interior, Building and Community; Federal Ministry of Defence; the Federal Ministry of Finance has to be heard). Formerly, according to sec. 19 of the Joint Rules of Procedure of the Federal Ministries of 30 July 2020 (*Gemeinsame Geschäftsordnung der Bundesministerien*, official translation available at https://www.bmi.bund.de/SharedDocs/downloads/EN/themen/moderne-verwaltung/ggo_en.pdf;jsessionid=7A85EABFD33C1DD5B80661552AEFA5C4.2_cid295?__blob=publicationFile&v=1 (accessed 12 June 2021)), the BMWi had to include those other ministries whose remits were affected by the transaction.

sector-specific review procedures require the aforementioned consent as well.[103] As was the case prior to the reform, the clearance of transactions falls within the sole responsibility of the BMWi.[104]

To comply with art. 11 (1) of the Screening Regulation, which requires Member States to establish contact points for the implementation of the regulation, the First Law assigned the BMWi the role of the national contact point.[105] The BMWi takes on prosecutorial responsibilities: Where 'gun jumping' occurs out of negligence, the Ministry assumes jurisdiction over the prosecution of regulatory offences (sec. 22 (3) sentence 3 AWG).[106]

Finally, the BMWi is also entitled to task trustees with the oversight and monitoring of conditions to transactions it has ordered or agreed upon with the parties to such transactions (sec. 23 (6b) sentence 1 AWG, sec. 59 (4) AWV).

4. Screening Procedure After Reform

The amendments described above have reshaped the screening procedure:[107] To determine the applicable investment review regime, the German ISCM differentiates between the *activity* of the target and the *nationality* of the investor:[108]

For investments in domestic companies in the *defence sector* (as defined by sec. 60 (1) sentence 1 no. 1 to 4 AWV) any such from *non-German investors* trigger the sector-specific examination under sec. 60 to 62 of the AWV if the acquisition gives the investor control over at least 10 per cent of the voting rights of the target (sec. 60a (1) AWV). Asset deals trigger review if non-German investors acquire a distinguishable part of the target operation or all essential operational resources necessary for the target's business activity (sec. 60 (1a) AWV). In sector-specific investment reviews, the BMWi investigates the effects of the transaction on the *essential security interests of the Federal Republic of Germany* (sec. 4 (1) no. 1, 5 (3) AWG).

Outside the defence sector, investments by *non-EU investors* are subject to cross-sectoral examinations (sec. 55 (1) AWV).[109] A review is triggered by the acquisition of voting rights of at least 10 per cent if the target company is or its operations are attributable to one of the sensitive sectors listed in sec. 55a (1) no. 1 to 7 of the AWV

103 Sec. 13 (4) in conjunction with (2) no. 2 (d), 4 (1) no. 1, 5 (3) of the AWG.

104 A fact now expressly enshrined under sec. 58a (1) sentence 1 of the AWV for cross-sectoral review. For sector-specific review, see sec. 61 sentence 1 of the AWV.

105 Sec. 13 (2) no. 2 lit. e) of the AWG.

106 See also Part 3.1.3.

107 Sec. 82a of the AWV stipulates that the provisions on investment review as reformed by the 17th Amendment Ordinance apply to transactions concluded on 1 May 2021 or later.

108 Barth and dos Santos Goncalves, 2020, p. 2507.

109 This includes investors who do not reside within the territory of the Member States of the European Free Trade Association (EFTA), see sec. 5 (2) sentence 3 AWG and sec. 55 (2) sentence 4 AWV.

(which, *inter alia*, includes operators of critical infrastructure[110] and related software developers, cloud computing providers above a certain threshold, high-impact media companies, and certain medical technology enterprises), of at least 20 per cent if listed in sec. 55a (1) no. 8 to 27 of the AWV, and of at least 25 percent in the case of any other target company that is not specifically listed (cf. sec. 56 AWV).[111]

The object of protection in cross-sectoral investment screening procedures is the *public order or security of the Federal Republic of Germany or of another Member State of the European Union* and *public order or security relating to projects or programmes of Union interest* (sec. 4 (1) no. 4, 4a AWG).

Sec. 62a of the AWV enables the BMWi to switch between cross-sectoral and sector-specific review procedures if it is found in the course of the review that the transaction falls within the scope of the respective other procedure.

■ *4.1. Notification or Other Knowledge*

Above-threshold investments or expansions of investments must be notified to the BMWi without undue delay after the conclusion of the SPA, unless the investment neither pertains to the defence sector nor the sensitive sectors (sec. 60 (3) sentence 1, 55a (4) sentence 1 AWV).[112] The direct acquirer is under an obligation to notify the BMWi (sec. 60 (3) sentence 7, 55a (5) AWV). Even acquisition vehicles incorporated under German or other Member State law may have an obligation to notify the BMWi.[113] The inclusion of indirect acquisitions can have far-reaching consequences. For example, if one-third of the shares in German company A are owned by Japanese company B, the acquisition of B by Russian company C falls under the purview of the German ISCM.[114]

Above-threshold foreign investments outside the defence and sensitive sectors may voluntarily be notified to the BMWi (cf. sec. 14a (3) sentence 1 AWG).[115] Such investors may, in accordance with sec. 58 of the AWV, also apply for a certificate of non-objection.[116]

110 As defined under sec. 2 (10), 10 (1) of the Act on the Federal Office for Information Security (*Gesetz über das Bundesamt für Sicherheit in der Informationstechnik – BSIG*) in conjunction with the Ordinance to Determine Critical Infrastructure in Accordance with the BSIG (*Verordnung zur Bestimmung Kritischer Infrastrukturen nach dem BSI-Gesetz*). According to this, critical infrastructure operators are certain enterprises in the energy, water, food, IT and telecommunication, health, finance and insurance, and transport and traffic sectors.

111 For the expansion of stakes, see Part 3.2.1.

112 Initially, the German ISCM did not include a notification obligation for transactions qualifying as cross-sectoral (cf. Schweitzer, 2010, p. 270). The BMWi had to rely on parties' voluntary notification or notification by other authorities (Pottmeyer, 2013, para 30).

113 Whether the requirements of sec. 60 (1) or 55 (1) of the AWV are met by the direct acquirer is immaterial (see also BAnz AT of 2 June 2020 B2, p. 4).

114 See Hensel and Pohl, 2013, p. 854; Seibt and Wollenschläger, 2009, p. 838.

115 Pottmeyer, 2013, para 30.

116 Cf. Traugott and Strümpell, 2009, pp. 189-190.

■ *4.2. Phase 1: Preliminary Investment Review*

Upon notification, the BMWi has two months to notify the acquirer and target if it opts to investigate the transaction (sec. 55 (3) sentence 1, 60 (4) AWV in conjunction with sec. 14a (1) no. 1, (3) AWG). This is often referred to as preliminary (or phase 1) investment review during which the BMWi determines whether the transaction is captured by the AWV and possibly poses a relevant threat to the relevant object of protection.[117] Phase 1 has three possible outcomes for notifiable transactions. First, the BMWi may open the main investment review, cf. sec. 55 (3) of the AWV.[118] Second, the Ministry can clear the transaction, cf. sec. 58a (1) of the AWV. Third, if it does not act within two months after receipt of the notification, the clearance is deemed to have been issued, cf. sec. 58a (2) of the AWV. This corresponds to the sector-specific review (sec. 61 AWV).

This regime is not applicable to investments that do not fall into the defence (cf. sec. 60 AWV) or sensitive sectors (cf. sec. 55a (1) AWV). Voluntary notifications cannot trigger clearance.[119] However, acquirers of such investments can apply for a certificate of non-objection.[120] If issued, the certificate will attest that there are no objections to the acquisition in terms of public order or security (sec. 58 (1) sentence 1 AWV). If the BMWi does not initiate an investment review within two months after receipt of the application, the certificate is deemed to have been issued (sec. 58 (2) sentence 1 AWV).

Where a voluntary notification is not made or certificate of non-objection has not been applied for, the BMWi has the power to initiate investment review *ex officio* within two months of acquiring knowledge of the SPA in keeping with sec. 14a (1) no. 1 of the AWG.[121] In lack of notification or other knowledge of the BMWi, this power – and with it the risk of investment review and rewinding after completion of the transaction – only expires five years after the SPA was concluded (sec. 14a (3) sentence 2 AWG).

■ *4.3. Phase 2: Main Investment Review*

If the BMWi so decides in due time, the transaction is subject to what is often referred to as the main (or phase 2) investment review.[122] In this case, the direct acquirer and target company have to be informed of the decision in an administrative act ('*Eröffnungsbescheid*', sec. 60 (4), 55 (3) AWV). Therein, the BMWi may discretionarily request further information or necessary documentation (sec. 14a (2) sentence 4 AWG) in addition to the documentation that must be submitted with the notification (sec. 60 (3) sentence

117 Pottmeyer, 2016, p. 271; Mohamed, 2019, p. 772.

118 Phase 2, below Part 4.3.

119 Sec. 58a (2) sentence 1 of the AWV requires a 'notification in accordance with sec. 55a (4)' of the AWV – a provision that only captures the sensitive sectors.

120 Following the 2020/21 reform, the certificate of non-objection is no longer available to notifiable transactions (sec. 58 (3) AWV). A certificate of non-objection would not free the parties to the transaction from the prohibition on execution (cf. sec. 14 (3) sentence 2 AWG and BAnz AT of 30 April 2021, B2, p. 11).

121 Stein, 2020, para 1.

122 Mohamed, 2019, p. 773.

4, 55a (4) sentence 4 AWV). Such requests may also be directed at all parties directly or indirectly involved in the transaction (sec. 14 (2) sentence 5 AWG).

Once the BMWi has received the documentation, the main investment review cannot, in principle, last longer than four months (sec. 14a (1) no. 2 AWG). Exceptions to this rule can be found in sec. 14a (4) and (5) of the AWG: An extension by three months is possible in case the individual investment review proves especially difficult on a factual or legal level; an additional, final extension by one month is possible if the defence or security interests[123] of the Federal Republic of Germany are affected and this is notified to the BMWi by the Federal Ministry of Defence within the three-month extension. Finally, the seller and direct acquirer may consensually agree to an extension of the deadline. The period for the main investment review is suspended if the BMWi requests additional information or documents (until they are fully submitted) or if the parties involved negotiate a contractual agreement with the BMWi (until negotiations are concluded) (sec. 14a (6) AWG).[124] At the end of the main investment review, the BMWi will either clear, block, or condition the transaction (cf. 61, 62, 58a (1), (3), 59 AWV).

■ *4.4. Cooperation Mechanism*

Whereas neither AWG nor AWV make provision for the European cooperation mechanism,[125] the direct applicability of the Screening Regulation impels to consider it a part of the reformed cross-sectoral[126] screening procedure. The cooperation mechanism requires Member States to notify the Commission and other Member States of any transactions undergoing screening as soon as possible (art. 6 (1) Screening Regulation). Potentially affected Member States and those with relevant information may issue comments to the screening Member State and shall inform the Commission thereof (art. 6 (2) Screening Regulation). If it has relevant information or deems that the transaction is likely to affect security or public order in more than one Member State, the Commission may issue an opinion in the sense of art. 288 (5) of the TFEU directed at the screening Member State (art. 6 (3) Screening Regulation). These rights must be exercised, in principle, within 35 days after the receipt of the notification by the screening Member State; additional information may be requested, and such a request can extend the deadline (art. 6 (6) and (7) Screening Regulation).

This procedure would seem to fit the case of a main investment review conducted by the BMWi because in this phase, it is not doubtful that the transaction is 'undergoing

123 On this term, see Art. 30 (3) sentence 3 of the Dir. 2009/81/EC of the European Parliament and the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ L 219, 20 August 2009, p. 76).

124 For a recommencement of the main investment review period, see sec. 14a (7) of the AWG.

125 Cf. BT-Drucks. 19/18700, p. 19; BAnz of 30 April 2021, B2, p. 1.

126 Owing to the Member States' sole responsibility for safeguarding their national and essential security interests (cf. art. 4 (2) Treaty on European Union (TEU); art. 346 (1) (b) TFEU), the cooperation mechanism only applies to the cross-sectoral review (as does the Screening Regulation as a whole).

screening' within the meaning of art. 6 (1) of the Screening Regulation. What remains unclear is the treatment of transactions that never leave the preliminary investment review phase. Is the BMWi required to notify such investments under the cooperation mechanism? While some authors believe that this is not the case,[127] the language of the Screening Regulation suggests otherwise. The trigger of the notification obligation under art. 6 (1) of the Screening Regulation – the 'foreign direct investment [...] that is undergoing screening' – is defined as 'a foreign direct investment undergoing a formal assessment or investigation pursuant to a screening mechanism', the latter being 'an instrument of general application, such as a law or regulation [...] setting out the terms, conditions and procedures to assess, investigate, authorise, condition, prohibit or unwind foreign direct investments on grounds of security or public order' (art. 2 (5) and (4) Screening Regulation). Not only does the Screening Regulation's wording differentiate between 'assessment' (German: '*Prüfung*') and 'investigation' (German: '*Untersuchung*'), it also consistently lets the 'assessment' precede the 'investigation', which is why the former can be understood to include preliminary screening such as the German preliminary investment review. In addition, the preliminary investment review is governed by laws and regulations, namely AWG and AWV, which formulate the terms and conditions such as strict deadlines and the required documentation (above Part 4.2). It is thus a 'formal' assessment within the meaning of the regulation. If only transactions that entered the main investment review phase were to be notified, the Commission and other Member States would not acquire knowledge of the majority of investments and would not be in a position to assess whether these are likely to affect security or public order or whether relevant information is available.[128] The effectiveness of the cooperation mechanism would not be ensured (cf. recital (23) Screening Regulation). This reading does not contradict art. 7 of the Screening Regulation, which applies to transactions that do not undergo screening. The provision maintains a scope of application, for instance in Member States without an ISCM, an ISCM which only covers particular sectors and – in the German case – investments that were not even preliminarily investigated by the BWMi, completed without its knowledge or fall outside the ambit of the AWG and AWV.[129]

127 Dammann de Chapto and Brüggemann, 2020, p. 375. Unclear the position of the BMWi itself, which cites the Commission as favouring the notification of all notified transactions while the Ministry only seems to notify the phase 2 investigations (see *Siebzehnte Verordnung zur Änderung der Außenwirtschaftsverordnung Verordnung der Bundesregierung (Kabinettsfassung)*, https://www.bmwi.de/Redaktion/DE/Downloads/J-L/kabinettsfassung-siebzehnte-verordnung-zur-aenderung-der-aussenwirtschaftsverordnung.pdf?__blob=publicationFile&v=6 (accessed 30 April 2021), p. 24).

128 As the Screening Regulation does not link the notification requirement to a 'screening mechanism', but to the process of screening, it includes any kind of *ad hoc* screening on a legal basis that is not specifically tailored towards FDI screening (Hindelang and Moberg, 2020, p. 1455). *A maiore ad minus*, it must include preliminary screening, which is specifically tailored towards FDI.

129 See Mohamed, 2019, p. 774.

As the cooperation mechanism and the screening procedure framework are not synchronised, the possibility exists that the Commission or another Member State may issue an opinion or comment after the BMWi clears a transaction, allows the deadline to initiate a main investment review pass either upon notification of an investment (for notifiable ones) or upon an application to issue a certificate of non-objection (for non-notifiable ones).[130] In order to withdraw or revoke any (deemed) clearance of a transaction in this setting, the BMWi would have to take action in a timely[131] manner and meet the applicable administrative procedural standards.[132]

5. Conclusion and Outlook

Of the numerous changes implemented by the 2020/21 reform, the widened scope of 'sensitive sectors', the notification obligation, and the prohibition on the execution of notifiable transactions falling under cross-sectoral investment review stand out. Without doubt, these changes, together with the cooperation mechanism, will lead not only to an increased workload for the BMWi but also provide the administration with yet another tool to intervene into processes that are actually governed by rational market forces. One may object saying that fortified ISCMs do not impede 'normal' or rational market processes (free of market failure) but rather aim to prevent political influence by foreign powers, which is very remote from the market rationale. As persuasive as this sounds in theory, in practice it must be shown that the mechanism does not degenerate into an instrument of dirigisme. Typical safeguards against market interventions according to political weather conditions, that is, judicial control, have thus far offered only weak protection for market participants in the present context of foreign trade and investment policy.[133]

On what this contribution would describe as a positive note for market participants, it was argued above that due to lacking harmonization by virtue of the Screening Regulation, the material criteria for review, namely public order or security, and bar on governmental intervention, namely actual and sufficiently serious danger, have not

130 See Lippert, 2021, p. 200; Mohamed, 2019, p. 774. This can also happen after the five-year deadline (sec. 14a (3) sentence 2 AWG) has passed.

131 Whether the one-year-deadline under sec. 48 (4) sentence 1, 49 (2) sentence 2 of the Administrative Procedure Act is 'overridden' analogously to EU state aid law (cf. Judgment of the Court of 20 March 1997, C-24/95, Alcan, ECLI:EU:C:1997:163) remains to be seen, see Lippert, 2021, p. 200.

132 Whether the decision of the BMWi can be withdrawn or revoked depends on a number of factors including whether the initial clearance (also in light of any information provided by the Commission or Member States) was lawful or unlawful, cf. sec. 48, 49 of the Administrative Procedure Act. Information that was available at the time of the BMWi's decision (or lapse of the deadline to initiate the main investment review), would normally not allow a revocation, but possibly a withdrawal (cf. Judgement of the Bundesverwaltungsgericht of 19 September 2018, 8 C 16.17, ECLI:DE:BVerwG:2018:190918U8C16.17.0, paras 18 et seqq.).

133 See generally Hagemeyer, 2020.

been altered or, more specifically, lowered by the various reforms of the German ISCM. A lowered threshold can only be observed regarding the notification obligations. The above outlined developments are likely to inform the debates on ongoing and future legislative changes in the ISCMs of Central and Eastern European countries which follow the German model.[134]

On a more fundamental level, both the quick concatenation of reforms in the German ISCM since 2017 as well as the many changes brought about by the 2020/21 reform demonstrate that the screening of foreign investment has become a highly politicised issue. The obvious convergence of cross-sectoral and sector-specific review procedures (to name only two alignments: the notification obligation and prohibition of execution) shows that it is becoming more and more difficult to separate security from economic and industrial policies and to prevent the usurpation of one by the other. This is a new development in the field of investment. Some may even call it a step back, at least from the perspective of German law, which has traditionally favoured a liberal approach to international economic policy and has been critical of political interventions into market processes.[135]

134 For Croatia cf. Poljanec and Jaksic, 2020, p. 133.
135 Cf. Bryde, 1996, paras 4-5, 13, 29, 45.

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TANJA KARAKAMISHEVA-JOVANOVSKA[1]

Fundamental Rights Seen Through the "Pluralistic Interpretive Box": The National, European Court of Human Rights, and Court of Justice of the European Union Perspective

ABSTRACT: *Interpretation, or the judicial understanding of the legal acts in the process of protection of the human rights, is becoming increasingly interesting and controversial, both from an aspect of the applied interpretation technique (which interpretation method is applied by the judge in a specific case and why), as well as from an aspect of the legal opportunism/legitimacy of the interpretation. It is a fact that so far, neither the European, nor the national legal theories and practice have offered coordinated systematic approach regarding the application of the legal interpretation methods, which often leads to different interpretation of the legal norms by the national and the European courts when applied in similar or identical legal situations for protection of the human rights. It is considered that the different interpretation of the legal documents by the judges endangers the protection of the human rights, but also the legal security of the citizens. Judicial discretion in choosing an interpretive method in a particular case by the national, or by the courts in Luxembourg and Strasbourg further complicates the already complex procedure of protection of human rights, which directly creates new problems instead of solving the existing ones. The "pluralistic interpretive box" is continuously filled with new and new cases from different approaches by different courts in the process of protection of human rights, which leads to increased scientific interest for a more detailed consideration of this issue.*

The growing scientific interest in the impact of the legal interpretation on the (non) equality of the human rights protection is the main reason for writing this paper, in which I will try to explain the connection between the three different, but still related issues encountered in the multilevel system of human rights protection in Europe. The first issue addressed in the paper concerns the most common methods of legal interpretation applied in the national and European court proceedings. The second issue concerns

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the search for a consistent answer to whether and how much legitimacy and legality the court decisions made by applying judicial discretion have when the interpretive method in judicial decision-making is chosen, and the third issue refers to finding an answer to the impact of such court decisions on the functionality and efficiency of the multi-level system of protection of human rights, that is, to what extent such court decisions have a positive or negative effect on the human rights protection. Given that each national court has its own instruments and techniques of interpretation by which the judges make their decisions, the need to study their causality and effectiveness is more than evident.

■ **KEYWORDS:** interpretative methods, principles, fundamental human rights, ECtHR, CJEU, Strasbourg Court, Luxembourg Court.

1. Introduction

The forms and methods of judicial and legal interpretation, as well as their optimal application, are becoming increasingly important in legal science and practice. Judicial discretion in legal interpretation sheds new light on the process of upholding national and international judicial jurisdiction and on the creation of new laws on human rights and freedom. Judges of courts, both at the national and international levels, through the application of correct interpretive methods and techniques in the process of protecting human rights, are increasingly becoming creators rather than enforcers of legal norms. Legal science increasingly speaks about *judocracy* and *judicial legislation* when aiming for human rights protection. However, citizens are only able to protect their human rights based on the interpretation of the legal norms by judges in courts. To address this dilemma, objective and impartial answers are yet to be found.

Judicial discretion in the interpretation of legal norms gives a new meaning, and sometimes, new content to these norms so often that citizens are forced to question who are the real legislators and the real enforcers of the law in a specific country, within a specific organization, or union of states? Do parliaments as legislators, in accordance with the principle of separation of powers, really create the law, or are they losing the *battle* to the executives in terms of judicial power? Judges, when asked whether they create new laws through the interpretation of existing legal norms, hardly ever admit that, through their judicial reasoning and discretion, they create *new* laws in the process of human rights protection. Academics, professors, analysts, and human rights experts, through their broader interpretations of legal norms, refer to the judges as 'drivers of the European legal train'.

Renowned academics and university professors are often cited as opinion makers in formulating the Strasbourg or Luxembourg judgments.[2] This known fact is disguised in the realm of interpretive methods and the need for their enhanced application. The use of the comparative method of legal interpretation in the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) has been criticized with regard to the rule of law.[3] The basic principle of the rule of law is the accountability in the use of power by obeying the law. Going by this definition, it can be said that the imbalanced judicial discretion in judicial proceedings is an arbitrary abuse of judicial power. Hence, there is a great need to analyze and determine the extent to which the method of comparative interpretation of the law is in accordance with the rule of law.[4]

Meanwhile, most human rights are established in a very generic and often imprecise manner, which raises the question of how to ensure the protection of fundamental rights when they are not well-defined? What happens in numerous cases under the scope of the protection of private and family life?[5] Should the difference in interpretation of this concept by the Strasbourg Court and the Luxembourg Court be particularly noted in terms of whether it also covers companies and legal entities, or is it applicable only to individuals? Does the protection of the freedom of association of citizens in civil associations include the right to protection not associated with any organization? Further, what about the freedom of religion? Does freedom of religion include the protection of all religions or only the religion of the believer? Does the protection of freedom of movement include the right, e.g., of a disabled person to have unimpeded access to a place or restaurant?[6]

The answers to the above questions are almost always inaccurate and can be viewed through the prism of many factors, depending on the national case-law or

2 For instance, the ECtHR, over the past three decades, relied on the comparative analysis prepared by legal scholars and professionals or by research assistants from several European and non-European countries in the civil and common law jurisdictions and international law. Extensive comparative analyses are possible when the principle of evolutive interpretation is applied. In these cases, the court explicitly wants to draw attention to the existence or absence of any concrete developments in the field. This was the case, for instance, with respect to the legal position of transsexuals in several cases: *Rees v. the United Kingdom, ECHR (1986); Cossey v. the United Kingdom, ECHR (1990); Sheffield and Horsham v. the United Kingdom, ECHR (1998); Christine Goodwin v. the United Kingdom, ECHR (2002); I. v the United Kingdom, ECHR (2002).*

3 Based on academic discussions, two main conceptions of the rule of law emerge: the substantive and the formal conceptions. The differences between these conceptions are that formal theories focus on the proper sources and forms of legality, while substantive theories also include requirements about the content of the law. See: Craig, 1997, pp. 467–87.

4 In the case-law of the ECtHR, the comparison is carried out randomly and is interpreted arbitrarily.

5 Lawson, 1994, pp. 219, pp. 250. The CJEU interpreted Art. 8 of the ECHR narrowly in that this provision was only 'concerned with the development of man's personal freedom and may not, therefore, be extended to business premises'.
European Court of Justice, 1989, ECR 2859, at para 18. See: ECtHR, 1989.

6 Dzehtsiarou, 2011, pp. 534–553.

judicial reasoning in the interpretation of the law. Carozza (2004)[7] presents an interesting position, which responds to the views of De Burca and Eeckhout, that this debate is not about human rights, but about the need to strike the right balance between human rights protection at the European level on the one hand, and respect for the autonomy of EU member states on the other.

Inaccuracy and lack of clarity in legal regulations lead to a greater probability of judicial interpretations in a way closest to the subjective judicial understanding and as a specific interpretive method of a legal norm. If, according to the judge, the text of the legal norms is not precise, then based on the national and European case-law, the right to judicial discretion is exercised based on its interpretation. This possibility has led to the dilemma regarding legal interpretation and its (non) justification, that is, the logical question of *how* the judge arrived at a particular interpretative court decision.

The answer to this question can be analyzed in two stages: the first is the heuristic part of the process related to the application of a different method of interpretation in a similar or the same case depending on the judge's assessment, and the second is related to the court decision and the reasons for the same. The reasons are mostly related to the judicial elaboration of the legal arguments used to explain the court's decision. The legal arguments facilitating court decisions are subject to evaluation and analysis by other judges, academics, experts, legislators, and the general public to strengthen or criticize the legitimacy of the court decision.

Judges often draw legal arguments based on legal acts, such as conventions, pacts, and agreements. However, many legal arguments are not derived from written legal acts, but from internationally recognized principles, and sometimes, from political and pragmatic interests, particularly to protect social or economic interests. These loosely defined principles, customs, and constitutional conventions can cause serious threats to the synchronicity of judicial practice, especially when judges employ subjective approaches to address human rights protection.

2. Interpretation and application of law in the judicial protection of human rights

Before discussing the application of interpretative methods in national and European legal practice, it is important to emphasize the differences in legal theory and the principles and methods of legal interpretation. This difference is best analyzed in the German Constitutional Court, which classifies basic human rights based on principles rather than rules. In my opinion, this position can pose a direct threat to human rights because if they are viewed as principles and not as rules, the importance of human rights in democratic societies is undermined. It is interesting to note that in international legal literature, as well as in national and European court practice, there is no

7 Carozza, 2004, pp. 35–59.

common approach to the legal terminology being used. Each author and judge can view an interpretative approach either as a method or as a principle, although the two words are not synonymous.

The key difference between a method and a principle is that the interpretative method defines the technique employed by the judge to present legal arguments in support of the court decision for passing the verdict. The interpretative method is a tool used by the judge to make a subjective court reasoning objective, by which they verify the court's decision. In other words, the method aims to explain to the parties in the process, and to the public in general, the legal facts and arguments based on which the judge passed the decision. Unlike the interpretative method, the interpretative principle does not aim to explain the reasoning technique behind the court decision by analyzing the legal norms used but aims to explain the essence of the legal norms in general, that is, the goal of the agreement, convention, or pact. For this reason, the courts in Strasbourg and Luxembourg do not view the comparative and teleological interpretation of a law as a principle, but as a method.

Another important issue is the difference between the interpretation phase and the phase of application of human rights in the court process. In the first phase, the judge defines the meaning, range, and essence of human rights or freedom as a means of protection—e.g., whether the concept of protection of private and family life also covers the right to protection of a certain personal hobby, and how broad is the scope of this protection. In the second phase, the judge has an obligation to determine whether that human right or any other segment of the law is truly violated or not. Both phases play an important role in the judicial process, although the present study highlights that the interpretative phase is more abstract compared to the more specific applicative phase.

The abstract character of the interpretative phase is because the judge, through court practice, as well as, through applied legal theory, determines and formulates the *content and range* of human rights and freedoms, while the applicative phase is reflected in the position of the judge on whether there is a violation of human rights. In the applicative phase, the meaning of the legal arguments and facts presented to the judge to decide the course of the verdict occupy a dominant place. Broadly speaking, the applicative phase decides whether the restrictions on human rights are determined by a law or convention on human rights, whether these restrictions are legally justified, and whether they are in accordance with the democratic values in society.

Although viewed separately, both the interpretative and applicative phases are complementary and interrelated. The interpretative phase places emphasis on the scope and content of human rights and freedoms, which are subjects for court protection. Meanwhile, the applicative phase determines whether certain aspects of human rights have been violated in a specific court case through the application of legal arguments and facts. Given that these two phases have different scopes of activity, different interpretation methods can be applied within their use. While the teleological, textual, and autonomous methods of interpretation are more common in the interpretative

phase, the applicative phase is more dominated by the techniques of interpretation, such as the margin of appreciation and the balance of rights, as well as the interests of the other.[8]

As such, the primary difference between the two phases is that the interpretative phase aims to secure an equal and uniform judicial approach in explaining the essence of a certain human right or freedom that is protected by national and international laws. The margin of assessment plays an important role in the applicative phase, especially in the protection of national character when determining the content and boundaries of protection of a certain human right. However, the margin of assessment should not be applied during the interpretative phase.

The main criticism addressed toward judges in the application of an interpretative method when passing their verdicts is the imprecision and lack of clarity on the legal arguments in the application of EU laws or the CoE (Council of Europe) law (primarily the European Convention on Human Rights (ECHR)). Instead, court decisions must not only aim to find the most specific legal solution in a given case but also serve as guidelines for a better understanding of the European stand on human rights. The courts in Strasbourg and Luxembourg play a key role in utilizing existing laws and setting new legal standards for the protection of human rights and freedoms. The two courts have the legal obligation to pass well-grounded, well-explained, and righteous decisions that can provide practical guidance on how to protect human rights and freedoms at the national level.

Bearing in mind this mission, national authorities and the public must persuade European courts to make decisions that uphold the legal foundation of the society. In fact, the most important goal of the legal decisions passed by European courts is to be persuasive by using legal arguments and detailed explanations acceptable to national authorities and the public. However, the use of interpretative methods by judges can lead to informed legal decisions when it is clear that both courts share the position that

8 'The determination of the margin of appreciation in the ECtHR has been combined with two principles of interpretation: evolutive and autonomous interpretation. It has been argued that these principles contradict each other and the doctrine of margin of appreciation. Theoretically, evolutive interpretation means that the interpretation of certain terms of the Convention might change over time in accordance with changes in European (or other) societies; a comparative exercise is thus inherent in this principle. An evolutive interpretation was invoked, for instance, in the *Sheffield case* with respect to the use of "protection of morals" as a justification ground. The Court established that at the time when the dispute took place, no evolution was discovered concerning the public acceptance of transsexuals. Specifically, it said, 'the Court is not fully satisfied that the legislative trends outlined by amicus suffice to establish the existence of any common European approach to the problems created by the recognition in law of post-operative gender status'. Since there was no evolution in this field, the margin of appreciation given to the respondent state was considered to be broad. In contrast, autonomous interpretation emphasizes that the Convention constitutes a legal order that is different from that of the contracting states. Thus, in principle, comparison becomes unnecessary. The Court has also looked for a common position in several cases in which it based its arguments on the principle of autonomous interpretation. In the *Sunday Times* case, for instance, the Court argued that 'the expression "authority and impartiality of the judiciary" has to be understood "within the meaning of the Convention"'. See: Ambrus, 2009, p. 358.

judicial decisions cannot be based only on the subjective persuasion of judges, but on objective parameters as well.

Although judges have the right to analyze an existing law, they do not have the right to create a new law or modify the existing one. At present, it is difficult to draw a fine line between the interpretation and application of law. Keeping in mind that the fundamental rights in the constitutions are very broadly and, quite often, imprecisely defined, judges may face a very broad spectrum of subjective interpretation, which often comes under serious criticism by the scientific and judicial public.

Thus, the methods of legal interpretation need to be applied by judges very carefully and only in extraordinary circumstances when there is a justified reason to do so. In my opinion, judicial reasoning must not be the only source for drawing legal arguments but should always be used as an auxiliary tool to strengthen the legal background for passing judicial decisions. Lately, however, legal interpretation by judges is highly common, which if applied without control, distorts the very meaning of law by enhancing judicial discretion in the application of the law.

This controversy becomes particularly visible when comparative interpretation is applied, considering that in each specific case, it is easy to find comparative data to support the position of the judge in the given case. The rich scientific and professional archive, as well as the national/European judicial and scientific case-law provide a solid basis for judges to undertake comparative analysis and draw subjective opinions when applying the law.

As a result, there might be a high scope for manipulations, which certainly harms the righteousness of the protection of human rights and freedoms. Pragmatically speaking, this scope for manipulation is much broader in European courts (CJEU and ECtHR), considering that the national differences in the application of law can sometimes be of a controversial nature. For this purpose, this study will analyze the experiences of European courts and the problematic aspects derived from the application of interpretative methods.

3. CJEU and interpretation methods: Experiences and controversies

Constitutive agreements in EU law allow the interpretation of the legal provisions by the CJEU (Court of Justice of the European Union), thus pointing out its focal place in the process. However, these agreements do not contain a provision that specifically outlines the use of compulsory interpretative methods by the Court. This absence of a single uniform approach in the use of interpretative methods leads to widespread judicial discretion and free judicial choice based on the views of the judge in the EU legal order. However, is the Luxembourg court truly moving in line with the protection of the EU legal order, or perhaps it chooses its direction for other reasons?

A wise and informed interpretation of the legal agreements and other provisions is an important competence of the highest EU court, which is often achieved through a

preliminary ruling procedure[9] as determined in Art. 234 of the EU Treaty. Meanwhile, the application of the interpretation is linked with the lower courts in the EU and, of course, the national courts of the EU members.

Lately, the Luxembourg court has grown into a decision-making court for the protection of fundamental rights in Europe due to the different interpretations of the concept of "minimum standard" concerning the protection of these rights. Art. 53 of the ECHR and Art. 53 of the Fundamental Rights Charter, although considered identical, contain a crucial difference pertaining to the obligation to respect the principle of primacy of the EU law. Based on this principle, the Luxembourg Court has a wide scope for applying the Charter in accordance with its own interpretation. Although it was believed that the national constitutional courts would oppose this new development, the opposite occurred. The German, French, Italian, Austrian, and Belgian constitutional courts agreed with a few interpretations made by the Luxembourg court and applied them as a standard in their work,[10] which practically increased the scope of the application of the Fundamental Rights Charter with regard to the ECHR.

To date, EU member countries have the right to call on national legal acts as part of fundamental rights protection if these acts provide the highest standards of protection without violating the key principles of the EU law—supremacy and effectiveness—as well as, the unity of the Union. The EU Court of Justice mainly uses three interpretation methods, although other methods are also applied. These are textual,[11] systematic, and teleological methods of interpretation. The textual method focuses on the interpretation of the text of the legal provision by analyzing the words it contains. The systematic interpretation method aims to highlight the context of the legal provision, while the teleological method, also known as the functional method, aims to determine the interpretation of the legal provision that will best achieve the goal of that provision.

9 It is interesting to mention that the Strasburg Court first promoted this principle in 1964. In 1993, the European Commission of Human Rights strongly encouraged national courts to make preliminary references to the ECJ (case *Soc. Divagsa v. Spain* (12.5.1993) *and Fritz and Nana S. v. France* (28.6.1993). The Strasbourg Court took over several advancements of the ECJ case-law, e.g., with regard to self-incrimination, the right of having a name, or the right of keeping one's state of physical health a secret. The ECtHR has also used references to EU law and the ECJ's case-law to operate reversals of case-law (December 1999 in the *Pellegrin v. France case*), *Goodwin v. United Kingdom case* (11.07.2002).

10 The PSPP-judgment of the *Bundesverfassungsgericht*, the Austrian *Verfassungsgerichtshof*, the Belgian Constitutional Court, the French *Conseil Constitutionnel*, the Italian *Corte Costituzionale,* and lastly the same *Bundesverfassungsgericht* in the *Right to be Forgotten I* & *II* issued in November 2019, have adopted the European fundamental rights in their interpretation of the CJEU as a standard of review for their own proceedings.

11 In the literature, it is generally assumed that the CJEU employs the textual method of interpretation, on occasion applying it to show the limits of its own competence. Some authors consider that the textual method of interpretation is the main method of interpretation employed by the CJEU. The main focus in the literature, however, is to show the limits of the textual method in the case-law of the CJEU.

The three most frequently applied interpretation methods introduced by the Strasburg Court presumed that they had to be taken into account by all EU and national institutions. This position of the Court was clearly mentioned in 1963, in the case *of Van Gend & Loos,*[12] where the Court of Justice viewed the spirit,[13] content, and text of the legal provisions, which led to the principle of the direct effect of the EU Law. The Court ruled that 'the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subject of which comprises not only member states but also their nationals. Independent of the legislation of Member States, Community Law therefore not only imposes obligations on individuals but is also intended to confer upon them rights, which become part of their legal heritage'.

This principle was in agreement with the realization of Art. 31, para. 1 of the Vienna Convention on the Law of Treaties: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.[14] The Vienna Convention limits the teleological method of interpretation by giving primacy to the text, which means that the object and purpose cannot be invoked to contradict the text. In addition to the above-mentioned methods, and of equal importance but certainly not of less importance, is the comparative method of interpretation, through which the Court considers the directions and standards of international law and practice for human rights protection, as well as, experiences drawn from the constitutional traditions of EU member states. The comparative method also often calls on the laws of EU members.

The comparative analysis of the national regulations in human rights protection can help European courts verify the legal grounds for their decisions that could cause disagreements. However, this method can cause certain difficulties in terms of reducing the credibility of judges and European courts in general. In the protection of human rights, the EU Court of Justice highlights the case-law of the ECtHR, the importance of the ECHR, the International Pact for Civic and Political Rights, and other international legal instruments. The case-law of the U.S. Supreme Court also has a very strong influence on human rights protection, although in cases that concern federalism, homosexuality, and death penalty, except certain references drawn from EU law, the U.S. Supreme Court has not quoted any other decision of the EU Court of Justice.

The Luxembourg Court is often criticized for its unclear reasoning. E.g., Prof. Von Bogdandy criticizes the Court for broadening its scope on certain rights without a strong legal justification. According to him, the key role of the Luxembourg Court is to secure coherent and harmonious application of EU law in the Union. Based on the well-established jurisprudence of the EU Court of Justice, national courts are, in

12 Bermann, 2002, pp. 239–242.

13 The CJEU refers to the spirit of the treaty as one of the main considerations for the Court when determining the scope of a provision.

14 Art. 32 of the Vienna Convention emphasizes on the preparatory work (*travaux preparatoires*) of a treaty as an additional interpretation tool, which is not used as an auxiliary instrument in cases related to interpretation of agreements, but as a preparatory activity.

turn, under the obligation to interpret national norms, so far as possible, in a manner consistent with EU law.

As the *Cilfit case* points out,[15] national courts must bear in mind some factors when interpreting or applying EU law: 'EU law uses terminology, which is peculiar to it. Legal concepts do not necessarily have the same meaning in EU law and in the law of member states. Every provision of EU law must be placed in its context and interpreted in light of the provisions of EU law as a whole. National courts, when interpreting or applying EU law, are obliged to adopt the same methods of interpretation as the Court of Justice'.

In the absence of a relevant case-law of the CJEU, it is entirely legitimate that national courts should regard the views expressed by other national courts on questions pertaining to EU law. This approach is conducive to the harmonious application of EU law in all member states. It is also consistent with the *Cilfit case* and the notion of *acte claire* as a ground for declining to make a reference pursuant to Art. 234.

4. Divergent interpretations of fundamental rights by the CJEU and Strasbourg-Luxembourg Courts

The disparities in incorporating the ECHR in the EU legal system have led to a number of challenges in the protection of fundamental rights within the Union. The ECHR is part of the EU legal system through its incorporation into the constitutions of member states, and its importance in human rights protection has never been disputed. However, the CJEU is quite rigid when it comes to the protection of "the particular characteristics of EU law", and the need for special interpretation and application of fundamental rights within the EU.

According to the Luxembourg Court, the ECtHR should not be able to 'call into question the CJEU's findings in relation to the *ratione materiae* of EU law', which could naturally include the interpretation of fundamental rights.[16] This statement undoubtedly points to a disparity in issues that originate from EU law and the free judicial interpretation of the protection of fundamental rights determined in accordance with the Charter. The case-laws of both courts contain several different interpretations of fundamental rights based on the EU Charter on Fundamental Rights and the ECHR.[17] This paper highlights several important cases. E.g., the CJEU has established that violations of fair trial guarantees could not be invoked as grounds for denying the execution of the European Arrest Warrant (EAW),[18] while the ECtHR follows a different approach

15 *SRL Cilfit v Ministry of Health C-283/81* [1982] ECR 3415.

16 Opinion 2/13 *Draft Agreement on Accession of the European Union to the ECHR, (paras 183–186).*

17 The Zolotukhin judgment precisely highlights the different perspectives of the Luxembourg and Strasbourg Courts to the realization of the *Ne Bis in Idem rule* at the European level.

18 CJEU, C-399/11 *Stefano Melloni v Ministerio Fiscal*, paras 38, 44, 46, 63 and operative part; CJEU, C-261/09 *Mantello* [2010] ECR I-11477, para 37; CJEU, C-123/08 *Wolzenburg* [2009] ECR I-9621, para 57, Dec. 13032011 *Poinika Chronika* 2012, 494, Areios Pagos.

in similar cases where a violation of Art. 6 of the ECHR amounts to a "flagrant denial of justice".[19]

To simplify, the established standards for the protection of fundamental rights based on the Charter on Fundamental Rights cannot be a subject of divergent interpretations in the interest of higher human rights standards, even if they are determined by the ECtHR or other international instruments of law. This rule corresponds with the principle of supremacy and effectiveness of EU law, as presented in the *Melloni* case.[20]

In this case, the Luxembourg court managed to secure a protective clause in Art. 53 of the Charter. Another example of divergent textual interpretations of the two courts is Art. 52, para. 1 of the Charter. A textual interpretation highlights the difference between the "absolute" and the "qualified" rights as determined in the Charter as redundant, bearing in mind that the EU legislator has the right to impose restrictions on both types of rights in the interest of the EU's protection and the demands for its greater safety and efficiency. Therefore, it is considered that Art. 52, para. 1 of the Charter can serve as a basis for additional restrictions on fundamental rights beyond those that the Strasburg Court considers necessary in a democratic society.

The disputes and tensions that occur between the two courts in the understanding and interpretation of legal norms are particularly visible in the area of criminal law, especially in instances of violations of the secondary EU law by an EU member country that threatens certain fundamental rights protected within the ECHR. The problem becomes more complex when the issue is reviewed within the preliminary ruling procedure by the Luxembourg Court, which is defined in EU law as 'the keystone of the judicial system of the EU'.[21]

These tensions further escalate when a decision of the Luxembourg Court is different from that of the Strasbourg Court based on an initiative for individual action by any physical person or group of citizens. In a case where the ECtHR, in considering whether that law is consistent with ECHR, had to provide a particular interpretation from among plausible options, there would most certainly be a breach of the principle that states that the Court of Justice has exclusive jurisdiction over the definitive interpretation of EU law. However, the CJEU is not obliged to follow the directions of the Strasbourg Court when it comes to the protection of EU law's supremacy and efficiency.

Additionally, even if the Luxembourg Court passed a decision in a preliminary ruling procedure, Art. 53 of the ECHR can create further impediments, considering that it reserves the right of the states to establish higher standards for the protection of fundamental rights, contrary to what has been decided by the Luxembourg Court when

19 ECtHR, *Soering v. UK*, no 14038/88, Series A-161, para 113; ECtHR, *Al-Saadoon and Mufdhi v. UK*, no 61498/08, ECHR 2010, para 149; ECtHR, *Othman (Abu Qatada) v. UK*, no 8139/09, ECHR 2012, paras 258–260.

20 CJEU, C-399/11 *Melloni para 60*; Opinion of Advocate General Bot, C-399/11 *Opinion Melloni* paras 102–114, 124–137.

21 Opinion 2/13 *Draft Agreement on Accession of the European Union to the ECHR,* para 176.

quoting Art. 53 of the Charter. There is also a situation where the Strasbourg Court demands the application of higher standards in the protection of human rights without considering the specifics of the EU law, which points to the possibility of divergent interpretations of the law. Considering that Protocol 16 of the ECHR does not liberate the national court from the obligation to address a preliminary question according to Art. 267 (3) of the Treaty on the Functioning of the European Union (TFEU), the referring court could find itself in the awkward position of having to decide which European Court to refer the question to, or if it could refer it to both Courts simultaneously.[22] What happens with the legal equality of citizens and the efficient protection of human rights in such cases?

5. Interpretative principles of the ECtHR: Strong narrative without a major impact?

The ECtHR has an interpretative mechanism created as a result of the different interpretations of the ECHR by the national courts in light of the principle of subsidiarity. As stated many times thus far, the ECHR is an instrument that is interpreted differently in accordance with the principle of consensus among the CoE member countries. The consensus on the interpretation of the ECHR has the goal of securing uniform access of the CoE member countries to the legal framework regarding human rights protection. In addition, the principle of consensus aims to justify the broad margin of appreciation as determined by the member countries in cases where consensus is impossible to achieve.

It is well-known that the ECHR often employs the comparative method of interpretation in order to support its arguments.[23] Although this type of interpretation can be considered a "common European standard", it can cause major inconsistencies in the application of the ECHR, considering that it does not include a definition or a criterion for its use.

22 See: *Ioannis Kargopoulos,* 2015, pp. 96–100.

23 The comparative method is not always consistently applied by the Court in the process of sourcing legal arguments in specific cases. In the Court's practice, we can find examples where the comparative method was considered critical in establishing legal arguments (such as in the *Odièvre v. France case, ECHR (2003))* concerning the question whether one can obtain identifying information about one's natural family in the case of anonymous child abandonment. In another example, the Court did not apply this method (in the *Öllinger v. Austria case, ECHR (2006*)) concerning the conflict between the right to peaceful assembly and the right to manifest one's religion, or in *Pini et al. v. Romania case, ECHR (2004*) concerning the conflict between the applicants' right to develop family ties with their adopted children and the children's interests. In the *Stoll v. Switzerland, ECHR (2007) case* concerning the applicant's conviction for 'secret official deliberations' as an alleged violation of his right to freedom of expression, a comparison was carried out. No comparative considerations were brought up, for instance, in the *Vereniging Weekblad Bluf! v. the Netherlands, ECHR (1995) case,* in which the seizure and subsequent withdrawal of a particular issue of a journal was at stake.

Therefore, we can conclude that the Strasbourg Court, similar to the Luxembourg Court, does not provide a precise guideline or framework for the use of interpretative methods. This drawback is also present in the doctrine of margin of appreciation, which emphasizes the use of interpretative methods and principles, but at the same time, does not provide guarantees for a uniform standard for application of the Convention.[24]

Although it is clear that the creation of a "uniform standard" of human rights is a slow and complex process, the absence of consensus among the member countries on sensitive issues justifies the broad application of the margin of appreciation, except when it comes to issues regarding discrimination.

6. Conclusions

Based on the above discussion, we can draw several conclusions regarding the application of interpretative methods in the practice of the two European courts. First, the European legal system does not offer a single systematic theory for a uniform understanding and implementation of legal interpretation methods at the national and European levels. The absence of an objective procedure leads to the application of divergent interpretative methods in the same or similar cases at national and European fundamental rights protection courts, which endanger individual freedoms and the overall legal framework of the society. As such, it is pertinent to maintain the same standards of interpretation and application of fundamental rights.

Given that there is no unified or common approach to the use of legal interpretation methods by the national or the Strasbourg and Luxembourg Courts, the application of legal interpretation of fundamental rights protection cases depends on judges' discretion, which could create subjective and biased judicial decisions in specific cases. Additionally, it is acceptable to have a system of uniform substantive law in the same language within the EU. To create such a uniform concept, member states must give up their own legal language. This approach will be applicable in national courts too, considering that the application of EU law is under crisis due to inconsistent terminology.

The idea that judicial creativity should only be present in activist or pro-integration decisions and not in cases where the Court decides to remain within the boundaries of existing legal norms, and its case-law is a plausible way of navigating the complexities of legal interpretation and directing judges on how far they can apply the methods of legal interpretation. Judicial creativity in activist or pro-integration decisions could be considered the margin of appreciation in the legitimacy of the judges' judicial discretion in using methods of legal interpretation. In cases outside of this framework, the method of interpretation based on the subjective assessment

24 In this direction, an example with a definition of the beginning of life is *Vo v. France* (GC), 53924/00, 8 July 2004).

of the judge might lead to legal uncertainty and pose impediments to the protection of fundamental rights.

Given that judges in Europe are not held accountable by any EU institution, the arbitrary interpretation methods used by judges can lead to a chaotic legal and human rights situation. This is one of the primary reasons why academics and scholars persist on this issue and aim to find a proper solution for creating a framework for defining and limiting of judges' discretion in selecting a method of interpretation in certain cases. The current case-law framework leaves scope for possible judicial voluntarism that could cause serious legal consequences at the European level as seen in a number of cases.

The methods of legal interpretation refer to the judge's approach to written legal materials (such as legislation or precedents) and, more generally, the way the legal argumentation is prepared based on general legal principles or canons of legal reasoning. Interpretation of unwritten materials where pragmatic, and sometimes, political reasons hide behind the judge's chosen method of interpretation is a question of great concern.

Do we have the legal right to talk about rethinking legal interpretation in the present situation of divergent judicial practices and inconsistent case-laws? We can revisit to the positions determined in the maxim: '*interpretatio cessat in claris'* and demand that the European and national courts use the methods of interpretation restrictively and only in cases when they face a confusing legal text. Thus far, the practice denies the opinion presented by Lasser that the CJEU follows a meta-teleological approach, which 'refers to a particular systemic understanding of the EU legal order that permeates the interpretation of all its rules.'[25] According to the author, this meta-teleological approach tries to identify the *"constitutional telos*" or constitutional goal of the EU, which may 'provide a thicker normative understanding of the law beyond the decision in the case [at] hand'.

However, what does "*constitutional telos*" of the EU truly mean and can it be sustained through the application of different methods of interpretation by the CJEU?[26] This question has led me to propose a new approach and "a new vessel that will sail on the open European sea". Building this new boat on an open sea, to borrow an expression from Jürgen Habermas, may be a necessary project, however difficult it may be. The CJEU may need to take up the task of providing justifiable answers to questions without obvious answers since judges have taken the position of legislators, which de facto, they are not.

25 Lasser, 2005.

26 Rasmussen, 1986; Neill; Hartley, 1996.

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DÁVID KAŠČÁK[1]

Area, Extent, and Restriction of Fundamental Rights During the Special Legal Order, with Exceptional Regard to the Epidemiological Situation in the Territory of the Slovak Republic

ABSTRACT: *The Slovak Republic, as other countries around the world, was affected by the coronavirus pandemic in the first half of 2020. This epidemiological situation has had a substantial social impact on the basis of which it was necessary to take measures that affected the daily lives of individuals. To prevent the spread of the coronavirus, states have often been forced to apply restrictions that were on the verge of acceptance in terms of respect for fundamental rights. Interference with such sensitive issues as fundamental rights and the adaptation of urgent and immediate measures to minimise the spread of the coronavirus had to be effective and conform to the requirements of balance and mutual proportionality. In 2020, the Slovak Republic, as many countries, faced difficulties in the fight against the coronavirus. This paper focuses on this global problem, the steps taken by government officials in the Slovak Republic, and the theoretical basis for respecting and exercising fundamental rights in this area. The aim of the introduction of this professional article is to present the anchoring of fundamental rights and freedoms in the context of revolutionary events. The purpose of the remaining portions of this expert article is to explain and analyse the related and most discussed legal facts that have had a social impact following the discovery of the coronavirus in the Slovak Republic. An additional intention is to elucidate and generalise the solutions that have been introduced in the fight against the pandemic while noting the actual steps taken by the government over time.*

KEYWORDS: fundamental rights, epidemiological situation, coronavirus, COVID-19, special legal order in the Slovak Republic.

