Acta Universitatis Sapientiae

Legal Studies

Volume 11, Number 1, 2022

Sapientia Hungarian University of Transylvania
Scientia Publishing House

Contents

Acta Univ. Sapientiae, Legal Studies, **11**, 1 (2022) 5–21

DOI: 110.47745/AUSLEG.2022.11.1.01

The British Isles and the Arctic Circle: Episodes from the Past and Present

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Abstract. This study deals with aspects of Britain's engagement with the region of the Arctic Circle, both in times past and during the present period. With regard to the past, it specifically looks at English and Scottish engagement with the area of Spitsbergen (present-day Svalbard, Norway), with a focus on exploration and whaling activities, and the competition that subsequently ensued with other European powers as a result. This also involves looking at legal issues that arose over time with regard to the archipelago. Furthermore, it examines how Svalbard has now once again become a source of contention, specifically between the European Union and Norway as a result of the allocation of fishing quotas that came about due to Brexit. This has caused tensions between the two entities, with both sides utilizing legal arguments to justify and bolster their positions. This incident is yet another example of the far-reaching impact that the restructuring of EU–UK relations has had as a result of the latter's departure from the former. Lastly, the article also surveys British engagement with the Arctic region at the present time, including Scotland's attempt at articulating an independent policy of engagement for itself with regard to the area.

Keywords: Arctic Circle, England, European Union, Scotland, Spitsbergen (Svalbard), United Kingdom

1. Introduction

The region of the Arctic Circle is a vital theatre of economic exploitation and geopolitical competition, a state of affairs that will only intensify in the future. As shall be seen in this study, our era is not the first period of history where such competition has occurred in that area. Here British (specifically English and Scottish) commercial activities in the Arctic region in the past will be examined,

specifically whaling in the Spitsbergen (now Svalbard)[1] archipelago in the present-day Kingdom of Norway. This involves a survey of the exploration of the region by the English Muscovy Company, attempts by the English Crown to exert sovereignty over the area, various rival claims that arose, and the archipelago's legal status. Furthermore, it shall be seen how Svalbard has now become once again a cause of contention and competition, specifically relating to the issue of fishing quotas, with tensions having arisen between the European Union and Norway in relation to this issue. It shall be seen that this issue is connected to Brexit, thus providing an example of the impact on the region of the UK's decision to leave the European Union. Additionally, certain modern developments regarding the UK's relations to the Arctic Circle shall be explored here, including an exploration of the United Kingdom's general attempt to engage with the Arctic Circle and articulate a policy with regard to it. Furthermore, Scotland's attempt to map out a distinct Arctic policy separately from the UK as a whole shall also be surveyed, which must be seen in the broader context of Brexit and the debate regarding possible future Scottish independence.

2. The English Muscovy Company

Originally, it was the Muscovy Company that established an English presence in the Arctic Circle. As to the background of its foundation, from the period of the early 1550s, there had been an attempt to obtain new markets due to a decrease in the export of cloth, which led in 1553 to the foundation of a company to look for passage to Cathay via a North-East route.[2] An expedition was led in the same year by Sir Hugh Willoughby, and it included three ships, with the merchants of London funding this project, though King Edward VI also gave his support to the mission.[3] Though this venture failed in its ultimate aim, it was of great importance as it established contact between England and Russia.[4] Richard Chancellor, who was the pilot for Willoughby's 1553 expedition, managed to get to the White Sea, and then later arrived in Moscow,[5] meeting Tsar Ivan IV in December 1553.[6] Before this meeting, Anglo-Russian relations practically did not exist, and each society knew little of the other.[7] Chancellor bore a letter from King Edward VI, addressed

1 The author shall refer to the area in question as Spitsbergen until the time of the full recognition of Norwegian sovereignty over the archipelago in 1920, and from then on he will use its official Norwegian name of Svalbard. See Churchill–Ulfstein 2010. 552.
2 Canny 1998. 60.
3 Gross 2019. 942.
4 Canny 1998. 60.
5 Kenyon 1994. 70.
6 Mund 2008. 351.
7 Ibid.

'to the Kings, Princes, and other Potentates, inhabiting the Northeast partes of the worlde, toward the might Empire of Cathay'.[8] The letter stated that 'certaine men of our Realme, mooued heereunto… have instituted and taken vpon them a voyage by sea into farre Countries, to the intent that betweene our people and them, a way may bee opened to bring in, and cary out marchandises, desiring vs to further their enterprise'.[9] The letter also went on to express the wish that there be 'an indissoluble and perppetuall league of friendship betweene us both', and that 'We therefore desire you kings and princes…, to permit vnto these our seruants free passage by your regions and dominions'.[10] Tsar Ivan responded favourably to the letter, writing in return to the English sovereign (who by this time was Queen Mary I)[11] that 'if you send one of your Majesty's council to treat with us, whereby your country merchant's may with all kinds of wares, and where they will, make their market in our dominions, they shall have their free mart with all free liberties through my whole dominions with all kinds of wares, to come and go at their pleasure'.[12] In 1555, King Philip and Queen Mary issued the Charter of the Merchants of Russia, thus establishing the English Muscovy Company.[13] Subsequently, the Muscovy Company sent Chancellor to Russia with two ships.[14]

3. British Whaling around Spitsbergen

Later, in 1577, the English Muscovy Company was granted by the English crown a monopoly for twenty years, which authorized it to engage in the hunting of whales 'within any seas whatsoever'.[15] However, at this time, the Muscovy Company did not engage in whaling in the Arctic Circle,[16] rather initially being focused on fin whales in Iceland's vicinity.[17] The development of England's whaling industry well reflected the growing mercantilist spirit in the country at the time, as well as the desire to increase its self-sufficiency.[18] At the same time, the Dutch, setting their sights beyond Western Europe and being desirous of a sea route to Asia, like the English, explored the possibility of finding such a route to

8 Quoted in Hakulyt 1886. 27.
9 Id. 28.
10 Ibid.
11 Gross 2019. 944.
12 Quoted in Hakluyt 1889. 60–61.
13 Hakluyt 1886. 101–112; Alan Day 2006. 205.
14 Gross 2019. 944. It is worth noting that Chancellor is considered to be the founder of Anglo-Russian relations, with 2021 having marked the 500th year anniversary of his birth, with various events organized to celebrate this across the Russian Federation. See Cork 2021.
15 Howard 1995. 39.
16 Jacob–Snoeijing 1984.
17 Jackson 2005. 2.
18 Id. 3.

their north[19] and also wished to gain a foothold with regard to Arctic trade.[20] This received official governmental support, with the States of Holland and Zeeland and the City of Amsterdam in 1594 subsidizing voyages in search of a northern passage.[21] Subsequently, Dutch explorer Willem Barentsz managed to reach Novaya Zemlya,[22] and in 1596 he also discovered the Spitsbergen archipelago,[23] an area in the Arctic located between the North Pole and Norway.[24] Later, in 1607, Henry Hudson, while in the service of the Dutch East India Company,[25] discovered the existence of whales and walruses in the vicinity of Spitsbergen.[26] In 1611, Jonas Poole, having been sent by the English Muscovy Company in search of the North-East passage and also land animals, spotted whales there, leading to the commencement of whaling at Spitsbergen,[27] a development which, according to one commentator, made 'Spitsbergen one of the most talked-of places in western Europe'.[28] English success eventually attracted others to the area, in particular the Dutch and Denmark–Norway, leading to fierce competition in the region. With regard to the latter, there were specific claims of sovereignty made with regard to the territory. King Christian IV of Denmark and Norway claimed that Spitsbergen belonged to the latter kingdom, a claim that was based on the false premise that Spitsbergen and Greenland were connected and also on the idea that the Arctic Ocean could be considered a closed sea (*mare clausum*).[29]

Due to this situation and in order to strengthen its claims in the area, the English Muscovy Company obtained from King James I a royal charter in 1613, which granted it exclusive rights to whale in Spitsbergen's waters.[30] In 1613, King James, given that Spitsbergen was in fact part of Denmark–Norway's Greenland territory, even offered to buy the archipelago from Christian IV.[31] Then, in 1614, King James I, though never acknowledging the Danish–Norwegian king's claims to Spitsbergen, offered to pay the latter rent in exchange for a shared monopoly for English subjects with Danes and Norwegians with regard to whaling in the area.[32] Eventually, however, in that same year, King James attempted to claim sovereignty over the territory.[33] Two explorers, William Baffin and Robert Fotherby were charged with this

19 Hacquebord 1995. 249.
20 Rudmose Brown 1919. 311.
21 Schilder 1984. 493.
22 Id. 496.
23 Hacquebord–Steenhuisen–Waterbolk 2003.
24 Churchill–Ulfstein 2010. 552.
25 Rossi 2015. 113.
26 Rudmose Brown 1919. 312.
27 Rudmose Brown 1919. 312; Hacquebord–Steenhuisen–Waterbolk 2003. 117.
28 Rudmose Brown 1919. 312.
29 Knaplund 1926. 386.
30 Dolin 2007. 24.
31 Rossi 2017. 152.
32 Rabot 1919. 225.
33 Mühlenschulte 2013. 5.

task.[34] They raised King James' standard and placed a cross on the territory, and also, in order to show that they had taken lawful possession of Spitsbergen on behalf of the king, removed earth from the area.[35] In response to King James's attempt to claim Spitsbergen in 1614, Christian IV sent warships to the archipelago and continued to do so until 1643.[36] Furthermore, he even sent diplomatic missions to various European courts in order to promote his claim, but these were unsuccessful.[37]

Ultimately, England's attempts at gaining control over the archipelago did not succeed.[38] Various incidences took place in the area between the English, Dutch, and Denmark–Norway,[39] these together being described by one commentator as 'the first colonial conflict among European nations'.[40] None of these states were able to maintain exclusive control over Spitsbergen and its waters,[41] and eventually the Dutch view,[42] that is, *mare liberum*, or freedom of the seas, prevailed, as opposed to the concept of *mare clausum*, that is, the idea of a closed sea, thus opening up the waters of the area to all whalers.[43] Various agreements between different whalers regarding the sharing of the area come into being, though even then tensions continued to persist.[44] Eventually, by the middle of the seventeenth century, the Dutch came to dominate whaling in the Spitsbergen area.[45] Part of the Dutch success was connected to the model of free enterprise which they followed, while British whaling interests relied upon being granted royal charters and the creation of monopolies, which included attempts to exclude not only foreign but also domestic rivals, making it difficult to successfully compete against the Dutch in whaling around Spitsbergen.[46]

It must also be added here that from among the constituent nations of the present-day United Kingdom, not only the English but also the Scottish attempted to become involved in Spitsbergen whaling. Scots themselves participated in whaling expeditions of the Muscovy Company in the earlier part of the seventeenth century and were also involved in Dutch expeditions.[47] With regard to the attempt

34 Rudmose Brown 1919. 314.
35 Mancall 2018. 87.
36 Rossi 2015. 118.
37 Richards 2003. 593.
38 Mühlenschulte 2013. 5.
39 It should also be noted that the French and Spanish-Basques lacked state support and capital in pursuing their interests in the region. See Richards 2003. 593.
40 Rabot 1919. 225.
41 Grant 2010. 75.
42 Dutch naval superiority played a decisive role in thwarting English ambitions in the area. See Mühlenschulte 2013. 5.
43 Richards 2014. 131. For further information regarding these concepts and the historical context, see Haitas 2019. 74–75.
44 Grant 2010. 75.
45 Ibid.
46 Sanger 1995. 15.
47 Sanger 2007. 162.

to establish an independent Scottish presence in this trade, King James VI and I, in his capacity as King of Scotland,[48] granted a patent in 1618 to a group of English, Scots, and Zealanders, which aimed to 'make the whale-fishery trade more general'.[49] The patent provided for 'all power and freedom to trade to all those countries which the English [East India] Company previously earlier has been privileged', granting the company rights to trade at Spitsbergen, as well as in the Levant and Muscovy.[50] However, this was subsequently annulled as it was seen as detrimental to the Muscovy and East India companies' privileges, thus allowing these companies to continue their monopoly in this area.[51] Later, in 1625, a certain Nathanial Edwards, along with his partners, was granted a royal licence to whale in the vicinity of Spitsbergen, a move which was also resisted by English whalers, with the Muscovy Company seeing it as infringing upon its own rights and privileges, with tensions and even physical altercations taking place.[52] There were also other seventeenth-century attempts by the Scots to establish themselves in the Spitsbergen whale trade, but these were ultimately unsuccessful.[53]

4. Svalbard and Fishing Quotas

As a result of the unregulated nature of whaling in the area, the Spitsbergen archipelago's resources became greatly depleted over time.[54] Thus, the whaling industry in the area began to wane eventually, specifically from around the late eighteenth to around the middle of the nineteenth century, and interest in the area was lost.[55] From a legal perspective, Svalbard gained the status of a *terra nullius*.[56] However, in the twentieth century, the area was eventually brought into focus again as a result of mineral interests in the region.[57] Norway, which had gained its independence in 1905, proposed a new legal framework with regard to the archipelago, and eventually, after World War I, the Spitsbergen Commission decided that the area should come under Norwegian sovereignty.[58] Subsequently, in 1920, the Spitsbergen/Svalbard Treaty was signed, coming into force in August 1925.[59] Presently, Norway, 22 of the European Union's Members States, plus

48 Sanger 1995. 18.
49 Scoresby 1820. 33–34.
50 Wagner 2020. 582.
51 Scoresby 1820. 33–34.
52 Sanger 1995. 19.
53 Sanger 1995. 21.
54 Churchill–Ulfstein 2010. 552.
55 Rossi 2015. 118.
56 Churchill–Ulfstein 2010. 552.
57 Rossi 2015. 118.
58 Churchill–Ulfstein 2010. 553.
59 Jensen 2020. 82.

23 other states adhere to this treaty.[60] The Treaty finally brought Spitsbergen/Svalbard's *terra nullius*, or no man's land status, to an end.[61] The Spitsbergen/Svalbard Treaty recognizes 'the full and absolute sovereignty of Norway over the Archipelago of Spitsbergen'.[62] However, the Treaty also stipulates that 'ships and nationals of all High Contracting Parties shall enjoy equally the rights of fishing and hunting' in the archipelago, though at the same time 'Norway shall be free to maintain, take or decree suitable measures to ensure the preservation and, if necessary, the re-constitution of the fauna and flora' of the region.[63]

Recently, Svalbard has once again become a bone of contention, this time within the broader context of Brexit and due to the need to redefine the relationship between the United Kingdom and the European Union.[64] The issue specifically relates to the determination of fishing quotas in the Svalbard area. On 18 December 2020, Norway allocated to the European Union 17 885 tons of cod in the Fisheries Protection zone in Svalbard's vicinity.[65] However, the European Union allocated to itself 28 431 tons of Arctic cod in the archipelago in late January 2021.[66] In response to this action, the Norwegian Ministry of Foreign Affairs stated that 'The European Union has no right under international law to establish fishing quotas in waters under Norwegian jurisdiction in contravention of Norwegian regulations. Any internal regulations of the EU cannot under international law exceed the relevant quotas accorded to EU vessels by Norway as the coastal state'.[67] More specifically, according to Norway, the EU's actions in this matter are contrary to the sovereign rights of the Kingdom of Norway according to the law of the sea.[68] As to the background to this issue, in 1977, a fisheries protection zone of 200 nautical miles was established, and from that time Norway allocated fishing quotas for third countries.[69] Norway claimed that in its calculation for the European Union's 2021 quota as a result of Brexit, UK fishing activities could no longer be taken into account and that instead the quota was based on the fishing patterns of the remaining 27 Member States.[70]

60 European Commission. Fisheries in Svalbard.
61 Jensen 2020. 82.
62 Treaty of 9 February 1920 relating to Spitsbergen, Article 1.
63 Treaty of 9 February 1920 relating to Spitsbergen, Article 2.
64 It should be mentioned here that another controversy regarding Svalbard between the European Union and Norway in recent times has involved the issue of fishing for snow crabs. See The Supreme Court of Norway 2021.
65 Royal Ministry of Foreign Affairs 2021. 1.
66 Council Regulation (EU) 2021/92 of 28 January 2021 fixing for 2021 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in Union waters and, for Union fishing vessels, in certain non-Union waters.
67 Royal Ministry of Foreign Affairs 2021. 1.
68 Bates 2021.
69 Ibid.
70 Annex: *Svalbard, the 200-Mile Fisheries Protection Zone and Norway's Fisheries Regulations*. 5.

However, the European Union emphasizes that the abovementioned Article 2 of the Treaty of Spitsbergen also states that measures for the preservation of the flora and fauna are to 'always be applicable equally to the nationals of all the High Contracting Parties to the Treaty without any exemption, privilege or favour whatsoever, direct or indirect to the advantage of any of them'.[71] The European Union claims that it has been discriminated against by the Norwegian government, which they claim is giving special treatment to Norwegian and Russian fishers[72] and that Norway's setting quotas in the region without the involvement of the states concerned is in contravention of international law.[73] The European Union argues that Norway has set the quota 'on a purely arbitrary basis', having done so without consulting the European Union.[74] It has also argued that it has concerns about the depletion of Arctic cod stock due to Norway's (and Russia's) fishing practices in the waters of Svalbard and Norway's north.[75] It was reported that the European Union has considered placing sanctions on Norway due to this disagreement[76] and that the EU's fishing industry is preparing to take Norway to court over its actions regarding the quota cut in relation to cod fishing in the waters of Svalbard.[77]

Norway has now passed legislation[78] that still allows EU vessels to fish in the Svalbard area, but any cod they catch is to be subtracted from the permitted amount established for fishing in the economic zone of Norway.[79] Norway has claimed that if fishers from the EU exceed the quota it has set on fishing, then this action will be considered illegal.[80] The geopolitical context of this issue must also be acknowledged, which relates to the opportunities arising in the area of resource exploitation and shipping in this region as a result of global warming, and Norway's fear that as a result the EU is utilizing a legal mechanism in order to do this.[81]

Regarding the United Kingdom, in December 2021, it managed to reach an agreement with Norway concerning mutual access to each other's fisheries and quotas for the next year, this being these two countries first fishing deal after Brexit.[82] As part of this deal, for the year 2022, the United Kingdom was allocated 6,550 tonnes of cod by Norway around Svalbard.[83] On a final note, it has also been reported that the UK government had attempted to persuade Norway to allow it

71 European Commission. Fisheries in Svalbard.
72 Moens–Galindo 2021.
73 European Commission 2021.
74 European Union – Delegation of the European Union to Norway 2021. 2. 26 February 2021.
75 European Commission 2021.
76 *The Fishing Daily* 30 July 2021.
77 Feijóo 2021.
78 J-165-2021: Regulation on stopping cod fishing for vessels flying the flag of Member States of the European Union (EU) in the fisheries protection zone off Svalbard in 2021.
79 *The Fishing Daily* 12 September 2021.
80 Moens–Galindo 2021.
81 Ibid.
82 AFP News 2021.
83 Department for Environment, Food & Rural Affairs 2021.

to buy part of the Svalbard archipelago for 250 million pounds with the aim of increasing the country's fishing waters.[84] Such an attempt by the United Kingdom in modern times is quite interesting to consider when one keeps in mind the earlier efforts by the English crown to establish a presence or even sovereignty in the area.

5. The Arctic Circle, Present UK Policy, and Scotland

Now we shall move beyond the issue of Svalbard and onto the matter of the United Kingdom's general engagement with the Arctic Circle at the present time. In 2013, the British government launched its Arctic policy framework with the document *Adapting to Change: UK Policy towards the Arctic*.[85] In fact, this was the first time that a British government had attempted to articulate a detailed policy regarding the region.[86] It is interesting to note that the document links the UK's present interests in the region to the past connections the country once had to the area, stating that 'This closeness, combined with a long tradition of exploration, has given the UK a historic interest in the Arctic that dates back to the voyages of discovery.'[87] The document acknowledges that though technically the UK is 'not an Arctic State… we are the Arctic's nearest neighbour'.[88] This policy includes maintaining support for the sovereignty of Arctic States, their populations, and the natural environment, while at the same time being committed to British interests in the region.[89] It states that 'The inextricable links between the Arctic and global processes means that non-Arctic States such as the UK have legitimate interests and roles to play in finding solutions to many of the most pressing issues facing the Arctic'.[90] It is also interesting to note that the document makes specific mention of a UK-based research located on the island of Svalbard, which was established in 1991 and which engages in various research projects, focusing on such areas as atmospheric physics, geology, glaciology, hydrology, or marine and terrestrial biology.[91]

This has been described as the first such document by an Arctic Council observer state.[92] The United Kingdom obtained observer status in the Arctic Council in 1998.[93] As to the background of this organization, it came into being in 1996 with the *Ottawa Declaration* of 19 September 1996, its members being Canada, Denmark, Finland, Iceland, Norway, Russia, Sweden, and the

84 Hope 2021.
85 HM Government 2013.
86 HM Government 2013. ii.
87 HM Government 2013. 7.
88 HM Government 2013. ii.
89 Ibid.
90 HM Government 2013. 7.
91 HM Government 2013. 11.
92 Arctic Office. Arctic Policy Framework.
93 Arctic Council 2020.

United States.[94] According to the *Ottawa Declaration*, the Arctic Council was established in order to 'provide a means for promoting cooperation, coordination and interaction among the Arctic States, with the involvement of the Arctic indigenous communities and other Arctic inhabitants on common Arctic issues, in particular issues of sustainable development and environmental protection in the Arctic'.[95] The organization claims to be 'the leading intergovernmental forum promoting cooperation, coordination and interaction among the Arctic States, Arctic Indigenous peoples and other Arctic inhabitants on common Arctic issues.'[96] The *Ottawa Declaration* makes provisions for granting observer status to countries that fulfil the stipulated criteria, which include non-Arctic states, global and regional inter-governmental and inter-parliamentary organizations and non-governmental organizations that the Arctic Council determines are able to contribute to the work of the organization.[97]

With the United Kingdom's exit from the European Union, it has had to formulate a foreign policy as a non-Member State of the latter. The Arctic Circle is one area where a policy has been articulated within this broader context. For example, the UK government's policy document *Global Britain in a Competitive Age*, which sets out the government's vision for the United Kingdom in international relations, reiterates this interest in and commitment to the Arctic region, stating that 'The UK is the nearest neighbour to the Arctic region. Through our role as a State Observer to the Arctic Council, we will contribute to maintaining the region as one of high cooperation and low tension.'[98] It goes on to say that the UK will continue to contribute to scientific endeavours related to the Arctic, with particular regards to the study of climate change, and that it will work with its 'partners to ensure that increasing access to the region and its resources is managed safely, sustainably and responsibly'.[99]

Scotland, though a constituent nation of the United Kingdom, has also focused more attention on the Arctic region in an attempt to create a foreign policy distinct from and more independent of the UK government in London.[100] Of course, this should also necessarily be viewed within the broader context of the issue of the possibility of a future independent Scotland.[101] The Scottish government launched its policy document in 2019, entitled *Arctic Connections: Scotland's Arctic Policy Framework*.[102] The Ministerial Foreword to the document explicitly states that

94 *Declaration on the Establishment of the Arctic Council* 1996.
95 Id. Article 1.
96 Arctic Council. About the Arctic Council.
97 Declaration on the Establishment of the Arctic Council 1996. Article 3.
98 HM Government 2021. 64.
99 HM Government 2021. 64.
100 *Over the Circle* 2019.
101 Ibid.
102 Scottish Government 2019.

'The United Kingdom's exit from the European Union puts our international partnerships, including with Arctic countries, at risk. We are determined to protect Scotland's reputation as an open and outward-looking nation and we are re-doubling our efforts at promoting Scotland as a good global citizen'.[103] It claims that 'Scotland's northernmost islands are closer to the Arctic Circle than they are to London'.[104] It wishes to place this Arctic connection within its broader historical framework, stating that 'For centuries, Scotland and the Arctic have enjoyed close links that have had a lasting impact on our cultural, economic and social fabric. While most visible in our northernmost areas, these bonds are evident across the country and lie at the heart of our valued relationship with Arctic states. Scotland is among the Arctic region's closest neighbours; we share many features and outlooks and have long looked to each other for inspiration, solutions and ideas.'[105] The document refers to 'consolidating Scotland's position as a European gateway to the Artic'.[106] The initiative makes it clear that this is completely complimentary to Scotland's connections to the European Union.[107] Additionally, there have even been suggestions of Scotland playing a role in the development of shipping lanes and of the Orkney islands becoming the 'Singapore of the North'.[108] However, it has been pointed out that Scotland's ability to be an influential player in the Arctic region acting in its capacity as a devolved nation of the United Kingdom is limited due to the key roles of defence and security in the region, these being competences firmly in the hands of Westminster.[109] On a final note, it is also interesting to consider that if Scotland does one day attain independence how this will in fact impact the United Kingdom's Arctic policy and its ability to project its power and pursue its interests in that region. For example, in the abovementioned 2013 *Adapting to Change*, it is stated that 'The UK is the northernmost country outside of the eight Arctic States; the northern tip of the Shetland Islands being only 400 km south of the Arctic Circle'.[110] If indeed Scotland one day attains independence, this would obviously no longer be the case.

6. Conclusions

As seen in this study, Britain played an important role in the Arctic Circle in the past, specifically with regard to whaling around the Spitsbergen/Svalbard

103 Id. 3.
104 Id. 5.
105 Id. 3.
106 Id. 3.
107 Id. 6–7.
108 Somynne 2017.
109 Ibid.
110 HM Government 2013. 7.

archipelago, which was a theatre of competition between various European powers. Now, once again, Svalbard is a scene of competition within the broader Arctic Circle, once again relating to the exploitation of its marine life, a state of affairs intensified and precipitated as a result of the realignment of the relationship between the United Kingdom and the European Union. Thus, the present 'cod war'[111] taking place between the European Union and Norway can be seen as one of the consequences of Brexit, with the realignment and readjustment of EU–UK relations having a knock-on effect in other areas. With regard to the Arctic Circle more broadly, the United Kingdom has attempted to articulate a policy in the light of the growing geopolitical importance of this region. With the country's need to establish an international identity for itself as a state now outside of the European Union and with the region's growing importance as time passes, one can imagine that this will only intensify in the future. Additionally, Scotland now seeks to establish an Arctic policy and vision for itself, a process that must also necessarily be seen within the context of the debate surrounding Scotland's status and future regarding its place within the United Kingdom.

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Acta Univ. Sapientiae, Legal Studies, **11**, 1 (2022) 23–45

DOI: 110.47745/AUSLEG.2022.11.1.02

Legal Position of the Consumer in the Event of a Lack of Conformity of the Goods in Croatian and Serbian Law

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Abstract. The objective of this paper is to analyse the legal position of the consumer in the event of a lack of conformity of the goods in Croatian and Serbian law. The national regulations governing this issue in both states are influenced by the legislation of the European Union. More specifically, Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees influenced the Serbian Consumer Protection Act, while the said Directive and the new Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods influenced the Croatian Act on Obligations. However, both legislators preserved certain specific rules, most notably the ones pertaining to the rescission of the contract. Given the fact that Serbia has not yet harmonized its Consumer Protection Act with Directive (EU) 2019/771, its regulation is to be assessed taking into account only Directive 1999/44/EC. In comparing the two legal orders, the paper discusses several issues in relation to consumer sales, such as the sources of law in this field and their application, basic definitions and the notion of conformity of the goods with the contract and consumers' rights in the event of a lack of conformity, with the aim to identify differences, similarities, and specificities. It can be inferred that the main differences concern the regulatory approach, the definition of the notion of conformity of the goods with the contract, and certain specific rules relating to the rescission of the contract. On the other hand, the main similarities regard the hierarchy of the rights at the disposal of the consumer and the time limit during which the seller may be held liable.

Keywords: lack of conformity of the goods, rights of the consumer, consumer protection, Serbian Consumer Protection Act, Croatian Act on Obligations

1. Introduction

Issues concerning consumer protection, particularly the rights of the consumer in the event of a lack of conformity of the goods with the contract, are recurrent, and it can be freely said that they are present in the everyday life of each citizen. This fact accentuates their crucial importance in modern society and the necessity to provide legal protection to consumers. Undoubtedly, their importance is growing exponentially in today's world. Croatia and Serbia are not an exception in this regard either.

The statutory rules of both countries are influenced by the legislation of the European Union, but in different ways. While Croatia, as a member of the European Union, has a direct obligation to transpose the *acquis communautaire*, Serbia, as a candidate country at present, has only an obligation to gradually harmonize its national legal order with that *acquis*. The essence of this paper is the analysis of the position of the consumer in case of the lack of conformity in Croatian and Serbian law, but it will not be limited solely to this issue. The paper also analyses sources of consumer protection law in these states, their application and fundamental notions, including the definition of conformity of the goods. The objective of the paper is to identify peculiarities, similarities, and, especially, differences between these two legal systems regarding the position of the consumer. Taking into account the fact that Croatia in 2021 amended its central piece of legislation governing these issues, i.e. the Act on Obligations, this paper also analyses and compares legal rules contained in this law both before and after the mentioned amendments.

2. Sources of Law and Their Application

2.1. Croatia

Croatia, concluding and ratifying the Stabilisation and Association Agreement with the European Communities,[1] undertook the obligation to harmonize its legislation and align the level of consumer protection to that in force in the Community. In order to achieve this objective, Croatia agreed to cooperate with other parties to the Agreement. The result of its activities aimed at the harmonization of the legislation and the alignment of consumer protection was the adoption of a set of laws, beginning from 2003, when the first Consumer Protection Act[2] was adopted,

1 Zakon o potvrđivanju Sporazuma o stabilizaciji i pridruživanju između Republike Hrvatske i Europskih zajednica i njihovih država članica [Act on Ratification of the Stabilisation and Association Agreement between the Republic of Croatia and the European Communities and Their Member States]. *Narodne novine* [Official Gazette] 14/2001. Titles are translated by the authors. Unless otherwise specified, all translations are by the authors.

2 Zakon o zaštiti potrošača [Consumer Protection Act]. *Narodne novine* [Official Gazette] 96/2003.

until today. Provisions protecting consumers are also contained in the Act on Trade,[3] Act on Energy,[4] Act on the General Safety of Products,[5] etc. The Consumer Protection Act[6] (hereinafter: the CPA), as the general law in the field of consumer protection still in force, was adopted in 2014. Among other issues, it deals with business-to-consumer practices, special forms of sale, public services provided to consumers, and unfair terms in consumer contracts.

In Croatian law, the provisions of Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees (hereinafter: the Directive 1999/44/EC) were transposed into the Act on Obligations[7] (hereinafter: the AO), passed in 2005, and not into the CPA. Croatia also transposed Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods (hereinafter: the Directive (EU) 2019/771), amending the AO in 2021, whereby the novel provisions do not apply to contracts concluded before 1 January 2022.[8] Therefore, issues concerning the rights of the consumer in the event of a lack of conformity with the contract are regulated by the AO.[9] Its provisions regarding the liability for material defects apply to contracts concluded between two natural persons, between two legal persons and even to consumer sales contracts. The AO explicitly limits the application of certain provisions to consumer sales contracts. In this manner, the Croatian legislator avoided the fragmentation of the regulation of the liability for material defects in civil and commercial sales contracts on the one hand and for consumer sales contracts on the other. A uniform regulatory approach – with certain exceptions for consumer sales contracts made with the intent to meet the requirements of the harmonization of Croatian consumer protection law with EU law – was deemed the best and most desirable legislative approach.[10] The AO may also be considered *lex generalis* in the field of consumer contract law given the fact that the provisions of the AO apply to business-to-consumer contractual civil obligations, unless otherwise determined by special laws governing specific administrative areas, which have been harmonized with the *acquis communautaire*, or by the CPA itself.[11]

3 Zakon o trgovini [Act on Trade]. *Narodne novine* [Official Gazette] 87/2008.

4 Zakon o energiji [Act on Energy]. *Narodne novine* [Official Gazette] 20/12, 14/14, 95/15, 102/15, 68/18.

5 Zakon o općoj sigurnosti proizvoda [Act on General Safety of Products]. *Narodne novine* [Official Gazette] 30/09, 139/10, 14/14, 32/19.

6 Zakon o zaštiti potrošača [Consumer Protection Act]. *Narodne novine* [Official Gazette] 41/2014.

7 Zakon o obveznim odnosima [Act on Obligations]. *Narodne novine* [Official Gazette] 35/05, 41/08, 125/11, 78/15, 29/18, 126/21.

8 Act on Amendments to the AO, Art. 22.

9 Given the fact that the Croatian legislator transposed the provisions of Directive 1999/44/EC and of the Directive (EU) 2019/771 in the AO containing general rules of contract law, the terminology used is different. For example, the AO uses the term object (*stvar*) instead of the goods and the term material defect (*materijalni nedostatak*) instead of lack of conformity.

10 Petrić 2007. 97–98.

11 Croatian CPA, Art. 4.

2.2. Serbia

The importance of the protection of consumers in Serbian law is emphasized by the fact that the Constitution,[12] as the highest legal-political act, establishes the obligation of the Republic of Serbia to protect consumers and stipulates that activities directed against health, security, and privacy of the consumers, as well as other unfair commercial practices, shall be strictly prohibited.[13] Ratifying the Stabilisation and Association Agreement[14] concluded with the European Union, Serbia undertook the obligation of ensuring the harmonization of its consumer law with that in force in the Community. Bearing in mind the requirement to harmonize the standards of consumer protection to those applied in the Community, Serbia committed itself to cooperate with the European Union and its Member States.

Until the adoption of the first Consumer Protection Act[15] at the federal level in 2002, consumer protection issues were regulated by various laws such as the Act on Obligations[16] (hereinafter: the AO), the Trade Act,[17] and the Standardisation Act.[18] Serbia, as part of the State Union of Serbia and Montenegro, adopted its Consumer Protection Act[19] in 2005 and subsequently, already as an independent state, adopted a new Consumer Protection Act in 2010,[20] another one in 2014,[21] and the latest one in 2021,[22] repealing the Act of 2014.[23]

12 Ustav Republike Srbije [Constitution of the Republic of Serbia]. *Službeni glasnik RS* [Official Gazette of the Republic of Serbia] 83/06.

13 Constitution of the Republic of Serbia, Art. 90.

14 Zakon o potvrđivanju Sporazuma o stabilizaciji i pridruživanju između evropskih zajednica i njihovih država članica, s jedne strane, i Republike Srbije, s druge strane [Act on Ratification of the Stabilisation and Association Agreement between the European Communities and Their Members on One Side and the Republic of Serbia on the Other Side]. *Službeni glasnik RS* [*Official Gazette of the Republic of Serbia*] 83/08.

15 Zakon o zaštiti potrošača [Consumer Protection Act]. *Službeni list SRJ* [Official Gazette of the Federal Republic of Yugoslavia] 37/2002.

16 Zakon o obligacionim odnosima [*Act on Obligations*]. *Službeni list SFRJ* [*Official Gazette of the Socialist Federal Republic of Yugoslavia*] 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia and 57/89; *Službeni list SRJ* [*Official Gazette of the Federal Republic of Yugoslavia*] 31/93; *Službeni list SCG* [Official Gazette of Serbia and Montenegro] 1/2003 – Constitutional Chapter and Službeni glasnik RS [Official Gazette of the Republic of Serbia] 18/2020.

17 Zakon o trgovini [Trade Act]. *Službeni list SRJ* [Official Gazette of the Federal Republic of Yugoslavia] 32/93, 50/93, 29/96.

18 Zakon o standardizaciji [Standardisation Act]. *Službeni list SRJ* [Official Gazette of the Federal Republic of Yugoslavia] 30/96, 59/98, 70/2001, 8/2003.

19 Zakon o zaštiti potrošača [Consumer Protection Act]. *Službeni glasnik RS* [Official Gazette of the Republic of Serbia] 79/2005.

20 Zakon o zaštiti potrošača [Consumer Protection Act]. *Službeni glasnik RS* [Official Gazette of the Republic of Serbia] 73/2010.

21 Zakon o zaštiti potrošača [Consumer Protection Act]. *Službeni glasnik RS* [Official Gazette of the Republic of Serbia] 62/2014, 6/2016 – special laws and special law 44/2018.

22 Zakon o zaštiti potrošača [Consumer Protection Act]. *Službeni glasnik RS* [Official Gazette of the Republic of Serbia] 88/2021.

