CENTRAL EUROPEAN ACADEMY

LAW REVIEW

CENTRAL EUROPEAN ACADEMY

LAW REVIEW

VOLUME **I**

2023 | № **1**

RIGHTS | CONSTITUTIONAL | SPACE ACTIVITY | SUSTAINAB
GOVERNMENTS | EUROPEAN CHARTER | FRAMEWORK REGU
E LAW | IMPACTS | LEGAL SYSTEM | CIVIL RIGHTS | CONSTIT
RACT | FINANCIAL AUTONOMY | SELF-GOVERNMENTS | EUR
DICTION | DEVELOPMENT | CIVIL RIGHTS | CONSTITUTIONA

CEA
PUBLISHING

Central European Academy Law Review (Print)
HU ISSN 3057-8396 (Print) HU ISSN (Online) DOI prefix: 10.62733

Publisher:
Central European Academic Publishing
1122 Budapest (Hungary), Városmajor St. 12.
E-mail: publishing@centraleuropeanacademy.hu
Prof. Dr. *Barzó* Tímea, Director-General

TABLE OF CONTENTS

Introduction to the first edition
7

FLAGSHIP STUDIES

Sibilla BULETSA
Virtual Assets as an Object of Civil Rights
11

Marcin WIELEC
Forms of prosecuting in the Polish criminal trial
25

ARTICLES

Iva RAMUŠ CVETKOVIČ
Introduction and Evaluation of Slovenian Space Activity, Policy, and Legislation Considering International Space Law
41

Miroslav CHUPÁČ
Current Development in the United States Case Law on Abortion and its Possible Impacts on the European Union and Continental Legal System
67

Ivan JOKANOVIĆ
Lack of conformity of goods with the contract and sustainability issue – Directive (EU) 2019/771
83

Irena KLEMENČIĆ
Financial autonomy of local self-government in Croatia
103

Denisa KOTROUŠOVÁ
The Relationship and Differences Between Surrogacy and Adoption in the Czech Republic
125

Enikő KRAJNYÁK
Protection of the Environment in National Constitutional Law in Light of the Jurisdiction of the ECtHR – A Hungarian Perspective
151

Dominika MORAVCOVÁ
Lack of conformity of the goods with the contract under Slovak legislation
179

Ádám PÁL
Financial Autonomy of Local Self-Governments Considering the European Charter of Local Self-Government
197

Manja SKOČIR
Legislative Framework of the Crime of Torture in the Regulation and Jurisdiction of Slovenia
221

Maria SKWARCAN
Protection of the Environment in Polish Constitutional Law in the light of the Jurisdiction of the ECHR
239

Introduction to the first edition

It is my great pleasure and privilege to introduce the first edition of the Central European Academy Law Review.

Starting a new journal is never an easy task, not to mention the fact that the present Review is managed by students with the help of senior researchers. Furthermore, there has never been any international English-language journal of this type in Central Europe before. However, trust in the benefits of cooperation between academics and students was a driving force that steadily supported the Managing Team throughout the creation of the journal and while addressing its pitfalls.

The journal at hand represents the effort of students, who were responsible for the management of the publishing procedure, supported by the advice of a senior professor, who was responsible for the editorial part of the articles. The aim of such teamwork was to establish an innovative and high-quality review. In this regard, I find it necessary to express my gratitude to Prof. János Ede Szilágyi and his innovativeness, as he developed the concept of the Review.

Since the tradition of student-run papers comes from America, the oldest continuously published legal periodical managed by students is the Harvard Law Review, first published in 1887. The success of the mentioned paper was a later inspiration for many other prestigious law schools, including Yale, Pennsylvania University, Columbia, and others. Nowadays, the quality of the mentioned journals is above reproach, since academia gives these periodicals high rankings, including significant impact factors.[1] Sadly, Europe did not perceive such a movement as inspirational for some time. In 2016, the Bologna Law Review was established, becoming one of the first student-run reviews in continental Europe.

To date, reviews as such have demonstrated that, by creating a proper platform for students, we give space to scientific innovations, enhancing the ideas of young researchers who may have different approaches as law practitioners. These journals have a great advantage in three ways. First, they properly disseminate information, including current case law, new legislation, and criticisms of the existing legislative framework. Articles are devoted to issues of law and other topics of interest which part of the current academic debates of the legal community.

Second, managing as well as contributing to a scientific paper provides an opportunity for the people involved to gain different types of skills, including learning the

1 Bruce and Swygert, 1985, p. 741.

proper ways to write and formally reviewing scientific texts and critical thinking. Additionally, the supervision and analysis of the submitted articles, written by students or professors, gives participants the ability to bear responsibility and later derive a sense of achievement from publishing the final draft of the issue.[2]

Third, establishing a review where doctoral candidates are in charge gives opportunities for the legal community to spread more progressive and advanced ideas. Thus, young researchers, raised in and living amid a different social and political context than their professors, have the ability to see situations from different points of view. The educational benefits of these reviews are therefore also valuable for more experienced academics and legal professionals, partly based on the fact that the reviews will present distinct and perhaps even more advanced perspectives. Moreover, the additional editorial process carried out by senior academics ensures that the published articles fulfil all the requirements of a high-quality paper.