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1. General cross-section of the legal regulation of fundamental rights in the Slovak Republic

Following the events of November 1989, which resulted in the birth of the so-called Velvet Revolution and victory over the communist regime, a democratic system was established in the Czech and Slovak Federal Republic.[2] In the spirit of democracy, society´s priority was to enshrine, respect, and exercise the fundamental rights and freedoms that had been dishonoured, deceptively proclaimed, and often violated by the communist regime for a long period of time. The violation of these values led people to raise their voices against the principles and actions of the communist regime.

Following these crucial events, the hard work of the new governmental officials began with the preparation of a document that would guarantee fundamental rights and freedoms that would be binding on level with the constitution. On 9 January 1991 Constitutional Act No. 23/1991 Coll., which introduced the Charter of Fundamental Rights and Freedoms as a Constitutional Act of the Federal Assembly of the Czech and Slovak Federal Republic, was approved based on the submitted material. The Charter of Fundamental Rights and Freedoms became a sample for the nearly identical wording of the provisions of the second title of the Constitution of the Slovak Republic. It was approved on 1 September 1992 by the Constitutional Act No. 460/1992 Coll. of the Constitution of the Slovak Republic.[3] The basis for both constitutional documents was agreements and treaties of an international character that reflected and completed the European standards of fundamental rights and freedoms.[4]

The supranational documents that contributed most to the creation of the Charter of Fundamental Rights and Freedoms and the Constitution of the Slovak Republic were mainly the Universal Declaration of Human Rights, the Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, and parts of Charter 77.[5]

An essential feature of enshrined fundamental rights and freedoms is reflected in their universality and inviolability, which are typical features of natural human rights. For this reason, fundamental principles and freedoms are inviolable, inalienable, imprescriptible, and indefeasible. These principles are explicitly expressed in the provisions of the Constitution. At that time, the possibility of their full-fledged protection was declared.

The constitutional enshrinement of fundamental rights and freedoms included not only natural rights but other rights as well. Basic human rights, political, economic,

2 Orosz, 2012, p. 36.

3 On the constitutional law and the Constitution of the Slovak Republic, see, for example: Drgonec, 2019; Giba, 2019; Svák–Cibuľka–Klíma, 2013; Bröstl et al, 2019; Čič, 2012.

4 Posluch and Cibulka, 2009, pp. 77–78.

5 Kráľ, 2004, p. 43.

social, and cultural rights, rights of national minorities and ethnic groups, rights to the protection of the environment, the right to judicial protection, etc., were also consolidated at the constitutional level.

In drafting the provisions of the Constitution, it was necessary to consider the compliance of the state's interests and the interests of the subjects of human rights should the need arise to limit them. Unpredictable future situations that could occur due to force majeure or other relevant circumstances also had to be taken into account. Given such a situation, however, the state must also protect the interests of those to whom fundamental rights and freedoms were granted.

Legal restrictions on fundamental rights are, therefore, permissible only in the case of objective interest, which may include the security of the state, protection of life and health, protection of property, protection of morals, protection of the environment, protection of the rights and freedoms of others, and protection of public policy. Fundamental rights are not denied by such restrictions; they merely constitute restrictions in the exercising of rights by any of the above-mentioned titles, which arose on the basis of an objective reason.[6]

A provision of the Constitution directly enshrines and explicitly states the nature of the restriction on the basis of which, when restricting basic rights and freedoms, attention must be paid to their essence and meaning, and the restrictions may only be used for the prescribed purpose.[7] Based on the above, they cannot be abused.

Certain restrictions on fundamental rights and freedoms may go beyond admissibility where the enforcement of restrictions may already be presumed to be at an unacceptable level and the protection has thus been guaranteed at the level of the proceedings of the Constitutional Court, which has jurisdiction to rule whether such violations, abuse, or misuse of powers was not permitted. Any natural or legal person who claims that their fundamental rights or freedoms as guaranteed by the constitutional order have been violated by an international treaty that has been ratified and promulgated in a manner laid down by law when their violation should have occurred by a valid decision, measure, or other intervention of a public administration body and their protection is not decided by another court, may make a legal complaint before the Constitutional Court.[8]

Finally, it should be noted that after expressing interest in joining the European Union, the Slovak Republic had to begin respecting the European Union's goals and values, including fundamental rights, thus maximising the consolidation of the rights and the need to comply with evolving standards.

6 Kráľ, 2004, p. 55.
7 Article 13(4) of the Constitution of the Slovak Republic.
8 Article 127(1) of the Constitution of the Slovak Republic.

2. The first wave of coronavirus on the territory of the Slovak Republic from the point of view of the most important facts and legally relevant events

With the worldwide spread of the coronavirus SARS-CoV-2 (also known as COVID-19), the Slovak Republic eventually succumbed to pandemic infection. This infectious disease has caused a global state of emergency which appears to be very difficult to overcome. This state of medical emergency not only has paralysed states economically and financially, but it also prevents the state from providing proper health care and education. The restrictions on social freedom have been so demanding that it will be extremely difficult for the world to heal. It can also be debated whether the sovereignty of the states has been undermined to some extent because of dependence on the help received from others in many cases. The deficiencies of medical devices, technological conveniences, and finances have caused dependence on non-governmental organisations. Although it is a necessary action, it can also give the impression of a weak and unstable state system as the state should be able to handle such critical situations on its own.

A state with foresight might have been a key element, as it could have played a huge role in preventing the massive spread of the coronavirus. Some states have taken such prevention too lightly; thus, the pandemic has affected every individual in the world in a matter of only a few weeks. In the Slovak Republic, efforts to prevent the spread of the coronavirus were made at a governmental level on behalf of the public and the entirety of Slovak society several weeks before the first infection occurred.

'An active approach to managing crisis phenomena requires an effective, comprehensive strategy for the analysis of threats and risks, permanent monitoring and analysis of crisis factors, and the creation of management bodies, forces, and the necessary resources to minimise the consequences of these threats."[9]

In January and February 2020, the Security Council of the Slovak Republic and the Crisis Staff made a decision regarding the general preparedness of the country. Initially, medical, rescue, tactical, and strategic readiness were checked through exercises, the provision of laboratory equipment, and assessment of laboratory environments. A call centre and an Infoline were established for the public through which information was provided. Important guidelines regarding personal and food hygiene were issued.[10] Gradually, more serious decisions were made, such as inspection at airports and random inspections of vehicles at border crossings. Leaflets were provided to passengers with information and recommendations for people coming from countries

9 Buzalka and Blažek, 2011, p. 18.

10 Press release of the Ministry of Health of the Slovak Republic. Available at: https://www.health.gov.sk/Clanok?premier-koronavirus-opatrenia.

and areas where COVID-19 cases had occurred.[11] Simultaneously, urgent mobilisation has begun in the security, defence, and health departments.

The turning point came when the first resident of Slovakia became infected, an inevitability that occurred in the first week of March in the Bratislava district.

On 6 March as a result of the confirmed case, a meeting of the Central Crisis Staff of the Slovak Republic was held, at which its representatives took measures for the first time in the form of bans and strict recommendations for the country's residents. Measures against the epidemic included application of a ban on hospital visits, social service home visits, visits to children's homes visits, and prison institution visits throughout the Slovak Republic. Outside the Slovak Republic, students were not allowed to participate in excursions, and arrivals from and departures to Italy were also stopped. Recommendations were made that residents avoid participating in mass events, namely in sports and cultural events, church masses, and other entertainment events where a large number of people would be expected to gather. Visits to shopping centres and submission to voluntary isolation and quarantine remained at the discretion of the population. At that time, border controls were ordered at the Slovak Republic's western border with Austria.[12]

In the following days, the number of confirmed positive cases increased. Hence, the Central Crisis Staff of the Slovak Republic decided to ban the organisation of public events, including sports and cultural events, for 14 days as of the date of the decision, which could be extended in case of need. Persons returning from the most affected countries (i.e. Italy, China, Iran, and South Korea) were ordered to undergo a 14-day quarantine as were persons living in the same household with them. Non-compliance with this regulation could result in imposition of a fine of up to 1650 euros for a public health offence.[13]

On 12 March the Government of the Slovak Republic declared an emergency situation in accordance with the Act of the National Council of the Slovak Republic No. 42/1994 Coll. on Civil Protection of the Population, as amended, as a period of danger or a period during which the consequences of an emergency event affect life, health, and property and during which measures to safe life, health, and property reduce the risks of danger or methods and operations to eliminate the consequences of an emergency event are carried out.[14] On the same day, the Central Crisis Staff of the Slovak Republic decided on strict measures to limit the spread of the coronavirus, which concerned the closure of schools and school facilities as well as the closure of all three international airports in the Slovak Republic. Finally, cultural facilities, leisure ski resorts,

11 Information from the Public Health Authority of the Slovak Republic. Available at: https://bit.ly/3mKLiyl.

12 Information from the Public Health Authority of the Slovak Republic. Available at: https://bit.ly/3wkLlEd.

13 Information from the Public Health Authority of the Slovak Republic. Available at: https://bit.ly/3GTIo2j.

14 Article 3(1) of the Act of the National Council of the Slovak Republic on Civil Protection of the Population

amusement parks, wellness centres, water parks, discos, and bars were closed. Additionally, temporary border controls were introduced with neighbouring countries, with the exception of Poland; however, the situation was continuously monitored at border crossings with Poland. International and domestic train and bus transport were restricted. The opening hours of offices and client centres were reduced. During the weekends, shopping centres were restricted such that only stores from which medicines, food, and drugstore products could be purchased were open. For persons coming from abroad to Slovakia, mandatory isolation in domestic quarantine was imposed for at least 14 days. For persons without permanent residence, temporary residence, or not working in the Slovak Republic, entering the country was prohibited. Foreigners were not permitted to travel to Slovakia without adequate confirmation that they belonged to one of those categories.[15]

Within a few days, people living and working in Slovakia experienced major changes and limitations in their lives in regard to their safety. The regulations elicited dissatisfaction and fear because people did not know what to expect in this situation, as it was constantly changing. This eventually led to a crisis.

According to Constitutional Act No. 227/2002 Coll. on State Security at the Time of War, State of War, State of Emergency, and State of Crisis, as amended by later constitutional acts and Act No. 387/2002 Coll. on the Management of State in Crisis Situations Other than Time of War and State of War as amended, the term 'crisis situation' refers to the period outside the time of war and state of war, during which the security of the state is endangered or disturbed and the constitutional authorities may declare a state of emergency, state of crisis, or extraordinary situation after fulfilment of the conditions set out in a constitutional or special act.[16]

at this point, shops and services, with the exception of the above-mentioned grocery stores, pharmacies, and drugstores as well as online stores, were closed even during weekdays.[17] On 15 March new exceptions were added to the list: newsagents, refreshment stands, and restaurants without the presence of guests outside the dining area. On the same day, the Government of the Slovak Republic declared a state of emergency[18] and imposed a work obligation on persons employed by institutional health care providers to ensure the performance of health care and to prohibit such persons from exercising their right to strike.[19]

15 Press release of the Ministry of Health of the Slovak Republic. Available at: https://bit.ly/3mKtoMe.

16 Article 1(4) of the Constitutional Act on State Security at the Time of War, State of War, State of Emergency, and State of Crisis and Article 2(a) of Act on Management of State in Crisis Situations Other than Time of War and State of War.

17 Press release of the Ministry of Health of the Slovak Republic Available at: https://bit.ly/3qahzRS.

18 See, for example, Drgonec, 2012.

19 Resolution of the Government of the Slovak Republic. Available at: https://rokovania.gov.sk/RVL/Resolution/18252/1.

A similar situation related to the declaration of a state of emergency has already taken place in Slovakia during the last decade. In September 2011, following the example of fellow Czech doctors, 2411 Slovak doctors resigned collectively in 34 hospitals due to dissatisfaction regarding non-compliance with four key requirements: salary increases, halting the transformation of hospitals into joint stock companies, compliance with the Labour Code, and co-financing of the health care system. The mass departure of doctors was the reason for declaring a state of emergency, effective beginning 29 November 2011, which was to be avoided so as not to endanger human lives. The state of emergency concerned 16 providers of institutional care, which took measures to ensure both acute and emergency medical care. The emergency regime did not affect doctors who did not resign and continued to work as expected in hospitals. It affected only medics who had a notice period and whose profession was essential for the proper functioning of the designated hospital wards.

A state of emergency may be declared by the Government of the Slovak Republic only on the condition that there is an imminent threat to people's life and health, in causal connection with a pandemic, the environment[20] or significant valued property as a result of a natural disaster, catastrophe, or an industrial, traffic, or other operational accident. The government may declare a state of emergency only in the affected or immediately endangered area,[21] only to the necessary extent, and only for the necessary time, for a maximum of 90 days.[22]

Notably, within the countries of the European Union, in *'terms of definition, the definition of the special legal status of a state of emergency appears in all constitutions, with the exception of the Slovak Constitution.'*[23]

As a result of the declaration of a state of emergency, the state implements a set of measures that form and represent activities that can manage, limit, and adapt the operation of state and local authorities as well as institutions, economic entities, and social organisations in the affected or directly endangered territory in the necessary range and time according to the seriousness of the threat to restrict fundamental rights and freedoms and impose obligations and to clarify the duties and tasks of the armed forces if the life and health of persons, the environment, or significant property values are endangered or threatened due to a pandemic, natural disaster, catastrophe, or industrial, traffic, or other operational accident.[24]

It is necessary to be aware of the seriousness of the declaration of a state of emergency in terms of fundamental rights and freedoms and the scope of their application

20 Note: A problem arising from the wording of the provision of the Constitutional Act exists, which has been unresolved for a long period of time.

21 Article 5(1) of Constitutional Act on State Security at the Time of War, State of War, State of Emergency, and State of Crisis.

22 Article 5(2) of Constitutional Act on State Security at the Time of War, State of War, State of Emergency, and State of Crisis.

23 Farkas and Kelemen, 2020, p. 214.

24 *Terminologický slovník krízového riadenia a zásady jeho používania.* The Security Council of the Slovak Republic, Bratislava, 2017, p. 22. Available at: https://bit.ly/3nXfqGl.

because under the provisions of the Constitutional Act on State Security at the Time of War, State of War, State of Emergency, and State of Crisis, it is legal *'to limit fundamental rights and freedoms and impose obligations in the affected or directly endangered territory for the necessary time, depending on the seriousness of the threat, to the maximum extent of:*

a) limit the inviolability of the person and its privacy by evacuation to a designated place,
b) impose work duties to ensure the supply, maintenance of roads and railways, the operation of transport, the operation of water supply and sewerage, the production and distribution of electricity, gas and heat, the performance of health care, maintaining of the public policy or to eliminate the damage,
c) limit the exercise of ownership of real estate for the deployment of soldiers, members of the armed forces, medical facilities, supply facilities, rescue services and release and other technical facilities,
d) restrict the exercise of ownership of movable property by prohibiting the entry of motor vehicles or restricting their use for private and business purposes,
e) to limit the inviolability of the person's home to the accommodation of evacuees,
f) restrict the delivery of postal items,
g) restrict freedom of movement and residence by applying a curfew at a specific time and a ban on entering the affected or directly endangered territory,
h) restrict or prohibit the exercise of the right to peaceful assembly or assembly in public conditional on authorisation,
i) restrict the right to spread information freely, regardless of state borders, and freedom of speech in public;
j) to ensure access to radio and television broadcasting associated with calls and information for the population,
k) prohibit the exercise of the right to strike,
l) take measures to address the state of the oil emergency.'[25] Such special interventions under the mechanism of the Constitutional Act on State Security at the Time of War, State of War, State of Emergency, and State of Crisis provide an opportunity to limit the fundamental rights and freedoms enshrined in the Constitution of the Slovak Republic and the Charter of Fundamental Rights and Freedoms.

However, it must be noted that the same constitutional law explicitly enshrines in its introductory provision that the basic mission of public authorities, even in times of emergency, is to take all necessary measures to respect fundamental rights and freedoms.[26] Due to the occurrence of the circumstances of threats to life and health caused by the COVID-19 pandemic, the declaration of a state of emergency by the Government of the Slovak Republic was justified under the conditions set out in the Constitutional

25 Article 5(3) of Constitutional Act on State Security at the Time of War, State of War, State of Emergency, and State of Crisis.

26 Article 1(2) of Constitutional Act on State Security at the Time of War, State of War, State of Emergency, and State of Crisis.

Act on State Security at the Time of War, State of War, State of Emergency, and State of Crisis.

The territorial delimitation according to the Constitutional Act on State Security at the Time of War, State of War, State of Emergency, and State of Crisis may raise several issues. The provision does not explicitly regulate the possibility of declaring a state of emergency for the entire territory of the Slovak Republic; however, it states that 'a state of emergency may be declared only in the affected area or in the area immediately endangered.' Here, the question of the lawfulness of restrictions on the fundamental rights of persons arises, in particular, their right to personal freedom linked to the observance of quarantine and the inference of consequences, which is the most significant interference with personal integrity. I would like to note that it is necessary to consider the seriousness of the pandemic situation, the objective interest of the public and society as a whole, and the protection of lives and health. In addition, in this regard, if the entire territory of the Slovak Republic is affected or directly endangered, this detail should not be an obstacle, taking into account the objective interest, threat to life, and health of the entire society in relation to the COVID-19 pandemic. To clarify, my intention is not to criticise the measures that were taken, but I feel that it is important to emphasise that the term 'the whole territory' should be explicitly included and legislated in the provisions of the constitutional act for reasons of legal purity and clarity in the future.

At the end of March, specifically on 25 March a measure of the Public Health Authority of the Slovak Republic came into force until further notice, prohibiting all persons from going out and moving about in public without covering their upper respiratory tract; protective masks, respirators, or other suitable alternatives had to be worn to cover the mouth and nose, effective immediately.[27]

Based on the recommendations of a council of experts, medical authorities, and prominent epidemiologists and infectologists, stricter measures were approved in the first week of April to restrict the free movement of people during the Easter holidays. On 6 April the Government of the Slovak Republic approved a decision according to which emergency measures were extended to restrict the movement of persons in consideration of the prevention of the spread of COVID-19. This decision also prohibited the exercise of the right to peaceful assembly for the period of the Easter holidays, with the exception of persons belonging to the same household. In addition, other exceptions have been considered with regard to restrictions on free movement in the public. These exceptions included transferring to and from work, performing business and other similar activities, transferring to procure necessary food, medicine, medical devices, hygiene goods, cosmetics, other drugstore goods, and feed and other pet supplies, arrangements of care for children, arrangements of pet care, fuel refill, trips aimed at arranging necessary life needs for another person, volunteering, neighbourhood assistance, and others within the district of residence. In

27 Measure of the Public Health Authority of the Slovak Republic No. OLP/2732/2020. Available at: https://bit.ly/2ZX0uiX.

the case of the capital, Bratislava, and of Košice, the above-mentioned activities could be carried out only within the city limits. Other exceptions included transportation to a medical facility for urgent examination, including escorting a close person or relative, transport to the funeral of a close person, and transport to care for a close person or a relative who is dependent on such care; however, such exceptions applied only within the district in the case of the capital city of Bratislava and only within the city limits in Košice. Finally, the exceptions included a stay in nature within the district in the case of Bratislava and within the city limits in Košice. [28]

We must again highlight that the restriction of fundamental rights and freedoms can be realised only to ensure the adequate protection of the public interest of society, the life and health of society, and the economy. The adequacy of the restrictions in relation to the circumstances, the degree of real necessity, and their purpose should be taken seriously. The only appropriate method is to subsequently verify the real justification of the circumstances and actions; if this is not confirmed, such action may be considered disproportionate, thus leading to the question of whether they may also be considered unconstitutional with regard to interference in fundamental rights and freedoms.

Professor Michael O'Flaherty, Director of the European Union Agency for Fundamental Rights (FRA), said the following: '*We clearly need strong public health responses to protect life during the pandemic. But we can protect our health and respect human rights. It is not a zero sum game'*[29]. At the same time, Professor Michael O'Flaherty expressed the following idea: *„The more we respect human rights, the better will be our public health strategies. These strategies must also ensure that any limitations to people's fundamental rights should only last as long as necessary and that they protect already vulnerable people who may face even greater risks from COVID-19.'*[30]

An additional dangerous situation occurred with the confirmation of the COVID-19 infection of a Roma person who had visited several places and contacted persons from several other Roma communities before being placed in quarantine. As a result, the disease began spreading in the affected communities, and there was a need for preventive placement of approximately 6,200 people in quarantine. The situation was monitored by the relevant authorities with the continuous assistance of soldiers deployed by the Armed Forces of the Slovak Republic, who managed the supply needs of these communities and the observance of measures, such as maintaining quarantine, in the affected communities.[31] The European Union Agency for Fundamental Rights (FRA) has ranked Roma people as a vulnerable and at-risk population, along with

28 Information from the Public Health Authority of the Slovak Republic. Available at: https://bit.ly/2YgDcEi.

29 Press release of the European Union Agency for Fundamental Rights (FRA). Available at: https://bit.ly/3D2GESp.

30 Presse release of the European Union Agency for Fundamental Rights (FRA). Available at: https://bit.ly/3ohOlOr.

31 Information from the Public Health Authority of the Slovak Republic. Available at: https://bit.ly/3wj7GSO.

refugees, the elderly, children, and people with disabilities. In addition, according to the FRA, attention should be paid to four important aspects when examining the impact of proposed measures by individual governments on fundamental human rights and freedoms during the actions to fight COVID-19. For this reason, the application of measures should focus particularly on vulnerable groups, racism, misinformation, and data protection in everyday life.[32]

Following the above-mentioned events and facts, a preliminary plan for a release program was presented by the Government of the Slovak Republic on 20 April, which had several phases. The first phase of the release program plan included the opening of services, retail shops, shops up to 300 m^2, markets, car bazaars, and car dealerships, the possibility of operating a long-term accommodation, and the possibility of access and subsequent performance of outdoor contactless sports. The release of the measures in the first phase was effective on 22 April.[33] As the rate of the spread of COVID-19 was favourable, the government of the Slovak Republic decided that the second and third phases of the release program plan would be combined. For this reason, the following permissions came into force on 6 May: taxi services could operate again, and several beauty salons providing pedicures, manicures, cosmetic treatments or massages, hairdressers, barbershops, solariums, and rehabilitation centres were opened. Galleries, museums, exhibition halls, and libraries were also opened, people were permitted to engage in outdoor tourism again, organise weddings, attend church masses, and run short-term accommodations, though excluding restaurants and dining in common areas. The fourth phase of the release program plan started on 20 May when the number of people per square meter in the interior of the shops would be increased. The organisation of events was permitted, though limited of 100 people, and the organisation of theatre, music, film, and other artistic performances was allowed again. Shopping centres, fitness centres, swimming pools, and entertainment establishments were fully opened, and access to restaurants and other public catering services was restored. The wearing of protective masks, respirators, or other suitable covering of the upper respiratory tract was no longer required if there was a distance of at least 5 m between the two individuals. Travel beyond the borders of the territory of the Slovak Republic was again permitted without the obligation of quarantine if the passenger returned to the Slovak Republic within 24 hours after crossing the border. From 27 May the period of staying abroad without the obligation to complete quarantine was extended from 24 to 48 hours. Kindergarten care and primary school teaching began on 1 June with attendance remaining voluntary at the discretion of the children's parents. Students from the second stage of primary and secondary schools were educated in the form of distance learning. In the fifth phase of the release program, which began on 3 June, the opening of the remaining facilities, services, and leisure activities was

32 Press release of the European Union Agency for Fundamental Rights (FRA). Available at: https://bit.ly/2Yi63bo.

33 Information from U.S. Embassy in Slovakia. Available at: https://bit.ly/3q6vvMr.

allowed.[34] The state of emergency in the Slovak Republic ended on 13 June and on that date, the obligation of medical workers to ensure health care as well as the ban on exercising the right to strike were abolished. However, after the abolition of the state of emergency, the extraordinary situation, which was declared by the Government of the Slovak Republic on 12 March remained in force.[35] Finally, the full-time teaching of second-grade primary and secondary school students was permitted in the last week of the school year, though it remained on a voluntary basis depending on parental decision.[36]

Gradually, the lives of the residents of the Slovak Republic began to normalise. People returned to their everyday lives as they had lived before the spread of COVID-19. The effects of the previous period were still present in society because the number of infected people continued to grow slowly.

3. Summer of 2020 and the impact of coronavirus

As summer arrived, people had high expectations regarding the complete victory over COVID-19 beginning around the beginning of June, and the number of patients was stagnating in the Slovak Republic. As the number of infected individuals slowly decreased, there were days when no cases of the disease were confirmed, so there was hope to overcome the problem. After the announcement of the second wave of the disease, the situation took an unexpected turn. An more significant problem arose when the first deaths of people associated with the disease began to be registered, as they had not previously been recorded by the Slovak Republic. The residents could not accept the idea that the Slovak Republic could be brought to its knees again, as in the first half of 2020.

Following the meeting of the Pandemic Commission of the Government of the Slovak Republic on 11 August the Minister of Health of the Slovak Republic announced that there was a real threat of a second wave of the COVID-19 pandemic due to the growing number of infected and hospitalised persons. Residents were challenged to observe strict hygienic habits, maintain adequate distance, and sufficiently cover the upper respiratory tract when staying indoors. At that point, the Pandemic Plan of the Slovak Republic was adopted at the meeting of the Pandemic Commission of the Government of the Slovak Republic. This plan was divided into four phases. In terms of its content, Slovakia immediately entered the first phase, which consisted of the general preparedness of selected hospitals, the allocation of hospital facilities for the hospitalised so-called 'COVID patients' and monitoring the daily epidemiological

34 Information from the Ministry of Investments, Regional Development and Informatization of the Slovak Republic. Available at: https://bit.ly/3bLmjVE.

35 Information from the Ministry of Investments, Regional Development and Informatization of the Slovak Republic. Available at: https://korona.gov.sk/prijate-opatrenia/.

36 Information from the Ministry of Education, Science, Research and Sport of the Slovak Republic. Available at: https://bit.ly/3ohOt0n.

situation by regional public health authorities. The second phase would occur when the number of infected persons increased or in the event of a deteriorating epidemiological situation resulting in the overcrowding of hospitals' infectious departments. In the third phase, the plan was to re-declare a state of emergency when occupancy reached 75% in the infectious departments of hospitals. The fourth phase was characterised by a gradual return to the interpandemic period.[37]

At the beginning of September, the Pandemic Commission of the Government of the Slovak Republic introduced what was termed the traffic light of districts. Based on the concept of traffic lights, the districts were divided into green, orange, and red zones. In districts in the orange and red zones (in addition to the measures in force across the entire territory of Slovakia), stricter measures were applied, which primarily concerned the organisation of mass events.[38] In the second half of September, almost all districts in the Slovak Republic were classified as orange and red zones because of the growing number of infected people.

4. The second wave of coronavirus in the territory of the Slovak Republic from the perspective of the most important facts and legally relevant events

The second wave of SARS-CoV-2 proved to be a serious problem in the middle of the summer and eventually became a substantial threat in the Slovak Republic. The number of patients rose unceasingly, and new records were broken daily in regard to the number of sick and infected people. As the condition of infected persons in the second half of September was worsening, a debate began regarding the possibility of re-declaring a state of emergency.

After negotiations, the Central Crisis Management Staff recommended that the Government of the Slovak Republic declare a repeated state of emergency. Based on these recommendations, the Government of the Slovak Republic decided to declare a state of emergency from 1 October but this time, only for a period of 45 days.[39] As of that date, a new measure of the Public Health Authority of the Slovak Republic came into force, on the basis of which stricter conditions were introduced concerning the wearing of protective masks, respirators, or other suitable coverings of the upper respiratory tract, hygienic provisions on the part of shops and facilities, and stricter travel conditions.[40]

37 Information from the Public Health Authority of the Slovak Republic. Available at: https://bit.ly/3BKnFu9.

38 Information from the Ministry of Health of the Slovak Republic. Available at: https://bit.ly/3k3y8uP.

39 Press release of the Ministry of Interior of the Slovak Republic. Available at: https://bit.ly/3GPiNHY.

40 Measure of the Public Health Authority of the Slovak Republic No. OLP/7694/2020. Available at: https://bit.ly/3CNXLqR.

In regard to this issue, a proposal was submitted to assess the constitutionality of the state of emergency, declared on 1 October 2020; the proposal was issued by the First Deputy Prosecutor General of the Slovak Republic and a group of deputies who objected to the formal and factual shortcomings of the government's resolution to declare a state of emergency. They blamed the resolution on the declaration of a state of emergency because the reason for its issuance was not made clear and because the affected area in which it was to apply was not precisely defined. The group also argued that the situation at the time of the declaration of a state of emergency was not such that a state of emergency could be declared. Based on the statistics of the number of infected and sick persons as well as the number of deaths in connection with COVID-19, it is unquestionable that, in the Slovak Republic, the life and health of person was at risk in connection with the emergence of the COVID-19 pandemic. In the proceedings on compliance with the decision of the declaration of a state of emergency with the Constitution of the Slovak Republic, the Constitutional Court of the Slovak Republic ruled that the contested resolution of the government of the Slovak Republic on the declaration of a state of emergency as well as related government regulation were in accordance with the Constitutional Act on State Security at the Time of War, State of War, State of Emergency, and State of Crisis. The Constitutional Court of the Slovak Republic stated that the government had not declared a state of emergency without having a basic rational support point for fulfilling the conditions under Article 5 (1) of the Constitutional Act on State Security at the Time of War, State of War, State of Emergency, and State of Crisis and had not declared it on grounds other than those permitted by this provision. The government had also met the formal conditions for declaring a state of emergency. The petitioners did not provide any facts or arguments that would signal the obvious excessiveness of the state of emergency or the possibility of its abuse, and the Constitutional Court of the Slovak Republic did not otherwise determine the existence of such facts. Thus, the government did not violate the designated articles of the constitution and the constitutional act; therefore, the contested government resolution was deemed to be in accordance with the constitution and the Constitutional Act on State Security at the Time of War, State of War, State of Emergency, and State of Crisis. The Constitutional Court of the Slovak Republic stated that it must always be judicious in order to declare a state of emergency from the point of view of the Constitution and the Constitutional Act on State Security at the Time of War, State of War, State of Emergency, and State of Crisis. A state of emergency may be declared only under the conditions specified in Article 5 (1) of the Constitutional Act on State Security at the Time of War, State of War, State of Emergency, and State of Crisis. A state of emergency can only be declared on the basis of statutory reasons, and the assessment of whether these reasons have occurred and whether they require a declaration of a state of emergency also requires expert, conceptual, and ultimately political consideration. Therefore, the Constitutional Court of the Slovak Republic declared that the government was in a better position to assess such circumstances and was democratically accountable for such an assessment. The Constitutional Court of the Slovak Republic rebuked the government's resolution on

declaring a state of emergency with certain shortcomings, which, however, did not affect its constitutionality. However, the Constitutional Court of the Slovak Republic interpreted the provisions of the Constitutional Act on State Security in Time of War, State of War, State of Emergency, and State of Crisis that required this to remove some ambiguities in regard to declaring a state of emergency and deciding on restrictions on fundamental rights and government obligations on the basis of this constitutional law. The Constitutional Court accepted the reason for declaring a state of emergency and confirmed that it was declared for the entire territory of the Slovak Republic.[41]

In view of the increasing number of infected persons, despite the stricter measures introduced, the Central Crisis Staff of the Slovak Republic determined that anti-epidemic measures need to be tightened further. As of 15 October wearing suitable alternatives to cover the upper respiratory tract outdoors was made obligatory. Mass events were banned, and fitness centres, wellness centres, swimming pools, saunas, and aquaparks were closed as they were during springtime. Food consumption within the dining areas of restaurants was banned; meals could only be consumed outdoors, or people could take their food packed. The number of people permitted in shops and malls was also limited.[42]

On 17 October the government made an important public announcement regarding preparations for mass COVID-19 testing of the population in the Slovak Republic, assuming two rounds of testing to be operated on a voluntary basis. Soldiers, police officers, and paramedics were involved in the implementation of mass testing. The plan was to carry out the announced testing using antigen tests, which were free of charge for the participants.[43]

Due to the deteriorating situation, the previously announced mass testing had to be conducted urgently, particularly in the northern portion of the Slovak Republic. First, pilot tests were conducted on the residents of four northern districts. The testing took place from 23 to 25 October and was relatively successful in terms of the detection of positive cases of infection.[44] Those who wanted to be tested had to travel to the collection point, where they then had to identify themselves with an identification document, perform basic hygienic instructions such as hand disinfection and nose blowing, and then endure a nasopharyngeal swab. Test participants obtained the results of the samples with a maximum delay of up to half an hour. They then received a certificate in a sealed envelope with the result of the sample, which contained instructions on the back if the person tested positive. In such cases, they had to remain in a domestic quarantine for 10 days along with anyone living in the same household. Persons who did not participate in the testing had to stay in home isolation for 10 days.

41 Judgment of the Constitutional Court of the Slovak Republic of 14 October 2020, file no. PL. ÚS 22/2020-104

42 Press release of the Ministry of Interior of the Slovak Republic. Online: https://bit.ly/3EQWkIT.

43 Information from the Government Office of the Slovak Republic. Available at: https://bit.ly/3GVtBUO.

44 Press release of the Ministry of Interior of the Slovak Republic. Available at: https://bit.ly/2ZYiCJG.

During the time of the pilot testing (24 October to 1 November), a curfew was applied throughout Slovakia, with the exception of travelling to the testing locations or work, escorting a child or a close person, travelling to ensure the necessities for life, and staying in nature, though only within the district of residence. Stricter rules were applied for the districts participating in the pilot test, which consisted of proof by way of a negative certificate if one wished to apply one of these exceptions during the curfew.[45]

The announced plans for the preparation of nationwide COVID-19 testing of the population in the Slovak Republic, assuming two rounds of testing, were confirmed with specific dates. For this reason, after the pilot testing, preparations began for the realisation of the first round of comprehensive testing, which was scheduled for 31 October and 1 November followed by preparations for the realisation of the second round of comprehensive testing, which was scheduled for 7 and 8 November.[46]

Effective beginning 26 October regular schooling was suspended for an indefinite period, excepting primary school pupils and children who attended kindergartens and nurseries. All other students had to switch back to the form of distance learning.[47]

The first round of nationwide testing began on 31 October at 7:00 a.m. and lasted until the evening of the following day. Several complications occurred at some of the testing points, but eventually, all sites were active. Thus, the rules that were applied during the pilot testing of the most affected districts entered into force throughout the entire territory of the Slovak Republic. After the first round of comprehensive testing, police officers and soldiers were entitled to request that people prove their health with a test certificate or a private certificate from a PCR test. If the person in question did not carry a certificate, they risked receiving a fine of up to 1659 euros.[48]

The second round of nationwide testing of the population on 7 and 8 November was carried out in only 45 districts, which, due to the large number of infected people, were marked as red districts. It was also possible for residents of different districts to be tested voluntarily in one of these 45 districts. [49] In the red districts, a negative test certificate from the second round of nationwide population testing was subsequently required, while in green districts, a certificate from the first round of nationwide population testing was sufficient.[50]

During a meeting of the Central Crisis Staff of the Slovak Republic, a plan for a third round of testing of the population (on 21 and 22 November) was approved, but

45 Press release of the Ministry of Interior of the Slovak Republic. Available at: https://bit.ly/3nT96iU.

46 Press release of the Ministry of Interior of the Slovak Republic. Available at: https://bit.ly/3BLrK1m.

47 Decision of the Ministrer of Education, Science, Research and Sport of the Slovak Republic No. 2020/17949:1-A1810. Available at: https://www.minedu.sk/data/att/17698.pdf.

48 Press release of the Ministry of Interior of the Slovak Republic. Available at: https://bit.ly/3bM1ut7.

49 Press release of the Ministry of Health of the Slovak Republic. Available at: https://bit.ly/3GQobL1.

50 Information from the National Health Portal. Available at: https://bit.ly/3BOrazU.

this time, it was to take place only in 458 selected cities and municipalities in which the percentage of infected people exceeded a set limit. A third population test was conducted according to the plan.[51]

On 11 November the Government of the Slovak Republic reached a decision on extending the state of emergency for another 45 days, which was declared on 1 October.[52] This step taken by the Slovak government raised a number of questions and a feeling of injustice among experts and the lay public alike. The reason for this was that the provision of the Constitutional Act on State Security at the Time of War, State of War, State of Emergency, and State of Crisis did not include the extension of the state of emergency. It should also be noted that although the goodwill of the government did not exceed the limit of 90 days enshrined in the Constitutional Act on State Security at the Time of War, State of War, State of Emergency, and State of Crisis, the correctness of the decision to extend the state of emergency and, in particular, the compliance of such a decision with the constitutional law was questionable. It is obvious that, for the aforementioned reasons, the drafting of an amendment to the Constitutional Act had begun, which included the possibility of extending the state of emergency, repeatedly, if needed.

On 16 November, a number of previous measures were lifted again: selected theatres as well as film, music, and other artistic performances could be opened. Fitness centres and swimming pools were also opened with a capacity limit of six people. Some sporting events and church visits were permitted as well. Naturally, it was necessary to follow strict hygiene rules. Milder measures were also related to the borders and border controls.[53]

On 17 November growing public dissatisfaction resulted in anti-government protests against the measures and the government itself, at which many members of the opposition spoke, accompanied by thousands of people demanding their rights on the streets of the capital and other Slovak cities.

Because of the steadily increasing number of people infected with COVID-19, on 16 December, the government decided to impose a lockdown of the country and reintroduce a curfew beginning on 19 December to tighten the anti-epidemic measures until 10 January 2021 that is, for 23 days.[54]

The end of 2020 brought several interesting facts to the forefront. On 28 December, an amendment to the Constitutional Act on State Security at the Time of War, State of War, State of Emergency, and State of Crisis was approved, into which the abovementioned possibility of extending the state of emergency was introduced. Until that

51 Information from the Ministry of Education, Science, Research and Sport of the Slovak Republic. Available at: https://bit.ly/301po1h.

52 Information from the Government Office of the Slovak Republic. Available at: https://bit.ly/2ZWZgEF.

53 Press release of the Ministry of Health of the Slovak Republic. Available at: https://bit.ly/3GSAxlP.

54 Press release of the Ministry of Interior of the Slovak Republic. Available at: https://bit.ly/3BN218w.

point, it was absent from the previously mentioned Constitutional Act.[55] One day earlier, on 27 December a crucial step was taken against COVID-19: the first vaccine was given to the President of the Slovak Republic. She believes that vaccination may be the only way to defeat the virus and return life to normal. I thoroughly agree with this idea.

5. Conclusion

During the nearly year-long fight against the COVID-19 pandemic, numerous national and supranational institutions highlighted the importance of respecting people's fundamental rights and freedoms. The measures that had to be introduced (whether in the Slovak Republic or in other countries around the world) were borderline admissible. The significant impact of state authorities' actions on the prevention of the spread of COVID-19 and on the number of infected people was inseparable as a highly sensitive topic regarding human life and health in society. With regard to the need to respect fundamental rights and freedoms, the decisions taken and the measures introduced were, at times, on very thin ice, and not everyone agreed with them.

With respect to fundamental rights and freedoms, the actions of public authorities still have a significant impact, particularly during the current situation, which continues to be determined by the pandemic. The influence of public administration helps regulate unfavourable factors caused by individual critical situations, which would certainly not be possible to achieve without its action, even if people engaged in independent disciplined efforts.

As stated in the article, with the restrictions adopted, which were permissible because of the multi-dimensional objective of protecting human life and health, it was still necessary to consider the interrelationship, proportionality, and rate between that objective and the means of protection used and their reasonable application so that they can facilitate the elimination of this dangerous threat. However, with regard to the Slovak Republic's obligation to take measures against the spread of the pandemic, fundamental rights and freedoms must remain in focus, while the mutual application of the principle of proportionality must not be neglected in accordance with the decisions taken.

Last but not least, I would like to state that in the event of any violation or presumption of violation of national law regulation, which enshrines the guarantee of respect for fundamental rights and freedoms or such supranational regulation, signed by the Slovak Republic, it is possible to turn to several institutions for the protection of rights, including the general courts, the Constitutional Court of the Slovak Republic, the Public Defender of Rights, and the Slovak National Centre for Human Rights, and with regard to membership in the European Union and the territorial location of the

55 Constitutional Act No. 414/2020 Coll. amending the consolidated Act No. 227/2002 Coll. on State Security at the Time of War, State of War, State of Emergency, and State of Crisis as amended.

Slovak Republic, the Court of Justice of the European Union and the European Court of Human Rights must also be mentioned.

In conclusion, I would like to recall the idea of the former President of the United States, John Fitzgerald Kennedy, who said, *'The rights of every man are diminished when the rights of one man are threatened.'*

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Evaluation of Member State Provisions Addressing Land Policy and Restitution by the European Commission

ABSTRACT: *The scope of action of EU Member States' land policies lies at the intersection of positive and negative integration. Therefore, if a Member State restricts the ownership and use of agricultural land, it implies both the legitimate restriction of fundamental freedoms and that it achieves the targets listed under the Common Agricultural Policy (CAP) on improving the quality of living for farmers in keeping with the case law of the Court of Justice of the European Union (CJEU). Despite this, it is worrisome that the EU's control over negative integration does not allow Member States to create sustainable regulations. In contrast, the EU law leaves it entirely to the Member States to introduce restitution measures vis-à-vis the properties that were confiscated before their accession. The EU's control prohibits direct discrimination against the citizens of other Member States. Under certain circumstances, according to the European Commission, the general principles of EU law and the provisions of the Charter can help individuals enforce restitution provisions. Bearing this in mind, we analysed the practice of the European Commission, its statements, and procedures against Member States, given that these are based on professional and/or political considerations. We examine the practice of the Commission and the CJEU vis-à-vis a Hungarian legislation on the so-called 'zsebszerződések'. We also propose recommendations.*

KEYWORDS: range of the Member States in the field on land policy, restitution of property and the EU Law, analysis of the European Commission's practice.

1. Introduction

We examine the evaluation and practice of the European Commission with respect to two different provisions covering the free movement of capital by analysing an infringement proceeding in a third area, the agricultural agreements which are intended to

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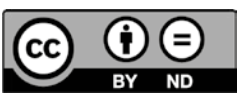

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sidestep regulations related to the acquisition of property. In the first part of this paper, we examine[2] the Commission's statements on the land policies of Member States that acceded in 2004. Following this, we study the judgement of the Court of Justice of the European Union (CJEU) on the so-called 'zsebszerződések'[3] in Hungary and the Commission's infringement proceeding against Hungary, while striving to understand whether the judgement covers land policies. In the third part, we examine specific EU requirements concerning the restitution process and the relevant measures of the European Commission and its statements.

The range of the Member States is not similar in these areas; They each show different characteristics. Although both areas cover the free movement of capital, the scope of the land policy of a Member State is defined by the intersection of positive and negative integration. Therefore, the Common Agricultural Policy (CAP) aims to improve the farmers' quality of living, which as a general rule, can be in line with the restrictions imposed by the Member States on the use of the agricultural land. However, as we show in this paper, most Member States pursue negative integration policies.

In contrast, the CAP's goals do not affect the Member State's margin of appreciation on the restitution, and it is 'unrestricted' on imposing restitution measures concerning the properties confiscated before the accession.. In other words, the EU law does not require Member States to return properties that were confiscated before accession. At the same time, in case the *rationae temporis* is applicability of the EU rules, the criteria for the free movement of capital can be applied in such a way that only discrimination based on nationality is prohibited while defining the personal terms for the restitution measures. Control over negative integration cannot be applied to regulate the Member States' discretion around imposing restitution measures. With certain limitations, in the case of restitution, Article 17 of the Charter of Fundamental Rights vis-à-vis the right to property can be applied, just like the general principles of EU law, namely the principles of legitimate expectation and legal certainty and *lex derogat legi generali*,[4] as well as provisions that restrict the Member States' procedural autonomy such as effectiveness and the principle of equal treatment.

How significant is the examination of the European Commission's statements in this field? It is well-known that the CJEU's interpretation defines the scope of action

2 I rely on a paper I co-authored with Réka Bokor, which was published in a volume in honour of Pál Bobvos. I compared the European Commission's practice vis-à-vis new Member States and the restitution cases with the EU's action against the Hungarian rule on the so-called 'zsebszerződések'.

3 The Hungarian word 'zsebszerződések' is not a legal term. It refers to contracts or acts that affect agricultural lands that violate legal provisions or that are not in conformity with relevant norms.

4 In Question No. E-004016/202, the Commission admitted that Member States should consider the general principles of EU law while imposing restitution measures.

for the Member States,[5] that the written answers of the European Commission are non-binding, and that in both areas, the preliminary ruling procedures following individual cases dominate in the land policy, and launching these procedures is more likely.[6] In this paper, we evidence the fact that the European Commission can be significantly important to both areas: in the field of the land policy and in the area of the restitution. We examine whether the Member States can give effect to the CAP's goals sustainably, so that they can regulate land policies appropriately.[7] We also examine whether EU law can help those concerned return the properties that were confiscated after World War II.[8] It may be interesting to examine the different practices of the European Commission that are relied on while addressing both land policy and the restitution of property, and to investigate whether the Commission's measures are compatible with the professional criteria relied on by the Commission or whether political decisions are considered more important.

While exercising its political margin of discretion, the European Commission aims to prove that the decisions on launching possible processes and reviews are not only based on political reasons, but also on professional considerations and the principle of equal treatment of Member States, just like individual entitlements derived from EU law, for instance, by considering individual complaints and the implementation of the CAP's goals as well as the compatibility with the requirements of the internal market.

We examine the infringement proceedings instituted against Hungary with respect to the so-called 'zsebszerződések', which can provide valuable inputs to both fields even though it did not cover both areas completely, in particular, that the Commission considered it was important to continue the proceedings related to the same rule, even after the individual case.

We analyse and evaluate the practice of the European Commission, and consider the judgements of the CJEU, the procedures launched by the Commission, and the Commission's answers to written questions. The similarities and differences between both areas offer a great opportunity to compare the practice of the Commission. Our recommendations are based on the relevant legal literature, especially on the land policy measures of the Commission concerning new Member States.[9]

5 The CJEU's case law is not as determinative in other fields of EU law. The European legislature has enjoyed wide amplitude in applying the CAP, especially in the case of medium- and long-term measures. In contrast, in the field of EU competition law, the European Commission's authority is significant.

6 The European Commission does not intend to start an infringement proceeding even if the situation is reasonable in light of substantive law and the enforcement of individual rights. We examine this in detail.

7 A lot of papers have examined the land policy, see: Szilágyi, 2017; Szilágyi, 2018; Szilágyi, Raisz, and Kocsis, 2017; Kurucz, 2015; Kurucz, 2001; Kurucz, 2003.

8 EU law does not mandate the return of properties that were confiscated within the concerned period. However, in several cases, it can help the individuals concerned.

9 This paper does not cover all aspects of the Member States land policies and restitution in detail. Several papers have considered these aspects. For more details on the Slovak restitution, see: Horváth and Korom, 2014.

2. The European Commission's investigations of Member States that acceded in 2004

The derogation period set by the Act of Accession allowed Member States to prolong existing rules concerning the ownership of agricultural lands that had already expired for Member States[10] that acceded after 2004. After the end of the derogation period, the European Commission began comprehensive reviews and procedures against most of these Member States.[11] This paper studies the Commission's practice concerning the Member States that acceded in 2004. However, it is necessary to examine the scope of their land policies and the specific situations that prevailed in the new Member States.

The CJEU has acknowledged[12] through its case law[13] that restrictions on fundamental freedoms in a land policy can be based on the CAP's goal of improving the quality of life for farmers, and on Member States' public interest, which is legitimate according to EU law. This has manifested at the Member State level as restrictions in order to prevent speculation, the maintenance of rural communities, and the facilitation of the equal distribution of agricultural lands.

In the phase of EU law development at the time of writing, because of Article 345 of the TFEU, which excludes the EU's intervention into property issues,[14] the EU has no authority to determine the goals of a land policy. These provisions can be imposed by Member States alone.

The EU's control over fundamental freedoms, also called the 'European Economic Constitution',[15] necessarily narrows down and makes the Member State's

10 Except Cyprus and Malta.

11 János Ede Szilágyi focused on significant developments pertaining to the free trade agreement between the EU and Canada (CETA). However, this falls beyond the scope of this paper, although closely related to the topic. Several aspects can cover agricultural land relations: *'It is a question, how the CETA's dispute settlement mechanism evaluate in the future the CETA's provision on the investments relationship with the regulations on the agricultural land in the states affected by the CETA. There is a danger that if do not clarify the Hungarian reservation extending to the agricultural lands, then in the light of the CETA's provision on the investor protection, Canadian citizens, Canadian companies, and legal persons, and with indirect land purchase, no one knows who could ask for the acquisition of the Hungarian land's ownership referring to the principle of national treatment'*. Szilágyi, 2017.

12 Court of Justice of the European Union: C-452/01, C-370/05.

13 János Ede Szilágyi pointed out that the CJEU's case-law is similar to the US Supreme Court case law on land relations in the US: *'Beyond the discrimination, related to the non-operational commercial clausula, the federal state's regulation shall meet the requirements of a test which is familiar to the Court of Justice of the European Union's (CJEU) test in similar cases; namely, the regulation shall serve a public purpose and be appropriate (so it is an important requirement that the federal state's regulation should not be replaced with a provision which is less restrictive to the commercial.)'* Szilágyi, 2017.

14 Az EUMSZ 345. cikk azonban a gazdasági alapszabadságokkal szemben nem hozható fel.

15 Simon, 2013. The European Economic Constitution is one of the central areas of focus in the monograph. It builds on EU law's most important provisions, which are central to this area.

legislation uncertain.[16] There are very few CJEU judgements in the area of land policy. This makes it difficult to determine the exact scope of the Member States' land policies. It is necessary to focus on the EU's control with respect to negative integration while analysing the scope of Member States' land policies in light of EU law and while proposing solutions, because without this, integration based on the internal market cannot take place.[17]

Valérie Michel stated[18] that the Member States keep finding newer and more sophisticated ways to introduce protectionist measures, which mostly follow legitimate targets. The CJEU classifies these measures incompatible with EU law if they are indirectly discriminatory and protectionist. It is enough if it considers these measures barriers to the internal market. According to Valérie Michel, Member States' measures that are compatible with negative integration, should be used to address non-economic issues. The Member State's margin of appreciation on the land policy should be improved towards positive integration form, ensuring that the Member States' land policy measures should not be impossible because of the negative integration form. Following Valérie Michel's ideas, an attempt can be made to strengthen the point that the CJEU should not consider Member States' measures incompatible with the EU law – because of the positive integration form and the specific features of the agriculture sector – on the ground that these measures are barriers to the internal market or protectionists. This should be based only on direct or indirect discrimination.

The scope of Member States' land policy that lies at the intersection of positive and negative integration is skewed towards the latter.[19] According to CJEU case law, if Member States' measures are incompatible with the criteria of national treatment or proportionality, conformity, and substitutability, the provisions cannot be applied. This ensures that, among other things, the aims of the land policy are legitimate in light of EU law. If a new Member State's land policy does not meet these requirements, which happened in two cases, then the Member State can be obliged to pay compensation[20] under EU law.