23 The Act of 2014 was repealed on the date of the commencement of the application of the new

The Consumer Protection Act deals with various issues relating to the protection of consumers such as the information and education of consumers, unfair commercial practices, consumer protection in exercising the rights from contracts containing unfair terms or the rights deriving from sales contracts, guarantees, consumer safety, strategy and system of consumer protection, etc. For the purposes of this article, the issues regarding the conformity of goods with the contract, liability for the lack of conformity, request for the removal of the lack of conformity, time limits, and the rules on the burden of proof contained in the CPA, based on the provisions of Directive 1999/44/EC, are the most important. The transposition of the provisions of Directive 1999/44/EC have already occurred by the adoption of the Consumer Protection Act of 2010.[24]

Furthermore, it is necessary to stress that the AO, regulating the creation, effects, modification, and cessation of obligations, but lacking a definition of consumer, contains provisions concerning the liability of the seller for substantive defects (art-s 478–500). They apply to relations between two natural persons, between two legal persons, or between a natural and a legal person, outside the context of consumer law. On the other hand, the provisions on the liability for a lack of conformity contained in the CPA applies to sales contracts in a consumer context (that is, if one of the parties is qualified as a consumer). However, if a specific legal issue is not governed by the provisions of the CPA, the provisions of the AO will apply if they do not reduce the degree of protection granted to the consumer by the CPA.[25]

3. Basic Statutory Definitions and the Notion of Conformity of the Goods with the Contract

3.1. Croatia

The definitions of essential and fundamental notions are given in the Croatian CPA. Consumer is defined as any natural person concluding a contract or acting for purposes which are outside of his/her trade, business, craft, or profession.[26] Trader, as the other party to a consumer contract, is any person concluding a contract or acting for purposes relating to his/her trade, business, craft, or

Act of 2021. It specified that it shall, in the most part, be applied starting from the expiration of three months from the date of its entry into force (19 September). This means that the new Act of 2021 is applicable as of 20 December 2021. However, provisions on the position of the consumer in the event of a lack of conformity remained the same as in the previous CPA of 2014. The only difference concerns the definition of the notion of goods.

24 Karanikić Mirić 2010. 137; Dudaš, 2021. 946.

25 Karanikić Mirić 2011. 177; Dudás 2020. 1059.

26 Croatian CPA, Art. 5, Sec. 1, P. 15.

profession, or anyone acting in the name or on behalf of a trader.[27] The goods, as the object of the consumer contracts, are any tangible movable items with the exception of items sold by way of enforcement or otherwise by authority of the law, water, gas, and electricity if they are put up for sale in a limited volume or in a set quantity.[28] The CPA also contains the definition of consumer sales contract. It is any contract under which the trader transfers or undertakes to transfer the ownership of goods to the consumer and the consumer pays or undertakes to pay the price thereof, including any contract having as its object both goods and services.[29] All these definitions are in line with the definitions contained in Art. 1 of Directive 1999/44/EC.

The legislator, amending the AO in 2021, dedicated Art. 399a to fundamental notions. The definition of consumer is identical to the one contained in the CPA, while the notion of consumer contract is defined in a similar manner as in the AO before the 2021 amendments.[30] Transposing the provisions contained in Art. 2 of Directive (EU) 2019/771, the amendments of the AO introduced the definitions of the notions of producer,[31] digital content,[32] digital service,[33] compatibility,[34] functionality,[35] interoperability,[36] and durable medium.[37]

Concerning the cases in which a material defect exists, the AO maintained the *numerus clausus,* envisaging a higher number of cases compared to their number

27 Id. P. 26.

28 Id. P. 22.

29 Id. P. 29.

30 Before the adoption of the amendments of the AO, the notion of consumer contract was defined in Art. 402 as a contract entered into by a natural person as the buyer, outside his/her economic and professional activity, with the natural or legal person as the seller, within the framework of his/her economic or professional activity. The definition of consumer contract contained in Art. 399a includes, additionally, the person acting on behalf of the seller.

31 Art. 399a, Sec. 1, P. 3 of the Croatian AO: Producer is a person who manufactured the object, imported the object into the European Union or any other person purporting to be a producer by placing his/her name, trademark, or other distinctive sign on the object.

32 Art. 399a, Sec. 1, P. 4 of the Croatian AO: Digital content is data which are produced and supplied in digital form.

33 Art. 399a, Sec. 1, P. 5 of the Croatian AO: Digital service is a) a service that allows the consumer to create, process, store, or access data in digital form or b) a service that allows the sharing of any other interaction with data in digital form uploaded and created by the consumer or other users of that service.

34 Art. 399a, Sec. 1, P. 6 of the Croatian AO: Compatibility is the ability of the object to function with hardware or software with which an object of the same type is normally used, without the need to convert the object, hardware, or software.

35 Art. 399a, Sec. 1, P. 7 of the Croatian AO: Functionality is the ability of the object to perform their functions having regard to their purpose.

36 Art. 399a, Sec. 1, P. 8 of the Croatian AO: Interoperability is the ability of the object to function with hardware or software different from those with which an object of the same type is normally used.

37 Art. 399a, Sec. 1, P. 9 of the Croatian AO: Durable medium is any instrument which enables the consumer or the seller to store information addressed personally to that person in a way that is accessible for future reference, for a period of time adequate for the purposes of the information, and which allows the unchanged reproduction of the information stored.

in the AO before the adoption of the amendments[38] and differentiating subjective and objective requirements of conformity, which is the consequence of the transposition of art-s 6 and 7 of Directive (EU) 2019/771. Subjective requirements of conformity take into account the intention of the parties expressed in the sales contract. According to the AO,[39] a material defect exists:

– if the object does not correspond to the description, type, quantity, and quality or does not possess functionality, compatibility, interoperability, and other features required by the sales contract;

– if it is not fit for any particular purpose for which the buyer requires it and which the buyer made known to the seller at the moment of the conclusion of the sales contract at the latest and in respect of which the seller has given acceptance;

– if it is not delivered with all accessories and instructions, comprising installation, as stipulated by the sales contract; or

– if it is not supplied with updates as stipulated by the sales contract.

In addition, the legislator enumerated the objective requirements of conformity[40] stating that a material defect also exists:

– if the object is not fit for purposes for which objects of the same kind are normally used, taking into account any existing law of the European Union and of the Republic of Croatia, technical standards, or, in their absence, applicable codes of conduct in the specific sector;

– if it does not correspond to the quality and description of a sample or model that the seller made available to the buyer before the conclusion of the contract;

– if it is not delivered with additional accessories, comprising packaging, installation instructions or other instructions, as the buyer may reasonably expect to receive;

– if it is not of the quantity or does not possess qualities and other features, including durability, functionality, compatibility, and security normally required

38 According to Art. 401 of the AO before the adoption of the amendments, a material defect shall exist:
– if the object lacks the qualities required for its regular use or circulation;
– if it lacks the qualities required for the specific purpose the buyer intends to use it for and where it was known or should have been known to the seller;
– if it lacks qualities or characteristics which were agreed or stipulated expressly or by implication;
– if the seller has delivered an object that does not conform to the sample or model, unless the sample or model has been shown for information purposes only;
– if it lacks qualities otherwise inherent to other objects of the same kind and which the buyer could have reasonably expected in accordance with the nature of the object, taking into consideration public statements of the seller, the manufacturer, and their representatives on the qualities or characteristics of the object (particularly in advertising or on labelling etc.);
– if it has been poorly assembled provided that the service of assemblage is included in the performance of the sales contract or if a bad assemblage is a result of deficiencies in the instructions for assembly.

39 Croatian AO, Art. 401, Sec. 1.

40 Croatian AO, Art. 401, Sec. 2.

of objects of the same type and which the buyer may reasonably expect given the nature of the object and taking into account any public statement made by or on behalf of the seller, or other persons in previous links of the chain of transactions, including the producer, particularly in advertising or on labelling;

– if it is installed incorrectly, provided the installation forms part of the sales contract, and was carried out by the seller or another person under the seller's responsibility; or

– if it is stipulated that the installation of the object is to be carried out by the buyer, and the incorrect installation is attributable to shortcomings in the installation instructions provided by the seller or, in the case of objects with digital elements, provided by the seller or by the supplier of the digital content or digital service.

Besides terminological differences, there is an important conceptual one as well, in comparison with the legal solutions from the Serbian CPA and Directive 1999/44/EU, which contain a negative definition of conformity with the contract combined with a rebuttable presumption of conformity.[41] The Croatian legislator specified an exhaustive range of possible cases of material defects (positive definition), envisaged by the AO even before its amendments, and distinguishing subjective and objective requirements of conformity in the spirit of Directive (EU) 2019/771. The obligation of the seller to deliver goods which are in conformity with the contract is not stipulated as a general rule. It is only one of the cases of material defects categorized into the subjective requirements of conformity. This positive definition – as it was the case in the AO before the adoption of the amendments – applies to contracts concluded between two natural persons or between two legal persons, not only to consumer sales contracts.

Given the fact that the seller is liable for any public statement made on his/her behalf, the AO, transposing Art. 7, Sec. 2 of Directive (EU) 2019/771, stipulates[42] that the seller will be released from the liability:

– if he/she demonstrates that he/she did not know and neither could reasonably have been aware of the public statement in question;

– if by the time of conclusion of the contract the public statement had been corrected in the same way, or in a way comparable to, as it had been made; or

– if the public statement could not have influenced the decision to buy the goods.

In all these cases, the burden of proof is explicitly on the seller, which is a significant difference in comparison with the previous regulation.[43] Previously,

41 Miščenić 2013. 163.

42 Croatian AO, Art. 401, Sec. 3.

43 Art. 401 of the AO stated that the seller would have been released from the liability if the seller was not or should not have been aware of such statements, or such statements were withdrawn by the conclusion of the contract, or they had no influence on the buyer's decision to conclude the contract.

regarding the relevance of the seller's awareness of the public statement, there was a presumption that he/she acted in good faith and, thus, the burden of proof was on the buyer.[44] Furthermore, the amendments of the AO introduced a new ground of release from the liability applicable exclusively to consumer sales contracts. Transposing Art. 7, Sec. 5 of Directive (EU) 2019/771, the AO prescribes that there shall be no material defect if, at the time of the conclusion of the contract, the consumer was specifically informed that a particular characteristic of the object was deviating from the criteria mentioned in Sec. 2, paras. 1–4 of the same article, and the consumer expressly, in a separate statement, accepted that deviation.[45] Therefore, the consent of the consumer who had been previously informed on deviations is an indispensable prerequisite in this case.

Concerning the time according to which the liability for material defects is determined, the AO prescribed even before the amendments that the seller is liable for material defects of the object that existed at the moment of the transfer of risk to the buyer (consumer), regardless whether he/she was aware of them or not.[46] The moment of the transfer of risk is the moment of delivery. The legislator also prescribed that the seller is liable for all material defects arising after the transfer of risk to the buyer if they arose as a result of a pre-existing cause.[47]

In order to comply with the definition of the sales contract contained in Directive (EU) 2019/771, the Croatian legislator stipulated that in consumer sales contracts the seller shall be liable for material defects according to the rules pertaining to the sales contract even if the object is yet to be produced or manufactured, notwithstanding whether it is qualified, according to general rules, as a sales, service, or any other contract.[48] The AO establishes two rebuttable presumptions according to which: (1) each material defect becomes apparent within one year following the passing of risk at the latest, (2) these defects have existed at the time of passing of risk unless the seller proves otherwise or this presumption, is incompatible with the nature of the object or with the nature of the material defect.[49] The burden of proving that the material defect did not exist at the time of the passing of risk is expressly on the seller. It is important to underline that the time period in which this rebuttable presumption applies is longer than the one envisaged in the previous regulation – one year, compared to six months. This provision represents the transposition of Art. 11 of Directive (EU) 2019/771.

The AO explicitly states that its provisions on the liability for material defects shall not apply to consumer sales contracts for the supply of digital content or digital services, except if the object of the contract is a movable item into which

44 Petrić 2007. 107.
45 Croatian AO, Art. 401, Sec. 4.
46 Id. Sec. 1.
47 Id. Sec. 2.
48 Id. Sec. 4.
49 Id. Sec. 9.

digital content or digital services are incorporated or they are interconnected with a movable item in such a way that the absence of the digital content or digital service prevents the object from performing its functions and which are provided under the sales contract, irrespective of whether such digital content or digital service is supplied by the seller or by a third person (objects with digital elements).[50] The objective of this provision is to differentiate the provisions of this law from those of the Act on Certain Aspects of the Contract for the Supply of Digital Content and Digital Services[51] by which Croatia transposed Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services. Furthermore, the AO stipulates that in the event of doubt as to whether the supply of incorporated or interconnected digital content or digital service forms part of the consumer sales contract, the digital content or digital service shall be presumed to be covered by it.[52] Both provisions represent the transposition of Art. 3, Sec. 3 of Directive (EU) 2019/771.

The legislator also introduced a particular rule regarding the moment of the passing of risk in the case of goods with digital elements, envisaging that the risk shifts onto the buyer when the supply of the digital content and digital service is completed or when the continuous supply of the digital content or digital service is initiated.[53] The abovementioned rebuttable presumptions, according to which any material defect becomes apparent within one year following the transfer of risk, and the defect must be considered as having existed at the time of the transfer of risk, are applicable to objects with digital elements as well.

3.2. Serbia

The CPA defines the notions of consumer, trader, and seller. Consumer is any natural person who acquires goods and services on the market for purposes that are outside of his/her business or other commercial activities,[54] while a trader is any legal or natural person who acts on the market for purposes related to his/her business or other commercial purposes, including other persons acting on his/her behalf or for his/her account.[55] A rebuttable presumption that each natural person acts in the capacity of a consumer should be established, though the CPA does not mention it explicitly.[56] The seller is a trader with whom the consumer

50 Croatian AO, Art. 400, Sec. 5.
51 Zakon o određenim aspektima ugovora o isporuci digitalnog sadržaja i digitalnih usluga [Act on Certain Aspects of the Contract for the Supply of Digital Content and Digital Services]. *Narodne novine* [Official Gazette] 110/21.
52 Croatian AO, Art. 400, Sec. 8.
53 Id. Sec. 6.
54 Serbian CPA, Art. 5, Sec. 1, P. 1.
55 Id. P. 2.
56 Karanikić Mirić 2010. 132.

concluded the sales or service contract.[57] The definition of the notions of goods and sales contract are also provided in the CPA. Goods are any tangible movable items, other than goods sold by way of enforcement, or otherwise by the authority of law, while water, gas, and electricity are to be considered goods where they are put up for sale in a limited value or set quantity.[58] A sales contract is any contract under which the trader transfers or undertakes to transfer the ownership of goods to the consumer, and the consumer pays or undertakes to pay the price thereof, including any contract having as its object both the sale of goods and the provision of services.[59] The notions of consumer and seller are completely concordant with their definition in Directive 1999/44/EC.

It is noteworthy that the definition of goods contained in the previous CPA showed discrepancies. The Directive in Art. 1, Sec. 2 excludes water and gas where they are not put up for sale in a limited volume or set quantity and electricity from the notion of (consumer) goods. On the other hand, pursuant to the repealed CPA water and gas were to be considered goods only if they were not put up for sale in a limited volume and set quantity. Additionally, thermal energy, not mentioned in the Directive, was also considered good without any limitation. The Serbian legislator eliminated these discrepancies in the novel CPA, although not completely since it stipulates that electricity, explicitly excluded from the notion of (consumer) goods in the Directive, can be considered good if put up for sale in a limited value or set quantity.

The CPA obliges the seller to deliver goods that are in conformity with the contract.[60] Any deviation from the quality and features of the goods specified by the contract represents a lack of conformity (negative definition). The CPA establishes[61] a presumption that the delivered goods are in conformity with the contract:

– if they comply with the description given by the seller and possess the qualities of the goods that the seller has presented to the consumer as a sample or model;

– if they are fit for any particular purpose the consumer requires them for, provided it was known or must have been known to the seller at the time of the conclusion of the contract;

– if they are fit for the purposes for which goods of the same type are normally used; or

– if they are of a quality and performance that are normal for goods of the same type and that the consumer can reasonably expect, given the nature of the goods,

57 Serbian CPA, Art. 5, Sec. 1, P. 3.
58 Serbian CPA, Art. 5, Sec. 1, P. 7.
59 Id. P. 6.
60 Serbian CPA, Art. 49, Sec. 1.
61 Id. Sec. 2.

and taking into account any public statement on the specific characteristics of the goods made about them by the seller, the producer, or their representative, particularly in advertising or on labelling.

This presumption, favouring the consumer as an economically weaker party to the contract, is rebuttable. It does not cover an extensive range of possible cases of lack of conformity, as the Croatian law does. Therefore, the consumer can prove before the court that the goods were not in conformity with the contract even if the above-mentioned conditions were met in a given case. This legal solution, based on the negative definition of the lack of conformity and on the presumption of conformity, is identical to the solution contained in Art. 2 of Directive 1999/44/EC. The difference between the CPA and the Directive[62] concerns the fact that pursuant to the CPA it is sufficient that the particular purpose of the goods required by the consumer was known or must have been known to the seller at the moment of the conclusion of the contract and there is no obligation of the consumer to inform the seller about it. On the other hand, according to Art. 2, Sec. 2 of the Directive, the consumer has to make it known to the seller at the moment of the conclusion of the contract and the seller has to accept it.

Regarding liability for lack of conformity, the CPA stipulates that the seller shall be liable for any lack of conformity of the delivered goods if it existed at the moment of passing of the risk onto the consumer (in Serbian law, that is the moment of delivery of the goods), irrespective of whether the seller knew about the lack of conformity.[63] In addition, the liability also emerges if the defect appears after the passing of risk, provided it derives from a pre-existing cause.[64] Finally, the liability arises for such material defects as well, which could have been easily noticed by the consumer, if the seller declared that the goods were in conformity with the contract.[65] The aim of the third case of liability specified by the CPA is to make liable the seller who apparently acted in bad faith. Along with that, the seller shall be liable for any lack of conformity resulting from improper packaging, installation, or assemblage by the seller or by a person under his/her supervision. The liability also arises if the incorrect installation or assemblage of the goods by the consumer are attributable to a shortcoming in the instructions the seller handed over to the consumer.[66]

The CPA specifies that the seller may be released from liability if at the moment of the conclusion of the contract the consumer knew or could not have been unaware of the lack of conformity or if its cause was in the material provided

62 The aim of the Directive was the minimum harmonization of the rules governing the sale of consumer goods, and states may guarantee better protection to the consumers than the protection offered by the Directive.

63 Serbian CPA, Art. 60, Sec. 1, P. 1.

64 Id. P. 2.

65 Id. P. 3.

66 Serbian CPA, Art. 60, Sec. 2.

by the consumer.[67] In these cases, the burden of proof is on the seller, who has to prove that at least one of the conditions of waiving the liability exists. The position of the consumer is further protected by a provision prescribing that the seller's liability for a lack of conformity may not be limited or excluded contrary to the provisions of the CPA.[68]

Furthermore, the general rule is that the seller is bound by his/her own public statements and by public statements given by the producer or his/her representative. The CPA specifies[69] that the seller shall be released from the liability:

– if he/she was not and could not have been aware of the statement in question,

– if the correction of the statement was published before the time of the conclusion of the contract, or

– if the decision of the consumer to conclude the contract could not have been influenced by the statement.

The burden of proof is also on the seller, who has to demonstrate that at least one of the required conditions was met in the specific case. The legal solutions concerning the liability for a lack of conformity are identical to those contained in Art. 2 of Directive 1999/44/EC.

4. Rights of the Consumer

4.1. Croatia

The Croatian AO, after its 2021 amendments, envisages that the buyer (consumer), who informed the seller of a material defect properly and in a timely fashion, shall be entitled to request from the seller the elimination of the defect (repair), delivery of another object without defect (replacement), request an adequate price reduction, or declare the contract rescinded.[70] The same rights were at the disposal of the buyer even before the adoption of the amendments in 2021. The novelty introduced by the amendments of the AO concerns their hierarchy.[71] Pursuant to the AO, the buyer is entitled to choose between repair and replacement unless the remedy chosen would be impossible or, compared to other remedies, would impose disproportionate costs on the seller taking into account all circumstances, particularly the value the object would have if there were no material defects, the

67 Serbian CPA, Art. 60, Sec. 3.

68 Id. Sec. 4.

69 Id. Sec. 5.

70 Croatian AO, Art. 410, Sec. 1.

71 Before the 2021 amendments, the right to repair, replacement, and price reduction were considered in the doctrine as primary rights that could be exercised alternatively, while the right to rescind the contract was considered secondary. See Slakoper in Gorenc 2014. 705.

significance of the material defect, and whether the repair or replacement could be provided without significant inconvenience to the buyer.[72] The AO entitles the seller to refuse to restore conformity if the repair and replacement are impossible or would impose disproportionate costs taking into account all circumstances, especially those that are relevant regarding the exclusion of the choice of the buyer between the remedies.[73]

Furthermore, the Croatian law prescribes[74] that the buyer shall be entitled to price reduction or rescission of the contract:

– if the seller has not repaired or replaced the object, or has refused to do so, or has not brought the object into conformity according to Art. 410, Sec. 2 and 3;

– if the material defect appears despite the seller having attempted to restore conformity;

– if the seller explicitly declined to restore conformity or it is obvious from the circumstances that he/she will not do so within a reasonable time or without significant inconvenience to the buyer; or

– if the material defect is so serious that it justifies an immediate price reduction or rescission of the contract.

Therefore, one may conclude that the rights to request elimination of the material defect or a delivery of another object without material defect are primary rights, and the consumer may exercise them alternatively, while the rights to request an adequate price reduction and to declare the contract rescinded are secondary, depending on the failure of the seller to bring the object into conformity or on the nature of the material defect. It is important to underline that these provisions apply to all, not solely to consumer contracts. Additionally, the consumer is entitled to damages in accordance with the general rules of liability for damage, including the damage caused by the defect to his/her other property.[75] These provisions represent the transposition of Art. 13 of Directive (EU) 2019/771.

On the other hand, the provision of the AO – in force before the amendments of 2021 – contained the term 'by choice',[76] which may have suggested that the buyer was completely free to choose between the rights.[77] However, it was not the case because the AO in Art. 412 stated that the buyer may rescind the contract only after having allowed the seller a subsequent adequate time limit to perform the contract. Thus, the right to request the elimination of a material defect, the

72 Croatian AO, Art. 410, Sec. 3.

73 Id. Sec. 4.

74 Id. Sec. 5.

75 Croatian AO, Art. 410, Sec. 2.

76 Art. 410, Sec. 1 of the AO: The seller (consumer), in the event of a lack of conformity, shall be entitled to the choice to request that the defect be eliminated by the seller, to request from the seller delivery of another object without defects, to request a price reduction or to declare the contract rescinded.

77 Petrić 2007. 118.

delivery of another object without material defect or a price reduction (the Act did not stipulate any precondition of the price reduction) were considered primary, while the right to declare the contract rescinded secondary, contingent on the non-performance of the contractual obligation by the seller in the subsequent adequate time limit for the proper performance of the contract.[78]

Regarding the seller's obligation to remove the defect or to deliver another object without defect, the amended AO stipulates that repair or replacement shall be carried out free of charge, within a reasonable time from the moment when the seller has been informed by the buyer about the material defect and without any significant inconvenience to the buyer, taking into account the nature of the object and the purpose for which the buyer bought it.[79] This provision seems much broader than the one contained in Art. 411 of the AO before the 2021 amendments, which stated that all costs of repair and replacement (for example, costs of labour, material, delivery, and taking-over of the object) shall be borne by the seller. Furthermore, the AO obliges the buyer to make the object available to the seller and requires the seller to take it over and to bear the costs relating to the takeover.[80]

A specific rule applies to the repair or replacement of the object that had been installed in a manner consistent with its nature and purpose before the material defect became apparent. In this case, the obligation to repair or replace the object shall include the removal of the non-conforming object and the installation of replacement or repaired object or bearing the costs of such removal and installation.[81] The legislator stipulated explicitly that the consumer shall not be held liable to pay compensation for the normal use of the replaced object during the period prior to its replacement.[82] This rule applies, however, only to consumer sales contracts. All these provisions represent the transposition of Art. 14 of Directive (EU) 2019/771. The only difference is that the Croatian legislator specified an obligation of the seller to take over the object and bear the costs of taking it over (Sec. 2), while the Directive stipulates that the seller shall take the replaced object back at his/her expense.

Concerning the right of the consumer to declare the contract rescinded, the legislator decided not to modify the above-mentioned Art. 412. Thus, the requirement to allow the seller a subsequent adequate time limit to perform the contract is the general rule.[83] However, the AO entitles[84] the buyer to rescind the contract even without providing the seller a subsequent time limit:

78 Petrić 2007. 118.
79 Croatian AO, Art. 410a, Sec. 1.
80 Croatian AO, Art. 410a, Sec. 2.
81 Croatian AO, Art. 410a, Sec. 3.
82 Id. Sec. 4.
83 Croatian AO, Art. 412, Sec. 1.
84 Id. Sec. 2.

– if the seller, duly notified of the defect, informs the buyer that he/she will not perform the contract;

– if the circumstances of the particular case render it obvious that he/she will not be able to perform the contract even within the subsequent time limit; or

– if the buyer, due to the seller's default, may not achieve the purpose for which he/she concluded the contract.

In the third case – which is similar to unilateral termination due to the non-performance of a fixed contract (when the performance of an obligation within a specified period of time is an essential element of the contract and if the debtor does not perform the obligation within such period of time, the contract is rescinded *ex lege*)[85] –, the buyer bears the burden of proof that the purpose for which the contract was concluded may not be achieved. The AO envisaged another exception from the general rule, taking into account the interests of the buyer who is also entitled to rescind the contract or to request an adequate price reduction if the manner of elimination of the defect or the delivery of another object without defect would create substantial inconveniences to him/her.[86]

The AO also protects the position of the seller by stipulating that if a defect is of lesser relevance, the buyer shall not be entitled to rescind the contract but retains other rights due to non-conformity, including the right to damages.[87] Furthermore, the Croatian law envisages that if the seller fails to perform the contract within the subsequent adequate time limit, it shall be rescinded by virtue of law (*ex lege*), but the buyer may extend its validity if he/she notifies the seller without delay that the contract is to remain in force.[88] The same rule applies to the defective performance of an obligation when performance within a specified period of time constitutes an essential term of the contract (fixed contracts).[89]

On the other hand, the amendments of the AO introduced a new rule applicable exclusively to consumer sales contracts in the spirit of Art. 16 of Directive (EU) 2019/771. Pursuant to the AO, if the seller does not perform the obligation from the consumer sales contract within a subsequent reasonable time limit, the consumer shall be entitled to rescind the contract.[90] Therefore, in this case, the contract will not be considered rescinded *ex lege*, but it depends on the will of the consumer expressed through his/her declaration to terminate it. Furthermore, the AO stipulates that if the contract is rescinded, the buyer shall return the object to the seller at his/her expense and the seller shall also reimburse to the buyer the price paid for the object upon receipt of it or of any evidence provided

85 Petrić 2007. 121.
86 Croatian AO, Art. 412, Sec. 3.
87 Croatian AO, Art. 410. Sec. 7.
88 Croatian AO, Art. 413, Sec. 1.
89 Id. Sec. 2.
90 Croatian AO, Art. 413a.

by the buyer of having sent the object back.[91] The AO also explicitly states that the rescission of the contract due to the material defect has the same effect as the termination of bilateral contracts due to non-performance.[92]

The legislator decided not to change the provision applicable solely to consumer contracts that has already been contained in the AO before the 2021 amendments[93] prescribing that the consumer, before exercising his/her rights, is obliged to notify the seller of any visible defects within the period of two months from the day he/she discovered the defect, but no later than two years from the passing of risk onto the consumer.[94] The time limit of two months is of so-called 'subjective' nature since it commences from the moment of the discovery of the defect by the consumer.[95] On the other hand, the liability of the seller ceases in two years after the passing of risk onto the consumer. This time limit is traditionally denoted as 'objective' since it is calculated from a moment that is independent of either parties' cognizance of the relevant circumstances.

Concerning hidden defects, the time limits for the notification of the seller applicable to consumer contracts are the same as for visible defects – two months from the day the defect was discovered and two years from the delivery of the goods to the consumer (passing of risk).[96] According to the AO, the time limit of two years commences from the day the notice was sent to the seller, after which the rights of the buyer shall be extinguished unless the buyer failed to exercise his/her rights due to the seller's deceit.[97] This time period of two years is considered preclusive since after its expiration the rights of the consumer, including the right to file a legal action, are extinguished.[98] The AO also allows the buyer, who has notified the seller in a due time and who has not yet paid the price, to request price reduction or compensation for damage even after the expiry of the two-year time limit, in a form of objection against the seller's request for the payment of the price.[99] This provision mitigates the legal implications of

91 Croatian AO, Art. 419, Sec. 3 and 4.

92 The effects of the termination of bilateral contracts are regulated by Art. 368 of the AO. Pursuant to this article, both contracting parties shall be released from their obligations other than the obligation to pay damages. In case that one party has performed the contract fully or partially, he/she has the right to restitution of whatever he/she has given. Furthermore, each party owes the other one compensation for the benefits that he/she enjoyed in the meantime from whatever he/she is obliged to return or compensate.

93 Croatian AO, Art. 403, Sec. 4.

94 This provision is in line with the option provided by Art. 12 of the Directive (EU) 2019/771, according to which Member States may maintain provisions stipulating that, in order to exercise his/her rights, the consumer has to inform the seller of a lack of conformity within a period of at least two months of the date on which the consumer detected such lack of conformity.

95 Petrić 2007. 114.

96 Croatian AO, Art. 404, Sec. 1 and 2.

97 Croatian AO, Art. 422, Sec. 1.

98 Petrić 2007. 122.

99 Croatian AO, Art. 422, Sec. 2.

the strict application of the time limit of two years. Furthermore, in the case of second-hand objects, the parties may agree on a period of one year in which the seller is liable for the material defect.[100]

The novelty introduced by the 2021 amendments of the AO concerns the continuous supply of an object with digital elements, transposing Art. 10, Sec. 2 of Directive (EU) 2019/771. The AO stipulates that if the consumer contract provides for a continuous supply of objects with digital elements in a period longer than two years, the seller shall be held liable for any material defect occurring within the period of time during which the object with digital elements is to be supplied. On the other hand, if the continuous supply covers a shorter period, the seller shall be liable for any material defect occurring within two years from the moment of the passing of risk.[101]

Finally, the Croatian legislator used the possibility envisaged by Art. 18[102] of Directive (EU) 2019/771 to prescribe the liability of the previous seller in the chain of transactions if all the prerequisites of the liability for material defects between the seller and the previous seller are satisfied. The AO specifies that the seller is obliged to inform the previous seller without delay that he/she repaired or replaced the object, reduced the price or that the contract has been rescinded, supplying all information necessary to the determination of the liability for material defects.[103] The legislator restricted the liability of the previous seller stipulating that he/she shall not be liable after two years from the passing of risk from the previous seller on the seller.[104] However, the previous seller and the seller may agree on other time periods, just as on the exclusion, limitation, or expansion of the liability.[105] It is important to underline that the same rules apply to relations between the previous seller and his/her predecessor in the chain of transactions as well.[106]

4.2. Serbia

Pursuant to the Serbian CPA, if the goods do not conform to the contract, the consumer who has notified the seller about the lack of conformity is entitled to demand from the seller the elimination of non-conformity, without additional

100 Croatian AO, Art. 404, Sec. 3.

101 Croatian AO, Art. 404a, Sec. 1 and 2.

102 Art. 18 of the Directive (EU) 2019/771: 'Where the seller is liable to the consumer because of a lack of conformity resulting from an act or omission, including omitting to provide updates to goods with digital elements in accordance with Art. 7(3), by a person in previous links of the chain of transactions, the seller shall be entitled to pursue remedies against the person or persons liable in the chain of transactions. The person against whom the seller may pursue remedies, and the relevant actions and conditions of exercise, shall be determined by national law.'

103 Croatian AO, Art. 422a, Sec. 3.

104 Id. Sec. 4.

105 Id. Sec. 5.

106 Id. Sec. 6.

charge, through repair or replacement, or to demand an appropriate price reduction or to rescind the contract in relation to those goods.[107] The CPA introduced a hierarchy of these rights, stating that the consumer is primarily entitled to choose whether the lack of conformity shall be remedied by repair or replacement.[108] However, it specifies[109] that the consumer is entitled to demand an appropriate price reduction or to rescind the contract:

– if the repair or replacement of the goods is not possible or cannot be completed in the appropriate time period;

– if the consumer cannot exercise the right to repair or replacement, that is, if the seller has not complied with the request to repair or replacement in the appropriate time period;

– if the repair or replacement cannot be completed without significant inconvenience to the consumer taking into account the nature and purpose of the goods; or

– if the elimination of the lack of conformity by repair or replacement represents a disproportionate burden to the seller.

Furthermore, the AO defines[110] the notion of disproportionate burden to the seller. It exists if it, in relation to the price reduction or termination of the contract, imposes excessive costs, taking into account:

– the value the goods would have if they were in conformity with the contract,

– the significance of the conformity in the specific case, and

– whether the lack of conformity can be remedied without causing significant inconvenience to the consumer.

It is worth underlining that the first and second cases of enabling the consumer to demand an appropriate price reduction or to rescind the contract represent the impossibility of the completion of repair or replacement, while the third and fourth cases deal with circumstances relating to the position of the consumer and the seller respectively. It is important to stress that these rights of the consumer do not affect his/her right to demand from the seller compensation for damage inflicted by the lack of conformity in accordance with the general rules on liability for damage, prescribed by the AO.[111]

The general rule is that the consumer is primarily entitled to choose freely and independently between repair and replacement, and only if the conditions specified in the CPA are met, can the consumer request the appropriate price reduction or the rescission of the contract. The CPA establishes an exception from this rule, stating that if the lack of conformity appears within six months

107 Serbian CPA, Art. 51, Sec. 1.
108 Id. Sec. 2.
109 Serbian CPA, Art. 51, Sec. 3.
110 Id. Sec. 4.
111 Id. Sec. 12.

from the passing of risk onto the consumer (within six months from the delivery of the goods), the consumer is entitled to choose between the request for the elimination of the lack of conformity by replacement, an appropriate price reduction or may rescind the contract.[112] Furthermore, in this period, the lack of conformity may be eliminated by repair only upon the explicit consent of the consumer.[113] Therefore, in this case, the appropriate price reduction and the rescission of the contract are not hierarchically superior and can be exercised immediately. Only the removal of the lack of conformity by repair depends on the explicit consent of the consumer. Hypothetically, the consumer may demand the elimination of the lack of conformity by repair or replacement even if it represents a disproportionate burden to the seller.

Furthermore, the CPA introduces the same legal solution (replacement, an appropriate price reduction, rescission of the contract as primary rights and repair only upon the explicit consent of the consumer) if the same or different lack of conformity appears after the first repair.[114] One may notice that this provision is similar to the one contained in the Croatian AO stating that the buyer shall be entitled to price reduction or the rescission of the contract if the material defect appears despite the seller's attempt to restore conformity. However, there are no such rules in Directive 1999/44/EC. Thus, it can be inferred that the Serbian law in this case offers broader and better protection to the consumer than this Directive.

The CPA stipulates that a repair or replacement must be completed in due time, without significant inconveniences to the consumer and with his/her consent, taking into account the nature of the goods and the purpose for which the consumer acquired them.[115] The CPA contains an additional provision which further strengthens the position of the consumer. It states that all costs required to restore the conformity of the goods, particularly the costs of labour, material, takeover or delivery, shall be borne by the seller.[116] On the other hand, the position of the seller is protected by the provision that the consumer may not rescind the contract if the lack of conformity of the goods is of a lesser relevance.[117] In these cases, the seller is also entitled to demand from the producer in the supply chain to reimburse to him/her the costs of actions he/she has taken in order to comply with his/her obligations.[118]

Furthermore, the CPA deals with time limits applicable to the consumer's request, prescribing that the seller shall be accountable for any lack of conformity of the goods becoming apparent within two years from the day of passing of

112 Serbian CPA, Art. 51, Sec. 7.
113 Id. Sec. 8.
114 Id. Sec. 5.
115 Id. Sec. 6.
116 Id. Sec. 9.
117 Id. Sec. 11.
118 Serbian CPA, Art. 51, Sec. 10.

the risk onto the consumer.[119] The Serbian legislator establishes a rebuttable presumption in favour of the consumer that the lack of conformity existed at the time of passing of risk onto the consumer if it manifests within six months from the day of passing of the risk unless it is contrary to the nature of the goods and to the nature of the specific lack of conformity.[120] The burden of proof is on the seller, who has to demonstrate that the goods were in conformity with the contract at the moment in which the consumer received it.[121] The legislator used the possibility offered by Directive 1999/44/EC and stipulated that in the case of second-hand goods, the seller and the consumer may agree on a shorter period in which the seller is liable for the lack of conformity, but not shorter than one year.[122] Therefore, any provision in the contract specifying a liability period shorter than one year shall be considered null and void. The above-mentioned time limits shall not apply to the period the seller uses to eliminate the lack of conformity.[123] This provision is clearly in favour of the consumer.

5. Concluding Remarks

Before the adoption of the 2021 amendments of the AO, which had the aim to transpose Directive (EU) 2019/771 into Croatian law, the Croatian and Serbian law on the regulation of the position of the consumer in the event of a lack of conformity of goods was based on the provisions of the same act: Directive 1999/44/EC. Since the Serbian legislature has not yet harmonized its consumer law regulation with Directive (EU) 2019/771, while its Croatian counterpart has already transposed the Directive, the existing differences between these two legal orders concerning the rights of consumers in case of a lack of conformity have only become more apparent.