There are significant benefits in terms of advancing the managing teams' substantive knowledge of the law and engaging in a joint production effort,[3] not to mention the dissemination of new trends in law occurring in Central European countries.

Our management team, consisting of doctoral candidates from the University of Miskolc in Hungary, carried out extraordinary tasks stemming from publishing duties. In addition to analysing manuscripts, the members of the management team learned how to properly cooperate with an honourable goal in mind. The Review has two sections: the main section is dedicated to doctoral students who wish to publish their research and the shorter section presents the work of more experienced professors.

The institutions that conform the legal and institutional system of Central European countries interact and cooperate, by virtue of the values and principles on which these countries were established. The region, facing current challenges arising from continuously changing events, needs to cooperate as tightly as possible. It is especially necessary to cooperate in matters related to law. Forming partnerships in the academic world dealing with the research and development of law would therefore assist the development and consequently the integration of the pertinent area. On this basis, the aim of the Central European Academy Law Review is to create a platform devoted to encouraging the cooperation of students, professors, and other scholars in the Central European region.

June 2023
Rebecca Lilla Hassanová

2 Harper, 1998, p. 1265.
3 Stier et al., 1992, p. 1472.

FLAGSHIP STUDIES

Sibilla BULETSA*

Virtual Assets as an Object of Civil Rights

ABSTRACT: *This academic article argues that virtual property should be included in the civil rights catalogue as an intangible element. This study examines the metauniverse's evolution, virtual property markets, legal regulation in the metauniverse across countries, and the potential to improve national legal frameworks in this domain. The author compared virtual property to tangible property and proposed using blockchain-based smart contracts to resolve metaverse legal concerns. Legal and practical regulations for virtual property transfers are lacking in the legislative realm. The metaverse and other new business models have raised complex legal issues regarding virtual asset authentication and use. These complex legal issues require further study. Metaverse operators should prioritise a thorough protection mechanism for users' virtual property throughout virtual business scenario development. Property value in the metauniverse is non-constant, raising concerns about its stability. The transaction's result depends on the collective or involved parties' consensus. Value is determined similarly to how modern culture values collectibles and art. It would be foolish to treat all metaverse items as collections and art. Its impact on the tangible economic structure may be negative. Despite the resolution of metauniverse and medium of trade ownership issues, the challenge of actualizing ownership within the metauniverse will endure. The author examined numerous issues linked to Ukraine's virtual property legislation. The author also made legislative development recommendations for this domain. The placement of virtual entities inside the Civil Code shall be subject to restrictions with regard to intangible or non-physical entities. This phenomenon arises as a result of the dynamic nature of society, characterised by the presence of societal norms and regulations. The evolution of law has emerged as a viable alternative that aligns with the changing demands of society in different historical periods.*

* Doctor of Legal Sciences, Full Professor, Head of the Department, Civil Law and Civil Procedural Law, "Uzhgorod National University," ORCID ID: https://orcid.org/0000-0001-9216-0033

https://doi.org/10.62733/2023.1.11-22

1.
Formulation of the problem

Russia's attack on Ukraine has prevented the world from recovering from the global crisis. Millions of people have lost their jobs, which has increased attention towards blockchain technology and the metaverse, in particular transactions with virtual property. Virtual online property is the technological and material basis for the development of the metaverse, which draws the attention of the legal community to study how the material basis for the development of virtual property should be placed in civil law. A it is important to reflect changes in the material form of modern society in a timely manner, to include it in the regulatory system of civil law, so that civil legislation keeps pace with the development of time, accordingly, it is necessary to introduce legal norms regulating forms of virtual property on the Internet. Considering that virtual property has all the attributes of objects, particularly its value and utility, and therefore, has the property value of objects, it is necessary to include virtual property as an incorporeal object in the list of objects of civil rights.

2.
The state of problem solving

A significant contribution to this study, particularly, regarding the definition and legal regulation of virtual property, was made by talented domestic scientists, R.A. Maidanyk, O.I. Kharitonova, L.R. Maidanyk, K.G. Nekit., N.O. Gorobec, I.V. Maisun, as well as international scientists, G. Darville, Ch. Anderson-Lewis, M. Stellefson, Yu-Hao Lee, J. MacInnes, R. Morgan Pigg, Jr., J. Gilbert, S. Thomas, G. Freeman, S. Zamanifard, D. Maloney, A. Adkins, M González-Franco, D. PérezMarcos, B. Spanlang, M. Slater, and Dongsik Jo.

This study comprehensively examines he need to include virtual property as an incorporeal object in the list of civil rights objects and an analysis of the directions of development and legal regulation of social relations in the field of virtual property in the metauniverse.