New Member States[21] have a stronger need to regulate land issues that can only be done through a long-lasting regulation. The European Commission admitted, in its

16 Csilla Csák, Bianka Enikő Kocsis, and Anikó Raisz share a similar opinion. Csák, Kocsis, and Raisz, 2015, pp. 50–52. János Ede Szilágyi proposes–an EU level – solution to the uncertainty around land policy, which should be considered, and can impose a modification of primary EU legislation. See Szilágyi, 2015. pp. 99-101.

17 In light of the objectives of positive integration, the limited intensity of this mechanism can manifest in land policy, but without a modification of the founding Treaties, the reduction of EU control, which maintains negative integration is unimaginable. See Dubout and Maitrot de la Motte, 2013.

18 Michel, 2014. p. 66.

19 Mihály Kurucz also acknowledged the uncertainty in land policy.

20 See Lentner, 2013, pp. 39–54; Lentner, 2000, pp. 11–21; Lentner, 2004, pp. 74–90.

21 For more on the new Hungarian land purchase regulation and its background, see Bobvos and Hegyes, 2014, pp. 1–173; Bobvos et al., 2016, pp. 31-40; Csák and Nagy, 2011, pp. 541–549; Csák and Szilágyi, 2013, pp. 215–233; Hornyák, 2015, pp. 88–97; Hornyák, 2014, pp. 70–76; Kurucz, 2015, pp. 120–173; Szilágyi, 2015, pp. 44–50; Olajos, 2015, pp. 17–32; Olajos, 2014, pp. 53–55; Raisz, 2010, pp. 241–253; Téglási, 2015, pp. 148–157.

answer to a letter from the Hungarian National Assembly's Committee on Agriculture, that Member States have a right to an EU legal environment that enables the long-term existence of their land policies.

De jure, Member States that acceded after 2004 are treated equally. De facto, their situation is far worse when compared to that of older Member States. In the case of the new Member States – and this is related to the differences in the levels of economic development – more individual cases can be expected, because, among other things, the price of the agricultural lands has not yet reached the thresholds of the older Member States. Thus, a larger number of potential investors will be against the regulation of new Member States. The European Commission should be far more understanding of the situation challenging new Member States, or at least extend comprehensive reviews and procedures to the older Member States, too, to guarantee equal treatment.

The European Commission's practice should be more flexible with new Member States in this sensitive area. We examine the Commission's answers to particular questions, highlighting cases in which the answers are incoherent based on our assessment, and in which we believe that the Commission refrained from giving a proper answer.

3. Investigating all Member States equally

The European Commission exercises its discretion in determining the States against which a comprehensive review or infringement proceeding should be initiated. The Commission stated in its answer to Question No. P-00558/2015 that it continuously checks the application of EU law in every Member State and takes necessary steps in response to complaints against the Member State's laws and measures. This answer is not in line with the remark of the Commission given to the same question. According to the Commission, it is carrying a comprehensive review against the new Member States, and it traces back this discriminative treatment against the new Member States to the expiration of the derogation period.. The Commission also noted that after the expiry of the derogation period, most new Member States introduced rules and procedures based on the new system.

Member States that acceded in or after 2004 introduced new rules and procedures. This may have caused, in principle, the intense reviews with respect to compatibility with EU law. Nevertheless, Member States that acceded before 2004 often change their land policies. However, this did not lead to the comprehensive review of the Commission. If the Commission has no locus standi in this issue, the question arises as to whether the Commission acted in light of the CJEU's case law in every Member State's case or whether it treated this as a subject of informal or singular political agreement in its relationship with the Member State in question

4. Reviews launched as a result of complaints

The European Commission has repeatedly emphasised in its answers to questions on the equal treatment of Member States that comprehensive reviews are launched in response to individual complaints. It is difficult to imagine that the European Commission received complaints against all Member States that acceded in or after 2004, following the expiry of the derogation period. The Commission denied, in its answer to Question No. P-00558/2015 that it launched reviews in response to complaints, citing the expiry of the transitional exemption provided by the Acts of Accession as the reason. Even if we assume that the complaints pertaining to the land policies of all new Member States arrived after the derogation period expired, and that the answer of the Commission to Question No. P-00558/2015 bears no relevance, the fact that several cases against individual people[22] were filed before the CJEU for a preliminary ruling against the land policy of the Republic of Austria makes it quite unlikely that no applicant turned to the European Commission with a complaint following a long legal dispute. It follows from the above that the derogation from the principle of equal treatment of the Member States cannot be justified by claiming that the comprehensive reviews and processes of the European Commission were initiated by individual complaints.[23]

These arguments are strengthened by the Commission's answer to Question Nos. E-002940/16 and E-008719/2016 with respect to the land policy of the Republic of Austria and its answers related to the register of complaints and the inconsistency between them. When asked through Question No. E-002940/16 to indicate the number of complaints received against the Member States that acceded in or after 2004 and against the land policy of the Republic of Austria, the Commission answered saying that the complaints were recorded in a register created for this purpose from 2009 onward. The Commission emphasised in the answer to Question No. E-008719/2016 that as the complaints were registered before the register was set up in 2009, no discrimination could have occurred. This inconsistency shows that even if the Commission registered the complaints properly, it did not provide an adequate answer to Question No. E-002940/2016. Thus, it did not comply with the obligation of giving information.

It can be concluded from the answer to Question No. E-002940/2016 that the Commission received 35 complaints since 2004 against the Member States that acceded before 2004, with respect to the regulation of property, of which 8 were against the Republic of Austria. The relatively high volume of complaints shows that a practice that violates the equal treatment of Member States cannot be justified by claiming that comprehensive reviews against Member States that acceded after 2004 were initiated

22 CJEU, C-302/97.

23 In the following sections, we note that the Commission did not initiate an infringement proceeding where over 1000 persons' rights were violated, and where all these individuals turned to the Commission with individual complaints because of direct discrimination based on nationality.

by individual complaints because the 35 complaints against the Member States that acceded before 2004 could have led to comprehensive review.[24]

5. Legal effect of the temporary exemption provided in the Acts of Accession

The Commission's Answer No. E-013450/2015 replied to the following two questions. The first question raised whether the derogation period provided by the Acts of Accession can be interpreted as an obligation to the Commission conducting comprehensive reviews. In case of a positive answer to this first question, the second question asked the Commission why are no comprehensive reviews against the 'old' Member States related to the expiration of the temporary exemption of the new Member States' workers. The Commission explained that EU law is fully applicable on the workers of the 'new' Member States after the expiration of the derogation period.. The Commission did not mention that any legal obligation, any kind of authorisation, or practice concerning all Member States exist with the intent to process comprehensive reviews after the expiry of the derogation period.

According to the Commission, if it conducts, in the narrow sense, comprehensive reviews against Member States that acceded after 2004 and against those that acceded before 2004 with respect to the derogation period concerning the property's purchase, then it should have conducted comprehensive reviews against the Republic of Austria, whose Act of Accession set a 5-year temporary exemption vis-à-vis secondary properties, shortly after the expiry of the derogation period. The fact that there are several preliminary rulings[25] by the CJEU in this field confirms that when the European Commission did not start a comprehensive review against the Republic of Austria – just like it processed against Member States that acceded in 2004 – the principle of equal treatment was not applied.

6. Transparency vis-à-vis the scope of the land policy of Member States

In Question No. E-013451/15, a Member of the European Parliament suggested the Commission carry out a consultation with the Members of the European Parliament and the relevant professional organisation related to the most significant issues of the Member States' land policy, not only discussing the issue case-by-case with the concerned Member States. This can allow these organisations to propose relevant recommendations pertaining to the Member States' regulations. Fabienne Peraldi Leneuf stated that

24 Answer of the Commission to question No. E-002940/2016. https://www.europarl.europa.eu/doceo/document/E-8-2016–002940-ASW_EN.html

25 CJEU, C-515/99, C-519/99, C-524/99, C-540/99.

the Commission discusses EU policies with civil society organisations, for example in the energy sector, and in the environmental protection and social policy contexts.[26]

Despite the differences between the above-mentioned two areas, the discussion of individual policies can inform the approach in discussions on land policies, too: the intersection of negative and positive integration can be considered a form of negative legislation. The extension of the scope of Member States' land policies is directly related to aspects of positive integration, which is contrary to negative integration. Thus, even though it is highly likely that Article 345 of the TFEU may exclude European regulations in this area, a proposal in which, among others, the scope of the land policy of Member States can be extended by the participation of the European Parliament can be considered negative integration.

The Commission admitted in its answer to Question No. E-013451/15 that it is obliged to answer the MEP's questions under Article 230 of the TFEU, and that it aims to provide a proper answer to professional organisations.[27] However, the Commission emphasised that it is difficult to reply to the MEP's question as the state's circumstances should be considered, among others, if the fundamental freedoms are restricted. According to CJEU case law, if the Member States' land policy measures and its compatibility with EU law are examined, the Member State's regulation should be examined overall. This does not mean, theoretically, that there is no possibility to assess[28] the extent of the restriction on the fundamental freedom in the context of land policy, in advance. This can influence the scope of the Member States' land policy.

In Question No. P-001509/16 the European Commission was asked to provide an exact answer to Question No. E-013451/2015, especially to the question on how the fundamental freedoms concerned by the question, generally, before the examination of certain Member States' different contexts and regulations, can be applied to land policy, and to explain the relationship between the fundamental freedoms and the CAP's provisions. The MEP aimed to get information from the Commission that it shares the professional standing point that the CJEU examines the relevant EU provisions' applicability first – during deciding the national regulations compatibility with the EU law – and after this, it analyses the Member State's rule considering the certain circumstances of the case? The MEP asked the Commission, bearing in mind these considerations, to provide an exact reply to Question No. P-005526/2015. In

26 Peraldi Leneuf–de la Rosa, 2013, pp. 190–194.

27 Professional organisations in this context mean NGOs, civil organisations, which are affected by the Member State's regulation on land policy, or organisations that found it important to discuss the issue – e.g. environmental, rural development – with the EU institutions.

28 Evaluating the scope of the Member State is relevant only for the Commission, as the CJEU has a monopoly over the authentic interpretation of EU law in this field. Despite this, assessing how 'old and new' Member States can regulate Member States' land policies according to the CAP's objectives can have a significant effect. On the one hand, it can affect the Commission's practice. On the other hand, a scientific proposal that fits into EU law through the Advocate General's opinion, can affect the CJEU's case law too, if the Advocate General would consider a proposal to this effect in a case before the CJEU.

Answer No. P-001509/2016, the Commission emphasised the evaluation of the national provisions and repeated the legitimate reasons behind the restrictions on agricultural lands. It explained that a national provision can restrict one or more fundamental freedoms and that 'when they are deciding on the national measures, its conformity and proportionality should be considered in light of relevant EU principles'. We found that the Commission missed out on explaining whether it agrees with the professional argument, that the CJEU first examines the relevant EU law, when it evaluates the compatibility of a national provision with EU law, especially the CAP's targets in relation to fundamental freedoms, and the examination of the concerned national provisions, which comes after this. However, the Commission has left it to Member States to evaluate the provisions introduced in light of EU law. By doing so, the Commission put them in an uncertain situation, in which their rules can be challenged by individuals before the CJEU, thus undermining the implementation of the CAP's goals.

7. The Commission's reaction to the Slovakian and Romanian restitutions

In evaluating Slovakia's case, we examine Act No. 503/2003 on the Restitution of Agricultural Property, in which the provisions discriminate among individuals based on nationality and residence. We also evaluate whether the Act on Restitution is relevant to the Beneš Decrees. In Romania's case, improper administrative practice produced negative consequences.

In Slovakia's case, the European Commission refused to admit the violation with respect to the confiscation of properties in the communist era and to the ex officio appeal after complaints were filed. Fearing potential political resistance from the European Commission, the first question[29] was raised by a Dutch Member of the European Parliament. There was no reference made to any Member State or other criteria. In its answer, the Commission explained that EU law does not oblige Member States to return properties that were confiscated before their accession, but if a Member State decides to introduce such measures, in the case of *ratione temporis*[30] measures, the condition of the free movement of capital should be respected, especially the prohibition on discrimination based on nationality. When the Commission was asked about the Slovak Act on Restitution's discriminative provision based on nationality and residence, which were applied for eight months after the accession, it should have answered the question within six weeks – according to the relevant rules – but it answered after over two and

29 This strategy and the questions were mostly developed by the Budapest-based NGO, the Institute for the Protection of Minority Rights (IPMR).

30 About the temporal scope, a special conference issue is under publishing within the Vojvodina Scientific Days, which points out that the CJEU interprets the temporal scope extensively, especially in those situations, where the procedural steps start before the accession of a Member State and finish after this.

a half years. This highlights the Commission's political resistance.[31]. In its answer,[32] the Commission acknowledged the violation and stated that it was unjustifiable, with vague references to Article 345 of the TFEU, indicating that the violation concerned few people. It refused to initiate an infringement proceeding. Following this, over a hundred people voiced their concerns before the Commission and asked it to help them exercise their rights under EU law.

The European Commission stated in the spring of 2018, that concerned individuals could enforce their EU rights individually before the Slovakian courts and reasoned the refusal of the infringement proceeding by geopolitical reasons, and the violation's slight effect on the internal market. After this, the injured parties turned to the European Ombudsman, who had developed a practice that requires the Commission to act upon the receipt of legally relevant complaints and that does not allow the Commission to refuse to help European citizens on political grounds. The European Ombudsman can provide aid if there are meaningful comments by the Commission in response to the complainants' remarks.

However, the European Commission missed out on providing a proper answer to the complainants' comments and consistently breached deadlines, despite the European Ombudsman's referral. In the legal literature,[33]the weakness is of the European Ombudsman's decision is often concluded, in the light of the enforcement. In this case, the Ombudsman did not offset the Commission's discretion to launch infringement proceedings which shows political characteristics. . One of the weakest parts of the procedure is that the European Commission can refuse to initiate infringement proceedings on political grounds.[34] The Commission was more willing to give answers which can facilitate the remedy before the Slovakian courts..[35] However, in the case of the Romanian violations, the Commission's answers were more supportive.[36]

We find Mairead McGuinnes' Answer No. E-000916/2021 on behalf of the Commission relatively not too professionally based,[37] but it can be considered as progress: according to the Commission, the Benes Decrees are historical documents, which

31 You can read more about the temporal scope and the regulation on agricultural property in the Segro case. Joined Cases C-52/16 and C-113/16.

32 The European Commission sent its answer through a letter in September 2016, instead of using the platform for the questions for written answers. The letter can be found in the archives of the IPMR.

33 Karagiannis and Petit, 2007, pp. 28–29.

34 Poirmeur, 2019, p. 65.

35 At first sight, it may seem hopeless to enforce EU law after over one and a half decades. However, it is not impossible. On the one hand, there is a Slovakian procedural rule, according to which final judgments can be opened again without a time limit. EU law can override, in certain circumstances, the limitation periods and periods for appeal if the Member State's courts developed a practice that goes against EU law and makes the enforcement of an individual's rights impossible.

36 Supportive means in this context that the answers help – as we will experience in the following – to prove remedy of a violation against EU law.

37 We do not go into this in detail in this paper.

should not be against the EU law. The latter answers[38] of the Commission stated that the scope of the Act on Restitution does not extend to the Decrees. The Commission refused to provide a clear answer to Question No. E-000916/2012, and instead, stated that the issue fell within the competence of the Member State's courts.

8. Answer to a Question on the Romanian restitution procedure

The Romanian laws on restitution are mostly compatible with EU law, whereas individual decisions and administrative practice are more likely to cause violations and other issues. [39] This is analysed in this paper. The Commission has provided greater or lesser help in its other answers related to this issue.

The answer to Question No. E-001140/2012 determined how a right, which was already confirmed in an earlier answer, can be enforced under a national legal order. In the previous answer, the Commission admitted that good administrative behaviour requires a review of the restitution of citizens of another Member State within a reasonable time.

There is a procedural rule[40] in Romanian law that can oblige competent bodies to give an answer or decide a case. The question emphasised on the principle of conforming interpretation, which requires a national court to interpret a Member State's procedural rule to allow, in keeping with good administrative practice, a decision on the application within a reasonable time. Didier Reynders explained[41] that a Member States' autonomy over property regulated under Article 345 of the TFEU is not absolute while defining the criteria for the restoration of the previous owners' right to ownership; relevant treaties and secondary law[42] should be considered, especially with respect to the free movement of capital.[43] Following this, the Commission adopted its opinion in two significant questions: it declared that the general principles should be considered, including good administrative behaviour, which requires a review within a reasonable time and emphasised that according to the principle of conforming interpretation,[44] in all ongoing procedures, competent courts should interpret EU law in a manner that contributes towards the enforcement of individual rights that originated from EU law.

38 For instance, answer given by Commissioner McGuinness on behalf of the European Commission Question reference: E-000916/2021.21 May 2021.

39 Korom, 2018

40 Government Regulation No. 890/2005. Article 5.

41 Written answer: E-001140/2021.

42 In the case of secondary EU law, the directive can be referred.

43 In Answer No. E-001140/2021, the Commission found EU law applicable under the condition that it covered the temporal scope. In line with the CJEU's extensive interpretation in the application of *ratione temporis,* the application of EU law cannot be excluded in cases that began before the Member State's accession and these restitution procedures did not end after the Member State's accession. .

44 Principle of conforming interpretation.

The Commission admitted the applicability of the general principles in restitution procedures,[45] especially good administrative behaviour, which is typically relevant to the CJEU's case law.[46] It is much more important than clarifying the general principles that the European Commission defined the standards of the EU law and gave help to the competent national court to enforce the EU law in the national legal system.If strictly professional and scientific standards are considered, the European Commission's answer has no value for the Members of the European Parliament. These answers are non-binding, except if the Commission initiates an infringement proceeding. Practice shows that the Commission was constrained to initiate a proceeding in the case of indigenous Hungarian minorities living in the Carpathian Basin.

The answer promotes legal enforcement before national courts. Member States shall enforce EU law in their national legal system following the interpretation of the CJEU. This is not like a textbook case, in reality. The literature mentions several cases in which national courts, including courts of the last instance, have either not applied EU law properly, or have not applied it at all.[47] The absence of a relevant CJEU case law on restitution is a barrier to legal enforcement. Moreover, we did not mention the possible political difficulties. Thus, a Member State can easily refuse to apply the requirements determined by EU law, the free movement of capital, and the general principles. If there is a written answer with an identification number by the Commission, the national courts cannot dismiss the arguments based on the EU law. The Commission's answers with identification numbers can be especially helpful for the courts of the last instance which can decide whether they are obliged to initiate a preliminary ruling according to the CJEU's case law, in the light of the Clifit formula or they can refuse to apply the EU law on the basis that its inapplicability is unambiguous at all..[48] The case[49] of Attila Dabis, who was prohibited from entering Romania, serves as a good example. By applying this guidance of the Commission by its answers with an identification number, the Romanian Court was able to make a judgement that meets the requirements of EU law.

The European Commission's written answers can facilitate restitution cases before the CJEU. Antione Vauchez demonstrated that advocates and judges are not experts in EU law. Thus, they may not want their case to be brought before the CJEU. In most cases, big corporations and legal entities' cases are brought before the CJEU.[50] A supportive answer from the Commission can be of great assistance to competent judges and advocates.

45 The case law and the legal literature are not unequivocal about whether the Member States apply EU law in the restitution procedure. . See Gyeney and Korom, 2020.

46 Coutron, 2014, p.p. 17-19.

47 L'obligation de renvoi préjudiciel á la Cour de justice: une obligation sanctionnée?.

48 Court of the European Union, 283/81.

49 Question No. P-004086/2020. According to this answer, the Romanian Supreme Court changed the judgement of the court of the second instance, which ruled that the case did not cover the scope of EU law. The answer of the Commission had a great influence on the enforcement of minority rights and thus on the dispute's advantageous outcome.

50 Vauchez, 2019, pp. 52–53.

9. Judgement in the Segro case[51]

The case concerned[52] a Hungarian-based company whose memberslived in Germany[53] and were citizens of other .[54] The company became a rightsholder of usufruct before Hungary accessed the EU and was registered to the land register. The competent authority removed the usufruct rights by applying the Hungarian Act on Transitional Rules. Hungarian courts[55] mostly turn to the CJEU to clarify whether particular Hungarian legal provisions are compatible with the fundamental freedoms and with Articles 17 and 47 of the Charter.Furthermore, the Hungarian courts asked the CJEU that these provisions eliminate by law – without further considerations – the right of use and the usufruct right of the persons who are not close relatives of the property's owner. The literature and case law under Article 345 of the TFEU are consistent on the point that[56] the autonomy of the ownership is governed by private law in practice, and that Article 345 of the TFEU cannot justify the restriction of fundamental freedoms.[57]

Finally, the CJEU examined the national rule in light of the free movement of capital. According to relevant case law, the CJEU first examined whether the concerned national rule restricted fundamental freedoms. All national measures that can serve as barriers to fundamental freedoms are restrictions and are only compatible with EU law if they can be justified according to it. The Court strengthened its stand when it decided that[58] the Hungarian rule was a barrier to the free movement of capital. This raises an interesting question of whether Hungarian rule is indirectly discriminative[59] to other Member States' citizens. The Court admitted that the family-tie requirements less likely in the case of other Member States' citizens, , particularly considering the fact that the Act of Accession authorised Hungary to restrict the ownership rights of foreigners.[60] The CJEU added that the rule prohibiting[61] other Member States' citizens from acquiring property till the expiry of the derogation period resulted in the growth of the usufruct rights of the citizens of other Member States. The Hungarian government pointed out during the negotiations that approximately 5% of the people concerned

51 Court of the European Union, C-52/16.
52 We did not examine the Horváth case as we did not find the explanation relevant.
53 The transboundary aspect is provided by this. The absence of this aspect results in difficulties in enforcing claims under EU law. However, case law may make an exception to the transboundary requirement.
54 Guiot and Mazille, 2018, p. 179. They explained that the literature is not unanimous on whether the transboundary aspect is necessary to exercise fundamental freedoms. Clément and Wiltz (eds.), 2018, 179.p.
55 Several cases were joined together before the CJEU.
56 Contrary to the arguments that were brought up in the case.
57 Court of Justice of the European Union, C-452/01, C-370/05.
58 Court of Justice of the European Union, C-52/16, paras. 61-66.
59 In light of the judgment, it can be concluded that the rule is not directly discriminatory based on nationality.
60 Court of Justice of the European Union, C-52/16, paras. 68-69.
61 Ibid. para. 70.

by the rule were citizens of another Member State or a third country. According to the Court, this did not disprove the fact that the rule resulted in greater disadvantage to the citizens of other States because in light of relevant case law,[62] it is important to see how the citizens of Hungary and other States were concerned by the elimination of usufruct rights in situations like this.[63] The Court made it likely for other Member States' citizens to be more concerned by the rule,[64] as such citizens can acquire only usufruct rights.

This interpretation results in disadvantages to Member States whose Acts of Accession contain provisions for a derogation period vis-à-vis fundamental freedoms. After expiry, if a Member State decides to regulate the concerned area according to EU law, then, in light of this interpretation, the regulation is indirectly discriminatory. Member States that are not part of the derogation period do not face challenges like this. According to para 72 of the judgement, it should be decided by competent national courts that in line with the criteria set by CJEU, the termination of these rights is concerning their own citizens more or the citizens of other Member States. Despite this, the CJEU makes it likely for other Member States' citizens to be affected more in light of the derogation period.

Maria Fartunova explained[65] that the principle of *actori incubit probatio* is a determining factor in the infringement proceeding as well, which means that the Member State's infringement cannot be based on presumptions, but should be evidenced by fact. EU law overwrites this principle before national courts only if it makes the enforcement of EU rights impossible; thus, it would be contrary to the principle of effectiveness, which narrows down the Member States' procedural autonomy.[66] We did not find any reasonable explanations for the CJEU's reference to the fact that after the expiry of the derogation period, in light of its interpretative logic, the concerned rule should be considered indirectly discriminatory towards other Member State's citizens even if most concerned individuals are Hungarians, whereas other Member States' citizens constitute only a small percentage of minorities. The Court reasserted that it considered an examined rule a barrier to the free movement of capital even in the absence of the abovementioned arguments,[67] and that if, despite this, it finds the rule indirectly discriminatory, it does not exclude the fact that it can be justified by considering EU law.[68] The Advocate General emphasised[69] that the restrictive measures, which were not discriminatory, could be justified by referring to public interest. He also noted that the injured parties were compensated according to Hungarian law. However, despite[70]

62 Court of Justice of the European Union, C-167/97.
63 Court of Justice of the European Union, C-52/16, paras. 73.
64 Ibid.
65 Fartunova, 2013, p. 589.
66 Ibid. p. 590.
67 Court of Justice of the European Union, C-52/16, paras. 75.
68 Ibid.
69 Advocate General's opinion, para. 69.
70 Ibid. para. 85.

this compensation,[71] the measure was inconvenient and the amount provided did not eliminate this fully.[72]

In the following section, we examine the factors justifying the provision, which is indirectly discriminative according to the CJEU, within the scope of the criteria for the control mechanisms under negative integration.

10. Violating the rules of foreign exchange

In light of Article 63 of the TFEU, Member States can take measures to enforce compliance with their regulations on foreign exchange.[73] The Hungarian government stated that obtaining usufruct rights was *ab initio* unlawful because it was linked to an administrative authorisation and the authorities did not receive any requests to this authorisation. .[74] The Advocate General referred to relevant case law – within the fundamental freedoms – which shows that the applied sanctions shall be proportional..[75] The Court strengthened the opinion's remarks on proportionality referring to the Brutscher[76] case.

11. The justification for the use of agricultural land

Case law allows the restriction of the free movement of capital for general interest objectives such as combating property speculation, promoting viable small- and medium-sized land use, avoiding the fragmentation of land, and ensuring that land is owned by those who cultivate it. The Hungarian government referred to the last general interest goal listed above. This motivated the prohibition of the acquisition of agricultural land. It was argued by the Hungarian government that the regulation allowed businesses to use land, and helped to create a competitive business size and prevent the land's fragmentation.

The Advocate General found that the general interest objectives provided by the Hungarian government could not be justified for several reasons, and thus, that the regulation was not compatible with EU law, which only allows the close relatives to maintain the rights of use.[77] This regulation is not capable of achieving the general interest objectives. One's close relatives may acquire land for speculative reasons, whereas

71 Ibid.

72 The Advocate General concluded that terminating the rights of those concerned against their will affects the citizens of other Member States more, and thus should be considered discriminatory. Ibid. paras. 86–87.

73 Particularly in the fields of taxation and prudential supervision.

74 General Advocate's opinion, para. 92.

75 Court of Justice of the European Union, C-213/04.

76 Court of Justice of the European Union, C-370/05.

77 General Advocate's opinion, paras. 111-114.

those concerned by the provision may acquire land for agricultural goals; thus the close relationship requirement is not a suitable means to achieve the goals.[78] The Advocate General did not find the provisions suitable according to necessity, because other measures that were less restrictive in comparison with the requirement of personal cultivation may have been more suited to achieve these goals. The Advocate General also argued that the concerned provisions were discriminatory based on citizenship.[79] The discriminative measure of the Member State could be justified by general interest objects, but the CJEU had to clear this issue. According to the CJEU, the provision went beyond achieving the land policy goals. The compensation provided under Hungarian private law was not enough because it led to long and uncertain proceedings.[80]

12. Preventing the misuse of rights

In principle, EU law does not prohibit the restriction of fundamental rights in preventing the misuse of rights.[81] However, the justification should adhere to the principle of proportionality. Thus, the regulation should allow Member States' courts to examine the possible abuse of rights on a case-by-case basis. The concerned provisions could not prevent misuse according to the Advocate General, because close relatives could also realise misuse..[82] The measures applied, according to the Advocate General's opinion, were more than what was necessary to attain the objective,[83] because they set a presumption of misuse on part of non-related individuals, without ascertaining whether there was an artificial agreement.[84] The CJEU does not seem to exclude the justification of the fundamental rights' restriction. It is encouraging that it provided for a broad range of objectives among the Member States' land policies.

13. The judgement in Hungary/Commission[85]

The infringement proceeding against Hungary continued after the preliminary ruling in the Segro case. This is worth examining individually. In practice, after a preliminary ruling, a Member State is not likely to modify its regulations. The Commission then initiates infringement proceedings. Member States can occasionally refer to the *ne bis in*

78 The CJEU's judgement justified the Advocate General's position.
79 Advocate General's opinion, para. 115.
80 Court of Justice of the European Union, C-52/16, paras. 89-92.
81 Advocate General's opinion, para, 102. This is why the rule did not meet the requirements of the principle of proportionality in this case.
82 Ibid. para. 103.
83 Advocate General's opinion, para. 204.
84 The fully artificial agreement is mostly applied in the field of taxation, and is especially acknowledged by EU practice where the agreements pertain to fiscal fraud.
85 Court of Justice of the European Union, C-235/17.

idem principle,[86] if the European Commission initiates multiple infringement proceedings against them. This happened in the Commission/Portugal[87] case. However, in the current case, there was a preliminary ruling. Unlike the Segro case, the Commission asked to address the violation of Article 17 of the Charter individually. Thus, the *ne bis in idem* principle cannot be used here.

According to the literature, the European Commission has enjoyed a wide margin of discretion vis-à-vis initiating an infringement proceeding, which include that the Commission should not reason the necessity[88] of the procedure, and that the termination of the infringement proceedings does not necessarily mean the end of the entire procedure altogether.[89] The reasons for this can be the following: [90] preventing Member States from ending the procedure with a 'fraudulent intent'; the *res judicata* effect of the judgement in the infringement proceeding clarifies the application of EU law; and it can base compensation procedures against the Member States.

We examine the most relevant remarks of the Advocate General and do not analyse the CJEU's considerations in the Segro case.[91] The Advocate General examined the Hungarian regulation in the light of Article 17 of the Fundamental Charter of the European Union. According to the opinion of the Advocate General, the provisions should be applied if the usufruct right covers two aspects – the use and the possession – from the three aspects of the right to ownership.The Advocate General emphasised that the judgement marked the first occasion on which the Commission asked the CJEU to address the infringement of the Charter's provisions. [92] However, the Commission stated in a communication in 2010,[93] that it would object if Member States did not fulfil the Charter's requirements, but this had not happened until then. The opinion clarified that this application at stake was the beginning of a series, but these judgements all concerned Hungary.[94]

In proceedings pertaining to Article 17 of the Charter, the Hungarian government acknowledged, in the course of its examination of the right to ownership in an infringement proceeding, that no Hungarian Court had encountered the absence of the foreign exchange authority's licence, which can *ab initio* annul the contract.[95] The reasons this rule generated a dispute in the CJEU should be also examined. It was mentioned several times[96] that the rules on agricultural land ownership and use are more likely to be brought before the CJEU in cases involving Member States that acceded in 2004 and 2007, because of a greater potential conflict of interest vis-à-vis economic

86 Simon, 2011, p. 242.
87 Court of Justice of the European Union, C-276/98.
88 Court of Justice of the European Union, 16/76.
89 Simon, 2011, p. 238.
90 Ibid.
91 The Advocate General referred to this in para. 2 of the opinion.
92 Advocate General's opinion, C-52/16, para. 64.
93 Com (1010) 573 final.
94 C-66/18, and C-78/18.
95 Advocate General's opinion, para. 147.
96 Korom, 2013.

reasons. Several cases from individual disputes were brought to the CJEU after the accession of the Republic of Austria. It can be the result of an economic conflict of interest too. It strengthens this conflict of interest if the concerned citizens or economic operators of other Member States are not just losing a possible investment or a possibility of land purchase after the expiration of the derogation period, but the regulation introduces measures against the existing agreements. This raises several questions on why the European Commission initiated and pursued the infringement proceedings[97] if it was aware that the preliminary procedure was ongoing against the same state on the same issue.

Initiating an infringement proceeding by the European Commission can have several reasons.[98] First, it may aim to demonstrate that it can effectively provide investor protection at the EU level, and thus, the Member States, especially old ones, would not have to join investor protection agreements within the framework of international law or other constructions. Second, as the Advocate General noted, the procedure cannot be separated from those initiated against Hungary based on political motives. Third, the regulation on the purchase of agricultural land is politically sensitive, particularly for Member States that acceded in 2004. The Commission possibly demonstrated with the infringement proceedings that it acts against the regulation on agricultural lands of a Member State which acceded in 2004 that is violating the interest of the founding Member States, and it would make it impossible for the Member States which acceded in 2004 to regulate properly after the expiration of the derogation period.

14. Conclusion and proposed solutions

In the current stage of development of EU law, we do not consider it possible for the CAP's objectives to be achieved sustainably because of the control imposed through negative integration if cases are brought before the CJEU. This issue especially concerns Member States that acceded in 2004 or 2007. The Commission can have a serious effect on this process. The principles and professional aspects that inform the Commission's land policy practice vis-à-vis Member States that acceded in 2004 cannot be considered well-founded, mostly because of their self-contradictory character.

The Commission's reaction to the Slovakian agricultural law is evident. Thousands of concerned people asked the Commission to resolve the violation of their rights by direct discrimination based on nationality, but in vain. The Commission's geopolitical reasons undermine the arguments according to which it acts against the violation concerning European citizens. It is difficult for those concerned to enforce their rights through individual proceedings. However, the Commission's answers vis-à-vis the

97 In light of this, carrying out the procedure was justified by individual considerations of Article 17 of the Charter.

98 Besides the abovementioned reasons in the literature and Article 17 of the Charter.

Romanian restitution process are encouraging. It may be of significant help to those concerned to reclaim their properties.

The reasons behind the Commission's action against the Hungarian regulation on the agricultural agreements, which are not in line with the current laws, a conflict of interest between the 'old' and the 'new' Member States can be found. This conflict of interest can be related to the ownership of the agricultural lands. Moreover, the Commission's aim to protect investments can also serve as a reason for this action. We should take into account that the Hungarian rule – unlike the Slovakian Act on Restitution – did not contain direct discriminative provisions based on nationality, and the Hungarian government brought up meaningful arguments, even though these failed on the control mechanism of the negative integration form.. The Commission also admitted that the Slovakian law's discriminatory provisions cannot be justified.

In the case of the examined Hungarian law, the Commission should have been more cautious, especially that it was not fully objective while deciding and considered political aspects: as far as we know, it was suggested in scientific events and the legal literature that the Brutscher judgement's considerations should be incorporated into the future regulation, especially in the case of individual discretion.In the case of fundamental freedoms, EU law neither accepts the wide discretion of Member States, nor the rule that makes such considerations impossible, whatever may be the cause of the Member State's public interest.

The fact, that the judgement on the Commission/Hungary case Article 17 of the Charter[99] – besides the free movement of capital – should be individually considered, can help in the restitution cases the persons concerned to enforce their rights derived from the EU law. [100] In our point of view, the Member States' range on land policy is less affected by article 17 of the Charter, except if the Member State would start to change the land structure in a greater volume, which would affect the owners' and the other's rights in rem. But the CAP's specific features can solve this[101] from the perspective of the Member State's range on the land policy if its appliance would growing in importance in the land policy range. According to the case law, the CAP's targets overwrites the ownership rights.[102]

It would be an optimal solution to establish an effective EU mechanism to address issues pertaining to the scope of Member States' land policies, which can sustainably implement the requirements of the internal market and the CAP's targets. The CAP can serve as an example for this optimal solution, as its part concerning the integral market preserves the agricultural sector's specifics and the entailing possibility of the state's – supranational – intervention. The legal literature also addresses such possibilities in other fields.

99 We assume that Article 17 would affect the restitution positively because it protects the former owners' interests.

100 A Romanian restitution rule can serve as an example, which reduced the enforcement of the rights derived from the EU law.

101 Biachi, 2012, pp. 63–65.

102 Court of Justice of the European Union, 44/79.

Ségolene Barbou des Places explained that EU law allows States to fulfil certain functions in general and to set fundamental rules for the community. The restriction is often determined not by the fact that the goal is economic, but based on the CJEU's examination of the goal set[103] through the exercise of state sovereignty.[104] Jean-Christophe Barbato noted that the CAP showed signs of protectionism at the beginning of integration. Therefore, it was difficult to manage the CAP to be accepted by the Member States – especially Germany – which considered the European construction based on liberal, free trade foundations. They were only willing to accept the 'original sing' of the CAP by the pressure of the USA.[105]

According to Myriam Dorian-Duban, it is gaining attention because aside from fundamental freedoms, certain social objects should be emphasised within EU law, as doing so will contribute to the welfare of citizens.[106]

In the case of restitution, the return of confiscated properties, especially, immovable properties, would have been useful in resolving challenges satisfactorily before accession. The consideration that EU law should oblige or currently requires Member States to return the properties that were confiscated before accession or at least pay compensation is not well-founded – this is strengthened by the *ratione temporis' s*cope.

It seems hard to imagine that issues pertaining to land policy and restitution can be resolved with a practice that is compatible with EU law, and could be a solution for both areas' problems, especially, that in the field of land policy, the Member States' capability to provide a sustainable regulation is in the focus, while in the field of the restitution, the solution can be defined by opposite tendencies. Despite this, we assume that a solution that can be applied to both areas may be proposed.

The European Commission should develop a model involving NGOs to reduce the EU's control within negative integration by combining positive integration and the CAP's specification against the internal market, so that Member States can safely and sustainably regulate matters, both in light of EU law and the objectives permitted by the CJEU. Individual rights relating to fundamental rights can be implemented in full. The Commission should develop its position with due respect for the values of transparency and the principle of the equal treatment of Member States, which can, in turn, increase the trust of Member States that acceded in 2004, while also overshadowing practice motivated by political considerations that can harm the community in the long term.

Conversely, in the field of restitution, the Commission's efforts to promote individual rights cannot be considered dangerous.. According to the phase of development

103 Barbou des Places, 2014, pp. 20–21, 66.

104 The extension of a Member State's land policy is not feasible if it includes a reference to Article 345 of the TFEU or withdraws the land policy from the free movement of capital. However, it is worth examining relevant case laws from the CJEU's repertoire and propose solutions for the transformation of land policies.

105 Barbato, 2014, pp. 20–21, 66.

106 Doriat-Duban, 2014, pp. 305.

of EU law at the time of study, the Member States have full discretion to introduce restitution measures vis-à-vis immovable property and identify the period and goods that will be addressed by such a measure. EU law only prohibits discrimination based on nationality and withholds the Member States to make it impossible to enforce the individual's rights before courts or during administrative procedures, even though there is an existing regulation.. In cases like this, the application of common rules and EU law is well reasoned for all European citizens and Member States. In the long term, this practice can strengthen trust in the EU. Denying the enforcement of rights based on geopolitical reasons for a specific group of EU citizens will be counterproductive in the long run.

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Statehood: the Essential Prerequisite for Law and Liberty

ABSTRACT: *The attempt to subject Poland and Hungary to procedures under EU law for allegedly not respecting European values has its roots both in the supranational nature of the EU project and also in the differing concepts of the nation in the Eastern and Western halves of the continent. The hegemonic West is deeply post-modern while former Communist states have retained some faith in the nation. Globalisation generally, and the EU project in particular, are based on functionalist assumptions whose origins lie in the early 19th century, yet these fail to understand the eminently political nature of law: all jurisdictions are rooted in society and the state and it is the role of government to adjudicate between the competing claims of citizens. This makes it very difficult, impossible even, to formulate universal rights since their formulation and application depend on interpretation, i.e. on jurisdiction, and therefore on the sovereignty of the ultimate decision-maker.*

KEYWORDS: statehood, sovereignty, Hungary, Poland, law, liberty.

In 1962, when a constitutional reform introduced direct election by universal suffrage for the office of president of the French Republic, the incumbent head of state, Charles de Gaulle, turned to his minister of justice, the eminent jurist, Jean Foyer, who had helped draw up the constitution of the 5th Republic four years earlier, and said, 'Remember this: first there is France, then there is the state, and then, to the extent that the major interests of these two are protected, there is the law.'[2]

De Gaulle is well known for having restored French sovereignty after the twin humiliations of defeat and collaboration. He is also known for having almost mystically embodied France[3] in his own person during the war: when Britain recognised Free

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2 Foyer, 2006, p. 7.

3 Bouthillon, 1995.

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France on 28 June 1940 as the true representative of the country[4], it was essentially a one-man show. But the fact that this remark about the correct relationship between the state and law was made in the context of establishing a direct national election for the head of state indicates that there is a link between De Gaulle's hierarchy of norms and democracy. Law is based on, and flows from, the state and the state is in turn based on the country or the nation, i.e. its territory and people. Law is not somehow above the state or prior to it: on the contrary, it requires the state, which in turn requires the nation, in order to have force.

De Gaulle's dictum is helpful in the context of the current conflict between the Brussels institutions and various EU member states in Central Europe, notably Poland and Hungary against which Article 7 proceedings are under way. That conflict pits two levels of jurisdiction against one another, the national and the supranational as the Brussels institutions seek to invert De Gaulle's hierarchy, putting 'the law' above both state and country. The conflict is the logical culmination of at least two decades in which supranational government has grown in size and power, in Europe and at around the world. The proliferation of organisations like the International Criminal Court or the World Trade Organisation, the doctrine of humanitarian interventionism, the internal dissipation of the state by NGOs, and of course the ever increasing federalisation of the EU are all based on the presumption that 'universal values' should override national politics.

Let us first dwell on the first part of De Gaulle's hierarchy: first the nation, then the state. He was affirming that the state is a product of the nation and that it flows from its existence. Nations precede states and are the pre-requisite for them but states also reinforce nations and protect them. When states like the Hungarian kingdom were created, the Hungarian nation already existed: the kingdom would not have been possible without the nation. But the existence of the new state gave the nation new strength. History gives us examples of nations which have lost their states (Poland being the obvious example) and then striving to recover it for fear that otherwise the nation itself might disappear.

The symbiotic relationship between nation and state explains why both of them are equally opposed by the post-national and anti-political functionalism of organisations like the European Union. We all know that the European construction is based on the absurd proposition that nationhood leads to war; less well understood is its specifically managerialist ideology which aims to replace the political art of government by the allegedly scientific practice of administration. The 'Monnet' method consists in incrementally transferring areas of state power specifically to bureaucratic, executive bodies: when Robert Schuman made his Declaration on 9 May 1950, the only body he proposed was the 'High Authority' (the future European Commission). This DNA remains decisive in the EU today: it seeks to dissolve nationhood not just through

4 Churchill wrote to his Foreign Secretary, Lord Halifax, to say that De Gaulle's 'Free France' was 'the responsible constitutional representative of France'. See Winston S. Churchill (1940) Letter to Lord Halifax, 24 June 1940, Churchill papers, 20/13, in: *The Churchill War Papers,* 404.

supranationalism but also through depoliticisation. Politics is considered just as as the nations of which it is the expression.

1. The nation, East and West

In Europe today there is an East-West split on the question of nationhood. The radically different historical experiences of the two halves of the continent explain, in large measure, this split and thus the current political conflict between Brussels and Poland and Hungary. In Central Europe, national identity played a major role in the fight against, and ultimate victory over, communism. In Western Europe, by contrast, national identity was severely damaged by the Second World War and nothing has happened since to repair it.

Everyone recalls how the election of Pope John Paul II seemed to tear open the iron curtain a decade before it finally fell. Poles were decisively energised in their national and religious identity by this event – a Catholic nation oppressed by a foreign and atheistic regime. Fewer people outside Hungary recall – but they should – that a young man called Viktor Orban was the first person in the Warsaw Pact publicly to call for the withdrawal of Soviet troops, on Heroes' Square in Budapest in June 1989 on the occasion of Imre Nagy's reburial. This was a momentous national event in which the Communist leadership tried to burnish its national credentials and spectacularly failed. Orban made his call specifically in the name of national liberation, and with reference to Hungary's long historical struggle for it over the centuries but especially of course in 1956.

These experiences meant that the movements which led to the collapse of Soviet rule in Central and Eastern Europe were not, as some liberal ideologues claim, fighting 'for Europe', at least not in the sense of post-political functionalism. What they wanted was national liberation – nationhood and the liberty which goes with it. Like their 19th century predecessors, they knew that you could not have the one without the other. 'Gulash communism' was a grotesque fraud designed to dupe Hungarians into believing that their communist regime was somehow national. Yet internationalism and anti-nationalism were the very core beliefs of Marxism, much more important than the international class struggle or state ownership of the means of production. The great move of the Marxian dialectic is towards internationalism and the withering away of the state: as Marx and Engels wrote, 'the worker has no country'[5].

In the post-war period, the situation in Western European states – with the single exception of Britain – was the opposite from that in Central Europe. In every single Western European state, national feeling had been severely discredited by the experience of the Second World War, when Western European states suffered the humiliations of defeat or occupation or both. In Germany and Italy, of course, their experiments in

5 Marx and Engels, 1848.

extreme nationalism ended in abject failure: in Germany's case, catastrophe coupled with moral abomination. In France and other occupied countries, the shameful memory of collaboration with the occupant has largely eclipsed the memory of heroic national resistance. The British exception (which also explains Brexit) lies in the fact that Britain's war success was due to a very strong national sentiment, especially when Britain stood alone in the period 1940–1941. Nationalism in Britain led to victory, not defeat. To be sure, Central and Eastern European countries also lived through dark times during the war but their subsequent national resistance to Communism paradoxically gave back to those countries a national feeling which Western European states never regained.

No sooner had the war ended than Western Europe embarked on the post-national project of European integration which quickly became a political ideology which continues to hold the entire political class in its grip. Moreover, Western European states generated subversive and Marxist popular culture in a way that Eastern European states did not, or less so. If John Lennon imagined, like his near namesake Lenin, a post-modern, post-historical and post-heroic world without countries and without identity ('nothing to live or die for, and no religion too'), Eastern European popular music often had a folksy dimension which emphasised the national over the post-national, and the rooted over the rootless.

For generations, Western universities have been dominated by Marxists which explains the rise to power in recent decades of former (or not so former) Marxists, usually of the Trostkyite or Maoist variety, such as José Manuel Barroso, student leader of the Maoist Reorganised Movement of the Proletariat Party during the Carnation Revolution of 1974, or Tony Blair, who has several times referred to his admiration for Trotsky. Jean-Claude Juncker, Barroso's successor as president of the European Commission, admitted to having 'flirted' with Trotskyism in his youth.[6] He seemed to relive his youthful errors on the eve of his retirement when, in 2018, he spoke at a ceremony in Trier to commemorate the 200th anniversary of Marx's birth, at which a huge bronze statue of the philosopher donated by China was unveiled, and where Juncker called Marx 'a forward thinking philosopher' and said that he was not responsible for the things done in his name.[7] If statues are being erected to Marx in the West, while they have been pulled down in the East, it is because in the West national sentiment was discredited while in the East Marxism was discredited.

To understand this intellectual hegemony of Marxists in Western Europe we need to understand the cultural politics of the Cold War. As Frances Stonor Saunders explains in *The Cultural Cold War,* the anti-Soviet left was especially targeted and

6 Noyon, 2016. This article contains a link to the site of the governement of Luxembourg which contains the quotation by Juncker about his Trotskyism but unfortunately the link no longer functions.

7 'Ein in die Zukunft hineindenkender Philosoph'. See *Participation of Jean-Claude Juncker, President of the EC, in the event commemorating the 200th anniversary of birth of Karl Marx, in Trier* 4 May 2018, Audiovisual Service, European Commission, https://audiovisual.ec.europa.eu/en/video/I-154723.

financially supported by the American secret services, not only in order to draw them away from Moscow but also for a more profound ideological reason: the West tried to beat Communism on its own terms, by presenting itself as more progressive and more materially successful than the Soviets. The West did not, generally speaking, present itself as more conservative or traditional but instead denounced the USSR precisely for being reactionary – for preferring Shostakovich to Stockhausen and socialist realism to Jackson Pollock. This is why it waged and won the Cold War from an essentially left-wing perspective.

This also explains the phenomenon of those left-wing dissidents who dominated the final days of the Communist system and, in many cases, the politics of post-communist states after its fall. Some Marxists came to the view, even before the collapse of Communism, that the Soviet system had become socially, culturally and economically reactionary. Milan Djilas, for instance, understood that globalisation was what Marx had been arguing for when he said that the bourgeois revolution would accelerate the end of nationhood. Just as Marx and Engels had argued that

> 'The need of a constantly expanding market for its products chases the bourgeoisie *over the whole surface of the globe* ... The bourgeoisie has through its exploitation of the world market given *a cosmopolitan character* to production and consumption *in every country*. To the great chagrin of Reactionists, it has drawn from under the feet of industry *the national ground on which it stood. All old-established national industries have been destroyed.'* [8]

so Milovan Djilas realised, in the late 1990s,

> 'Every Marxist, going back to Marx himself and forward past Lenin, regarded the creation of a world market and all that it brought about (strengthening each and every link among peoples, tearing down the barriers between nations, etc.) as a progressive fact of capitalism and a necessary condition for proletarian internationalism itself and the true convergence of peoples in socialism.'[9]

It is because of this ideological continuity that globalisation was so eagerly seized upon by Western elites in the euphoria of the 'end of history' at the end of the Cold War. It meant that a man like Barroso could easily progress from Maoist student leader to law professor (including at the CIA college, Georgetown University), to leftist politician, to president of the European Commission and, finally – the cherry on the cake – to chairman of the very crucible of globalist ideology, Goldman Sachs, a bank which has often been compared to a cult.

8 Marx and Engels, 1848, emphasis added.
9 Djilas, 1998, p. 135.

In fact, the internationalist programme was deployed long before the age of globalisation (if that is said to begin in the 1990s) and for the same reason. Just as, in the cultural field, the West sought to portray itself as more avant-garde than the USSR, which indeed seemed mired in endless performances of *Swan Lake* at the Bolshoi, so in the political field the European project, which began in 1951, was also designed to draw support away from Moscow by appealing to left-wing and internationalist ideas. Robert Schuman made his famous *Declaration* on 9 May 1950, unilaterally announcing the plan to create a coal and steel community, at least partly to counter the influence of the Moscow-backed 'peace movement' in the West by creating a mini-USSR also devoted to peace, just like its big rival based in Russia. In discussions with the US Secretary of State, Dean Acheson, in Paris the day before the Schuman Declaration, Schuman told Acheson, 'We must counter (the) powerful Communist peace propaganda theme, which is making dangerous headway even in non-Communist circles …'[10] That is why the first words of the Schuman Declaration he read out the next day are 'World peace…' and not just 'peace in Europe' (i.e. between France and Germany). Moreover, he chose to call his new organisation a 'community' no doubt partly because the word sounds like a reassuringly cosy-sounding substitute for its more intimidating etymological cousin, 'communism'.

2. Different concepts of the state

It is not just concepts of the nations which differ between East and West but also concepts of the state. Under communism, the states of Central and Eastern Europe continued to exist as officially sovereign entities. Like today's member states of the EU, they had all the attributes of statehood including membership of the United Nations, their own governments, police forces and armies. Yet they were not sovereign because their national governments were in reality under foreign control by means of the Communist international. The citizens of Central and Eastern Europe have therefore had 45 years of experience of bogus statehood and especially of the radical disconnect between, on the one hand, the official policy and behaviour of the state and, on the other, the real desires of the nation. This has inoculated them against the same deception practised by the EU whose governments are similarly connected by a trans-national ideology which becomes explicit when, as often occurs, different national governments simultaneously use the same slogan ('Build Back Better' is only the latest example).

The experience of Central and Eastern European states was therefore of a return to the natural symbiosis between the nation and the state. Their struggle to recover their national sovereignty, was inspired by the conviction that the sovereign state was the necessary precondition for freedom. This was the very opposite of the Leninist (and

10 *Telegram from the Secretary of State to the Acting Secretary of State,* Paris, 8 May 1950, 10 pm. Office of the Historian, Foreign Relations of the United States, 1950, Western Europe, Volume III, p. 1007.