The first difference concerns the regulatory method. The Serbian legislator opted for dual regulation: liability for material defects (non-conformity) is regulated both in the CPA and the AO. The CPA applies to consumer sales contracts, while the AO applies to sales contracts outside the consumer context. Bearing in mind that the AO is *lex generalis* in this field, it should be applied to consumer sales contracts when the CPA does not regulate the specific issue, if it does not reduce the degree of protection granted to the consumer by the CPA. On the other hand,

119 Serbian CPA, Art. 52, Sec. 1.
120 Id. Sec. 2.
121 Id. Sec. 2.
122 On the other hand, the Serbian legislator did not make use of the possibility provided by Directive 1999/44/EC to prescribe the obligation of the consumer to inform the seller of the lack of conformity within a period of two months from the date on which he/she detected such lack of conformity.
123 Serbian CPA, Art. 52, Sec. 4.

the Croatian legislator opted for a different regulatory approach: the rules of the Directives have been transposed into the law containing general rules of contract law, i.e. into the AO. It applies to both consumer and non-consumer contracts, whereby it explicitly states if certain provisions apply exclusively to consumer sales contracts. It is worth noting that the legal terminology is also different. The terminology used in the Serbian CPA is in line with Directive 1999/44/EC (for example, *roba* – the goods, *saobraznost ugovoru* – conformity with the contract), while the Croatian AO uses words different than those used in Directive (EU) 2019/771 (for example, *stvar* – object, *materijalni nedostatak* – material defect) but in line with the terminology used in general rules of contract law.

A further difference may be identified regarding the definition of conformity of the goods with the contract. The Serbian CPA envisaged a general obligation of the seller to deliver goods that are in conformity with the contract and introduced a rebuttable presumption of conformity in certain enumerated situations. Conversely, there is no such general obligation in the Croatian law. It states specifically the cases in which a material defect exists and differentiates – in the spirit of Directive (EU) 2019/771 – subjective and objective requirements of conformity. However, the obligation of the seller to deliver goods (the object) that are in conformity with the contract is incorporated into subjective requirements of conformity. It renders this difference less important from a practical point of view, and thus it is rather theoretical and conceptual. The Croatian legislator amending the AO introduced certain notions and specific rules, such as the ones pertaining to digital content and digital services (object with digital elements), which are not known by the Serbian CPA. Furthermore, the Croatian legislature extended the time period in which a rebuttable presumption applies that the material defect existed at the moment of the passing of risk onto the consumer (one year compared to six months envisaged by the Serbian CPA and the Croatian AO before the adoption of the amendments).

Finally, though the hierarchy of the rights of the consumer is identical in these laws (repair or replacement as primary rights, the appropriate price reduction or rescission of the contract as secondary rights), there are some differences as follows: The Serbian CPA prescribes exceptions favouring the position of the consumer: if a lack of conformity appears within six months from the passing of risk onto the consumer or if it appears after the first repair by the seller, the right to request replacement, appropriate price reduction or to rescind the contract can equally be exercised, while the repair is admissible solely upon the explicit request of the consumer. The Croatian AO contains a similar rule stating that the consumer shall be entitled to price reduction and rescission of the contract if the material defect appears despite the seller's attempt to restore conformity. However, in this regard, it seems that the Serbian law offers a higher level of protection to the consumer than the Croatian one. It is worth underlining that

before the 2021 amendments of the Croatian AO, the hierarchy of the rights of the consumer was different because only the rescission of the contract was considered a secondary right. The Croatian legislator, unlike the Serbian one, used the option offered by Directive (EU) 2019/771 envisaging a time limit for the notification of the seller of the defect (a 'subjective' time limit of two months and an 'objective' one of two years).

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Acta Univ. Sapientiae, Legal Studies, **11**, 1 (2022) 47–67

DOI: 110.47745/AUSLEG.2022.11.1.03

Between Anti-corruption and Access to the Legislative Process: A Glimpse into Lobbying Regulation in East Central Europe

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Abstract: Lobbying is usually associated with corrupt activities, but its regulation is viewed as an especially important tool for eradicating corruption. Nevertheless, countries seem to find it hard to grapple with the matter of regulating lobbying, demonstrated by the fact that such regulation is predominantly lacking worldwide. The paper presents a brief incursion into the field of lobbying regulation in several countries of East Central Europe: the Czech Republic, Hungary, Poland, Romania, Slovakia, and Slovenia. It delves into some of the specifics of each country's regulation in this respect or the lack thereof, trying to make sense of the reasons why countries seem to struggle with this regulatory challenge. As a topic that has been marked as important by the European Commission in its Rule of Law Reports, the paper looks into the ways this issue has been approached by the aforementioned countries in the light of their membership of the European Union and the public opinion of their citizens.

Keywords: lobby, public affairs, regulation, East Central Europe

1. Introductory Remarks

Widely recognized for the bad press it usually gets, happening whether it is regulated or not, it holds different names, but encompassing mostly the same activities, *lobbying* – as it is more widely known – appears as inherent to democratic states, as it is an activity through which influence is sought over law making and government.[1] There are two main approaches to lobbying. One considers lobbying a distortion of the democratic will by special interest groups, seeking to impose their interests using their money and power. The other views lobbying

1 Lobbying has also been defined as 'the act of individuals or groups, each with varying and specific interests, attempting to influence decisions taken at the political level' (Chari et. al. 2019: 4).

as a democratic right, a right to petitioning, adding expertise and improving the law-making process.[2] Proponents of lobbying argue that a government cannot rely solely on the expertise of its own members, that it must also tap into the know-how offered by the private sector, and in such cases listen to a variety of actors on the part of industry, labour organizations, academia, NGOs, etc.

It is without a doubt that *public affairs* has become a significant industry in a Europe united in a number of international organizations, most important of which is the European Union (EU). The development of the lobbying industry is seemingly a natural process. The opening up of legislative decision making to the advocacy of business and NGO interests – among others – with regard to the moulding of regulation is an innate part of democratic states. The political decision-making process is fragile; it is definitely open to manipulation, which is why many believe that lobbying must be regulated in order to ensure transparency and accountability. However, confidentiality is also a basic trait of political influence, which is why lobbying regulation worldwide seems to be lacking, and it is mostly present in some Western states. Regulating this activity is still in the works in younger democracies such as the ex-communist states of East-Central Europe, but there are exceptions to this, as well as some particularities in the regulatory endeavours. State-owned enterprises and trade unions, which mostly have their roots in the communist era, have maintained their influence to a certain degree and often still lobby successfully in these countries. This has left other organizations in need of regulation to enhance their own chances of lobbying successfully. Regulated or unregulated, lobbying still goes on in one form or another, with more or less transparency, with wider or narrower possibility for public scrutiny in the involvement of lobbyists in the regulatory process, ensuring more or less possibility for public participation.

The purpose of this paper is to briefly analyse the situation of lobbying regulation – both soft and hard laws – in six EU Member States (MS) that have transitioned three decades ago from one-party communist regimes to pluralist democratic and market economy systems. The paper consists in a descriptive look at the situation of lobbying in the Czech Republic, Hungary, Poland, Romania, Slovakia, and Slovenia as concerns their regulation and the assessment of such regulation (or lack thereof) in the European Commission's Rule of Law Reports (RLR).

The analysed states have much in common regarding their economic and political development over the past half century. Professional lobbying was mostly brought into these states by multinational corporations from the West and was not something that was sought after by local businesses, which mostly relied on the knowledge of local political players and of the specifics of *the game*. It must be noted, however, that anti-corruption legislation, which some of these

2 Bitonti 2017. 17. The author goes on to present five other conceptions of *public interest*; however, presenting these exceeds the scope of the present paper.

countries enacted at the request of western partners, is also a factor that hinders a proper regulation of lobbying, as such regulation could possibly interfere with the criminal regulation of some acts of corruption such as influence peddling.[3] While with corrupt activities results are sought by evading the law, lobbying means just the opposite: achieving results while respecting the law. However, if the lawmaker does not regulate a healthy delimitation between the illegal and the legal, how will public affairs professionals be able to do it?

The word itself – *lobbying* – receives bad press at many times, so using this word by political actors seeking regulation leaves them open to attacks. Creating appropriate regulation in this field is also difficult when a strong and stable governing majority is lacking, because attempts at regulation might draw unwanted attention. It might also be against the interest of a governing majority to regulate lobbying, which is why this issue seems to be taken up mostly by civil society organizations and political parties when they are in opposition.

Norms regarding lobbying in general are part of a number of measures and regulations usually implemented in order to ensure transparency and open government; such are, for example, conflict of interest rules, rules on revolving doors (a problem very much related to lobbying, as many lobbyists – or at least the most efficient ones – seem to come from the public sphere), campaign or political financing, and other transparency rules. This paper will only address some questions concerning the regulation of lobbying in a stricter sense. It will first look into some of the international instruments through which the enactment of lobbying regulation has been encouraged, followed by a brief incursion into the matter of regulation versus public opinion. This is followed by a brief analysis of the above-mentioned states' regulatory solutions (or the lack thereof). The paper ends with the author's concluding remarks.

2. The Push towards Regulation

International organizations such as the Organization for Economic Cooperation and Development (OECD),[4] the Council of Europe (CoE),[5] and the EU have also

3 This is the case of Romania, where proper legislation is yet to be adopted, even though several legislative proposals have been put forward in the past couple of decades and there has also been private action (attempts at self-regulation by the industry); see *infra*, note 40.

4 The OECD Recommendation on Principles for Transparency and Integrity in Lobbying (2010) presents recommendations for regulating lobbying activities; there is also a series of publications on this topic – see *Lobbyists, Governments and Public Trust*, which has three volumes, the latest of which (2014) is titled *Implementing the OECD Principles for Transparency and Integrity in Lobbying*. A new Report on the implementation of the OECD Recommendations was prepared in 2021, ensuring an up-to-date picture of the situation of lobbying in a number of OECD member states.

5 Venice Commission Report on the Role of Extra-institutional Actors in the Democratic System

been looking into lobbying regulation more intensely in the past decade, with the EU putting a bit of pressure on some of its MS to better regulate lobbying, making this issue part of its RLR.

As one of the most powerful economic blocs, one of the biggest markets for consumers, and, most importantly, one of the leaders in international regulation for the environment, industry, and trade, the regulation of lobbying also appears as an important duty at the EU level. However, the regulation is also split at the EU level, different institutions having had different rules and regulations for lobbying. Thus, while EU Member States show a variety of solutions for lobbying (mostly voluntary rules or non-regulation), the EU has just recently gotten to the point where the Commission, the European Parliament (EP), and the European Council have finally agreed on a unitary system with a mandatory Transparency Register, through an inter-institutional agreement signed in May 2021.[6] Although it is not a topic of legal harmonization, in the reverse logic of *none is better than some*, EU MS with some regulations are experiencing heavy criticism in the RLR as opposed to no criticism towards MS with only self-regulatory, voluntary initiatives regarding lobbying.

Centred in the triangle of Brussels, Berlin, and Paris, the capitals of the two most populous nations of the 27 EU MS, it is also here that the tone is set regarding the environmental, health, and trade regulations ultimately enacted EU-wide. The Crossroads of Europe, as it is called, with the most important EU institutions having their seat there, Brussels evidently sees a high concentration of lobbying power. In the exclusive and shared competences granted to the EU by its MS, the Union has also allowed businesses and other organizations to exert their influence on the direction of its regulatory activity. This resulted in much of the lobbying activity in the EU being concentrated in Brussels and less so in MS, the focus of lobbyists understandably shifting evermore towards Brussels as national legislation becomes *Europeanized*.

From a business perspective, in order to gain a competitive edge, to work out an advantage in the global marketplace, companies must be able to exert pressure on governments.[7] As many of the issues faced by decision-makers have become increasingly sophisticated, lobby groups have popped up as intermediaries for private interests and as tailors of policy changes in the consideration of their clients. Thus, lobbying organizations (positively or negatively) influence politicians by providing them with information akin to their interests. Obviously, lobbying is not only done by business and industry but also by civil society organizations and academia. Indeed, in a well-working system, advice should be

(Lobbying) of 2013.

6 The text of the agreement: https://data.consilium.europa.eu/doc/document/ST-5655-2021-INIT/en/pdf.

7 Bitonti–Harris 2017. 9.

sought from all sides. The EU expects the concurrence of the different interests in front of MS's regulatory institutions to take place in a legal framework that is able to provide transparency and accountability. As lobbying activities have become more pervasive, it has been noted that there have been major steps towards its professionalization, with more attention paid to ethical principles and professional standards. Such steps are also meant to avoid confusion between lobbying on the one hand and corruption and influence peddling on the other, which still constitute a problem in most EU MS.[8] It is also one of the main purposes of regulating lobbying to delimit these activities, keep them in the sphere of the legal system, and avoid the appearance of corruption, while another purpose of regulation would be to reveal excessive influence.

According to Bitonti, there are four main values lobbying regulation should encompass for a more trustworthy and qualitatively better decision-making process: accountability (decision makers justify their actions in a way that makes them accountable to the public), transparency (access to information concerning decision makers and public institutions), openness (communication with stakeholders), and fairness (in enforcing openness and participation).[9] Not all states have considered the legal regulation of lobbying as an element strictly necessary for the professionalization of this activity. In some cases, self-regulation and ethical standards self-imposed by influential industry actors have also brought benefits to the system. However, voluntary regulation and voluntary transparency registers do not seem sufficient, especially in states where lobbying is mostly done through personal ties, without a professional lobbying industry having been given the chance to develop. In EU MS where the natural development of democracy and market economy have been interrupted after the Second World War by the communist regimes imposed by the Soviet Union, the reinstatement of a market economy system and of a democratic, multi-party system has at many times been a race to meet Western expectations, a race for promises of Western integration, foreign direct investment, and the accompanying development. Much of what is today called lobbying has also come through these channels with the purpose of opening up the markets as quickly as possible. Improving the regulatory situation of lobbying is just a small piece of the ensemble of expectations set by the EU towards all Member States. The EU has considered lobbying an important element of the rule of law, reason for which its current situation has been analysed in the Rule of Law Reports of 2020 and 2021.

Although there is definitely a push on the part of international institutions and organizations towards states to regulate lobbying, providing them with proposals, publishing evaluations, and even harsh criticism regarding their attempts, most states have yet to take steps in this respect. Attempts at regulating

8 Bitonti–Harris 2017. 10.

9 Id. 26–27.

this activity have seen mixed results. Although it has been called the world's second oldest profession,[10] most countries where regulation can be found have only adopted such regulation in the last two decades.[11] Due to the fact that the word *lobbying* has received a bad reputation, it might also be the case that it is harder for politicians to *sell* the fact that regulation might be beneficial. Also, it should not be excluded that it would be in the interest neither of politicians nor of business and industry to have their dealings out in public – which might explain the global *shortage* in lobby regulation.

3. Lobbying in the Eyes of the Public

As all of the analysed countries' citizens have experienced to a larger or lesser extent an unhealthy intertwining of business and politics, massive corruption scandals and privatization serving private – rather than public – interests, lobbying is perceived as something negative in most countries. It is mostly viewed as something that is definitely not there to *serve the interests of the people*. This paper will just briefly consider the matter of public perception, and only with the purpose of ascertaining its importance as a possible factor in the existence or non-existence of lobbying regulation.

In the Czech Republic, it has been noted that lobbying is perceived as something illegal, and not only the public but also the political class associates lobbying with corruption and criminal offences.[12] It is also a field that received media attention mainly due to scandals.[13] The situation is similar in Slovakia, where the negative public perception of lobbying is also fuelled by the media and politicians, resulting in such activities mostly being linked – in the eyes of the public – to corruption and bribery.[14] In Poland, lobbying has a bad reputation after the massive corruption scandal that has widely become known as the *Rywin affair*.[15] Following this case, corruption in the public sphere had become a major subject of public debate. Because the persons associated with this case were labelled *lobbyists* in the media, politicians had turned to using the term as a

10 A quote attributed to Bill Press.

11 See the timeline of lobbying regulation put together by the OECD: https://www.oecd.org/gov/ethics/oecdprinciplesfortransparencyandintegrityinlobbying.htm.

12 Soukenik et al. 2017. 107. The Czech public perception on lobbying has also been sampled recently, and Czechs think that lobbying has a strong impact on the wording of laws, but they see it mainly as a tool for 'godfathers'. (Lobbing má podle poloviny Čechů výrazný vliv na podobu zákonů, vnímají ho ale hlavně jako nástroj pro kmotry.). https://www.rekonstrukcestatu.cz/archivse-novinek/lobbing-ma-podle-poloviny-cechu-vyrazny-vliv-na-podobu-zakonu-vnimaji-ho-ale-hlavne-jako-nastroj-pro-kmotry.

13 McGrath 2008. 21.

14 Zoltvany 2017. 295.

15 McGrath 2008. 20.

political weapon against their opponents, which in turn negatively influenced the development of the lobbying profession as an institution.[16] The media also contributed to this by portraying lobbying activity as corruption, a view still maintained by the public opinion.[17] A negative image of lobbying seems to prevail in Slovenia as well,[18] where it is mostly associated with activities of corruption.[19] In Romania, lobbying is perceived as a controversial subject due to the association of this activity with the crime of influence peddling.[20] However, polling has shown that only about 16% of the Romanian public perceives it as having negative connotations.[21]

Although public perception of lobbying is mostly a negative one in the countries of East Central Europe, it does not appear to have major effects on its regulation. Poland seems to have the most severe case of public aversion vis-à-vis lobbying; nevertheless, it has regulated lobbying a few years after the *Rywin affair*. Negative perception seems to have had some effect in the Czech Republic and Slovakia, which do not have any regulation in this field. Public perception is also negative in Slovenia; however, this country seems to have one of the most advanced regulations in this field in the analysed region. On the other hand, Romania, where the negative perception of lobbying appears as minimal, has only voluntary rules that were put together by non-governmental organizations and businesses in an attempt to self-regulate. To this regulation, a registry developed by the Government was added more recently. Lobbying has had a bad reputation in Hungary as well.[22] Nevertheless, there is now a second law regulating this field, adopted in 2013, after the first law (of 2006) was deemed a failure and was subsequently abrogated.

The above brief exposition shows that there is no rule that public perception precludes or encourages the regulation of lobbying. The reasons for regulation, or the lack of it, go beyond public perception. The interest in regulating lobbying lay elsewhere than in the interests tied to political prestige in the public eye. Furthermore, based on the cases of Poland and Slovenia, it could be argued that regulation may be the best way to change the public perception of this industry, improve its workings, and thus make it more acceptable.

The issues around regulation abound, which is why a country-by-country analysis of the regulatory situation of lobbying will be presented in the following section, with the purpose of shortly describing the types of regulation found in the analysed countries, the solutions they have reached, as well as some of the challenges faced in their endeavours to regulate lobbying more appropriately.

16 Michalek 2017. 266.
17 Chari et al. 2019. 87.
18 Fink-Hafner 2017. 302; Chari et al. 2019. 147.
19 Fink-Hafner 2017. 306.
20 Florea–Dima 2017. 281.
21 Id. 284.
22 As also noted in McGrath 2008. 19.

4. Diverse Regulatory Solutions

Most countries seem to have difficulties regulating lobbying, which also becomes apparent from the analysis of such regulation worldwide – which is mostly missing. The main purpose of regulation would be to boost transparency in the regulatory process in general in order to open up to the public an activity – lobbying – that is definitely happening whether regulated or not. At this time, it seems that drafting suitable regulations appears as a difficult task. Most do not have regulations, which means that there are no mandatory rules applying to lobbyists in most countries in the world.

In most of the analysed countries, there has been much debate around regulation, and legislative proposals have been put forward; however, taking the step of adopting regulation has proven to be difficult in some cases. As no regulation is perfect, it could be argued that some regulation is better than no regulation at all. Progress is often bogged down in debates on some of the details in these regulations, as is for example the case in the Czech Republic, where the definition of the term *lobbyist* has been debated for a while now.[23] Regulators in other countries seem to be more worried about the overlapping with other regulations meant to curb corrupt activities.

Despite the similitudes in these countries' development, the regulatory solutions they have chosen are very much different, as will be shown.

4.1. The Czech Republic

In the past two decades, there have been a number of attempts at regulating lobbying; however, none of these have come to fruition,[24] so currently there is no state regulation with regard to the interaction between lobbyists and members of parliament, members of government, or other public officials. There is, however, a group formed by six public affairs agencies that established the Association of Public Affairs Agencies (or APAA), which has adopted a shared code of conduct and actively contributes as an advisor in the process of preparation of the lobbying regulation.[25]

The 2020 Rule of Law Report on Czechia[26] had already noted that there was a draft bill pending adoption, a situation also noted in the 2021 Report.[27] The

23 2020 Report. 9.

24 Soukenik et al. 2017. 108.

25 Id. 107. The agencies are: CEC Government Relations, Euroffice Praha–Brusel, Fleishman-Hillard, Grayling Czech Republic, Merit Government Relations, and PAN Solutions.

26 2020 Rule of Law Report, Country Chapter on the rule of law situation in Czechia, Document no. SWD(2020) 302 final. 9.

27 2021 Rule of Law Report, Country Chapter on the rule of law situation in Czechia, Document no. SWD(2021) 705 final. 9.

draft bill contains regulation for the establishment of a publicly accessible register of lobbyists and lobbied persons. After registration, the lobbyists have the obligation to submit a quarterly report shortly detailing their contacts, the matters discussed, with details on specific aspects pertaining to who lobbied which legislative proposal (the so-called 'lobbying footprint').[28] The draft bill also regulates the authority that has the obligation of maintaining the register: the Office for the Supervision of Political Parties and Political Movements (*Úřad pro dohled nad hospodařením politických stran a politických hnutí*).

Sanctions for failing to report – as per the draft regulation – consist in fines ranging from approximately EUR 2,000 to 4,000. This is such a low amount that for some firms, which would want to keep their lobbying activities hidden from the public eye, it could definitely be acceptable to pay this simply as a cost of handling their interests in a confidential manner. This fine would in no case represent a deterrent, especially as lobbying is mostly done by big businesses, for which this would remain a *cost of doing business*, a cost of protecting company reputation when it comes to their position on sensitive matters.

According to the Input from the Czech Republic on the Rule of Law Report of 2021, debates are under way in the lower chamber of parliament, so regulation might soon see the light of day in this country as well.

4.2. Hungary

The first legislative regulation on lobbying adopted in Hungary dates back to February 2006;[29] however, recognizing that this law did not work, it was repealed by a law that entered into force in 2011 (the Law),[30] which was complemented by Government Decree no. 50 of 2013 (the Decree).

As the title of the 2011 Law shows, this is an act that regulates all types of public participation in the preparation of legislation, containing provisions regarding a general public consultation and another process dubbed *direct consultation*. The general public consultation is done through a website where legislative proposals are published and the general public can send in their comments and suggestions. These comments and suggestions must be taken into consideration by the minister responsible for the legislative proposal, who will also have to publish a summary of these submissions. There is also a process according to which comments and suggestions can be sent in *after* the entry into force of legislation, which deal with its implementation and matters concerning its application.

28 2020 Report on Czechia. 9. 2021 Report on Czechia. 9. The draft bill can be accessed here: https://www.psp.cz/sqw/text/tiskt.sqw?O=8&CT=565&CT1=0.

29 Law no. XLIX of 2006 concerning lobbying activities – *2006. évi XLIX. törvény a lobbitevékenységről*.

30 By-law no. CXXXI of 2010 on social participation in the preparation of legislation – *2010. évi CXXXI. törvény a jogszabályok előkészítésében való társadalmi részvételről*.

In the process of direct consultation, the minister responsible for the legislative proposal may establish strategic partnerships with organizations willing to engage in mutual cooperation. This possibility is open to organizations that prove wide societal interest or to those that can perform scientific research regarding the topics addressed by the legislative proposal in question. The *strategic partners* – as they are called in the law – can be NGOs, religious organizations, professional and scientific organizations, or even *advocacy organizations*, among others. Advocacy organizations (in Hungarian: *érdekképviseleti szervezetek*) also include lobbyists. For the purposes of the strategic partnership, an agreement is signed between the minister and the organization, which will contain the aims of the collaboration, the subjects they will collaborate on, and the duration of the agreement, among other details. These agreements are then published on the website of the minister, followed by summaries of all in-person meetings, which should especially contain the opinions of the strategic partner. The minister also has the possibility to engage in consultations with persons other than strategic partners, the law leaving it open for all people to participate in the legislative process.

The regulation in Hungary only contains obligations for public officials. The Law provides that public officials shall make reports[31] regarding their meetings with lobbyists, while the Decree provides that meetings between public officials and lobbyists can only take place after the superior of the public official has received notice of the planned meeting. This notice must contain the essential details regarding the meeting, such as the name of the organization requesting the meeting, the aim of the meeting, its time and place. The superior may deny permission for the meeting or may require that a third party attend it as well. The Law also adds a special obligation for public officials to inform their superiors in writing in case during the meeting they obtain information that purports to endanger the integrity of the organization they are a part of. There is also an obligation for public officials to report to their superiors on meetings with lobbyists on a yearly basis.

These rules apply mainly to government officials; there are no such rules that are applicable to members of parliament. Also, there is no public registry for lobby organizations.[32] The law places all burdens regarding lobbying activities on the government officials who sought out the meeting or accepted the invitation.

It must be observed that the Hungarian legislation provides a wider framework for public participation in the regulatory process, of which lobbying organizations and the rules pertaining to their activities represent only a small piece. This has

31 Thus, the criticism contained in the 2021 Rule of Law Report on Hungary is not accurate. See 2021 Rule of Law Report, Country Chapter on the rule of law situation in Hungary, Document no. SWD(2021) 714 final. 13.

32 2020 Rule of Law Report, Country Chapter on the rule of law situation in Hungary, Document no. SWD(2020) 316 final. 11–12.

been the case from the get-go, when in 2001 a legislative proposal for a *lobbying act* (*lobbitörvény*) was put forward; it then received a different name: the law on advocacy in the process of law making (*a jogalkotás során történő érdekérvényesítés*).

4.3. Poland

Lobbying regulation in Poland is one of the oldest in Europe,[33] having been adopted in 2005.[34] The Act on Lobbying Activity in the Process of Lawmaking (the Lobbying Act) establishes the principles of transparency regarding lobbying activities in the legislative process, the rules related to professional lobbying activities, the supervision of these activities, the rules related to keeping the register of activities related to lobbying, and the sanctions for violating the legal provisions.

According to the Lobbying Act, lobbying activities performed by professional lobbyists are legal activities aiming to influence public authorities in the law-making process. A special form has to be filled out in order for stakeholders to be able to submit their proposals. The Ministry of the Interior and Administration keeps the registry, where all professional lobbyists who interact with the government can be found. For lobbying activities aimed at Members of Parliament, the two chambers of the Parliament (Sejm and Senate) have their own obligations (and rules) of supervision, while lobbying activities aimed at the Government and its staff have their own register, which is established in accordance with the Lobbying Act.

Regarding the moment when lobbying is made possible, the regulation provides that as soon as a draft bill is made public, interested parties must submit the above-mentioned form to the relevant authority (which handles the draft bill in question), which will then be published in the Public Information Bulletin (*Biuletynie Informacji Publicznej*). The form must include information regarding the entities showing interest in working on a particular draft bill, their names and addresses (or registered offices), the interests which they represent, the intentions of their work (information regarding the aim of their lobbying efforts), and also whether or not they are remunerated for their work. The law provides that in case the persons showing interest in a draft bill are professionals registered for lobbying activities, they must also present a certificate proving that they are on the registry mentioned above. The certificate in question is valid for a period of three months from the date of issuance.

Lobbyists have the obligation to submit a request for entry in the public register, also indicating the entities they represent and lobby for. Other than that, lobbyists

33 2021 Rule of Law Report, Country Chapter on the rule of law situation in Poland, Document no. SWD(2021) 722 final. 18. See also timeline provided by the OECD, *supra* note 11.

34 Law of 7 July 2005 on Lobbying Activity in the Process of Lawmaking – *Ustawa z dnia 7 lipca 2005 r. o działalności lobbingowej w procesie stanowienia prawa*. http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20051691414/U/D20051414Lj.pdf

do not have disclosure obligations under this Act, but those that are lobbied do. Public officials contacted by lobbyists must prepare a detailed report regarding their contacts with lobbying professionals, which must also contain information on the influence these professionals had on the regulatory process. This has reportedly resulted in state officials seeking to avoid contact with professional lobbyists in order to avoid these extra tasks.[35] Critics have noted that the registry and the forms which are meant to ensure transparency are not put to use (with only one such participation having been noted for the year 2020), and neither has there been any evidence of sanctions ever been applied.[36]

Some have also opined that this law *discriminates* against professional lobbyists in their access to the lawmakers, which has resulted in more lobbying being done by non-profit organizations and other types of organisms that are not covered by these provisions of the law.[37] Such avoidance, however, makes for a risky activity, as the sanctions prescribed by the Lobbying Act also target professional lobbying activities pursued by persons who are not registered in accordance with the law. Persons or organizations pursuing such activities without adhering to the rules on transparency mentioned above risk a penalty of between approximately EUR 700 and 11,000. It must be also noted in this case that the maximum amount does not seem like a large sum, so it might not be such an efficient deterrent. There is currently no official code of conduct that could represent another deterrent factor for lobbyists (there used to be one that was proposed by the Polish Association of Professional Lobbyists – *Stowarzyszenie Profesjonalnych Lobbystów w Polsce* –; however, this association does not seem to be active currently).

It is also noteworthy that the Polish regulation is reduced strictly to law-making activities, which means that all other interactions between lobbyists and lawmakers or other public officials (i.e. which do not concern law making specifically) fall outside the scope of the law, which, according to critics, leaves an opportunity for clandestine influencing activities.[38] This criticism, however, seems to put forward expectations which can simply be deemed as unrealistic. On the one hand, it begs the question: should public officials avoid all persons due to the risk of clandestine influencing activities? On the other hand, requiring public officials to report any and all meetings where discussions take place that *might* be deemed as influencing them would be a most unrealistic expectation. Such regulation would make holding office excessively burdensome and would put public officials in a difficult position regarding their obligations to respect the rules concerning lobbying disclosures. As the existing law is regarded as highly

35 Michalek 2017. 268.
36 2021 Report on Poland. 18–19.
37 Michalek 2017. 265.
38 2020 Rule of Law Report, Country Chapter on the rule of law situation in Poland, Document no. SWD(2020) 320 final. 12–13.

burdensome by public officials, this effectively renders the law inapplicable and stymies public affairs activities.

In the input submitted by Poland for the 2021 EU RLR, it is noted that in 2020 only one interest representative participated in one single parliamentary committee session, while a total of 508 entities are registered in the lobby registry of the Sejm.[39]

It seems that with all efforts made by Poland in this field, lobbying regulation appears cumbersome for lobbyists and especially for public officials, wherefore these actors seem to prefer the risks that avoiding this law implies.

4.4. Romania

Despite the avid anti-corruption wave that has been dominating political discourse for more than two decades now, a modern regulation to clarify the position occupied by lobbying activities seems to be evading lawmakers. In Romania, there is no specific regulation on lobbying; thus, persons pursuing lobbying activities do not have to register, and neither do public officials have any sort of obligation to report on their contacts with lobbyists. Draft laws proposed so far have been criticized for being conducive to the decriminalization of influence peddling.[40] Although it may appear as a valid criticism, the proper regulation of lobbying is usually aimed at just that: the delimitation of illegal and illegitimate activities from legitimate public affairs activities.

While there is no legislation on lobbying in Romania, there is, however, a voluntary transparency registry[41] that was set up by the Romanian Lobbying Registry Association,[42] a non-governmental organization established in 2010 with the purpose of enhancing transparency in political lobbying. However, this registry has not seen much activity; there are still only a handful of members, and the websites related to this Association have not been updated recently. The transparency registry has been created mirroring the Joint Registry of the European Commission. While registration is voluntary, the Association has made it mandatory for its own members to register. Registered entities also adhere to a code of conduct put together by the Association, which lays down some of the principles members must respect in their lobbying and advocacy activities, such as integrity, transparency, and professionalism. The Association only has about twelve members, and the number of its members has not changed in years.

39 Input from Poland for the 2021 EU Rule of Law Report. 23.
40 Florea–Dima 2017. 288.
41 See website: http://www.registruldetransparenta.ro/.
42 See website: http://registruldelobby.ro/en/.

Additionally, in 2016, the government set up the so-called Unique Interest Groups Transparency Register[43] (*Registrul Unic al Transparenței Intereselor*) in a project initiated by the Ministry for Public Consultation and Civic Dialogue. The Register is an initiative based on voluntary commitment on both the government's side and that of business and civil society, expert groups, religious organizations, trade unions, chambers of commerce, etc., called *specialized groups*. The Register holds information on meetings that have taken place, the persons who attended such meetings, and also a short description of the discussions that have taken place. While it is not widely used, there are signs that some public officials take the initiative seriously and do interact with this voluntary system. There are a few hundred so-called *specialized groups* that have signed up and are part of this system.

Despite the lack of mandatory legal provisions related to lobbying activities, the occupation of *lobbying specialist* has officially been made part of the Romanian Classification of Occupations (code no. 243220)[44] since it was first introduced in 2011.[45]

The Rule of Law Reports on Romania only shortly mention that there is no legislation on lobbying and it is recommended that legislation is adopted, while also noting as a positive factor the existence of a self-regulatory, non-mandatory initiative, which established a transparency register – as also noted above.[46]

It is possible that the transition from a voluntary system to a mandatory one will be much leaner and easier for lobbying groups and interested persons, as well as for public officials, who have taken part and have gained experience in this voluntary system.

4.5. Slovakia

Slovakia presents a similar situation to that of Czechia. There have been attempts at regulating lobbying since 2002; however, none succeeded, so there is now no regulation of lobbying in the country.[47] There is legislation in place establishing that some law-making and business activities shall be public either through the

43 A short description can be found here: http://ruti.gov.ro/wp-content/uploads/2016/10/English-description-of-the-Romanian-Unique-Group-Interests-Transparency-Register.pdf.

44 The classification can be consulted here: https://mmuncii.ro/j33/images/Documente/Munca/COR/20201026_ISCO08_COR_lista_alfabetica_ocupatii.pdf.

45 Order (of the Minister of Labour) no. 1832/856/2011 concerning the approval of the Classification of occupations in Romania, published in the *Official Gazette of Romania* no. 300 on 8 August 2011.

46 2020 Rule of Law Report, Country Chapter on the rule of law situation in Romania, Document no. SWD(2020) 322 final. 13. 2021 Rule of Law Report, Country Chapter on the rule of law situation in Romania, Document no. SWD(2021) 724 final. 16.

47 Zoltvany 2017. 296.

business registry or through the publication of contracts and other information regarded as being of interest to the public. However, these will not be analysed in this paper, as the current research only focuses on lobbying regulation in a stricter sense. There is no official definition of the term, and the profession itself is not regulated in the Slovak system.[48]

According to both the 2020 and 2021 Rule of Law Reports on Slovakia,[49] the government promised to regulate lobbying; however, there has been no progress in the matter. An opinion has been launched stating that the lack of regulation is a consequence of a lack of *need* for regulation, which stems from the fact that there is no lobbying going on in the country.[50] As noted above, there has been a shift in lobbying efforts, which now centres around Brussels, so such an opinion – although it may seem a bit radical – definitely has some relevance.

4.6. Slovenia

As opposed to the other analysed countries, we see that Slovenia presents a completely different political system, in which the lower house – called the National Assembly –, which does the legislative work, is joined by an upper house – called the National Council –, where representatives of business and industry also have their place.[51] This obviously greatly influences law making in the process of regulation of different economic sectors.

In the early 1990s, there have been attempts at establishing lobbying as a professional activity associated with public relations activities. However, the most important step forward was the establishment of the Slovenian Association of Lobbying, with its members signing an *Ethical Code*.[52]

Following this private initiative, a law has been put in place – the so-called Integrity and Prevention of Corruption Act[53] –, which requires persons who wish to involve themselves in lobbying activities to register, with the exception of individuals, informal groups, or interest groups acting to promote the rule of law, democracy, and the protection of human rights and fundamental freedoms.[54] The regulation on lobbying in Slovenia only allows for natural persons and interest groups to engage in lobbying activities, and it requires such persons to register themselves in the registry of lobbyists of the Commission for the Prevention of

48 Ibid.

49 2020 Rule of Law Report, Country Chapter on the rule of law situation in Slovakia, Document no. SWD(2020) 324 final. 8. 2021 Rule of Law Report, Country Chapter on the rule of law situation in Slovakia, Document no. SWD(2021) 727 final. 13–14.

50 Coming out of the pen of at least one scholar, see: Zoltvany 2017. 297

51 Fink-Hafner 2017. 300.

52 Id. 305–306.

53 Law on integrity and prevention of corruption no. 69/2011 – *Zakon o integriteti in preprečevanju korupcije. Uradni list 69/2011*.

54 Fink-Hafner 2017. 304–305.

Corruption of the Republic of Slovenia (*Komisija za preprečevanje korupcije Republike Slovenije*). When registering, these persons and interest groups must disclose details regarding the entities they represent and lobby for.[55] This regulation also contains a revolving door provision, according to which former political officials may only exercise the lobbying profession once a period of two years has elapsed since the end of their mandate.[56]

Public officials are not allowed to meet with persons aiming to engage in lobbying activities unless such persons are registered in the lobbying registry. In addition to registering, lobbyists are also required to publish a report on their activities on a yearly basis. It is important to note that the Slovenian law sets a difference in the treatment of professional lobbyists and in-house lobbyists, where only the former have an obligation to sign up on the registry.