3.
Presenting primary material

'Metaverse' is the latest buzzword in technology. In general, the metaverse can be considered a form of cyberspace. Similar to the Internet, it is a world – or even a

reality – beyond our physical world on Earth. However, it differs in that the metaverse allows one to immerse oneself as avatars in one's environment, usually through augmented reality (AR) or virtual reality (VR), which people have and will be able to increasingly access using tools such as the VR glasses. The first usage of the term 'metauniverse' was in the 1992 novel 'Snow Crash'. It describes a virtual reality that people can explore using their avatars.[1]

For example, Fortnite, an online game, practically hosted a live concert in 2020 that was attended by millions. Although free to visit, each virtual world usually also facilitates in-game purchases with its own virtual currency (which can be converted to real money). MANA, the currency used in Decentraland, has a market cap of over $3 billion. One company stated, it spent more than $2.5 million on land in Decentraland, a cryptocurrency-based metauniverse with its own currency where every piece of in-game content is completely autonomously owned by players. Another firm stated, it spent $4.3 million to buy a plot of land in Atari's The Sandbox metaverse. It is argued that the metaverse is to these various virtual worlds what the Internet is to websites. The website is a combination of three aspects: audiovisual, informational and technical (software). It is defined as a set of interconnected informational online resources in audiovisual form, intended for viewing via a computer network using special programs — browsers, usually united by a common theme[2]. Horizon Workrooms, software the provision, offered by Meta (formerly Facebook), will allow users to interact virtually in 3-D conference rooms using VR glasses. So, considering Mark Zuckerberg's vision of the metaverse, the time we spend in such virtual realities will only increase. For example, CNBC reports that since Facebook transformed to Meta, prices for digital stories have increased by as much as 500%.

According to R.A. Maidanyk, the question arises objectively and naturally about the expediency of applying the numerus clausus principle in real property law. Recently, opinions have been expressed regarding the possibility of modifying the numerus clausus principle in the form of a principle regarding a closed/open list of property rights.[3] K. Nekit indicates the possibility of the existence of the right of ownership of virtual objects as incorporeal property.[4]

As noted by N.O. Gorobec and I.V. Maysun virtual property arises in relation to virtual objects (data) that have economic value, are objects of trade in the virtual space, do not have a material shell, are unique, stable, serviceable, and considered by the owners as their belongings. Properties such as uniqueness, stability, and serviceability allow these objects to be included in the institution of property rights. Virtual space allows the owner of virtual objects to own, use, and disposethem of.

1 Taylor Wessing. (31 January 2022).
2 Jefremova, K.V. 2017, 4
3 Maidanik, 2019. 13.
4 Nekit,. 2019, 39.

They believe in electronic relations in the field of virtual space and judicial practice, it is noteworthy that the right of virtual property arises on virtual objects, which should be considered as a special type of property right, the object of which is incorporeal articles.[5]

R.A. Maidanyk believes that the current stage of the development of the institution of property law is characterised by the expansion of the list of subjective rights with features of property law, the convergence of the concepts of property rights and obligations, the emergence of new types of 'intangible' property that have the characteristics of goods (information, know-how, etc.). There is a tendency to reevaluate the social purpose of property rights, and property rights in general, which is determined considering the doctrine of liberal legal understanding, based on the ideas of social solidarity and cooperation, economic and sociological analysis of law.[6]

L.R. Maydanik notes that as the interaction with the virtual object on the part of the user may be limited by the developer or owner of the site, the exercise of the entire set of rights of ownership (possession, use, disposal) at its discretion with respect to such a virtual object is limited. Therefore, the realisation of the title of ownership of a virtual object depends to a certain extent on the will of other persons, and this does not give grounds for the unquestionable extension of the regime of an incorporeal object to a virtual object. In addition, domestic law-enforcement practice considers the list of 27 objects of property rights provided for in the Central Committee to be closed, and therefore, the concept of an incorporeal object, to which it is proposed to attribute a virtual object, requires a direct indication of the law.[7]

The metaverse, or Web 3.0, is developing; the first layer being the blockchain, an immutable database for storing information along with the spread of cryptocurrencies, the ability to transfer value similar to currency, however, later representing all assets. Asset tokenisation is a fundamental concept and means that anything physical, or more importantly digital in this case, can be proven and authorised by a code in an immutable ledger.

The latest manifestation of this authenticated representation of property is NFT (Non-Fungible Tokens), a unique digital asset which can be an image, piece of music, video, 3D objects or other type of creative work,[8] and their popularity is the slippery slope of the metaverse. There is no specific regulation regarding NFTs yet, however, the carefree attitude of early adopters should not avoid the reality. NFTs are regulated similar to any other type of asset that can be bought online. People buy digital art; the houses, offices, land and even the designer clothes of this world – legally represented by deeds, contracts and leases – have been tokenised. This means one can buy digital

5 Horobets and Maisun, 2021, 54.
6 Maidanik, 2017, 227.
7 Maidanik, 2019,.62.
8 Pin Lean Lau. (1.02.2022).

land, houses, and other objects on a platform such as OpenSea to prove one owns them. This value creates a network effect that allows interaction within the ecosystem, and therefore a new metaverse (world) is born.[9]

By eliminating the physicality of the real world, the metaverse is poised to push our human society away from several ancient legal concepts, including the concept of property. Since 'possession' has a completely different meaning in the virtual world than it does in the real world, what one owns or can own in the metaverse differs. The solution to the problem of protecting their rights is to extend the legal regime of ownership to virtual objects. International law firm Reed Smith said that 'ownership' in the metaverse is the provision of a service (authentication of a work of art) or the granting of a license (a limited permission to use and enjoy digital art), however, it is are that actual ownership is transferred to the acquirer. In such cases, the true ownership remains with the owner. For example, this could imply that the buyer cannot sell the item without the rightful owner's permission. The key takeaway from this is that NFT buyers need to understand what they are 'buying'.[10]