Lenonist) view, which held precisely that the state was only an instrument of oppression. 'So long as the state exists, there is no freedom. When there will be freedom, there will be no state.'[11]

This return of the symbiosis between the nation and the state in Central Europe did not occur immediately after the events of 1989–1991. On the contrary, there were many years in which left-wing pro-European and post-national figures dominated the politics of the region, the most famous example being Vaclav Havel but other former Communists, recycled as Social Democrats, also proliferated across the region. These years were therefore also a learning experience for the region whose initial enthusiasm for the EU project soon cooled as politicians and electorates began to understand the full implications of it.

Havel was one of the main theoreticians of these implications, the most important of which was the explicit goal of ending national sovereignty, i.e. the sovereignty of the nation-state, and instead moving towards functionalist global governance. In 1999, in a speech entitled 'Kosovo and the end of the nation-state' delivered to the Canadian parliament, Havel announced that the heyday of national sovereignty was now in the past. He denounced 'the idol of State sovereignty,' which, he said, 'must inevitably dissolve in a world that connects people – regardless of borders – through millions of links of integration ranging from trade, finance and property, up to information; links that impart a variety of universal notions and cultural patterns.'[12]

Like Marx, Havel thought that the nation-state would be swept aside by technological advance and international communication and trade. It is striking that Havel used the word 'dissolve' to describe the end of the nation-state because that is also the vocabulary used by Marx and Engels to describe their vision of the withering away of the state, a key Marxist doctrine: 'The society which organises production anew on the basis of free and equal association of the producers will put the whole state machinery where it will then belong – into the museum of antiquities, next to the spinning wheel and the bronze axe.'[13] Engels used the vocabulary of 'disintegration' to describe what he saw as unquestionably a matter of progress : 'The disintegration of mankind into a mass of isolated, mutually repelling atoms in itself means the destruction of all corporate, national and indeed of any particular interests and is the last necessary step towards the free and spontaneous association of men.'[14]

The key notion in Havel, as in Marx, Engels and Lenin, is that the evolution towards a supranational system is a development towards a more rational system than the current irrational national one. This is why Havel derided the state as 'an idol', a 'cult-like object' and 'a dangerous anachronism'. This thought is the direct continuation of the old slogan (wrongly attributed to the Comte de Saint-Simon[15], and which

11 Lenin, 1917.

12 Address by Václav Havel, President of the Czech Republic, to the Senate and the House of Commons of the Parliament of Canada, Parliament Hill, Ottawa, 29 April 1999.

13 Engels, 1848, Chapter IX, *Barbarism and civilization*.

14 Engels, 1844 cited by Phillips, 1980, p. 24.

15 See the very useful article by Kafka, 2012.

instead in fact originated with his disciple Auguste Comte in 1822, but which Engels made famous in the *Anti-Dühring* of 1877) that the government of men would soon be replaced by the administration of things. In what is undoubtedly the first use of this famous thought, ('The government of things will then replace that of men') Auguste Comte makes it absolutely explicit that his 'scientific politics radically excludes arbitrariness' and that henceforth government will be conducted only according to the law. 'Then there will be truly law in politics, in the real and philosophical sense attached to this expression by the illustrious Montesquieu.' He concludes the passage by saying that scientific politics will abolish both the 'theological arbitrariness' of 'the divine right of kings' *and* the 'metaphysic arbitrariness' of 'the sovereignty of the people'.[16] In other words, the 'rule of law' is designed to do away with the human choice, including democratic choice, which Comte denounces as 'arbitrary', and that it will be replaced by a rationalist, functionalist technocracy acting as if automatically according to impersonal rules or laws and not on the basis of decisions.

3. Different concepts of law

There is a direct link between the fantasies of Comte and Engels that the science of industrial production would replace the dangerous vagaries of government, and the now hagiographic account of the 'declaration' by Robert Schuman on 9 May 1950 that henceforth Franco-German coal and steel production would be placed in the hands of a High Authority. It is quite explicit in Schuman's proposed new community that the High Authority would 'bind' the members states and that choice would no longer be possible: the High Authority was the only institution Schuman proposed in his Declaration, the more decisionist bodies, the Court of Justice and the Assembly (the future European Parliament), being only added in later, as an afterthought.

This fantasy that governmental (or administrative) measures can and should be implemented 'scientifically' rather than 'politically' was not confined to 19th century positivists or to Communists. On the contrary, it also seduced at least a generation of jurists, especially in the latter half of the 19th century, who campaigned for a new kind of international law to constrain the activities of states. As Martti Koskenniemi has shown in his magisterial account[17], the growth of modern international law starts with the creation of the Institute of International Law in Ghent in 1873. In its journal, numerous jurists explained that they wanted their new law to constrain states and thereby to serve the cause of world peace. The German jurist August von Bulmerincq put this idea very forcefully when he wrote in 1877, 'Where the law penetrates and advances, politics must withdraw. Law, which is the guardian of civilisation, must end up prevailing more and more, just as darkness must end up fleeing the light. Whoever loses faith in the growing and final triumph of law no longer believes in the triumph of

16 Comte, 1822.
17 Koskenniemi, 2001.

civilisation.'[18] Like today's EU ideologues, Bulmerincq equates politics with the forces of darkness.

As with the Marxists and the positivists, these grand bourgeois liberals explicitly identified their cause with that of civilisation and humanity as a whole. Whoever opposed their ideas was either a cretin or a criminal. Like the positivists and the Marxists (of whom we must never forget that they regarded themselves as scientists, Engels having explicitly compared Marx to Darwin at the oration he gave at the former's funeral in Highgate in 1883) these 19th century architects of the new legal world order believed that they were progressives bringing rationality where previously there had been only arbitrary and unenlightened decision-making. One of the main pillars of the Institute of International Law, the Dutch jurist, Tobias Asser, made the link between the natural or exact sciences and the science of law in the founding document of the Institute when he declared, 'Just as communes and provinces learned to recognise the superior unity of the state, so states are beginning to submit to the superior unity of the great human society. Already, under the influence of this new way of thinking, the exact sciences, industry and economic institutions have made astonishing progress. It is impossible that the science of law should not reflect this in turn. It is up to the legislators and jurists of civilised countries to study this movement and to direct it.'[19]

Universalism and scientism went hand in hand. If the laws of science were universal, how could nations or individuals possibly diverge from them? Any such divergence must surely be irrational and possibly evil if it represented an opposition to the interests of the human race. In this new world view, particularism became unintelligible. Moreover, because these various categories of people regarded themselves as progressives, any opposition to their cause was reactionary, stupid, nasty or all of the above – Hilary Clinton's 'deplorables'. In order to justify to themselves that their cause was right and just, these people saw politics as an eternal struggle – against the forces of reaction. They did not see their views as one opinion among others, but instead instead regarded them as the dividing line between civilisation and barbarism. Politics became an existential battlefield and the political adversary became either an enemy to be destroyed or a criminal to be punished – using the law, again. The Article 7 sanctions proposed against Hungary and Poland are only one part of this much broader trend.

Indeed, nowhere has the law been used so overtly to pursue a political project than in the European Union. In the early years of the European construction, the 1950s, 1960s and 1970s, activist jurists constructed, by their rulings, a supranational legal order which had not basis in the treaties themselves until it was retroactively incorporated into the Treaty on European Union at Lisbon in 2009 (Declaration 17). The jurists who undertook the task of creating a new legal order, over and beyond what the treaties then provided for, did this with the same ideological conviction as that expressed by von Bulmerincq, Asser and others nearly a hundred years earlier: that law had to prevail over politics in order to preserve peace.

18 Von Bulmerincq, 1877.
19 Asser, 1902, p. 117.

The lead in this project was given by the first president of the European Commission, Walter Hallstein. Hallstein is the least well known of the 'founding fathers' of the EU and yet his influence was immense. As acting foreign minister (Hallstein was *Staatssekretär* in the *Auswärtiges Amt*; Adenauer held the post of foreign minister) he attended the Messina conference in 1956 which led to the signature of the Treaty of Rome the following year. As the first president of the European Commission, he was able to mould the new institutions according to his own supranational conceptions. His influence extended to the new Court of Justice because, as a law professor who liked to be addressed as 'Professor Hallstein' instead of 'President Hallstein', he took a great interest in juridical matters.

As it happens, Hallstein had already devoted part of his professional life to the juridical implications of political unification. During the 1930s, Professor Hallstein, who had been a protégé of Hans Frank and a member of his Academy of German Law, had belonged to no fewer than four Nazi legal organisations including the *Nazionalsozialistischer Rechtswahrerbund* (National Socialist League of Guardians of the Law). He addressed this organisation in Rostock in January 1939 on the juridical implications of the Anschluss (Austria having a different legal system from that of the German Reich). When he became president of the European Commission, he approached the same problem but from a different angle: how to push ahead with political unification using the law as an instrument.

Together with jurists from the Court of Justice, Hallstein developed a doctrine according to which it was for jurists and the law to cement political union in Europe. Antoine Vauchez recounts[20] how Hallstein played a key role in discretely encouraging jurists at the ECJ to push for a maximalist interpretation of the treaties and to find things in them which were not, in fact, there. Much of this work was done behind the scenes: Hallstein as president of the Commission had to be careful.

No sooner had the European Economic Community been created in 1957 than Hallstein set about encouraging the Court to engage in judicial activism. His first major success, and a definitive one, was the seminal rulings in 1963 and 1964 in *Van Gend en Loos v. Nederlandse Administratie van Belastingen* and *Costa v. ENEL*. These two rulings established the twin principles of primacy and direct effect – that EEC member states had limited their sovereignty by joining the organisation, and that EEC law had direct effect on natural and legal persons, unlike classical international law which affects only states and not their citizens. Hallstein worked behind the scenes to obtain these rulings and then put a definite spin on them in his own speeches and writings to ensure that everyone understood their significance once they had been handed down.

Having started in 1962 to formulate the idea that the EEC was not a normal international organisation but instead something *sui generis*[21] he explained after the *Costa v. Enel* and *Van Gend en Loos* rulings that they had established a new principle.

20 Vauchez, 2013.

21 Hallstein, 1962, p. 29.

At a conference in October 1964, Hallstein explained that the European communities were not really economic at all – because they did not merely regulate economic or commercial matters – but that instead they constituted an embryonic political union.[22]

The following month, in a lecture delivered to the law faculty in Paris, and entitled ' The European community, a new juridical order' (a title which bore a glancing resemblance to 'The legal unity of Greater Germany' delivered at Rostock in 1939), Hallstein explained that the European community was unique because it had created a system. 'I do not hesitate to employ the term 'constitution' to describe the basic norms of this system ... By creating the Community, the member states have subjected themselves to this new juridical system to the extent that they have transferred powers to it. National rules which are in opposition give way even if they are promulgated after the community norm. This result is completely in conformity with the ruling of 15 July 1964 of the European Court of Justice'[23] (i.e. the *Costa v. ENEL* judgement). In this speech, incidentally, Hallstein also struck a distinctly political note, saying that 'the United States of Europe would never be achieved until defence became part of community policy, a pious wish that continues to be repeated, in vain, to this very day.

After he ceased to be Commission president in 1967, Hallstein waxed even more lyrical about the transformative power of law. In *The Unfinished Federal State* (*Der unvollendete Bundesstaat*) published in 1969, he wrote, 'The Community is a creation of law. That is what is decisively new about it. That is what distinguishes it from earlier attempts to unite Europe. Neither force nor subjection has been used as a means but instead a spiritual and cultural force, the law. The majesty of the law will achieve what blood and iron were unable to do for centuries.'[24]

It is essential to understand the assumption underlying Hallstein's doctrine that law will unite Europe. It is that law is universal and that it therefore can and should encompass previously separate states and ultimately the whole of humanity. Here we can see quite clearly in operation the mathematical or geometrical presuppositions which govern so much of modern thought and which, in the field of morals, were formulated by Immanuel Kant using the language of law: Kantian philosophy has been influential including in the judicial domain because it embodies the liberal idea that the whole of humanity has the same interests. Hallstein is of course also following in the footsteps of the 19th century jurists who, as we have seen above, unequivocally identified the law with civilisation and progress.

22 Hallstein, 1964.

23 Walter Hallstein, *La communauté européenne, nouvel ordre juridique,* speech given to the Law Faculty at the University of Paris, 21 November 1964, and published by Bureau d'information des Communautes européennes. For a report on the speech by Le Monde at the time, see here: https://www.lemonde.fr/archives/article/1964/11/21/m-hallstein-les-etats-unis-d-europe-ne-sont-pas-concevables-si-la-defense-n-est-pas-inseree-dans-le-processus-d-unification_21-16680_1819218.html

24 Hallstein, 1969.

4. Judgement and sovereignty

The idea that science and universal abstract laws will enable humanity to progress is perhaps the key thought of modern progressivism – what Pierre-André Taguieff calls 'the civil religion of modern man'.[25] It was born in the early 17th century with Francis Bacon's *The Advancement of Learning* (1605). This notion of progress (or advancement) has come to dominate our age, including in politics: in his seminal work which first expressed the desire for a new international law to be above that of states, *On the reorganisation of human society* (1814) Henri de Saint-Simon stated one of the key notions of progressivism: 'The golden age of humanity is not behind us, it lies before us, in the perfection of the social order.' Like Marx, Saint-Simon believed that politics was a science: 'Politics, is, to sum up my thinking in two words, the science of production.'[26]

The Covid pandemic and the way governments have reacted to it have illustrated the highly questionable consequences of politics allegedly based on science. Authoritarian measures, brushing aside fundamental rights and restricting or destroying basic liberties, have been introduced all over the world. Many people are sceptical when politicians claim to be basing their decisions on science, because the science often does not seem to justify the decisions taken (the illness is not as bad as scientists feared; there is no consensus about the health effects of lockdown, etc.). However, everyone can see that liberty is restricted as a result (whether or not they agree that it should be). In other words, there seems to be a clear link between politics as science and an end to liberty, which is no doubt why numerous works of science fiction have indeed portrayed science-based regimes as dictatorial, from Laputa in *Gulliver's Travels (*1726) to Aldous Huxley's *Brave New World* (1932). The word 'robot', indeed, comes from Karel Capek's 1920 science fiction novel about androids taking over the world and destroying the human race.

Yet this alleged pre-eminence of the mathematical model, and of the exact sciences in general, is itself a historical development and therefore deserves to be questioned. It was precisely the change in the understanding of the universe, which occurred in the 16th century, which pushed mathematics and geometry into the foreground, as the only certain sciences, while relegating other forms of knowledge into the background. For Alexandre Koyré, the difference was brought about by the change in perspective of the universe, which after Galileo and Copernicus was believed to be infinite, not finite and clearly structured as the medievals, following Aristotle, had believed. Left without any structure, and above all having lost its heavenly status, i.e. its status as that to which inhabitants of the heavy earth aspired to elevate themselves, the universe could henceforth be comprehended only by means of the abstract and universal laws of geometry, without any notion of hierarchy, rather as the new science of astronomy, developed in the Tudor period, had enabled to apparently infinite sea to

25 Taguieff, 2001, p. 5.
26 Saint-Simon, 1817.

be navigated using latitude and longitude. This in turn led to a devaluing of being in general, which henceforth had no intrinsic value, in favour of new abstract sources of order, the universal rules of Euclidian geometry. The universe was no longer itself a source of value but instead just an empty space onto which man had to project order using the inventions of his mind, rather than deducing the existence of order from his observations.[27] Knowledge no longer came from observation but instead from calculation.

In politics, of course, this movement led to positivism – to the view that law had to be invented in order to exist. It was the end of the belief in natural law. Hobbes is the natural successor of Galileo, his monster-state Leviathan being nothing but an instrument to protect men from death and violence. Law becomes an emanation of the human will, in Hobbes as in Kant where moral laws are valid only if universal and only if they can be coherently willed. Laws, for Hobbes, are commands; they are not, as before, conclusions about the intelligible nature of the universe derived from observation, prior knowledge, reflection or even judgement.

The fact that scientific politics seems to leave no room for judgement is especially striking, in view of the fact that law is precisely all about judgement. The law is only very partly a command; it is above all also a discernment. When a judge is faced with litigation, he must decide, between two parties who have competing and differing claims, which one of them is right. Alternatively, he must adjudicate between a prosecutor and a defendant: is the accused guilty as charged? His judgement may well lead to a command in the form of a sentence but it is not only that. On the contrary, it is a judgement of fact. This is why the vocabulary of law is deeply infused with the etymology of truth. At the end of a trial, the judge gives a *verdict*: he says the truth. Law itself in many languages (*Recht* in German, *pravo* in Russian) directly expresses the notion of veracity (*Du hast recht*); in other languages the notion of veracity is expressed slightly more indirectly though the vocabulary of straightness (*droit*, *diritto*, etc.) To the extent that the judge's ruling contains a command – to acquit or convict – it is based only on the findings of fact which have taken place during the trial. A judge's ruling can under no circumstances be compared to a command like that of a general in battle.

The research into the facts of the matter constitute the essence of all judicial procedures. Once they have been established, the judge then has to establish into which legal category they fit. The overriding concern, of course, is equity – the right balance between the competing claims of citizens and the state, a balance which is symbolised by the scales held by the symbolic representation of justice. 'Therefore let this be the goal in civil law: the preservation of lawful and traditional equity in the affairs and the legal proceedings of citizens.'[28] As Michel Villey writes, law does not consist of commandments, as if dictated by a master. Instead, judicial proceedings are dialectical: they weigh up the competing claims of litigants and they decide on what the fair share

27 Koyré, 1957.

28 See Cicero, *De Oratore* I, 188, 'Sit ergo in iure civili finis hic: legitimae atque usitatae in rebus causisque civium aequabilitatis conservatio.'

is, after due consideration of these claims. The golden mean is sought and found after consideration of each side.

This understanding of the judicial process found its reflection in the scholastic method of disputation, in which a 'sentence' or judgement would be given after due consideration of opposing points of view. Villey writes, 'Right is discovered by observing social reality because right is precisely this mean, the right proportion of things distributed between members of a polity.'[29] Justice is therefore a right relation or a proportion between members of a polity – as Aristotle says, 'a species of the proportionate.'[30] It is a relationship between things and people, a relationship of harmony, uniting a multiplicity of individuals within a social order. Justice is the equilibrium achieved between citizens assembled in a polis. Those citizens have different interests and claims, and justice is the balancing out of those competing claims in a proportionate and harmonious way. Punitive justice is about rectifying the imbalance created by a crime, and by imposing a punishment through which the guilty man pays his debt to society.

In other words, justice is inseparable from society. It is the orderly arrangement of that society. There is no positive law without judges, and judges can function only in organised polities. Justice presupposes the existence of a state, within which certain proportions are established and preserved by a functioning judiciary. Justice is specifically social. For the ancient Greeks, the *polis* provided the framework for the evaluation of all excellence and virtue; it was therefore the indispensable framework for the administration of justice. Alistair MacIntyre writes, '*Dike* (natural and social order) is the ordering of the *polis* ... for the *polis* is human community perfected and completed by achieving its *telos* (end), and the essential nature of each thing is what it is when it achieves its *telos*. So it is in the forms of the *polis* that human nature as such is expressed ... *Dike* orders by the giving of just judgements, and justice (*dikaiosune*) is the norm by which the *polis* is ordered, a norm which lacks application apart from the *polis*.'[31] In short, there is no justice without the state.

These reflections help us to understand why the concept of 'universal' human rights is so difficult. A right is precisely something very individual and particular: I have a right to a certain salary because of the contract I have signed: my rights differ from those of my colleague. I have the right to live in the house I own: my rights differ from those of my neighbour. Universal rights can only be formulated in very general terms ('right to life', 'right to found a family') and everything then depends on the interpretation given to these deliberately vague expressions. On their own, they are essentially meaningless, at least juridically. In recent years, we have seen constitutional courts claim to find things, like gay marriage, in constitutions even though they have not been there for centuries.

So-called universal rights are not only problematic from the juridical point of view. They are also morally very problematic. The danger of moral angelism is very

29 Villey, 1983, p. 54.
30 See Aristotle, *Nicomachean Ethics,* V, 3.
31 MacIntyre, 1988, p. 97.

great, because the moral certainty which flows from statements of universal right gives the accuser an intoxicating sense of superiority over the accused. This certainty grows in intensity the more abstract the alleged moral law is – in other words, the more the actual facts are not allowed to get in the way. Yet, as we have seen, it is precisely the very careful consideration of facts (and not of universal principles) which are essential to arrive at a judgement. It is precisely because of the complexity of facts that judgement needs to be made carefully, according to agreed procedures, and within a social context.

However, while facts and the careful consideration of facts (what Aristotle called 'dialectics') play an absolutely essential role in judgement, there is also a non-factual element in legal judgement, namely the authority of the judge. His authority derives from his learning, from his professional record, from his skill – but also from his position in society. Of course if a judge is biased his judgements will not be respected, but there are plenty of cases in which the rulings of a judge are obeyed even if people disagree with them. This acquiescence in the authority of the judge, and of the state in general, even when one disagrees with the substance of the decision, is the inevitable and natural consequence of the fact that authoritative judgement and authoritative government is essential for the smooth running of society, and because people understand that the costs of undermining legitimate authority are higher than the costs of obeying a judgement or a policy with which one disagrees.

In other words, government is never about science alone. We recognise the necessity of a system of authoritative judgement for the smooth running of society because we recognise that there will always be differences of opinion about everything. The unpolitical notion that politics can be dissipated away by science or law is deeply misleading and fails to integrate the supremely political concept of authority (or legitimacy) which cannot itself be subsumed into law. The great paradox of all jurisdictions is that they are maintained in place by something which is outside and beyond law – the authority of the overall political-juridical system and the authority which accrues to the various officers of that system (including judges). The interplay between the social rootedness of the fundamental legitimacy of the state, the social and political conditions in which judgements are made and applied, show once again how adjudication is a profoundly political and social act which makes sense only within a social context.

All this delicate constitutional balance is upset when an outside body intervenes in the juridico-political process. Within a state, there is a balance between the judiciary and the legislature in which it is embedded. The judiciary is an integral part of the structure of the state and there is an interplay between those who apply the law and those who make the law. Above all, the powers enjoyed by the state in the legislative and judicial fields are justified by the protection which the state provides to its citizens. This is the absolute cornerstone of the social contract: a state become tyrannical if it does not protect its citizens but instead oppresses them. But this key element of the social contract simply disappears when an international court or body interferes in the internal affairs of a state. An international body can never be held to account by the

citizens of the state in which it interferes: it wields power without responsibility. All international bodies suffer from this systemic constitutional weakness which is why the principle of non-interference and national sovereignty is essential to the proper functioning of all states.

Instead, law must grow out of a society and be rooted in it. The state which makes laws has to live with the consequences of its decisions. International bodies, by contrast, are systemically protected from those consequences: they wield power without responsibility and this is why, from the European Court of Justice to the European Court of Human Rights, they are easily hijacked by political, activists. The right not only to make laws but also to adjudicate them therefore belongs to the state (legislature and judiciary) and not to a supranational body which, like Laputa, the floating island of crazy scientists in *Gulliver's Travels*, is as absurd as it is detached from reality. The attempt to foist laws onto states like Hungary is not just an exercise in political correctness. It is also designed to dissolve the very concept of national sovereignty itself. Such an exercise can only be anti-democratic. De Gaulle summed up his position very clearly: 'In France, the Supreme Court is the people.' This should be the motto of all European nation states.

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GYÖRGY MARINKÁS[1]

Ethnic Data Collection for Educational Purposes and the Situation of Segregation in Some Western and Central and Eastern European Countries

ABSTRACT: *The aim of this article is to examine the legislation of selected European countries on the collection of ethnic data for educational purposes and how these legislations are put into practice. The author also examines whether educational segregation exists in the selected countries and attempts to draw conclusions about the possible link between the collection of ethnic data for educational purposes and the existence of segregation. In the last part of the article, the author introduces good practices in the fields of desegregation and inclusive education.*

KEYWORDS: segregation, desegregation, inclusive education, ethnic data, good practices.

1. Premises

This research[2] was conducted in response to the European Commission (EC) challenging the existence of rules on ethnic data collection for desegregation purposes in the ongoing infringement procedure against Hungary[3] and Slovakia.[4] The collection of racial and/or ethnic data requires careful regulation and is a sensitive issue in most European countries. Accordingly, the author's aim was to examine the legislation of *selected European countries on the collection of ethnic data for educational purposes and how these legislations are put into practice.* The current paper studied the relationship

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3 COM (2016); CERD, 2018, pp. 27–33.

4 COM SWD (2016) 93.

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between this legislation, including which persons are entitled to process the data and the application of the purpose limitation principle, and the existence and extent of educational segregation in these countries. Thereby, conclusions were drawn about the possible link between the collection of ethnic data for educational purposes and the existence of possible segregation. That is to say, to examine whether *official positions are supported by practical experience in countries where segregation does not officially exist, and where the collection of data on racial or ethnic origin is prohibited.* The objective is to present specific legal provisions for desegregation – or, as labelled in some countries, *promoting inclusive education* – and how they are applied into practice,[5] as well as to present good practices and approaches for the guidance of the Hungarian legislator.

However, handling the outlined objectives was difficult for several reasons: *on the one hand, in some of the examined countries, the law categorically prohibits collecting data on racial or ethnic origin.*[6] This is despite the fact that several UN bodies have already drawn attention to the importance of these statistics and the problems caused by their absence.[7] The countries in question typically record the citizenship of children in education statistics,[8] which allows conclusions to be drawn primarily for children with migrant backgrounds. Thus, the data is not relevant for children of Roma origin, unless they belong to the Roma communities migrating to Western Europe from the former Eastern Bloc states after the fall of the Iron Curtain[9] or after the 2004 EU enlargement.[10] In these cases, it is possible to draw indirect conclusions based on nationality. *On the other hand,* even if data on racial or ethnic origin can be collected for educational desegregation, *these cannot be considered objective in all cases, as they are typically based on self-assessment*[11] *and since Roma origin itself may be determined in various ways.*[12]

2. Research methodology and hypotheses

Due to constraints on length, the author has refrained from examining the regulatory background of all European countries or EU member states. Although this may make the choice of countries appear arbitrary at first, the chosen countries *(Austria, Belgium, the United Kingdom, France, Poland, Germany, Italy, Romania, Slovakia, and Switzerland)* were

5 Hoffman, Fazekas, and Rozsnyai, 2015; Nikolov and Brosio, 2013; Hoffman and Asbóth, 2011; Lidström, 2002.

6 Keen, 2015.

7 CRC GC, 2003; CRC, 2015.

8 For example, in the case of Austria, Germany, and Switzerland.

9 Another wave of quasi-emigration began after the 2004 enlargement: one of the unintended consequences of the right to free movement within the EU was a quasi-migration from the poorer new Member States to the older, more affluent Member States. See: Longhi and Rokicka, 2012.

10 OSCE, 2008.

11 If the data collector indicates a presumed ethnic origin, as is the case in Czech practice, he must do so based on certain criteria, as will be explained below. See: Kalaydjieva, Gresham, and Calafell, 2001.

12 Kiššová, 2017.

selected based on the following factors. *For one,* there are several immediate neighbours of Hungary among the selected countries, as well as countries with which Hungary shares common historical heritage and experiences, namely, members of the V4 group. *On the other hand*, those Western European countries have been selected where the Roma minority was traditionally small,[13] but had their numbers increase significantly due to the migration that followed after the fall of the Iron Curtain and the internal migration following the 2004 enlargement. At the same time, these countries have traditionally experienced educational segregation and integration, even when they constantly deny the existence of segregation, as is the case with France. The division used in the previous paragraph, namely Western Europe v. Central-Eastern Europe (CEE), is also clearly reflected in the rules on the collection of ethnic data for educational purposes. In the selected Western European countries, with the exception of Italy, it is not possible to collect ethnic data for educational purposes, given that the education system is formally defined by integration and inclusivity. In contrast, in most CEE countries – and in Italy, which is an anomaly among the Western countries in this respect – the collection of ethnic data for desegregation purposes is either a legal requirement or a practice allowed by law. There are a number of reasons for this difference, including diverse concepts of nationhood originating from diverging historical trajectory.[14] However, as research has pointed out, regardless of these differences, educational segregation is present in countries belonging to both groups. This is despite the fact that the phenomenon manifests itself in CEE countries in more visible and spectacular ways, for example, in the form of either a European Court of Human Rights (ECHR) judgement[15] or an infringement procedure.[16] In contrast with this, despite indications from international organisations or the European Commission, these problems are not the subject of public debate and are not clearly reflected in the regulations of Western countries.

3. Factual basis

Educational segregation can be detected to some extent in all examined countries, with the exception of Poland.[17] The grounds on which this segregation occurs can be divided

13 Only Switzerland is an exception to this rule, with its Yenish community counting some 35,000 members. See: EKRE, 2020; Murphy, 2017.

14 Gulyás, 2018, pp 59–86.

15 Raisz, 2017; Raisz, 2009.

16 Kazuska, 2011; Asztalos, 2007.

17 In Poland, due to the *relatively homogeneous ethnic, national, and religious composition, research and country reports do not report segregation as a serious social problem.* According to an Organisation for Economic Co-operation and Development (OECD) study conducted in 2012, educational segregation is a marginal problem in Poland, with low rates of underachieving and early school leaving, and with appropriate PISA measurements. The research highlights that although there is always room for improvement, Polish education policy reduces the gap between students, and the social background has a much smaller impact on student progress than in other OECD countries. See: OECD, 2012; PISA, 2018.

into three major groups: first, *spatial segregation of the population*, that is, segregation of population by neighbourhood, including differences between different districts of cities, and differences between cities and rural areas. Second, *the inaccessibility of different levels of education for certain sections of society*. Third, the *over-representation of disadvantaged children – whether of Roma origin or having a migrant background – in classes for children with special educational needs (SEN)*.

■ *3.1. Spatial segregation of the population*

The first aspect to be considered is the spatial segregation of the population, which noticeably induces segregation in schools; both in countries that enable and those that deny freedom of choice in education.

In the case of countries with free school choice – the Czech Republic,[18] the United Kingdom, and Italy – segregation is not only due to the parents' choice of school,[19] but also due to the *constant and differentiated spatial distribution of different population groups*. This can be seen in the Czech Republic[20] and in Italy.[21] Another trend observed in the UK is that *wealthier families move to a better neighbourhood, at the latest when the child reaches compulsory school age*, so that the child can attend a school with similarly affluent students.[22] The same is true for Switzerland, where the right to choose a school is essentially absent.

Spatial segregation can also be observed in countries where free school choice is restrained. According to surveys in Romania, designated school districts and the spatial separation of the population together result in the segregation, primarily of *Roma children and of children living in rural areas, irrespective of their origin*.[23] In Slovakia, the Education Act[24] requires that children be enrolled in the school district *where their permanent residence is.* Under Slovak legislation, *the determination of territorial competence of primary schools – that is, the designation of school districts – falls under the jurisdiction of the local governments,[25] according to which, in contrast to the Hungarian regulation, there is no binding and enforceable legislation requiring anti-segregation considerations to be taken into account when considering the designation of school districts.* This fact, along with the well-observed separation of social groups by place of residence (similar to the situation in the Czech Republic),[26] has led to the formation of segregated classes or schools. Switzerland is a striking example among countries limiting freedom of school choice, as it is allowed only in exceptional cases within the state education

18 Zákon č. 561/2004.
19 OECD 2018; Cederna, 2019.
20 Sýkora, 2007.
21 In the case of Italy, there are also significant differences between the richer north and the poorer south.
22 All this is worth comparing with Switzerland, discussed in the next section.
23 FRA 2016; PTS, 2015.
24 Zákon č. 245/2008.
25 Zákon č. 596/2003. Z.z.
26 Hapalová, 2017.

system.[27] However, public education is of a high quality and is completely gratuitous.[28] It is therefore not surprising that only around 5% of children attend private schools,[29] making the formation of segregated classes or schools inconceivable. However, the practice here is different: *wealthier parents, at the time when the child's compulsory school age is reached, choose districts with better schools as residences* (at this point, reference should be made to an analogous situation in the United Kingdom). Considering the high real estate rental and purchase prices, unaffordable for lower-status social classes, the geographical separation of social strata shapes segregation in Switzerland.[30] The existence of this phenomenon is also supported by recommendations and policy papers promoting inclusive education for asylum-seeking children.[31]

■ *3.2. The exclusive nature of certain levels of education that excludes certain social groups*

Like spatial mapping, the *exclusive nature of certain levels of education may result in segregated education* as well. This phenomenon is discernible both in the high number of children attending private schools and in the public-school sector where institutions provide various quality of education at the same International Standard Classification of Education (ISCED)[32] level.

This phenomenon has been observed in *France* and the *United Kingdom*. In France, which has consistently denied the existence of segregation,[33] the middle class typically enrols its children in private schools, specifically in schools maintained by the Catholic Church. According to statistics published by the Ministry of Education[34] in 2020 a surprisingly high proportion (57%) of children in primary education (ISCED levels 1 and 2) attended a secular or church-run private school.[35] Private schools in the UK also play a crucial role, and interestingly, the state can also run religious schools. According to a 2019 report by the *National Institute of Economic and Social Research,*[36] *34% of public schools are religious institutions.* Although only 50% of the students in these schools are required to belong to a particular denomination, religious schools are a typical setting for segregated education; *Muslim, Hindu, and Sikh religious schools are highly segregated* due to the generally homogeneous composition of the local minority population.

The upper grades of the *Austrian and German primary schools* (ISCED Level 2) are two-tiered, and there are sharp differences between these tiers when comparing

27 Mercator, 2017.
28 EACEA, 2019.
29 EACEA, 2020.
30 van Ham et al., 2019.
31 SCR, 2016.
32 International Standard Classification of Education.
33 OECD – France, 2012; FRA – France, 2011.
34 MLNJ, 2020.
35 OECD, 2014.
36 Manzoni and Rolfe, 2019.

the social situations and further study opportunities of the students. Research shows that *Gymnasium Unterstufe*, which provides a higher level of education, and therefore, requires better learning results, typically includes children from parents with a higher social status and a higher level of education. In the *Hauptschule*, which has a lower level of education, children of less educated and lower social status parents[37] (for example, those with Roma or migratory backgrounds)[38] are enrolled.[39] However, according to existing research, it is *not ethnic origin or migration background alone that determines the chances of further education, but also the social disadvantages typically associated with them. This conclusion was confirmed by EC reports as well.* The Commission found that the social status of parents in Austria has a greater impact on their children's further education opportunities than in other EU countries.[40] The two-tier higher classes of German primary schools, called *Gymnasium*, *Realschule*, or *Hauptschule*, divide children on the basis of social status, and the same can be observed in the Austrian system.[41]

■ *3.3. Over-representation of Roma or migrant children in SEN groups*

Among the Western countries, the existence of this phenomenon is particularly striking in Austria, Belgium, and Switzerland;[42] while among CEE countries, the Czech Republic, and Slovakia deserve special emphasis.

In *Austria*, until 1995, there was a verifiable trend that a significant proportion of children from Roma and migrant backgrounds were directed, almost automatically and without objective justification, to groups and schools for children with special educational needs. Although there has been a major change in this practice since 1995, the EUMC[43] 2004 Report[44] found that this phenomenon remained observable. According to the 2018 reports,[45] this practice still does not meet 'expectations'.[46] In *Belgium*, children with migratory backgrounds and those of Roma origin are enrolled

37 EUMC, 2004.
38 Altzinger and Schneebaum, 2018.
39 While 47% of people of Austrian descent have higher education qualifications, this proportion is only 8% for people of Turkish descent. See: NBÖ, 2018.
40 COM SWD, 2020; COM SWD, 2017.
41 OECD, 2018.
42 BS, 2019; Hoti, 2015.
43 European Monitoring Center on Racism and Xenophobia.
44 According to the EUMC, children with a migrant background accounted for 9.6% of students in primary education (ISCED levels 1 and 2), while in institutions belonging to the Sonderschule category, their proportion exceeded 20%. See: EUMC, 2004.
45 NBÖ, 2018.
46 The 2017 report of the *Initiative für ein Diskriminierungsfreies Bildungswesen* (IDB) identified a number of cases in which the school principal automatically recommended a language preparation class to parents registering their child of compulsory school age, citing possible language deficiencies due to the child's origin or religion. In one case, a child of Turkish descent who – following the parents' decision – spoke only German at home, was registered by the principal as a child requiring a language preparation class. See: IDB, 2017

in special schools at a higher proportion than children with Belgian ancestry.[47] It was a common practice in *the Czech Republic* before the transition of the regime to declare Roma children to be mildly mentally handicapped and to place them in special schools. Because of this practice, to which the transition brought no change, the ECHR condemned the country in a 2007 judgement.[48] Despite the adoption of a number of measures following the judgement, the Second European Union Minorities and Discrimination Survey (EU-MIDIS II) of 2016[49] found that there is *still a high level (16%) of Roma people enrolled in SEN groups or schools in the Czech Republic at IESCED levels 1 and 2.* There is a repeated criticism of the Slovak education system as well, for the exceptionally high rate of diagnosis of 'mild intellectual disability' among Roma children and students, based on which they are enrolled in a special school or a special class.[50] One of the likely reasons for this phenomenon is the financial support for children with SEN,[51] which makes schools financially interested in launching SEN groups.[52] Based on the literature, buildings reserved for students in the SEN category tend to be in a worse-than-average condition, and educational conditions are generally significantly worse.[53] In order to reduce this phenomenon, several measures, including amendments to the law,[54] were taken by the Slovak state. Some of these came after the European Commission sent a letter of formal notice to the Slovak government in April 2015 for violating *Directive 2000/43/EC* by segregating Roma children and students. After considering the measures and their impact,[55] the Commission in 2019 concluded that these proved insufficient to solve the problem, and thus sent a justified opinion to the government. The topic is also on the agenda in Slovak public life as well as in the trade press.[56] Based on the circumstances explained in this section, it can be argued that segregation is an existing phenomenon in the educational systems of the examined Western European and CEE countries.

47 Although catch-up classes set up to integrate children with a migrant background can only be studied for a limited period of time, they should be provided with integrated education thereafter. See: ECRI 2020; UNIA 2020; CODE, 2017; COE 2017.

48 D.H. et al. v. Czech Republic.

49 FRA, 2016.

50 These trends are well illustrated by the fact that in the 2017/18 school year, 72% of all students in preparatory classes were of Roma origin.

51 In the 2018/19 school year, € 250 per student.

52 Zákon č. 597/2003 Z.z.

53 Rafael, 2017.

54 Amended sections of the Public Education Act: Sections 29 and 107; The 2015 Act in question also amended Act No. 596/2003 Coll., On the State Administration of Education and School Municipalities, and on Amendments and Supplements to Certain Acts. Act No. 1: the changes are contained in Section 13 (1) and (3).

55 Among other things, the 2015 amendments limited the maximum duration of placement in an SEN class to one year and extended the powers of the State Education Inspectorate to establish institutions for diagnosing special educational needs and to establish rules for making a diagnosis.

56 Sirotnikova, 2019.

4. Rules for ethnic data collection

■ *4.1. Ethnic data collection for educational purposes is required by law or appears in practice*

There is no legal definition of segregation *in the Czech Republic; the Anti-Discrimination Act of 2006*[57] contains the concept of discrimination instead. However, a 2006 document prepared by the Ministry of Labour and Social Affairs[58] defines this concept.[59] Pursuant to Article 4 paragraph 2 of the 2001 *Act on the Rights of National Minorities,*[60] *public administrations do not keep records of persons belonging to national minorities.* Data revealing racial or ethnic origin were otherwise considered to be sensitive personal data according to Article 66 paragraph 6 of the 2019 Act[61] on Processing Personal Data.[62]

In practice, however, contrary to the legal regulations and in the absence of a clear definition of segregation, ethnic data collection for educational purposes exists. Starting from the 2014/15 academic year, the Czech School Inspectorate carried out this type of data collection, and from 2016, the *Ministry of Education* took up the task.[63] The official justification is that this is what the EU expects from the Czech Republic. Otherwise, the 2007 judgement of the ECHR cannot be enforced. *The collection of data for statistical purposes is made electronically through the school statistics system simultaneously with the processing of enrolment data*, and in a personally unidentifiable manner to ensure data protection.[64] The guidance presented to schools provides an orientation regarding who can be categorised as Roma when compiling statistics.[65] Although completion of the questionnaire is mandatory, some schools refused to cooperate with the Ministry on principle, and entered a value of zero even if children of Roma origin attended school. Their justification was that neither the school nor the teachers were capable of establishing 'Roma origin' or analysing the ethnic backgrounds of the students. The

57 Zákon 198/2006 SB.

58 GAC, 2006.

59 In summary, a process that minimizes the relationship between the majority society and a well-defined group in society. Segregation can stem from pressure from the majority society, as the report states in the Czech Republic, but also from the free will of a segregated group (for example, in the interest of ensuring that the group's identity is preserved).

60 Zákon č. 273/2001 Sb.

61 Zákon o zpracování osobních údajů č. 110/2019 Sb.

62 According to the literature, this regulation, which is otherwise justified from the point of view of data protection, also makes it difficult to assess segregation and take measures against it. Experts and international organizations have also made recommendations for more accurate data collection in order to better assess the situation.

63 MSMT, 2018.

64 Numbers are entered by the school principals in the electronic data collection interface.

65 According to the guide, a person is considered to be a Roma if he or she considers himself or herself to be so, without necessarily undertaking it in all circumstances; or if a significant part of his or her environment considers him or her to be real or perceived based on anthropological, cultural or social characteristics.

legitimacy of this data collection has not only been debated by teachers, but has also been examined by the Ombudsman.[66]

The *Polish legal system* does not define segregation, although, as described above, the phenomenon is not prevalent in the country's education system. *As a general rule, the collection of ethnic data for educational purposes is not permitted.* Article 151 of the *Education Act*[67] defines the scope of data to be provided when enrolling in a school, and *data on racial and ethnic origin* are not included on the list. However, the Act provides for certain exceptions: Article 30/A states that kindergartens, schools, pedagogical supervisory authorities, and other organisations performing tasks specified in the act may use personal data, including *information on racial or ethnic origin*, to the extent necessary to fulfil obligations arising from the provisions of this Act. These allowances are made with the provision that the data can be transferred or published only under the conditions specified by law.[68] The sanction for the unauthorised transfer of data is laid down in Article 107 of the Act of 10 May 2018 on the Protection of Personal Data.[69] Article 160 of the Education Act, which sets a time limit for data processing, can be regarded as an important guarantee: the data and documentation of children admitted to the school are kept for as long as the child is a student of the school. The data of children who have applied to school but have not been admitted will be kept for one year.

There is no expressis verbis definition of segregation in the Italian legal system either.[70] The legal framework for the processing of personal data was provided by the *Data Protection Act*[71] and the *Legislative Decree 322 of 1989 on the Collection of Data from Schools.*[72] The recommendations of the *Italian Data Protection Supervisor*[73] and the guidance on personal data management[74] of the Ministry of Education (MIUR)[75] provide information regarding the practical implementations of these regulations. According to the above-mentioned legislative decree, *the following data may be collected in connection with public education: year of birth, grade, sex, citizenship, disability, and repetition of school years.* Processing, that is, the collection and dissemination of personal data in school registers, is required by the national statistical program with regard to a task derived from public interest. It is worth emphasising that *different regulations apply*

66 VO, 2020; Klípa, 2017.
67 USTAWA z dnia 14 grudnia 2016.
68 In addition to the expressed legal provisions, such a case is the protection of the student's health or, in the case of a student or a minor student, the consent of the person exercising parental responsibility to the release of the data.
69 Ustawa z dnia 10 maja 2018.
70 Articles 2 and 3 of the Constitution and Article 43 of Legislative Decree 286/98 on immigration lay down the prohibition of discrimination, which is defined as disadvantages in connection with education on grounds of racial, ethnic, or religious origin. See: MIUR, 2014.
71 Decreto legislativo 30 giugno 2003.
72 Decreto legislativo 6 settembre 1989.
73 IPRS, 2016.
74 MIUR, 2017.
75 *Ministero dell'Istruzione, dell'Università e della Ricerca.*

to state and non-state-maintained schools; the former collect data[76] required by law or data necessary for the pursuit of educational activities without the consent of the concerned.[77] In contrast, non-public schools are required to obtain written consent from the persons affected, unless the data processing is needed because of enrolment or the child's request. As required by the Italian Data Protection Supervisor, both public and non-public schools must inform parents and students about the data they collect and manage. MIUR is responsible for managing the statistics collected by the schools and for regularly updating and publishing them on its website. *In the case of explicit requirements of law, schools will take into account the recommendations*[78] *of the Data Protection Supervisor and specific data, such as race, ethnic origin, religious beliefs, health status, and financial situation can be collected. The law does not exclude this possibility,* provided that they are processed for a specific purpose[79] and are treated confidentially. Special data may be handled in a targeted manner in accordance with legal and MIUR regulations.

Among the countries examined, only the *Romanian legislature defines expressis verbis* the concept of discrimination. According to Article 3 of the Framework Regulation No. 6134 of 2016, *school segregation is a segregation based on ethnicity, disability, special educational needs, socioeconomic situation of the family, place of residence, or school performance.* Importantly, among the examined countries, *the widest range of ethnic data collection for educational purposes takes place in Romania*: it is not only possible *to collect data on racial and/or ethnic origin with the aim of anti-segregation, but it is also a mandated legal obligation of all academic institutions.* The scope of the data to be collected is defined by Decree 5633 of 2019 on the Approval of the Methodology for Monitoring School Segregation (Methodological Decree). The data collected under the Methodological Decree, including that on ethnic segregation, are collected and forwarded by the inspectorate[80] to the National Council Responsible for Desegregation and Educational Integration. Annex 2 of the Methodological Regulation defines the conditions under which segregation can be assessed, and ethnic-based segregation is quantified according to 11 criteria.[81] Data collection required by the Methodological Decree was scheduled for the

76 For the processing of data not specifically related to school activities, public schools are also obliged to obtain the consent of the data subject.

77 However, they are obliged to provide information on the data processed.

78 Through questionnaires, after informing students and parents in advance about data management, data retention, and data protection.

79 The condition of purpose limitation is the establishment of integration goals in the case of data on racial and ethnic origin, and the eligibility for education benefits in the case of data on financial situation.

80 Decentralized body under the Ministry.

81 The school should report, inter alia, on the proportion of students belonging to each ethnic group in a given school, the buildings in which these students are typically housed and the performance of each school level. – It should be noted that the legislation uses the concepts of ethnicity and minority alternately.

first time in the second half of the 2019/2020 school year.[82][83] At the time of writing this article, [84] the data is not yet available.

In Slovakia, anti-discrimination laws[85] *do not name expressis verbis the concept of segregation (separation).* Though the Public Education Act[86] *integrates the prohibition of segregation into the basic principles of education and training,* neither the law nor the related implementing legislation contains a definition. Pursuant to Article 16, paragraph 1 of the Personal Data Protection Act,[87] racial origin and ethnic origin are special categories of personal data; therefore, as a general rule, the processing of such personal data is prohibited.[88] According to the law, data processing for public interest is an exception to the general prohibition. This exception raises a debate on legal interpretation: *Can the statutory obligation of equal treatment be interpreted as a public interest that justifies the processing of data relating to racial or ethnic origin?* In practice, this dispute is manifested in the fact that while public bodies consider the collection of this data to be illegal, and consequently refrain from it, non-governmental organisations active in the field carry out data collection relating to desegregation. Pursuant to Article 11, paragraph 6 of the Public Education Act, schools and educational institutions *may collect personal data relating to nationality.* However, since this is an issue of personally confessed identity – and *a significant part of the Roma population in Slovakia defines itself as non-Roma*[89] – this data can be used only in a limited capacity for the purpose of desegregation. Thus, 'anonymized and disaggregated' data on children and students of Roma origin are not available in Slovakia. An 'ethnographic mapping' was conducted by the office of the government commissioner for Roma affairs between 2004 and 2019. The resulting 'Atlas of Roma Communities'[90] survey series, which due to legal considerations is based on the concept of the Roma 'community', can be considered a reliable and useful source of information.[91]

82 The arrival of the first measurable data is expected to be further delayed due to the school holidays ordered from 11 March 2020 due to the COVID-19 epidemic. See: hirado.hu, 2020

83 Since the legislation was adopted and published at the end of 2019, in Official Gazette No. 1056 of 31.12.2019, its application actually started in the second semester of the school year.

84 15 April 2020.

85 Zákon č. 365/2004 Z.z.

86 Zákon č. 245/2008 Z. z.).

87 Zákon č. 18/2018.

88 Based on Paragraph 1 Section 16 of the Act on Data Privacy: It is prohibited to handle special categories of personal data. Special categories of personal data are data which reveal a person's racial or ethnic origin, political views, religion, worldview, trade union membership, genetic data, biometric data, or data relating to his or her state of health and sexual life or sexual orientation.

89 In Slovakia, the number of Roma in the ethnic sense is very low compared to the number of Roma in the non-ethnic sense.

90 Kiššová, 2017.

91 Data provided by local mayors and field social workers.

■ *4.2. Ethnic data collection for educational purposes is prohibited or not regulated by law*

The current research suggests that *the issue of discrimination against minorities is not a major issue in Austria and the existence of segregation itself cannot be considered an officially recognised phenomenon*. For example, the Integration Act[92] and the Asylum Seekers Act[93] *use the words integration and inclusion.* Considering this, *segregation should be approached from the conditions set out in relation to the concept of discrimination*.

In Austria, pursuant to Article 5, paragraph 3 of the *Federal Statistics Act*[94] adopted in 2000, no one is obliged to provide data on racial or ethnic origin. Also, Article 1, para. 3 of the Act on Minorities allows anyone to voluntarily assume membership in a national minority.[95] It should be noted that since 1993, the Romani people have also been a national minority in Burgenland.

During the collection of data for educational purposes, *only the citizenship and mother tongue of the children are recorded;*[96] *data on their racial or ethnic origin* are not collected.[97] Pursuant to Article 20 of the Integration Act, reports on the integration situation of children seeking asylum are to be submitted to the Integration Council. This includes the nationality and gender of students attending a special school, according to Article 21 para. 5. Data processing is regulated by the Data Processing Act of 1999.[98]

In Belgium, the concept of segregation is not defined at the legislative level, but the prohibition of discrimination is applied to practical cases of segregation.

Under the Act on the Protection of Individuals with Regard to the Processing of Personal Data, personal data classified as sensitive, such as data on racial or ethnic origin, cannot be collected, with certain narrow exceptions.[99]

Article 34, paragraph 1 of the Data Protection Act permits the collection and management of sensitive personal data only if it is done for clear and legitimate purposes.[100] Additionally, the individuals concerned should be properly informed.[101] Article 185 paragraph 1 of the Data Protection Act specifies which bodies are allowed to collect various types of data, including data on racial or ethnic origin. The law does not specify education as a valid purpose; thus, it can be argued that *sensitive personal data of children on racial or ethnic origin in connection with education cannot be collected and processed*.

92 BGBl. I Nr. 68/2017.
93 BGBl. I Nr. 100/2005.
94 BGBl. I Nr. 163/1999.
95 BGBl I Nr. 396/1976.
96 Education statistics differentiate between foreign and non-EU students within foreigners.
97 EUMC, 2006.
98 BGBl. I Nr. 165/1999.
99 De Terwangne et al., 2019.
100 Conditions: *absolutely necessary,* the fundamental rights and freedoms of the data subject are adequately guaranteed and one of the following cases exists: if the processing is authorized by law, regulation, international treaty or European Union law; if it is necessary to the vital interest of the data subject or of another natural person; if the processing relates to data disclosed by the data subject.
101 Pursuant to Article 193, the controller collecting the data must inform the data subject whether or not his or her data will be anonymized.