Regarding lobbying, the Commission for the Prevention of Corruption collects data on its website,[57] which is updated quite often, with entries made on a daily basis, containing information on the lobbyists, the lobbied, the subject lobbied on, and the purpose of lobbying. This activity is also due to the obligation to report contained in the law, according to which all contacts must be reported in 72 hours after they have taken place.

Violations of the rules on lobbying may involve prohibition from lobbying in specific cases for a determined amount of time, which cannot exceed two years, as well as fines of between 400 and 100,000 euros. As compared to other fines shown in this paper, this seems to be a bit more daring, threatening more serious consequences for violations of the law.

It is noteworthy that Slovenian regulation also covers public officials at a local level, not only at the level of the central government. Public officials must report contacts both to their employer and the Commission, the latter having the data published on its webpage, the *Erar*. In addition, lobbyists also have an obligation of disclosure according to the law.

The Slovenian law has also been criticized for not being implemented and applied properly, leaving all of the above looking good on paper but having limited effects on the lobbying industry, where the large majority of lobbyists have been reported to be unregistered.[58] Despite this fact, Slovenia has received nothing but positive feedback in the RLR of 2020 and 2021.[59]

55 A contact list can be consulted here: https://www.kpk-rs.si/delo-komisije/instituti/lobiranje/register-lobistov/.

56 Fink-Hafner 2017. 304–305.

57 The lobby registry can be consulted here: https://erar.si/lobiranje/.

58 Chari et al. 2019. 148.

59 2020 Rule of Law Report, Country Chapter on the rule of law situation in Slovenia, Document no. SWD(2020) 323 final. 9. 2021 Rule of Law Report, Country Chapter on the rule of law situation in Slovenia, Document no. SWD(2021) 726 final. 13.

5. Takeaways

The professionalization of lobbying may be viewed as one of the most important achievements of any lobbying regulation. The legal separation of lobbying from activities associated with corruption, such as influence peddling, can also build trust in this activity on the part of citizens. As an activity that seems to bind itself to democratic systems, it holds the potential of greatly influencing law-making and regulatory activity. For this reason, regulation should be enacted in order to ensure that the excessive representation of private interests in law making is revealed, and efforts can be made to counter it if the public finds it excessive or as jeopardizing public interest.

Regulation is also in the interest of lobbying firms, as it contributes to pushing out informal lobbying, or at least to reduce lobbying done in the grey zone. The transparency of the activities of professional lobbying firms may thus benefit their business. Also, clients can check on the activities their hired firm engaged in from a more neutral source. This might also be the reason why we have seen lobbying firms set up self-regulatory instruments, public registries, codes of ethics, or why they put forward legislative proposals and push for more detailed regulation (as seen in the case of Romania and Czechia).

Building trust by ensuring transparency and accountability is just as important a purpose for lobbying regulation as offering access to the law-making process to a wider range of opinions by establishing the appropriate channels to this end. With proper access by interested parties, lobbying regulation can genuinely improve the quality of the adopted laws.

The arguments endorsing the need for regulation mostly revolve around the need for transparency in decision making and the accountability of decision makers, as well as that of lobbyists. The EU RLR considers lobbying regulation as something that improves the rule of law and also as an important tool in the fight against corruption. However, there are also many other tools that can provide for transparency and accountability, or even improve anti-corruption efforts outside of the narrow field of lobbying. Inadvertently, regulating lobbying also creates paths for avoiding the regulation itself, in the sense that there will still be lobbying done in a clandestine way if the parties involved do not want to report meetings that have taken place. This is demonstrated by the fact that the above-analysed lobbying regulations are mostly ignored or not applied as expected. It is also true that the parties involved in public affairs dealings can always report acts of corruption regardless of the existence of a lobbying register.

Lobbying in the EU is mostly concentrated in Brussels, which seems appropriate, as some estimate that almost 80% of legislation affecting our daily lives and that of industry is initiated there and then transposed into MS's legal

systems.[60] This means that appropriate lobbying regulation is mostly needed at the EU level, and the EU should be the one to set an example for its MS, as Brussels is the second capital of lobbying after Washington D.C. However, we see that progress has been slow also at an EU level, and it was just recently that regulation turned into mandatory rules not only at the Commission but also at the Parliament and the Council. Setting an example would be welcome, especially in view of the fact that in the RLR of the Commission a progression can be seen in the expectations set towards the MS analysed in this brief research. The progression goes as follows: when there is no regulation, the Commission recommends that regulation be implemented, and where regulation can be found, criticism abounds about either the limited scope of application or the sufficiency of the sanctions or the level of transparency it ensures. In all cases where regulation exists, it is recommended that such regulation be extended, improved, and amended. When improvements never seem to be enough, and criticism does not cease, the nudging of governments can backfire, and other suggestions would also lose their edge. For now, most of the criticism regarding lobby regulation seems to revolve around the suitability of regulation in curbing corruption and excessive influence, instead of concentrating on how such regulation ensures proper public participation in law making.

A key point in the regulation of lobbying is the willingness and actual need of the people to engage more often in political discussions and be more active in the shaping of their countries' laws. Leading an active political life outside the election periods is as important to a healthy democracy as elections themselves. It is also true that the disillusionment felt by many in this region after the regime change around 1989 has discouraged active participation.

Despite the many similarities between the analysed countries – all in the same *neighbourhood* and with similar recent history –, there are also many differences. Differences in the way the democratic transition was carried out, differences in the way political pluralism and civil society grew, and differences in the degree of transparency of political decision making. Which is why it is not a surprising fact that all six countries have different approaches to lobbying regulation. Each country has it differently: Slovakia has no rules, Czechia has industry self-regulation and a law under preparation, Romania has industry self-regulation and a voluntary registration system put together by the Government, Poland regulates lobbying with burdensome mandatory rules that have resulted in widespread avoidance of the law, Hungary has looser but still mandatory regulation, with most obligations burdening public officials, while Slovenia has strict mandatory regulation imposing obligations on both public officials and lobbyists. The diversity must be noted in this regard as well: Slovenia has chosen to regulate

60 In this sense, see Research Paper 10/62. 2010. How Much Legislation Comes from Europe? https://researchbriefings.files.parliament.uk/documents/RP10-62/RP10-62.pdf.

lobbying as part of a broader package in an anti-corruption legislative act, while Hungary has chosen to regulate lobbying as part of a law concerning public participation in law making. The direction from which the two states approach the regulation of lobbying is relevant as to the primary goal they pursue.

There are a number of Western democracies that have no regulation on lobbying (such as Belgium or Luxembourg), states with voluntary registers (such as Germany), and states with mandatory lobbying registers (such as France). So, as varied as the regulatory situation presents itself in East-Central Europe, the same can be said about Western Europe as well. It took the United States and Germany more than half a century to get their lobbying legislation to where it is now. One could argue that these are models that could be copied; however, it is a more sensible approach that each country develops their own legislation suitable for their own systems.

Many conclusions can be drawn from this intriguing mix of regulatory solutions, of which the most important is that no matter the apparent or genuine similitudes between countries, regulation, its application, and its effects will always differ. It is evident that lobbying as a regulated activity will see some evolution in the coming years. What seems to be similar is that there is avoidance of compliance on both the part of lobbyists and that of public officials when the regulation becomes too burdensome. When too much regulation becomes counterproductive, it becomes evident that the state must rebalance regulation to make it more suitable to the specific institutional and cultural environment. In this region, the better path would be one of regulation that prioritizes public participation in law making as a way for *re*building democracy.

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Acta Univ. Sapientiae, Legal Studies, **11**, 1 (2022) 69–81

DOI: 110.47745/AUSLEG.2022.11.1.04

The General Concept of Public Policy and Law

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Abstract. This paper provides insight into the concept of public policy and its relationship to the law. The purpose of this paper is to describe how public policy is applied in the legal world, particularly in the field of internal commercial arbitration. The paper identifies the public policy dynamic and its applicability in various jurisdictions. The major issue confronting countries that use arbitration as a dispute resolution mechanism is the defence of public policy and its ever-changing complexities. The public policy process is said to be versatile since it operates under a variety of social, political, and economic situations. The guiding role of public policy forbids regulatory authorities from enacting legislation against it. This study uses a literature analysis to assess and draw conclusions about the general concept of public policy and law.

Keywords: public policy, international commercial arbitration, international law, policies

1. The General Notion of Public Policy

Public Policies are said to be as long-standing as governments. To put it simply, whenever and wherever governments have existed, public policies have been made and implemented. To handle the requirements and diverse predicaments of the population, policies are created; further known as public policies. Public policy is a course of action created and/or enacted, typically by a government, in response to public, real-world problems. Carl Joachim Friedrich, a German-American professor and political theorist was of the opinion that: 'Public policy is a proposed course of action of a person, group, or government within a given environment providing opportunities and obstacles which the policy was proposed to utilize and overcome in an effort to reach a goal.'[1] From the above definition, public policy is a set of activities the government opts to take when

1 Friedrich 2000.

tackling a problem that concerns society as a group, rather than on an individual level. Furthermore, public policy insinuates policies that the government forms on the public's behalf to settle a certain issue. Public policy process is a dynamic and complicated process that occurs through public forums. These policies can be political, economic, cultural, or social in nature. Public Policy plays an important role in the society as it helps to understand the intentions of the government for a particular sector, department. Through this, the public can even measure the achievements made by the government to resolve their issues.

Politics plays a critical part in the implementation process since it determines the results of the activities. Woodrow Wilson published an article on public administration in which he argued for a complete separation of politics and administration. However, the awareness of the degree to which politics influences the administration and the acts done by the administration sparked interest in the execution of public policy. Thus, the concept of public policy and its execution have changed throughout time. There are many key significant public policy documents that facilitated the shaping of the modern approach to how policy is formed. The evolution of public policy is marked by expansion of the power of the people as well as the government. After the Second World War, the development of public policy received substantial attention, as the analytical approaches to social problems were combined into formal policy processes. The importance of analytical approach was highlighted by several other disciplines to get a better understanding of the policy-making process, for cognizant decisions. Economists in the 1960s developed many different cost-effective analysis theories as a method of problem solving. Other related disciplines of social sciences gave additional inputs, added several other approaches to confront the tribulations through the system approach.[2]

In the 1950s and 1960s, the process of policy followed a wider policy analysis approach and included political attention by sociologists and economists, centred on the Keynesian Economic Model.[3] Many important historic events, such as the War on Poverty, the Vietnam War, the Watergate Scandal, or the Energy Crisis of the 1970s, were first proposed as the events that formed the development of the policy sciences. In the case of lack of tangible results, measurable indicators were considered important especially during the implementation of a programme for professions in social sciences. This dispute led to policy analysts to take up a more rational approach that focused on achieving maximum social improvements that surpassed costs. Public policy puts down overall orders rather than thorough directions. After the lines of action have been determined, specified sub-policies that convert the general theory into a concrete one are required to implement it. It initiates the rudiments of ambiguity and doubtful prediction that establish the basis of all policy making. It is made and implemented to attain the objectives that

2 Mokhaba 2005.

3 Moran–Rein–Goodin 2008.

the government has thought for the crucial advantage of the people. The reason for the formulation and execution of these policies is for the welfare of the citizens.

According to the researchers, public policy encompasses all government acts, beginning with the intention to perform a specific action and ending with the outcome of that action.[4] Public policy is interconnected with public administration and other fields of study such as political science and law.[5] If we believe that state politics have full influence over bureaucracy, we may assume that implementation process starts when policy is turned into action. The early research on the subject focused on bureaucracies since the concept aligned with Max Weber's paradigm. It included concepts from the goal-setting and rational decision-making processes.[6] It is up to a government to decide how precisely it wants to define the essence of its public policy in a particular sector and how 'vast, qualitative, and complicated' might the public policy be in nature.[7]

Public policy is the most widely used ground or exception to avoid enforcement of arbitral awards when it comes to the international commercial arbitration. It remains a highly debated and controversial topic. The purpose of public policy is to protect the fundamental principles of the society. It is defined as 'a mechanism that corrects the choice-of-law designation for substantive reasons, namely the defense of the forum's fundamental legal principles and moral values'.[8] But the application of this ground is based on the interpretation of national courts. Public policy is always an 'unsafe and treacherous ground for legal decision'.[9] The prominent role of national courts in international arbitration has been recognized in almost every country, enjoying greater recognition in some than in others. Although the researchers utilized a variety of approaches to investigate the nature of public policy, a well-defined conceptual framework for it can only be developed through an in-depth examination of the policy implementation process,[10] which is critical for comprehending the nature of public policy.

International commercial arbitration is often conducted in a neutral country. It is customary for the prevailing party to seek enforcement of the judgment in other foreign jurisdictions. Enforcement occurs when winning parties attempt to get the arbitrator's award in their favour. When the losing party fails to comply, the parties may seek help under a variety of international conventions such as the New York Convention. Arbitration cannot be considered successful unless and until the award is enforced. Public policy is one of the New York Convention's grounds for challenging the execution of a foreign arbitral decision. It is mostly tainted by the

4 Cairney 2019.
5 Hogwood 1995. 59–73.
6 Hogwood-Gunn 1993. 217–225.
7 Sunday 2013.
8 Guedj 1991. 661–697.
9 Case Janson v. Driefontein Consolidated Gold Mines Ltd. (1902) AC 484, 500.
10 Meter–Horn 1975. 445–488.

facts that this defence is incapable of being defined precisely, is entirely reliant on the rules of different nations for applicability, and varies by state.

Public policy can be generally defined as a system of laws, regulatory measures, courses of action, and funding priorities concerning a given topic promulgated by a governmental entity or its representatives. The concept of public policy originated as early as the fifteenth century.[11] It reflects a common law origin and initial definitions of public policy focused on acts injurious to the public interest or immoral or illegal actions. Public policy is a concept that is adapted periodically in order to meet the changing societal needs, including political, social, cultural, moral, and economic dimensions. Courts often refer to public policy as the basis of bar.[12] Thus, if the court feels that such an issue falls within the scope of public policy, it may interfere to protect the interest of the public. Commonly, public policy is used to describe the authoritative or mandatory rules that parties cannot exploit.[13]

2. Elements of Public Policy

Although the majority of research on public policy implementation is based on the generalized theory of policy implementation, which confines the concept of policy implementation to a top-down connection, the study recommends that a more democratic approach should be used.[14] This method is effective and is also referred to as the bottom-up technique.

The intermediate factors have an effect on the process of policy implementation.[15] Due to intermediate factors, the results of government public policy may differ from the policy objective. Researchers anticipate that public policy implementation will be 'dynamic and complex', yet a study of public policy implementation instances shows that the degree of complexity may vary[16] According to the researchers, under certain circumstances, it is conceivable for some factors to have a more complicated impact on the public policy implementation process, thus affecting the efficacy of the policy results.

The researchers identified three drawbacks to the central (top-down) approach to public policy implementation. The first problem that arises when a central method is used to execute public policy is whether top management is clear about its objectives. The second problem is how policy is conveyed from the top to the bottom. The third issue is about the difficulty that the traditional approach

11 Knight 1922. 207.
12 Shore 2009.
13 Kossuth–Sanders 1987.
14 DeLeon–DeLeon 2002. 467–492.
15 Hupe 2011. 63–80.
16 Brynard 2005. 649–664.

to the problem faces, since it becomes problematic for the democratic method when input for goal formulation comes directly from top management.

Researchers found three possible explanations for the disconnection between organizational performance and policy results. These include disagreements over facts, values, and policy.[17] According to the social exchange theory, if public policymakers fail to achieve a good social exchange because of their actions, they risk being labelled 'illegitimate' by the public. Some academics have referred to it as the government's reputational risk or political risk.[18]

Due to the fact that it works under a variety of social, political, and economic circumstances, the public policy process is said to be 'dynamic' in nature.[19] Policymakers work under a variety of circumstances in order to provide services to the public. Due to the dynamic nature of public policy making, it becomes complicated. Consider the time value of the money argument, for example. If the value of a policy varies over time, it becomes very difficult for policymakers to predict its future value, particularly given the qualitative character of the policy. This is often referred to as the subjective risk that policymakers confront as a result of the dynamic character of public policy in a given scenario. Researchers believe that economic feasibility is critical for public policymakers because it allows them to determine the value of a public policy for both the general population and the government. It aids in the decision-making process for the formulation of public policy.[20]

Occasionally, policymakers will continue to use the same old methods in new situations. This results in policy failure, since the process of policy implementation is dynamic, wherefore not every policy will be effective in all circumstances. While public input is critical for making policy decisions, under a central decision-making system, decision makers often disregard it. This explains the disconnection between governmental policy and popular expectations. Policy analysis is necessary to guarantee that policies are implemented smoothly. The implementation process is entirely responsible for the policy results that may determine the government's and its activities' legitimacy. A government may be branded illegitimate by the people if it fails to implement a policy. As a result, the government's legitimacy is contingent upon the effectiveness of its public policies.

Through the policy-making process, decision makers often opt for the most cost-effective option when developing a policy.[21] Harold Lasswell is credited with developing the five-stage policy process model.[22] The first step of this procedure

17 Heath–Palenchar 2008.
18 Power 2004. 58–65.
19 Simon 2016.
20 Aven–Renn 2010. 121–158.
21 Simon 2016.
22 Howlett–Giest 2012. 35–46.

is referred to as 'agenda setting'. This stage identifies the issues and proposes remedies to them. The second stage is referred to as 'policy formulation', and it is at this step that policymakers examine a collection of possible solutions to a specific issue and eliminate the infeasible ones. At this point, decision makers often undertake a comprehensive cost–benefit analysis. A decision is only viable if the advantages outweigh the costs. Policymakers who have received training in strategic management tend to limit down policy options using a ranking system to find the most viable alternatives. This is the third stage of 'decision making', during which the government determines the course of action to follow. Thereafter, the tools of public administration are employed to carry out the policy. This fourth step is referred to as 'policy implementation' and the fifth step as the 'policy assessment stage'.[23]

Not only is it the government's duty to assess the ability of public policy, but it is also the people's responsibility in a democracy to provide feedback on the execution of public policy. For example, with the advancement of telecommunications technology brought about by the Internet and cable, academics have shifted their emphasis to ways for increasing public involvement in policymaking. This is sometimes referred to as 'e-democracy',[24] which allows the public to use a variety of technologies to give input to the government. This increases the degree of public involvement in the process of developing public policy.

Political scientists conduct four kinds of policy research: substantive area research, evaluation and effect studies, policy process research, and policy design research. The substantive field of study is concerned with policy formulation in a particular area of politics, which may include health, the environment, and others. For instance, the study of social security politics may be considered a substantial research area.[25] While conducting a thorough examination of policy implementation in relation to the politics of a particular region, researchers noted that Aaron Widavsky did not define policy analysis.[26] According to the researchers, policy analysis is a multidisciplinary endeavour that may be accomplished via the following four strategies:

1. 'prospective and retrospective analysis;
2. descriptive and normative analysis;
3. problem finding and problem solving;
4. the segmented and integrated analysis'.[27]

The approach in which policies are conveyed to the organization's lower levels, particularly the government, influences their execution since the bureaucracy

23 Ibid.
24 Macintosh 2004. 10.
25 Derthick 1979. 94.
26 Nelson 1996. 559–594.
27 Dunn 2015.

reacts differently when political masters' express policies in a formal manner.[28] While organizational hierarchy is critical for policy implementation, when seen through a democratic perspective, it becomes a barrier. According to experts, public policy makes use of laws to influence the interaction between the government and the general population. Advocates of a democratic approach to public policy think that disparities between policy goals and growing concerns cannot be bridged without resolving such disparities.

3. Domestic and International Public Policy

Domestic public policy impacts the internal affairs of a country's citizens, but when the government's activities in the international arena begin to affect the public, it becomes international public policy. International public policy may also be referred to as 'global public policy'. In an international context, the policies pursued by one government may have an effect on the policies pursued by another, complicating matters. When it comes to the distinctions between domestic and international public policy, it is recommended that management adopt an aggressive approach at the policy level, since the issue may affect many sectors, including social, political, and economic ones.[29] Domestic public policy is stated to be formed from enactments of statutes, constitutional restrictions, or any other judicial procedures inside a given state. The term is used to describe a variety of issues such as personal rights and freedom, social welfare, healthcare, education, legislation, law enforcement, etc. Since the arbitration is connected to only one nation, only that nation's public policy is considered. Domestic public policy has an impact on the life of every citizen in the nation since it shapes issues such as environmental protection, legislation, education, social welfare, and law enforcement.[30]

According to the experts, the government confronts policy difficulties both domestically and internationally because of the development of newer technologies and shifting sensitivities. For example, although the management may face no threat to its sovereignty while formulating domestic policy, the process of public policy formation is influenced by foreign events. This prompts us to consider whether domestic public policy is really autonomous. International public policy, on the other hand, refers to the principles that govern a country's domestic policy that will also be applied in an international setting.[31] International public policy encompasses the public policies of many jurisdictions; therefore,

28 Friedrich 2007. 49–75.
29 Bayvel–Cross. 2010. 3–12.
30 Team 2016.
31 Rashid 2018.

the domestic court must consider the arbitration's international aspects while enforcing its domestic public policy limitations. Certain nations, such as France and Switzerland, have even replaced their domestic public policy arbitration statutes with international ones. Indian courts made a distinction between domestic and international awards, indicating that domestic public policy is more limited in scope than foreign public policy under the Indian arbitration law.[32] The distinction between domestic and international public policy, on the other hand, is very thin. Domestic and international public policy differ in their levels of enforcement. The arbitration at the International Court of Justice (ICJ) may reflect the differences between domestic and international public policy. For instance, the Tampico Beverages, Inc. v. Productos Naturales[33] at the Supreme Court of Colombia revealed the differences of enforceability between domestic and international public policy.

International public policy is directly related to the country's reputation in an international arena where countries engage, while domestic public policy is often concerned with the country's general welfare. International public policy enables a country to strengthen its ties with other countries. Domestic public policy enables the government to gain legitimacy from the country's domestic population. Transnational public policy is international in nature since it enables the participation of other nations. Domestic public policies are defined by domestic legislation, while international public policies are determined by international legislation. When researchers attempt to establish a link between domestic and foreign public policy, the idea of state sovereignty comes under criticism. While a country may operate independently on the international stage, it may have to surrender part of its sovereignty in order to join international agencies and organizations such as the World Bank and the United Nations (UN). For example, a government may accept stringent conditions in order to get a loan from the International Monetary Fund (IMF). It is still up to the IMF to determine whether to sanction the loan or not.

Today, the world is now referred to as a global community. Domestic public policy information is readily transferrable to the international level. International response may compel the government to reform or alter domestic policies. For example, UN General Assembly (UNGA) decisions have an impact on the domestic public policy of different countries worldwide. Civilian engagement is supporting governments in redefining the role of domestic and international public policy.[34] The connection between public policy and law becomes

32 Section 34 of the Indian Arbitration and Conciliation Act 1996 enables the court to set aside an arbitral award if the court finds that the award conflicts with the public policy of India, whereas Section 48 of the Act enables the court to refuse the enforcement of foreign awards if the court finds that the enforcement of the award would be contrary to the public policy of India.

33 Case Tampico Beverages, Inc. v. Productos Naturales de la Sabana S.A. Alquería, 12 July 2017.

34 Deibert 2000. 255–272.

apparent at the implementation stage of public policy. Usually, laws are the tools utilized to carry out public policy. Domestic policies are governed by domestic law, while foreign policies are governed by international law. As a rule, the general population is interested with domestic laws inasmuch as they influence the planning and implementation in the social, economic, and other spheres of a citizen's life. The quality of governance can get better by improving the level of implementation of both domestic and international laws.

4. Public Policy and Law

'With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles. It can leap the fences put up by fictions and come down on the side of justice.'[35]

Public policy is always more expansive than the laws that define it. The relationship between law and public policy can be described as a 'hand in glove', where laws protect the private interest while the public policy pursues social justice and mediates the competing interests.[36] While legislation may be utilized to provide for reward or punishment in a particular sector, public policy is constantly pursuing larger goals. The public expects the government's public policies to effect change in society. Civil courts may address the first nature of conflict, and the law of takings or regulatory laws may deal with the second aspect. Public policy may shape the legal plane of bureaucracy or public administration and guarantee the rule of law ideals. It plays as an enabling authority and monitors arbitrariness and unfairness in the bureaucratic government.[37] Jacob Dolinger in his article states that the character of public policy may have a damaging effect due to its diverging nature, and it has a 'barrier effect'.[38] Therefore, the different interpretations of public policy add numerous layers of complexity in determining the validity of arbitral awards. Without laws, a public policy may exist. For example, even if the government does not outright prohibit smoking, it may nevertheless establish a public policy against it, since public policy can reflect societal preferences.

It is the policymakers' duty to comprehend the objectives of public policy. If policymakers determine that a policy conflicts with the country's laws, they replace or modify it. The policymakers understand that nothing becomes a law unless and until it is authorized by the legislative body of that country. It is

35 Refer Case Enderby Town Football Club Ltd v The Football Association Ltd. (1971) 1 All ER 215, p. 219.
36 Kim 2014. 137–143.
37 Kim 2015.
38 Dolinger 1982. 167–194.

the function of public policy as a guide that enhances its popularity among the people. Historically, the courts' role has been to interpret the laws, not to establish new ones. Due to the presence of regulatory agencies in the states, the function of public policy guidance role becomes critical. It is the regulatory authorities' responsibility to enforce the laws. These regulatory organizations are mandated to act in accordance with administrative law. Public policy's guiding function precludes regulatory agencies from adopting legislation against it. Public conduct is controlled in the nation via the enforcement of laws. The executive branch of government is accountable for implementing public policy that reflects popular preferences.

Government size has a direct correlation with the intricacy of the laws. Increased government size increases the complexity of the laws. At times, citizens accuse the government of implementing unconstitutional laws. This adds to the executive's workload. The diverse nature of public policy adds to its value for policymakers. If public policymakers formulate policies based on prior experiences, the public may not enjoy a steady result. This is because public policy is inherently dynamic. A particular policy may be applied to a particular social, economic, or political sector. For instance, a change in public policy resulted in the repeal of the United States' prohibition laws. The liquor business thrived in the United States after the shift in public opinion although many states continue to have laws prohibiting 'drink and drive'.

Public policy is used as the moral, social, and/or economic considerations that are applied by courts as grounds for refusing enforcement of an arbitral award. In civil law systems, references to good faith and good morals, as well as to public policy as a bar to parties' freedom are incorporated in codes. In common law, references to public policy are mainly included in judicial practice, but also in legal documents. The House of Lords of England in early 1853 explained that public policy is a 'principle which does not permit the doing of anything that could harm the basic principles of any society'. For international private law, public policy is a reaction to the foreign laws that are contrary to the *ius naturale principles*,[39] while, on the other hand, public policy appeals to the principles forming the 'political and social foundation' of a specific society's civilization or to the 'principles of preserving certain legislative policies'. While the dynamism of the concept of public policy cannot be denied, it is important to exercise extreme caution in applying the concept.[40] Public policy, by its nature, is a dynamic concept that evolves continually to meet the changing needs of society, including political, social, cultural, moral, and economic dimensions.

39 *Ius naturale* is a Latin term for natural rights, the laws common to all beings.

40 Case Kiran Atapattu v Janashakthi General Insurance Co. Ltd., SC Appeal 30-31/2005.

5. Conclusions

The concept of public policy is prejudiced by the old concept that it is against sovereign dignity to submit to any type of dispute resolution system not controlled by the state itself. Hence, it is a concept formed on the basis of public good. Lord Mansfield laid down the principle that 'no court will lend its aid to a man who finds his cause of action upon an immoral or illegal act', thus, in effect, laying the foundations for the refusal to enforce an illegal contract.[41] A public policy outlines what a government ministry hopes to achieve and the methods and principles it will use to achieve them. It states the goals of the ministry. A policy document is not a law, but it will often identify new laws needed to achieve its goals. So, policy sets out the goals and planned activities of a ministry and department, but it may be necessary to pass a law to enable the government to put in place the necessary institutional and legal frameworks to achieve their aims. Laws must be guided by current government/public policy. Public policy ensures public safety, and it becomes even more critical as the regulatory function of the government expands. While developing public policy, public policymakers confront both qualitative and quantitative risks. Budgetary analysis, forecasting, and cost–benefit analysis may all be included in public decision making. Numerous variables, most notably public expectations, influence the formation of the public policy. Public policy mediates between the interests of transnational business and those of the State with the closest connection to the contract. Each state has its own concept of public policy. For example, in case of trade activities, what is legal in one state might be illegal in another one. In most countries, commercial whaling is a banned practice; however, countries such as Japan, Norway, and Iceland still practice it.[42] Similarly, a dispute between a distributor and an alcohol producer is regarded as arbitrable in many countries, whereas easy enforcement of awards might be more difficult in Islamic states, where consumption of alcohol is prohibited; the rules will be stricter while enforcing an award, as it is against their public policy. It affects citizens directly or indirectly. It takes elements from various disciplines such as public administration, sociology, economics, history, cultural practices, and customs. If a government is unable to sustain an effective public policy, it loses public legitimacy. Though there is no precise definition of public policy, it is an accepted norm that states have the ultimate right to refuse to enforce an arbitral award on grounds of public policy.

41 Case Holman v Johnson (1775) 130 E.R. 294.

42 BBC News. 2019. *Japan Whaling: Why Commercial Hunts Have Resumed Despite Outcry*. Available at: https://www.bbc.com/news/world-asia-48592682 (accessed on: 24 February 2020).

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Acta Univ. Sapientiae, Legal Studies, **11**, 1 (2022) 83–94

DOI: 110.47745/AUSLEG.2022.11.1.05

Grave Robbery in Early Mediaeval Frankish Laws

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Abstract. Almost all German codices – except for *Lex Saxonum*, *Lex Thuringorum*, and *Ewa Chamavorum* – extensively discuss legal protection of the grave and the dead body and sanction persons who disgrace them. This scope of issues is dwelt upon in details by *Edictum Theodorici*, *Leges Visigothorum*, *Lex Burgundionum*, *Edictus Rothari*, *Lex Salica*, *Lex Ribuaria*, the *Pactus*, *Lex Alamannorum*, and *Lex Baiuvariorum*. In the present paper, we analyse the state of facts that constitute grave robbery in Frankish laws. This investigation requires the analysis of the legal source base as well as some examination in the history of language, which allows a comparative analysis of the issue and helps to highlight the various layers of the norms of Frankish laws by the example of this state of facts.

Keywords: Early Mediaeval legal history, sepulchrum violatum, wargus, Lex Salica, Lex Ribuaria

From among Frankish sources, first it is worth investigating *Lex Ribuaria* recorded in the first half of the 7th c. Under the title *De corporibus expoliatis*, the law distinguishes plundering of an unburied corpse and an already buried corpse. In case of plundering an unburied corpse, if the perpetrator admits his/her act, s/he shall pay sixty *solidi*, if s/he denies it and s/he has been proved to have committed the act, s/he shall pay one hundred *solidi* and the *dilatura*, or s/he shall take a cleansing oath together with six fellow oath takers (this issue will be discussed later).[1] *Dilatura* is usually interpreted in the sense of *default penalty* – nevertheless, the term covers the reward to be paid to the *delator*, the

1 *Lex Ribuaria* 55, 1. „Si quis autem hominem mortuum, antequam humetur, expoliaverit, si interrogatus confessus fuerit, bis trigenos solidos multetur. Si autem negaverit et postea convictus fuerit, bis quinquaginta solidos cum dilatura multetur, aut cum VI iuret."

person who makes the charge.[2] In the above-mentioned case of plundering the dead person, the perpetrator shall pay two hundred *solidi*.[3]

It should be noted that a few titles later *Lex Ribuaria* returns to this issue and under the title *De corpore expoliato* expounds the state of facts of plundering an unburied and a buried corpse again; however, here it no longer distinguishes a perpetrator who admits his/her act from the one who denies it. The robber of an unburied corpse shall pay one hundred *solidi*, shall return or compensate for the robbed valuables, and shall bear the reward of the person who made the charges.[4] Compared to the state of facts referred to in the above-mentioned title, the difference is that in the former the lawmaker might have presumed that the injured party had been killed by the perpetrator and for this reason inserted the distinction between an admitting and a denying perpetrator in the text subsequently, which is supported by the fact that a cleansing oath to be taken together with six fellow oath takers is completely senseless in case of a perpetrator who admits his/her act. In the light of that, the latter title refers to the state of facts when the plundered person has not been killed by the robber.[5] With respect to the two hundred *solidi* penalty imposed on the person who plunders an already buried person, there is no difference between the two titles, but the latter adds a stipulation to it, concordant with *Lex Salica*, stating that the perpetrator will be considered *wargus* 'until' – emphatically 'until and so long as' – he has paid the *conpositio* to the relatives of the injured party.[6]

The analysis of the relevant loci of *Lex Salica* is significantly more problematic than the examination of the folk laws containing fairly clear provisions, discussed so far, which can be attributed to a considerable extent to uncertainties of the texts left to us, wherefore – for the avoidance of doubt – we shall consistently use the terms of Eckhardt's *editio*.[7] In the most reliable manuscripts (A2, A3, A4, C5, C6), the state of facts of plundering a yet unburied dead person of a free status can be found under the title *De supervenientis vel expoliationibus*, and the law orders its punishment by a one-hundred-*solidi* penalty.[8] In agreement with Eckhardt, the term *chreumusido* can be translated as body snatching (*Leichenberaubung*).[9] However, a few titles later, the state of facts of body

2 Nehlsen 1972. 313.

3 *Lex Ribuaria* 55, 2. „Si quis mortuum effodire praesumpserit, quater qinquagenos solid. multetur aut cum XII iuret."

4 *Lex Ribuaria* 88, 1. „Si quis corpus mortuum, priusquam sepeliatur, expoliaverit, C sol. cum capitale et dilatura multetur."

5 Nehlsen 1978. 136.

6 *Lex Ribuaria* 88, 2. „Si autem eum ex homo traxerit et expoliaverit, CC sol. cum capitale et dilatura culpabilis iudicetur, vel wargus sit (hoc est expulsus), usque ad parentibus satisfecerit."

7 Eckhardt 1969.

8 *Lex Salica* 14, 9. „Si quis hominem mortuum antequam in terra mitatur in furtum expoliaverit, malb. chreumusido sunt den. III M qui fac. sol. C cupl. iud."

9 Eckhardt 1962. 281.

snatching occurs again (under the title *De corporibus expoliatis*), and on this locus there are considerable differences between the manuscripts that belong to group A and group C, since the texts of group C set out sixty-two-and-a-half-*solidi* penalty and speak about the corpse of a dead person only (*corpus hominis mortui*);[10] yet, the texts of group A stipulate a *conpositio* amounting to sixty-three *solidi* and mention the corpse of a killed person (*corpus occisi hominis*).[11] Eckhardt corrected the term *freomosido* in the glossary (interpreted by him as the robbing of a free man) and replaced it by *chreoosido* that occurred before;[12] yet, no matter which text version we accept, the amounts of the *conpositio* set out in the two titles are by no means equal, which is adopted by *Lex Salica Karolina* too.[13] At the same time, newer manuscripts (D, E) mention body snatching at one place only, and they order its punishment by sixty-two and a half *solidi*.[14] There is a good chance that *Lex Salica Karolina* did not adopt the two separate states of facts – specifically: the differentiation of plundering a person killed by the robber (*occisus*) and of a dead person not injured by the robber (*mortuus*) – because it did not become deeply rooted in legal literacy. On the other hand, it maintained the double amount of *conpositio*: sixty-two and a half and one hundred *solidi*, which might have meant that the man who plundered the valuables of a dead person was obliged to pay one hundred *solidi*, while the one who killed his victim first and then plundered him was obliged to pay, in addition to blood money for murder, sixty-two and a half *solidi*.[15]

In case of plundering a dead slave, the perpetrator was set to pay thirty-five *solidi* to the slave's master;[16] if, however, the objects with the slave did not exceed the value of forty *denarii*, then the perpetrator was obliged to pay merely fifteen *solidi*.[17]

All these amounts of *conpositio* properly harmonize with other blood moneys regulated in *Lex Salica*: a robber of a free man shall pay sixty-two and a half *solidi*

10 *Lex Salica* 55, 1. (C6) „Si quis corpus hominis mortui antequam in terra mitatur in furtum expoliaverit, malb. freomodiso sunt den. IIMD qui fac. sol. LXII semis culp. iud."

11 *Ibid.* 55, 1. (A1) „Si quis corpus occisi hominis antequam in terra mittatur expoliaverit in furtum, mal. uuaderio hoc est f. sol. LXIII culp. iudic."

12 Eckhardt 1962. 205.

13 *Lex Salica Karolina* 17, 1. „Si quis hominem mortuum antequam in terra mittatur in furtu expoliaverit, IVM denariis qui faciunt solidos C culpabilis iudicetur.; 57, 1. Si quis corpus hominis mortui antequam in terra mitatur per furtum expoliaverit, MMD denariis qui faciunt solidos LXII semis culpabilis iudicetur."