This does not contradict the Ukrainian concept of property rights, which recognises the possibility of the existence of ownership rights to incorporeal property, that is, virtual objects. The right of virtual property should be distinguished from the right of intellectual property and can be defined as a specific type of property right, the object of which is virtual property. In addition to the specifics of the object of such a right (which will always be incorporeal objects, that is, virtual property), this right will be characterised by the specifics of the grounds for its origin, content, protection, etc. Indeed, OpenSea is simply one of the several marketplaces where people can purchase future ownership of assets in the metaverse. All ownership of assets, both digital and physical, can be transferred to NFTs on blockchains. All of these critical elements are then superimposed on the animation platform – the actual space inside the headset that has been with us for years. It is asset tokenisation that makes this paradigm shift the most important. Transactional attorneys should be wary, and litigants should feel empowered.

Emerging virtual spaces have cities where one can buy almost anything. Land one can build one's house on, then fill that house with artwork (via NFT) and wear a suit that is a proven Ralph Lauren suit with Nike shoes. The concert one attends requires a ticket (another NFT) and the subsequent music one wishes to purchase is also digitally stored with copyright in mind. Again, this is all bought from companies with an emphasis on NFT ownership.

9 Joseph Raczynski. (11.10.2021).
10 Sophie Goossens Nick Breen. (19.11.2021).

These digital worlds are likely to be our future in the next decade, and a significant portion of our time will be spent inside these worlds, as OpenSea processed over $3.3 billion in transactions in August alone, and this is only the beginning.

In the metaverse, people will interact, transact, own assets, have relationships, create objects and companies, create intellectual property (IP), have copyright issues, and advertise. In addition, crimes may occur, insurance will probably be developed, and there are several other IRL (In Real Life) concepts that are currently being developed – and this will require the involvement of legal professionals.

Moreover, it will include the scaling of DeFi (decentralized finance), which has already begun and will continue to grow. Furthermore, DAOs (decentralised autonomous organisations) are created – these are human-created organisations that spread within the metaverse; $25 billion is for one DeFi DAO. The implications of the creation of the metaverse for the legal nd social community are enormous. During the next few years of the development of the metaverse, there will be a need for lawyers to solve legal problems, lawyers will be able to apply their legal intelligence and critical thinking.[11]

Considering that when one buys a piece of virtual real estate, one receives an immutable token that represents, essentially, a digital space. Once an account is created on one of the metauniverse platforms, one can use cryptocurrency to buy land either by selling project land or directly from landowners. Land can be bought via auction or at a fixed price, and thereafter, one can build one's own piece of real estate in the metaverse – be it a digital house, a tower, a museum, and more. Or one can sell it on the secondary market[12] According to CNBC, virtual real estate prices have increased by 500% since Facebook switched to Meta. Plots in some virtual worlds are already as expensive as a real house[13] Thus, if there is demand and supply in the metaverse, then there is virtual property that is the object of civil rights.

Today, there are four platforms for buying virtual property:

1. SAND: What began as an online video game in 2012 transformed into a meta universe platform in November 2021. In real estate, it is the largest platform in the metaverse, owning 62% of the available land of the metaverse, which is equivalent to 166,464 evenly divided plots. The metaverse real estate market can fluctuate in price similar to the real one. In January 2022, a plot of land was valued at $14,099, up from $12,700 only a month earlier. Land can be bought using the SAND currency available on Binance or purchased through auctions. According to Analytics India Mag, its currency is $SAND, which is equivalent to $2.80.

11 Nekit, 2019.42.
12 Carmela Chirinos. (2.02.2002).
13 Raisa Bruner. (20.01.2022).

2. Decentraland: It was founded in 2015 as an open-source 3D world. Its parcels sell for $14,440 and its cryptocurrency is MANA, which as of January 11th was worth $4.40 per piece. It is one of the oldest platforms in the metauniverse, and as of January 2022 had 90,600 equally divided plots. However, land is limited and only the community can create more plots/land.
3. Cryptovoxels: The smallest of the virtual blockchain worlds, Cryptovoxels, originally comprised only 3,026 parcels. Prices per parcel are variable and traded through OpenSea, the leading NFT marketplace. They can be purchased in USD or ETH. While not currently the largest metaverse, it continues to expand, according to Metaverse Property, the world's first virtual real estate company.
4. Somniy: First released to the public in September 2018, Somnium had 5,000 unevenly distributed plots of land in January 2022. However, it frees up more land from time to time. The space is used for VR, PC and Internet. The currency is CUBE, equivalent to $7.19 as of 11 January 2022.