In the UK, under the provisions of the School Admissions Code, data relating specifically to racial or ethnic origin cannot be collected during the school admission process. According to the guidelines issued by the Ministry of Education,[102] the racial and ethnic data of *enrolled students are considered particularly sensitive and can therefore, only be collected when necessary and must be stored separately.* The provisions of the *Human Rights Act*, the *Data Protection Act*, and the *Freedom of Information Act* allow the *British Office for National Statistics* and local governments to gather and manage ethnic data in order to help some ethnic minorities in integrating.[103] Belonging to an ethnic minority is based on *self-declaration*.[104]

In France, segregation is an officially non-existent phenomenon.[105] The French system ensures that both regulation[106] and communication should focus on absolute equality, inclusive education, and integration. *In line with this, Article 8 of Act 78 of 1978 on Data Processing*[107] *explicitly prohibits the collection of data on racial and/or ethnic origin.*

Although *the German Act on Equal Treatment* covers education, *the concept of segregation has not been defined.* Under current regulations, the collection of data concerning ethnic profiles*, both generally and in education, is not permitted.* However, information on the migration background of students can be collected, from which the origin of the child can be deduced.[108]

In Switzerland, Article 8, paragraph 2 of the Constitution prohibits discrimination, stating that *no one should suffer discrimination, particularly due to their origin or membership of a race […]. This research did not reveal any specific legal provisions regarding the concept of segregation,* which also stems from the fact that it is not *formally recognised as a phenomenon in Switzerland.* According to correspondence with the *Swiss Statistical Office, no data can be collected in the country on either Roma origin or nationality*,[109] and the statistics[110] only indicate the status of children under the age of 15 as either Swiss nationals or foreigners. There is also a *recurring criticism* in the reports of UN bodies and other organisations that *there is limited data available on educational goals, that is, the achievement of inclusive and integrative education,* which makes it difficult to take measures to address desegregation and to assess their effects. In addition, the clarity of the question is hampered, because the organisation of basic education and related activities is a cantonal competence under Article 62 of the Constitution.

102 DE, 2018.
103 ONS, 2016.
104 GSS, 2015.
105 In other words, the French legal system, including education legislation, neglects France's ethnic diversity.
106 Article L. 111-1 of the Education Code. Article 1 of the Convention explicitly provides for inclusive education for all, regardless of origin or religion.
107 Loi n 78-17 du 6 janvier 1978.
108 COM, 2017.
109 Based on correspondence with the Eidgenössisches Departement des Innern EDI Bundesamt für Statistik BFS.
110 BS, 2020.

5. Good practices

Finally, this section will discuss measures that countries have taken towards desegregation or promotion of inclusive education.[111] In *Austria,* in response to the criticisms described above regarding lower-level secondary education, the *Neue Mittelschule* (New High School) was introduced instead of the previous Hauptschule from the 2018/19 school year.[112] This new educational concept is based on *competency-based and personalised education* with the aim of improving learning outcomes for students with difficulties. In *Belgium,* schools arrange language courses for newly arrived children, while for the host community, they organise sensitisation programmes to other cultures and languages.[113] The *Czech* government in 2010 – responding to a condemnatory judgement in the D.H. case – accepted the *Inclusive Education National Action Plan* document, and then the *Equal Opportunities Action Plan in 2012*.[114] The *Strategy for Social Cohesion 2014–2020* is also an important measure concerning the Czech Roma community.[115] Research in the United Kingdom, initiated by the Ministry of Education, aims specifically to establish measures for the integration of children *with Roma or immigrant backgrounds*. In France, the existence of segregation is not officially recognised, but in the spirit of inclusion, the country undertakes desegregation measures for schools as well as the broader community,[116] particularly, to allow students to integrate and grow as individuals.[117] In order to meet the requirements of the EU Framework of 2020 Roma Integration Strategies,[118] the government in 2011 adopted a *policy package in line with French social inclusion efforts.* The term 'Roma' refers to an ethnic group, and *in French law, an ethnic basis cannot be used to adopt comprehensive public policies.*[119] Therefore, the French approach aims to eradicate poverty and social exclusion in marginalised communities in accordance with national law. With regard to *Poland,* the Decree of the Minister of Education of 18 August 2017 on the preservation of national and ethnic identity and language[120] in Article 12 paragraph 2 allows kindergartens and schools to assign a *Roma education assistant* to help teachers to integrate Roma children into the school environment. The *German province of Baden-Württemberg* is mentioned in

111 These measures are also important because school failures or dropping out of school can have a significant impact on an individual's later life. See: Váradi 2019; Váradi, 2013; Váradi, 2008.
112 EACEA Austria, 2019.
113 The program currently involves eight partner countries: China, Spain, Greece, Italy, Morocco, Portugal, Romania and Turkey, which also send visiting teachers to participating schools.
114 MSMT, 2012.
115 MPSV, 2014.
116 The so-called balancing education policy. See: CGT, 2014,
117 By way of example, the so-called linguistic catch-up scheme for non-native French-speaking students. UPE2A classes.
118 CGT, 2014.
119 COM, 2011.
120 Rozporządzenie Ministra Edukacji Narodowej z dnia 18 sierpnia 2017.

an OECD report as a template for community schools, for their inclusive education of pupils with heterogeneous social backgrounds and ethnicities.

In Italy, the provisions of Act No. 107 of 2015,[121] relating to the comprehensive development of schools and the increasing of schools' autonomy, led to the drafting of the 'good school' principle. The aims are to strengthen the role of schools in children's lives, to eliminate socio-cultural inequalities among students, and to reduce early school leaving. In *Romania*, the National Council for Desegregation and Educational Integration started its work in 2019, and there is also an *'After-School'* programme to support learning before or after the compulsory school programme. The results of the survey conducted in the 2019/2020 school year are still awaited; however, if it is carried out in accordance with the regulations, it undoubtedly deserves to be mentioned as a good example. The Slovak Republic in 2012 adopted the *Strategy for the Integration of the Roma* until 2020.[122] This document pushes for educational programs for Roma children by providing help to develop national catch-up projects and action plans. In Switzerland, an *algorithm formulates a continuous uniform distribution of children with migration backgrounds to eliminate the residence-based segregation that has developed over the past decades.*[123]

6. Conclusions

This paper argues that there is a connection between a country's historical background and its attitudes towards segregation: Western European countries, which have seen increased migration in recent decades, deny the existence of segregation. Even when desegregation measures are employed, they are typically labelled as inclusion measures. Importantly, although surveys by the Council of Europe, the OECD, and the EU indicate the existence of the problem in these countries, they have not so far been challenged for segregation in primary education, either before the ECHR[124] or before the Court of Justice of the European Union (CJEU). The cases of Austria and the Czech Republic are an illuminating example. In both Austria and the Czech Republic, it was a common practice to categorise Roma students as children with special educational needs. While proceedings against the Czech Republic were brought before the ECHR, no proceedings were instituted against Austria.[125] Instead, Austria in 1995 finally

121 Legge 13 luglio 2015, n. 107.

122 Stratégia pre integráciu Rómov do roku 2020.

123 The Local, 2019.

124 As an illustration, in the Belgian language case (ECHR, Judgment of 23 July 1968 (2126/64) para. 10), one of the complainants referred to expressis verbis segregation. However, the case examined the Belgian education system in a different context from the current research and therefore, cannot be considered relevant.

125 Due to the nature of the proceedings before the ECHR, this may of course also mean that the case has been satisfactorily resolved before the national courts, so that potential complainants did not feel the need to bring the proceedings before an international forum.

instituted a change in practice, albeit without an ECHR judgement. In contrast, the issue of educational segregation in CEE countries is seen as a constant problem; one that is closely monitored by the European Commission, as evidenced by the ongoing infringement proceedings against Hungary and Slovakia. Nevertheless, one of the positive benefits of this focus is that there are many good practices in these countries to eradicate the problem. The push for further improvements to the system requires that the problem be kept on the agenda and in public dialogue, and that discussions and solutions be based on real data. The collection of ethnic data for educational purposes, with purpose limitation and with appropriate guarantees, can clearly contribute to the goals of desegregation and inclusion.

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JÁNOS MARTONYI[1]

Ferenc Mádl and International Economic Law[2]

ABSTRACT: *Ferenc Mádl, while rising to the ranks of the outstanding Hungarian statesmen who served their country unconditionally, remained a scholar with exceptional knowledge and a unique academic life. In the 1970s, he was the first to recognise that even the broadest interpretation of the field of private international law could not cope with the expansion and transformation of international economic relations in the world and in our country. Reality had gone beyond the given framework of thought, „the facts had rebelled", a new system and new solutions were needed. A new discipline, international economic law was born to meet the needs of theory, education and practice. The new field of law not only sensed the changes in reality and the interconnections between different areas of reality, but also anticipated the future. Decades later, Ferenc Mádl comprehensively summarised the most important legal consequences of economic, political and social changes and demonstrated the role of law in these changes. In the field of international economic relations, changes have continued to accelerate, new issues and new dilemmas have emerged, including in the area of foreign investment, where public law meets private law, international law meets national law, substantive law meets procedural law. These – and many other exciting new topics – remain best located, cultivated and taught in the field of international economic relations 'invented' by Ferenc Mádl.*

KEYWORDS: *Ferenc Mádl, scholar, statesman, international economic law, theory and practice.*

"Once upon a time, there was a country called Hungary, where the gates were closed more than seventy years ago. Some had left before the door was shut, but many stayed home. Many were then taken away; others withdrew into passivity – and some just worked. That is what they had to do, because they felt the urge to do so, and they also knew that their abilities obliged them to perform, that they owed it to themselves, their

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parents, their ancestors, and even felt that this was what their community, their nation, expected them to do.

In the meantime, a great historical experiment on humans began, with one of its key goals being to achieve total isolation from the world. This closure followed from the forced and temporary postponement of the world revolution, the resulting thesis of building socialism in one country, and the construction of an economic and political system based on autarchy. This laid the foundations for the institution of foreign trade monopoly as the legal technique for complete and unconditional isolation. It is noteworthy that not even this objective of 'existing socialism' succeeded, as it quickly became apparent that, without foreign trade, even the most powerful country in the world cannot function; it needs knowledge and advanced technology that it can only obtain from abroad, and it can only create the necessary resources for that by exporting its own goods. 'Navigare necesse est' – recognised the Bolshevik leaders, and their Hungarian stewards came to the same conclusion after the failed attempts to grow cotton in Hungary and to make it a country of coal and steel. A slow opening started, with a long series of reforms; the proclamation of a state monopoly on foreign trade was tamed into a 'one-hand policy'; Hungarian products and services could not compete with each other on the foreign market, but our external economic relations with the world beyond the thinning Iron Curtain also expanded strongly, and integration into the world economy became an accepted objective.

Life, and even legal life, continued; and the legal culture, developed over the centuries, stubbornly hung on, although mostly withdrawn to form part of the abstract concepts of civil law. Legal institutions operated because there were people operating them, with an international outlook, language skills and the knowledge that became increasingly important during the opening towards the external economy. The law of foreign trade was born, which later became international economic law, including not only classical conflict-of-laws, but also public law standards regulating, to an increasingly broad extent, the area of private law aimed at the direct regulation of legal relationships containing international elements and the area of international economic relations."[3]

This saved and preserved legal culture, knowledge and international outlook was represented by Ferenc Mádl, who also felt that all these would one day be particularly needed, not only for science, education and legal practice, but also for the governance of the country, the uplifting of the nation and its reintegration into Europe. Before the first free elections, he talked about waiting to be addressed with a gun at his feet, and if that happened he could not back down from the task. And he did not. And while he rose to the ranks of outstanding Hungarian statesmen who served their country unconditionally, all along he remained a legal scholar of exceptional knowledge who created a unique scientific oeuvre.

3 Martonyi, 2010, p. 129.

But now we are still in the 1970s. Big and real changes have not started yet, but things were happening both around and in Hungary. The rapid and continuous growth of the world economy, and especially world trade, and the increasing emergence of new forms of international economic relations did not leave processes – not even Hungarian ones – unchanged. Cautious and sometimes uneven attempts were launched to "integrate the isolated Hungarian economy into the world economy", which, in turn, led to a significant expansion in Hungarian trade relations with the developed "non-socialist" world. New, more advanced forms of economic collaboration with the West, including cooperation and other atypical treaties, were emerging; and there was also an attempt, although very limited at the time, to allow foreign working capital to enter the country under strict conditions.[4] The world was changing and we were changing with it; above all in the area of international economic relations. In turn, the accelerating expansion of external trade relations and of our economic relations in general has inevitably created new demands on the system and content of the legislation on these relations, which have appeared in the fields of jurisprudence, legal education and, of course, legislation and the application of the law.

The quantitative and qualitative changes in our international economic relations triggered the "revolt of facts"[5], and Ferenc Mádl was not only the first to recognise it, but he also drew the resulting taxonomic conclusions on structural changes in the areas of the legal system. It became clear to him that private international law, as a science and educational subject, could not properly place new and expanding forms of international trade and economic relations, not even in its broader interpretation that had already gone beyond the interpretation of the concept of private international law covering only indirect regulation, i.e. conflict-of-laws and referring rules, and included, in addition to the law of traditional conflicts of law, direct regulations of legal relationships containing an international element, which appeared largely in an international legal norm of some level, first in the field of intellectual property law and international transport, and then in international sales.[6] Thus, private international law was able to handle, better or worse, the first big wave of the expansion of international trade; it went beyond the classic field of "conflits des lois" in both textbooks and university education and, in addition to indirect rules, it also placed direct rules applicable to international obligations containing an essential international element, defined by type of treaty in international trade, within international private law. However, the division of private international law into these direct and indirect rules was far from becoming universally accepted, and the approach that it would be more appropriate to limit the concept of private international law to its traditional meaning, i.e. to the conflict of laws, was increasingly gaining ground. (At least, Hungarian private international law followed that approach.)

4 See Decree No. 28/1972. (X. 3.) of the Finance Minister on Foreign Investments.
5 Mádl, 1977, pp. 196–240.
6 See: Martonyi, 2010.

However, not even this broader interpretation of the field of international private law was able to handle the next great wave of the expansion and transformation of international economic relations, especially in the specific Hungarian circumstances. Reality moved beyond the given framework of thought and organisation; "the facts revolted"[7], new solutions in line with reality and the facts displaying it had to be sought. Ferenc Mádl knew, of course, that the facts did not only revolt regarding the organisation and content of private international law and legislation on international economic relations. This rebellion was about to extend to increasingly broad areas, shattering not only the current frame of scientific organisation, but over time, at least he hoped so, the entire political, economic and social order, as well as the corresponding legal system. However, here and now, the opportunity to face reality – and to develop a scientific theory and education system consistent with the facts, and thus to further develop our international trade and economic relations through the modernisation of the legal framework, and ultimately to bring Hungary closer to Europe and the developed and free Western world – presented itself in that rather narrow area. Obviously, it was not by accident that he turned to the study of European Community law and wrote not only the first but also the most significant work on Community law[8]. At the same time, European law, with its complexity and diversity, provided further arguments and evidence of the relative nature of the system of traditional legal branches and the need for new approaches, along with a system better reflecting reality in this area, too.

The other area that contributed significantly to the revolt of facts, in particular at international level, was the explosion of foreign investments and capital relations in general and, as a result, the emergence of international investment law, the rapid spread of bilateral international conventions for the protection of foreign investments and multilateral international dispute resolution systems for the settlement of investment disputes, in particular the 1965 Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.[9] The emergence of bilateral substantive and multilateral dispute settlement and procedural rules on disputes between sovereign states and natural and legal persons as the actors of the economy stretched not only the framework of private international law, but also the international trade law in the broader sense, and raised new, previously unknown dilemmas in terms of the separation of public and private law, the relationship and disputes between the sovereign state and non-state actors in economic life, and even the relationship between the issues of substantive and procedural law.

Rapid changes in reality were reflected in the varied picture of names that Ferenc Mádl calls the "battle of names".[10] The designations used for the multifaceted and multilevel legal material applicable to international trade and the economy indeed show a

7 See: Mádl, 1977, p. 197.

8 Mádl, 1978.

9 This Convention established the International Centre for the Settlement of Investment Disputes (ICSID) and the Rules of Procedure for Arbitration Proceedings referred to that Centre. See Martonyi, 1987, pp. 113–122; Király and Mádl, 1989.

10 Mádl, 1977, p. 197.

very diverse picture in a wide variety of languages to this day and their content is still not uniform and precisely delimited. International trade law (public law), international business law (private law), international business transactions (even more private law), droit du commerce international (both), internationales Handelsrecht (private law), internationales Wirtschaftsrecht (public law), just to mention some well-known categories in these three languages.

The expression "name war" also signals that the changes made it necessary to further rethink the system of categories used so far. This task had to be carried out by jurisprudence. That is why Ferenc Mádl asks the question: "here and now – what path can be offered to bring our rebel facts together into a liberating and creative system."[11] He then mentions that "Hungarian jurisprudence is now quite generally convinced that it must overcome this situation and move forward, both in terms of education, scientific research and many practical aspects…"[12] He summarises the system theory requirements of the new answer, stating that the legal branch ("a homogenous cohesion of norms that preserves its strength of character, which is not denatured in its elements; even if it participates in a larger heterogeneous norm complex, it preserves the values of its substance; moreover, it uses the same to promote the goals of such a complex"[13]) is not the answer, but 'no' is not an answer, either. That is why he answers the dilemma by stating that "international economic law is a complex area of law and discipline" whose "body of legislation constitutes a complex area of law linked together by the weight of the rules, the specificities and functions of regulation, forming a scientifically independent discipline and, as regards its name, attracting the designation of 'international economic law'.[14] The subject matter of regulation mainly consists of property and economic relations, and its peculiarity is that "it is about international economic and financial relations and therefore regulation is always born and developed on the assumption of a foreign element".[15]

The realisation evoked by the change of reality and the thought based on it became reality. A coherent complex legal area and discipline was born, which drew the conclusions from the first and second waves of the development of world trade and of international economic relations, and brought the norms of public and private law relating to international economic and property relations, which assumed a foreign element, and which belonged to different legal branches, together into a coherent, complex area of law. This heterogeneous legal area is a scientifically independent discipline "and, as regards its name, attracts the designation of 'international economic law'. Ferenc Mádl formulated the main cohesive elements, characteristics and elements of the legal field and discipline in accordance with the facts, and named it. Indeed, the name he proposed, that was "attracted" by this field of law, quickly became

11 Mádl, 1977, p. 221.
12 Mádl, 1977, p. 223.
13 Mádl, 1977, p. 229.
14 Mádl, 1977, p. 230.
15 Mádl, 1977.

generally used in science, education, textbooks, the naming of departments and also in practice.

The birth of this field of law was a good example for the desired unity of science, education and practical legal work. The recognition and thought were the results of a scientist's research; that result was taken over by legal education and then exploited in practice. A few decades of teaching experience have made the benefits of the uniform handling of this legal field clear to all of us, making it easier to understand the common principles and essential characteristics, in particular the identical functions of the legal branches that were built on different regulatory methods, as well as to obtain the knowledge necessary for this. This single function was none other than the fair and balanced international regulation of international trade and wider economic relations, increasing legal certainty for all parties, and ultimately developing international relations.

However, the creation of international economic law as a complex area of law has produced the greatest results in practice. The work of international lawyers and arbitrators was the most successful and convincing in demonstrating the correctness of this insight of science and the transfer of this insight into education. Large international transactions, acquisitions and investment decisions always require a complex research and analysis of all elements of the case, covering legal norms classified into a wide variety of legal branches and the end result can only be based on the entirety of the conditions of public and private law, international law, European law and national law. The legal diversity of legislation is further complicated by the different levels of legal norms, the relationship between these levels and possible conflicts. This diverse, multifaceted and multilevel world of norms with varying geometry and spatial structure[16] gives the environment where practical legal work must be navigated, which requires the consideration of both the characteristics of homogenous legal regulations and the complex unit of rules governing international economic and property relations built on a common function.

Scientific research and thinking has therefore produced significant results by establishing international economic law as a complex area of law. It enriched science, helped education and substantially increased the quality of practical legal work on legal relationships with an international element. There is nothing more and nothing better a scientist and science can do.

On the basis of the history and perhaps on the pretext of establishing the legal field of international economic relations, we must make three statements, each of which goes beyond this specific area and characterises the scientific activity of Ferenc Mádl as a whole.

The first item is that the basis of scientific research is reality, and if reality changes, facts revolt and then science must address the new situation first and foremost. The changes in the international economies and Hungary stretched the known and

16 Martonyi, 2001; Martonyi, 2007, pp. 137–175.

familiar frameworks, necessitating new insights, new organisation and a new way of thinking. The theory did not venture alone on a speculative path selected by itself, but it recognised, followed and re-thought reality, creating a new system and, in line with it, new content, thus significantly influencing reality itself in the right direction. This was achieved in a specific area, but the result suggested, and even made it increasingly clear, that the facts were revolting increasingly widely, that the messages of reality were becoming stronger and that conclusions needed to be drawn in an increasingly wider scope. Hungary belongs to Europe, to the Western world; it is linked there by its values, history and culture – not the least its legal culture. Economic and commercial opening leads to this direction, just like jurisprudence and legal education, bringing the country closer to that world. The success of this approximation must be based on reality and facts, never forgetting the end goal.

But it is necessary to see not only the changes in reality, but also how the different areas of reality are interlinked. Seeing the links in the field of our narrower subject concerned, above all, the internal context of the legal system; but the conclusions drawn also made it clear that the quality practice of jurisprudence makes it essential to see and understand the wider impacts of economic, social, sociological, political and, above all, cultural contexts beyond the law.[17] After all, the revolt of facts started primarily from these areas and triggered a new solution to the systematisation of legal norms, better suited to reality and better helping to shape reality. The legal scholar did not, and could not, lock himself in the inner world of law, because he was also a political thinker worried for his country and wanting to act, and a man who later became an exceptional statesman. But, in addition to the context beyond the law, he also saw that the law has its own structure, system of concepts, organising principles and theorems, which legal thinking can never ignore, because doing so would deprive the law of its very essence. The law must also respect its internal system and theorems because without these it would lose the possibility, as is often the case, of influencing the development of economic, social and political conditions.

The importance of law not becoming dysfunctional due to the disregard for the internal structure and conception, and the legal system continuing to fulfil its role in shaping the state and the economy, is presented in a work written by Ferenc Mádl a decade later in English that was translated into Hungarian by László Burián.[18] In the countries of Central and Eastern Europe, regime changes were implemented through law, which, despite numerous errors and shortcomings, has shown that the law can play a decisive role in the transformation of the state and the economy, and that revolution is possible through law.

If we go back to the seventies, the era that was decisive for our topic, from that decade, Ferenc Mádl's work, written in the middle of the 1990s, seems to be the distant future. Distant? Two decades is a long time in a person's life, but in history it is a – sadly protracted but – short period. However we judge the long or short nature of time, which

17 On the context see Mádl, 1983, pp. 238–254.
18 Mádl, 1997.

we know to be relative, we get to our third statement. The essence of this is that Ferenc Mádl may have suspected and sensed the developments of the future by looking at reality and great connections. It is certainly not that he foresaw the events of the 1990s in the 1970s and knew how he would write a uniquely valuable and instructive analysis of the role of the law in regime change. We cannot reverse the course of time either, but it is safe to say that both the scientific response to the revolt of facts half a century ago and the scientific presentation of the legal institutions and legal instruments of regime changes in Central and Eastern Europe formed part of a straight-line oeuvre. The same scientist, the same scientific sophistication, the same values and, above all, the same man.

What could be foreseen, though (and foresight is far from forecast, as the latter is rather the profession of meteorologists and economists) was that changes would continue and the restlessness of the facts would not decrease but increase. This applies above all to our domestic affairs, because that is why Ferenc Mádl could write his work on the revolution carried out by law. But significant changes also continued in the world economy and in world trade, and no less in the relevant international regulations.

For decades, one of the important factors for the growth of the world economy was the more dynamic growth of world trade, the trade of both goods and services. At the same time, international capital and money flows have multiplied. The third great wave of economic relations had taken place, and by the end of the first decade of our century, the syndrome called globalisation had peaked. At the same time, the regulation of world trade was characterised by continuous expansion for nearly 60 years, and the rules of the GATT, initially considered "soft law", hardened especially after the establishment of the World Trade Organisation in 1994, and became real law through the creation of an effective, relatively well-functioning dispute settlement system. It is no coincidence that this successful dispute resolution and the expanding and hardening norms and values underlying it have begun to serve to enforce other non-commercial values, so-called "non trade values" as well, the political and moral basis of which is understandable, but which expanded the regulations of the world trade system and dispute settlement itself to the edge of disintegration, since it is difficult for an overloaded system to deal with almost all the problems of the world with its own means alone.[19] In addition to being overloaded, the system faced other challenges as well, which have been more serious and are currently increasing. Mostly as a result of technological developments, the structure of world trade has changed; the share of trade in goods has decreased, and the trade in services has increased, but the real explosion has been brought by the huge increase in data traffic. Security concerns have intensified, and security policy considerations were increasingly gaining ground against commercial and economic aspects. These previously started processes have been significantly accelerated by the COVID-19 pandemic.

19 See Martonyi, 2016; Martonyi, 2018, pp. 80–95.

The system of regulation has fundamentally transformed, the multilateral structure has weakened and fragmented. Regional and bilateral systems are coming to the fore, increasingly ignoring the previously (more or less) followed multilateral rules; the principle of equal treatment that formed the basis of the system, implemented through the legal technique of the most favoured nation, is disintegrating, and, after protracted agony, the procedure that was the most successful dispute settlement procedure in the international relations system so far will disappear, at least temporarily. The previous several-decade hardening of rules, the strengthening of the legal element, the so-called "judicialization"[20] is today replaced by a process to the contrary; the legal element is not strengthening but is becoming weaker, and we bear witness to a process that must be called "de-judicialization" in English. And if we use the English terms, the whole point of the process is that "security trumps economy", most notably the regulation of economic relations; with the escalation of the world situation, the heightening of uncertainty, tensions and dangers – again not caused but greatly enhanced by the epidemic – the guarding of city walls and keeping an eye on opponents have become the most important issues. More broadly, this can also be put in a way that, in the cooperation and competition between geopolitics and "geoeconomics", the former seems to get the upper hand, and geopolitics and security policy seem to corner and occupy the place of traditional "trade policy" i.e. the policy of international economic relations.[21]

All this, of course, does not help the legal security and predictability of world trade and economic relations, or the exercise of rights, compliance with obligations and the enforcement of responsibilities.

This process characterised by fragmentation, regionalisation and localisation, coupled with a simultaneous de-judicialization, caused mostly by other factors, i.e. the weakening of the legal elements, essentially concerns rules considered to be of a public-law nature within the law of international relations. At the same time, the private-law regulation of international trade transactions has not shown spectacular results in the last few decades either. In the framework of UNCITRAL, work continues, with many exciting and new issues on the agenda[22], but the comprehensive unification of the law of international trade seems to have reached its peak with the Vienna Sales Convention in 1980. (That the spread of the application of the Convention has not proved to be a major success is another matter).

However, the change in reality did not slow down, but, on the contrary, accelerated. First and foremost, technological progress is accelerating, but the geopolitical and security policy situation is changing rapidly as well. Trade policies are changing, policies on foreign investment are changing and, as a result, regulations expressing these policies are changing as well. Recent developments make it clear that, without a

20 Nagy, 2021, pp. 49–59.

21 Martonyi, 2020, pp. 13–21; Martonyi, 2021, pp. 117–129.

22 Issues such as commercial mediation and arbitration, collateral, financial transactions, the legal aspects of public-private partnerships, questions related to the contracts of micro, small and medium-sized enterprises.

broader and more flexible framework of international economic law as a complex and cross-disciplinary area, the latest directions of international law development could no longer be addressed at all by using the classical structure, thinking, education and practical approach. And this is where the pursuit of reality, the understanding of the context and, building on all this, sensing the future, foresight, and the progress made possible by that, are given special importance.

The time and place make it possible to mention only one topic in a long series of new developments, a topic that is particularly supportive and illustrative of the specifics, complexity and diversity of the legal field discovered by Ferenc Mádl.

It is beyond doubt that, from among these topics, the most attention has been paid to the legal regulation of foreign investments, in particular the protection of investments and the settlement of investment disputes. This is because here, not only public and private law (and their important actors), international law and national law, substantive law and procedural law meet, compete and collide with each other, but also economic and political interests affecting the fate of the whole world and worldviews that express and influence them – ideologies, if you will – are in conflict[23]. And, of course, the dissolution of the normative hierarchy, the rivalry and conflict between the levels of power and regulation also play their part in the big game – it is enough to refer to the recent decisions of the European Court of Justice, which graphically show not only the economic and political weight of the subject, but also the contrast between the international legal obligations assumed by the Member States and the autonomy of European law.[24]

The special system for the settlement of investment disputes, arching over the boundaries of the branches of law, was mainly created by the fact that neither international law nor national law and justice were able to resolve how to make balanced decisions in the legal disputes between a sovereign state and an investing individual, protecting all interests and properly enforcing the requirements of economic constitutionality. International law has tried two known principles that are completely opposite to each other, and the conflict between these two principles has resulted not in a solution, but in worsening political conflicts. The "doctrine of espousal" proclaimed by the United States, according to which the host State's unfair and inequitable action, such as the nationalization or expropriation of the investor's property without compensation, establishes international legal action on the part of the State of which the investor is a resident (the issue of residency, of course, has raised further questions), has obviously created international tensions, especially if the host State has stood on the basis of the "Calvo doctrine"[25], which assumes the absolute primacy of sovereignty and the tacit acceptance of equal treatment by the foreign investor, and has made it

23 Martonyi, 2016, pp. 145–156.

24 For a thorough critique of this decision see Nagy, 2018, pp. 981–1016; Martonyi, 2019, pp. 428–431. See later the opinion of the Court of Justice in the CETA (EU-Canada Agreement) case on the dispute settlement clauses used in the investment protection agreements concluded by the European Union. (Opinion 1/17 of the Court, 30 April 2019).

25 See Brower, 1981.

the basis of its policy towards foreign investors. The judiciary of the host State did not provide remedy; the judge should have ruled against their own legislation, which is an excessive expectation against the primacy of international law. However, the action before the court of the investor or other State was made impossible by the immunity of the sovereign state which adopted the law subject to complaint. The collision of the interests of host States and those of the investors and their states and the inapplicability of traditional legal instruments together led to a new dispute settlement solution that could not be placed in the binary world of public and private law, which juxtaposed sovereign and private individuals resident in other states and allowed the individual's claims to be directly enforced against sovereignty in some form of arbitration. Has the individual been elevated to the level of public international law in relations between sovereign states? Or has the State been forced to take off its toga of sovereignty (Ferenc Mádl used this term in relation to state immunity) and to descend to the level of individuals, of "traders"?[26] Actually, none of these happened. Public and private law jointly solved a dilemma, creating a new, original, far from perfect solution that, in the given situation, satisfied the economic and political interests of encouraging and protecting foreign investments. The function and principles are common and the new form of dispute settlement can be placed without difficulty in the framework of international economic law.

However, the punchline of the story is not the proliferation and relative success of this form of dispute resolution, and not even the extraordinary intensification of criticisms of it, with reflects almost the most important economic, political and ideological differences in our world today, but the fact that the task of comprehensively reviewing the international convention on dispute resolution forums and procedures and creating a possible new forum (permanent international court) and procedure was given to UNCITRAL, the organisation designed to unify trade law, based on the decision of its Member States at the 50th jubilee meeting held in 2017. The situation is far from complete consensus regarding the creation of a new forum, but the Member States nevertheless considered that the relatively most neutral international institution essentially dealing with the legal unification of private law had the best chance to solve this politically sensitive task.

It would be impossible to even list the new topics of international economic law that cross the boundaries of public and private law, and embrace and compete with each other. All these new developments and the relevant regulations can be easily placed within the complex but flexible and wide framework of international economic relations, based on the criteria given by Ferenc Mádl. At the same time, one should not lose sight of the statement already quoted above, which Ferenc Mádl made about the branches of law ("a homogenous cohesion of norms that preserves its strength of character, which is not denatured in its elements…"). The fact that the regulation of many new phenomena of the world economy and world trade requires a combined use

26 Nagy, 2020, pp. 898–917.

of standards of a public and private nature falling within different legal branches does not mean that the "homogenous strength of character" of these branches and that "the legal branch, even if it participates in a larger multi-type norm complex, preserves the values of its substance; moreover, uses the same to promote the goals of such a complex", can be disregarded[27]. In the meantime, technological developments have led to a huge transformation, in particular in the areas of tax law, competition law and data protection. The row cannot be closed because further advances in biotechnology and artificial intelligence will not leave classic civil law untouched. It is therefore particularly important to bear in mind the "values of substance" of the legal branches. It is not certain that important public policy issues need to be resolved and regulated by traditional private law instruments, especially if this leads to legal consequences that are difficult to foresee and may also jeopardise the achievement of the objective pursued.[28]

The change in reality is therefore accelerating; and drawing the consequences of the changes, seeing the context and sensing the future are more important than ever. Today's researchers are facing incredibly exciting and huge tasks. They are very lucky that, in addition to the work to be done, they also have a role model to follow.

27 See Mádl, 1977.

28 The latest example for this disregard for the specificities of the branches of law is the solution already applied in some Member States and envisaged to be introduced at EU level that wants to ensure the protection of environmental, social and human rights by imposing an obligation of due diligence on the buyers regarding each actor in the supply chains, and, in the event of a breach of this obligation, joint and several liability for damages set forth in an imperative rule. See European Parliament Resolution of March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability, P9 TA (2021) 0073.

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The Fundamental Right of Marriage in the Constitutions of European Countries

ABSTRACT: *This study aims to present an overview the position of marriage in the constitutions of European countries. First, the origin of marriage as a fundamental right is looked at from a historical perspective, leading to different supranational instruments' declarations. Subsequently, different approaches of the constitutions of European countries are scrutinised and classified depending on what protection, if any, is given to marriage. The spectrum spreads from defining marriage as protected by declaring it as a fundamental right to the lack of constitutional mention. For this broad overview, the scope of this work is based on the fact that all of these countries are parties to the Council of Europe, and the Rome Convention of 1950. Finally, a short exploration of some of the countries' constitutional jurisprudence is carried out regarding the most controversial topics concerning the fundamental right to marriage.*

KEYWORDS: marriage, constitution, comparative law, Europe, fundamental right of marriage, same-sex marriage, traditional marriage.

1. Marriage as a fundamental right

The fundamental right of marriage implies a number of things: it contains the freedom to voluntarily decide whether to contract a marriage, to a certain extent who to marry, that no one sex is privileged over the rights of the other and that the duties of spouses are equal, and finally the role of marriage in forming a family, thereby creating the building block of society; these values are to be protected by the state.

Auspiciously, equality of the sexes has gained recognition on a normative level and increasingly in societies over the last two centuries,[2] and the protection of equal

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2 Pylkkänen, 2007, p. 294.

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rights and anti-discrimination measures play a pivotal role in the social change that is reflected in the equal rights and responsibilities of spouses. Nonetheless, family models are determined by sexes. Gender roles in the family, to a certain degree, are not originally rooted in sexism but derive from the natural differences and biological[3] roles of reproduction and nurture: babies, if possible, need their mothers in the first phase of their lives. Consequently, in most social security systems, mothers may go on maternity leave, although sometimes fathers are granted these rights as well.[4] It is unclear why it is detrimental if mothers are given a preference to nurture children in order to stop dropping birth rates. Such intentions are not sexist, nor did they originate in Christianity; they are simply a matter of society's interest if it is done in the best interest of the child. Notably, the Hungarian Constitutional Court has pointed out that *"Equality of man and woman is only reasonable until natural differences between man and woman are acknowledged and equality is realised with recognition to this'*.[5]

The criterion of different sexes for marriage has become the most debated question concerning marriage in the last 20 years.[6] There seems to be a division between the so-called conservative and liberal perceptions of the law. While there is much interest about the crises of marriage and family—high divorce rates, lack of commitment and breaking up of intact families—it is curious that such a large portion of scholarly discourse is occupied by the dispute connected to a rather limited minority of society. This is not to say that minority rights are not important, but the disproportionality is conspicuous.

This is all the more surprising as the concept of matrimony as known for centuries and it being a fundamental right seemed to be beyond a shadow of doubt. In fact, such private rights proclaimed as fundamental liberties are rather recent;[7] however, the history of civil marriage dates back to the first generation of human rights. Secular marriage, a building stone of civil society, has been with us since the *Code civil* of Napoleon. As a legal option continuing a long tradition, including that of ancient Rome and the regulation of the church, it has been characterised by its heterosexuality. The right to marry and to form a family as a fundamental right has been declared in a number of international conventions from the middle of the 20th century. Article 16 of the United Nations Universal Declaration of Human Rights[8] and Article 23 of the

3 Cole and Cole, 2006, p. 58.
4 Pylkkänen, 2007, p. 292.
5 14/1995 (III.13.) AB Decision, ABH 1995, 82, 84.
6 Szeibert, 2013, p. 38.
7 Lenkovics, 2006, p. 117.
8 (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. (2) Marriage shall be entered into only with the free and full consent of the intending spouses. (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

International Covenant on Civil and Political Rights[9] phrases this right as one that enables men and women to get married and form a family, and that their right to do so has to be guaranteed by the state. Other aspects highlighted by these declarations are those of free will, the consent of the parties to enter the relationship, being of full marriageable age, and equality of the spouses regarding rights and responsibilities of the marital relationship. This nature of the law regarding fundamental rights and institutional protection implies that marriage has an overriding role and importance beyond the fundamental right to private life and individual dignity. Furthermore, this is strengthened as a social right in the International Covenant on Economic, Social and Cultural Rights or European Social Charter.

The explicit reference to the two sexes is not a mere coincidence; instead, the choice of words is deliberate. A number of fundamental rights, such as the right to life, right to vote, freedom of conscience and right to privacy, are individual rights, that is, they entitle individuals. However, other fundamental rights are collective rights: they entitle the individual but can only be practiced together with others—for example, freedom of assembly and freedom of association logically cannot be exercised alone. It functions in communities with others, and without another individual's exercise of the same right it is incomprehensible. In this respect, the fundamental right of marriage is a special right; nobody can be married alone, as it has to be two individuals' decision to exercise the right to marriage together. This mutual complementarity follows from the nature of marriage; spouses are married relative to each other, and they are husbands and wives in relation to one another. In this sense, it is artificial to interpret the explicit individual rights of men and women in marriage, rather than in relation to each other.[10]

Similar in its conceptualisations to a European perspective, this right has been declared in the European Convention of Human Rights and the Fundamental Charter of the European Union half a century apart.

The cause of the recent turbulence in the definition and redefinition of marriage at the time of the formation of these earlier treaties was not a question at all. That is to say, the heterosexuality of the marital relationship was beyond question and was considered to be a conceptual principle arising from its essential purpose: complementarity.

9 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

10 Different opinion: Drinóczi and Zeller, 2006, p. 17. We are going to see the controversies of the interpretation of the Spanish Constitution.

A number of constitutions followed the lead and included the fundamental right of marriage ever since.

Comparing human rights tools with the constitutions of European countries, we find that there are numerous similarities in the notion of marriage. However, a striking difference has emerged in the last 20 years concerning the sex of spouses.[11] Although historically, matrimony had always been considered the union of a man and a woman, their commitment was pronounced before the community or society and was understood as such in European legal systems as well.

On the one hand, the Convention of Rome[12] in Article 12 declares the right to marriage,[13] and similarly, the 7th protocol in Article 5 establishes the spouses' equal rights vis-à-vis each other and toward children, even in the event of dissolution. On the other hand, the Charter of Fundamental Rights of the European Union approaches this right cautiously— since it was formulated fifty years later, by which time some EU countries were in the process of contemplating same-sex marriage—not articulating man and woman as parties to the marriage, which right is guaranteed as: *"The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights"*.[14]

As a point of departure, let us analyse where the human rights declared in conventions are derived from. Those composing these documents never pretended to have given these rights to humanity themselves by formulating and adopting these texts. In other words, these conventions are rather declarative in nature rather than constitutive. The fact that these declarations are formulated is merely a pledge from the States Parties to guarantee these rights. These human rights are derived from human nature and the person's human dignity.[15] A number of these rights are characterised as inherent rights that underline that it is not legal recognition which gives them their validity.

The fundamental right to marriage is featured in a number of conventions, most often together with family life the right to found a family. An interesting phenomenon of legislative counter-movement may be observed in relation to same-sex marriage on both international fundamental rights and the national constitutional level. Early fundamental rights instruments explicitly refer to men and women regarding the right to marriage; perhaps consequently, a large number of national constitutions did not consider this crucial when formulating the laws regarding marriage, as wedlock axiomatically meant the union of man and woman. Recently, a portion of European countries addressed the issue by enacting the requisite of opposite sex in law or even

11 Díaz-Ambrona Bardaji and Hernandez Gil, 2007, p. 41.

12 Convention for the Protection of Human Rights and Fundamental Freedoms (from now on: European Convention on Human Rights), Rome, 4 November 1950, and the Protocol No. 7, 22 November 1984.

13 Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

14 Article 9. of Charter of Fundamental Rights of the European Union (2007/C 303/01).

15 Frivaldszky, 2010, p. 9.

in the constitution.[16] This tendency is also divided geographically or according to historical and cultural overlap. On the other hand, at the supranational level, draftsmen refrain from this criterion: The Fundamental Charter of the European Union, unlike earlier, similar documents, acknowledges the right to matrimony in a general manner according to national laws.

2. Marriage in national constitutions

A number of states declare rights concerning marriage and the family on a constitutional level, while others remain silent about these institutions and regulate them on a statutory level only. In the first group, some constitutions define or narrow the marriage they protect; others generally declare marriage to be a fundamental right, while others formulate support of marriage as the only state objective.

The first group includes, besides Hungary, other central and eastern European countries in addition to Italy, Spain, Germany and Switzerland.[17] A common ground for them is that they either define marriage and family as a fundamental right, constitutional state task, or both.[18]

A subcategory is where marriage is protected as a fundamental right. In this regard, there are two classes of countries: one additionally defines marriage as the union of man and woman, and the other generally proclaims marriage of fundamental nature.

The Hungarian Fundamental Law in Article L) paragraph 1 declares the institutional protection— much the same way as in the earlier Constitution— and specifies opposite sex of the spouses among the conceptual elements of marriage. According to the constitution, wedlock is established by a voluntary decision, declaring the freedom to contract a marriage.[19] The Constitution also adds community of life to the elements of marriage, which may be interpreted as the essence of matrimony. Institutional protection generally means restrain on the part of the state, which is amended by social policy acting in the case of marriage and family, as the state has to provide an environment that enhances family life.[20] However, the state's obligation does not end at non-intervention and social policy, but it has to establish such a framework for matrimony that fosters its aims and does not create a legal ambiance where other forms

16 Subsequently, in Hungary as the Fundamental Law requires heterosexuality in marriage the Civil Code also made this distinction Act V 2013. 4:5. § (1)

17 For Hungarian translations, see *Nemzeti alkotmányok az Európai Unióban*. Budapest, Wolters Kluwer, 2016. Also Constitute Project has been a great help providing English translations, for more information see: constituteproject.org. However, original texts were used as much as possible.

18 Drinóczi and Zeller, 2006, p. 18.

19 22/1992 (IV. 10.) AB Decision, ABH 1992, 122, 123.

20 Drinóczi and Zeller, 2006, p. 19.

of partnership are more advantageous, or regulated in the same way as the institutional protection of marriage.[21]

The jurisprudence of the Hungarian Constitutional Court[22] underlines the institutional protection to the right of marriage, although the Fundamental Law only mentions family and not marriage in the section "Freedom and Responsibility," which is the fundamental rights segment of the constitution.[23] During the conceptualisation and its resolution, as well as in the experts' proposal, a more precise, obvious and explicit protection had been suggested for marriage and its relation to family.[24] Nevertheless, it is still considered true that the structural position does not necessarily mean that marriage is not a fundamental right.[25]

The protection of fundamental rights is declared by Article 18 of the Polish Constitution,[26] which defines marriage as a covenant of men and women. Article 110 of the Latvian Constitution[27] protects marriage as a tie between men and women. The Lithuanian Constitution[28] in Article 38 grants recognition to marriages celebrated by the church and requires spouses to be of opposite sex, whereas the protection given to family, besides marriage-based family, includes, according to the Lithuanian Constitutional Court, other forms of family as well.[29] First paragraph of Article 41 paragraph 1 of the Slovakian Constitution[30] protects marriage for "its own good" but this has been amended in 2014 to define marriage as a union between a man and woman; it also protects marriage and the family and Article 19 private and family life. The Croatian Constitution[31] requires heterosexuality when protecting marriage in Article 62, however it extends the protection for families to cohabitating partners. Article 46, paragraph 1 of the Bulgarian Constitution[32] grants freedom to marriage for men and women, and also establishes that only civil marriage of equal rights is acknowledged by the constitution. In Ukraine, the Constitution[33] not only proclaims the heterosexuality of marriage in Article 51 but also emphasises the equality of the spouses. Likewise, the Constitution of Moldova[34] in Article 48, paragraph 2, grants equal rights for parties to

21 "no such protection is given to cohabitation" "ilyen védelmet az élettársi kapcsolatnak nem biztosít" 1097/B/1993. AB Decision, ABH 1996, 456, 464. Article 4 of the Legislation Act (Act No. CXXX. of 2010) also obliges the legislative.

22 4/1990. (III. 4.) AB Decision, ABH 1990, 28, 31.

23 More on the constitution see Drinóczi and Zeller, 2006, p. 20.

24 Varga, 2012, pp. 126–127.

25 Csink and Schanda, 2009, p. 493.

26 Konstytucja Rzeczypospolitej Polskiej 1997, Dziennik Ustaw No. 78, item 483.

27 Satversme, Latvia's Constitution of 1922, reinstated in 1991.

28 Lietuvos Respublikos Konstitucija, Constitution of the Republic of Lithuania 1992.

29 Resolution No X-1569 of the Seimas of the Republic of Lithuania of 3 June 2008 On the Approval of the State Family Policy Concept, Official gazette, 2008, No. 69-2624.

30 Ústava Slovenskej republiky, the Constitution of the Republic of Slovakia 1992.

31 Ustav Republike Hrvatske, the Constitution of the Republic of Croatia 1990.

32 Konstitutsia na Republika Balgaria, the Constitution of the Republic of Bulgaria 1991.

33 The Constitution of Ukraine 1996.

34 The Constitution of Moldova 1994.

the marriage, which is a free choice for husband and wife. Montenegro's Constitution[35] in Article 71 declares the equality of the spouses in a marriage that women and men can enter in free will. In Armenia, the Constitution[36] also confirms the freedom and equality for women and men to get married and proclaims that the freedom of marriage may be restricted for protecting morals and health. In Azerbaijan, the Constitution[37] declares the right for marriage and provides equal rights for husbands and wives in Article 34 IV. The Constitution of Russia[38] has recently been amended to include that a man and woman may be the parties to a marriage. Most peculiar of all is the Spanish Constitution,[39] as it explicitly contains a reference to a man and woman as to whom the right of marriage belongs, yet homosexual marriage was introduced in 2005 without changing the Constitution.

The German Grundgesetz in Article 6 paragraph 1 explicitly protects marriage and requires that other family formations not be favoured to marriage.[40] The Constitution of Greece[41] in Article 21 paragraph 1 affirms the protection of marriage, family, and the child. Article 36 paragraph 1 of the Portuguese Constitution[42] acknowledges a general protection of the right to marriage, which is understood as cohabitation cannot be treated equally to marriage because that would infringe on the freedom of marriage; this includes the freedom not to marry.[43] The Irish Constitution has undergone a substantial change as it provides, in Article 41, not only the protection of family and marriage, but also asserts the conditions for divorce on a constitutional level. Article 53 of the Slovenian Constitution,[44] besides protecting the family and reaffirming equality in marriage, explicitly calls for legislation of cohabitation. The Italian Constitution[45] in Article 21 announces that family is based on marriage, and as such, it enjoys protection; nonetheless, the Constitutional Court has interpreted Article 2, the individual's right to expression of personality to include cohabitation.[46] Article 48 of the Romanian Constitution[47] acknowledges marriage, besides parental responsibility, as the basis of family, and although there was a proposal to amend this with the requisite of heterosexuality, the referendum was not approved because of low turnout.[48] The Constitution of Cyprus,[49] besides providing the right to marriage in Article 22, discusses jurisdictional questions of religious marriage of the Greek Orthodox Church or other religious groups

35 The Constitution of Montenegro 22 October 2007.
36 The Constitution of Armenia July 5, 1995.
37 Azərbaycan konstitusiyası, Constitution of Azerbaijan, 12 November 1995
38 Konstitútsiya Rossíyskoy Federátsii, Constitution of the Russian Federation, 12 December 1993
39 Constitución Española 29 de diciembre de 1978. Spanish Constitution Article 32.
40 Perelli-Harris and Sánchez Gassen, 2012, p. 462.
41 Syntagma tis Elladas 1974, the Constitution of Greece.
42 Constituição da República Portuguesa, the Constitution of the Republic of Portugal 1976.
43 De Oliveira, Martins and Vítor, 2015, p. 4.
44 Ustava Republike Slovenije, the Constitution of the Republic of Slovenia 1991.
45 Costituzione della Repubblica Italiana, the Constitution of the Republic of Italy 1 January 1948.
46 Corte Constitutionale del Repubblica Italiana 8 February 1977, n. 556.
47 Republicarea Constituţiei României, Constitution of the Republic of Romania 1991.
48 More on this: Gherghina, Racu, Giugăl, Gavriş, Silagadze and Johnston, 2019, pp. 193–213.
49 Constitution of the Republic of Cyprus 16 August 1960.

in length. In Switzerland's Constitution,[50] the right to marriage and founding a family are connected in Article 14. The Constitution of Georgia[51] in Article 36, paragraph 1, emphasises equality and free will upon entering marriage. The Constitution of Bosnia and Herzegovina[52] in Article 3 j) states the right to marriage and to found a family. In Albania, the Constitution[53] provides a strong protection of marriage, besides providing the right to matrimony in Article 53.

The Estonian Constitution[54] maintains that the family is the foundation of society as it provides survival and growth of the nation in Article 27 paragraph 1. This article also affirms the equality of spouses. Similarly, in the Turkish Constitution,[55] Article 41 states that Turkish society is based on the equality of spouses in addition to family life as a whole. Equally, Andorra[56] in Article 13 protects the equality of spouses and the right to found a family; the regulation of marriage belongs to the law and civil effects of religious marriage are recognised.

Private and family life is protected in Article 22 of the Belgian Constitution[57], although the celebration of religious marriage is restricted in Article 21 to occur only after the civil wedding. In the same way, in Luxemburg, the Constitution[58] declares the priority of civil weddings to religious weddings. Austria[59] and North Macedonia[60] are similar in the sense that no other provisions on marriage can be found in their respective constitutions than the fact that legislative power to enact laws on marriage and family is declared.