14 *Lex Salica Karolina* 19, 1. (D) „Si quis corpus occisi hominis, antequam in terra mittatur, in furtum expoliaverit, mallobergo chreo mardo (sunt dinarii MMD qui faciunt) solidus LXII semis culpabilis iudicetur."

15 Nehlsen 1978. 138.

16 *Lex Salica* 35, 6. (C6) „Si quis servum alienum mortuum in furtum expoliaverit et ei super XL den. valentes tulerit, malb. teofriomosido IMCCCC den. qui fac. sol. XXXV culp. iudic."

17 *Lex Salica* 35, 7. (C6) „Si quis spolia minus XL den. valuerit, teofriomosido DC den. qui fac. sol. XV culp. iud."

too,[18] just as those who intrude into an alien courtyard[19] or commit bodily injury causing paralysis of the hands;[20] similarly, a person who plunders a live slave shall pay thirty-five or fifteen *solidi*.[21] The *conpositio* amounting to one hundred *solidi* occurs in the case of robbing a sleeping person.[22]

Actual robbery of a grave is dealt with by the groups of older manuscripts (A, C, K) under two titles: *De supervenientis vel expoliationibus* and *De corporibus expoliatis*. In the case of the first, the person robbing a grave shall pay two hundred *solidi*.[23] The second locus (according to groups A and C) again stipulates indemnification of two hundred *solidi*; however, it includes the stipulation containing the term *wargus*, which gives rise to extensive disputes that condemn the perpetrator as *wargus* until s/he has discharged his/her debt. A person considered *wargus* 'outcast' is compelled to live outside society until the relatives of the injured party ask the judge to let him/her return, until which time nobody, not even his/her next of kin or relatives, can give him/her bread or shelter; so, s/he is thrust into an *exlex* 'outlaw' status, and anybody who breaches this prohibition shall pay fifteen *solidi*.[24] The groups of manuscripts D and E explain the term *wargus* by the word *expellis* 'expelled' and again add that the perpetrator can live his/her life solely as an outcast until paying off the *conpositio*.[25]

From among the provisions on the desecration of a grave, the greatest attention in literature so far has been paid to title 55 of *Lex Salica*,[26] as it is here that the word *wargus* can be read as a synonym of *expulsus* or *expellis*, which was translated by Jacob Grimm as 'robber' or 'wolf', in view of the fact that the person cast out of the community is the inhabitant of the wilderness just as a beast, and anybody

18 *Lex Salica* 14, 1.

19 *Lex Salica* 14, 6.

20 *Lex Salica* 29, 2.

21 *Lex Salica* 35, 2. 3.

22 *Lex Salica* 26, 1.

23 *Lex Salica* 14, 10. (A2) „Si quis hominem exfuderit et expoliaverit, mal. turni cale sunt din. VIIIM fac. sol. CC cui fuerit adprobatum cul. iud.; (C6) Si quis hominem mortuum effoderit vel expoliaverit, malb. ternechallis sive odocarina sunt den. VIIIM qui fac. sol. CC culp. iud."

24 *Lex Salica* 55, 4. (A, C) „Si quis corpus iam sepultum effoderit et expoliaverit et ei fuerit adprobatum, mallobergo muther hoc est, uuargus sit usque in diem illam quam ille cum parentibus ipsius defuncti conveniat, ut et ipsi pro eo rogare debeant, ut ei inter homines liceat accedere. Et qui ei, antequam cum parentibus conponat, aut panem dederit aut hospitalem dederit, seu parentes, seu uxor sua proxima, DC denarois qui faciunt solidos XV culpabilis iudicetur. Tamen auctor sceleris, qui hoc admisisse probatur aut efodisse, mallobergo tornechale sunt, VIIIM denarios qui faciunt solidos CC culpabilis iudicetur."

25 *Lex Salica* 55, 4. (D, E) „Si quis corpus sepultum exfodierit et expoliaverit, uuargus sit, id est expeliis, usque in diem illum, quam ipsa causa cum parentibus defuncti faciat emendare et ipsi parentes rogare ad iudicem debeant, ut ei inter homines liceat habitare, si tamen auctor sceleris, mallobergo turnichal, (sunt dinarii VIIIM qui faciunt) solidus CC culpabilis iudicetur. Et qui eum, antequam cum parentibus defuncti satisfaciat, ospicium dederit, (sunt dinarii DC qui faciunt) solidus XV culpabilis iudicetur."

26 Geffcken 1898. 205 et seq.; Unruh 1957. 1–40; Jacoby 1974.

can kill him/her with impunity just as a wolf.[27] This conception was confirmed by Wilda's view,[28] which stated that a close connection can be made between *wargus* – interpreted by him in the context of restlessness (*Friedlosigkeit*) – and the Old Norse *vargr* 'malefactor', 'wolf'; in spite of all the criticism,[29] this view prevailed both in older[30] and contemporary German legal history.[31]

For example, Mitteis defines *Friedlosigkeit* – in organic relation to the legal content of the meaning of the term *wargus* – as follows: it includes violation of the interests of the people and the state (for example, body snatching, since thereby the perpetrator makes it impossible to exercise the cult of the dead), acts committed with vile intentions, by stealth. Due to all that, the perpetrator will become an outlaw (*exlex, outlaw*), his wife shall be considered a widow and his children orphans; from then on, he must live in the wilderness, far from any human community, just as if he were a werewolf (*Werwolt, gerit caput lupinum*).[32] Kaufmann also connects the phrase *wargus* with the Anglo-Saxon word *vearg* and the Old Norse word *vargr* and relates the person cast out of the community – specifically concerning the robbing of a grave, considered religious crime – to a wolf that lives outside human society, civilization.[33] In his interpretation, Erler goes even further: he calls attention to the aspect of the wolf in Old German religion based on which it was associated with body snatching and the consumption of corpses/carrion and was therefore considered a demon of death. So, he provides further *indicium* with regard to a desecrator of a grave or a body snatcher for relating him/her to a wolf.[34] It should be underlined that Erler considered this identification an allegory, imagery manifesting itself in law as well as one of the most magnificent documents of archaic thinking.[35] A similar position, a position unambiguously considering body snatching/desecration of a grave one of the major crimes, was taken in this respect by Amira[36] and His[37] too. In literature, it was Nehlsen who called attention for the first time – quite properly – to the point that in relation to this state of facts extreme care should be taken when comparing sources, especially in involving northern sources.[38]

When interpreting this locus – to obtain an answer to the question as to whether the *wargus* locus covers an institution of ancient German customary law *ex asse*

27 Grimm 1922. I. 270; 334 et seq.
28 Wilda 1842. 278 et seq.
29 Rehfeldt 1961. 437–439.
30 Brunner 1906. I. 410 et seq.
31 Mitteis 1978. 31 et seq.
32 Mitteis 1978. 31.
33 Kaufmann 1971. 25–32.
34 Erler 1938/40. 303–317.
35 Erler 1938/40. 317.
36 Amira 1922.
37 His 1928. 159.
38 Nehlsen 1978. 111.

indeed –, it is worth examining ecclesiastical law making as well. The Council of Toledo IV held in 633 classified the desecration of a grave as *sacrilegium*.[39] *Poenitentiale Romanum* from the 8th c. sentences a cleric who commits desecration of a grave to seven-year penitence, including three years on bread and water;[40] in other words, it imposes the same punishment as on a layman committing manslaughter,[41] and *Poenitentiale Casinense* dating from the early 8th c. prescribes a five-year penitence[42] (exactly as many as in case of kidnapping/abduction),[43] just as the Frankish *Poenitentiale Parisiense*,[44] *Poenitentiale Merseburgense*,[45] and *Poenitentiale Hubertense*.[46] If the perpetrator was not willing to submit to either secular punishment (payment of *conpositio*) or ecclesiastical penalty (penitence), the church had the opportunity to excommunicate him/her from the church, i.e. apply the *anathema* against him/her.[47] This sanction was applied, for example, against those who caused damage to ecclesiastical property, who stubbornly refused to pay reparation;[48] however, similar punishment was imposed in accordance with *Poenitentiale Vinniai* on clerics who committed homicide and who were allowed to enter the community again only after a long penitence and reconciliation with the relatives of the injured party.[49] The sanction of *Poenitentiale Columbiani*[50] created in Gallia – which can be definitely compared with this provision – states that a *homicida* who does not submit to secular punishment must be expelled from the community and can enter it again when a cleric attests that s/he has paid the *conpositio* to the relatives of the injured party.[51] In accordance with *Lex Salica*, the relatives themselves stand witness that payment of the *conpositio* has been made.

In case of abduction of nuns, the expulsion of a perpetrator who fails to perform the punishment imposed on him is prescribed by *Lex Baiuvariorum* too,[52] and the phrase *expellatur de provincia* used by it is a clear reminiscence of the phrase *wargus sit, id est expellis* of *Lex Salica*.[53]

39 *Concilium Toletanum IV.* (*a.* 633) 46. „Si quis clericus in demoliendis sepulcris fuerit deprehensus, quia facinus hoc pro sacrilegio legibus publicis sanguine vindicatur, oportet canonibus in tali scelere proditum a clericatus ordine submoveri, et poenitentiae triennio deputari."
40 *Poenitentiale Romanum* 29.
41 *Poenitentiale Romanum* 4.
42 *Poenitentiale Casinense* 76.
43 *Poenitentiale Casinense* 79.
44 *Poenitentiale Parisiense* 9.
45 *Poenitentiale Merseburgense* 15.
46 *Poenitentiale Hubertense* 16.
47 Cf. *Concilium Toletanum IV.* (*a.* 633) 75.
48 *Concilium Turonense II.* (*a.* 567) 25.
49 *Poenitentiale Vinniai* 23.
50 Laporte 1958. 20 et seq.
51 *Poenitentiale Columbani* 15.
52 *Lex Baiuvariorum* 1, 11.
53 *Lex Salica* 55, 4.

On the other hand, ecclesiastical law making contains, in addition to excommunication, a prohibition of maintaining contact with the outcast. For example, the relevant canon of the Council of Arles concluded in 506[54] was inserted in *Collectio vetus Gallica* created between 585 and 626/27, which forbids any kind of connection with the outcast.[55] In 511, the Council of Orléans I[56] set similar regulations; what is more, it subjected persons breaching this prohibition to *anathema* (*excommunicatio*).

Based on all that, it can be stated that the provision of *Lex Salica* highly corresponds to the ecclesiastical law making of the period, i.e. the efforts of the church to cast out from society those who are reluctant to pay the penalty and to ensure that all kind of solidarity and communication with them shall be prohibited until it is proved credibly – by testimony of the relatives of the injured party in *Lex Salica* – that they have discharged the statutory sanction. As the church introduced this practice already from the late Antiquity, the current ruler who took such action against perpetrators in case of robbery or desecration of a grave could rely on the support of the church. As far as *Lex Baiuvariorum* is concerned, ecclesiastical assistance in drafting the text can be considered fairly clear; however, based on that, even in the case of *Lex Salica*, the contribution of the clergy to editing cannot be ruled out either.[57]

Now, it is worth examining what the term *wargus* covers in *Lex Salica* and to what extent it can be considered a surviving element of ancient German linguistic tradition and written law. Three loci in Wulfila's Gothic translation of the New Testament are noteworthy with respect to the translation of the verb *damnare* and its derivatives. It interprets the text on condemnation of Jesus in the Gospel according to St. Matthew (*et damnabunt eum morte*) by the phrase *jah gawargjand ina dauþan*,[58] in which *gawargjand* corresponds to the Latin verb *damnare*.[59] The noun *damnatio* in one of the loci of St. Paul[60] is translated into Gothic by the word *wargiþa*[61] and in another locus[62] *condemnatio* corresponds to the Gothic noun *gawargeins*.[63]

54 *Concilium Arelatense* (*a.* 442–506) 2.

55 *Collectio vetus Gallica* 17, 12. „Si quis a communione sacerdotale fuerit auctoritate suspensus, hunc non solum a clericorum, sed etiam a totius populi conloquio adque convictu placuit excludi, donec resepicens ad sanitatem redire festinet."

56 *Concilium Aurelianense I.* (*a.* 511) 11. „De his, qui suscepta paenitentia religionem suae professionis obliti ad saecularia relabuntur, placuit eos a communicatione suspendi et ab omnium catholicorum convivio separari. Quod si post interdictum cum iis quisquam praesumserit manducare, et ipse communione privetur."

57 Nehlsen 1978. 154.

58 *Evangelium secundum Marcum* 10, 33.

59 Feist 1939. 210; 325; 551; Nehlsen 1978. 154.

60 Paulus, *Epistola ad Romanos* 13, 2.

61 Feist: *op. cit.* 551; Nehlsen 1978. 155.

62 Paulus, *Episola ad Corinthos* 2, 7, 3.

63 Feist 1939. 325; Nehlsen 1978. 155.

The term *wargus* in this form occurs for the first time in one of Sidonius Apollinaris's letters, which relates that a woman was abducted by *vargus*es, i.e. highwaymen, and explains that this is how local robbers are called (*latrunculi*).[64] In chronological order, this locus is followed by the relevant passage of *Lex Salica*;[65] however, this law contains both the noun *wargus* and the verb *wargare* in relation to kidnapping an alien slave where *plagiavit* is explained by *wargaverit*:[66] this *locus* supports that *wargare* means 'to kidnap' ('to abduct').[67] The first loci of the Carolingian Age can be found in the Anglo-Saxon *Heliand*: Judas ends his life *warg an wargil*,[68] the convicted rogues crucified alongside Christ die as rogues deserve to die (*waragtrewe*),[69] and the author puts the word *giwaragean* into Christ's mouth regarding those condemned to the pains of hell.[70] Tatianus's Old High German translation of the Gospel contains *firwergit*[71] and *forwergiton*[72] as equivalents of *maledicti*.[73] In the light of all that, it is not surprising that the authoritative lexicon lists the phrases *wiergan* and *weargcwedolian* as equivalents of *maledicere*, *maledictio*, *maledictus*, and *malignari*.[74] The terms *anathemazatus*, *maledictus*, *profugus*, *vagus*, and *rapax* that appear in ecclesiastical law making, applied by the lawmaker to a person expelled from the community, can be taken as equivalents of the phrases *wargus*, *gawargjan*, *warc*, etc.[75]

Based on the above, Nehlsen excludes *a limine* that the phrase *wargr* (*vargr*) means *wolf* with respect to early mediaeval sources and adds that the (mostly Old Norse) underlying sources are from the 11th c. or from later periods, and thereby he deprives the *Friedlosigkeit* theory of one of its most important bases. He asserts that the term *wargus* is the German equivalent of the ecclesiastical usage and that the loci of *Lex Salica* (and *Lex Ribuaria*) indicate merely borrowing of ecclesiastical law making and do not prove the ancient German theory and continued existence of ancient German faith.[76] Furthermore, he makes it clear that expulsion from the community did not incur *ipso facto*; instead, the perpetrator had to wander the world alone as Cain (*more Cain vagus et profogus*) only as a consequence of failure of the payment of *conpositio*, i.e. the refusal of

64 Sidonius Apollinaris, *Epistulae* 6, 4. „… forte Vargorum, hoc enim nomine indigenas latrunculos nuncupant".
65 *Lex Salica* 55, 4.
66 *Lex Salica* 66. (E); 65. (D).
67 Nehlsen 1972. 110 et seq.; Nehlsen 1978. 155.
68 *Heliand* 5168.
69 *Heliand* 5563.
70 *Heliand* 25131.
71 *Evangelium secundum Iohannem* 7, 49.
72 *Evangelium secundum Matthaeum* 25, 41.
73 Nehlsen 1978. 156.
74 Köbler 1975. 189.
75 Nehlsen 1978. 156.
76 Nehlsen 1978. 157 et seq.

statutory punishment.[77] Therefore, in this case, living the life of a *wargus* is the consequence of defiance of the law, as it seems to be supported by the phrase *si noluerit emendare et reddere*[78] in *Lex Baiuvariorum*.[79]

On the other hand, still with regard to the phrase *wargus*, the question arises as to why the later groups of texts of *Lex Salica* (E) completely omitted this term from the text. Probably because this folk law term without any explanation would have been no longer interpretable in the Carolingian Age.[80] The Middle Latin term *wargus* appears to be related to the following German words: the Old Norse *vargr* 'malefactor', 'wolf', the Anglo-Saxon *wearg* 'outcast', 'damned', 'malefactor', and the Old High German (*Althochdeutsch*) *warg/warch* 'enemy', 'devil'; and to the Gothic words: *gawarjagjan* 'to condemn', *wargiþa* and *gawargeins* 'judgment', 'condemnation').[81] Furthermore, the following words can be considered related phrases: the Old Saxon *giwaragean* 'to condemn a malefactor', *warg/warag* 'malefactor', 'devil', *wurgil* 'rope', *wargtreo* 'gallows', the Old English *warhtreo* 'gallows-bird', the Old Norse *gorvargr* 'cattle thief', *kaksnavarher* and *brennuvargr* 'murderer by arson', *morđvargr* 'murderer' and *vargdropi* 'descendant of an outcast'.[82] The etymology of all these phrases that can be traced back to the Old German word **ɥarʒ-a* is not fully clarified;[83] yet, if we presume to find its origin in the Indo-European root **uer-gh* 'to wind', 'to press, 'to strangle', then *wargus* might mean 'strangler' and 'the person to be strangled'.[84] In the light of the above, Schmidt-Wiegand can see a clear connection with the meaning *wolf*; at the same time, he claims that it should be investigated whether this word carried the meaning *hostis* 'alien', 'enemy' in ancient German times already, and as underlying words he refers to the Langobardic *waregang* and the Old English *waeregenga* 'alien', 'protection seeker'.[85]

Consequently, it should be analysed in what connection, chronology the meaning *malefactor* is related to the meaning *wolf*, in other words, which meaning can be considered primary with respect to the phrase *wargus/vargr*. It can be declared beyond doubt that the meaning *malefactor* is much earlier in terms of the age of the source since sources from the Continent in this sense occur from the 6th c. already, while the meaning *wolf*, besides the meaning *malefactor*, can be documented only in Old Norse sources from five centuries later. On the other hand, it should not be forgotten that the Old Norse terminology was

77 Nehlsen 1978. 164.
78 *Lex Baiuvariorum* 1, 11.
79 Nehlsen 1978. 165.
80 Schmidt-Wiegand 1978. 190.
81 Schmidt-Wiegand 1978. 191; Feist 1939. 210. 551.
82 Sehrt 1966. 641 et seq.; 725; Schützeichel 1974. 222; Vries 1962. 183; 645.
83 Jacoby 1974. 12.
84 Pokorny 1959. 735.
85 Schmidt-Wiegand 1978. 191; Baesecke 1935. 96; Rhee 1970. 133 et seq.

basically developed later than the Continental one.[86] In the light of that, the Old Norse phrase *vargr* – irrespective of whether 'malefactor' or 'wolf' is considered the primary meaning – belongs to a later layer compared to Continental terms and even within Old Norse.[87] Also, it should be made clear that both on the Continent and on northern territories relatively few traces of pagan tradition can be found in laws written down since all the rulers wanted, by enacting such laws, to eliminate ancient German elements and introduce Christian thinking and legal awareness.[88] After all, Schmidt-Wiegand finds that *wargus* as a legal term should be interpreted in a wider sense, as expulsion from the community, and refuses the primacy of the meaning *wolf/werewolf*, although he acknowledges the significance of further development of the term to this direction both on the Continent and in the north. Expulsion (*Acht*) was imposed on perpetrators of all the acts (desecration/robbing of a grave, manslaughter by arson, assassination, breach of peace, etc.) that was denoted by the Gothic and Old Norse legal language by the phrase *fairina* and *niðingsverk*, respectively, and whose sanction, i.e. expulsion, was expressed by the Old Swedish word *utlœgher*, the Old Norse *utlagr*, the Anglo-Saxon *utlath*, the Middle High German *ēlos*, and the Middle Latin *exlex*. The transformation of the meaning *outcast* and its extension by the meaning *wolf* can be undoubtedly connected with the fact that it was noted in *Lex Salica* already that a malefactor who has failed to pay *conpositio* hides in the forest (*per silvas vadit*),[89] and later s/he was denoted by the phrase *wealdgenga* by the Anglo-Saxon sources and *skōgarmaðr* by the Old Norse sources.[90]

As a result, with regard to all these codices, it can be established that formulation of the state of facts of desecration or robbery of a grave and the related sanction clearly draws on Roman and canon law roots. As a matter of fact, these provisions organically fit in with the spirit and system of sanctions of German laws; both the system of sanctions and the images related to it imply a genuine connection with ancient German (pagan) thoughts and religion.

86 Schmidt-Wiegand 1978. 193.
87 Jacoby 1974. 15 et seq.
88 Schmidt-Wiegand 1978. 194.
89 *Lex Salica* 115. „Nam si certe fuerit malus homo, qui malei in pago faciat et non habeat ubi consistat, nec res unde conponat, et per silvas vadit et in praesentia nec agens nec parentes ipsum adducere possunt…"
90 Schmidt-Wiegand 1978. 196.

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Acta Univ. Sapientiae, Legal Studies, **11**, 1 (2022) 95–118

DOI: 110.47745/AUSLEG.2022.11.1.06

Household Social Robots – Special Issues Relating to Data Protection[1]

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Abstract. Household social robots may have massive effects on our everyday lives and raise several concerns on data protection and privacy. The main characteristic of these devices is their capability of building close connections, even emotional bonds between humans and robots. The socially interactive robots exhibit human social characteristics, e.g. express and/or perceive emotions, communicate with high-level dialogue, etc. Affective computing permits development of AI systems that are capable of imitating human traits (emotions, speech, body language). The goal is to gain the trust of humans, to improve safety, and to strengthen emotional bonds between human and robot with the help of anthropomorphization. However, this emotional engagement may incentivize people to trade personal information jeopardizing their privacy. Social robots can infer from emotional expressions and gestures the feelings, physical and mental states of human beings. As a result, concerns may be raised regarding data protection, such as the classification of emotions, the issues of consent, and appearance of the right to explanation. The article proceeds in two main stages. The first chapter deals with general questions relating to emotional AI and social robots, focusing on the deceptive and manipulative nature that makes humans disclose more and more information and lull their privacy and data protection awareness. The second chapter serves to demonstrate

1 The research of Ibolya Stefán was supported by the ÚNKP-20-3 New National Excellence Programme of the Ministry for Innovation and Technology from the source of the National Research, Development and Innovation Fund.

National Research, Development and Innovation Office Hungary

Új Nemzeti Kiválóság Program

several data protection problems such as the categorization and datafication of emotions (as biometrics), the issues of consent, and the appearance of the right to explanation. The third chapter highlights certain civil liability concerns regarding the infringement of the right to privacy in the light of the future EU civil liability regime for artificial intelligence.

Keywords: household social robot, AI, emotion, affective computing, HRI, right to explanation, data protection, children, civil liability, AI Act

1. Introduction

For the first time in 1770, at Schönbrunn Palace, a man called in Hungarian Farkas Kempelen (Baron Johann Wolfgang Ritter von Kempelen de Pázmánd, 1734–1804) presented his famous invention, the mechanical chess-playing machine, 'the Turk'. Kempelen showed the audience the inside of his machine every time but never revealed the secret that, in fact, it concealed a professional chess player, hidden from view with special mirrors, who operated it, as is presumed today.[2] Spectators always sought to find the trickery behind the machine and kept searching for the man inside, to no avail.

Nowadays, engineers could build this robot without the need for a human inside, and at an imaginary show every member of the audience would accept unconditionally that the robot operates and makes decisions autonomously. Our positive approach to artificial intelligence systems and our great expectations of their special and superhuman capabilities, even of their existence in the psychical and spiritual realm, stem from the psychological process in the course of which a human can project specifically human meanings and characteristics onto a lifeless machine made of metal and plastic. Trust in this way becomes emotional 'overtrust'. Highly automated systems, especially those embedded in some physical form, i.e. robots, are at risk of being 'overtrusted'.[3]

In the following, we intend to focus on certain legal implications of a relatively new and fast-evolving application field of AI systems[4] (henceforth, AIS), that is,

2 Although he built this toy only for momentary amusement, as it was said, and he had several engineering works, moreover, inventions of greater importance – among them, a water pump, a steam engine, a pontoon bridge, a speaking machine, a typewriter for the blind, just to name a few –, this 'robot' made him famous in Europe. Reininger 2011.

3 Aroyo et al. 2021.

4 Among the plentiful notions for the manifold types and applications of AI systems, we use here a recently adapted approach, laid down in the European Parliament Resolution on civil liability regime for artificial intelligence of 20 October 2020: '"AI-system" means a system that is either software-based or embedded in hardware devices, and that displays behaviour simulating intelligence by, inter alia, collecting and processing data, analysing and interpreting its environment, and by taking action, with some degree of autonomy, to achieve specific goals.' Cf. Article 3 point (a) of the *EP Resolution on Civil Liability Regime for Artificial Intelligence* (P9_TA(2020)0276).

household social robots, particularly companion robots for children. In this case of application, special concerns appear to cumulate, such as ethical considerations, data and privacy protection issues, as well as the need for a far more serious multifaceted protection of especially vulnerable users, i.e. children. The list of the problems is not complete: for example, concerns about data protection issues relating to the Internet of Things are not touched upon. We strive to highlight several problems overlapping one another, moreover, to demonstrate that not merely the complexity but the emergence of qualitatively new problematic issues poses challenges to the legal system.

The article proceeds in two main stages. The first chapter deals with general questions relating to emotional AI and social robots, focusing on the deceptive and manipulative nature that makes humans disclose more and more information and lull their privacy and data protection awareness. The second chapter serves to demonstrate several data protection problems such as the categorization and datafication of emotions and the right to explanation. The third chapter highlights certain civil liability concerns about the infringement of the right to privacy in the light of the future EU civil liability regime for artificial intelligence.

2. Emotional AI and Social Robots

2.1. Affective Computing and Its Effect on HRI

Humans are emotional and social. Their emotions and rationality jointly affect their decisions and actions. Emotions have an influence upon attention and information processing, judgment and decision making, and on cognitive processes as well. Struggling to build trust in artificial intelligence, producers and developers must exploit the affective side of human behaviour and mental processes, as they always did since emotional factors had been considered in design. From this point of view, affective computing is a special method of the emotional design relating to human–computer interactions.[5]

Indeed, there are several approaches to affective sciences that relate to affective and emotional factors in human–robot interaction (henceforth HRI). Among them, the importance of affective computing is the highest. According to Rosalind W. Picard's epoch-making work, the purpose of affective computing is to design a computer system that at least recognizes and expresses affects, and its human-centric goal is making machines better in serving people by endowing them with affective abilities.[6]

The expression of affective artificial intelligence systems refers to two main

5 Myounghoon 2017.
6 Picard 1997. 137.

groups of special features of an AI system. Firstly, affective computing means developing AI systems that are capable of perceiving and recognizing human emotions by tracking behaviour, facial expressions, eye gaze, tone of voice, posture, gesture, hand tension, heart rate, or electrodermal activity (EDA). Strong emotions may be accompanied by special physiological arousal (shortness of breath, rapid heart rate) – a social robot may be able, even in an unobtrusive manner, to identify human emotions better.[7] That means social robots can infer further emotional data from recognized expressions. Secondly, the AIS endowed with emotional features is able to imitate human traits (e.g. by facial expression, speech or body language in the physical world) and to mimic emotional expressions. These artificial emotional expressions could facilitate human–robot interactions and promote the effective communication between them. With these affective abilities, the development of the emotional AI is essential for new technology in order to gain trust.[8] However, affective AI can potentially be applied in an abusive way or for illegal purposes, which is prohibited in ethical guidelines worldwide.[9] For the purposes of this article and in the light of civil liability, the artificial intelligence system, i.e. the algorithms and the related technologies, are treated as a unit, complying with the approach of the European Parliament reflected in its Resolution of 20 October 2020 on ethical considerations.[10]

Artificial emotions could create a false impression of human connection or interaction; moreover, they could generate a false sense of social bonding. This is especially very dangerous in the case when the emotional AI may affect vulnerable and susceptible persons, so it may have an unethical or harmful influence upon their minds and the freedom of their decision-making process and choices, it may manipulate, nudge, or deceive its users or third parties.[11] Therefore, artificial emotions could also have a subliminal effect upon human decision making, or they may even have a recognizable but irresistible influence upon human thinking and behaviour since they affect the emotional side of the human psyche, not the rational one.[12]

As far as deception is concerned, the main critique against emotional AI systems is the false impression of users about the feelings and emotions artificially generated by the robot. Among the works of the rich literature dealing with the ethical issues, we highlight Coeckelbergh's study, who puts the focus on the ideal communication conditions and the possible cases where the emotionally designed robot may destroy them: a robot may deceive us (1) because its developers

7 Bieber et al. 2019.
8 Scheutz 2012.
9 For instance, see: EU-HLEG 2019. IEEE 2019. 168–176.
10 European Parliament resolution 2020 *Framework of Ethical Aspects of Artificial Intelligence, Robotics and Related Technologies* P9_TA(2020)0275.
11 IEEE 2019. 97.
12 Pusztahelyi 2020.

intend to deceive humans, (2) because its emotions are not unreal, or (3) because it pretends to be an entity that is not.[13] Instead of emotional and ontological authenticity, he suggests an appropriate level of emotional responses with which a robot would need to provide only minimal emotional communication in order to function smoothly in a human, social environment. Thus, a robot would not use deceptive features during human–computer interactions.

Besides prompt negative effects, a robot with affective features can generate long-term influence upon human cooperation and social bonds, which is also to be mentioned. In the following, several consequences of this deceptive nature will be discussed in detail in the light of privacy and data protection although the possible significant social benefits associated with specific applications of emotionally designed robots (e.g. in healthcare, education, elderly care) are undeniable.

2.2. Social Robots: Definition and Taxonomy in Brief

Neither legal regulations nor even academic literature provides a common taxonomy of social robots. For the sake of this work, the notion 'robot' refers to autonomous artificial agents with physical embodiment that could not only facilitate and evolve direct human–computer interaction but could also make a difference in the perception of a social agent's capabilities and the user's enjoyment of a task.[14] In our opinion, even deceptive capabilities (both benevolent and malevolent ones) operate better in the physical reality. The hypothesis was already demonstrated: physical embodiment has a measurable effect on the performance and perception of social interactions.[15] The physical reality is not the only world where these smart products function; great concerns were articulated about the cases where a social robot needs to stay in online mode to maintain the connection for backend support (e.g. in case of cloud computing). That means, social robots may operate partly in the physical and partly in the virtual world, where the latter fact is often disguised from the users.[16]

What is special about social robots is that they can develop a close connection with humans.[17] They may be used in both public (e.g. in a shopping mall) and individual or private settings by lots of users.[18] They require a general communication model that is equal for all users (for example, in education), or they can be programmed according to special individual needs to fulfil everyday

13 Coeckelbergh 2012.
14 Wainer et al. 2006.
15 Deng 2019.
16 For the case of chitchatting, see Barbie according to Moini 2017.
17 Augusto et al. 2018.
18 Hegel et al. 2007. 7.

tasks (for example, in the case of care robots).[19] According to the numerous possible types of their use, they may be tailored differently and endowed with different features, sensors, and actuators. Each of them may 'behave' differently and may have a unique personality.[20] They may have a functional design, or they may display zoomorphic, anthropomorphic, or caricatured design.[21] They may have humanoid form or not, their shape and construction may be determined by their tasks, the external environmental conditions, and the expectations about their social skills (for example, a social robot may have a pair of humanoid-like eyes to 'produce' eye gaze and to be able to maintain eye contact although these eyes are not for visual sensing).[22]

That means the umbrella expression of 'social robot' comprises a great number of different types of robots with various social skills and physical features. Among them, differentiations as per the field of use or in respect of their main tasks and functions seem to be appropriate. Accordingly, there are social robots for healthcare, domestic care,[23] educational purposes, restaurant waitering tasks, reception, a companion to a child, etc.

In relation to domestic purposes, in the vague group of home robots, we should distinguish between household robots fulfilling household tasks (e.g. cleaning, vacuuming, mowing the lawn, etc.) and household social robots. The main purposes of the latter group are to amuse the whole family as a user group or only a single person, mitigating his or her loneliness, nudging to add new activities to his or her daily routine, etc. In addition, these robots can fulfil other small tasks in the physical or the digital world, such as household robots do. The companion robot is tailored for children and can be highly personalized according to his or her particular needs and personality.

In 2003, Fong et al. elaborated a comprehensive survey of social robots and listed several taxonomy methods, starting from design approach, embodiment, emotions, personality to skills for human-oriented perceptions and the skill of socially situated learning. According to Fong et al., who touched upon interactivity, socially interactive robots are able to exhibit 'human social' characteristics such as express and/or perceive emotions, communicate by high-level dialogue, learn/recognize models of other agents, establish/maintain social relationships, use natural cues (gaze, gestures, etc.), exhibit distinctive personality and character, or learn/develop social competencies.[24]

19 Ibid.
20 Nocentini et al. 2019.
21 Lohse 2008.
22 Kaminski 2017.
23 Søraa et al. 2020.
24 Fong et al. 2003.

Cynthia Breazeal also puts this interactivity into the focal point. According to her views, social robots are a class of autonomous robots explicitly designed to encourage people to socially interact with and understand them.[25]

In 2017, Eduard Fosch-Villaronga elaborated a special taxonomy for personal care robots, a special branch of robots. According to his definition, a personal care robot may be either a social robot or not. It depends on the range of its tasks and on which social skills it should be endowed with.[26] That means there is no sharp distinction between these categories.

From our point of view, among social robots, companion robots have outstanding social skills. They are likely to be highly or extraordinarily sophisticated, physically embodied, and equipped with deep learning or reinforced learning capabilities, designed to have 'personality', and the possibility of customization by a given user (i.e. its master) may be permitted or even encouraged. Through personalization and anthropomorphization, it may self-evolve individual characteristics and become (or at least, to all intents and purposes, may behave like) a 'real' albeit electric friend.[27]

2.3. The Deceptive and Manipulative Nature of Social Robots and Human Trust

As humans always approach their social relationships emotionally, it is unavoidable that a social robot would elicit an emotional response and generate attachment. Therefore, we could add one more characteristic, that is, a social robot is able to create emotional bonds with humans regardless of the fact that it was not designed for such purpose. We presume that the more sophisticated and well-equipped with social skills a robot is, the deeper the emotions reflected within the user would be.

As far as the manipulative nature of social robots is concerned, first, anthropomorphism and this strong unintended emotional bond between human and robot should be discussed. We agree with Paula Sweeney in that this emotional attachment to social robots is very different in nature, we should understand it differently, and we should distinguish it from both attachment to lifeless things (such as a memento) and emotional attachment to animals. Claiming that robots stay on the borderline between living and non-living, the cited author suggested the so-called Fictional Dualism model. According to this, the anthropomorphism of social robots is to be understood as a creation of a fictional character. Now we can return to 'the Turk', and with the help of this toy we can highlight how human thoughts are charged with emotion and imagination about companion

25 Breazeal 2005.
26 Villaronga 2017.
27 Prescott–Robillard 2021.

robots. Nevertheless, these are acting in the physical world, which fact could strengthen humans' irrational thoughts about their real existence. They can be damaged as well. In this case, programmed feedback (e.g. expression of mimicked pain) would give the impression that the robot is actually suffering.[28] It is true that these anthropomorphic features might obscure certain risks, for example concerning privacy, as they have an effect on 'overtrust' and strengthen any deceptive nature.[29]

As mentioned above, the social robot's skills are dependent on the purposes it serves. Where a robot companion was created to help humans to evolve their own social skills and positive feelings and to make them happier, it needs not only high-level proactive social competencies but also an ability to develop these skills over time.[30] Thus, there are concerns about the long-term effects of companion robots upon the mental health and psychological development of the user (especially a child or an elderly adult). Among several other authors, Prescott and Robillard draw attention to the differentiation between the roles where the robot may or may not replace the original human caretaker.[31] Beyond the fact that these robots may generate immanent risks to mental health, we intend to stress here other consequences and risks as well. While a social robot with highly developed socially interactive features can establish life-like social bonds with its user, it may gain the complete trust of a human individual, and, without any negative 'intentions', it may make him or her reveal confidential information in order to 'get to know' him or her better. We will discuss this phenomenon in the following point.

2.4. Social Robots and Their General Implications Relating to Privacy and Data Protection

For the sake of clarifying the connection between privacy and data protection, we use the taxonomy of privacy constructs for human–robot interactions set up by Rueben et al. as follows:

– physical privacy, over personal space or territory;
– psychological privacy, over thoughts and values;
– social privacy, over interactions with others and influence from them;
– informational privacy, over personal information.[32]

According to this approach, data privacy would be deemed as a legally protected branch of informational privacy rights.

28 Sweeney 2021.
29 Aroyo et al. 2021.
30 Fong et al. 2003.
31 Prescott–Robillard 2021.
32 Rueben et al. 2021.

It is generally recognized that a household robot may jeopardize the right to privacy and personal data protection. There are concerns over excessive sharing and processing of information and concerns over the initial recording of information.[33] In the case of social robots, the situation is different, even more worrying. On the one hand, the robot exerts a subliminal influence on its targeted human to share more information, and, on the other hand, both the amount and the type of collectable data is special. It collects, infers, and processes the required information as much as possible for its improved operation. This phenomenon is closely connected to the fact that this mass of information consists of mostly special biometric data about the user and any other individual contacting the user in the presence of the robot. In our opinion, due to the same characteristics, companion robots may generate even greater risks to privacy and to personal data rights than to mental health.