For the legal settlement of legal issues in the metaverse, it is proposed to use smart contracts that use blockchain technology to fulfil the terms of the agreement, such as the fulfilment of payment terms for the purchase of property, asset pledge or return policy. Smart contracts are believed to be a natural, automated solution for buying, selling and fulfilling products in the metaverse – and while the legal status of smart contracts remains far from established, the growth of the metaverse could create opportunities for their wider use.[14]

Andrew Kiegel, CEO of Tokens.com, spent $2.4 million on land in the fashion district of Downtown. Moreover, he stated that he would rent out some of the acquired space to clothing brands for window shopping. He considers the potential in the metaverse land to be most fruitful if it is used for commercial purposes, such as renting space and hosting events. Republic Realm's Janine Yorio shares a similar view and predicts that land value will be determined not by what owners build, but by its functionality. Therefore, the construction of a museum or popular attraction can increase prices in the area. Moreover, for example, Paris Hilton, created a virtual island on Roblox and played an electronic set for revellers last New Year. Other brands and celebrities supporting the metaverse include Tommy Hilfiger, Nike, and Reese Witherspoon.[15]

However, there is an argument that location does not matter. The entire point of the metaverse is that one can teleport anywhere, which makes some investors question the true value of the land. Some even believe that it may become pointless over time, arguing that unlike earth, where earth is limited, the metaverse is infinite,

14 Ken Crutchfield. (2022).
15 Carmela Chirinos. (2.02.2002).

making location less important. Buying virtual land is simple – either directly from the platform or through the developer. Investors build on their land and make it interactive. 'You can decorate it, you can change it, you can renovate it', Yorio says. 'This is the code'.[16]

Whether virtual objects are property, continues to be debated. Considering international practice, it can be confidently stated that various countries such as South Korea, China, and Taiwan have already considered this issue and laid the legal foundation in this direction. This situation is connected with the fact that the mentioned countries are a couple of steps ahead in terms of virtualisation of society in general and the economy in particular. In 2001, the Ministry of Justice of Taiwan recognised by its resolution that virtual objects are property that can be alienated and/or transferred to anyone. Actions that are performed in relation to such objects should be considered as actions that are performed with ordinary property. There were several reasons for this decision. First, it was done to correctly classify crimes committed in the field of virtual property and provide punishment for illegal actions. Second, to unify the understanding of the legal nature of the origin of virtual objects. Third, to regulate the circulation of virtual objects at the state level.[17]

Regarding national legal regulation, in the draft law of Ukraine from 2019, a virtual asset is defined as a special type of property, which is a value in digital form that is created, accounted for and alienated electronically. Virtual assets include crypto, token and other virtual assets. Token asset – a type of virtual asset in the form of a token, which is created, accounted for and alienated in a distributed ledger, certifies the property and/or non-property rights of the owner of the token asset, which correspond to the obligations of the person who issued the token asset.

Transactions with the token asset are taxed according to the rules applicable to property and/or non-property rights evidenced by the token asset.

Moreover, it is proposed to amend Article 190 of the Civil Code of Ukraine, which defines the concept of property as a special object and includes a separate object, a set of objects, virtual assets, as well as property rights and obligations. Article 139 of the Civil Code property is recognised as a set of objects and other valuables (including virtual assets and other intangible assets), which have a value definition, are produced or used in the activities of business entities and are reflected in their balance sheet or are considered in other legally prescribed forms of accounting of the property of these entities' objects.[18]

16 Chris DiLella. Andrea Day. (2022).
17 Jefremova, K. (2017). 9.
18 (2019), 'On amendments to the Tax Code of Ukraine and some other laws of Ukraine regarding the taxation of operations with crypto-assets.'

In the 'Law on Virtual Assets'[19] a virtual asset is an intangible good that is the object of civil rights, has a value and is expressed by a set of data in electronic form. That is, the virtual asset has legally become property, therefore illegal actions against it can be the subject of protection in criminal proceedings (for example, an account can become the object of theft). If we analyse the concept of a virtual asset proposed by the specified Law, it is possible to single out the following features:

- intangible good;
- is the object of civil rights;
- has value;
- a virtual asset is expressed (exists) in electronic form in the form of a set of data;
- existence is ensured by the system of ensuring the turnover of virtual assets. Thus, the 'life' of a virtual asset is ensured by the appropriate software complex.

The existence and liquidity of a virtual asset is ensured by the system of ensuring the turnover of virtual assets. A virtual asset can testify to property rights, in particular, claims to other objects of civil rights.

The law also regulates the ownership of a virtual asset, in particular, that it is acquired:

- by the fact of creating a virtual asset,
- execution of a transaction regarding a virtual asset,
- based on the provisions of the law or a court decision and is evidenced by the possession of the key of such a virtual asset, except for specified cases.

The conditions of acquisition, transfer and the scope of rights to virtual assets can be expressed in the form of algorithms and functions of the system for ensuring the turnover of virtual assets, within which the turnover of virtual assets is conducted.

In general, the 'Law on Virtual Assets' is a framework and aims to gradually legalise the segment of the market, which is currently actively operating in the 'grey' zone.

Currently, the most anticipated continuation of legislative work in this area is the draft amendments to the Tax Code of Ukraine ('Tax Code'), which will determine the taxation regime of operations with virtual assets and will become a catalyst for the development of this legal field.

One of its chief problems is a small correction made between the first and second readings. This is Part 7, Article 4 of this law. It states that virtual assets are not a means of payment on the territory of Ukraine. Moreover, this is acceptable, as they are not recognised as an official means of payment almost anywhere in the world. However, they cannot be the subject of exchange for property, goods, works, and services. This

19 Law About Virtual Assets (2022)

is precisely the problem, because in no normal jurisdiction, where there is already a market for virtual assets, there are any such restrictions. Owing to this, the use of virtual assets is significantly reduced, and they become practically useless. The law makes p2p-operations (Peer-to-Peer – from person to person) illegal. Moreover, this is the easiest way to send money from one physical person to another. For example, a person decided to sell his computer through OLX and the buyer offers to pay for it in USDT. However, he will not succeed, because such transfers will be illegal in Ukraine.