The last group of states is the one in which no constitutional provision can be found about the right to marriage. In France, the Constitution[61] contains no provision on either marriage or family; furthermore, this holds true for Liechtenstein,[62] Monaco[63] and Finland[64]. The Constitution of Iceland[65] also remains silent about marriage or family. In the Czech legal system, family, parenthood and marriage are not protected

50 Bundesverfassung der Schweizerischen Eidgenossenschaft, Federal Constitution of the Swiss Confederation 1 January 2000.
51 Sakartvelos K'onstitutsia, Constitution of Georgia, 24 August 1995.
52 Ustav Bosne i Hercegovine, the Constitution of Bosnia and Herzegovina 14 December 1995.
53 Kushtetuta e Republikës së Shqipërisë, Constitution of Albania 21 October 1998.
54 Constitution of Estonia 1992.
55 Türkiye Cumhuriyeti Anayasası, the Constitution of the Republic of Turkey 7 November 1982.
56 Constitució d'Andorra, Constitution of Andorra 14 March 1993.
57 Constitution belge, Constitution of the Kingdom of Belgium 1831.
58 Constitution du Grand-Duché de Luxembourg, Constitution of the Grand-Duchy of Luxembourg 1 January 1842 technically amended but in reality the modern constitutionality dates to 17 October 1868, Loi du 17 octobre 1868 portant révision de la Constitution du 27 novembre 1856
59 Article 10 of Österreichische Bundesverfassung, the Constitution of Austria of 1920, Reinstated in 1945.
60 Article 40 the Constitution of North Macedonia 17 November 1991.
61 Constitution française du 4 octobre 1958.
62 Constitution of Liechtenstein 5 October 1921.
63 Constitution of Monaco 17 December 1962.
64 Suomen perustuslaki, Constitution of Finland 1 March 2000.
65 Constitution of the Republic of Iceland No. 33, 17 June 1944.

at the constitutional level, but special protection is declared in the Civil Code.[66] Apart from the protection of private and family life, no articles of the Constitution[67] of Malta deal with marriage, much like the Serbian Constitution.[68]

An interesting constitutional question arises in the Kingdom of the Netherlands. The Dutch Constitution[69] does not protect any particular form of family or marriage, which is possible between both hetero- and homosexual couples. Even though there are no constitutional provisions concerning marriage, a number of prerogatives are only available for married couples. Since the Netherlands is a constitutional monarchy and the succession to the throne is determined by descent in the case of royal marriage, same-sex marriage is excluded as a same-sex couple cannot produce a royal offspring.[70] In a similar manner, no provisions on marriage are made in Denmark,[71] Norway,[72] Sweden[73] and the UK; being monarchies, these might produce the same problem. A number of states that are monarchies have restrictions for members of the royal family to the freedom of marriage: Article 28 of the Constitution of the Netherlands, Danish Act of Succession Article 5, Article 36 of the Constitution of Norway, Article 85 of the Constitution of Belgium, Section 57 paragraph 4 of the Spanish Constitution, and the Swedish Act of Succession Article 5. Furthermore, the Swedish Constitution does not provide explicit constitutional protection for marriage to aspire neutrality. Since the 1970s, there has been an agenda to minimise the difference between the treatment of marriage and cohabitation.

In the absence of constitutional protection of marriage, as in the Northern countries, cohabitation is widespread, as there is no legislative agenda to grant preference to matrimony or to encourage individuals to choose it over other forms of partnership.[74] Moreover, they tend to embrace a broadening approach of marriage that includes same-sex couples; one of the reasons is that there is no constitutional provision to be interpreted, regardless of the deliberations of official interpreting forums of international conventions that they are parties to, which still apply.[75]

However, the role and reasoning of interpreting forums is well worth an analysis, where there are provisions on family and marriage in the constitution. Does the interpretation follow originalism, textualism, or despite the explicit norm, a continuous progressive line of interpretation of the living constitution that perhaps even changes the meaning of family and marriage?

66 Act 89/2012 of the Czech Civil Code 3. § (1) b).
67 Konstituzzjoni ta' Malta, the Constitution of Malta 21 September 1964.
68 Ustav Republike Srbije, the Constitution of Serbia 2006.
69 Grondwet voor het Koninkrijk der Nederlanden, Constitution for the Kingdom of the Netherlands 1815.
70 Antokolskaia and Boele-Woelki, 2002, p. 56.
71 Constitution of the Kingdom of Denmark (1953) and the Act of Succession Act no. 170 of 27 March 1953.
72 Kongeriget Norges Grundlov 17 May 1814.
73 The Fundamental Laws and the Riksdag Act. See: https://www.riksdagen.se/globalassets/07.-dokument--lagar/the-constitution-of-sweden-160628.pdf.
74 154/2008. (XII. 17.) AB Decision, ABK 2008. December, 1655, 1203, 1223.
75 Drinóczi and Zeller, 2006, p. 18.

3. Interpreting constitutions

■ *3.1. Spain*

According to law 13/2005 in Spain, the Civil Code has been modified so that it expands the option to contract a marriage to couples of the same sex. The constitutionality of the law was called into question, as the Spanish Constitution had not been changed. Unlike the Charter of Fundamental Rights of the European Union, the wording of the Spanish Constitution explicitly refers to man and woman, and this has not been altered in the course of the modification of the Civil Code.

> *32. 1. Men and women have the right to marry with full legal equality.*
> *2. The law shall regulate the forms of marriage, the age at which it may be entered into and the required capacity therefore, the rights and duties of the spouses, the grounds for separation and dissolution, and the consequences thereof.*[76]

What could be the reason for not changing the constitution? Obviously, amending the basic law of a country occurs through a special procedure that usually requires a supermajority or referendum, which carries a high political cost. The proposal of the Act that changes the Civil Code argues that same-sex cohabitation is widespread. However, this seems elusive and weak reason to alter marriage so fundamentally. In addition, a rather interesting constitutional question arises: does the protection of the Spanish Constitution include same-sex marriages or is it limited to opposite sex spouses?

First, the argument that the Constitution does not explicitly state that man and woman have the right to marry each other, so it only acknowledges the right to marriage for both sexes, can be rebutted by textual interpretation. As such, if the draftsmen of the Constitution had wanted to declare general citizens' rights to marriage, they would surely have used a more general term and not specified the two sexes. Moreover, this is the wording used in other international documents,[77] and Article 10.2 of the CE states that fundamental rights and freedoms have to be interpreted according to that of the Universal Declaration of Human Rights and other international conventions to which Spain is a party.[78]

In any case, Act 13/2005 amended article 44 of the Código Civil—"Man and woman has the right to get married according to the regulations of this act"[79]—by adding a second

76 Article 32. CE, also we must highlight how the official English translation diverges from the original text where a singular form is used: "the man and the woman…"

77 See: 10th of December 1948 Universal Declaration of Human Rights Article 16.1, 4th of November 1950 Rome Convention, European Convention on Human Rights Article 12, 8th of December 1966 New York, International Covenant on Civil and Political Rights Article 23.2.

78 Constitución Española 29 de diciembre de 1978. Spanish Constitution (from now on: CE) CE Article 10.2.

79 Código Civil Español Article 44.

paragraph "The same rights and duties follow if marriage is contracted by people of the same or opposite sex." Naturally, the Act had been challenged by the Constitutional Court for unconstitutionality; nevertheless, in a highly criticised decision, the court has not found unconstitutionality.[80] Their arguments are investigated as follows.

According to the proposal, the motive for the amendment of the law is that the relationship and cohabitation of couples is the expression of human nature and as such an important channel to the free self-expression that is guaranteed by the Constitution[81] as a precondition to political order and social peace.[82] The proposal of the Act provides a modest explanation for why same-sex marriage is the means of self-expression by stating that a number of same-sex couples cohabit. *"Opening this gate to self-realization provides the opportunity for those who choose their gender freely and those who are attracted to their own sex to express themselves and for equal rights adapted to the changed life of citizens, the Act intends to satisfy these claims."*[83] Conversely, such strong protection of the relationship is disproportional to the number of people living in these relationships and their social functions.

The freedom to develop personality has been integrated into the Spanish Constitution from the German Basic Law. However, unlike in Germany where it is a "*Grundrecht*" that is a fundamental right, which can be a basis for the claim that this occurrence in Spain is not deemed a fundamental right. The proposal overestimates the importance of this right as it poses it as the foundation for broadening marriage to same-sex couples.[84]

Therefore, two questions must be distinguished: first, whether protection of Article 32 includes same-sex marriages. Textually different sex marriages are the objectives of constitutional protection.

The other is whether heterosexuality is a defining characteristic of marriage. Can sex be a question of capacity that is regulated by law? As such questions are listed in the second paragraph of the article this may be dismissed: it is unlike legal capacity.

The protection of marriage is privileged in the Spanish legal system. Moreover, not only is it safeguarded through the protection of family (Article 39), but a specific constitutional guarantee is assigned to it, contrary to cohabitation. A family based on cohabitation is protected by the Constitution; therefore, cohabitation may be indirectly protected.

■ *3.2. Germany*

In Germany, courts faced the question of whether same-sex couples could get married long before legislatures considered changing the law. In 1992, the German courts were asked after a number of registry offices refused requests from homosexual couples to

80 Sentencia 198/2012, de 6 de noviembre de 2012.
81 CE Article 10.1.
82 Exposición de Motivos de la Ley 13/2005, de 1 de julio.
83 Ibid.
84 Verda y Beamonte, 2006, p. 33.

marry. In the case before the city court of Frankfurt am Main, the verdict obliged the registrar to wed the couple. The justification of the judgement claimed that there was no actual piece of law that would explicitly require the spouses to be of opposite sex, nor among reasons for impediment or for void marriage. Thus, according to Article 6 of the German Basic Law, everybody has the right to marriage in conjunction with Article 3 paragraph 3, and no discrimination is possible; therefore, without objective and reasonable justification, there is no way of prohibiting marriage.[85] Finally, the Provincial Court of Frankfurt repealed this judgement, and the jurisdiction followed this line of thought.

Let us follow the various justifications of the jurisdiction on prohibiting same-sex marriage. The arguments cover a truly wide range of theoretical touchpoints, with hardly any common ground as to what defines marriage. First, it has been claimed that although there is no explicit ban in positive law, being of opposite sex is self-evidently derived from tradition, and therefore there is no need to enact it in law. The fact that the German Basic Law defends marriage means, on the one hand, that the legislator supports it vis-à-vis other forms of companionship. On the other hand, the law includes institutional protection, and thus it may not alter such an institution's fundamental structure. With this in mind, the sex of the spouses becomes a fundamental question.

One such verdict[86] holds that the interpretation of marriage in Article 6 of the Basic Law as stable relationship between man and woman is not solely a constant understanding of literature and the Constitutional Court, but the everyday use of the word that is in public opinion. This interpretation is independent of the consequences of marriage, and a reinterpretation by the courts would mean constitutional amendment, which is beyond their jurisdiction. The verdict did not discuss where the legislation ought to draw the line for the regulation of the rights of same-sex couples; however, it stated that even though there is no obligation to open marriage for same-sex couples, it remains completely within the legislator's political discretion. In other words, the question of whether marriage involves the same or different sexes is not a legal question but instead a political one.

The German Constitutional Court, the Bundesverfassungsgericht,[87] concluded that the legislator can preserve the original meaning of marriage, which protects the primary meaning of the union. It has been declared that the marital community ensures the best conditions for children's physical, mental and physiological development.[88]

The Constitutional Court has also established that the notion of marriage is designed by public opinion and social context, therefore it is open to change. However, at the time, no sufficient evidence was found that this definition had been altered so as to include same-sex couples' right to marriage. The Court clarified that such modification is justified neither by the fact that fertility is not a prerequisite for marriage, nor

85 Szentistváni, 2000, pp. 4–5.
86 OLG Köln StAZ 93, 147.
87 BVerfG FamRZ 93, 1419.
88 Bundesverfassungsgerichts (BVerfGE) 76, 1, 51.

that there is an increase in childless marriages and extramarital births. Moreover, families are under constitutional protection, independent of whether they are based in marriage.

These sociological justifications seem to contradict somewhat the following arguments that are also used in the judgements. Constitutional protection of marriage is explained to have always aimed to establish legal security for founding a family. Additionally, it asserted that since no children may be born from the relationship of same-sex people, marriage cannot be expanded to include them.[89]

Paragraph 1 of Article 6 of the GG speaks of protected fundamental rights and it is among the eternity clauses; therefore, it cannot be amended.[90] However, this seems to contradict the fact that the Court proclaims on a number of occasions that legislation may freely determine the meaning of marriage.[91]

Apart from the tangled lines of argumentation, the question arises as to what social change may incline the abolishment of the different sex from the requisites of marriage. Could it be a contributing factor that there are fewer and shorter marriages? No convincing argument has been raised about this hypothetical social change.

It was implied by the introduction of registered life partnerships (*eingetragene Lebenspartnerschaft*) in 2001 that the German Constitution protects traditional marriage and considers the relationship of same-sex couples to be of a different nature, which does not fall under the special protection of Article 6 of the Basic Law, but it is protected under other provisions of the Constitution.[92] Since the effects are similar in both institutions, the Constitutional Court has evaluated whether the legal consequences of registered life partnerships are proportionate. The legislator has aimed to mark the differences between the two forms of relationship; therefore, adoption was not permitted for homosexual partnerships, for inheritance and taxation purposes they remained single, and no pension rights were guaranteed for widowers. Nonetheless, this verdict established that the Constitution's special protection for marriage does not mean that other forms of partnership cannot be advantaged in the same way.[93] Accordingly, the legislation has a wide margin of appreciation, and special protection does not mean unique protection,[94] nor uniquely special protection.

Consequently, most differences had been erased, and in more recent judgements, the Court emphasised the similarities between the two relationships. Furthermore, it established a constitutional right for homosexual life partnerships in paragraph 1 of both Article 2 and 1 with specified rights of privacy and freedom.[95] Moreover, according to the Court, differentiating constitutes a discrimination based on sexual orientation, which requires strict scrutiny in line with paragraph 3 of Article 3, which expands

89 See more: Szentistváni, pp. 3–11.
90 Schlüter and Szabó, 2013, p. 222.
91 For example: BverfGE 31, 58, (70).
92 Sanders, 2012, p. 925.
93 Sanders, 2012, p. 926.
94 Toldi, 2005, p. 22.
95 Sanders, 2012, p. 927.

the protection of Article 6 to registered life partnerships. Conversely, the basis of the judgement in 2007 was that the essence of marriage is procreation when it had been affirmed that the social security cover human reproduction technology, and which was given solely to married couples, was not unconstitutional.[96] Alternatively, in 2009 and 2013, in a number of verdicts, the Court ruled it unconstitutional to differentiate– in cases concerning pension rights, tax benefits and adoption – between married and registered civil partners.[97]

Therefore, it comes as no surprise that in 2017, marriage had been extended to same-sex partners by legislation.

Accordingly, a struggle may be observed on the part of a constitutional court when trying to define marriage or trying to justify the legislator's definition of this fundamental right. The arguments are obscure and often contradictory, and there is an underlying need for change over time that the courts seem to be advocating.

4. Closing thoughts

In conclusion, we have contemplated how different national legal systems interpret and transpose the fundamental right to marriage, which was established in the European Convention of Human Rights. A certain geographical-historical-cultural divide may also be recognised, and although by no means are sharp lines implied, eastern and western states continue to regulate and interpret policies differently. Moreover, a timeline can be drawn between older constitutions that have fewer details about the fundamental right to marriage, and more recent ones, especially in the post-communist countries that, after stabilising their democracies, enacted new constitutions that tend to elaborate more on marriage and thus adopt a more traditional view. Comparatively, a cultural difference emerges in which religion plays an important role, especially in southern Europe. However, neither the former nor the latter is an absolute rule. Another finding is that there is a better chance of a more traditionalist view where the fundamental right of marriage is better unfolded in the constitution that enumerates more building bricks of this fundamental freedom.

96 Sanders, 2012, p. 935.

97 BVerfG, Order of the First Senate of 07 July 2009 – 1 BvR 1164/07 – paras. (1-127), BVerfG, Beschluss des Ersten Senats vom 18. Juli 2012 – 1 BvL 16/11 – Rn. (1-50), BVerfG, Judgment of the First Senate of 19 February 2013 – 1 BvL 1/11 – paras. (1-110), BVerfG, Beschluss des Zweiten Senats vom 07. Mai 2013 – 2 BvR 909/06 – Rn. (1-151).

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■ Verda y Beamonte, J. R. (2006) El libre desarrollo de la personalidad como principio inspirador de la Ley 13/2005, de 1 de julio, por la que se modifica el Código Civil en materia de derecho a contraer mantrimonio. In: Verda y Beamonte, J. R. (ed.) *Comentarios a las Reformas de Derecho de Familia de 2005.* SA: Editorial Aranzadi, pp. 29–53.

JÁNOS EDE SZILÁGYI[1]

Some Values and Guarantees in the Ten-Year-Old Hungarian Constitution, With a Look at the Constitutional Arrangements of the Countries Founding the European Integration

ABSTRACT: *In this study, certain values and guarantee institutions of the Hungarian Fundamental Law are analysed in the light of the constitutions of the countries that have established European integration – Germany, France, Italy, and Belgium. Among the value systems, Christian culture and the family have been examined, while the study has also focused on the guarantees important for living conditions, such as strict public finance provisions, rules on emergency powers, and provisions guaranteeing a high level of protection for future generations and the environment. In addition to the analysis of the constitutions, the study makes several references to the jurisprudence of the countries concerned and to the most important aspects of constitutional developments in recent years.*

KEYWORDS: constitutional values, human rights, public finance, emergency powers, future generations.

> "*The Hungarian Constitution suffers from shortcomings in the concept of the common good and in the definition of moral values*."
> Ferenc Mádl[2]

The above words of former President of the Republic Ferenc Mádl referred to the constitution, which was repealed in 2012. What would he say today on the occasion of the tenth anniversary of the adoption of the current Hungarian Constitution, the Fundamental Law? Does the Hungarian Fundamental Law reflect such a specific

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2 Mádl, 2011, p. 23.

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concept of values and the common good? On the occasion of this anniversary, in this study[3] we will try to present certain rules and specific features of the Fundamental Law, looking at the constitutions of other countries. However, given the limitations of this study, this presentation can only be arbitrary, in terms of the constitutional provisions highlighted for analysis, the scope of the countries used for comparison and the depth of the analysis. Nevertheless, we believe that this brief summary can also serve as a testimony to the uniqueness and distinctiveness of the Fundamental Law on the tenth anniversary of its adoption, and to the fact that the Fundamental Law itself is an important and valuable piece of our national identity.[4]

Starting from the fact that in the past decade some provisions of our young constitution have often been analysed in the light of the constitutional rules of other countries, the ideas of decision-makers in other countries and the representatives of international organisations,[5] this has prompted us to examine in this paper, from a reverse perspective, how some of the achievements of the Fundamental Law that we consider important have been regulated in the constitutions of other countries.[6] In the comparison, we focus primarily on the normative text of the constitutions themselves, but – within the limits of the scope of the report – we also try to take into account the constitutional jurisprudence woven around them and the legislation detailing the provisions of the constitutions, knowing that without them we would only get a half-formed, false picture.[7] Our comparison also includes some values that are important elements of our identity, as well as safeguards to ensure that we can continue to provide a framework and conditions for living our identity. The comparison focuses on two important values of the Fundamental Law that need to be protected, namely the family and Christian heritage and culture[8]. The comparison focuses on three specific elements of the guarantees provided by the Fundamental Law: firstly, the provisions on the protection of public funds, which are unique in certain respects; secondly, the guarantees that safeguard the living conditions and

3 I would like to take this opportunity to thank the staff of the Mádl Ferenc Institute of Comparative Law (MFI) for their help in writing the paper, especially Márta Benyusz and Zoltán Nagy, the heads of the MFI's departments, Attila Horváth, the MFI's senior researcher, as well as Noémi Suri and Flóra Orosz, the MFI's researchers.

4 Cf. Varga, 2021, pp. 155–178.

5 Examples are given of the scrutiny of the Fundamental Law by EU and international organisations, and the positions of French politicians in: Trócsányi, 2021, pp. 135–139, 141–142.: The Dutch Parliament, for example, has examined the state of the rule of law, and thus our constitutional system and legal practice: Serdült, 2019.

6 As for date of reference, we have set April 2011, i.e. the date of adoption of the Fundamental Law.

7 On the same see Badó and Mezei, 2016, p. 145.

8 Similarly, these two characteristic values are highlighted by Varga, 2021, pp. 303–321. A 2020 survey of other EU Member States on 'respect for identity, culture and traditions' under the comparative perspective brought up five 'key themes', three of which (if not coincide, but) overlap with two of the value elements of our present study: 'national identity', 'interpretation of religious freedom', 'main measures and philosophy of family policy'; see Trócsányi and Lovászy, 2020, pp. 15–16.

security of our present generation in specific situations[9] and, thirdly, the guarantees that are intended to ensure that future generations have adequate opportunities in the face of the environmental challenges of the 21st century. And the countries whose legislation is examined in this study are among the states that have established the European integration, namely Germany, France, Italy and the Benelux State of Belgium.

1. Christian tradition and the family as a value in some European constitutions

Constitutions can reflect a wide range of values, many of which can be considered universal, others European, and others national. Moreover, different values can be regulated in different forms and textual contexts. In our view, one or another constitution cannot be considered inferior per se because a particular value is not reflected in it or not the way as in the constitution of another nation.[10] Therefore, after all this introduction, we can state as a fact that family and Christian heritage and culture are characteristically represented as values in the Fundamental Law;[11] in the following, we will look at how these are reflected in the constitutions of the other countries under review.[12]

■ *1.1. Christianity as a value in European constitutions*

It is not surprising that Hungary, as a country roughly one third of whose area was part of a Muslim (Ottoman) world empire for 150 years against the will of its people, and in which the communist dictatorship of the 20th century was explicitly hostile to Christian culture and its carriers, should regard its thousand-year-old Christian traditions as an element of its identity to be emphasised, protected and preserved, as part of its culture. Accordingly, the Fundamental Law of Hungary states Christianity *expressis verbis* as a value to be protected.[13] In the preamble to the Fundamental Law, the National Avowal, the adopter of the constitution declares with "pride" that our country has become "part of Christian Europe" and has recognised "the role of Christianity in preserving nationhood". Besides the fact that the symbols of the Hungarian state, as enshrined in the Fundamental Law, are imbued with Christian symbols and

9 On the importance of values and their exercise in a special legal order, see Schanda, 2021.
10 Cf. Badó and Mezei, 2016, pp. 156–157.
11 See Trócsányi, 2021, pp. 141–142.
12 An important starting point for writing this chapter is provided by: Benyusz et al., 2021.
13 It does not fall within the scope of the study, but it is important to mention the Greek and Polish constitutions, which have, although not the same, but a similar character of Christianity as a value; Benyusz et al., 2021, Appendices I and II. On the special features of Hungarian legislation in comparison with other Central European countries, see Sobczyk, 2021.

language,[14] in Article R) of the Foundation, the Seventh Amendment to the Fundamental Law[15] makes it the duty of all organs of the state to protect "the constitutional identity and Christian culture of Hungary". And with the Ninth Amendment to the Fundamental Law, Article XVI of the section entitled Freedom and Responsibility, Hungary provides children with an upbringing "that is in accordance with the values based on the constitutional identity and Christian culture of our country". The current text of the Belgian Constitution of 1831, the French Constitution of 1958 and the Basic Law of the Federal Republic of Germany[16] do not mention Christian traditions *expressis verbis* as a value to be protected.[17] The Italian Constitution of 1947 does not itself contain a direct reference to Christianity as a value to be protected, but in Article 7 of the constitution, which regulates the relationship between the State and the Holy See, it does mention the Lateran Treaty, which is an atypical source of Italian law, but an important one, despite the fact that it is not considered to have constitutional status. Article 9 of the text of the Lateran Treaty, as in force in 1984, states that the Italian State recognises the importance of religious culture and that "the principles of Catholicism are a part of the historical heritage of the Italian people".[18]

Countries regulate their relations with Christian (and other) churches in accordance with their models of church regulation or (in the case of France, for example) do not regulate them in their constitutions. These are – based on the categorisation[19] of Balázs Schanda – the following: in the case of Hungary, which actively wishes to preserve Christianity as a cultural value, and Germany, which prohibits the state church in its constitution *expressis verbis*, the so-called related model regulates the relationship

14 In the Fundamental Law, the "patriarchal cross" and the "Holy Crown" are visibly embodied in the coat of arms of Hungary in a visualised form in Article I(1) of the Fundamental Law; the anthem of Hungary is a prayer to God (Article I(3) of the Fundamental Law); and King Stephen is also referred to as "Saint", not "I" (Article J of the Fundamental Law). The National Avowal is preceded by the first line of the national anthem ("God bless the Hungarians"); and in the postamble of the Fundamental Law, the "Members of the National Assembly", "being aware of" their "responsibility before God and man", adopted the country's first Fundamental Law. And in the National Avowal, "love" (God is love; 1 John 4:7–21), among other things, is established as a fundamental cohesive value.

15 For the significance and interpretation of the relevant parts of the amendment, see Schanda, 2018.

16 Germany is a federal state, and it is also true for the subject of our analysis that beyond the federal level, the Land level is also of decisive importance (for example, in the recognition of certain churches as public bodies or in the normative state support of certain churches); however, we will not discuss the Länder constitutions in this section.

17 It is interesting to note that there has been (for example in 2016) and is currently (2021) a French amendment pending on this issue, which would refer to France's pride in its "Judeo-Christian roots". At the same time, the German Basic Law can be seen as an indirect reference to certain Christian traditions, for example, according to its preamble, the German Basic Law is adopted in awareness of the "responsibility before God and man". Benyusz et al., 2021, pp. 6, 9 and 12. For more on these countries, see also Benyusz, Pék and Marinkás, 2020, pp. 148–173.

18 The Italian Constitutional Court Decision 203/1989, interpreting the 1984 amendment to the Lateran Treaty, states as a fundamental principle that the principles of Catholicism are part of the historical tradition of the Italian people. Benyusz et al., 2021, pp. 16, 18–19.

19 Schanda, 2019.

between the state and the churches; France, which has no constitutional provision on the relationship between the state and the church and professes the principle of full laicisation, follows the so-called "radical separation" model; in relation to the Catholic Church, Italy follows the so-called "cooperative separation" model, and in the case of Belgium, which, in its constitution, only indirectly establishes the separation of church and state in comparison to Hungary, there is a kind of hybrid[20] model similar to the separation and related models. All these different models provide different opportunities for the transmission of Christian faith and culture (for example through education).

■ *1.2. The family as a value in European constitutions*

The Fundamental Law provides for a distinctive concept of family and marriage and for the protection and support of the family, marriage and children.[21] In the National Avowal, the family is defined alongside the nation as the "principal framework of our coexistence". Article L(1) of the Foundation, as amended by the Ninth Amendment, states that Hungary shall protect "the family as the basis of the survival of the nation". In this same paragraph, the adopter of the constitution defines marriage and the relationship between parents and children as the basis of family ties. Marriage, as the family form clearly favoured by the Fundamental Law, is given a concrete definition in the Fundamental Law, which states that marriage is "the union of one man and one woman established by voluntary decision". The Fundamental Law also gives a strict definition of parents, i.e. the "mother shall be a woman, the father shall be a man". These provisions provide clear guidance on the concepts of family and marriage (their constituent elements) and their relationship to each other in a complex way compared to the constitutions presented below.[22] Our Fundamental Law contains several provisions on family protection and family support:[23] Article L(1)-(2) provides that Hungary supports childbearing and regulates the protection of families in a special, cardinal law[24]; Article XV(5) of the Fundamental Law, as amended by the Fourth Amendment, provides that "[b]y means of separate measures, Hungary shall protect families, children"; Article XVIII(2) provides that "[b]y means of separate measures, Hungary shall ensure the protection of [...] parents at work"; and Article XXX(2) on public support provides that "[f]or persons raising children, the extent of their contribution to covering common needs must be determined while taking the costs of raising children into consideration." In addition to the protection of private life, Article VI of the Fundamental Law also provides for the protection of family life;

20 Sägesser, 2011, p. 13.; Benyusz et al., 2021, p. 6.

21 On the model characteristics of the Hungarian Fundamental Law and the legal regulation based on it in comparison with other Central European countries, see Heinerné Barzó and Lenkovics, 2021.

22 Benyusz et al., 2021, pp. 20-35.

23 As a point of interest, I note that under Article P(2), "family farms" in agriculture are also considered as a supported form.

24 Namely Act CCXI of 2011 on the Protection of Families.

the combination of these two elements is not unique in Europe. The Fundamental Law provides *expressis verbis* for children's rights, although not in a general sense, but emphasising the protection and care aspect in Article XVI(1) of the Fundamental Law, as shaped by the Ninth Amendment: "[e]very child shall have the right to the protection and care necessary for his or her proper physical, mental and moral development. Hungary shall protect the right of children to a self-identity corresponding to their sex at birth, and shall ensure an upbringing for them that is in accordance with the values based on the constitutional identity and Christian culture of our country." A specific feature of the Fundamental Law is that it contains specific provisions on parent-child relations. On the one hand, Article XVI(2)-(3) sets out the rights and duties of parents towards their children: "[p]arents shall have the right to choose the upbringing to be given to their children" and "[p]arents shall be obliged to take care of their minor children. This obligation shall include the provision of schooling for their children." On the other hand, it also provides guidance on the obligations of children towards their parents, which is unique compared to the other constitutions examined (in other countries, this obligation is mostly found in civil codes);[25] Article XVI(2) to (3) of the Fundamental Law states that "[a]dult children shall be obliged to take care of their parents if they are in need."

The Belgian Constitution also protects the family in the context of the right to privacy, but does not provide a constitutional definition of the family, nor does it give guidance on some of its components. The Belgian Constitution is similarly silent on marriage. Both the definition of the family and the definition of marriage are only found in lower-level legislation; under the Belgian Civil Code, opposite-sex and same-sex couples can marry, same-sex couples can adopt and female couples can also engage in artificial insemination.[26] At the same time, Article 23 of the Belgian Constitution establishes the right to a family allowance (which can be seen as a kind of family support institution) and Article 24 of the constitution defines school choice as a right of parents. However, the Belgian Constitution does not guarantee a child's right to be supported by his or her parents (this is provided for in the Belgian Civil Code), nor is there any provision in the Belgian Constitution (or under their Civil Code) for an adult child's obligation to support his or her parents. An amendment in 2008 made certain child protection provisions part of the Belgian Constitution (Article 22/A). On the one hand, every child has the right to moral, physical, mental and sexual integrity (the latter does not mean the right to the sex of birth, but protects against rape and indecent assault[27]). On the other hand, every child has the right to express his or her views on all matters that concern him or her; his or her opinion must be taken into account.

The French Constitution declares the protection of family life indirectly: the preamble to the French Constitution of 1958 provides that the preamble to the Constitution

25 Benyusz et al., 2021, p. 21.
26 Ibid., p. 22.
27 Ibid., p. 23.

of 1946 remains in force, and the Constitutional Council in 1993[28] bases the right to a normal family life on paragraph 10 of the preamble to the Constitution of 1946, which is inseparable from the right to respect for private life. The concept of family is not defined in the French Constitution; in this regard, a 2004 interpretation by the Constitutional Council[29] can give some guidance: the family is first and foremost a married couple, a couple and then children.[30] The French Constitution does not define marriage either; same-sex marriage is provided for in the law of 17 May 2013[31]. According to Article 143 of the French Civil Code, marriage is contracted by two people of different or the same sex, and according to Article 6-1, marriage (including adoption) has the same legal effects if it is contracted by people of the same sex as if they are of different sexes. A same-sex spouse can adopt the child of his or her spouse. The French Constitution does not contain any rules on the rights of the child (but the Constitutional Council's practice[32] suggests that, for example, the best interests of the child are constitutionally protected) and other elements of the child-parent relationship are covered by the French Civil Code (including parental and child maintenance obligations).

According to Article 6 of the German Basic Law (*Grundgesetz*), marriage and the family are under the special protection of the state; the care and upbringing of the child is primarily the right and duty of the parents, which is guarded by the state community; children can only be taken from the family by law. The German Basic Law does not define the concepts of family and marriage *expressis verbis* by defining their constitutive actors (spouses, parents), but the German Federal Constitutional Court in its 1959[33] (and later in 1980[34]) decision deduced from Article 6 that marriage is a union of man and woman. The practice of the Constitutional Court subsequently changed, and in a 2013 decision the German Federal Constitutional Court[35] ruled that parents in a registered partnership are also considered a family under Article 6 of the German Basic Law if the child is adopted by the registered partner of the child's biological parent (but did not extend a similar level of protection to non-registered partnerships[36]). Legislation[37] allowed registered partnerships for same-sex couples in 2001.[38] In 2002, the German Federal Constitutional Court[39] first declared the related law

28 Décision 93-325 DC – 13 août 1993 – Loi relative à la maîtrise de l'immigration et aux conditions d'entrée, d'accueil et de séjour des étrangers en France.
29 Hauser, 2004.
30 Benyusz et al., 2021, p. 24.
31 LOI n° 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe.
32 See: Décision n° 2018-768 QPC du 21 mars 2019; Décision n° 2013-669 DC du 17 mai 2013. In the latter decision, the Constitutional Council allowed same-sex couples to adopt a child, putting the best interests of the child first; see also Benyusz et al., 2021, p. 25.
33 Bundesverfassungsgericht Urteil vom 29 July 1959, 1 BvR 205/58.
34 Bundesverfassungsgericht Urteil vom 28 Februar 1980, 1 BvL 136/78.
35 BVerfG, Urteil des Ersten Senats vom 19. Februar 2013 – 1 BvL 1/11 -, Rn. 1-110.
36 Benyusz et al., 2021, p. 27.
37 Gesetz über die Eingetragene Lebenspartnerschaft vom 16. Februar 2001 (BGBl. I S. 266).
38 For an interesting account of the process and controversy surrounding the adoption of the law, see: Sanders, 2016, pp. 490-491.; also Benyusz et al., 2021, pp. 27-28.
39 BVerfG, Urteil des Ersten Senats vom 17. Juli 2002 – 1 BvF 1/01 -, Rn. 1-147.

constitutional precisely because of the differences between marriage and registered partnerships, and later, based on Article 3 of the German Basic Law guaranteeing equality before the law, gradually declared the same differences unconstitutional,[40] at the end of which the legislature, by amending the Civil Code (BGB) in 2017[41], made same-sex marriage possible (while abolishing the possibility of registered partnerships). In the case of unmarried same-sex couples, a law passed after the German Federal Constitutional Court's 2019 ruling[42] allowed one member of the couple to adopt the biological or adopted child of their partner.[43] For the time being, a child cannot have two mothers or two fathers on the birth certificate, but the German government has already proposed a Scandinavian-style co-motherhood arrangement in August 2020.[44] The current text of the German Basic Law (beyond the equal status of children born out of wedlock) does not provide for children's rights, however, the German government has submitted a proposed amendment[45] to Article 6 of the German Basic Law in January 2021. The obligation to maintain or bring up children and the parental responsibility are not covered by the German Basic Law, but by the German Civil Code.

Articles 29–31 of the Italian Constitution deal with the family and children in several important points, and the interpretation of these provisions has been a central theme of the activities of the competent Italian forums in the last decade. According to Article 29 of the Italian Constitution, the Italian State recognises the rights of the family as a natural community based on marriage, and the same article provides for equality between spouses. Under Article 31 of the Italian Constitution, the state also provides financial support and other measures to help start a family and protect motherhood and children. Article 30 of the Italian Constitution contains provisions on the parent-child relationship, namely with regard to parents, according to which parents have the duty and the right to maintain, educate and bring up their children, and if they are unable to do so, the law shall provide for the exercise of these duties. The Italian Constitutional Court, through a strict interpretation of Article 29 of the Constitution, had for a long time[46] given priority to relationships based on marriage when defining the family, without granting to cohabitation outside marriage the same

40 On this see Grünberger, 2010, pp. 203-208.; Benyusz et al., 2021, p. 28.

41 Gesetz zur Umsetzung des Gesetzes zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts. Gesetz 18.12.2018 (Bundesgesetzblatt Jahrgang 2018 Teil I Nr. 48, ausgegeben am 21.12.2018, Seite 2639).

42 BVerfG, Beschluss des Ersten Senats vom 26. März 2019 – 1 BvR 673/17 -, Rn. 1–134.

43 On this see Gössl, 2020.; Benyusz et al., 2021, p. 30.

44 Benyusz et al., 2021, p. 29.

45 "The Basic Law recognises and protects the constitutional rights of children, including the right to grow up to be responsible adults. The best interests of the child shall be duly taken into account.[...] This provision does not diminish the primary right of parents." Bundesregierung (20 January 2021): Change in legislation: Children's rights to be enshrined in the German Basic Law, https://www.bundesregierung.de/breg-en/news/rights-of-child-in-basic-law-1841338; translation Benyusz et al., 2021, p. 30.

46 C.f. Corte costituzionale, Sentenza n. 79 del 1969.

constitutional conditions as marriage. A significant change[47] in the concept of family was brought about by the 2010 decision of the Constitutional Court,[48] which ruled that although the rules on marriage presuppose the different sexes of the spouses, same-sex couples' relationships are also included in the concept of family as defined in Article 29 of the Constitution, since such relationships also enjoy constitutional protection as social organisations under Article 2 of the Constitution. In 2012, the Court of Cassation also ruled in a decision[49] that same-sex couples have the same right to family life as married couples. As a result of this, and an ECtHR judgment[50] (in which Italy was condemned by the Strasbourg Court for failing to regulate same-sex couples), Italy adopted in 2016 a law regulating same-sex couples' relationships[51] which guarantees same-sex couples all the social, financial and property rights that the Civil Code grants to married couples. Just as the Italian Constitution contains no provisions on the sex of spouses, it is silent on the sex of parents. The Italian Constitutional Court and the Court of Cassation have played a major role in shaping the jurisprudence on adoption by same-sex couples.[52] In a 2013 decision[53] the Court of Cassation ruled that refusal of eligibility for adoption on the basis of sexual orientation is discriminatory, and in a 2016 decision[54] it ruled that a partner's child is adoptable by same-sex couples. In the latter decisions, it is important to point out that they did not allow same-sex couples to adopt children as a couple. In 2021, the Constitutional Court, considering the possibilities offered by the adoption rules alone to be insufficient, issued two decisions[55] calling on the legislator to take further steps to protect children born of same-sex couples, namely to draft legislation "to ensure that children born to same-sex couples have the same rights as other children and that they have the right to parents in respect of both parents".[56]

2. Certain constitutional guarantees for the enjoyment of values

Each constitution guarantees the protection of the values they enshrine in a number of ways. Among these, this paper focuses on some of the safeguards that also make the Hungarian Fundamental Law unique compared to the constitutions of other countries.

47 See about this Benyusz et al., 2021, pp. 32–33.
48 Corte costituzionale, Sentenza n. 138 del 2010.
49 Corte di Cassazione n. 418 del 2012.
50 ECtHR, Oliari and Others v Italy, no. 18766/11 and 36030/11, judgment of 21 July 2015.
51 Legge 20 maggio 2016 n. 76 Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze.
52 See about this Benyusz et al., 2021, pp. 34–35.
53 Corte di Cassazione n. 601 del 2013.
54 Corte di Cassazione n. 12962 del 2016.
55 Corte costituzionale, Sentenza 32/2021, Sentenza 33/2021.
56 Benyusz et al., 2021, p. 35.

■ *2.1. Constitutional guarantees for responsible public finances*

The Fundamental Law was born at a time when the financial and then economic crisis of 2008 was an important shaper, so the provisions on public finances were a priority. Ten years after the Fundamental Law, and in the midst of the financial and economic challenges caused by the COVID epidemic, these public finance provisions are now back in the spotlight and we have the opportunity to reinterpret them in a real-life situation.[57]

Our Fundamental Law contains several types of provisions on public money. For example, Article N) of the Fundamental Law sets out the principles of budgetary management, namely the principles of equilibrium, transparency and sustainability.[58] However, fiscal management principles can also be found in other constitutions, such as the German or the French, and in our view, what makes the Fundamental Law really special compared to the constitutions of the countries analysed in this study are the rather strict rules on government debt and the strong powers of the constitutional body for enforcing them, the Fiscal Council. The aims of the Fundamental Law are quite clear with these provisions: the sovereignty of a country in drastic debt is very limited, and not only does this situation affect the present generations, but it also has serious consequences for the future generations' life chances. According to Article 36 of the Fundamental Law, the National Assembly may not adopt a central budget law that would result in the government debt exceeding half of the total gross domestic product, and as long as the government debt exceeds half of the total gross domestic product, the National Assembly may only adopt a central budget law that includes a reduction of the ratio of the government debt to the total gross domestic product. However, the Fundamental Law also provides for the possibility of derogation from these rules, while also specifying the extent of the derogation: only in times of special legal order, to the extent necessary to mitigate the consequences of the circumstances giving rise to it, or in the event of a lasting and significant downturn in the national economy, to the extent necessary to restore the balance of the national economy. However, these rules would be difficult to enforce without the associated organisational guarantees. To this end, Article 44 of the Fundamental Law establishes a strong institution, the Fiscal Council,[59] which is a body supporting the legislative activity of the National Assembly and examining the soundness of the central budget, and which, in this capacity, contributes to the preparation of the law on the central budget. The strongest power[60] it has in all these activities is that the adoption of the law on the central budget requires the prior approval of the three-member Fiscal Council in order to comply with the provisions mentioned in Article 36. The government debt target set in Article 36 of the Fundamental Law, i.e. that Hungarian government debt should not exceed half of the

57 Nagy, 2021, pp. 176–177. An important starting point for writing this sub-chapter was provided by: Nagy et al., 2021.

58 For a more detailed description, see Nagy, 2014, pp. 12–13.

59 Kovács, 2016, pp. 320-337.

60 The cardinal law setting out the detailed rules for its operation: Act CXCIV of 2011 on the Economic Stability of Hungary.

total gross domestic product (i.e. 50%), is stricter than the 60% level of the convergence criteria of the European Union.[61]

There is no similar independent institution in the Belgian Constitution that has a degree of control over the legislature in adopting the budget, but there is an institution created by a Royal Decree[62] of 2018, the Supreme Finance Council (*Conseil supérieur des Finances*), an independent body of experts whose task is to give opinions on federal and other budgets. However, this Supreme Finance Council may also have a role in other matters, namely to ensure budgetary cooperation between the various levels of the Belgian state system, federal, regional and other communities. In the event of a breach of the relevant provisions, including those relating to debts, if the Council of the European Union imposes a fine, the parties shall jointly bear the liability for that, in the proportion of their default determined by the Supreme Finance Council.[63]

The French Constitution does not have such a clear and strict provision on the possible level of government debt as the Hungarian one, nor an institution to guarantee its implementation. A body under the Court of Auditors, the High Council of Public Finances (*Haut Conseil aux Finances Publiques*), was created to ensure the implementation of the organic law on the programming and management of public finances[64], with the important task of examining national public finances and France's European commitments. It should be stressed, however, that this Council is only an advisory body and that its opinion could be taken into account by the Constitutional Council when assessing the appropriateness of the budget[65] (but this has not been the case so far).[66]

Although there are provisions in the Italian Constitution regarding government debt – for example, that debt can only be called upon in the event of an exceptional event, taking into account the effects of the economic cycle, if approved by an absolute majority of the chambers of parliament[67]– but there is no strict level requirement, nor does the constitution provide for a body such as the Hungarian Fiscal Council.[68]

In the German Basic Law, finance is dealt with in a separate section (X), at some length. The separation of the federal and provincial levels and the need to make provision for their relationship with public funds may explain such level of detail. On the other hand, the German state is clearly placing a very strong emphasis on sound management. Article 109 of the German Basic Law contains an explicit reference to the management obligations arising from the rules of the European Union and makes

61 Articles 126 and 140 TFEU and Article 1 of Protocol No 12 and Protocol No 13 thereto.
62 Arrêté royal du 23 mai 2018 relatif au Conseil supérieur des Finances. On this, see also: Nagy et al., 2021, pp. 5–7.
63 Nagy et al., 2021, p. 7.
64 Loi organique n° 2012–1403 du 17 décembre 2012 relative à la programmation et à la gouvernance des finances publiques.
65 Conseil constitutionnel, Décision n° 2012-658 DC du 13 décembre 2012, *Loi organique relative à la programmation et à la gouvernance des finances publiques*.
66 Nagy et al., 2021, p. 9.
67 Article 81 of the Italian Constitution.
68 The National Economic and Labour Council mentioned there (Article 99) is not considered as such. See also Nagy et al., 2021, pp. 10–12.

compliance with these rules a constitutional obligation. In addition, there are also provisions to maintain the budgetary balance of the federal state and the provinces without borrowing. However, the German Basic Law allows an exception to this strict rule in the same place and in Article 115 on the limits to borrowing.[69] The latter provides that borrowing requires a federal law authorisation with a fixed or determinable maximum amount. Article 109/A of the German Basic Law mentions the Stability Council[70] which, at both federal and Land level, has important supervisory functions. It also has the essential function of avoiding a so-called fiscal emergency, to which end it draws up a consolidation programme and adopts countermeasures.[71] Based on the above, it can be concluded that the German Basic Law regulates government debt issues and the institutions that enforce them at a constitutional level similar to Hungarian law, with similar strictness and similar organisational arrangements and structures (although not with the same tasks and powers).

■ *2.2. Constitutional guarantees for special situations: the regulation of special legal order*

At the time of writing this section, in the midst of the COVID epidemic, there is probably no need to discuss how important it is for the constitutional functioning and viability of a country that its constitution not only provides clear guidance and institutionalised solutions for 'normal' peacetime situations, but also contains provisions for dealing with special challenges and situations in an effective, yet secure manner, including legal safeguards. Without going into the – otherwise justified – definition of the special legal order,[72] we will consider below whether the young Hungarian Constitution is sufficiently thought through in this respect, whether the experiences of the rather turbulent 20th century of Hungarian history and the equally challenging first decade of the 21st century are reflected in it in comparison with other constitutions.[73] In the present analysis, we have examined the current text of the Fundamental Law, with only a passing reference to the Ninth Amendment to the Fundamental Law, which will significantly change the special legal order regulation from 1 July 2023.[74]

69 See also Article 112 of the German Basic Law.

70 On its establishment, its tasks and its procedures, see: Gesetz zur Errichtung eines Stabilitätsrates und zur Vermeidung von Haushaltsnotlagen (StabiRatG).

71 Nagy et al., 2021, p. 15–16.

72 Trócsányi, 2021, pp. 26-36.; Horváth, 2021, pp. 624-625.; Till, 2017, pp. 55–75.

73 It is important to emphasise that this section deals mainly with situations and institutions of the special legal order regulated by constitutions, while both Hungarian and other legal systems know other special legal categories regulated below the constitutional level, typically at the level of statutes. See also Horváth et al., 2021. See also Kádár, 2021. For the regulation of other countries, including the Visegrad Group, see Hojnyák and Ungvári, 2021, pp. 305-323.

74 Horváth, 2021, pp. 122-148. See also from earlier: Horváth, 2020, pp. 17–25, 23–25.

First of all, we can say that the Hungarian Constitution[75] and the German Constitution[76] are the most detailed among the constitutions of the countries under study. Both the special legal order situations and the powers of the bodies are regulated in detail in these regulations. In contrast, the French Constitution[77] is much shorter, containing only the basic rules, the Italian[78] and Belgian[79] constitutions contain shorter references to war (i.e. they are considered to be very under-regulated), and the Belgian one also prohibits the partial or total suspension of the constitution,[80] which is thus a relative obstacle to the introduction of a special legal order at federal level.[81]

Regarding the nature of constitutional regulation, it can be stated that the Hungarian Fundamental Law separates the special legal order regulation from the ordinary legal order operation in a conspicuous, separate section; in other words, the "constitution in the constitution concept", which is often referred to in English literature with the *terminus technicus* '*emergency constitution*', clearly prevails in the constitution of our country.[82] The German Basic Law regulates the special legal order in separate sections, although there is a chapter named as such (Xa), but this does not contain all the relevant constitutional provisions.[83] The regulation of this issue in the French Constitution is similarly fragmented.[84] The Italian and Belgian constitutions contain in one chapter each the few provisions that apply to war.[85]

In terms of the number of special legal order categories, the current text of the Hungarian Fundamental Law, uniquely in Europe, names six categories, five of which (state of national crisis, state of emergency, state of preventive defence, unexpected attack, state of danger) already existed before the adoption of the Fundamental Law, and which were supplemented by the so-called state of terrorist threat from July 2016. Unlike many other constitutions, the Fundamental Law clearly sets out the names and number of special legal order categories.[86] It is important to note that from July 2023, there will only be three categories (state of war, state of emergency, state of danger). The German Basic Law is not so clear: it does not itself define the special legal order,

75 Articles 48-54 of the Hungarian Fundamental Law.
76 German Basic Law, Articles 35, 80a, 91, 115a-115l. For a detailed analysis of the German Basic Law, see De Negri, 2021, pp. 414–433.
77 French Constitution, Articles 16, 35-36 For a detailed analysis of the French Constitution, see Stollsteiner, 2021, pp. 322–340.
78 Article 78 of the Italian Constitution. For a detailed analysis of the Italian Constitution, see Ungvári, 2021, pp. 457–479.
79 Article 167 of the Belgian Constitution.
80 Article 187 of the Belgian Constitution.
81 Horváth et al., 2021, p. 1.
82 Ibid., p. 1.
83 See also Chapters VII (Federal Legislation) and VIII (Federal Enforcement) of the German Basic Law.
84 See Chapters II (President of the Republic) and V (Relations between Parliament and Government) of the French Constitution.
85 Chapter II/1 (Parliament) of the Italian Constitution and Chapter IV (International Relations) of the Belgian Constitution.
86 Horváth et al., 2021, p. 2.

or the cases that fall under it, so it is questionable what is included in the special legal order.[87] As regards the French Constitution, it is also difficult to say how many cases of special legal order are recognised: most typically, the extraordinary presidential powers (Article 16) and the state of siege (Article 36) are included; it is questionable whether the provisions on war in Article 35 can be interpreted as a separate category.[88] The Italian Constitution mentions one case as a special category of legal order, the so-called state of war (Article 78); however, the constitution also allows emergency decree government and the central withdrawal of powers (e.g. from regions) to function as such in certain aspects.[89] In the Belgian Constitution, the only category of special legal order is state of war (Article 167).

If we turn to the provisions regulating the powers of the organs during a special legal order, it can be seen that under the provisions of the Hungarian Fundamental Law currently (yet) in force, a rather complex network of powers has been established between the various actors (National Assembly, Government, President of the Republic, National Defence Council), and the "crisis manager" is different for each type of special legal order:[90] in four cases the Government, in the case of a state of national crisis the National Defence Council – which can be considered a uniquely Hungarian institution –, and in the case of a state of emergency the President of the Republic. In essence, this complexity was one of the reasons why a simpler, clearer structure was put in place from July 2023 (and the National Defence Council was removed from the ranks of crisis managers). In Germany, competences also differ according to the type of specific cases of special legal order, but it can be said that the federal legislature has the strongest competences. In France, by contrast, the executive is dominant.[91] The Italian Constitution provides for the declaration (by the two chambers of Parliament), proclamation (by the President of the Republic) and exercise of special powers (by the Government) of state of war, but is silent on the cases in which state of war may be declared, and similarly does not provide any guidance on the nature of governmental powers.[92] In the Belgian Constitution, the king determines the occurrence and end of a state of war, but the constitution is silent and does not give any guidance on all other important aspects of the special legal order.

87 Thus, while the situations of protection (Articles 115a-115l), emergency (Article 80a) and internal state of danger (Article 91) can be relatively clearly considered as situations of special legal order, the situation of disaster (Article 35) can only be called such by analogy with the Hungarian constitutional rules. However, the legislative emergency (Article 81) would not really fall into this category. Horváth et al., 2021, p. 3.

88 In relation to the French legislation, it is important to note that there is also the case of state of emergency that is only regulated by law, and the case of exceptional circumstances that has been developed by the judiciary. Horváth et al., 2021, pp. 3–4.

89 Horváth et al., 2021, p. 4.

90 Ibid., p. 5.

91 Ibid., p. 6.

92 Ibid., p. 6.

■ *2.3. Constitutional guarantees for the protection of future generations in the light of environmental challenges*

Protecting the interests of future generations and, (also) in this context, the environment, is one of the indisputably important issues of the 21st century. The significance that a constitution attaches to the representation and resolution of this issue says a lot about the social importance of the issue in the society concerned.[93] However, given that environmental protection and the protection of future generations is still a relatively recent phenomenon, it cannot be concluded from the more restrictive wording of an earlier constitution that environmental protection is not important or that it is not protected, for example through constitutional jurisprudence. It is also important to say in this section that it is important to take into account certain elementary specificities of each country when analysing this issue. Thus, the *federal* structure of *Germany* and the fact that, as a consequence of this – and of the provisions of the German Basic Law on competing legislation (Articles 72 and 74) – the related provisions of the Länder constitutions may be equally relevant. Similarly, it is important to note that although the *French Constitution* itself is rather vague[94] on environmental protection, the Environmental Charter *(Charte de l'environnement*) adopted in 2004, which can be read as an annex to the constitution, regulates the issue in more detail.[95] Finally, in the introduction to this section, it should be noted that in this subsection we will not go into the provisions that have already been analysed in other parts of this paper. Thus, we do not analyse the mutually reinforcing potential of the relationship between *Christian heritage* and environmental protection, which is strongly reflected in the Hungarian Fundamental Law,[96] nor do we repeat the provisions of the Hungarian Fundamental Law on *public finance*[97] that are assessed in the context of the interests of future generations. We do this despite the fact (essentially due to the limitations of this paper) that one of the unique features of the Hungarian Fundamental Law in relation to the protection of future generations and the environment is precisely this particular complexity.