A companion robot needs a tremendous amount of data of high quality in order to operate appropriately, to perform better and better in terms of socially interactive skills, to make meaningful conversations, to 'behave', and to develop over time. In addition, not only its functionality but also the level of its personalization is dependent on the amount and the quality of the collected data. In our opinion, the data collection minimalization principle has less importance here and provides only a slight limit to the amount or to the types of information to be collected. That is, a social robot is strongly characterized by data dependency, which does not only raise cybersecurity concerns but also leads to data processing problems and risks the safety derived from faulty data. We agree with Anna Chatzimichali et al., as they state: 'the impact of data governance policies has to be investigated and tailored especially for the field of personal robots, where both the legal and the social norms play a crucial role in creating public trust'.[34] As they claim, personal robots are highly personalized products adapted to fit user needs, behaviours, and preferences.[35] They highlight human engagement to trust personal robots with the most sensitive information without actually understanding the policies that govern the control of this information. They identify this phenomenon as a privacy–personalization paradox as a special subcategory of the privacy paradox, often referring to the contradictory behaviour of individuals sharing sensitive data with the public in social media while worrying about their data protection. Aroyo et al. have recently proved with their research that this emotional engagement, the gained trust may incentivize people to trade personal information for functional rewards, and, consequently, people may be targeted by cyberattacks and victimized by social engineering through their robots.[36]

33 Kaminski 2015.
34 Chatzimichali et al. 2021.
35 Chatzimichali et al. 2021.
36 Aroyo et al. 2018. In the field of information security, social engineering means a psychological

In searching for the underlying causes of human vulnerability, besides the trust issue, we need to return to the above-mentioned deceptive nature of social robots.

To show the connection between robot deception and data/privacy breaches, we choose John Danaher's approach. He distinguishes three types of robotic deception upon humans: the external state deception, the superficial state deception, and the hidden state deception. The first means that the robot uses a deceptive signal regarding some states of affairs in the world external to the robot. Superficial state deception means that the robot uses a deceptive signal to suggest that it has some capacity or internal state that it actually lacks. The hidden state deception is the opposite: the robot uses a deceptive signal to conceal or obscure the presence of some capacity or internal state that it actually has.[37] Although Danaher's findings relate to ethical considerations, we could apply this grouping to make differentiations between the various reasons of personal data or privacy breaches, i.e. the situations leading to infringement. These situations are particularly important when we assess the applicability of certain data protection rules such as the right to explanation or the problem of implied or expressed consent.

As an external state deception, we could regard the situation where the robot seems to operate offline and not connected to any other device or software, and it does not seem to be required to share, to store data in an external storage or in the cloud.[38] In addition, we could count here another situation where a robot companion deceives by stating that it can keep a secret even though it reports immediately any event of bullying that the child shared with it to the parents. In our opinion, superficial state deception can trigger personal data breaches indirectly, for example, in cases where the robot seems to express 'real' emotions and the human adjusts his or her behaviour accordingly. In the light of data privacy awareness, the last group of deception is the most dangerous one.

As we mentioned above, household social robots can be used for many purposes, wherefore children can easily interact with these tools. The possibility of emotional recognition during HRI is extremely dangerous for everyone; however, the situation of children as a vulnerable group is a lot worse. Children are not aware of the risks and consequences of the technology as they do not know the methods of data collecting, processing, and HRI. Regarding AI, there are several concerns for children such as discrimination, profiling, privacy and data protection. McStay and Rosner in their study examined emotional AI in children's toys and devices. Regarding generational unfairness – it means 'that

manipulation of people (targets) to perform actions or obtain sensitive information such as personal data.

37 Danaher 2020.

38 For example, this issue becomes very important in the case of Internet-connected intelligent toys. Cf. Peppet 2014.

children have little control over the datafication of their childhood years'[39] –, the authors highlighted several concerns such as manipulation and data longevity. In the case of emotional AI, the fear of manipulation is also a real concern for the same reasons as have been stated above. Concerning data longevity, another risk is the breach of data protection – e.g. the 'right to be forgotten' (the right to erasure) – and privacy, as 'longevity of collected emotion data can be detrimental to a child's growth and self-definition'.[40] Moreover, it can affect mental health (e.g. chatbots)[41] and physical safety (e.g. hackers),[42] as well as the social and moral development of children.[43]

3. Data Protection Issues Regarding Household Social Robots

3.1. Biometric Data and Household Social Robots

As we discussed, household social robots can collect, process, and store several types of data for many reasons, e.g. to identify and recognize its user(s) or to interact and provide personalized services. To achieve this user-centric characteristic, they process and link a large amount of data that is collected through their interactions with humans – analysing the users' facial expressions, voices, or gaze. As a result, these tools (accompanied by AI) can be dangerous as they may infer the emotional state of a person, simulate empathy, and decide how to interact;[44] this phenomenon is seriously alarming in terms of data protection and privacy.[45] Recognizing the significance of the problem, the European Data Protection Board and the European Data Protection Supervisor released a Joint Opinion on the AI Act, in which they suggest several changes. The Opinion highlights three areas where amendment is needed: protection against commercial manipulation, the regulation of emotion recognition, and biometric classification.[46] Andrew McStay differentiates soft – such as age or height – and hard – such as fingerprint – biometric data: the former is not suitable to identify a person, while the latter is. The author categorizes emotions as soft biometrics and points out that GDPR does not mention them.[47] This highlights the problem of classifying (inferred)

39 McStay–Rosner 2021.
40 Id. 5.
41 UNICEF 2020. 22.
42 Id. 20.
43 McStay–Rosner 2021. 5.
44 'Since social robots can simulate empathy and decide the best way to interact according to the facial expression of the user.' Ramis et al. 2020.
45 Kaminski 2015. 661–677.
46 Malgieri–Ienca 2021.
47 McStay 2020.

emotions or the mood of an individual. The categorization of emotions under the General Data Protection Regulation (henceforth: GDPR) is an essential issue. In order to solve this problem, we need to examine the key definitions of the topic such as personal and biometric data.

According to the GDPR, 'personal data' is defined as any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural, or social identity of that natural person.[48] Meanwhile, 'biometric data' means personal data resulting from specific technical processing relating to the physical, physiological, or behavioural characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images.[49] Information about emotion is clearly personal data; although it is not a characteristic, it is still essential and inseparable – such as information on religious or philosophical beliefs. We believe that data regarding emotion should be classified as special, sensitive data – such as sexual orientation or ethnic origin –, wherefore stricter rules would be applicable. Furthermore, it could be categorized as biometric data, even though soft biometrics are not suitable for identification, as we mentioned above – if we consider the possibilities of the GDPR (personal, biometric data, genetic data, and data concerning health) –, because the technology infers emotions from biometric features.

3.2. Consent to Collect Information on Emotions Regarding Household Social Robots

The categorization of emotion is significant because it also affects the lawfulness of data processing. If we consider emotion as personal data, we have to consider the rules of Article 6, while in the case of a special category or biometric data, Article 9 of the GDPR shall be applied. According to the Regulation – in general – the processing of data can be based on one of the following grounds:

– the data subject has given consent to the processing of his or her personal data for one or more specific purposes;

– processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;

48 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation) Article 4, (1).

49 General Data Protection Regulation, Article 4, (14). Cf. Halász 2019. 303–318.

– processing is necessary for compliance with a legal obligation to which the controller is subject;

– processing is necessary in order to protect the vital interests of the data subject or of another natural person;

– processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;

– processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.[50]

On the contrary, GDPR prohibits data processing regarding special categories, except in a few cases – for example, if the data subject gives explicit consent or it is necessary for the purposes of carrying out the obligations; to protect vital interests; for the establishment, exercise, or defence of legal claims.[51] In the following, we focus only on consent, as we believe that in the case of household robots it is more significant due to the role played by emotions.

Several requirements must be fulfilled to call the consent valid.[52] It is essential to be 'given by a clear affirmative act establishing a freely given, specific, informed and unambiguous indication of the data subject's agreement to the processing of his or her personal data'.[53] Technically this means that the data subject has a choice to give consent – in the case of special data, it can be given orally or in writing, but it cannot be based on inactivity or silence[54] – to the data processing without being afraid of negative consequences, influences, or pressure and having an opportunity to withdraw it. The consent must be beyond reasonable doubt and specific, concerning the purpose of processing, wherefore 'it must be described clearly and in unambiguous terms'.[55] Information has a great significance, which must be clear and plain for the data subject to understand it and decide on consent.[56] Moreover, data subjects must be aware of the consequences of giving or not giving consent. Recital (42) underlines that the data subject should know

50 General Data Protection Regulation, Article 6, 1.

51 General Data Protection Regulation, Article 9, 1–2.

52 Concerning consent, it is noteworthy to mention the regulation of the Member States. 'Additional requirements under civil law for valid consent, such as legal capacity, naturally apply also in the context of data protection, as such requirements are fundamental legal prerequisites. Invalid consent of persons who do not have legal capacity will result in the absence of a legal basis for processing data about such persons. Concerning the legal capacity of minors to enter contracts, the GDPR provides that its rules on the minimum age to obtain valid consent do not affect the general contract law of Member States.' EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS AND COUNCIL OF EUROPE (FRA) 2018. https://fra.europa.eu/en/publication/2018/handbook-european-data-protection-law-2018-edition (accessed on: 30.07.2021).

53 FRA 2018. 112. See also the definition of consent in GDPR, Article 4, (11).

54 FRA 2018. 113.

55 Id. 147.

56 Ibid.

at least the controller and the purpose of the data processing. Article 29 (Working Party) also highlights the importance of information, as 'consent must be based upon an appreciation and understanding of the facts and implications of the data subject's action to consent to the processing'.[57] Our point of view is that information included in Articles 12–14, such as the purposes of the processing, is not enough, as users need more technology-specific information about the applied technology (AI) and the possibility of emotional detection because of the HRI.

It is also significant that household social robots may frequently interact with children. As a result, we have to mention Article 8, as we consider related services of household social robots such as applications or programmes as information society services.[58] In this case, data processing is lawful if the child is at least 16 years old. Under the age of 16, data processing shall be lawful if the holder of parental responsibility gives consent, except for preventive or counselling services. However, Member States may lower this age limit, which may not be lower than 13 years.[59]

Because of the above-mentioned interaction, we believe it is important to consider the concept of child-friendly household social robots regarding the *Policy Guidance on AI for Children* published by UNICEF and the *Age-Appropriate Design – Code of Practice for Online Services* by the Information Commissioner Office of the United Kingdom to protect the rights and ensure the safety and well-being of children. Therefore, we believe it is essential to notify children and parents when they interact with AI systems, educate parents and children, use age-appropriate language to describe AI (e.g. explain the system and data collecting with animations), and make the systems transparent so that children and their caregivers can understand the technology.[60]

3.3. Rights of the Data Subjects

In the digital era, which is constantly changing, the rights of data subjects are becoming much more significant as they ensure the protection of data and privacy. In the following, we list and describe the rights of data subjects in a few words.

The right to information is a highly significant right, especially in the case of AI systems and household social robots as both of them access, collect, and process a large amount of data. The data controller should fulfil the obligation to inform the data subject of the intended processing at the time of collecting the data. Articles 13 and 14 of the GDPR list the necessary information considering whether the data is collected from the data subject or not. Without aiming to give an exhaustive

57 FRA 2018. 146.
58 Information Commissioner's Office 2020. 15–16.
59 FRA 2018. 149–150.
60 UNICEF 2020. 33–34.

list, we only name a few of the many such as the identity and the contact details of the controller, the contact details of the data protection officer, or the purpose and legal basis of the processing.[61] According to the Explanatory Report to the Modernised Convention, the mentioned information 'should be easily accessible, legible, understandable and adapted to the relevant data subjects'.[62]

The right to access ensures the data subject has the right 'to obtain from the controller confirmation as to whether or not personal data concerning him or her is being processed, and, where that is the case, access to the personal data'[63] and the information, e.g. the purpose of processing.

The right to rectification means that, upon request of the data subject, the controller shall rectify inaccurate personal data without undue delay and that the data subject may also request to complete his or her incomplete personal data.

The right to erasure, or *the* '*right to be forgotten*' ensures that upon the data subject's request based on the grounds set forth in the GDPR, the data controller erases the personal data or is obliged to do so, without undue delay, e.g. when the personal data have been unlawfully processed.[64]

The right to the restriction of processing means that the data subject can request from the controller the restriction of processing if one of the conditions of Article 18 of the GDPR is fulfilled.

The right to data portability provides the right to the data subject to receive his or her personal data 'in a structured, commonly used and machine-readable format' and to transmit it to another data controller.[65]

The right to object ensures the right of the data subject to object to personal data processing on the grounds of his or her particular situation – e.g. profiling or direct marketing – through electronic means.[66]

The '*right to explanation*' technically cannot be found in the GDPR, it is not listed as one of the rights of the data subjects. On the other hand, we believe it is significant, and therefore it is worth examining.

3.4. The 'Right to Explanation'

In the literature, there are several opinions on the existence of the right to explanation.[67] First of all, it is important to start with the definition of the 'explanation' of automated decision making.[68] Wachter et al. differentiate between

61 GDPR, Article 13 and 14.
62 FRA 2018. 207.
63 GDPR, Article 15, 1.
64 GDPR, Articles 15–17.
65 GDPR, Article 20.
66 FRA 2018, 229.
67 Cf. Selbst–Powles 2017. 237–239.
68 We need to highlight that the right to explanation is relevant to decisions made by automated

system functionality and specific decisions. The former is 'the logic, significance, envisaged consequences, and general functionality of an automated decision-making system, e.g. the system's requirements specification, decision trees, pre-defined models, criteria, and classification structures',[69] while the latter is 'the rationale, reasons, and individual circumstances of a specific automated decision, e.g. the weighting of features, machine-defined case-specific decision rules, information about reference or profile groups'.[70] Regarding timing, the authors classify *ex ante* explanation, which takes place before the automated decision making, and *ex post* explanation, which is after the automated decision making.[71] Wachter et al. examine three legal bases for the right to explanation, as follows: Article 22 and Recital (71) of the GDPR – the right not to be subject to automated decision making and safeguards enacted thereof; Articles 13–14 and Recitals (60)–(62) of the GDPR – notification duties of data controllers; Article 15 and Recital (63) of the GDPR – the right to access. However, they ultimately reject the idea of the right to explanation – based on the thorough examination of the mentioned regulations.

Other authors, however, believe that the right to explanation can be found in the GDPR. According to Selbst and Powles:

> Articles 13–15 provide rights to 'meaningful information about the logic involved' in automated decisions. We think it makes sense to call this a right to explanation, but that point is less important than the substance of the right itself. We believe that the right to explanation should be interpreted functionally, flexibly, and should, at a minimum, enable a data subject to exercise his or her rights under the GDPR and human rights law.[72]

Our point of view is that right to explanation can be inferred from the above-mentioned rights, right to information, and right to access ((Articles 13 – 15) and Recitals (60) and (61) of the GDPR). The right to explanation is highly important as it ensures the safety – regarding data protection and privacy – of data subjects. This form of safety is becoming much more significant as AI appears in several fields of life – at home or in healthcare – whether as software or in an embedded form, as hardware. Moreover, the technology is very opaque because of the so-called 'black-box effect', which derives from the self-learning method. The right to explanation as a broader, technology-specific interpretation of the right

and artificially intelligent algorithmic systems. Therefore, it is related to our study, as household social robots also make decisions during their interactions with humans.

69 Wachter et al. 2017.

70 Id. 78.

71 Ibid. For a different classification and definition, see Edwards–Veale 2017. 55–59.

72 Selbst–Powles 2017. 242. Considering the legal bases of the right to explanation, see Cabral 2021 and Kaminski 2019. In a different context, regarding human rights, see also Winikoff–Sardelić 2021.

to information and access can provide more knowledge on the technology and the way it works, which is necessary, especially concerning household social robots and HRI. This right may help to make the technology more transparent and accountable for consumers.

4. Civil Liability Questions Arising from Privacy Infringement

After explaining special data protection issues relating to household social robots, we need to point out the significance of the recently drafted document of the European Commission, namely the Artificial Intelligence Act (henceforth: AI Act).[73]

Although the Commission proposal dealt only briefly with biometrics and emotion recognition systems, and even that mainly in the field of public surveillance, we firstly stress here the transparency obligation of users of an emotion recognition system or of a biometric categorization system to inform of the operation of the system natural persons are exposed to.[74] From our viewpoint, this provision on the transparency obligation should have a pervasive effect on users of all emotional AI systems.

Going into details about the future impacts on data protection implications of the AI Act, the European Data Protection Board and the European Data Protection Supervisor welcomed the risk-based approach underpinning the AI Act.[75] However, they called attention to the undefined relation between the AI Act and European data protection law. They suggested that the principles of data minimization and data protection by design should also be taken into consideration before obtaining a CE marking for a product. They underlined the vulnerability of individuals exposed to emotional recognition systems and requested to create a list for the well-specified use cases where these AI systems are allowed to operate. Although these findings are primarily true for public surveillance, they draw attention to the high risk the emotional AI system would trigger. The next question is how the European Union will form the interplay between the GDPR and the future AI Liability Regulation, since Article 82 of the GDPR[76] already entitles the individuals to claim compensation for data privacy infringement. We should mention here that the relevant national judicial practice

73 Proposal for a Regulation of the European Parliament and of the Council: Laying down harmonized rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain union legislative acts COM/2021/206 final, Brussels, 21.4.2021.

74 Artificial Intelligence Act, Article 52, Section 2.

75 EDPB-EDPS joint opinion No. 5/2021.

76 Cf. Art. 82, Paragraph GDPR: Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered.

is now evolving;[77] however, one should state that the mere violation of the GDPR does not generally entitle the data subject to claim for damages. The future AI Liability Regulation may cover all immaterial harms stemming from any type of privacy infringement caused by AI systems, even granting more extended protection than GDPR actually does, in the light of the above-mentioned data-dependency characteristics of AI systems.

As far as the possible exemption from liability for damages is concerned, we should mention here the strict liability of operators of high-risk AI systems. According to the European Parliament Resolution of 20 October 2020 on *Civil Liability Regime for Artificial Intelligence*, the following factors should be considered to assess a given AI application as being high-risk: (1) its autonomous operation involves a significant potential to cause harm to one or more persons, in a manner that is random and goes beyond what can reasonably be expected; (2) the sector in which significant risks can be expected to arise and the nature of the activities undertaken must also be taken into account; (3) the significance of the potential depends on the interplay between the severity of possible harm, the likelihood that the risk causes harm or damage, and the manner in which the AI system is being used.[78] The proposed regulation on civil liability regime will also be applied if an AI system has caused significant immaterial harm resulting in a verifiable economic loss (Article 2 point 1).

For this reason, we suggest assessing each social-robot-embodied emotional AI system to determine whether it is a high-risk AI system or not according to Article 7 of the AI Act. In our opinion, Article 9, Section 8 should also be applied during the risk assessment process in the case of companion robots, where children's rights to privacy and data protection are concerned, as it states that specific consideration shall be given to whether the high-risk AI system is likely to be accessed by or have an impact on children.

5. Concluding Remarks

'Today's children are the first generation that will never remember a time before smartphones. They are the first generation whose health care and education are increasingly mediated by AI-powered applications and devices, and some will be the first to regularly ride in self-driving cars.'[79] Therefore, we believe it is essential to protect them with every single tool we have, both on the level of technology and that of regulation.

77 Cf. for the German judicial practice: Hanssen 2020. For practice of the European Court of Justice, cf. the 'Schrems-II' judgment of 16 July 2020, case no. C-311/18.

78 European Parliament resolution 2020 *Civil Liability Regime for Artificial Intelligence*, Point 15.

79 UNICEF 2020. 17.

Due to the rapid development of technology, data protection and privacy are becoming much more important, especially in the age of artificial intelligence. This technology has several benefits, but it also carries risks. In this paper, we intended to highlight a few concerns regarding a special version of AI, namely household social robots, as the number of such devices is likely to increase in the future.

Household social robots aim to provide the best human-centric service, in which regard we have studied affective computing and the aspects of HRI, as well as the nature of the devices and human trust, with special attention to emotions. Considering emotional AI, we analysed various privacy and data protection issues such as the categorization of inferred emotions, the bases of data processing (specifically consent), and the rights of the data subjects (in particular, the right to explanation), also focusing on a vulnerable group, i.e. the children.

As the aforementioned authors, especially Aroyo et al., showed, irrational expectations and unreasonable (over)trust should be mitigated on the level of society as a whole[80] to strike a balance between human reactions and emotional features of social robots. In parallel, the manufacturers have a significant responsibility in designing, testing, developing, and enrolling these special smart products, as well as in complying with safety, data protection, and ethical standards.

In this paper, we only scratched the surface of this vast topic, wherefore our research cannot be considered finished, especially in the light of future EU regulation, to mention here not only the Proposal for the so-called 'Artificial Intelligence Act', which was published on 21 April 2021, but also the Resolution of the European Parliament of October 2020. In this article, we did not deal with the relevant product liability questions due to the fact that the revision of the Product Liability Directive is still awaiting elaboration.

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80 Aroyo et al. 2021.

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Acta Univ. Sapientiae, Legal Studies, **11**, 1 (2022) 119–126

DOI: 110.47745/AUSLEG.2022.11.1.07

Non-litigious Proceedings under the Jurisdiction of the Court in Hungary

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Abstract: The objective of the study is to present the regulation of non-litigious electronic proceedings placed in the jurisdiction of courts, applicable in Hungarian civil procedure. The author examines such procedures in the fields of electronic company registration, insolvency procedures, and the registration of non-governmental organizations.

Keywords: digital technology, electronic procedure, non-litigious procedure, public authorities, Hungary

1. Introduction

The aim of our study is to explain the system of rules pertaining to non-litigious civil proceedings primarily based on electronic procedures under the jurisdiction of the courts.

Given the fact that most non-litigious proceedings examined in the essay are regulated by separate acts but all refer to the Hungarian Code of Civil Procedure as their background legislation, we will first review the regulation of electronic communication in the Code of Civil Procedure. Then, in the subsequent sections, we will describe the role, function, and purpose of electronic devices in each non-litigious civil procedure.

2. Digital Technologies in the New Code of Civil Procedure

On 22 November 2016, the Hungarian National Assembly adopted Act CXXX of 2016 on the Code of Civil Procedure, which is applicable in civil proceedings

brought before a court as of 1 January 2018. The major goal of the codification process during the creation of the new legislation was from the beginning to apply and use the possibilities of new technologies in order to ensure effective, fast, and timely closure of civil procedures.[1]

Pursuant to the new code adopted by the Hungarian National Assembly as the prevailing legislation, the use and adoption of electronic technologies in civil procedures is jointly governed by Act CCXXII of 2015 on the general rules of electronic procedures and trust services (hereinafter referred to as the 'e-Procedure Act') and the Code of Civil Procedure. Government Decree 451/2016 should also be mentioned as the implementing regulation of the e-Procedure Act, which defines technically detailed provisions. The e-Procedure Act constitutes the legal framework for the applicability of electronic technologies and shall be considered as the main norm governing the issues not regulated under the Code of Civil Procedure.

The right to access electronic procedures is defined by § 8 (1) of the e-Procedure Act,[2] which is further limited in legal proceedings by the right of choosing electronic communication as outlined in § 605 of the Code of Civil Procedure.[3] Parties are entitled to the right of choice regarding electronic communication if they act in person or through representatives not qualifying as legal representatives.

It is the e-Procedure Act that defines who is obliged to communicate electronically, not the Code of Civil Procedure.[4] Bertold Baranyi identifies three categories of such parties: (1) business entities, (2) public entities (including in particular the state, local governments, budgetary bodies, the public prosecutor, notaries, public bodies, and other public administration authorities), and (3) a client through legal representative.[5]

1 *The Concept of the New Code of Civil Procedure* 2015. 18–19.

2 § 8 (1) of the e-Procedure Act: 'Lacking any provisions to the contrary in any law or government decree created through original legislative power, clients are entitled to execute their administrative tasks through electronic means and submit their declarations electronically towards an authority that provides for electronic communication.' (Translation by the author. Unless otherwise specified, all translations are by the author).

3 § 605 of the Code of Civil Procedure '[Optional communication through electronic means] (1) In civil procedures, the party not obliged to use electronic communication or its representative not qualified as a legal representative – except for the cases outlined in paragraph (5) – may submit any claims, other submissions and annexes thereto or documents (in this chapter furthermore referred to as "submissions") electronically as by their choice pursuant to the modes outlined in the e-Procedure Act and the implementation regulations thereof.'

4 § 9 (1) of the e-Procedure Act: 'Unless a law based on an internationally binding contractual obligation or an international convention defines provisions to the contrary, the following parties are obliged to apply electronic communication in cases pursuant to § 2 (1): a) party proceeding as a client, and it is either aa) a business entity, ab) a state, ac) a local government, ad) a budgetary body, ae) a prosecutor, af) a notary, ag) public body, or ah) any other public administration authority not named under points ac)–ag); b) legal representatives of clients.'

5 Baranyi 2018. 2097–2098.

3. Electronic Company Procedures

Electronic company procedures were the first electronic court procedures in Hungary. Online administration was first made possible from September 2005, and then Act LXI of 2007 on the amendment of Act V of 2006 on public company information, company registration, and winding-up proceedings (Company Information Act) and other acts made it mandatory from 1 July 2008 to apply electronic procedures for company registration and the registration of changes in company information. From this date, requests for company registration and change registration are submitted electronically to the registering court for all types of companies, and it is also possible to publish annual reports, query company information and submit applications for the conduct of statutory control procedures electronically.

The IT system for electronic company procedures is provided by the Company Information and Electronic Company Registration Service (Company Information Service). From an information technology perspective, clients communicate with the Company Information Service during electronic administrative procedures conducted at the registering court.

The essence of electronic company procedures is that communication between the mandatory legal representative and the registering court as well as the registration of company data are carried out electronically, which is a faster and less costly way compared to traditional paper-based procedures.

The content of the e-file to be sent to the registering court consists mainly of digitized, i.e. scanned, PDF format copies of paper documents (articles of association, power of attorney, declaration of use/acceptance of the registered office, etc.) required for the company procedure. In addition to the documents prepared by the legal representative, the latter is also responsible for converting documents not prepared by it (e.g. a copy of the title deed, official licences, certificates of cash deposits from the payment service provider) into electronic form.

Applications for company registration (change registration) must be submitted electronically. An e-file is a complex data file containing all the documents to be sent to the registering court in the course of the company procedure, which is signed by the legal representative with a qualified electronic signature.

The application for company registration (change registration), together with the annexes, must be submitted to the competent commercial court according to the registered office of the company on the electronic form corresponding to the legal form of the company signed by the legal representative, in the manner specified in the Civil Code.

The key reason for the fact that the electronic procedures introduced later did not follow the pattern of the electronic company procedure is also the main weakness of the system, namely communication by e-mail.[6]

6 Szalai 2018. 48.

4. Insolvency Procedures

Under the current legislation in force in Hungary, debtors in payment difficulties have access to the following non-litigious civil procedures to restore their solvency.

Bankruptcy proceedings aim at restoring the solvency of economically distressed but still salvageable economic entities through the institutions of moratorium and the so-called reorganization programme in order to avoid the liquidation of the debtor entity.[7] Bankruptcy proceedings are insolvency procedures governed by Act XLIX of 1991 on bankruptcy and liquidation proceedings (Bankruptcy Act). They are non-litigious civil proceedings initiated by application to the court, in which the debtor obtains a moratorium on payments and attempts to reach an arrangement agreement.

A *debt settlement procedure for natural persons* is a procedure enabling the settlement of debt for natural persons in payment difficulties. The aim of debt settlement procedures is to ensure that the debts of natural persons in payment difficulties are settled and their solvency restored within a regulated framework using the necessary assets and income. The procedure must not be aimed at a definitive discharge of the debtor's payment obligations. Act CV of 2015 on the debt settlement of natural persons (hereinafter: Debt Settlement Act) created the institution of *private bankruptcy* in Hungary as envisaged by EU legal sources.[8]

On 21 May 2021, the National Assembly of Hungary adopted Act LXIV of 2021 on restructuring and amending certain acts for the purposes of legal harmonization (Restructuring Act) in order to establish compliance with Directive (EU) 2019/1023 of the European Parliament and of the Council (20 June 2019) on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency, and discharge of debt, and amending Directive (EU) 2017/1132 (Restructuring and Insolvency Directive). The new legislation is expected to lay down the civil substantive law and applicable procedural rules for restructuring from 1 July 2022 and to introduce judicial non-litigious civil proceedings for restructuring as new non-litigious civil proceedings. The purpose of a restructuring procedure is to enable the debtor, in the event of a probability of insolvency, to decide on a restructuring plan in which it can agree with some or

7 Nagy 2001. 186.

8 In this context, reference should be made to the Entrepreneurship 2020 Action Plan adopted on 9 January 2013 [COM(2012) 795 final, 09.01.2013], Commission Recommendation 2014/135/EU on a new approach to business failure and insolvency [COM(2014) 1500 final, 12.03.2014] and Directive (EU) 2019/1023 of the European Parliament and of the Council (20 June 2019) on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 [OJ 172/18. 26.6.2019].

all of its creditors on a restructuring plan that will prevent the debtor's future insolvency or ensure its operability.

Liquidation proceedings are insolvency proceedings that are of a non-litigious nature under the jurisdiction of the court against an entity that is already in debt with the aim to distribute the assets of the entity to its creditors in a specified order by dissolving the entity without a successor in title. In addition to bankruptcy, liquidation proceedings are insolvency proceedings governed by Act XLIX of 1991 on bankruptcy and winding-up proceedings (hereinafter: Bankruptcy Act).

Although voluntary liquidation is not considered by the literature as constituting an insolvency procedure, it does offer companies in payment difficulties the possibility in the context of *non-litigious civil proceedings within the jurisdiction of the court*[9] to satisfy their creditors through the dissolution of a non-insolvent entity without a legal successor. The basic rules of voluntary liquidation are laid down in Act V of 2006 on public company information, company registration, and winding-up proceedings (hereinafter: Company Information Act). There are three conditions for voluntary liquidation: (1) the company must not be insolvent; (2) the (substantive) law applicable to the company must not contain any provision to the contrary; (3) the supreme body of the entity must decide to voluntarily liquidate the company without a successor in title.

Of these procedures, bankruptcy and liquidation are the main procedures to be affected by dematerialization.

As of 1 January 2015, the Bankruptcy Act made electronic communication between courts and legal entities (parties) mandatory. Natural persons may submit applications and other official documents and may be served such documents on paper too. In bankruptcy proceedings, as well as in liquidation proceedings opened at the request of the debtor, creditor, or liquidator, legal representation is mandatory on the side of the applicant.

Any party can switch to electronic means at any stage of the procedure.

9 Some authors question the nature of voluntary liquidation as a non-litigious civil proceeding within the jurisdiction of the court. In Judit Gál's view, voluntary liquidation is 'not a judicial or non-litigious procedure but (...) a special stage of a company's existence: a stage when its owners decide to terminate the company's activities permanently and without a successor in title' (Gál 2006. 49). In my opinion, this statement can be disputed from two aspects: on the one hand, the decision of the supreme body of the entity alone is not sufficient for voluntary liquidation to be carried out, as it requires the order of the commercial court declaring the opening of voluntary liquidation and its publication in the Official Gazette of Hungary; on the other hand, most of the procedures concerning the solvency and/or dissolution of entities are carried out at the request and with the active participation of the entity in the procedures (e.g. bankruptcy proceedings).

5. Registration Procedures for Non-Governmental Organizations

Act CLXXXI of 2011 on the court registration of COs ('civil society organizations', i.e. non-governmental organizations, or NGOs) and the related procedural rules (hereinafter: Civil Organizations Registration Act) constitutes the source of law for non-litigious procedures related to the registration of non-governmental organizations by the competent court (hereinafter collectively referred to as registration procedures).

Registration procedures include the registration of NGOs and other organizations (*registration procedure*), the entry, amendment, and deletion of data, rights and facts concerning the registered organization (*changes in registration procedure*), the erasure of organizations from the register (*deregistration*), the keeping of registers of NGOs and other organizations not qualifying as companies, and the provision of information on the data of these registers (*data provision*).

The Civil Organizations Registration Act is not structured according to the separate regulations of individual non-litigious proceedings. The legislator first laid down general provisions on submissions, followed by rules on serving documents and other specific tasks of the court, and then continued by the rules summarized under the term 'other general rules' pertaining to the use of the information technology system and the evidentiary value of electronic documents.

The second chapter of the act declares the mandatory content of applications for the initiation of certain registration procedures with separate provisions for registration, changes in registration, and deregistration.

Chapter III, titled *Rules of Non-litigious Civil Proceedings Regulated by This Act* and summarizing most of the procedural provisions, is essentially an overview of court functions containing detailed rules on the formal and substantive examination of applications, the rejection of applications, the simplified registration procedure, and deregistration. This chapter contains rules on the recording of the name, tax number, and statistical number of the organization in the register, on the registration of public benefit status and the removal thereof from the register, as well as on legal remedy proceedings.

Chapter IV of the Civil Organizations Registration Act lays down special provisions for foundations, associations, and other organizations that qualify as NGOs, and in a subchapter (Chapter IV/A) statutory control procedures are defined as separate non-litigious procedures.

Chapter V of the Act sets out the primarily technical provisions for record keeping and managing the NGO register, which contains the background rules for the use of the IT system. Chapter VI sets forth the provisions pertaining to data reporting, embodying the principle of publicity, while Chapter VII comprises of

a detailed list of the scope of data contained in the register of NGOs and other organizations not constituting a company.

As of 1 January 2015, electronic procedures also became mandatory for NGOs with regard to certain legal entities and for certain types of applications. Article 8 of the Civil Organizations Registration Act specifies which organizations are obliged to maintain electronic communication. Private pension funds, voluntary mutual insurance funds, voluntary deposit guarantee and protection funds for credit institutions, public bodies, mutual insurance companies, wine communities, political parties, national sports federations, associations and public foundations are obliged to use electronic procedures for court registration.

In addition, the submission may only be made electronically if:

a) the applicant is acting through a legal representative, or

b) the applicant requests a simplified registration (change in registration) procedure.

The application for public benefit status may only be submitted electronically, and the applicant may only file submissions in the procedure electronically. A public benefit organization may only file submissions electronically.

If the applicant is not required to use electronic procedure, they may submit the application on paper but may also voluntarily choose to submit it electronically. If they choose to submit their application electronically, they must communicate only by electronic means during the procedure.

The biggest advantage of the electronic procedure is the simplified registration procedure. The registration and change in registration of associations, foundations, and sports associations under the Act on Sports can also be carried out in a simplified procedure as of 1 January 2015. In principle, the procedure is similar to the simplified company procedure, but it differs significantly in practice.[10]

6. Summary

The study has examined – without claiming to be exhaustive – the civil non-contentious proceedings of the courts that have based their rules on electronic procedures. It can be concluded that electronic communication is becoming increasingly widespread not only in civil but also in non-contentious proceedings. Looking at the layers of legislation, it can be concluded that the e-Procedure Act is the basis for electronic procedures in both civil and non-civil litigation.

10 Vándor 2018. 69.

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Acta Univ. Sapientiae, Legal Studies, **11**, 1 (2022) 127–151

DOI: 110.47745/AUSLEG.2022.11.1.08

The Emergence and Limits of State Supremacy. A Comparative Analysis of the Powers of the Prince of Transylvania and the Habsburgs Holding the Hungarian Royal Title

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Abstract. This study outlines the historical and theoretical background of the evolution of sovereignty and monarchy, that is, its Roman-Germanic roots, as well as the constitutional history of Hungarian and Transylvanian sovereignty, and discusses the limitations of the ruler's power, in particular the fundamental role of Transylvanian electoral conditions, on the basis of which the Transylvanian princely state was given a manner of rule of law. The paper contains a comparative analysis of royal and princely powers.

Keywords: Hungary, Transylvanian sovereignty, Transylvania, Habsburgs, Ottoman Empire

1. Introduction

The aim of this article is to outline the theoretical background and the development of the supremacy of the state; therefore, the antecedents of *res publica* and *principatus* must be discussed. However, as the background of intellectual history is beyond the scope of this paper, only a limited outline of the history of ideas is addressed, and thus it is not comprehensive.[1]

Perhaps with the only exception of the Venetian state,[2] sovereignty in the development of the mediaeval state was predominantly embodied in the sole

1 'Those that fail to learn from history are doomed to repeat it' (Winston Churchill). https://liberalarts.vt.edu/magazine/2017/history-repeating.html (accessed on: 23.10.2021).

2 The term 'perhaps' is justified by the fact that the Venetian republic was also headed by one man: the Doge.

rulers – princes, kings, emperors, and sultans –, and thus the sovereignty of the principal power was manifested in a monarchical framework.