4.
Conclusion

Structuring, governance, and ownership issues in virtual worlds should be encouraged through enhanced freedom in these areas, which is essential for the further development of the metaverse. The best manner to achieve this goal would be to recognise that participants should have ownership of the properties they create, develop, and buy.

The property systems in all of these worlds largely follow the norms of a modern private property system, with free alienation of property, transfers based on local currency, etc., which is not surprising, considering that the virtual worlds are largely created by 'property-owning' corporations. In general, virtual property in the metaverse primarily faces two problems: one is the scope of virtual property, that is, what standard should be used to judge whether a virtual object belongs to virtual property; the other is the relationship of ownership and possession of virtual objects, that is, how to determine the right of ownership in the metauniverse.

Although the property right in the current Civil Code divides property into movable and immovable property, with the development of blockchain and the virtual world, virtual IP is an intangible property right through intelligent algorithms, data storage, and creative design, which meets the production and living needs of people in virtual reality, and therefore, it is possible to investigate the scale of inclusion of such virtual properties in objects. In particular, it is necessary to amend Article 177 of the Civil Code of Ukraine: 'Objects of civil rights are things, including money and securities, other property, including virtual property, property rights, results of works, services, results of intellectual, creative activity, information, as well as other tangible and intangible goods'.

Adoption of the 'Law on Virtual Assets' provided virtual assets a certain legal status, and market participants – the opportunity to protect their interests and work in the legal field. However, an important step, in addition to the actual changes to the Civil Code of Ukraine, is the development and implementation of normative legal acts,

which, in accordance with the provisions of the Law, will regulate the details of the functioning of the virtual assets market, and ensure the protection of participants from the risks of fraud and investment losses.

By recognising ownership of virtual property between participants, the path to democratisation of the metaverse is likely to begin. This democratisation is necessary to live up to the expectation that virtual worlds will become a new vehicle for business and economic development, rather than remaining tightly regulated amusement parks.

Bibliography

- Chirinos, Carmela. (2.02.2002). Someone just paid $450,000 to be Snoop Dogg's neighbor in the metaverse. Here's how you can live by a celebrity too. *Fortune*. [Online]. Available at: https://fortune.com/2022/02/02/how-to-buy-metaverse-real-estate-snoop-dogg-celebrity-neighbor/ (Accessed: 25 september 2023).
- Chris, DiLella. Andrea Day. (2022). Investors are paying millions for virtual land in the metaverse. [Online]. Available at: https://www.cnbc.com/2022/01/12/investors-are-paying-millions-for-virtual-land-in-the-metaverse.html (Accessed: 25 september 2023).
- Joseph, Raczynski. (11.10.2021). The Metaverse is coming: Is the legal market prepared? *Thomson Reuters*. [Online]. Available at: https://www.thomsonreuters.com/en-us/posts/legal/legal-metaverse/ (Accessed: 25 september 2023).
- Ken, Crutchfield. (2022).The Metaverse And The Practice Of Law. Above the Law. [Online]. Available at: https://abovethelaw.com/2022/01/the-metaverse-and-the-practice-of-law/ (Accessed: 25 september 2023).
- Pin, Lean Lau. (1.02.2022). The metaverse: three legal issues we need to address. The conversation. [Online]. Available at: https://theconversation.com/the-metaverse-three-legal-issues-we-need-to-address-175891 [Online]. (Accessed: 25 september 2023).
- Raisa, Bruner. (20.01.2022). Why Investors Are Paying Real Money For Virtual Land. Time. [Online]. Available at: https://time.com/6140467/metaverse-real-estate/ (Accessed: 25 september 2023).
- Sophie, Goossens Nick Breen. (19.11.2021). Ownership in the metaverse – the great illusion of non-fungible tokens (NFTs). *Reed Smith Guide to the Metaverse*. [Online]. Available at: https://www.reedsmith.com/en/perspectives/metaverse/2021/05/ownership-in-the-metaverse (Accessed: 25 october 2023).
- Taylor, Wessing. (31 January 2022). The Metaverse: legal challenges and opportunities. [Online]. Available at: https://www.lexology.com/library/detail.aspx?g=c1872705-ccbe-49bb-98f4-77092e4f26ec (Accessed: 25 august 2023).
- Горобець, Н.О., Майсун, І.В. (2021). Віртуальні об'єкти, їх місце в інституті права власності. *Юридичний науковий електронний журнал*. № 5. С.52-54 DOI https://doi.org/10.32782/2524-0374/2021-5/11
- Єфремова, К.В. (2017). Щодо визначення об'єктів інтернет-правовідносин. [Online]. Available at: https://ndipzir.org.ua/wp-content/uploads/2017/01/Yefremova.pdf (Accessed: 24 september 2023).
- Єфремова, К.В. Об'єкти Інтернет-правовідносин. (2017). [Online]. Available at: https://ndipzir.org.ua/wp-content/uploads/2017/07/Yefremova/1_3.pdf (Accessed: 25 september 2023).