Turning to the analysis of the specific normative texts, the first thing to note is that the Hungarian Fundamental Law refers to *future generations* in several respects. In the Preamble of the Fundamental Law, it is declared that "[w]e bear responsibility for our descendants and therefore we shall protect the living conditions of future generations by making prudent use of our material, intellectual and natural resources". Under Article P) of the Fundamental Law, the protection of natural resources is also a

93 See also Bándi, 2020b, pp. 7–22.

94 It was essentially designated as a field of competence of the Parliament (Article 34) and a special council was also set up (Articles 69–71).

95 The normative scope of the Environmental Charter has been the subject of debate; see Mathieu, 2004. The "Constitutional Council recognised the constitutional value of this text. On the other hand, rights of general application without direct application must be implemented by law. Most of these are contained in the Environmental Code *(Code de l'environnement*), established in 2000"; Orosz et al., 2021.

96 See about this Bándi, 2020, pp. 9–33.

97 See also Szilágyi, 2021, p. 231.

duty of the state and of all others to "preserve them for future generations", and under Article 38 of the Fundamental Law, national assets can only be managed by "taking into account the needs of future generations". Under Article 20/A of the German Basic Law, the protection of natural living conditions and animals is precisely in the interests of responsibility for future generations.[98] At the same time, the Italian Constitution does not mention future generations. The situation is similar in France; however, the Environmental Charter mentions this issue. According to Article 7/A of the Belgian Constitution, the Belgian state, the community and the regions shall pursue the principles of sustainable development with regard to 'intergenerational solidarity', i.e. the category of the future generation is not explicitly mentioned, but it is implicit in the context of the text.

The Hungarian Fundamental Law also refers to sustainability[99] and *sustainable development* in several places. With regard to the latter, Article Q) of the Fundamental Law declares that "[i]n order to [...] achieve the sustainable development of humanity, Hungary shall strive for cooperation with all the peoples and countries of the world." Sustainable development is not mentioned *expressis verbis* in the German Basic Law, nor in the Italian Constitution. In the context of the French and Belgian constitutional rules, sustainable development is also mentioned in the context of future generations, as described above.

Article 30 of the Hungarian Fundamental Law provides an important *institutional guarantee* to protect the interests of future generations. Namely, a deputy for the protection of the interests of future generations is named *expressis verbis* as one of the deputies of the Commissioner for Fundamental Rights, an institution which represents a serious guarantee, especially when compared with the constitutions of other countries analysed in this study, which do not have a similar serious ombudsman institution.[100] It is important to note that the environmental provisions of the Hungarian Fundamental Law have also been praised by the former Green Ombudsman, *Sándor Fülöp*, who considered his contribution to its development as the most important success of the Green Ombudsman institution[101].

The Hungarian Fundamental Law – in addition to naming the protection of the environment in Article XX as a state task promoting the right to physical and mental

98 The naming of future generations is also known in the state constitutions (e.g. in Bavaria, Brandenburg, Lower Saxony).

99 According to Article N) of the Fundamental Law, "Hungary shall observe the principle of [...] sustainable budget management"; and pursuant to Article XVII of the Fundamental Law, "[e]mployees and employers shall cooperate with each other with a view to [...] the sustainability of the national economy, and to other community goals."

100 At the same time, the French Constitution (Articles 69–71) refers to the Economic, Social and Environmental Council, which gives its opinion on draft legislation at the request of the Government. The Council may also consult the government and parliament on environmental issues.

101 Fülöp, 2012, p. 76.

health – in Article XXI names the '*right to a healthy environment' expressis verbis*.[102] In the German Basic Law[103] the right to a healthy environment is not found in the normative text, but instead in Article 20/A the protection of natural living conditions and animals is named as a state goal.[104] In the Italian Constitution, the protection of the environment is recognised as an objective of the State, as a public task (Articles 9 and 117).[105] There is also the right to health (Article 32) in the Italian Constitution, which is interpreted as extending to environmental protection.[106] The French Constitution itself does not, but the Environmental Charter mentioned above does include the right to a healthy environment. Article 23 of the Belgian Constitution declares that everyone has the right to live a life worthy of human dignity, and the constitution also guarantees the right to a healthy environment, among other rights.[107] In the interpretation of the relevant rights, the practice of the judicial forums of the country in question is of enormous importance, which we will not discuss in this study; however, with regard to the Hungarian aspects, we mention that just as the interpretation of the prohibition of retrogression by the Constitutional Court in the past (in relation to the constitution preceding the Fundamental Law) gave the right to a healthy environment a remarkable force, so the principle of precaution, which the Constitutional Court has developed in relation to the Hungarian Fundamental Law, is of enormous importance beyond itself.[108]

The Hungarian Fundamental Law, in its Article XX, mentions as a state task the provision of *agriculture free of genetically modified organisms*,[109] and *access to drinking water*[110] in order to promote the right to physical and mental health. These provisions are unique compared to the other countries under examination.

The Hungarian Fundamental Law addresses *the conservation of natural resources* in several places. On the one hand, in the Preamble of the Fundamental Law, the adopters undertake to "protect the living conditions of future generations by making prudent use of [...] natural resources", on the other hand, Article P) of the Fundamental Law declares that "[n]atural resources, in particular arable land, forests and the reserves of water;

102 In the same article, the adopter of the constitution also provides for the restoration of environmental damage not specified in the previous Constitution and a ban on the import of certain waste.

103 An excellent analysis of this and related case law is provided by Fodor, 2006, pp. 71–101.

104 However, the picture is nuanced by the fact that in some Länder constitutions, environmental protection can take other forms; for example, in the Brandenburg constitution it takes the form of the right to environmental information (Article 39(7)) or the right of social organisations to participate and bring public interest actions (Article 39(8)). See also: Fodor, 2006, p. 93., Orosz et al., 2021, pp. 4–5.

105 See also, in particular, decisions 2002/407, 2003/222 and 2006/214; Orosz et al., 2021, p. 8.

106 Fodor, 2006, p. 34.

107 For an interpretation of this, see for example judgment C.C. n 34/2020, 5 mars 2020 (in which the precautionary principle is also reflected), C.C. n 6/2021, 21 janvier 2021.

108 Szilágyi, 2019, pp. 88–112.

109 For an interpretation of this see: Raisz and Szilágyi, 2021.; Fodor, 2014, pp. 113–114.; Tahyné Kovács, 2015, pp. 88-99.; Téglásiné Kovács, 2015, pp. 300–319.; Téglásiné Kovács, 2017, pp. 147–164.

110 For an interpretation of this see: Szilágyi, 2018, pp. 259–271.

biodiversity, in particular native plant and animal species; [...] shall form the common heritage of the nation, it shall be the obligation of the State and everyone to protect and maintain them, and to preserve them for future generations", and finally, Article 38 of the Fundamental Law states that the "management and protection of national assets shall aim [*inter alia*] at [...] preserving natural resources". Strong constitutional protection – not detailed in this study[111] – can be derived from these provisions. [112] A similarly strong, *expressis verbis* protection of natural resources is neither mentioned in the German Basic Law,[113] nor in the Italian[114] and Belgian constitutions. The French Environmental Charter calls for avoiding the overuse of natural resources.

3. Concluding thoughts

Béla Zsedényi, the "forgotten head of state",[115] who died a martyr's death, in his speech at the first session of the Provisional National Assembly that moved from Debrecen, in Budapest on 5 September 1945, when he was still Speaker of the Hungarian Parliament, discussed how the new structure of the Hungarian state should be established. In this speech, he placed particular emphasis on how we can rely on the constitutional arrangements of other countries to set the regulatory framework for our own:

> "*Democracy, which this National Assembly has the task of establishing, is not a uniform that we simply put on when it is ready to wear. Democracy is a political, social and economic order of life, which we must plan and create ourselves, with great care, great expertise and far-sighted caution. We must use the best workers of the nation for this task, because the clothes of democracy must not only be new, but must also fit the body of the Hungarian people. And this is not an easy task, because the Hungarian people have never had such clothes! We have to design this democracy according to Hungarian problems, Hungarian wounds,*

111 See: Szilágyi, 2016, pp. 47–49.

112 Although the term itself as 'natural treasures' is essentially included for example in the list of competing legislative domains (Article 74). The same article also refers to certain elements that we consider to be natural resources. The category of 'natural living conditions' in Article 20/A cannot be equated with the category of natural resources in our assessment, although there is an obvious overlap.

113 At the same time, the priority protection of natural resources may appear in some provincial constitutions. Thus, in the Bavarian constitution, the protection of natural resources, soil, water, air and forests is *expressis verbis* included in the constitution as a priority task of the state and local authorities. Likewise, the guarantee of certain natural resources and access to them is also included in the Brandenburg constitution. Orosz et al., 2021, pp. 4-5.

114 Article 44 of the Italian Constitution contains certain provisions to restrict private property in order to ensure the rational use of land.

115 Zsedényi is referred to as such by Péter Gantner, who wrote a monograph on him; see Gantner, 2008. On Béla Zsedényi, see furthermore Raisz, 2021, pp. 349–364.

Hungarian goals and Hungarian dreams, for which the West and the East can only give us an example, but never a model!"[116]

These "clothes tailored to the body of the Hungarian people" could not be created in Zsedényi's time. However, looking at the provisions of the Fundamental Law and the provisions of the individual countries that founded the European integration analysed above, it seems that in the past ten years, a unique creation and a constitution with a unique set of values, rich in its guarantee system and exemplary in many elements was born in Hungary on Easter Monday, 25 April 2011.

116 Zsedényi Béla Elnök megnyitó beszéde az Ideiglenes Nemzetgyűlés budapesti összeülése alkalmából. [Opening speech of the President on the occasion of the Provisional National Assembly meeting in Budapest.] In: *Nemzetgyűlési Napló (Ideiglenes Nemzetgyűlés Naplója). [National Assembly Journal (Journal of the Provisional National Assembly).]* Volume I, 21 December 1944 – 13 September 1945, Budapest, Athenaeum, 1946, 36.

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EMŐD VERESS[1]

Remarks on Church Property Restitution in Romania, With Special Focus on the Case of the Székely Mikó College[2]

ABSTRACT: *The Soviet-style dictatorship nationalized church property, primarily educational and social institutions, run by the historical churches of national minorities. After the collapse of this political regime, a quest for restitution began, which raised complex private law issues. Finally, legislation favorable for restitution was created. However, the application of the legislation unchanged in its relevant provisions has two distinct phases: the first one is favorable for restitution. The second phase started after the Romanian accession into the EU, and NATO was less favorable. The external pressure for restitution, based on the rule of law, diminished. The restitution of the national minority church property today is largely perceived as a process conflicting with Romanian national interest. These changes and the complex legal problems raised and misused even by courts are illustrated in the case of Székely Mikó College.*

KEYWORDS: nationalization, church property, denominational schools, restitution, contradictory jurisprudence, Romania, Székely Mikó College.

1. Basic premise: a general overview of property restitution in Romania

The Soviet-style dictatorship established in Romania after the Second World War was based on the Marxist-Leninist doctrine that exploitation could only be eliminated by abolishing bourgeois property and converting them to so-called community property, which was in fact state property. In principle, community property is "owned by all members of society." How can each asset be owned by the collective society? Common

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property exists because it is owned by specific persons (such as the undivided common ownership of traditional rural commonages, that is, communities whose members share an undivided piece of land, usually pasture and woodland). However, community property cannot exist, because in this case there is no actual person in the active role that allows the exercise of the right of ownership. The meaning of 'ownership' itself prevents non-owners from exercising this right. In the case of community property, no one is excluded; thus, it would be incorrect to label them as 'property.' It is, in fact, a paradoxical concept. Therefore, when civil property was abolished, the new owner was neither the community, nor the society, but the state.

According to the Manifesto of the Communist Party (1848), "*the theory of communists may be summed up in a single sentence: Abolition of private property.*" In pursuit of this aim, totalitarian states used a coercive system of instruments to eliminate private property and imposed severe restrictions. The result, however, was neither the loss of the class (bourgeois) character of property, nor the creation of an ideal, classless society. It engendered a system of total oppression, a Soviet-style dictatorship, where the state itself exploited the people.

Church property, and in this context, denominational schools in Transylvania[3] became targets of nationalization for several reasons:

a) Because they were a form of private property;
b) Because anticlericalism was a defining feature of the Soviet-style dictatorship;
c) Because the monopoly of education and upbringing (ideological indoctrination) was to be retained by the state.
d) Because the Soviet-style dictatorship, which took up, continued, and fulfilled the program of creating the Romanian nation-state in minority issues, thus eliminating the key players of the minority institutional system;[4] these denominational schools, in the overwhelming majority, belonged to the churches of national minorities.

In 1948, a hundred years after the Communist Manifesto was published, the great wave of nationalizations during the Soviet occupation abolished 531 Reformed (Calvinist), 468 Roman Catholic, 34 Unitarian, and 8 Evangelical Lutheran schools[5] and seized their assets used for educational purposes.[6] In many cases, as the schools were associated with other nationalized properties (e.g., teachers' living quarters, dormitories etc.), the number of properties nationalized in this context greatly exceeded the reported number of schools. Nationalization meant the simultaneous closure of the denominational

3 Transylvania is the easternmost historical region of Central Europe. Before 1918, was part of Hungary, and from 1918–1920 is part of the Romanian state. It had a multiethnic and multicultural character, but in the present beside the Romanian majority the Hungarians are the only large ethnic minority (1.215.479 persons).

4 On why and how the Romanian national program in Transylvania was fulfilled by the Soviet-style dictatorship, see Veress, 2018a, pp. 15–19.

5 This figure does not include schools nationalized from the Evangelical Church of Augustan Confession of Transylvanian Saxons.

6 Cf. Ballai (ed.), 2016, p. 8.

school and, in most cases, the creation of a new state school on the property. In many cases, the Hungarian language schools were replaced by Romanian-language schools, so nationalization was a tool of Romanian ethnic occupation orchestrated by the Soviet-type dictatorship.

After the regime change (December 1989), it was a hope, an expectation, and a legitimate political campaign to reverse the most serious excesses of the Soviet-style dictatorship, including violent nationalizations, in general, as well as the nationalization of church property. Several morally justifiable alternatives were conceivable: the reality, however, does not fall into any of the ideal types of these models. In general, the program of regime change was noble: reversing nationalization, achieving reprivatization, establishing the rule of law, and creating a market economy based on private property. However, reality has become much more prosaic.

a) The political elite that came to power after the regime change, interested only in a partial dismantling of the Soviet-style dictatorship, and with countless ties to the former regime, did not want real reprivatization. As a Romanian civil law professor summarized, "it is impossible that the disrespect shown to private property during the communist regime, as well as the ideological propaganda of the time, did not leave deep traces in the mentality of a large part of the population, especially those who had no property to recover and who sometimes saw their own more or less legitimate interests threatened by the restitution demanded by the owners."[7]

b) The reprivatization solutions were limited, partial, and gradual, and their ideological basis was the denial of the principle of *restitutio in integrum*. In fact, the initial steps of reprivatization instantly compromised the possibility of full restitution. For example, in the case of agricultural land, initial restitutions were made without considering the original locations, forever impeding the restoration of ownership on the original sites in many cases. This approach also destroyed the land registry system for agricultural land, which survived the Soviet-style dictatorship. Similarly, Law 112 of 1995 on the Regulation of the Legal Status of Nationalized Housing Estates[8] allowed tenants to purchase their rental housing under certain conditions, preventing restitution in kind at a later date. Thus, the content of the first reprivatization laws (Law 18 of 1991 and Law 112 of 1995) and the abuses committed during their application, while giving the impression of reparation, sabotaged the application and the expansion of the later 'generous' reprivatization laws.

c) Another characteristic is the delay in the adoption of legislation on property settlement and reparation compared to other "former socialist" states.[9] A list can be

7 Chelaru, 2001, p. 8.

8 Legea nr. 112/1995 pentru reglementarea situației juridice a unor imobile cu destinația de locuințe, trecute în proprietatea statului.

9 Undeniably, however, that there were also political, financial, and social problems in other 'former socialist' states in connection with the various reprivatization and reparation solutions. Similarly, there is no general model for reprivatization or reparations. However, the Romanian situation has its own specific features in this context as well, as will become clear in this article.

drawn up of the political promises and commitments—enshrined in law—that have either not been honored at all or have been disproportionately and unjustifiably delayed, or even only partially implemented.[10] Regarding the duration, the length of the property settlement process should be highlighted. After three decades, several procedures are still pending, and thousands of legal uncertainties exist, limiting the safety or realization of civil circulation.

d) The delay of the process and the uncertainties have led to an increasing complexity of the problem of reprivatization. Inadequate content and quality of legislation have led to an incredible amount of litigation.

Why is (was) reprivatization necessary? First, because nationalization was an abuse, a forcible dispossession of property, based on an erroneous, failed, and absurd ideology, contrary to human nature, which was carried out in the context of a Soviet-style dictatorship; it was a failed and inhuman social experiment. The nationalization of private property did not create a more just social order, but lead to the exploitation of people by the state.

Specifically, with regard to immovable church property, the historical Hungarian churches in Transylvania have traditionally, and especially after the change of sovereignty in 1918–1920, been key players in the survival and development of the Hungarian minorities in Transylvania as providers of education, as well as social and cultural services. Regardless of the interruptions, tradition and actual necessity both demands that these functions of the minorities' historical churches be carried out in a modern context as well, even with public funding, in the symbolically significant properties that served this purpose in the past. However, this is clearly the expectation of the Hungarian community: Romanian political attitudes are fundamentally different. As the external pressure[11] to implement restitution eased (ceased?), the momentum behind proper and fair church property settlements has faded. Many of these properties currently host Romanian institutions (for example, the building of the Cluj-Napoca[12]

10 Only a few examples. Law 58 of 1991 on the privatization of commercial companies (no longer in force) provided in its Article 77 that "a special law will regulate compensation for assets taken by the state by abuse." Similarly, Law 147 of 1992 on the Organisation and Functioning of the Constitutional Court provided in Article 26 (3) that "the damages suffered before the 1991 Constitution will be settled by law" (the version before the amendments introduced by Law 138 of 1997). According to Article 43 of Emergency Government Ordinance No. 88 of 1997 on the privatization of commercial companies, "within 60 days of the publication of this Emergency Government Ordinance (...) the situation of economic assets that became the property of the State through nationalisation laws or other legislation shall be regulated." Article 25 of Law 112 of 1995 provided that "special laws will regulate the legal status of immovable property acquired by the State before 22 December 1989 and not covered by this Law, regardless of its original purpose, including those demolished for reasons of public interest." Or, according to Article 26 of Law 213 of 1998, "within 6 months of the entry into force of this Law, the Government shall prepare a draft law regulating the restitution in kind or compensation for the property taken over by the State by abuse between 6 March 1945 and 22 December 1989."

11 Basically, joining NATO and the EU.

12 In Hungarian: Kolozsvár.

Reformed College is home to one of the best and most respected Romanian secondary schools in the city[13]), and restitution would mean a loss of Romanian space. Therefore, the Romanian interest dictates the preservation and protection of the nationalization measures of the Soviet-style dictatorship, which is the reason why the short-lived restitutionary momentum of church property has been broken. In general terms, there is also a demand for a partial reversal of reprivatization on the Romanian side (the only internationally justifiable instrument for this being the justice system, which in such cases—it can and it must be said—makes decisions guided by the Romanian national interest[14]).

2. Legal framework for the restitution of nationalized church property

Following the regime change, several specific pieces of legislation implementing property restitution were adopted. They are specific in that they are applicable to a specific group of natural or legal persons.[15]

Viewed in the context of constitutional law, the legal basis for the restitutions was provided by government ordinances—administrative acts that have the force of law in the Romanian legal system, but not the stability and legitimacy of a law. (A government ordinance is an executive order in substance, but a legislative one in its subject.[16]) A government ordinance cannot have the legitimacy of a law[17], because it is not adopted

13 The restitution of the property was rejected on the basis of the argumentation discussed later in relation to the Székely Mikó College.

14 Additionally, several lawsuits are pending against historical Hungarian families in Transylvania to reverse previous restitutions.

15 Examples of special restitution rules include:
– Emergency Government Ordinance No 21 of 1997 on the restitution of certain immovable property owned by the Jewish Community in Romania, Law 140 of 1997 approving this Ordinance, as well as Government Ordinance 111 of 1998 supplementing it;
– Emergency Government Ordinance No 13 of 1998 on the restitution of certain properties owned by communities of citizens belonging to national minorities;
– Government Ordinance No 112 of 1998 on the restitution of certain properties owned by communities (organizations, churches) of citizens belonging to national minorities;
– Emergency Government Ordinance No 83 of 1999 on the restitution of certain immovable property owned by communities of citizens belonging to national minorities in Romania;
– Government Resolution 2000/1334 supplementing the Annex to Government Emergency Ordinance No 83 of 1999;
– Emergency Government Ordinance No 94 of 2000 on the restitution of certain immovable property owned by churches in Romania;
– Emergency Government Ordinance No 101 of 2000 amending and supplementing the Annexes to Emergency Government Ordinance No 21 of 1997 and Emergency Government Ordinance No 83 of 1999.

16 Pactet, 1998, p. 560.

17 At least until it is adopted by Parliament. Ex-post parliamentary approval of an emergency government ordinance is mandatory; in the case of a (simple) government ordinance issued on the basis of prior parliamentary authorization, it depends on the law authorizing the Parliament whether it provides for the obligation of ex-post parliamentary approval or not.

by the supreme representative body, the legislature elected by universal, equal, direct, secret, and free suffrage.

Based on the Government Emergency Ordinance No. 13 of 1998 on the restitution of certain properties owned by citizens belonging to national minorities, the properties listed in the annex to the ordinance were (partially) restituted. The law benefited the German, Hungarian, Polish, Bulgarian, Serbian, Turkish, and Greek minorities. The situation was similar in the case of the Government Ordinance No. 112 of 1998 on the restitution of certain immovable property owned by citizens belonging to national minorities (organizations, churches etc.).

The Emergency Government Ordinance No. 83 of 1999 on the restitution of certain immovable properties owned by communities of citizens belonging to national minorities in Romania can be included within the same scope.

Another rule allowing for the restitution of a limited number of properties was the Emergency Government Ordinance 94 of 2000 on the restitution of certain properties owned by churches in Romania. According to its original text, a maximum of ten properties should be returned to each archdiocese. However, this emergency government ordinance was converted into a general restitution law of church property by the approval act, Law 501 of 2002. At present, this regulation still forms a specific legal basis for church property restitution.

At first reading, the legislation offers a balanced and fair solution to the problem. However, its application is problematic, moreover it is possible to identify a process in it that is relevant for legal sociological analysis: the way in which the law, without any modification to its text, has changed from a norm that achieves restitution to a rule that prevents restitution. Thus, it is a good example of the fact that the content of a law can change even without a formal amendment of the norm, and that this change without amendment is triggered by ideological, interpretative-political reasons.

According to this law, real estate[18] taken by the state, cooperatives, or any other legal entity from churches between March 6, 1945, and December 22, 1989, as a result of abuse, with or without legal basis, and becomes a state property, a legal entity under public law or another legal entity as defined by law (a company with a state/municipality majority shareholder[19]), shall be returned to the former owner.

18 This legislation, however, does not apply to church buildings, because the dominant Orthodox Church in Romania took over the church buildings of the Romanian religious minority in Transylvania, the Greek Catholic Church, dissolved in 1948 and re-established after the regime change; the Orthodox Church did not intend to return these buildings after the regime change. The political promise in the legislation was that the status of church buildings would be regulated by a separate law. Nevertheless, no such legislation has yet been adopted.

19 In such a case, the restitution must be decided by the organs of the company concerned and the state participation is reduced by the value of the restituted property (a reduction in share capital is carried out).

The law provides for a presumption of abuse for the takeover as a basis, even in the case of property donated to the state (although this presumption may be rebutted by the current owner of the property). Indeed, in most cases, the donations to the state were made under a specific duress, the donation agreement only formalized the abuse, providing a legal disguise to the measure dictated by the regime.

An application (request) for the restitution of church property had to be submitted to the Special Restitution Committee (*Comisia Specială de Retrocedare*) within the six-month time limit set by law (and the additional six-month time limit provided by Law 247 of 2005). The committee consisted of representatives from different ministries and government institutions. If the restituted property is necessary for the performance of an educational or health task in public interest, possession is currently only possible 10 years after the restitution decision is taken (the original text of the Ordinance provided for a 5-year deadline for possession). During this period, the church was entitled to a use charge set by the government decree. During this time, the state would have to find a new location for the institution operating on the property.

The committee takes a reasoned decision to accept (return in kind or refer to another committee for compensation) or rejects the request for restitution. If the property was disposed of after December 22, 1989, by the State in compliance with the law in force at the time, compensation is due to the former owner, the Church. (A significant part of the residential property nationalized from church property has been sold by the state to tenants—for example, in the case of teachers' quarters next to schools, under the provisions of Law 112 of 1995, mentioned above).[20]

The decisions can be challenged in administrative litigation proceedings (within 30 days of receipt), in the first instance before the court of appeals of the district in which the property to be restituted is located, and in the second instance before the High Court of Cassation and Justice. Cases that often raise complex civil law issues are resolved as administrative lawsuits by judges specializing in administrative matters. The consequence is that the parties have only one remedy available to them, compared to the two remedies normally available in civil actions. As with other restitution cases, the natural approach would be to treat such cases as civil actions. The limitation of remedies in church property restitution cases compared to other restitution cases also raises constitutional concerns.

20 Under Law 112 of 1995, restitution was only possible for the benefit of natural persons, churches were excluded from the scope of this legislation. However, only those former owners or their heirs who resided in the nationalized property were entitled to restitution or if the property remained unused (in practice, this is extremely rare, as these properties were rented out by the state). Tenants, on the other hand, could purchase these tenements at a discounted price, and the state even offered them a discount on instalments. This 'legal' purchase made subsequent restitution in kind impossible.

3. Case study: the case of the Székely Mikó Reformed College in Sfântu Gheorghe

■ *3.1. Context of the action*

The complexity of the problem, the difficulties of applying legal norms, and the ideological changes that made restitution impossible, is well illustrated by Székely Mikó College, founded in 1859 in Sfântu Gheorghe (in Hungarian: Sepsiszentgyörgy).[21]

By decision No. 684 of May 31, 2016, the Special Restitution Committee rejected the request of the Reformed Diocese of Transylvania for the restitution of the property of the Székely Mikó College in Sfântu Gheorghe. On a cursory examination, the justification is seemingly reasonable. The Committee established that the *former owner* could request restitution under relevant legislation. However, "the property was owned by Székely Mikó College (the school) when it was taken over by the Romanian state and not by the church." Consequently, the request was rejected "because the Reformed Diocese of Transylvania was not the owner of the property sought to be returned." This is based on the land registry extract, which has the following entry on the title deeds: "Ev. Ref. Székely Mikó Kollégium" [Evangelical Reformed Székely Mikó College]. This was registered on March 2, 1900, in land register number 71 of the city of Sfântu Gheorghe.

However, the problem is much more complex than the Committee's simplistic position: it requires a complex legal-historical analysis.

The legal basis for the restitution of Székely Mikó was provided by Emergency Government Ordinance no. 83 of 1999 (the annex to which included the property at the express disposition of the government, with the need for restitution being recognized at the highest level of state administration).

According to Article 1 of Emergency Government Ordinance No. 83 of 1999, the conditions for restitution were as follows:

a) Property is listed in the original or supplemented annex to the government emergency ordinance.
b) The property was owned by a community (organizations, churches) of citizens belonging to the national minority in Romania before nationalization.
c) The property belonged to the Romanian State after 1940.
d) The transfer of ownership was carried out by coercion, confiscation, nationalization, or fraudulent means.

21 The restitution struggle related to the college is earlier than the case described here, as the college was previously restituted, but the criminal case against the members of the restitution committee was based on documentary deficiencies in the restitution procedure by the Ploiești Court of Justice in 2014, which therefore convicted the members of the restitution committee and re-nationalized the college (at that time the composition of the restitution committee was different from the one analyzed above: it included representatives of the churches as members). The Reformed Diocese of Transylvania then requested the continuation of the restitution procedure. The case at hand is in fact an examination of subsequent events.

e) The return may be requested by the former owner or his legal successor.[22]

To make a lawful decision, the restitution committee should have examined whether these conditions were met.

The first condition is certainly met: the property is listed in the Annex to the Government Ordinance, as amended by Government Decree No. 1334 of 2000.

The third condition (I will return to the second condition later) is also met: the property was nationalized by Decree 176 of 1948[23], which formed the framework for the nationalization of denominational schools. The decree nationalized the "Reformed Secondary School for boys of the Reformed Church of Sfântu Gheorghe, with all its property, according to the inventory."[24]

According to the fourth condition, the way the state gained ownership is also relevant: in this case, nationalization took place, so this condition is also met.

Therefore, only the second and fifth conditions can be relevant.

According to the second condition, the property must have been owned by a minority organization or church before nationalization. The fifth condition is that the property must be returned to the former owner or his legal successor. It is also an undisputed fact that the title deed mentions: "Ev. Ref. Székely Mikó Kollégium" [Evangelical Reformed Székely Mikó College]. Under these circumstances, are the second and fifth conditions met, or is the position of the restitution committee correct and the Reformed Diocese of Transylvania not entitled to the restitution of the property? The courts in Romania (Brașov Court of Appeal, High Court of Cassation and Justice) ruled in favor of the restitution committee. The question arises: Are these court decisions correct?

To determine the subject of ownership, we need to answer important questions about the legal status of reformed schools. To provide a truly correct answer, we must not approach the issue with present concepts, but focus on the two points of reference: on the one hand, the registration of the property in 1900, and on the other, the legislation, existing practice, and interpretation of norms at the time of nationalization in 1948.

■ *3.2. The issue of land registration*

The exploration of the way in which land is registered requires a spatial and temporal examination of the legal norms that clarify the issue of land registration. This means, on the one hand, an analysis of *church law*, and on the other, an analysis of the relevant *Hungarian private law,* given that until 1918–1920, Sfântu Gheorghe was part of the Hungarian state.

22 Here, Emergency Government Ordinance No 83 of 1999 differs from the similar wording of Emergency Government Ordinance No 94 of 2000, because the latter only mentions the former owner, not the legal successor. The difference is not irrelevant: see section 3.5 of this paper.

23 Decretul nr. 176/1948 pentru trecerea în proprietatea Statului a bunurilor bisericilor, congregațiilor, comunităților sau particularilor, ce au servit pentru funcționarea și întreținerea instituțiilor de învățământ general, tehnic sau profesional.

24 "Liceul reformat băieți din Sf. Gheorghe, al Bisericii reformate, cu întreaga avere, conform inventarului jurnal."

The broader context of church law may be understood by referring to the work of Elek Dósa, one of the greatest Transylvanian jurists of the nineteenth century.[25] In his book titled *Az erdélyhoni evangelico-reformátusok egyházi jogtana* [The Ecclesiastical Jurisprudence of the Transylvanian Evangelical Reformed Church], he states thus:

> Church property is the property of the church, meaning that the congregations, clergymen and schools which possess it are only as such possessors and users of it, the universal church itself being the owner of it by reason of that fact that they are appointed for the attainment of not the separate goals of individuals or ecclesiastical bodies, but for the attainment of the ends of the universal Church in the respective congregation and school, and as such are subject to its disposal, i.e. that of the universal Church who has control over the ends of their appointment... This right of ownership and disposal of the Church is, however, limited by the inalienable purpose of the ecclesiastical property, which, according to chapter 28 of the Helvetic Confession, is to maintain science in the schools...[26]

This approach is a constant tenet of the reformed ecclesiastical law. According to Dósa,

> the universal Church itself is the owner of the ecclesiastical property, and the right of the respective congregations and schools to use it being limited, inasmuch as the ecclesiastical property in their possession can only be used for their intended purpose, it follows of its own accord that the Church is responsible for regulating the manner of handling this property...[27]

In other words, Dósa considered school assets to be the property of the church, over which the school itself had only the right to use, whereas both the church and the school were obliged to respect the educational purpose of the property.

The norms of ecclesiastical law lent concrete expressions to this approach. The norms adopted at the Extraordinary General Assembly of the Reformed Diocese of Transylvania held in Cluj-Napoca during 20-23 September 1885 stipulated the following:

> Art. 81 In the Transylvanian Diocese, the function of secondary and higher education is fulfilled by the colleges, which at present are the partial gymnasium of the Székely-Mikó College in Sfântu Gheorghe,[28] the

25 On Dósa see Veress, 2019, pp. 5–15.
26 Dósa, 1863, pp. 204–205.
27 Dósa, 1863, p. 205.
28 In Hungarian: Sepsiszentgyörgy.

> complete gymnasiums of the colleges in Zalău[29] and Odorheiu Secuiesc,[30] the Kún-college in Orăștie,[31] the colleges in Târgu-Mures[32] and Cluj-Napoca, and finally the complete gymnasium, the theological academy and the teacher training school of the Bethlen College in Aiud, with its training school.
> Article 82 The colleges, within the limits of national and ecclesiastical law, are autonomous ecclesiastical bodies that govern themselves, retaining patrimony and endowments for the purposes of teaching and education, and participate through their representatives in the legislative of the Diocese and of the universal Church.[33]

Several conclusions can be drawn from this text:

a) The church law specifically named Székely Mikó College as an institution of the Reformed Church;

b) Its legal status is defined as follows: an autonomous ecclesiastical body (i.e., belonging to the Church), whose character is also underlined by the fact that it participates in the legislation of the universal Church; it is therefore a body which is an integral part of the ecclesiastical organization system; otherwise, it cannot participate in ecclesiastical legislation.[34]

c) In material terms, it 'retains' a patrimony, but this means nothing more than that it uses ecclesiastical property,[35] that is, the material conditions for its operation are provided by the ecclesiastical property placed at its disposal, over which it has the right of use.

Notably, ecclesiastical law did not recognize schools as entities or legal personalities separate from the church: colleges were considered ecclesiastical bodies that could be used for educational purposes.

This legal status is confirmed by the Church Constitution of 1904, which states the following in its paragraph 3:

29 In Hungarian: Zilah.
30 In Hungarian: Székelyudvarhely.
31 In Hungarian: Szászváros.
32 In Hungarian: Marosvásárhely.
33 Az erdélyi Ev. Ref. Egyházkerület Kolozsvártt, 1885. szeptember 20-23. napjain tartott rendkívüli közgyűlésének jegyzőkönyve [The minutes of the Extraordinary General Assembly of the Reformed Diocese of Transylvania held in Kolozsvár on 20-23 September 1885], Stein János, Cluj-Napoca, 1885, 43.
34 It is rightly stated that "the school has always been part of the ecclesiastical structures, and in no way vice versa. The relationship between the church and its schools was undefined for a long period of time in terms of secular law, and thus external law, since the secular legal order has for centuries fully respected the internal autonomy of the church(es), together with its legal character." See Balogh, 2016, p. 46.
35 Corporeal detention (*detentio*) is less than possession (*possessio*). The possessor exercises the right in its own name, holding the thing as its own. The detentor, for example the tenant, can use the thing, but is not a possessor, only a detentor (*detentor*). This was also the position of the colleges with regard to church property: they were detentors, but not possessors.

> the elementary, secondary and high-schools of the Reformed Church in Hungary, as institutions which are essentially connected with the right of the free exercise of religion and are the means of the church's self-preservation, in compliance with the provisions of constitutionally established national laws, namely Article XXVI of law 1790/1 as fundamental law, shall belong to the body of the Church and are subject to the ecclesiastical authorities.[36]

Like other historical churches, the Reformed Church is a complex system of organizations composed of hierarchically interconnected institutions. The colleges were part of this internal ecclesiastical organization, as it follows from the relevant ecclesiastical law: they functioned as ecclesiastical bodies, without being entities separate from the church in our modern sense, that is, without having their own legal personality.

Beyond the ecclesiastical law, state law is at least as relevant. It may be noted that the land registration method referred to was not unusual in Transylvania in the late nineteenth and early twentieth centuries. In fact, this method of land registration was deliberate because it recorded the strict purpose of the property (its educational purpose), and it did so in a way that was enforceable even against the owning church, the real subject of the property right (see Elek Dósa's reference to chapter 28 of the Helvetic Confession). Such a land registry entry virtually simultaneously reflected the owner, the Reformed Church (through the abbreviation "Ev. Ref."), and the property's own purpose: Székely Mikó College, that is, the purpose of the property is the operation of the Székely Mikó College, to the exclusion of any other use. The following table illustrates this:

Owner	*Name*	*Purpose*
Ev. Ref.	Székely Mikó	Kollégium ['College']

This form of land registration is also confirmed by land registers in which, for a similar reason, the title deeds are marked "ev. ref. harangozói állás" ['Evangelical Reformed bell-ringer position'], "ev. ref. papi hivatal" ['Evangelical Reformed priest's office'], "ev. ref. egyháztanítói hivatal" ['Evangelical Reformed church teacher's office'], "ev. ref. kántori hivatal" ["Evangelical Reformed cantor's office"]. Another example from the contemporary land registers is where the title deed reads "S.Szentkirályi[37] református papi lak" ['S.Szentkirályi Reformed clergy house']. Even in this context, it is clear that the position of the bell ringer, the priest's office, the teacher's or cantor's office, or the priest's dwelling did not have a separate legal personality and marked not only the owner but also the specific purpose of the property.

36 Az 1904. év november havának 10. napján megnyílt budapesti országos református zsinat által alkotott I. törvénycikk az egyházalkotmányról és szervezetről, 3. §. [The First Law of 1904 on Church Constitution and Organisation, adopted by the Synod Council of the Reformed Church in Budapest on the 10th of November 1904, paragraph 3].

37 Sepsiszentkirályi.

The issue was (theoretically) settled by the Hungarian Ministry of Justice in 1911. At that time, the following decree was published in the *Igazságügyi Közlöny* ['Judicial Gazette'] in relation to the problem already identified at that time:

> although the registration of the properties in the name of the Reformed school and of the Reformed teachers' office is in accordance with the existing rules of land registry (Art. 35 of the Decree of the Minister of Justice of July 23, 1854, Art. 45 of the Transylvanian field ordinance), and if the registration expressly states the church to which the properties belong, not jeopardizing the property rights of the congregations concerned, according to the new rules of land registry (see art. 125 of the Instruction on the compilation of the land registry issued by Decree No. 19.665/1893 of the Ministry of Justice, annex to the Igazságügyi Közlöny, Vol. 7, 1893), the properties in question are to be recorded as the property of the respective Reformed congregation, with their specific purpose being indicated, and since this method of land registry has a proper basis in substantive law, the request for an adjustment of the land register entry so that the properties in question are transferred from the name of the Reformed school and the Reformed teachers' office to the name of the congregation cannot be considered unjustified.

It was also stated that

> the statement no 56.982 of the Minister of Religious Affairs and Public Education of the Hungarian Kingdom on 14 October 1907 declared that the change in the land register status of the Reformed Church's educational property does not require the approval of the government authorities; because the Reformed Universal Church, as self-government, is the only one entitled and competent to claim the ownership of the property for the purposes of its denominational schools in favour of the church as the undisputed owner of the school property, in order to correct the erroneous land register entry; and it is also beyond doubt that the Reformed Church, as self-government, has the sole right and authority to administer its school funds and endowments, and may, if it deems it in the best interests of the school, sell some properties and purchase others in their place.[38]

In other words, the land was recorded in a customary and acceptable manner, but could be adjusted at any time to benefit the Church as the true owner, in accordance with the law. The original method of registration recorded ownership in its own particular complexity: on the one hand, it indicated the affiliation, that is, the Reformed Church,

38 2207/1909 and 19407/1911 I.M. sz., Igazságügyi Közlöny [Judicial Gazette], 1911/6, 188–189. For more, see: Hegedűs (ed.), 1913, p. 73–74.

and on the other, it indicated the specific educational purpose of the property (the compulsory purpose of use).

These facts were confirmed by the case law of the courts of the time. In several cases, as mentioned above, a request was made for the land register to be corrected, and the land registry authority requested payment of a transfer fee. In this context, the Hungarian administrative court stated that

> "this claim, however, has no legitimate basis, because according to the fee schedule … only entries for transfer purposes are subject to … fees … In this case, there is no entry for transfer purposes, however, as the school and the church building belong to the church and that neither the school nor the church is a separate legal entity, the name of the owner is corrected—a procedure in accordance with circular no. 2207 of 1909 of the Hungarian Royal Minister of Justice and the circular no. 19497 of 1911 of the Ministry of Justice (Igazságügyi Közlöny [Judicial Gazette], 1911, no. 6)."

In a similar sense, the Hungarian Royal Administrative Court also stated "the school and the pastoral residences are also the property of the church and have been marked in the land register according to their purpose of use." Therefore, only the name of the owner is corrected, and there is no case for land registry entries for transfer purposes.[39]

The combined application of ecclesiastical law and civil law provides a clear picture: schools are internal ecclesiastical structures without legal personality, which do not own the church's educational property as such, but use and administer it under the authority of the church. The method of land registration, which also exists in the case of the Székely Mikó College, adequately expresses the property right of the Reformed Church and does not "put at risk" this property right. Indeed, in many cases, the Church did not take advantage of the possibility of adjustment offered by the decree of the Minister of Justice, because it did not feel that its property rights were threatened and insisted on the traditional method of land registration. It was felt appropriate for the church to give an indication that it considered itself bound to preserve the educational purpose of the property.

Therefore, it is clear that the Hungarian state, prior to the change of sovereignty, recognized the property rights of the Reformed Church, and that the colleges were entities without their own legal personality, which were part of the church organization and not separate entities.

39 1912. évi 25.365 sz. a. kelt ítélet. [Resolution no 25.365 of 1912.] Published by Protestáns Egyházi és Iskolai Lap [Protestant Church and School Journal], 1913/34, p. 537.

3.3. Romanian pre-nationalization law and nationalization

In the post-World War I settlement, Transylvania became part of the Romanian state. Therefore, it is particularly important to examine Romania's attitude toward the property and Székely Mikó College as an institution before nationalization.

The change of sovereignty was followed by legal continuity in many areas, beyond the international public law dividing line codified by the Treaty of Trianon. The process of legal unification that lasted several decades has commenced.[40] Székely Mikó College continued its activities and gained its new status under the Romanian Private Education Law of 1925.[41] Notably, this legal status did not differ from that prior to 1918–1920: the Reformed College *did not become a legal entity* that could own property in its own name, that is, we can speak of a continuity of legal status. The law on private education did not give the school its own legal personality other than that of the founding/maintaining legal entity. In this context, the previously discussed legislation continued to prevail. According to the law on private education, the education and training of students could take place in private schools outside state schools, organized by churches, communities, or private individuals or in the family. Article 3 states that "these schools may be founded only by Romanian citizens, either individually or as legal persons, in recognised cultural associations or religious communities."

The situation is further clarified by legislation on legal persons, Law 21 of 1924.[42] According to Article 5 (2) of this law, "an organization created by a legal person may not have a personality other than that of the legal person which created it, unless this is formally recognized under this law." Such formal recognition of the College's legal personality has never taken place. The college has never been registered as a legal entity, and there are no documents to prove its legal personality. Moreover, legal persons established prior to Act No. 21 of 1924 were required by this Act to re-register with the competent territorial court within six months of its promulgation. The Székely Mikó College was not registered under this rule either, precisely because it did not have a legal personality before.

In our case, the college belonged to the Reformed Church, or more precisely, to the Reformed Diocese of Transylvania, a church structure with legal personality.

In these circumstances, the college cannot be classified as a legal person and as an owner of property by referring back to the moment of land registration, which lacks any legal basis; it is merely a side effect of a registration anachronism unforeseeable at the time.

In the period between the two world wars, the Romanian state justified the legal status outlined above on numerous occasions. Based on the Private Education Act of 1925, on July 23, 1928, the Ministry of Education issued the operating license of Székely Mikó College (license number 81). This includes the following specification: "Liceul

40 On the process of legal unification see Veress, 2018b, pp. 458–469.
41 Legea asupra învățământului particular.
42 Legea nr. 21/1924 pentru persoanele juridice.

Coleg. Ref. Băieți Székely Mikó" [Székely Mikó Reformed Boy's College], as "property of the Reformed Diocese of Transylvania."

Likewise, the Székely Mikó College bulletin for the school year 1933-34, approved by the Brasov School Inspectorate by Decree No. 13.000/1935, states thus,

> the college, as an institution connected with religious freedom, operates under the authority of the Reformed Church, in accordance with the laws in force, and belongs entirely to the body of the Reformed Diocese of Transylvania and is subordinate to the ecclesiastical authorities.[43]

The question of legal personality also arose in court cases during this period. For example, in 1934, in a lawsuit concerning the repayment of a loan, it was established that the Székely Mikó College was not a legal entity and that only the Reformed Diocese of Transylvania could issue the power of attorney to represent it in the lawsuit.[44]

As per land register regulations, in the spirit of continuity, Law No. 2207 of 1909 and circular No 19497 of 1911 of the Ministry of Justice continued to be in force, that is, the norm recognizing the property rights of the Church and allowing for the correction of the registration continued to exist,[45] which also emphasizes the unchanged legal status of the college until its nationalization.

A transcript from the school year 1945-46 contains the following statement: "The building: the classrooms, living quarters and the canteen of the boys' gymnasium are housed in buildings owned by the Reformed Diocese of Transylvania."[46]

There are also documents from the preparatory phase of nationalization that clarify this status. On January 30, 1947, the Székely Mikó College informed the tax authorities in a transcript under number 622-1946/47 that "the Lyceum is the property of the Reformed Diocese of Transylvania, a legal entity under public law."[47] On November 18, 1947, the National Bank of Romania addressed the following question to the College in a transcript: "Please kindly inform us whether your College has its own legal personality or whether it is only a ministry of the Reformed Diocese, and as such is included in its budget. If the College is a legal person, please provide the registration number of

43 The original Romanian text: "Colegiul ca o instituțiune, ce stă în legătură cu libertatea religioasă, și ca mijlocul de susținere al bisericii reformate, în sensul legilor în vigoare, aparține cu totul absolut corpului Eparhiei Reformate din Ardeal și este supus autorităților bisericești."

44 See Transcripts 604-1933/34 and 632-1933/34 of the Reformed Székely Mikó College, and the power of attorney issued by the Reformed Diocese of Transylvania to Dr. Károly Keresztes, lawyer, on July 16, 1934.

45 Laday, 1924, appendix 32.

46 Transcript no 136-1945/46.

47 "Liceul este proprietatea Eparhiei Reformate din Ardeal care are personalitate juridică de drept public."

the legal person in the register of legal persons."[48] The reply from the college (under no 299-1947/48, on December 11, 1947): "Our College does not have its own legal personality, but is owned by the Reformed Diocese of Transylvania, which is a legal entity."

Decree 176 of 1948, which implemented nationalization, ordered the nationalization of the Reformed Lyceum *of the Reformed Church*, that is, the nationalization measure was taken against the Reformed Church. Obviously, the question arises as to whether the Reformed Church was legally suitable to be the passive (suffering) subject of nationalization, why is the Church not recognized as owner in the reverse process of nationalization, that is, restitution, based on the principle of symmetry? The Székely Mikó College, as an internal organ of the Reformed Church, no longer exists, precisely because it was abolished by nationalization, a measure of the Soviet-style dictatorship that denied the centuries-old right of the churches to maintain schools and completely monopolized educational activities.

According to Article 4 of the Emergency Government Ordinance No. 94 of 2000 (which, according to Article 8 of Emergency Government Ordinance No. 83 of 1999, as amended by Law No. 66 of 2004, is also applicable to the case at hand), in the absence of contrary evidence, the existence and, as the case may be, the extent of the right of ownership shall be presumed in accordance with the normative or public authority act that ordered or implemented the abusive seizure. In the present case, the only 'contrary evidence' is the land title deed, the exact contents of which have been presented above, and which is not suitable to rebut the Reformed Church's presumption of ownership, and in fact, the land title deed confirms that presumption.

■ *3.4. After the regime change*

Even after the regime change, the Romanian state, through Emergency Government Ordinance 83 of 1999 and Government Resolution 2000/1334, recognized that this property should be returned to the Reformed Diocese of Transylvania.

Moreover, the entire interpretation was supported by the previous case law. The High Court of Cassation and Justice stated the following in the case of the College of Aiud (decision 4684 of November 2, 2010):

> "Decree No. 176 of 1948 is the factual and legal basis which confirms that the Reformed Diocese of Transylvania is entitled to the restitution of the property, not as the legal successor of the former owner, but in its own name, i.e. as the former owner. The fact that the ecclesiastical schools, which were financially maintained and supervised in terms of educational activity by the various ecclesiastical structures, belonged to them, was correctly established and justified in the restitution decision

48 The original Romanian text: "Vă rugăm să binevoiți a ne comunica dacă Colegiul Dvs. are personalitate juridică de sine stătătoare sau este doar un serviciu al Eparhiei Reformate, integrat în bugetul acesteia. În cazul în când Colegiul are personalitate juridică, vă rugăm a ne comunica numărul din registrul persoanelor juridice sub care sunteți înscrișii."

> No. 391 of September 20, 2004, including references to ecclesiastical law, and is also confirmed by the documents in the case file. According to these documents, the Reformed religion is recognized as a historic religion, and the movable and immovable property, such as schools, housing for teaching and clerical staff, and the Bethlen Gábor College in Aiud, are the properties of the Reformed Church.
> In this respect, a relevant argument of the judge of the first instance, which the High Court accepts as lawful and supported by evidence, is the transcript of the Ministry of Culture and Religious Affairs No. 5447 on April 11, 2008, which informs the Reformed Diocese of Transylvania that the diocese, as a constituent part of the Reformed Church of Romania, is entitled to restitution by the State of the property belonging to the local constituent units of the Reformed religion."

The legal issues raised in this case are the same, but in 2010, the ideological shift—even at the level of the courts—that has since turned the attitude towards restitution from a supportive to a negative position, had not yet occurred.

In contrast, in the case of Székely Mikó College, both the Brasov Court of Appeal and the High Court of Cassation and Justice have ruled that Székely Mikó College was the owner of the property, and only the former owner was entitled to restitution, while the Reformed Diocese of Transylvania is not considered a former owner. Therefore, the restitution claim should be rejected.

This (erroneous) position, which has been turned into a definitive court decision, is based on a single isolated argument, the contents of the land register, as discussed in detail above. As a legal argument, Article 32 of Decree-Law 117 of 1938, which implemented the Transylvanian land register reform, was used, according to which if a right *in rem* is registered in the land register in a person's favor, it must be presumed that this right is in favor of that person. This argument is fundamentally flawed. Decree-Law 117 of 1938 did not enter into force until 1947 under the provisions of Law No. 241 of 1947. A land registration on March 2, 1900, cannot be judged on the basis of a norm that entered into force in 1947, five decades later. A land register entry cannot confer legal personality to an organization, and legal personality is a precondition for ownership.