In addition to the foregoing, the study outlines the limits of sovereignty, with particular reference to the status and role of the Assembly of the Estates and the Princely Council of the early modern principality of Transylvania as an example. This study also presents a comparative analysis.[3]

After outlining the theoretical background and the Romano-Germanic historical antecedents, the Hungarian beginnings of sovereignty are presented, followed by the Transylvanian aspects. This is justified by the fact that the Hungarians became part of the European system of relations that had already been established before the occupation of the Carpathian Basin.

The status of the Transylvanian Prince is also discussed in this context.

2. The Emergence of Autocratic Supremacy

As Péter Erdő points out, sovereignty was defined at the end of the Middle Ages and the beginning of the early modern age by Jean Bodin – describing the concepts used earlier, such as *maiestas imperii* –, who clarified the concept of sovereignty.[4]

In her study, Györgyi Máté notes that, compared to other scholarly works on state theory, Bodin's reception in Hungary and Transylvania in the sixteenth century was weakened by a number of factors, and thus its reception is uncertain.[5] It should be stressed that the Tripartitum[6] already existed at that time, which considered the sovereign – in this case, the prince – as the ultimate material source of law:[7] 'Yet we do not say all these things to be statutes of the people, but especially of the prince, because if the consent and confirmation of the prince do not in both cases accompany them, these decrees have no force. Nevertheless, these decrees are very often called by their common name the decrees of the country.' [8]

Among contemporary notables, István Szamosközy, who studied in the West, and István Illésházy may have been familiar with Bodin's theory.[9] In the First

3 All translations in this paper are the author's translations, which are – in necessary cases – referenced in the footnotes, in the original language.

4 Erdő 2015. 46.

5 Máté 1981. 65. http://acta.bibl.u-szeged.hu/945/ (accessed on: 18.03.2021).

6 Tripartitum, or *Hármaskönyv*: the Customary Law of the Hungarian Kingdom collected by István Werbőczy in 1514.

7 Varga 2015. 27.

8 Márkus 1897. Chapter II., Section 3., § 5. 'Mégis mindezeket nem a nép, hanem különösen a fejedelem statutumainak mondjuk azért, mert ha a fejedelem beleegyezése és megerősítése mindkét esetben azokhoz nem járul, eme rendeleteknek semmi ereje nem leszen. Mindazáltal általános néven eme rendeleteket igen gyakran az ország végzeményeinek nevezzük'.

9 See Máté 1981. 66–67.

Book of Bodin's work,[10] starting from biblical and Platonic bases, he defines *res publica*, or state, as the public interest (German: *Vom gemeinen Nutzen*) and the main attributes of the state: (a) sovereignty, which must be understood as supreme power; (b) the existence of families; (c) the common things and characteristics that bind families together; (d) the state must have sufficient territory to provide the basic conditions for the existence of its citizens (food, housing, and protection). Bodin uses the analogy of the family and state because family is the basis of the state, and, in addition, households, which are under the control of the head of the family, are a model for governmental activity in the state or activity of the head of state.

In Bodin's opinion, sovereignty is the highest level of state supremacy, characterized by full legislative power. Sovereignty is exercised absolutely and continuously by the sovereign, as God's vicegerent on earth, and citizens are bound to obey the sovereign's commands. The latter line of thought also had biblical foundations, which we find in the following New Testament quotations:

> 13:1 Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained of God. 13:2 Whosoever therefore resisteth the power, resisteth the ordinance of God: and they that resist shall receive to themselves damnation. 13:3 For rulers are not a terror to good works, but to the evil. Wilt thou then not be afraid of the power? Do that which is good, and thou shalt have praise of the same: 13:4 For he is the minister of God to thee for good. But if thou do that which is evil, be afraid; for he beareth not the sword in vain: for he is the minister of God, a revenger to execute wrath upon him that doeth evil.[11]

According to Bodin, only God and the laws of nature stand above the sovereign ruler. It is also worth pointing out how much the Roman Catholic Bodin, in this respect, thought like Calvin,[12] who in the *Institutes* explains the following:

> … Eighth Commandment. Thou shalt not steal. … This commandment, therefore, we shall duly obey, if, contented with our own lot, we study to acquire nothing but honest and lawful gain; if we long not to grow rich

10 Bodini 1592. The whole of First Book has been used in this study, as indicated by the length of the text. https://tinyurl.hu/LeVu/ (accessed on: 15.03.2021).

11 The Holy Bible: 1611 (hereinafter referred to as the Bible). Romans 13, 1–4. Augustine also points out in *The City of God* that the creation of the empire is the result of God's will, just as the sword, which in the biblical quotation represents power, is the result of God's will (approval). See *Aurelius Augustine*. https://www.gutenberg.org/files/45304/45304-h/45304-h.htm#Page_135 (accessed on: 02.08.2021). A further connection can be found between the symbol of the sword in the Pauline theology and the two-sword doctrine of Gelasius (cf. Chapter 3). Henne 2012.

12 Compared to Calvin, Luther only considered the separation of church and secular government to be important. Egresi–Pongrácz–Szigeti–Takács 2016. 199.

> by injustice, nor to plunder our neighbour of his goods, that our own may thereby be increased; if we hasten not to heap up wealth cruelly wrung from the blood of others; if we do not, by means lawful and unlawful, with excessive eagerness scrape together whatever may glut our avarice or meet our prodigality. On the other hand, let it be our constant aim faithfully to lend our counsel and aid to all so as to assist them in retaining their property; or if we have to do with the perfidious or crafty, let us rather be prepared to yield somewhat of our right than to contend with them. And not only so, but let us contribute to the relief of those whom we see under the pressure of difficulties, assisting their want out of our abundance. Lastly, let each of us consider how far he is bound in duty to others, and in good faith pay what we owe. In the same way, let the people pay all due honour to their rulers, submit patiently to their authority, obey their laws and orders, and decline nothing which they can bear without sacrificing the favour of God. Let rulers, again, take due charge of their people, preserve the public peace, protect the good, curb the bad, and conduct themselves throughout as those who must render an account of their office to God, the Judge of all.[13]

It is also necessary to point out that in Calvin's opinion, the supreme king or judge is God himself, according to the cited *Institutes*.[14]

According to Bodin, the estates can advise the sovereign, but the sovereign has the right to make the final decision. As a legislator, the sovereign is not, in

13 Calvin 1599. https://reformed.org/master/index.html?mainframe=/books/institutes/ (accessed on: 13.09.2021).

14 The following quotes support this interrelation: '40: 7 The grass withereth, the flower fadeth: because the spirit of the LORD bloweth upon it: surely the people is grass. 8 The grass withereth, the flower fadeth: but the word of our God shall stand for ever.' … '40: 13 Who hath directed the Spirit of the LORD, or being his counsellor hath taught him?' (…) '40: 17 All nations before him are as nothing; and they are counted to him less than nothing, and vanity.' (…) '40: 23 That bringeth the princes to nothing; he maketh the judges of the earth as vanity.' (…) Bible, Isaiah 40: 7, 8, 13, 17, 23. The above is confirmed by another correlation: '90:4 For a thousand years in thy sight are but as yesterday when it is past, and as a watch in the night. 90:5 Thou carriest them away as with a flood; they are as a sleep: in the morning they are like grass which groweth up.' Bible, Psalms 90: 4–5 – it is worth contemplating (sine ira et studio) on the basis of fate-transforming and holistic examples: 476 fall of Rome – 1453 fall of second Rome (Constantinople), beginning of the rise of third Rome (Moscow); 622 the 'flight' (Hegira) of Muhammad – around 1622 the beginnings of the Ottoman decline; 814 Charles I – 1814/1815 Napoleon I; 843 Treaty of Verdun – 1848/1849 beginnings of 'new' eastern 'Frankish' state; around 920 'A sagittis Hungarorum libera nos, Domine!' [Lord, deliver us from the arrows of Hungarians!] – 1920 Trianon, 955 Augsburg, Hungarian defeat – The defeated Hungarian Revolution of 1956; 960 the beginning of the rise of imperial China (Song dynasty, brought a new Confucian flourishing in China, characterized by the people being guided by the behaviour of the rulers: 'The ruler is like the wind, the subjects are like grass. When the wind whistles over the grass, it must bow' (Von Glasenapp 1975. 169, 180–181, 186). 1949 the beginning of the rise of 'new' China; 997 Vajk, Hungarian prince: Western orientation – 1998 Hungarian EU accession negotiations begin.

principle, bound by his own laws, but Bodin argues that he must obey them for political reasons. This line of thought has its antecedents in Roman law, which has been transposed into canon law as a legal principle and the outstanding principle that served to justify the absolute power of the pope (*potestas absoluta*): *Princeps legibus solutus est* (the princeps is above the laws) because, according to the Roman legal deduction, the laws of the emperor are sacred (*sacrae*) and eternal (*in omne aevum*) – his will is the only law: *Quod principi placuit, legis habet vigorem* (what pleases the princeps has the force of law).[15] According to Bodin, no citizen can demand that the ruler obey the law; his sovereignty in this respect is truly expressed in the attributes of independence and supremacy, as Károly Kisteleki explains.[16] Bodin also elaborates on the various features of princely sovereignty: (a) unlimited legislative power, (b) the right to decide on war and peace, (c) the right to appoint supreme officials, (d) the role of a supreme court, (e) the right to pardon, (f) the right to demand allegiance, (g) the right to mint money, (h) the right to determine weights and measures, and (i) the right to grant privileges. As a quasi-compensation for this, the sovereign monarch is obliged to guarantee the internal and external security of his subjects, their property and their families; it should be pointed out here that the latter idea is very similar to the Calvinist ideal already quoted. Thus, the sovereign is bound only by treaties with other sovereign princes. The sovereign is obliged to keep public promises made to his subjects, and a further limitation on the sovereign's power is that, except in times of danger, even the sovereign cannot freely impose taxes on the people at will, nor can he arbitrarily confiscate his subjects' property; among the limiting factors, the literature highlights the Salian Frankish laws on inheritance.[17]

Gábor Bethlen's contemporary, the Protestant thinker Grotius, in his *On the Law of War and Peace*, defined sovereignty, the sovereign power in such a way that the sovereign's actions are not subject to the right of another, that the decision of another person cannot override his own; hence, the sovereign power can change its own decisions at will. He denies and seeks to refute the view that sovereignty always belongs to the people; there is always interdependence between the king and the people; the actions of the sovereign cannot be judged by their moral rightness because this could lead to confusion; he idealizes a patrimonial kingdom where the sovereign has the power of the state. He denies the right to resist the monarch and suggests to tolerate rather than to resist by force. War against supremacy is generally not permitted, except in certain

15 Kisteleki 2015. 458.

16 Id. 461.

17 Szmodis 2020. 162. It is worth mentioning that the restrictive nature of Lex Salica (i.e. that a woman could not inherit) was removed by Pragmatica Sanctio, a rather great regulatory feat in relation to the Habsburg House. On the latter, see Szentpáli-Gavallér 2020.

exceptional cases.[18] Bodin, Calvin, and Grotius have a very similar understanding of the denial of the right to resistance.[19]

3. Romano-Germanic Roots

For centuries, the state of ancient Rome was a republic. Accordingly, sovereignty was exercised by the *senatus* and the *res publica*, and the expression of this and of Roman statehood was the SPQR, or *Senātus Populusque Rōmānus*, meaning the Senate and the Roman people, for the *populus Romanus* was the state itself, while the *senatus* was the permanent holder of state sovereignty.[20] The beginnings of mediaeval autocracies are linked to the Latin-Roman princeps. The origin of this term goes back to before the rise to power of Octavian, who established the principate as an institution based on the 'ruinous' institutions of republican Rome. In republican Rome, the term was used as *princeps senatus*, conferred on the most prestigious senator, and in time it evolved into the office of princeps.

Before Octavian's victory, he formed an alliance establishing the second triumvirate and used it to gain autocracy in the guise of a republic. In 27 BC, the Senate granted Octavian the title of Augustus, indicating his greatness, majesty, and sanctity, but for all his power and title Octavian refrained from holding the position of king, claiming to be no more than princeps, which at this time simply meant 'first citizen of the state'.[21] Tacitus describes Augustus's principate, family, and immediate environment in the following sentences:

> …Augustus meanwhile, as supports to his despotism, raised to the pontificate and curule aedileship Claudius Marcellus, his sister's son, while a mere stripling, and Marcus Agrippa, of humble birth, a good soldier, and one who had shared his victory, to two consecutive consulships, and as Marcellus soon afterwards died, he also accepted him as his son-in-law. Tiberius Nero and Claudius Drusus, his stepsons, he honoured with imperial tides, although his own family was as yet undiminished. For he

18 Paczolay 1997. See Grotius 1689. 18–21. „Quam nam summam vocas potestatem in civitate, cujus consensum expressum in bello inferendo, probabilem vero assensum in propulsando requiri doces? Summa potestas illa dicitur, cujus actus alterius juri non subsunt, adeoq a nullo superiore irriti reddi possunt. Cui convenit haec summa potestas? (...) Deinde personis, uni vel pluribus, pro cujusque, gentis legibus aut moribus, quibus cura civitatis specialius est comissa."

19 The author agrees with these views but believes that the most appropriate state in peacetime is a democracy based on the modern division of powers, where the freedom of the individual is exercised in such a way that it is limited by respect for the freedom of other individuals.

20 Brósz–Pólay 1976. 37. In the pre-republican era of Kingdom of Rome, the king was – mainly under Etruscan influence – a judge, commander, and high priest, with the senate acting as an advisory body.

21 Mousourakis 2015. 18.

> had admitted the children of Agrippa, Caius and Lucius, into the house of the Caesars; and before they had yet laid aside the dress of boyhood he had most fervently desired, with an outward show of reluctance, that they should be entitled 'princes of the youth' and be consuls-elect…[22]

In parallel with Károly Kisteleki's opinion, it can be stated that the supreme power was concentrated in the princeps, unlike Augustus and his successors, who, although they preserved the externalities and institutions of the republic in a sham way, rendered *res publica* itself viable and functional with monarchical content.[23] From the above, it is clear that Augustus was not stingy with the granting of titles within his family, ensuring that trusted people close to him were given status. This was both generous and logical, as it was a matter of trust for each position.

Moving forward in time to the beginnings of the Germanic states on Roman soil, living alongside the Romans, the Germanic princes (*Germanenfürsten*) were given Roman patrician titles and ranks.[24] By granting titles, the Romans not only showed respect for the Germanic princes but also that they were subject to the Roman state. With this subordination, the seeds of a true system of feudal relations appeared. In the centuries that followed, a distinction was made between the position and status of prince (*princeps*) and king (*rex*) within the circle of rulers.[25]

Following the foregoing, it is also worth mentioning that Niccolo Machiavelli in *The Prince* expresses the following views on the mixed form of government:

> But the difficulties occur in a new principality. And firstly, if it be not entirely new, but is, as it were, a member of a state which, taken collectively, may be called composite, the changes arise chiefly from an inherent difficulty which there is in all new principalities; for men change their rulers willingly, hoping to better themselves, and this hope induces them to take up arms against him who rules: wherein they are deceived, because they afterwards find by experience they have gone from bad to worse. This follows also on another natural and common necessity, which always causes a new prince to burden those who have submitted to him with his soldiery and with infinite other hardships which he must put upon his new acquisition.…[26]

22 Tacitus 14–15. http://classics.mit.edu/Tacitus/annals.1.i.html (accessed on: 19.10.2021).
23 Szentmiklósi 1858. 46.
24 Jörs 1893. 7–8.
25 The two terms are used synonymously in the dictionary. Burián 1907. 136.
26 Machiavelli 1998. https://www.gutenberg.org/files/1232/1232-h/1232-h.htm (accessed on: 20.10.2021).

The Middle Ages, while maintaining the idea of mixed government, contributed to the transformation of the monolithic structure of power by the assumption of dual majesty, or dual authority, the foundations of which had already existed in the Roman and Germanic predecessors of the dual kingdom and the parallelism of the authority in times of war and peace.[27] Here, the former is the justification and acceptance of absolute power, the latter of which is subject to law, leading to Janus-faced sovereignty. This dichotomy resulted in the doctrine of the two swords in the relationship between church and state, and in other respects led to the theoretical distinction between king and crown, of which the Hungarian doctrine of the Holy Crown is a good example. In this respect, royal or princely absolutism could be opposed by the customary law of the country, that is, the law of the land, or *ius consuetudo*. The resistance of the nobility, based on customary law, was a counterweight to the power of the monarch (prince). In Miklós Szabó's correct view, it was after the Renaissance and the Reformation, which justified absolutism, that the way was opened for the division of powers.[28]

4. The Beginnings of Hungarian Sovereignty

An important precedent, parallel to the dual authority in the Hungarian context, is the princedom associated with the Árpád era. As Dezső Dümmerth describes, the logical consequence of the Hungarian tribes becoming independent from Khazar rule in the ninth century AD was the election of Álmos as Grand Prince[29] aimed at establishing a one-man leadership.[30] This status of early principality also had a sacral character, inherited by his son Árpád and his family. In the period immediately preceding the occupation of the Carpathian Basin, there were two other prominent chief officers in addition to the Grand Prince:[31] (a) Gyula (greater dignity) and (b) Horka (the one with lesser power).[32]

In the administrative territory of the Kingdom of Hungary, founded by the House of Árpád, a *ducatus* was established several times, covering a certain area within the Hungarian state (e.g. Transylvania or Slavonia), at the head of which the king's close blood relative as a dux exercised almost similar rights to a prince or the king himself.[33]

27 Szabó 1997. 193. Dual or multiple authority not only had Roman and Germanic but also religious antecedents, such as the trichotomous character of the doctrine of the Trinity: Father, Son – Jesus Christ –, and the Holy Ghost.

28 Szabó 1997. 193.

29 In Hungarian: *kende*.

30 Dümmerth 1980. 103–105.

31 For more on this, see: Tóth 2004. https://tinyurl.hu/UAq1/ (accessed on: 09.12.2020).

32 This system of triple rule harkens back to the Romano-Germanic predecessors of multiple rule such as the Roman imperial tetrarchy.

33 Csizmadia–Kovács–Asztalos 1998. 40.

From an administrative point of view, the development of the public institution of the Transylvanian voivode within the administrative unit of the Kingdom of Hungary, in addition to the institution of the *ducatus*, which was established during the Árpád dynasty, is significant. According to the Encyclopaedia, the institution of the Transylvanian voivode can be defined as follows:

> The title of voivode (Slavic: vojvoda [as much as] general) was once held by the princes of Moldavia and Walachia, who later replaced their title with that of hospodar; it was also the name given to the chiefs of the provinces in the Polish Kingdom (in Latin: palatinus). Until Transylvania was transformed into a separate principality, this was the name given to the governor of the Transylvanian parts, whose powers were similar to those of the Banus and extended to the whole civil and military administration. Verbőczy … lists the Transylvanian V. [= Voivode] among the flag-lords of the country, who was next in rank after the Croatian-Slavonian-Dalmatian Banus.[34]

In comparison, the legal lexicon of the early 1900s is terse: 'Vajvoda, Vajda, formerly the name of the governors of the provinces belonging to the Hungarian crown: Vajda of Transylvania (...), who was also a flag-lord (...) was not one of the great judges of the country (...) was obliged to swear an oath of allegiance to the king (...) was obliged to provide a band of soldiers…'[35]

5. The Development of the Status of the Transylvanian Prince and the Autonomy of the Principality of Transylvania – A 'Watershed' between King and Prince

After this background, the development of the status of the Transylvanian prince should also be mentioned. In the aftermath of the tragedy of Mohács (1526),[36]

34 https://mek.oszk.hu/00000/00060/html/104/pc010438.html#3 (accessed on: 17.12.2020). „Vajda (szláv vojvoda a. m. [= annyi mint] hadvezér) címet viselték hajdan Moldva és Oláhország hübéres fejedelmei, kik címüket utóbb a hoszpodáréval váltották fel; igy nevezték a lengyel királyságban a tartományok főnökeit is (lat. palatinus). Erdélyország külön nagyfejedelemséggé átalakulásáig igy nevezték az erdélyi részek kormányzóját, kinek hatásköre olyan volt, mint a bánoké s kiterjedt az egész polgári és katonai igazgatásra. Verbőczy (I. R. 94. sz.) az erdélyi V.-t [= Vajdát] az ország zászlósai közt sorolja föl, ki rangban a horvát-szlavon-dalmát bán után következett."

35 Márkus 1907. 848. „Vajvoda, Vajda, korábban a magyar szt. koronához tartozó tartományok kormányzóinak neve: Erdélyi Vajda (...), aki zászlós úr is volt (...) nem tartozott az ország nagy birái közé (...) a királynak hűségesküt tartozott tenni (...) egy bandériumot tartozott kiállítani..."

36 The battle ended in a decisive and overwhelming Ottoman victory, in contrast to Hunyadi's victory at Nándorfehérvár (the present-day Beograd) in 1456.

King János Szapolyai held Transylvania and the eastern parts of the country, while King Ferdinand secured his rule in the western parts.

The territorial division was in no small part due to the fact that János Szapolyai had previously held the office of Voivode of Transylvania (1510–1526), in which he was able to concentrate extraordinary governmental and military power in his own hands, which ensured his authority over the territory in later years. In this sense, the role of the Transylvanian voivode was a key factor in the public history of Transylvania, since Szapolyai's position was largely determined by his former position as a Transylvanian voivode. After many years, the Peace of Várad[37] was concluded, the most important element of which was the legal basis for the division of the country into two parts, stating that both kings had full sovereignty over the part of the country over which they ruled. Following this series of events and the fall of Buda in 1540, the Kingdom of Hungary was divided into several parts. At the end of January 1542, before the Transylvanian estates assembled in Marosvásárhely,[38] a letter of command from the Sultan was read out by György Martinuzzi,[39] which was in fact addressed to the widowed Queen Isabella. In this letter, Sultan Suleiman decreed that he would hand over the whole of Transylvania to the queen and her son immediately and gave György Martinuzzi full powers and the governorship of the country.

During the 1540s, Martinuzzi was in constant correspondence with the imperial courts of Europe, including Emperor Charles V, from whom he hoped to liberate the divided country, but this hope was thwarted by the Treaty of Adrianople (1547), which turned Transylvania into a clear Ottoman sphere of influence.[40]

In relation to the following decade and the constitutionality of the emerging state, Szádeczky used the following formulation:

> *Transylvania was briefly (1551) annexed back to Hungary, but five years later the Transylvanian estates re-elected John Sigismund as prince. The new form of government of Transylvania was established at the Diet of Kolozsvár*[41] held at that time (November 1556). From this time onwards, Transylvania and the counties beyond the Tisza that belonged to it began to live as an independent state and independent elective principality, which lasted until the death of Prince Mihály Apafi I in 1690.[42]

37 The present-day Oradea.

38 The present-day Târgu-Mureș.

39 György Martinuzzi: Hungarian cardinal, original name Juraj Utje-šenović, byname Brother George, Friar George, Latin-Hungarian Fráter György, or Latin Frater Georgius (born in 1482, Kamicic, Croatia – died on 17 December 1551, Alvinc, Transylvania, now Vinţu de Jos, Romania), Hungarian statesman and later cardinal who worked to restore and maintain the national unity of Hungary. https://www.britannica.com/biography/Gyorgy-Martinuzzi (accessed on: 21.10.2021).

40 Oborni 2007. https://epa.oszk.hu/00400/00458/00127/3638.html (accessed on: 12.10.2020).

41 The present-day Cluj-Napoca.

42 Szádeczky 1901. https://tinyurl.hu/vh3p/ (accessed on: 19.12.2020). „Erdély ugyan rövid időre

The result of the international political games, however, was achieved later in 1570, when, as a temporary end to the constantly changing internal war situation, negotiations between Ferdinand and János Zsigmond resumed with the aim of settling the public law situation in Transylvania and defining the title of János Zsigmond as a monarch. These issues and the relationship between Transylvania and the Kingdom of Hungary were not fully settled until the Treaty of Speyer (1570–1571). In this context, it is worth quoting Barna Mezey's summarizing thoughts, which characterize the status of Transylvania and the principality:

> The rulers of the Transylvanian state before Gábor Bethlen consistently considered Transylvania as part of the Hungarian kingdom and linked their ideology of rule to the doctrine of the Holy Crown, thus creating a contradiction between the Habsburgs' recognition of the Hungarian monarchy and their own anti-Vienna policy. In the 1570 Treaty of Speyer, János Zsigmond recognized Maximilian I as the legitimate ruler of Hungary and renounced the use of the royal title. For an extended period, Zsigmond Báthory held only the title of Voivode of Transylvania. The Principality of Transylvania was an independent state, unconnected to the Vienna administration, but its princes generally sought to have their election approved by the rulers of Vienna. But even so, the princely ideology did not recognize the Habsburgs as vassals of Transylvania and regarded the country as the heir and depositary of the mediaeval Hungarian state…[43]

In the light of the above, the Treaty of Speyer, concluded in 1570–1571, thus completed the long process of Transylvania becoming a state and at the same time defined its inter-state relationship with the Kingdom of Hungary. In December 1570, the first 'interstate' treaty was signed, which recognized that a new country had been formed from the eastern part of the Kingdom of Hungary, separate from it but still belonging to it, thus creating a special state and a special public status

(1551) visszacsatoltatott Magyarországhoz, de az erdélyi rendek öt év múlva János Zsigmondot ismét fejedelmökké választották. Az ekkor (1556. november) tartott kolozsvári országgyűlésen megállapították Erdély új államformáját. Innen kezdődik Erdélynek és a hozzá tartozott Tiszán túli vármegyéknek önálló állami élete s független választó fejedelemsége, mely 1690-ig, I. Apafi Mihály fejedelem haláláig fönnállott."

43 Mezey 1998. 66. „Az erdélyi állam Bethlen Gábort megelőző irányítói Transsylvaniát még következetesen a magyar királyság részének tekintették, uralmi ideológiájukat a szentkoronatanhoz kapcsolták, ellentmondást hordozva ezzel a Habsburgok magyar uralkodókénti elismerése és saját Bécs-ellenes politikájuk között. János Zsigmond az 1570-es speyeri egyezményben elismerte I. Miksát Magyarország törvényes urának, s lemondott a királyi cím használatáról. Báthory Zsigmond hosszabb ideig csak az erdélyi vajda címet viselte. Az Erdélyi Fejedelemség független, a bécsi közigazgatás apparátusához nem kapcsolódó állam volt – fejedelmei általában mégis igyekeztek választásukat jóváhagyatni Bécs uraival. De a fejedelmi ideológia mégsem ismerte el a Habsburgokat Erdély hűbérurainak, az országot a középkori magyar állam örökösének és letéteményesének tekintette..."

for Transylvania. Under the Treaty of Speyer, János Zsigmond renounced the title of king by choice and took the title of Prince of Transylvania in its place. In the treaty, the Austrian side recognized the limited sovereignty of the prince over the territory under his rule, but it was also stated that Transylvania and the territories attached to it would remain part of the Hungarian Crown, and that the Prince of Transylvania would recognize the supremacy of the Hungarian King over himself.[44]

6. The Prince and the Government Organization, Absolutism vs. Constitutional Monarchy, Central Government, Comparison of Princely and Monarchical Power – Limits of Power[45]

Like the neighbouring Romanian states, the Principality of Transylvania was a sultanically vassal state, which the Sublime Porte (hereinafter referred to as Porte) considered as conquered by the sword and liable to pay taxes. It paid 10,000 and 15,000 gold florins annually to the Porte and sent gifts of almost equivalent value to the Sultan, the Grand Vizier, and other dignitaries of the dynasty.

Nevertheless, it was sufficient for the Ottoman power that Transylvania should remain separate and not unite with the western Hungarian state, and the Porte was not bothered by the fact that Transylvania, with its limited sovereignty, played the role of an 'independent' state, and to this end the princes sent their sovereign envoys abroad and made alliances with other states. The Ottomans only intervened in Transylvanian internal affairs when fighting arose that threatened the maintenance of relations with the Porte.[46]

6.1. The Prince and the Organization of the State

The Principality of Transylvania was based on a special estate structure, which was expressed by the three nations[47] and the local administration based on the Partium.[48] Before outlining the situation of the central government, the issue of princely absolutism will be discussed.

44 Oborni 2007. https://epa.oszk.hu/00400/00458/00127/3638.html (accessed on: 10.12.2020).

45 In view of the fact that the idea and the system of checks and balances emerged after the period under study, in the eighteenth century, I will therefore try to outline the limits of the sovereign's power as their quasi-precedents.

46 Eckhart–Degré 1953. 45.

47 The three nations: Hungarian nobility, Székely community, Saxons.

48 Partium (*Részek* in Hungarian, i.e. 'the Parts'): those counties over which the Transylvanian princes ruled as 'lords of the Parts of Hungary'.

6.1.1. Princely Absolutism vs. Constitutional Monarchy

In Szádeczky's opinion, the Prince of Transylvania ruled constitutionally.[49] The most important feature of the early British constitutional monarchy was the operation of checks and balances and in modern times the primacy of the British Parliament (over the British monarch).[50] In contrast to this, Ferenczy defines as a characteristic of absolute monarchy that the prince controlled the functioning of the state to the exclusion of all other organs of state,[51] which is supported by the fact that the prince was the source of the key positions and that the assembly of the estates (Diet), for example, was a power-limiting factor. However, in some cases, the limitation of the prince's power was a conflict between the nation and the prince's power, such as the resistance of the nation of Saxons in the earlier period. Britannica goes even further than Ferenczy, claiming that despotic rule existed in mediaeval Transylvania:

> … in 1613 the Sublime Porte (the Ottoman government) imposed the election of Gábor Bethlen (1613–29), who proved the most competent of all the Hungarian princes of Transylvania. At home, Bethlen's rule was thoroughly despotic; through his monopoly of foreign trade and his development of the principality's internal resources, he almost doubled his revenues, devoting the proceeds partly to the upkeep of a sumptuous court and partly to the maintenance of a standing army. Keeping peace with the Porte, he often intervened against the emperor in the Thirty Years' War (1618–48) and safeguarded the rights of the Protestants in Royal Hungary. Under the Treaty of Nikolsburg (Dec. 31, 1621), Bethlen gave up the royal title along with the Holy Crown of Hungary. (He had been elected king by the Hungarian estates in the lands under his control in 1620 but declined to accept the crown, even though the Porte approved his election.)…[52]

Contrary to the foregoing, Lajos Rácz distinguishes between the Transylvanian electoral conditions (hereinafter: conditions) – types A, B, and C – presenting in detail their background in public law, state theory, political, and military history. As a result of the historical development of these three types of conditions, the weakening of princely power led to the creation of a princely authority bound to a degree that bordered on constitutional monarchy.[53]

49 Szádeczky 1901. https://tinyurl.hu/vh3p/ (accessed on: 19.12.2020).
50 Gönczi–Horváth–Stipta–Zlinszky 1997. 258–282.
51 Ferenczy 1905. 145–146.
52 https://www.britannica.com/place/Hungary/Royal-Hungary-and-the-rise-of-Transylvania#ref411255 (accessed on: 15.10.2021).
53 Rácz 1992. 162–182.

Sharing this opinion, it can be stated that in a certain sense – based on the above – the Transylvanian constitutional system predates the era of British constitutionalism and, of course, its results, even with a more far-reaching perspective. Therefore, it can be said that the above also represents the forerunner of the modern rule of law, because 'the starting point of the rule of law is that the measure of all activity – that of the state as well as that of the people – is law, which the state is obliged to observe'.[54] In this case, the ruler representing the state also performed his duties under the constraints of these conditions because in this sense they functioned as limits. This point of view is reinforced by the fact that the conditions thus imposed were, from a regulatory point of view, in a certain sense general in character and thus met the standard of *lex generalis*.[55] In this connection, Schauer argues that in order to interpret law and rules in general, a distinction must be made between the general and the particular, although he notes that the general is often only a collection of the particular, as illustrated by the simple example of (a) the particular: 'this tree', and (b) the general: 'the trees'.[56] Following the Schauerian and mathematical logic: *group A* is very similar to *group A'*, even if there are some differences, but also similar to *group 'A*, so the three very similar groups can be generally called '*groups A*', and hence the fact that during the reign of the princes of Transylvania all the respective conditions actually played the role of *lex generalis*, thus ensuring historical continuity.

6.1.2. The Prince of Transylvania

In the Principality of Transylvania, the dignity of the prince was granted by his election. The Porte had some influence over the election: notification was required before the election, the Ottoman Sultans exercised the right of confirmation, and in several cases appointed a prince before election could take place. The Transylvanian estates tried to 'circumvent' this Ottoman right and thus to weaken the right of appointment by receiving the Turkish envoys only after the election and then taking over the declarations of appointment from them.[57] The prince had to be of Transylvanian origin. The Sultan exercised his right to confirm the elected prince by issuing a solemn charter and sending the following insignia of princely dignity: (a) a mounted horse, (b) a royal staff, (c) a flag, (d) a sword, (e) a cap with a coat of arms and feathers, and (f) a caftan. Among these ceremonial objects, there were some with symbolic meaning; for example, the flag expressed that the prince was a vassal of the Sultan, and the caftan was a symbol of loyalty to the Porte, which limited the supreme power, that is, the sovereignty of the prince.

54 Küpper 2007. 347.
55 Küpper 2007. 348–349.
56 Schauer 1991. 647–648.
57 Eckhart–Degré 1953. 45–46.

The powers of the prince generally covered those of the Hungarian king, but his powers as a ruler also depended on his person as a prince. He was primarily responsible for conducting foreign policy, which was a major challenge in the dual Habsburg–Ottoman dependence. As previously mentioned, various conditions were imposed on the election of the prince, the most important of which was that he should maintain 'friendly' relations with the two powers, especially the Porte, and likewise maintain peace with the two Romanian princes. The complexity of the situation is also shown by the fact that the Porte constantly tried to force the princes to maintain friendly relations with the friends of the Ottoman state. Despite the fact that international law in the modern sense did not exist at that time, the will of the Porte was already a 'norm of international law' that was binding on the states despite their agreement.[58] The prince could also send envoys to the Porte, but their legal status was not equivalent to that of envoys from other states because they were considered subjects of the Porte. In terms of the judicial aspect, the role of the prince was similar to that of the Hungarian king. In the area of military defence, the prince was obliged to ensure the defence of Transylvania, which is why it was important that most of the princes also held the title of the Székely[59] community's chief leader,[60] which was primarily a military post. Thus, a declaration of war, the conclusion of peace, and the formation of alliances with the rulers of other states was the exclusive right of the princes. As a kind of security for the foregoing, the prince administered the revenues of Transylvania, the taxes and regalia voted at the assembly of the estates.

The aforementioned electoral conditions were also understood at the time to play a constitutional role, as contemporaries considered the conditions to be constitutional. These conditions were shaped according to what had been observed in relation to either the previous prince or the personality of the new prince, and electoral conditions were also established for those princes appointed by the Ottomans. From the fact that the conditions were established for each of these princes, we can conclude that they had a normative effect.[61] These electoral capitulations always included the guarantee of the main freedom, that is, the right to vote and that the prince was not permitted to determine his successor. In a certain sense, the reign of Gábor Bethlen was an exception to this because he named his wife as heir to the throne but also appointed a kind of governor to her in his testament. Other important princely obligations under the terms of the election were (a) to guarantee the practice of the four established religions,[62]

58 Kardos 2010. 61.

59 Rarely: Székler (according to Országh–Futász–Kövecses 2006. 1318), or sometimes: Szekler – for example: https://translate.google.com/?hl=hu (accessed on: 20.02.2021).

60 The title in question: 'Székely ispán'.

61 Küpper 2007. 347.

62 These religions in Transylvania were Roman Catholic, Reformed, Lutheran, and Unitarian.

(b) to guarantee freedom of expression in the assemblies of the estates, (c) to guarantee the liberties of the nobility, (d) to guarantee personal freedom, and (e) to uphold the laws of the country.

In connection with the foregoing, it is worth noting that the purpose of limiting and controlling power was to prevent the development of despotism, that is, to place power at the service of the common good, or else of those subject to it, as a means of which the government's subordination to the rule of law was used.[63] Interpreted in this way, the depositary of power must be governed by law and, until amended, is bound by the laws in force. It was in this spirit that the Transylvanian orders applied the aforementioned conditions in the election of princes, in the light of which the significant changes of the eighteenth century, that is, the idea of the constitution and constitutionalism – in fact, the acquisition and exercise of power on the basis of the constitution –, was also preceded by the constitutional structure of the Transylvanian estates, as mentioned earlier.[64] Thus, the constitutional approach characteristic of the Transylvanian princely era gives an emphatic constitutional colour to the monarchy of Transylvania, which is more akin to the ideals of the Western constitutional monarchies that would emerge in the following centuries. Thus, it is perhaps no exaggeration to claim – with reference to Lajos Rácz's observation, already referred to above – that the Transylvanian monarchical system was unique of its kind, ahead of its time, and even ahead of the British constitutional system.