- Майданик, Л.Р. (2019). Віртуальний об'єкт як виклик для класичних підходів у речовому праві. *Теорія і практика інтелектуальної власності*. № 2. С. 59-64. DOI: https://doi.org/10.33731/22019.167301
- Майданик, Р.А. (2017). Речове право. Загальні положення. *Спогади про Людину, Вченого, Цивіліста-епоху (до 85-річчя від Дня народження академіка Ярославни Миколаївни Шевченко)* за заг. ред. Р.О. Стефанчука. К.: АртЕк,. С. 226-249.
- Майданик, Р.А. (2019). Модернізація речового права: базовий принцип і напрями. *Речове право: пріоритети та перспективи: матеріали тез Київських правових читань* (22 березня, 2019 р., м. Київ). Київ, С. 11-19.
- Некіт, К.Г. (2019). Віртуальна власність: поняття та сутність. *Право і суспільство.* № 2. С. 37–42 Available at: http://pravoisuspilstvo.org.ua/archive/2019/2_2019/part_1/8.pdf (Accessed: 25 october 2023).
- Про віртуальні активи: Закон України від 17.02.2022. [Online]. Available at: https://zakon.rada.gov.ua/laws/show/2074-20#Text (Accessed: 25 october 2023).
- Про внесення змін до Податкового кодексу України та деяких інших законів України щодо оподаткування операцій з криптоактивами. (2019). Проект Закону. [Online]. Available at: http://w1.c1.rada.gov.ua/pls/zweb2/webproc34?id=&pf3511=67423&pf35401=5101 (Accessed: 25 september 2023).

Marcin WIELEC*

Forms of prosecuting in the Polish criminal trial

ABSTRACT: *The subject of this article is to analyse forms of prosecuting in the Polish criminal trial. The author discusses the following issues related to the title issue: the essence of prosecuting, type of criminal offence and manner of prosecuting versus choice of prosecuting option, public prosecution, private prosecution, and Auxiliary prosecution. Discussion of statistical data is also part of the analysis. The article is built around the thesis that the functioning of the three options of prosecution in Polish criminal proceedings depends, as can be seen, on the type of offence committed. Whether the crime is public or private depends on the choice of the appropriate prosecution option.*
KEYWORDS: *criminal procedure, criminal trial, indictment, prosecution, judiciary.*

1. Introductory remarks

Every criminal proceeding has specific grounds for its commencement and continuation. There are also strictly designated entities involved in the criminal proceedings. In Poland, the basic legal instruments that form the principal basis for incurring criminal liability are the 1997 Criminal Code (substantive criminal law), providing for the rules for criminal liability, the 1997 Criminal Procedure Code (formal criminal law/procedural criminal law/criminal procedure), providing for the mechanisms of public authorities to proceed in criminal cases, the rules for their commencement and conduct, the manner and forms of carrying out individual procedural steps, and providing a list of rights and duties that procedural authorities have. Most criminal proceedings are essentially made up of two stages of proceedings, with the *first* stage being pre-trial proceedings, and *the second* stage being judicial proceedings.

The main purpose of pre-trial proceedings in Poland is to determine whether a prohibited act has been committed and whether it constitutes a criminal offence, to detect and, if necessary, to apprehend the perpetrator, to collect data about the

* Full professor, Head of the Department of Criminal Procedure of the Faculty of Law and Administration of the Cardinal Stefan Wyszyński University, Director of the Institute of Justice in Warsaw. https://orcid.org/0000-0001-6716-3224.

https://doi.org/10.62733/2023.1.25-38

perpetrator's character, data about the perpetrator's criminal record, to clarify the circumstances of the case, including identifying the aggrieved parties and the extent of the damage, to collect, secure and, to the extent necessary, record evidence for the court. Therefore, the most important role of pre-trial proceedings is to issue decisions to initiate or refuse pre-trial proceedings.

On the other hand, judicial proceedings are the final part of criminal proceedings as a whole. At this stage of the proceedings, the leading authority here is the court, whose role is to definitively determine, based on the evidence before it, the extent of criminal liability of the accused person, and as such, in principle, either to find the person guilty and sentence him or her accordingly, or to acquit the person.

A special moment in criminal proceedings is the moment between the end of pre-trial proceedings and the beginning of judicial proceedings. The link between the end of pretrial proceedings and the beginning of judicial proceedings is precisely the moment of drafting and filing an indictment with the court. This is a very delicate moment with many interesting consequences. Therefore, it is worthwhile to learn about the options for bringing charges to examples of criminal proceedings in Poland.