■ *3.5. The fate of the property of the Székely Mikó College*

Under these circumstances, the restitution committee and the law courts applied the factual situation and the relevant legislation to deny the Reformed Diocese of Transylvania the right to restitution. Unfortunately, despite the courts' knowledge of the above argument and the documentary proof supporting it admitted as evidence, they

rejected the application for restitution of the Reformed Diocese of Transylvania without reasonable grounds.[49]

In addition to the question of misinterpretation of the law or disregard of the applicable legislation, the courts' classification of Székely Mikó College as a legal person is questionable; the issue of legal succession was not examined. The legal basis for restitution in this case was Emergency Government Ordinance No. 83 of 1999, which also allowed restitution in favor of the legal successor (in our case, the Reformed Diocese of Transylvania), and not emergency government ordinance No. 94 of 2000, which regulates the general restitution of church property, which did not open up any possibilities for restitution for the legal successor. Therefore, the case would have been legally resolved in favor of the Reformed Diocese of Transylvania, even if Székely Mikó College had been a separate legal entity.

It is also worth noting that the same legal problem arises in relation to the Roman Catholic Batthyaneum Library in Alba Iulia, which houses an incredibly rich historical collection, or the Roman Catholic Marianum Institute for Girls' Education in Cluj, another building of outstanding importance. The initial judgments in these two cases were unfavorable to the Roman Catholic Archdiocese.[50] In the second judgment for the case regarding the Battyaneum Library, the High Court of Cassation and Justice, at the time of the closing of the manuscript, ruled once more against the restitution of the library.[51]

4. Conclusions

This article is a short analysis of an extremely complex problem. Yet it illustrates one area of disillusionment: by refusing restitution of church property, it is not only the rights of the churches concerned that are violated. This phenomenon, which is unfortunately not an isolated one, as illustrated by the case of Székely Mikó College, is also an indicator of irregularities in the relations between the Romanian State and Hungarian minority. Unfortunately, a significant part of Transylvanian Hungarians experience this as a state restriction on the minority community's ability to organize itself and limit its opportunities for progress. The history and current state of the property settlement process and the legally doubtful refusal to restitute buildings of symbolic significance (such as the Székely Mikó College) have led to a trust deficit between the Hungarian minority and the Romanian state.

49 High Court of Cassation and Justice, administrative section, Decision no. 4087/2018.

50 See Decisions 153/2018 and 114/2018 of the administrative section of the Court of Appeal of Alba Iulia.

51 High Court of Cassation and Justice, administrative section, Decision no. 3093/2021.

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‘Children in Criminal Procedure – Friendly Law’: Analysis of the Government Draft Amendments to Some of the Legal Acts in Poland

ABSTRACT: *The considerations undertaken in the scientific article constitute an analysis and evaluation of the solutions included in the government’s legislative proposal aimed to change the provisions of the Code of Criminal Procedure, the Family and Guardianship Code, and the Law on the System of Common Courts with regard to the position of minor victims. The legislative initiative is a significant change that aims to improve the protection of children participating in criminal procedures. This legal act’s draft indicates the provision of a special position to children in the criminal procedure. If children happen to be the aggrieved parties in criminal procedures, they deserve to be met by the court and participants with exceptional awareness and sensitivity. I am of the opinion that the criminal procedure must be structured in such a way that the participating children feel safe. The judiciary should aim to be child-friendly. It is extremely important that children feel understood as well as they understand the new legal reality in which they find themselves. In this analysis, I have referred to the regulations on the protection of children’s rights under the international law and the law of the European Union. In this study, I have laid emphasis on the point that the proposed legislative solutions should meet the assumptions of the European directives issued by the European Union institutions as well as the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, the main act on the protection of children’s rights issued by the Council of Europe.*

KEYWORDS: protection of children’s rights, protection of crime victims, criminal procedure, improvement of legislation, minor child, aggrieved person.

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1. Introduction

On 24 February 2021, during the Week of Assistance to Victims of Crime, the Ministry of Justice[2] announced a set of 21 draft amendments to the legislation entitled 'Child-friendly law'. These amendments were prepared with a view of strengthening the sense of security of children involved in criminal proceedings as the victims or witnesses of crime.

The explanatory notes to the draft act have pointed out[3] the extensive analyses of Polish and international legal regulations[4] concerning the participation of minors in criminal procedures carried out prior to the preparation of the amendments proposed by the government. The drafters also considered the postulates raised in the jurisprudence, the doctrine of the criminal process, and the results of empirical research.

The conceptual core of the work was the idea of child-friendly justice. An idea that has been specifically set out in the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice[5] as well as in the report of the European Union Agency for Fundamental Rights titled 'Child-friendly Justice: Perspectives and Experiences of Professionals on Children's Participation in Civil and Criminal Judicial Proceedings in 10 EU Member States'.[6]

The idea refers to 'justice systems which guarantee the respect and the effective implementation of all children's rights at the highest attainable level, bearing in mind the principles listed below and giving due consideration to the children's level of maturity and understanding and the circumstances of the case. It is, in particular, justice that is accessible, age appropriate, speedy, diligent, adaptable, focused on the needs and rights of the children, and respectful of the rights of children, including the rights to due process, to participate in and to understand the proceedings, to respect private and family life, and to have integrity and dignity.[7]

Based on the analyses performed, the drafters of the act developed legislative solutions that, as they indicate,[8] had been construed so as to be minor-friendly and prevent any situation where anxiety and fear of criminal procedures would be a barrier

2 Press release of the Polish Ministry of Justice on the child-friendly law – groundbreaking changes for the youngest, https://www.gov.pl/web/sprawiedliwosc/prawo-przyjazne-dzieciom--przelomowe-zmiany-na-rzecz-najmlodszych (Accessed: 21 March 2021).

3 *Explanatory notes to the draft act amending the Code of Criminal Procedure Act and certain other acts.*

4 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support, and protection of the victims of crime, and replacing Council Framework Decision 2001/220/JHA (OJ L.2012.315.57, hereinafter Directive 2012/29/EU); Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA (OJ L.2011.335.1, hereinafter Directive 2011/93/EU).

5 Council of Europe, 2012.

6 Council of Europe, 2015.

7 Council of Europe, European Union, 2012, p. 17; Stalford, 2017, p. 208.

8 *Explanatory notes to the draft act amending the Code of Criminal Procedure Act and certain other acts.*

to children's revealing offences to their own detriment. The proposed legislative amendments were adapted to the specific needs of children due to their age, maturity, personality, and the nature of the crime committed against them. They introduced the principle of communication between the representatives of the justice system and minors in a way that they understand, and they also aimed to provide protection to minors from the experiences of re-victimisation and secondary trauma during their participation in legal procedures.

The proposed legislation for the protection of children's interests calls for the presentation and analysis of government-drafted amendments, which we have done so in this paper.

2. The right to have a child-friendly interview

The amendments to certain legal acts, as drafted by the Ministry of Justice, call for a number of changes in view of the need to improve the standard set to protect the children giving testimony.

This is due to the fact that, under the Polish Code of Criminal Procedure, a child victim cannot exercise his/her rights independently because of his/her minority status. In the course of the proceedings, a child must be represented by an adult, either his/her statutory representative or *de facto* guardian (Article 51 § 2 of the Code of Criminal Procedure).[9] A child victim is 'excluded' from being required to participate in criminal procedures. His/her active attendance is necessary only when there is a 'personal source of evidence', for instance, when they give testimony as a witness.

When children give testimonies, they are having a personal and direct contact with the justice system. They are independently exercising their rights and performing their obligations in the given situation.[10] Being interviewed is always a challenge for children, for they find themselves in a completely new legal reality. They are also required to report the circumstances of a crime, which often entails the reporting of traumatic experiences.

Following the recognition of the specific situation children are put in when they are required to give testimonies in criminal proceedings, 'protective interviewing arrangements' were introduced in the Polish criminal procedure (Article 185a of the Code of Criminal Procedure),[11] which have been amended a number of times since. Currently, these arrangements are as follows:[12]

- as a rule – there has to be a single-session interview, unless essential circumstances are revealed, the clarification of which warrants another interview, or

9 Paluszkiewicz, 2020, argument no. 3; Dudka, 2016, p. 15; Eichstaedt, 2018, argument no. 7.
10 Mierzwińska and Lorencka, 2016, p. 35.
11 Podlewska and Trocha, 2012, p. 143.
12 Horna, 2014, p. 14.

the defendant, who did not have a defence advocate during the first interview of the minor, requests this;
- children are always interviewed by the court (children may not be interviewed by any other authority, such as a police officer and public prosecutor);
- obligatory participation of an expert psychologist in the interview;
- a closed catalogue of interview participants (court, expert psychologist, prosecutor, defence advocate, counsel of the victim, and the representative of the minor or an adult identified by the minor, only if this does not restrict the freedom of expression of the interviewee);
- prohibition of the participation of the offender in the interview;
- obligatory recording of the interview using an image and sound recording device (Article 147 § 2a of the Code of Criminal Procedure); and
- interview held obligatorily in a room specially assigned for this purpose, i.e., a 'friendly interviewing room' (Article 185d of the Code of Criminal Procedure).

These specific conditions for providing evidence are not available to all children. The procedure adopted to interview children depends on their age, mental health, and the nature of the crime.

The Polish legislators decided that child victims and witnesses of crimes committed via the use of violence or an unlawful threat, crimes against sexual freedom and morals, and crimes against the family and guardianship, and crimes against freedom, who at the time of interview are under the age of 15, would always be asked to provide evidence under 'protective arrangements'.

Older child victims (15 to 18 years of age) of the above-mentioned crimes may benefit from the specific protection under strictly defined circumstances, that is, when there is a legitimate concern that providing evidence otherwise could have a negative impact on their mental condition. It is important to note that the adolescent witnesses (15-18 years old) of the above-mentioned crimes are excluded from this protection regime.

The applicable legal regulations significantly differentiate the situation of minors when it comes to interviewing. They provide different levels of security guarantees with regard to their well-being, interests, and process guarantees. Notably, if children cannot use the 'protective interviewing arrangements', they are required to provide evidence the same way as an adult. This means that the circumstances of a crime will be narrated to them a number of times during a criminal trial (without the support of a psychologist) held in the courtroom, or in the office of a prosecutor/police officer, in the presence of many people, including the offender.

The government proposal aims to systematise the situation of child interviewees. The legislative drafters[13] pointed out that the current legal regulations do not fully comply with international standards, namely the ones set by Directive 2012/29/EU of

13 *Explanatory notes to the draft act amending the Code of Criminal Procedure Act and certain other acts.*

the European Parliament and the Council of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime, and the replacing Council Framework Decision 2001/220/JHA (OJ L.2012.315.57, hereinafter Directive 2012/29/EU). They partly comply with the standard set by Directive 2011/93/EU of the European Parliament and the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and the replacing Council Framework Decision 2004/68/JHA (OJ L.2011.335.1, hereinafter Directive 2011/93/EU).

The drafters[14] argued that all children should be guaranteed the right to a friendly interview, irrespective of the crime they had witnessed or been a victim of.

It was highlighted that international standards, such as the ones set by Directive 2011/93/EU, specifically regulate the situations of the child victims of certain crimes associated with high trauma (such as sexual abuse). Directive 2012/29/EU clearly stipulates that, whenever children's situation and their individual needs so require, the criminal process must be shaped in such a way that each minor is guaranteed a sense of security and the highest level of protection. There were various examples provided of such situations. One such instance is when a child's parents are the victims of a road accident. While reporting of the circumstances of the event may undoubtedly have a very negative impact on the child's mental condition, the current criminal procedure regulations do not initiate any 'protective interviewing arrangements' for the child in such a case.[15]

The drafters[16] have further argued that both the pieces of EU law define a 'child' as any person below 18 years of age, and that they call for the provision of special treatment until a child reaches the age of majority. Thus, it is not acceptable that adolescents, solely due to their age, would be provided a lower level of protection than younger children, and would be treated on par with how the adults are treated.

The government draft act[17] has also pointed out the criminal-procedural situation of minors who come of age during a criminal process. There was a rule put in place in this regard. According to the rule, if a victim or a witness has given a testimony under the protective arrangements as a child, then, even if he/she has reached 18 years of age when called again to report the circumstances of a crime, he/she will still be entitled to give the interview under 'protective arrangements'.

In view of the above, the drafters have proposed that the legal regulations concerning the 'protective interviewing arrangements' be given the following wording in the Code of Criminal Procedure.[18]

14 *Explanatory notes to the draft act amending the Code of Criminal Procedure Act and certain other acts.*

15 This also, *inter alia*, in. Ł. Mrozek, 'Czynności procesowe z udziałem małoletniego – wybrane zagadnienia (przesłuchanie, okazanie, konfrontacja)' in *Kurator procesowy dla małoletniego pokrzywdzonego. Prawne i psychologiczne aspekty udziału małoletniego w postępowaniu karnym.* (Warszawa, Fundacja Dajemy Dzieciom Siłę): 23.

16 *Explanatory notes to the draft act amending the Code of Criminal Procedure Act and certain other acts.*

17 *Explanatory notes to the draft act amending the Code of Criminal Procedure Act and certain other acts.*

18 *Explanatory notes to the draft act amending the Code of Criminal Procedure Act and certain other acts.*

1) Article 185a:

§ 1. In cases of offences committed with the use of violence or unlawful threats or specified in chapters XXIII,[19] XXV[20] and XXVI[21] of the Criminal Code, a child victim shall be interviewed as a witness only where their testimony may be of significant importance for the resolution of the case, and only once, unless essential circumstances are revealed, the clarification of which warrants another interview, or the defendant, who did not have a defence advocate during the first interview of the minor, requests the admission of such evidence.

§ 2. The interview shall be conducted by the court at a session with the participation of an expert psychologist, immediately, not later than within 14 days from the date of receipt of the request. The public prosecutor, defence advocate, counsel of the victim or guardian representing the child, as referred to in Article 51 § 4, shall have the right to participate in the interview, unless their participation is obligatory. The person mentioned in Article 51 § 2 or 3[22] or an adult identified by the victim, as referred to in § 1, shall also have the right to be present at the interview, if this does not restrict the freedom of expression of the interviewee. If the defendant, who has been notified of such interview session, does not have a private defence advocate, the court shall appoint an ex officio defence advocate. The provisions of Article 185c shall not apply.

§ 3. At the main hearing, the recorded image and sound of the interview shall be replayed, and the interview report shall be read out.

§ 4. The provisions of § 1-3 shall also apply in cases of offences not listed in § 1, in particular, in cases of offences specified in chapters XIX,[23] XX[24] and XXI[25] of the Criminal Code, if there is a legitimate concern that interviewing of a minor victim in other conditions could have a negative impact on their mental condition.

§ 5. If, at the time of re-interviewing, the victim has reached 18 years of age, the provisions of § 1-3 shall apply, if there is a legitimate concern that interviewing in other conditions could have a negative impact on their mental condition. At the request of the victim, re-interview may be carried out pursuant to Article 177 § 1a.[26]

19 This chapter of the Criminal Code regulates the crimes carried out against freedom.

20 This chapter of the Criminal Code regulates the crimes carried out against sexual freedom and morals.

21 This chapter of the Criminal Code regulates the crimes carried out against family and guardianship.

22 The person mentioned in Article 51 § 2 or 3 of the Code of Criminal Procedure is a statutory representative or *de facto* guardian of a child or a disabled person.

23 This chapter of the Criminal Code regulates the crimes carried out against life and health.

24 This chapter of the Criminal Code regulates the crimes carried out against public safety.

25 This chapter of the Criminal Code regulates the crimes carried out against safety in transport.

26 Article 177 § 1a provides that the interview may be held with the use of technical devices that enable remote communication for the purposes of this procedure, with there being simultaneous direct transmission of image and sound.

2) Article 185b:

§ 1. In cases of offences committed with the use of violence or unlawful threats or specified in chapters XXV[27] and XXVI[28] of the Criminal Code, a witness who at the time of interviewing is under 15 years of age shall be interviewed under the conditions specified in Article 185a § 1-3.

§ 2. In cases of offences listed in § 1, a minor witness who at the time of interviewing has reached 15 years of age shall be interviewed under the conditions specified in Article 185a § 1-3, if there is a legitimate concern that interviewing in other conditions could have a negative impact on their mental condition.

§ 3. The provisions of § 1 and 2 shall not apply to a witness being an accomplice in the prohibited act for which the criminal proceedings are being carried out, or a witness whose act is related to the act for which criminal proceedings are being carried out.

§ 4. The provision of Article 185a § 4 and § 5 shall apply mutatis mutandis.

3. Children's right to understand and be understood

The idea of 'child-friendly justice'[29] clearly emphasises the principle that, from the moment children come in contact with the judicial system or other competent authorities, children should be ensured of their right to information regarding the rights, obligations, systems, and procedures. Information should be provided to children in a manner that takes their age and maturity into consideration, and in a language that is both understandable as well as gender and culture sensitive. It is also indicated that children should directly receive information and contacting of parents or legal representatives should not function as an alternative through which children are informed.

The same approach is visible in the construction of the regulations of Directive 2012/29/EU, which (in Article 1(2), namely third sentence, Article 3, Article 4, and Recital 21) points to the need to guarantee every victim, including child victims, the right to information, the right to understand, and the right to be understood in the course of legal procedures.

As Trocha rightly argued,[30] the right to information is the fundamental right with which everything begins. In her study, she quoted the speech of the Commissioner on Citizen's Rights and the speeches of the other representatives of the Polish criminal process. They emphasised on the point that improper information to victims about their rights makes it difficult for them to be assisted and limits their activity in the criminal process.

27 This chapter of the Criminal Code regulates the crimes carried out against sexual freedom and morals.

28 This chapter of the Criminal Code regulates the crimes carried out against family and guardianship.

29 Council of Europe, European Union, 2012, p. 21.

30 Trocha, 2015, p. 17.

The author also made reference to the following point: *'(...) children often do not know what is going on in their case, they are surprised by evidence taking activities with their participation, they do not understand why they have to report on events again and again or why they have to talk about them to some people and not to others.'*[31]

The report '*Child-friendly justice–Perspectives and experiences of professionals on children's participation in civil and criminal judicial proceedings in 10 EU member states*'[32] has brought out the benefits that both the child and the justice system gain when minors are ensured the right to information. The benefits are as follows:

- relieving of children's anxiety when facing a potentially intimidating justice system;
- well-informed children gain greater trust and confidence in themselves and in the judicial system; and
- they moving forward feel more secure and talk more freely, which means their statements are taken into consideration, and they can participate in the proceedings with more conviction.

As it was already emphasised in the earlier part of the article, children as special participants of criminal proceedings, due to their sensitivity and immaturity, need to be provided with special protection through the introduction of separate legal regulations. These regulations would regulate their status and refer to their rights and obligations in a way that would be adapted to their level of maturity and psycho-physical development.[33] In accordance with the detailed recommendations formulated in the Guidelines, information and counseling should include activities performed by persons representing the judiciary aimed at properly informing the respective child and its parents, *inter alia*, about the child's rights, the system and procedures in which the child participates or will participate, about the position of the child in the proceedings, the manner in which the interview is conducted, the possible consequences of the proceedings, the available protective measures, the existing mechanisms for verifying decisions relating to the child.[34] It should be especially respected in the criminal procedure which due to its repressive nature is characterised by a significant interference with the rights and freedoms of an individual. Therefore, it is so important that children are sufficiently informed in an appropriate manner about their rights and obligations.

The currently applicable Polish criminal procedure contains legal regulations related to the right to information. The Code of Criminal Procedure includes provisions which define a legal obligation for a procedural authority to provide information to participants in proceedings about their obligations and rights regarding the procedural activities in question. The principle of the right to information is also one of the basic principles of the criminal process, which arises from Art. 16 of the Code of Criminal

31 Ibidem.
32 Council of Europe, European Union, 2015, p. 53.
33 Podlewska, 2018, p. 10.
34 Mazowiecka, 2016, pp. 9–13.

Procedure.[35] It constitutes a directive on the provision of information by procedural authorities to participants in proceedings, if it is important for the protection of their rights and interests. The implementation of this principle is manifested in the information obligation imposed on the procedural authorities when performing specific procedural activities, which was mentioned above.

However, the instruction-giving procedure is a standard one, which is identical for everyone. It does not differentiate the situation of children in terms of their needs that are related to them obtaining information about their rights, obligations, and the structure of the process. Due to the special role of the child in the criminal procedure and its sensitivity, the legislator considered it necessary to formulate the legal obligation towards the procedural organs to inform the child about their rights and obligations incumbent on them in a manner adapted to their maturity and psycho-physical condition.

As a result, the government draft act proposed an introduction to the Code of Criminal Procedure.[36]

1) A general rule that emphasizes on the necessity and importance of giving specific instructions and information to minors. This been brought out in the following provision:

Article 16 § 3 of the Code of Criminal Procedure. If a participant in the proceedings is a person who is under 18 years of age, a fully or partially incapacitated person or a disabled person, the instruction should be adapted to their age and health condition, including mental health and mental development.

2) Precise regulation, which imposes on the interviewers the obligation to specifically instruct and inform the participating children the respective procedure, through which the situations of a child and an adult in terms of the right to information are clearly differentiated. This has been brought out in the following provision:

Article 300 § 3a. Not later than before the first interview, a minor witness shall be instructed about the rights and obligations referred to in Article 177, 182-183, 185a-185b, 186-192 and the manner and conditions of the interview, as referred to in Article 185a.

3) Precise regulation, which obligates the Minister of Justice to develop a written model instruction for minors. As the representative of the Ministry of Justice pointed out,[37] these instructions will be in the form of pictorial graphic tips through which children can learn about why they give evidence, what rights they have, and who and where to ask for assistance during criminal proceedings in an accessible way. This has been brought out in the following provision:

Article 300 § 4a. The Minister of Justice shall define, by way of a regulation, the model of the instruction referred to in § 3a, with regard to the imperative that the minor understands the instruction.

35 Kulesza and Starzyński, 2020, pp. 28–30.

36 *Explanatory notes to the draft act amending the Code of Criminal Procedure Act and certain other acts.*

37 Press release of the Polish Ministry of Justice, *Prawo przyjazne dzieciom – przełomowe zmiany na rzecz najmłodszych*, https://www.gov.pl/web/sprawiedliwosc/prawo-przyjazne-dzieciom---przelomowe-zmiany-na-rzecz-najmlodszych (Accessed: 21 March 2021).

Further, the government draft act has made a proposal to amend the Law on the Organisation of Common Courts Act (Journal of Laws of 2020, item 2072) by imposing an obligation on the judges adjudicating criminal cases to undergo a specialised training on interviewing children. This has been brought out in the following provision:

Article 82a § 3a. A judge adjudicating in criminal law cases shall participate, every four years, in training and professional development sessions organised by the National School of Judiciary and Public Prosecution or in other forms of professional development, in order to raise specialist knowledge and professional skills for interviewing minors and persons referred to in Article 185c of the Code of Criminal Procedure Act of 6 June 1997 (Journal of Laws of 2020, items 30, 413, 568, 1086, and 1458).

To have the above amendments enacted is extremely important to ensure that the children's right to information, and the right to understand and be understood in criminal proceedings find their implementation in society. The reason for emphasising on the enactment is that the training will allow judges to gain knowledge and skills, particularly of appropriate interviewing techniques, child psychology, and how to communicate in a language that is adaptable to the levels and needs of minors.[38]

4. Children's right to professional legal representation

As has already been indicated, under the Polish criminal procedure, a victim of a crime cannot appear independently in a criminal process. In such cases, minors are represented by their statutory representatives, most often parents.

In the course of the criminal process, children's representatives may use the professional support of an advocate or an attorney. The relationship between the lawyer and the representative of the minor is referred to as legal counselling.

The costs incurred for obtaining legal counselling are covered either by the parents of minors (i.e., private counsel) or by the state (appointed, public or *ex officio*, counsel).

International regulations such as Directive 2011/93/EU (Recital 32, Article 20(2)) and the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice[39] have pointed out to the need to provide the children and their representatives participating in a criminal process professional legal representation or legal counselling. This obligation is delegated to the state, and it is the state that is obligated to cover all the costs related to the provision of such legal support, namely the support of an appointed counsel.

In many EU member states,[40] and also in Georgia,[41] every child victim and their representatives may use the assistance of an advocate or an attorney. However, in

38 *Explanatory notes to the draft act amending the Code of Criminal Procedure Act and certain other acts.*
39 Council of Europe, European Union, 2012, p. 80.
40 Trocha, 2013, p. 187.
41 Council of Europe, European Union, 2012.

other countries, the entitlement to assistance depends on the nature of the crime committed against children or on their (children's families/guardians) difficult financial situation.

The legal regulations that are currently in force in Poland enable every victim (both children and adults) to avail free-of-charge representation of a public counsel if they duly demonstrate that they are unable to bear the costs of such assistance without hampering the necessary maintenance of themselves and their family (Article 88 in conjunction with Article 78 § 1 CCP).

Empirical research conducted in Poland has shown that the persons entitled to exercise the rights of minors display little in-process activity[42] and very rarely (a few percent) use the assistance of a professional counsel, either public or private.[43]

The above data are very disturbing with regard to the protection of the rights and interests of child victims. However, this is undoubtedly a consequence of the fact that the responsibility for exercising the rights of children rests with adults who neither are lawyers nor have the knowledge of the procedures being carried out. Even though they are grown-ups, participation in the criminal proceedings is a serious challenge to them. Additionally, the representatives are emotionally involved in the ongoing proceedings as they directly concern their children, that is those whom they care for. Therefore, it is extremely important that representatives are in a position to benefit from the assistance of the professional counsel, namely professionalism and legal assistance and psychological assistance,[44] which will undoubtedly be a significant positive factor in the proper protection of the rights and interests of child victims in the ongoing criminal proceedings.

The government draft act implements the above assumptions by indicating that every child victim of a sexual offence and their representatives will receive free assistance from an *ex officio* counsel for the duration of the criminal process.

Anyone who is not supported by a private counsel will have the choice to use a public counsel for assistance. This person is required to have the highest qualifications. They must have specific experiences of handling cases involving minors or must have completed specialised training on the principles of the representation of children, their rights, and needs. More importantly, the role of a professional lawyer *ex officio* does not end with the child he/she is representing has come of age. It continues until the end of criminal proceedings.

An ex officio counsel is, as a rule, obliged to get to know the children they are representing, and inform them about the actions taken, the course of the proceedings and how they conclude, and the consequences of the actions taken in their legal situation in a manner that is understandable and adaptable to the children's level of development or maturity.

42 Krawiec, 2012, p. 327.
43 Trocha, 2013, pp. 59–60.
44 Kulesza, 2012, p. 118.

Thus, the legislative drafters have proposed that the legal regulations concerning public counsel should carry the following wording in the Code of Criminal Procedure:

Article 89a § 1. In criminal proceedings, a minor victim shall have assistance of a counsel in cases of offences specified in Chapter XXV of the Criminal Code.[45]

Article 89b § 1. The provision of Article 89a § 1 shall not apply in the case referred to in Article 51 § 4.[46]

Article 89c. § 1. If the minor referred to in Article 89a § 1 has no private counsel, the president of the court, the court or the senior judicial clerk of the court competent to hear the case, and in the preparatory proceedings the public prosecutor, shall immediately appoint for their benefit a public counsel, who shall demonstrate specific knowledge of matters concerning minors or have completed training on the principles of representation of children, their rights and needs.

§ 2. The obligation on the appointed public counsel to take in-process actions shall survive the minor's reaching the age of majority.

§ 3. The authority conducting the proceedings shall release the public counsel if the victim or the persons referred to in Article 51 § 2 or 3 have arranged for assistance of a private counsel.

§ 4. If the mental development, health condition and level of maturity of the minor victim allow it, the appointed public counsel shall contact them immediately and shall inform them about the actions taken, the course of the proceedings and how it should conclude, as well as about the consequences of the actions taken for their legal position, in a manner which is understandable and adapted to their level of development and maturity.

Article 89d § 1. The participation of the appointed public counsel in the hearing shall be obligatory.

§ 2. The provision of § 1 shall apply to the sessions attended by the victim.

Article 89e. Article 84, 86 § 2 and 89 shall apply to the appointed public counsel mutatis mutandis.

Article 89f. The Minister of Justice shall define by way of a regulation the manner to provide the minor victim with assistance of a public counsel who is an advocate or an attorney, including the method to establish a list of public counsels and to appoint the same, having regard to the need to ensure the proper course of the proceedings and to provide immediate

45 This chapter of the Criminal Code regulates the crimes carried out against sexual freedom and morals.

46 Article 51 § 4 CCP applies to a guardian representative who acts on behalf of a child in criminal proceedings when the offender against the child is one, or both, of their statutory representatives. As the drafters have pointed out: *'(...) in such a case, the minor is guaranteed a professional level of representation by a guardian who is an advocate or an attorney, who should demonstrate specific knowledge of matters concerning the child, of the same type or similar by type to the case in which child representation is required or has completed training on the rules of representation of children, their rights or needs.'* Drawn from *Explanatory notes to the draft act amending the Code of Criminal Procedure Act and certain other acts*.

legal assistance to the minor victim by persons with specific knowledge of matters concerning the minor, or properly trained.

5. Summary

The government draft act is an essential legislative initiative that aims to substantially strengthen the protection of children in criminal procedures. The modern criminal process must take due consideration of the position of victims, in particular, the victims who require exceptional care and sensitivity.

The criminal process must be structured in such a way that the children taking part in it feel safe. The justice system should strive to attain child friendliness. It is extremely important that children feel understood and they understand the new legal reality in which they find themselves.

The proposed legal regulations undoubtedly fulfil the assumptions of the EU directives and the guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice.

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REVIEWS

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Summary of the 'Dialogue on the Future of Europe: Building a Digital European Union' Conference Organised by the Ministry of Justice and the Ferenc Mádl Institute of Comparative Law as Part of the 'Conference on the Future of Europe' Series

ABSTRACT: *On June 21, 2021, the Hungarian Ministry of Justice (Deputy State Secretariat for EU Relations) and the Ferenc Mádl Institute of Comparative Law (MFI) organised a high-profile international conference entitled 'Dialogue on the Future of Europe: Building a Digital European Union' as part of a series in which two previous conferences were held on June 25 and September 21, 2020. By organising these events, Hungary is among the first Member States to launch a dialogue as part of a series of discussions on the future of Europe. As a proactive actor, Hungary has contributed to the ongoing exchange of views offering a comprehensive assessment of and approach to the digital developments and perspectives of the European Union. The June 21, 2021 conference – composed of three thematic panel discussions – focused on the future of digitalisation and competitiveness in the European Union. Highly accomplished*

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national speakers such as Hungarian Minister of Justice Judit Varga and Hungarian Member of Parliament and President of the Economic Committee Erik Bánki and international speakers such as Commissioner Mariya Gabriel and State Secretary Ana Paula Zacarias gave presentations outlining their visions. This article summarizes those presentations. In addition to public officials and economic actors, academic experts and researchers on digital transition also gave presentations at the conference. The conclusions drawn from their exchanges of views seek to contribute to the creation of sensible decisions leading towards a digital future, while also raising public awareness regarding digitalisation, a realm of growing influence on policymaking.

■ **KEYWORDS:** Conference on the Future of Europe, CoFEU, digitalisation, sovereignty in the digital sphere, digital readiness.

Introduction

On June 21, 2021, the Hungarian Ministry of Justice (Deputy State Secretariat for EU Relations) and the Ferenc Mádl Institute of Comparative Law (MFI) organised a high-profile international video conference entitled *Dialogue on the Future of Europe: Building a Digital European Union*[8] as a follow-up event to the meetings of June 25, 2020 and September 21, 2020. The first panel discussion was opened by the Hungarian Minister of Justice, Judit Varga. She was followed by Mariya Gabriel, Commissioner for Innovation, Research, Culture, Education and Youth; Ana Paula Zacarias, representing the Portuguese Presidency as Secretary of State for European Affairs; Leonardo Cervera Navas Director at the Office of the European Data Protection Supervisor; and Erik Bánki, Hungarian Member of Parliament and President of the Economic Committee. Edina Tóth, a Hungarian Member of the European Parliament, moderated the first panel discussion. Participants discussed issues concerning the balance between digitalization and sovereignty. The second panel discussion focused on digital competitiveness. Speakers included László György, Secretary of State for Economic Strategy and Regulation, and Valentina Superti, Director at DG GROW. The speakers provided insights into the aims and measures taken by Hungary and the European Commission. In addition to representatives of the public sector, economic actors also contributed during the second-round table discussion. The presenters included Josephine Wood (EuroHPC), Erzsébet Fitori (Vodafone), Balázs Nyers (SAP), and Marie-Theres Thiell, President of the German-Hungarian Chamber of Commerce. The second panel discussion was moderated by Gergely Böszörményi Nagy, Founder of BrainBar. The third and final panel discussion involved academic experts and researchers in a discourse on digitalisation and European citizens. Contributors included András Koltay, Rector

8 For the event report, see https://futureu.europa.eu/processes/Digital/f/14/meetings/276.

of the University of Public Service; professors Lennard Brand, Cristopher Markou, and Michel Cannarsa; and Head of Department Ms. Krisztina Stump (European Commission). The discussion among experts was moderated by Márton Sulyok, Lecturer at the University of Szeged.

Panel discussion 1: *'Digitalisation and sovereignty: how to balance the legitimate interest of both?'*

During the first roundtable discussion, EU-level and national representatives shared their views on how far the EU has come in terms of digitalisation. The potential future contribution of Member States' national assemblies to common EU objectives was also addressed. A number of speakers concluded that joint efforts are required on behalf of Member States to regulate the digital sphere and to counter the influence of big tech companies.

Edina Tóth, an independent Member of the European Parliament, moderated the first panel discussion. In her opening remarks, she reminded the guests that the conference of June 21, 2021, was the third official international event held in Hungary organised under the aegis of the Conference on the Future of Europe.

Judit Varga, Minister of Justice, discussed sovereignty from the Hungarian point of view, highlighting the importance of national parliaments, which, she argued, must play a key role in the Conference on the Future of Europe. The Minister referred to the Conference as a historic opportunity to rediscover the roots of the initial spirit of European cooperation with a renewed sense of ambition. According to the Minister, one of the duties of current generations is to preserve their heritage while progressing toward the ever-changing future. She recalled that the digital revolution – that is, the third Industrial Revolution – brought fundamental changes to economies, societies, and cultures, including the European Union. She argued that evaluating the long-term consequences of related changes is a key obligation of all governments. Highlighting the fact that it is Member States that write the history of integration, she emphasised that the Digital European Union must work for the benefit of all European citizens. According to the Minister, one of the most important features of sovereignty is freedom of action and the ability to decide one's own fate. Therefore, considering that we have come to live a significant part of our lives online, we have to ensure that the principle of sovereignty can prevail not only in the physical world but also in the digital world. While social media platforms seemed to have promising potential for democracies worldwide, growing disenchantment among users due to issues such as data breaches, fake news, and censorship has become a reality. People are becoming increasingly aware that their data, behaviour, opinions, and habits are continuously collected and analysed by these platforms, which, instead of fulfilling a passive gatekeeper role, have come to manipulate users. She argued that the online private sphere has been shrinking despite users' opinions and interests. Hence, she claimed that one of the most

urgent questions of modern times is whether people will be able to control technology instead of allowing it to control their lives, stressing that neither expert warnings nor users' worries should be neglected. Referring to the freedom of speech and digital sovereignty as common successes, the Minister pointed out that, under her leadership, the Hungarian Ministry of Justice established a Digital Freedom Committee with the aim of bringing about more transparency regarding the operation of transnational technological companies and their data management.

She informed the participants of the conference that the Digital Freedom Committee drafted a White Paper with the aim of summarising and discussing issues concerning regulation, based on the experience of government agencies and law enforcement. The priorities of the White Paper include freedom of expression, the protection of data and private life, the protection of children, and national sovereignty. The Committee has already organised a number of meetings to discuss how digital sovereignty can prevail in times of crisis. Minister Varga argued that the same laws should apply both offline and online. After many Member States acknowledged the urgency of regulating social media platforms, the European Commission drafted two legislative proposals: the Digital Services Act and the Digital Markets Act. Their aim was to establish a common set of rules throughout the EU. The Minister warned of the threat posed by big tech companies due to their monopolistic status in the global market. Since Member States might have a hard time establishing effective legislation on their own, as shown by experience, she encouraged firm European action to counter the hegemony of social media platforms in the name of fairness and objectivity.

In concluding, she underlined the importance of Europe as a pioneer in the online protection of fundamental rights, setting a global example. The Minister stressed that 'As the world changes, the legal context must change, too' and hence urged a 'smart' Union instead of an 'ever closer' EU, as the former could face the challenges of a 'smart' world.

Mariya Gabriel, European Commissioner for Research, Innovation, Education, Culture, and Youth, asserted that it is only by joining forces that Europe will achieve a digital transition. She highlighted the need to invest in new technologies and disruptive innovation, and referred to innovation as a critical element of the challenge Europe is ready to take up. The commissioner sees the digital sector as the source of numerous transformative technologies, with its capacity to accelerate knowledge diffusion and ease innovation adoption. Achieving economic competitiveness and technological sovereignty is of key importance for European integration. The Commissioner said that the European Innovation Council (EIC), aimed at overcoming financing shortages with a total budget of €10 billion over the next seven years, will fund start-ups as well as small and medium-sized enterprises (SMEs) through venture capital-style funding. In terms of the latter, the EIC functions as a shareholder in the enterprises. The European Innovation Fund will have a blocking minority for projects with strong security components or when the EU wants to reinforce its sovereignty over prominent technologies. Gabriel added that the Commission is preparing the ground for a pan-European innovation

ecosystem connecting national and local ecosystems, through which cooperation, exchanges of ideas, cross-funding, and networking would all be possible. As for the innovators, they must express their needs; the EIC's forum will function as a platform for this, alongside the creation of policy recommendations and activities. In addition, connecting local, digital, and deep-tech innovation ecosystems will result in more global-champion scale-ups, such as the winner of this year's Future Unicorn Award, the Hungarian *Oncompass Medicine*, which developed artificial intelligence-based (AI-based) medical software that assists in selecting the most appropriate targeted cancer therapy. At the end of her speech, she encouraged all actors in the digital market to put forward their own proposals.

Ana Paula Zacarias, Portugal's Secretary of State for EU Affairs, invoked the first Plenary Session in the framework of the Conference which took place on June 19, 2021. The Secretary of State recalled that the issue of the 'double' (green and digital) transition was raised by several citizens. In her speech, she focused on the issue of how to make the digital world more sustainable and the need to use the digital domain for more sustainability. She envisioned a reliable and competitive digital world and evaluated digital transformation as both a challenge and an opportunity. The Commissioner pointed out that, while digitalisation can be a tool facilitating the EU's economic recovery, the pandemic accelerated the pace of digitalisation. In her view, a well-functioning single market and the establishment of an e-market are both imperative. She claimed that public services have been key to overcoming this pandemic. Regarding the future, she emphasised the need not only for more innovation in Europe but also for more autonomy concerning Europe's value chains, with special attention paid to micro, small, and medium enterprises. The importance of ensuring that the EU takes on board the issue of digital rights was highlighted, since the people themselves are at the core of digital autonomy. In addition, the State Secretary underlined the importance of continuing to deepen the internal market while ensuring that the data being shared are protected. Finally, the State Secretary expressed the necessity of defending against multilateralism.

Leonardo Cervera Navas, Director of the European Data Protection Supervisor, began his speech by asserting that digital sovereignty does not mean digital protectionism; sovereignty is about alternatives, as well as about being able to define our own rules autonomously. The Director pointed out that since the EU cannot seclude itself from the rest of the world, digital sovereignty does not require keeping personal data in the EU. Regarding the global arena of data protection, he highlighted the lack of a truly global international convention dealing with the issue of personal data flows. In addition, he recalled the ruling of the European Court of Justice of July 2020, which invalidated the Privacy Shield for EU–US data transfers. The Director welcomed the new impetus being given to the trans-Atlantic relationship, and expressed a hope for a sustainable solution, supporting both an intensified dialogue with the US and other third countries, as well as the policy initiatives required to achieve digital sovereignty. He also emphasised that data localisation should not be a goal.

Erik Bánki, Chair of the Economic Committee of the Hungarian National Assembly, concluded that it would be timely to initiate a pan-European dialogue on problems essential to citizens instead of abstract ideological dilemmas. He argued that this would, in the long run, reduce the distance between citizens and EU institutions. Recalling the conference co-organised by the Hungarian Ministry of Justice and the Ferenc Mádl Institute of Comparative Law last September, he concluded that Hungary was the first Member State to commence a discussion on the future of Europe. Bánki justified the importance of national parliaments, underlining that these institutions are the closest to citizens through their legitimately elected representatives. He pointed out that both e-commerce and the digital transition were given a significant boost during the COVID-19 pandemic, resulting in a 3% growth in the share of e-commerce transactions in global retail in a single year. He then drew attention to the double-edged joint impact of digitalisation and the pandemic: while digitalisation rendered commerce more resilient, the pandemic deepened the already-existing digital divide. As the chair pointed out, big tech became the biggest winner of the pandemic, while a number of SMEs have lost market share. Therefore, he argued, creating a comprehensive long-term strategy is necessary to help SMEs. While a market ecosystem would contribute to Europe's increased resilience, the demand side must also be prepared for imminent changes, and, to this end, they must be provided with proper guidance.

Following the presentations, the audience had the opportunity to address questions to the speakers. Minister of Justice *Varga*, reflecting on a question about the Digital Freedom Committee's involvement in promoting joint EU efforts regarding the DSA and DMA regulations, emphasised again that an EU-level solution is required, since big tech companies follow 'big numbers'. Thus, an entity with a population of 500 million is more influential than a member state of 10 million people. She added that what happens online reflects the offline world; however, regulating the former poses more significant challenges. State Secretary *Zacarias*, referring to the most significant achievements of the Portuguese Presidency, highlighted the Porto Social Summit, which offered an opportunity to raise awareness concerning the social aspects of the digital transition. One audience question enquired about the efficiency of the EU in guaranteeing the safety of European users' data, to which Director *Cervera Navas* replied by acknowledging that the EU has acted adequately in terms of data safety. Chairman *Bánki* addressed a question on the national parliaments' contribution to EU digitalisation objectives. He mentioned the integrated law-making initiated by the Hungarian government, which makes available each decision made by either the municipalities or Parliament.

Panel Discussion 2: *'Digitalisation and businesses: the future of European competitiveness'*

The panel discussion addressed the economic implications of digitalisation and the responsibilities of economic actors, Member States, and the European Union.

Fundamentally, all speakers agreed that Europe lags behind the rest of the world in this regard – most notably compared to the United States and China. They explored the reasons for this and possible solutions. One very important factor is the underdevelopment of the infrastructure needed for digitalisation, which will require significant development and resources if we are to build successful digitalisation programs.[9]

László György, State Secretary for Economic Strategy and Regulation of the Ministry of Innovation and Technology, stated that high regulatory standards in Europe have significantly increased living standards but at the same time represent a serious economic disadvantage for businesses on a global level. The speaker suggested that new competition and data protection rules are needed to allow large European digital companies to emerge. In addition, a strong industrial base and infrastructure are needed, which could serve as the basis for strategic autonomy. He also stressed the need to prevent hostile takeovers, and argued that practical examples are needed for the digitalisation of SMEs, such as the Hungarian Modern Model Plants program.[10]

In her presentation, *Valentina Superti*, Director at DG GROW, emphasised that businesses that invest in digital solutions are more likely to succeed than those that do not. In addition to public funds, the involvement of private capital is a condition for success in the PPP model.[11] She spoke about the European Commission's support for digitalisation in terms of three pillars: the adoption of the digital compass,[12] digital transformation roadmaps developed by each sector, and transformation initiatives such as local digital platforms for local economies.

Josephine Wood, Senior Program Officer at EuroHPC, reported that EuroHPC was launched as a European PPP with 33 participating States and two private sector supporters with the aim of procuring and commissioning supercomputers.[13] Eight supercomputers are being procured, and their computing capacity plays a major role in data analysis. In addition, training is being conducted to ensure that the professionals needed to operate them will be available.

Erzsébet Fitori, Group Head of EU Affairs and Relations of the Vodafone Group, addressed four important issues: political ambition, overcoming obstacles, assessing gaps, and making recommendations to bridge the digital divide. Within the policy field, she highlighted the need for high-level policies and the use of the PPP model. She added that the most important factor in reaching our goals is the development of infrastructure, which will serve as a basis for later steps. She underlined that the development of

9 Kotarba, 2017, pp. 123–138.

10 Available at: https://modem4.hu/ (Accessed: 1 August 2021).

11 Public-private partnership (PPP) is a very useful tool, especially for infrastructure development, based on mutually beneficial conditions and risk sharing. See: Tolstolesova et al., 2021.

12 See: https://ec.europa.eu/info/strategy/priorities-2019–2024/europe-fit-digital-age/europes-digital-decade-digital-targets-2030_hu (Accessed: 1 August 2021).

13 EuroHPC was established by Council Regulation (EU) 2018/1488. For information on its tasks. See: https://digital-strategy.ec.europa.eu/en/policies/high-performance-computing-joint-undertaking (Accessed August 1, 2021).

rural connectivity is an important goal, as 30% of EU citizens live in these areas, and the digital divide could deepen without a strong focus on this area.[14]

Balázs Nyers, Chief Operating Officer of SAP Labs Hungary, emphasised the essential role of new technologies in ensuring that businesses can continue to operate during the COVID-19 pandemic. China is seeking global leadership in the development of new technologies by relying on its vast internal market, while American companies have also benefited greatly from the liberal economic policies of the United States. Meanwhile, Europe is lagging far behind and is reacting to new challenges slowly.[15] He cited the lack of vaccine development by European companies and the introduction of the delayed EU Green Passport as examples of the backlog. Developments can only be made at the EU level, as Member States alone cannot compete with China or the United States in his view.

In her presentation, *Marie-Theres Thiell,* Vice President of the German-Hungarian Chamber of Commerce, emphasised that greater digitalisation often results in better efficiency but also requires investment. She said that digital administration is often expected by customers dealing with utilities. She also stressed the importance of education in digital skills, where older people should also be taken into account. In responding to a question on the effectiveness and attractiveness of Hungarian digital developments, Vice President *Thiell* complimented the flexibility and readiness of the Hungarian labour force in adapting to changes. She also underlined the convenience provided by the fact that Hungarian innovation and technological developments are guided and supervised by a common Ministry. Another technical question was addressed to *Ms. Fitori,* who enumerated three areas in which 5G systems perform better than 4G systems: increased speed, low latency, and capacity growth.

Panel Discussion 3: *'Digitalisation and European citizens: how to ensure an ethical transition?'*

Lennart Brand, head of the Managing Director of Leadership Excellence Institute at Zeppelin University, pointed out that judging and regulating the technology of the future under current ethical rules is harmful, as it hinders the emergence of the kind of new ethics that has always resulted from changing social situations.[16] Ethics has always followed the material framework of societies. In his opinion, the Judeo-Christian value system provides a permanent basis for the development of new ethics, by which new technologies can be regulated effectively. He mentioned as an example genome-modified humans (as a possible new human subspecies) and combat-robots, for which current ethics does not provide a solution but for which a new ethics may.

14 See: https://enrd.ec.europa.eu/sites/default/files/enrd_publications/smart-villages_orientations_digital-strategies.pdf (Accessed: 1 August 2021).

15 Korreck, 2021.

16 For an ethical approach to digital technology, see Capurro, 2017, pp. 277–283.

Professor *András Koltay*, Rector of the University of Public Service, examined the relationship between online platforms, freedom of speech, and the press,[17] pointing out that these platforms have no moral obligation to provide public services. They do have internal rules but lack procedural guarantees, a good example of which is the blocking of former US President Donald Trump.[18]

Among the regulatory options, he highlighted self- and co-regulation. Two solutions seem to have emerged in Member States: one focusing on the removal of illegal content (e.g. Germany) [19] and the other focusing on the protection of freedom of expression (e.g. Poland).

Krisztina Stump, Head of Unit of the Audiovisual and Media Policy Unit at the Directorate General for Communications Networks, Content and Technology, of the European Commission, also addressed regulatory issues but from a different perspective. She was concerned about the problem of online disinformation. The EU has been working on regulating this phenomenon since 2016 using self-regulation, which will become co-regulation once the Digital Services Act (DSA) is adopted. In her view, financial incentives for addressing disinformation content should be withdrawn. She also emphasised that disinformation should not be made impossible to spread; rather, it should be controlled.

Christopher Markou, an affiliated lecturer at the University of Cambridge, spoke about the possibility of involving AI in judicial work, which is a very sensitive subject for lawyers.[20] The question is whether we can reach the point where the machine will be able to evaluate all aspects taken into account by a judge. The 17th-century mathematician Gottfried Leibniz claimed that law is ideally structured like mathematics, giving a predictable result in the end, Markou however argues that making such a decision is almost impossible. He also referenced John von Neumann, who said that technology is moving towards singularity at such a rate that humanity cannot keep up with it. Automating decisions leads to a deterioration of legal language and lower standards, as it needs to be approximated to the binary language of machines. In his view, therefore, we should not allow the letter of the law to be applied in a way that is contrary to its spirit. Therefore, he argued that an impenetrable red line is required in this area.

Professor *Michel Cannarsa*, Dean of the Faculty of Law at the Catholic University of Lyon, focused on the regulation of AI, pointing out that, while it can increase efficiency, its risks must also be considered from legal and ethical points of view. He asserted that this should be the responsibility of developers, while at the same time, lawyers also need to learn about new technologies so that technology does not come to determine law in the long run.

17 Koltay, 2019, pp. 1–56.
18 Rodriguez, 2021.
19 See Germany's 'Facebook law' (Gesley, 2017).
20 Deakin and Markou, 2020.

Summary

The first panel discussion of the conference granted space for a discussion on the relationship between digitalisation and sovereignty. Judit Varga, Minister of Justice of Hungary, emphasized the importance of the principle of sovereignty and the role of national parliaments in the digital world. She highlighted that, to achieve an efficient digital transition in Europe, Member States need to cooperate with and rely on one another. Panellists pointed out that the digital European Union must serve the interests of European citizens. Making the digital world more sustainable is crucial for the future of a well-functioning European digital market. The minister spoke about the consequences of the monopoly held by big tech companies and underlined that the EU needs to take joint action in this regard. The EU lacks a convention on the protection of fundamental rights online; hence, the aim should be to implement legislation to protect citizens and to set a global example. To achieve global economic competitiveness, Europe needs to invest in technologies and innovation. Digitalisation has rendered commerce more resilient, yet the pandemic has widened the digital gap. At the end of each panel discussion, audience members – many of whom were representatives of youth organisations such as the Youth Business Group – had the opportunity to ask the speakers questions. The audience seemed to be particularly interested in the national parliaments' contribution to the digitalisation aims of the EU, as well as the level and effectiveness of digitalisation in Hungary.

In the second panel, the most important ideas revolved around the need for infrastructure development as a prerequisite for digitalisation. It was argued that rural populations must be taken into account in this process and that rural infrastructure development must be supported in order to avoid a digital divide. It was also observed that SMEs, which form the backbone of the European economy, find it more difficult to adapt to new challenges than American or Chinese digital companies do. It was claimed that digitalisation should not be treated as just a financial issue for SMEs and that the right models should be made available to them; an example of this is the modern model plants program in Hungary. Education and digital skills development are important and are also key for older people. In the area of regulation, it must be understood that high standards mean additional costs for businesses and put them at a competitive disadvantage in the global market. The speakers agreed that digitalisation will be successful only through the effective use of public–private partnerships.

The third panel discussion explored the social impact of digitalisation. Views differed on the importance of an ethical approach, as one speaker argued that we should wait for technology to create a new ethical framework, while others claimed that we need to address key issues before the new technologies fully emerge. In the field of regulation, online platforms and misinformation were key issues in the lectures. In Europe, self-regulation and co-regulation have become the primary solutions. Two lectures dealt with the regulation of AI. According to the speakers, in addition

to increasing efficiency, the dangers of technology must also be considered. This is especially true for the use of AI in the legal field, which may be promising but can also lead to a decline in legal standards. The main question was whether the letter of the law would be applied in way contrary to its spirit.

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