6.1.3. The Prince and the Central Government

The most important executive body of the government after the prince was chancellery. The first office of the state was chancellor, which was established in 1550. The chancellor combined the roles of the president of the council of state and the first adviser to the prince, whose powers included: (a) administrating the most important affairs of the state; (b) presenting both the prince's and the council's proposals for the assemblies of the estates; (c) representing the prince and administering the exercise of the princely rights, that is, issuing and countersigning the prince's charters; (d) a role in the granting of titles and coats of arms;[65] (e) the prince responded to foreign envoys through the chancellor.[66]

As far as the chancellery is concerned, it can be said that it has not fulfilled the function of management in the modern sense,[67] which is leadership exercised by

63 Szabó 1997. 191.

64 A work published in the nineteenth century went further when it stated that the Kingdom of Hungary was a hereditary and constitutional monarchy. Von Szepesházy–Von Thiele 1825. XXVII.

65 See: Kóta 1991. 17; Bárczay 1897. 42.

66 Eckhart–Degré 1953. 46–47.

67 Berényi–Martonyi–Szamel 1978. 27.

a higher body over a lower body. Although the period under discussion is already in the early modern era, which includes a period of great discoveries, it is not yet possible to speak of government in the modern sense of the term. It is also worth pointing out that the title of *procancellarius*,[68] which became established in the Báthory era, continued to be used, but its existence and function survived until the seventeenth century. The duties of the *procancellarius* – see, for example, Márton Berzeviczy – thus broadly included (a) acting as a deputy to the chancellor and (b) performing diplomatic duties. However, the function of the chancellery cannot be examined in a simplistic way because the activity of the *protonotarius* had also persisted for a time as a consequence of the earlier period.[69] Another significant fact of legal history is that, in accordance with the precedents, the princely chancellery was divided into two 'departments': *cancellaria maior* and *cancellaria minor*.

The electoral conditions discussed in detail above may have contained additional provisions on the composition and powers of the Princely Council, a feature that strengthens the constitutional character of the conditions.[70] The chancellor, who presented the council's business and the documents to be discussed, played the most important role in this body. The importance of the Princely Council is also indicated by the fact that it met at the court of the prince in Gyulafehérvár,[71] either of its own free will, or, when an important matter arose, at his invitation. It was up to the ruler, however, whether he accepted the opinion of the Princely Council. The Princely Council was not subject to control by the estates; this right belonged exclusively to the prince.

In Szádeczky's view, the Transylvanian prince ruled constitutionally, and this seems to be confirmed and suggested by the fact that, as described above, thus the conditions were regarded as a basic law. Alongside the prince, the Princely Council consisted of twelve members chosen from the social strata of the three political nations, and its hearing was necessary when important matters were to be settled. Its members, known as councillors, elected and appointed the chief officials of the state and court and, for the most part, the ambassadors sent abroad.[72] According to Ágnes R. Várkonyi's dissenting opinion, Bethlen organized the Princely Council according to his interests, factoring in the political, religious, ethnic, and property relations of aristocratic society and supplementing it with experts. In my opinion, this latter interest-based approach is logical because, in a certain sense, the activity in such a council (body) presupposes in any case – as in ancient Augustan practice – a trusting character. It is not possible to argue for

68 Fejér 2016. http://real.mtak.hu/39690/1/EME_EM_2016_1_FejerTamas_Procancellariusi.pdf (accessed on: 19.12.2020).

69 See for more: Bogdándi 2012. 135–143.

70 Eckhart–Degré 1953. 47.

71 The present-day Alba Iulia.

72 Szádeczky 1901. https://tinyurl.hu/vh3p/ (accessed on: 19.12.2020).

one or the other position since there is truth in the opinions expressed from both points of view.[73]

A treasurer at the head of the treasury managed the state's revenue. The activities of the chambers attached to the Treasury remained of paramount importance given the income from the salt mines. Thus, this system of administration in Transylvania was organized into two parts: (a) the mining chambers and (b) the salt chambers.

Similarly, the Transylvanian courier post played a vital role – both in the everyday and in a diplomatic sense. There was a short but continuing link between the Transylvanian and Hungarian royal postal services – as testified by the account books.[74] Although the two postal networks operated in diverse ways, they were also linked organizationally. In addition, the Transylvanian courier service had the character of a public service tax, from which some privileged classes could be exempted.[75] A good example of the latter is the exemption of Tokaj in 1629 from the burden of postal services – post office, provision of accommodation.

It should not be forgotten that the government also required court officials, among whom should be mentioned: (a) the chief courtier, who was in charge of the court guard; (b) the court captain and vice-principal, who were the commanders of the bodyguard – blue and red, according to their dress; (c) the commander-in-chief; (d) other internal court officers – the chief caretaker, chief steward, etc.; (e) internal staff (e.g. noble chamberlains), and (f) external court officers (e.g. master equestrian).

In terms of administration, the estates gained decisive influence through their rural self-governing bodies in the counties, towns, Székely and Saxon seats, and the role they played in the administration of the field towns and villages was a further area of influence.[76]

Among the military dignitaries[77] – according to the social structure discussed above –, there are the captaincies such as (a) the national captain – the head of the forces, (b) the captain of the Székely forces, and (c) third, the captain of the fortress of Várad, the head of the Partium forces. The last of these is also a political dignitary, as it was the governor of Partium. It should be noted, however, that this dignity is of a dual nature because, on the one hand, it belongs legally to the Kingdom of Hungary, while, on the other hand, it was practically entirely under the jurisdiction of the Transylvanian prince.[78] It was held, for example, by no less personage than István Bocskai.

73 Várkonyi 2013. 26.
74 See for more: Kamody 1994.
75 See for more: Márkus 1900.
76 Eckhart–Degré 1953. 46–47.
77 Szádeczky 1901. https://tinyurl.hu/vh3p/ (accessed on: 19.12.2020).
78 See: Benda 1972. 310.

The prince and the Assembly of the Estates jointly exercised the right to legislate. The Assembly of the Estates was convened by the prince by issuing invitations to the counties, towns, Saxon and Székely nations, indicating the time of and the reason for the assembly. The assembly was composed of the following members: representatives of the seven Hungarian counties, representatives of the Partium counties, representatives of the Székely and the Saxon seats, and various towns (e.g. Enyed,[79] Torda,[80] Kolozsvár, Várad, etc.). There were also so-called regalist members of the assembly, who, either because of their wealth or their dignity, were invited by the prince by special letter – also known as regale – and appeared in person. The assembly was unicameral and envoys and invitees were obliged to attend; and those who left before the end of the assembly were usually fined by the prince. The archbishops played a prominent role in county envoys. Bills were submitted by the prince, but the assembly itself could make requests and freedom of speech was guaranteed. The president of the assembly was appointed by the prince of his councillors. All decisions taken by the assembly had to be confirmed by the prince, preceded by a review of the decisions by the prince's council, followed by approval or, possibly, the raising of objections. After this process, all the decisions were brought together to the prince and, following his approval, signed by the president and two magistrates of the Court of Justice,[81] after which the prince gave his confirmation and signature, and the decisions became law. During the final act, the prince handed the ratified rules to the Diet and granted permission to leave.[82]

6.2. Comparison of the Royal and Princely Powers

In this subchapter, I outline the differences in the powers of the Habsburgs, who were the most prominent of the mediaeval European heads of state, and the Transylvanian princes. This comparison focuses on the status of the king and the prince.[83]

First, it must be pointed out that the ideological and public law basis of both states – the Hungarian Kingdom of the Habsburgs and the Principality of Transylvania – was the doctrine of the Holy Crown. As noted earlier in the Principality of Transylvania, the dignity of prince was obtained by election, over which the Porte exercised influence, requiring notification before the election, exercising the right of confirmation, and, in several cases, appointing the prince

79 The present-day Aiud.
80 The present-day Turda.
81 Magistrates of the Court of Justice originally in Hungarian: *ítélőmesterek* 'masters of justice'.
82 Eckhart–Degré 1953. 47–49.
83 It is also important to note that the term 'prince' in German also meant the title 'Fürst', which in Hungarian was used as the rank or title of 'herceg' (e.g. *Klemens Fürst von Metternich* – Klemens, prince von Metternich).

before the election could take place. In comparison, the Habsburgs, who bore the dignity of the Hungarian kings, made their titles hereditary. The prince had to be of Transylvanian descent, whereas the Habsburgs bearing the title of King of Hungary in the period under discussion were of German – or, more precisely, Swiss – descent.[84] The latter origin, as well as the genealogy of the Habsburgs – see the development of the Spanish–Austrian branches –, was significant because of the rise of imperialism. The Ottoman Sultan, as *padishah*, exercised his right to confirm the elected prince by issuing a solemn charter and the following insignia of princely dignity: (a) a mounted horse, (b) a royal staff, (c) a flag, (d) a sword, (e) a cap with a coat of arms and feathers, and (f) a caftan. In contrast, the insignia of a king,[85] who did not require sultanic confirmation, generally included (a) a crown, (b) a royal staff, (c) a robe, (d) a pomum (globus), and (e) a sword. The most striking difference in the insignia is that among the heads of state discussed the king is the crowned head of state, and in this context there is a difference between the inauguration of a king and that of a prince.

The powers of the prince generally covered those of the Hungarian king, but his powers as a ruler also depended on his person as the prince. He was primarily responsible for the conduct of foreign policy, which was a major challenge given the geopolitical situation of Transylvania at the time. In the election of the prince, as has been amply described above, various conditions were imposed, among which the most important was that the prince should have 'friendly' relations with the two powers, especially the Porte, but this condition did not apply to kings. The prince could also send envoys to the Porte, but their legal status was not equivalent to that of envoys of other states and rulers, as they were considered subjects of the Porte. In judicial matters, the role of the prince was similar to that of the Hungarian king (*personalis praesentia regia*).[86] In the field of military defence, the prince was obliged to ensure the defence of Transylvania, which is why most of the princes also held the office of the Székely community's chief leader, which was primarily a military post and extremely important. Thus, the declaration of war, the conclusion of peace and alliances with rulers of other states were the exclusive rights of the princes. The prince administered the revenues of Transylvania, taxes and regalia voted at the Assembly of the Estates.

It should also be stressed that, as mentioned above, the electoral conditions at the time were also understood as playing a constitutional role, since contemporaries regarded those conditions as a constitution, and it is worth pointing out that while these conditions were a constraint on the princes, they

84 They settled east from Habichtsburg in Switzerland, in the then Austria of the Babenbergs. See for more: https://www.habsburger.net/de/themen/herrschaftszeiten-i (accessed on: 13.12.2020).

85 It is interesting to note that the Habsburgs, who also bore the title of German–Roman Emperor, were usually referred to by the Ottoman Sultans in their letters only as the 'King of Vienna'. This obviously implied that they regarded the Austrian monarch as inferior.

86 See Bogdándi 2012.

did not apply to kings.

One important discrepancy is worth pointing out: while the Transylvanian princes could come from any of the established religions – Roman Catholic or Protestant –, the holders of the title of King of Hungary had to be Roman Catholics.[87] The essence of the previous comparison is illustrated in *Table 1* below:

Table 1. *Summary of comparison between Habsburg kings and Transylvanian princes*

Delimitation criteria	**Habsburg kings**	**The princes of Transylvania**
Fundamentals of public law	Doctrine of the Holy Crown	Doctrine of the Holy Crown
Origin	German (Swiss)	Transylvanian[88]
Enthronement	Filial hereditary succession[89]	Election
Public inauguration	Coronation	The approval, de facto appointment, of the Porte[90]
Dependency under public law	Not characterized as a vassal	Characterized by vassality[91]
Insignia	Crown, royal staff, robe, pomum (globus), sword	Mounted horse, royal staff, flag, sword, cap with a coat of arms and feathers, caftan
Powers (supreme authority)	No limits to the powers of the head of state	Powers as head of state are limited, albeit partially, by conditions, estates, nations, and sultanic confirmation.
Legislation	Exercised legislative power jointly with the bicameral Diet – mainly in Pozsony[92]	Exercised legislative power jointly with the unicameral Diet – mainly in Gyulafehérvár[93]
Jurisdiction	*Personalis praesentia regia*	*Personalis praesentia regia*
Religion	Exclusively Roman Catholic	Roman Catholic or Protestant

Source: author's own editing

87 Von Windisch 1780. 71. „§. 2. Ein König von Ungarn muß nach den Gesetzen der katholischen Religion zugethan seyn…"

88 An exception is the Transylvanian principality of the Romanian Voivode Mihai Viteazul, or Mihai Bravul.

89 It should be noted that one exception was Maria Theresa and in relation to her the Pragmatica Sanctio of 1723.

90 This was usually granted by the 'athname' – a letter of command or letter of donation – from the Sublime Porte.

91 The Ottoman Sultan – as *padishah* – appears in this public relationship as a seignior.

92 The present-day Bratislava.

93 The present-day Alba Iulia.

7. Summary

From the point of view of constitutional law, the role of the created princely power in establishing and maintaining the Transylvanian state must be emphasized. Although this was achieved by implementing centralization in the system of relations of that era, this centralization can by no means be considered unlimited. The limitations, in the context of the subject under examination, were the three nations, the estates, the sultanic confirmation, and, taking into account Lajos Rácz's analysis, the conditions that gave the principality a constitutional character. Thus, in the author's view, the Transylvanian state – in a sense – predated British constitutionalism by several decades.[94]

The greatness of Gábor Bethlen's reign, apart from the consolidation of Transylvania and the abundant literature, is better demonstrated by the fact that the Principality of Transylvania was able to function as a counterweight to the Habsburgs in the seventeenth century, even in a limited framework, both in Hungarian and international terms. The preceding is complemented by the following quotation:

> Transylvania was at its largest during Bethlen's reign because in the peace treaty with the Emperor-King, the seven counties of northeastern Hungary, as far as Kassa, were annexed to Transylvania during his lifetime. These had to be returned after his death. The Transylvanians wanted to compensate for this by electing as their prince the richest lord of northeastern Hungary, György Rákóczy...[95]

Acknowledgements

The author thanks the anonymous peer reviewers for their helpful comments and his colleagues at the Ferenc Mádl Institute of Comparative Law and the professors at the Faculty of Law, University of Miskolc, for their suggestions and fruitful discussions.

Disclosure Statement

No potential conflict of interest was reported by the author.

94 See the parliamentary regency of the House of Hanover on British soil.

95 Szádeczky–Kardoss 1927. 181. „... Erdély Bethlen uralkodása idején volt legnagyobb kiterjedésű, mert a császár-királlyal kötött békekötésben az ő élete tartamára Erdélyhez csatoltatott a magyarországi északkeleti hét vármegye, egészen Kassáig. Ezeket az ő halála után vissza kellett bocsátani. Ez Erdélyország nagymérvű meggyöngülését okozván, az erdélyiek úgy akarták ellensúlyozni, hogy fejedelemmé választották északkeleti Magyarország leggazdagabb főurát, Rákóczy Györgyöt...”

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Acta Univ. Sapientiae, Legal Studies, **11**, 1 (2022) 153–163

DOI: 110.47745/AUSLEG.2022.11.1.09

Lajos Takács: A Hungarian Lawyer's Life in 20th-Century Transylvania

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Abstract: Lajos Takács was born in Transylvania, a multi-ethnic region, at the time (before 1918/20) part of Kingdom of Hungary and later part of Romania. He finished his studies in law in what was by that time Romania, given that the university centre of Transylvania, Cluj, had become part of Romania. He was a young lawyer of good ability, gifted with political and social sensitivity. After 1945, he found himself in the service of the emerging dictatorship because he certainly believed that the time had come for a solution to the question of nationalities, for reconciliation, equality, cooperation, and friendship between Romanians and Hungarians. In this capacity, however, he contributed to the dismantling of Hungarian institutions and organizations, most notably – as rector – to the forced merger of Bolyai University into Victor Babeş University. Instead of reconciliation, the system was characterized by the oppression of minorities. Takács, in his old age, realizing his mistakes, became an opponent of the regime and of Ceauşescu. In the 1980s, during the darkest period of the dictatorship, he died without the hope that some of his former dreams would come true.

Keywords: Romania, Hungarian minority, Bolyai University, Soviet-type dictatorship, opposition to the dictatorship

Lajos Takács was born in 1908 in Vízakna (today Ocna Sibiului, Romania), near Nagyszeben (today Sibiu, Romania), where salt had been mined since the Middle Ages and which was a spa town during the Austro-Hungarian Monarchy. In February 1849, the battle of Vízakna took place there, one of General Bem's bloodiest battle losses. Hundreds of dead soldiers were buried in one of the mine shafts because it was impossible to dig graves in the frozen ground. In 1890, it caused a national sensation when, after a heavy rainfall, seven bodies – preserved by the brine – turned up almost intact on the surface of a lake. They were buried, but their memorial cross disappeared after the change of sovereignty in 1918–1920.

At the time of Lajos Takács' birth, the village had a Romanian majority (2,649 people). However, there was also a significant Hungarian population (1,232 people), most of them Calvinists (today, there are about 400 Hungarians and 4,000 Romanians). His grandfather was a national guardsman in the 1848/49 revolution and then a Calvinist pastor and schoolmaster. Lajos Takács remembered his father as follows. 'My father was the sixth of twelve children. He worked as a commercial clerk in several Transylvanian towns. After a brief and bankrupt self-employment, he took over the local Hangya (Ant) Cooperative business as a manager.'[1]

Lajos Takács completed his secondary schooling at Bethlen College in Nagyenyed (today Aiud, Romania). Later, he studied law at the Romanian University of Cluj, named after King Ferdinand I (the Hungarian university was first removed to Budapest and then finally settled in Szeged when Transylvania was annexed to Romania). He did not live permanently in Cluj, often only appearing for exams. However, both in secondary school and at university, he was a student of exceptional aptitude. He said of his career choice:

> I took stock of my situation. My father's limited financial resources would not have allowed me to pursue careers that required a permanent university presence such as medicine or engineering. But I soon developed a unique attraction to the legal profession. In my father's meagre library was a hefty tome, *A magyar család aranykönyve* [The Golden Book of the Hungarian Family], which presented in its chapter on career choice the legal profession as one in which one *becomes the embodiment of justice*. True, this book meant this statement for the judiciary, and the judicial career was – at that time – inaccessible to the Hungarian minority.[2]

He finished university in 1930. Between 1930 and 1932, he was a trainee lawyer in his hometown. In 1932–33, he served his military service as a lieutenant. He continued to practise as a lawyer in Ocna Sibiului until 1938, when he moved to Timişoara (before 1920, in Hungarian, Temesvár), where the big city offered greater career opportunities. He was involved in the life of the local Hungarian community in both places, and in Timişoara he was elected Calvinist presbyter.

From September 1940, the Second Vienna Award returned Northern Transylvania to Hungary. Takács, however, remained in Timişoara, Romania, where, in addition to his work as a lawyer, he was active in the Hungarian People's Association of Romania (*Romániai Magyar Népközösség*) as secretary-general of the Banatian chapter.

1 Beke 1983. 8.

2 Beke 2002. 18. Translation by the author. All translations are by the author.

> [In the] villages of the Banat (*Bánság*) region, Hungarian farmers' houses, livestock, and farm equipment were confiscated one after another, without any legal basis. The relevant law only provided for the confiscation of abandoned property. Even if the head of the family had left and escaped from military service, especially from labour service, the family members continued to cultivate the land. Hundreds of applications were submitted to the court, but the two chambers often rejected them, often without any grounds. The Hungarian People's Community of Banat sought to help and protect the families of those who had worked in miserable conditions in the labour service. It was typical of the situation at the time that while Romanian labour servicemen – if they were called up at all – only worked for two months and were then discharged anyway, Hungarians were called up for an indefinite period. In addition to helping family members, we also provided food and clothing to those who were languishing in the camps. In these actions, the Hungarian people's sense of responsibility and self-consciousness was brilliantly demonstrated. A large amount of money was collected in our winter aid campaign and delivered to the needy. The Hungarian churches also participated in these actions. For example, Bishop Áron Márton personally visited the labour camps several times, where he distributed clothes and food... We did everything we could to help the Hungarian masses in South Transylvania to save their lives...[3]

In 1941, the Romanian Royal Secret Police – the Siguranța – court-martialled the thirty-three-year-old Lajos Takács. The proceedings may have been triggered by the fact that, as a lawyer, he had called on local entrepreneurs who had illegally dismissed Hungarian workers, in all likelihood on the orders of the police, to remedy the situation. The criminal proceedings were brought for sedition. The case was not finally decided and was closed after the war. However, he may have been under surveillance by the Royal Secret Police, as he was recorded as having maintained contact with the Hungarian consulate in Arad. Indeed, Takács regularly informed the consulate in Arad about the situation of Hungarians in South Transylvania. This fact led to the accusation of espionage. The accusation was certainly used against him on numerous occasions later on in order to steer his actions in the direction expected by the Romanian political leadership. After the Romanian breakout from the German alliance (23 August 1944), Takács was arrested and was about to be interned in a concentration camp but was released after the intervention of communist politician and historian László Bányai. From 1945, he took part in the leadership of the Hungarian People's Alliance (*Magyar Népi Szövetség*), a leftist organization of Hungarians living in Romania, and

3 Ibid.

joined the Romanian Workers' Party. His political career took him to Bucharest. Even in 1945, the communist takeover began in earnest.

In György Beke's assessment, Lajos Takács:

> embarked on a new, unknown political career. Obviously, like so many other well-intentioned Hungarian intellectuals from Transylvania, he was convinced that he could continue his service on this path. Only in a broader context, not as an excluded minority but in possession of power, in the spirit of fulfilling its events. This generation, the adherents of popular literature, bourgeois democrats, Christians, and libertarians, who took their destiny with them, became prisoners of the Moscow-born power, only realizing their vulnerable position when there was no escape from it. Death was the only escape from the grip of power, organized with unprecedented precision and ruthlessness.[4]

During the Soviet-style dictatorship, he also held important state positions: from 1947 to 1952, he was Deputy Minister for Minorities (together with Finance Minister László Luka, he was the first minister in Romania belonging to the Hungarian nationality), from 1961 to 1975 member of the Council of State, an alternate member of the Central Committee of the Romanian Communist Party (1965–1977), and from 1968 member of the Central Election Committee. He was also Member of Parliament (1946–1947) and then of the Grand National Assembly (1948–1952, 1957–1961, 1965–1969, 1975–1980).

At the time of the ratification of the Paris Peace Treaty (1947), he was strangely pleased that the minority rights provisions (which were really of little effect and almost non-existent) that accompanied the Trianon Peace Treaty of 1920 were not ratified.

> The second issue that I feel necessary to point out here is the omission of any minority protection clause in the peace treaty. For twenty-five years, we have seen clauses of this kind. We know the results. The so-called *Minority Convention* has brought us closed schools, bans on the use of languages, the removal of workers from their jobs, and the impoverishment of the working classes. We were convinced, and our conviction has been strengthened many times since, that the arm of the Romanian worker, the calloused hand of the Romanian peasant, and the word of the progressive Romanian intellectual will give us far greater and more powerful protection than any such clause.[5]

4 Ibid.

5 *Népi Egység* [Popular Unity], 27 August 1947.

Is this the statement of an international public law specialist, soon-to-be professor of this subject? According to György Beke, Dr Takács's statement is so grotesque that it could only have raised a smile had it not heralded the beginning of another minority destiny. These sentences are arguments for Hungarian praise of Hungarian vulnerability. A little-known element is that Hungary drafted a 'Minority Code', proposing that the peace treaty should include provisions for the protection of national minorities or that the permanent members of the UN Security Council should conclude separate agreements with the states concerned with the protection of minorities. Takács opposed this attempt at a settlement on behalf of the Hungarians in Transylvania.

In November 1947, at the 3rd Congress of the Hungarian People's Alliance, Petru Groza, the President of the Council of Ministers, announced that he would appoint Lajos Takács as Deputy Minister of Nationalities. In this capacity, he was observed by the communist secret services. His activities were subsequently described as inadequate: he obstructed proper work, he failed to address the concerns of the Hungarian nationality so as not to take a stand against nationalist elements and the kulaks, he employed for years suspicious and hostile persons, including Ferenc Szentmiklósi, a confidant of Bishop Áron Márton, who was arrested for espionage (on the absurd charge of spying for Tito), etc. Nevertheless, at that time, his appointment must have been a politically planned act: it was at this congress that Gyárfás Kurkó, the former, overly independent leader of the Hungarian People's Alliance, was purged. Takács's appointment as deputy minister was a gesture towards the Hungarian community to divert attention from Kurkó's orchestrated removal and make it acceptable.

In 1949, he became lecturer at Bolyai University's Faculty of Law and Economics, a Hungarian-language university established in 1945 in Cluj (in Hungarian, Kolozsvár). He commuted weekly from Bucharest to Cluj. He was able to continue his activities until 1952, when he was removed from the university. The fault line of 1952 is also visible in his public functions: he lost his function and was expelled from the Romanian Workers' Party. He was accused of spying for Hungary before 1944. The context of the measure is the persecution of the intellectual elite associated with the Hungarian People's Alliance by the Romanian communist authorities. In the considered opinion of Sándor Enyedi, 'the prison list of the leadership of the Hungarian People's Alliance is also a bit of a list of values'.[6] Gyárfás Kurkó, János Demeter, Lajos Csőgör, Lajos Jordáky, József Méliusz, and Edgár Balogh were all imprisoned. Unlike his fellow law professor János Demeter, Takács avoided imprisonment. He was soon also allowed to teach again.

According to a report on him in December 1956, he 'behaved well' during the Hungarian Revolution of 1956. As a law student of Bolyai University recalled later,

6 Enyedi 1988.

'we made the poor man very embarrassed when we asked him in an international law class in '56 what he thought about the Soviet intervention in Hungary. He was a much wiser man and knew more about this regime than we did. He said: boys, we'd better not talk about this, don't embarrass me.'[7]

A small book on public international law published in Hungarian (*Tudnivalók a nemzetközi jogról*, Bucharest, 1957) is related to the period he taught at Bolyai University. A year after the 1956 Soviet military intervention in Hungary, in the mentioned book he circulated the following: 'In its practice, the Soviet Union not only gave credence to the principles of state sovereignty, equality of rights between small and large nations, and non-interference in internal affairs, not only faithfully observed its obligations under international treaties but also helped to establish new legal institutions in international law.' It is a perfect example of the freedom of science in a Soviet-style dictatorship: there was no such thing.

In 1957, Takács was appointed Rector of Bolyai University. He was to be the last rector of that institution. He held on to this post until 1959, when the two – Romanian- and Hungarian-language – universities of science in Cluj were forcibly merged on orders from the party, in 1959. Takács had to and did assist in the grand unification meetings at the House of University Students in Cluj: he sat at the main lectern. He took part in this well-orchestrated charade of justifying decisions already made.

Professor János Demeter, who was released from prison in 1955, spoke on behalf of Hungarian lawyers in support of the unification of the universities: 'It is our duty as Hungarian teachers and students to fight vigorously, above all, against the nationalism that certain corrupt and hostile elements are trying to spread among Hungarian academic cadres and students.'[8] Takács himself asked:

> Have we done everything to bring students of different nationalities closer together? Can we be satisfied with the fact that the young people of Babeş and Bolyai universities meet only occasionally in the work camps or at comrades' meetings? I believe that this is not enough. We call Babeş and Bolyai Universities our sister universities. As we know, siblings live in the same house.[9]

Takács's assistance with the university merger is difficult to appreciate. They could have ordered and coerced him or assured him that everything would be fine. They could have pretended that there would be separate Romanian and Hungarian sections within the unified university and that Hungarian education would not be threatened (it was not). The immediate liquidation of the independent Bolyai

7 Veress–Kokoly 2016. 196.
8 Vincze 2005. 668.
9 *Ifjúmunkás*. 26 February 1959. 8.

University and the regression of the merged Hungarian education (for example, in the case of the Hungarian legal education, the effect was immediate cessation, while in other cases a permanent deterioration took place throughout several decades) could certainly not have been prevented by Takács' opposition. Nevertheless, his servile behaviour contributed to the unification of the university. It cannot be forgotten that other university professors of Bolyai University committed suicide in protest against the forced merger of the two universities. The dual name of the university, according to János Demeter's recollection, 'was precisely to avoid the appearance that Bolyai had been liquidated, insisting that the university resulting from the merger should keep both names: Babeş and Bolyai. Thus, for such reasoning, it became Babeş–Bolyai, as it were a symbol.'[10]

However, Lajos Takács's career was not interrupted. He was not transferred to the Romanian Law Faculty in Cluj, as some of his colleagues had been, but back to Bucharest. He became an adviser to the Ministry of Education and Culture and taught at the Faculty of Law at the University of Bucharest. He was awarded the Order of Labour, Class I, in 1964.

In 1968, a decade after the unification of the universities and three years after Ceauşescu had come to power, Takács was still a staunch supporter of the communist regime. He declared that he considered 'the nationality question to be solved' and that 'the biggest problem is that Hungarians still do not speak Romanian well enough' and that Romanian language teaching should be strengthened. In the same year, Takács and János Demeter drafted a new nationality statute (minority act), but negotiations on this issue could no longer begin. It was precisely about this period that the following discussion was recorded regarding the visit of comrade Lajos Takács to a meeting in Braşov (in Hungarian, Brassó), where the situation of Hungarian education was discussed.

> – Look, maybe I can understand his behaviour at the meetings to dismantle Bolyai University. He was under mortal duress. Everyone couldn't just sacrifice themselves like Szabédi. But who demanded that he lecture the Hungarians of Braşov for requesting a Hungarian-language vocational school? All the time, he kept saying that it is the assertion of Hungarian youth that requires their education in Romanian. Because if they know the terminology in Hungarian, how can they stand their ground in, say, Galați or Brăila? The Hungarian language would be a ghetto for them.
> – I know this argument, Sándor. I just don't know why a Szekler [Hungarian living in the Szeklerland region of Transylvania – translator's note] worker

10 Vincze 1997. 401.

> should necessarily have to stand his ground in Galați? This is Ceauşescu's thinking.
> – Exactly! And Takács is Ceauşescu's puppet![11]

Something must have broken in this man. His tortured conscience must have won out. From the early 1970s, Takács became increasingly vocal in his defence of minority rights. On 31 March 1972, Takács protested against the fact that more than half of the Hungarian native speaker students were no longer allowed to study in their mother tongue after the eighth grade. According to Károly Király:

> [T]he last straw for him was the Council of Hungarian Nationality Workers' meeting on 31 March 1972, where Lajos Takács criticized the party leadership's anti-nationality policy, which was depriving the students of their rights, in a harsh tone. The last rector of Bolyai University also criticized himself: he was ashamed that he had allowed himself to be misled about the merger of Bolyai and Babeş Universities, which led to the liquidation of Bolyai.[12]

It was partly as a result of this Takács speech that Károly Király became 'oppositional'.

In June of the same year, Takács wrote a letter to Ceauşescu about the rapid decline in minority education. His letter went unanswered. In the following period, relations deteriorated further. Ceauşescu declared that 'Romanian is not a foreign language for any young person living in Romania! It is the language of our socialist society, and all Romanian citizens must learn it.'

In April 1974, Takács spoke at the national plenum of Hungarian national minority workers, and he also described to the party leadership the minority grievances in the field of education and pointed out that the proportion of Hungarian minority members in the prosecutor's offices, courts, and police force was almost negligible. Ceauşescu's reply was that everyone should speak one language, the language of socialism and that the emphasis should therefore be on learning the official language. The dialogue with the nationalities living together, after a long pause, ended in complete failure. Immediately afterwards, the plenary leader, Miron Constantinescu, who is also a Hungarian speaker, was relieved by the party's central committee of his duties to supervise the national councils. This was punishment: Constantinescu had led the meeting too liberally.

> In Cluj, it is recorded that when the former Piarist grammar school, Hungarian Lyceum No. 11, was to be *transformed* – the only Hungarian

11 Beke 2002. 20.
12 Csinta 2020. 10.

> secondary school left in the city – Edgár Balogh, Sándor Kacsó, and Lajos Takács sent a joint telegram to President Ceauşescu, protesting against the planned *merger*, i.e. the liquidation of the Hungarian school. The merger was not carried out to the consternation of the local education inspectorate. When in 1977 a security brigade arrived from Bucharest to Braşov and the Háromszék region in Szeklerland to force the targeted Hungarian teachers to confess their crimes by physical and psychological torture: that they were educating Hungarian children in a nationalist spirit, and when professor Zsuffa [Zoltán – translator's note], a teacher from Covasna [in Hungarian, Kovászna – translator's note], after the suicide of Jenő Szikszay from Brasov, escaped from his home in the middle of the night and did not stop until Lajos Takács's home in Cluj, the former deputy minister went straight to the President of Romania without hesitation to stop the fatal persecution.[13]

In 1978, an informant wrote the following report to the Securitate: '... a few days ago I met Lajos Takács on the street, who was coming home from a walk in the park... I congratulated him on the Academic Prize he had received for a textbook he had written with a colleague, and I had the impression that he was delighted to have won this prize.' The Romanian-language volume, *Drept internațional public* (Public International Law), was written by Takács and his co-author Marțian I. Niciu and was published in Bucharest in 1976. He was conferred the Order of Tudor Vladimirescu, 2nd class, in 1971. In 1973, in honour of his 65th birthday, he was awarded the Order of 23 August, 1st class. In 1978, with a masterstroke of state hypocrisy, he was awarded the first degree of the Order of Merit in Science. He was by then 70 years old. The state tried to reassure him with awards.

But at the same time he became a definitive dissident, an oppositionist. As vice-president of the Council of Hungarian Nationality Workers, he submitted a petition on the erosion of Hungarian-language education and the dismantling of minority rights and drafted an eighteen-point package of proposals. The Memorandum reached the West, was reported in the Western press, and the text, smuggled out of Romania, was published in English the following year (in *Witnesses to Cultural Genocide. First-Hand Reports on Romania's Minority Policies Today, New York, 1979*, edited by György Schöpflin). The Memorandum accurately and richly detailed the increasing national oppression and violations of the Hungarian minority's rights in Romania and became widely known.

In March 1980, another secret service report on him recorded how he objected to the nomination of Győző Hajdu as a representative to the Grand National Assembly. The informant, a paid asset of the communist secret police, was the author of the previous report as well. Takács objected to Győző Hajdu because the latter behaved at the XII Congress like a buffoon who outdid even Păunescu

13 Beke 2002. 20.

in flattery towards Ceauşescu (Adrian Păunescu was the 'court poet' of the Ceauşescu regime). Hajdu was mocked as a Hungarian Păunescu. Takács was angry that such people represented Hungarians and that other, more capable people were being ignored. So angry, in fact, that he did not renew his subscription to *Előre* (Forward, the Hungarian-language newspaper of the Communist Party) having as Editor-in-Chief Győző Hajdu. In fact, according to Takács, the whole Hungarian community should have boycotted *Előre* in protest. At the end of the informer's report, the secret police wrote: the informer has been made aware of his obligations to moderate and influence.

A memorandum written by Hungarian intellectuals in Cluj (*Malomkövek között*, in English: Among Millstones) included the following about Păunescu:

> Why is the exponent of the government, of its most nationalist, and one might even say fascist ideology, Adrian Păunescu, inciting against us? After all, most Romanian intellectuals also condemned his unbridled incitement, nationalist fanaticism, and anti-Hungarian agitation among Romanian youth. Let us ask: why is he shooting more and more wildly at us?! We know the answer: only because he is expressing the government's intentions and ideas, only because the government has decided that we, the Hungarians in Romania, must disappear into the abyss of history so that a nationalist fever dream, the *united socialist Romanian nation*, can be created. It is a disgrace to humanity that such a far-reaching programme can be announced at all, which is destined to eliminate the nationalities of a country by force (...) It is a nightmare. It is heartbreaking to think that not a single person in the country has publicly rejected this diabolical plan to create a *homogeneous socialist Romanian nation*, a monolingual country, by the year 2000. The obsessives of the racial myth are impatient; the deadline has been set too short.[14]

This passage is a good indication of the reality and spirit of the times.

Sándor Kacsó, writer, politician, recorded the following in his diary when Bishop Áron Márton died:

> 4 October 1980. Today after eight o'clock, we left in Lajos's car, Lajos and I, to Gyulafehérvár, to the funeral of Áron Márton. I was worried by Lajos's condition; fits of weeping tormented him, which greatly affected me, resulting in the same. My son Feri was driving the car, and one eye was constantly on us. There, in the cathedral, in the crowd, we calmed down a bit.[15]

Takács's tears were not only for the death of Áron Márton but for his own tragedy. Lajos Takács, who was seriously ill in the last years of his life, died in

14 Király 2014. 109.
15 Antal 1997. 116.

1982, caught in a web of hopelessness and impossibility. His remains lay in state in the House of University Students in Cluj, used as a funerary home for these occasions, and were buried next to his parents in Ocna Sibiului.

In the last decade of his life, Takács was an oppositionist, but, as Lajos Kántor recalls, the atrium of the House of University Students, where the funeral casket was displayed, was ringing with emptiness.

> Attending the funeral could have been a mass protest against the dictatorship and national oppression – instead, an unusual, cool reserve filled the huge space at the ornate funeral (...) Lajos Takács, the rector who played the pathetic role he had been assigned in the unification of the Romanian and Hungarian universities of Cluj without public protest, could not be forgiven for his behaviour in 1959.[16]

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16 Kántor 1995. 2.

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Acta Universitatis Sapientiae
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ISSN 2285-6293
http://www.acta.sapientia.ro

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Printed by F&F INTERNATIONAL
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