2. The essence of prosecuting

The act of prosecuting itself is not only the aforementioned link between the two stages of criminal proceedings (pre-trial and judicial proceedings), but also one of the functions pursued in criminal proceedings. As such, the act of prosecuting as a function of criminal proceedings consists of initiating criminal proceedings, gathering evidence, drafting, filing, and supporting an indictment before the court. The next function is defence, which is contrary to prosecution and consists of gathering and presenting facts and evidence that are favourable to the accused. The next and final function is that of judging, which in the Polish legal order always belongs to the judicial authorities and consists of examining and evaluating the facts and evidence presented by the parties to criminal proceedings, and finally determining the extent of the criminal liability of the accused.[1] All these functions are performed in the area of criminal procedures, which undoubtedly fall under public law in the broad sense of the word, where the obligation of law enforcement agencies to undertake certain operations in the event of conduct which is inconsistent with the legal norm contained in the provisions of criminal law, that is, in the event of a commission of a criminal offence, is very strongly exposed.[2]

In this context, prosecution is the element that *first*; closes pretrial proceedings and *second*; opens judicial proceedings. Prosecution contains a direction to conduct

1 Kalinowski, 1981, p. 7.
2 Pohl, 2019, p. 23.

judicial proceedings, as the drafting of indictments follows pre-trial proceedings, which has made it possible to identify the accused as well as the type of criminal offence committed. Prosecution is a recapitulation of operations carried out at the pre-trial stage, or more precisely, a result of these operations. Therefore, the prosecution becomes more specific when an indictment is drafted. It is an indictment, as a request of an eligible prosecutor, to initiate judicial proceedings and punish the accused for the criminal offence charged to him or her, which provides the basis for continuing criminal proceedings at the judicial stage, where the main focus is on examining the extent of criminal liability.[3] For the court, an indictment determines the object, that is, the act involved (the so-called legal qualification of the act) and the subject, that is, the perpetrator (the accused), against whom the proceedings will be conducted.

As a rule, an indictment may be drafted and filed with the court by, *first*; an entity with the authority to appear before the court as a public prosecutor and, *second*; under certain conditions, the victim himself/herself or the victim's relative or partner as a private prosecutor.[4]

Simultaneously, there are three types of indictment in Polish criminal proceedings. This depends on who is bringing the indictment and in what case the indictment is brought. Therefore, in the Polish system of criminal proceedings, there is first a public indictment, then a private indictment, and finally a subsidiary indictment. The exception to this is the so-called subsidiary (autonomous) indictment, which will be discussed below, as this is a rather complicated mechanism in which it is possible to bring an indictment by the victim himself/herself, but in cases where it is always brought directly by the public prosecutor.[5]

In this context, in cases of criminal offences prosecuted on public indictment, the public prosecutor is, as a rule, the state attorney. For criminal offences prosecuted in private indictments, the indictment is brought about by the victim as a private prosecutor.

3. Type of criminal offence and manner of prosecuting *versus* choice of prosecuting option

The above-mentioned choice of prosecution from the very beginning depends on the provisions of substantive criminal law, and therefore, on the type of criminal offence in question. The type of criminal offence determines the manner in which the prosecution is conducted.

3 Bieńkowska et al., 2003, p. 337.
4 Skorupka, 2017, p. 568
5 Boratyńska, Chojniak, Jasiński, 2016, p. 163.

In Poland, substantive criminal law was recompiled as the basic legal instrument for criminal law–that is, the 1997 Criminal Code. It introduces a division into types of criminal offences distinguished in terms of how criminal proceedings are commenced and conducted.

The first group is public charge criminal offences, also known as crimes prosecuted by public indictment, or crimes prosecuted *ex officio*.[6] This was the most numerous group of criminal offences listed in the provisions of the Criminal Code. If the Criminal Code does not expressly state in which manner a criminal offence is prosecuted, it is always a criminal offence prosecuted by a public indictment. Criminal offences classified in this group are characterised by the fact that the commission of a publicly charged criminal offence is a violation of the public interest, and therefore, the infliction of harm on the general public, since a criminal offence is an action directed against the state and its citizens, and the punishment is the response of the state to the violation of the general public peace and order by this criminal offence.[7] Thus, the prosecution of public offences traditionally involves the initiation and conduct of pre-trial proceedings by a competent authority–most often the public prosecutor's office–followed by the drafting and filing of a public indictment with the court, thereby commencing the aforementioned stage of judicial proceedings. In this type of criminal offence, an indictment is filed in the public interest by a state authority authorised to act as a public prosecutor. Pursuant to Article 45 of the Polish Criminal Procedure Code (hereinafter: CPC), a state attorney acts as a public prosecutor before all courts.[8]

The second group of criminal offences are private charge crimes, otherwise known as criminal offences prosecuted on private indictments.[9] In this case, the provisions of the Criminal Code must clearly indicate this and not any other manner of prosecution. For example, Article 212 of the Polish Criminal Code (CC) provides for the crime of defamation as follows: Pursuant to Article 212 of the CC, whoever slanders another person, a group of persons, an institution, a legal person, or an unincorporated entity about conduct or qualities that may bring him or her into disrepute in public opinion or expose him or her to the loss of confidence necessary for a given position, profession, or type of activity shall be liable to a fine or community sentence. Nevertheless, this provision clearly states that this crime was prosecuted on private indictments.[10] Other types of private criminal offences under the Polish Criminal Code include the crime of insult[11] or violation of bodily integrity.[12] In the

6 Gardocki, 2013, p. 29.
7 Makarewicz, 1924, p. 68.
8 Bieńkowska 1994, p. 57.
9 Gil, 2011, p. 50.
10 Stefanski 2017, p. 1376.
11 Article 216 of the Polish Criminal Code.. Kodeks Karny- 1. Act of 6.6.1997.
12 Article 217 of the Polish Criminal Code.. Kodeks Karny- 1. Act of 6.6.1997.

case of offences prosecuted under private indictments, unlike offences prosecuted under public indictments, no pre-trial proceedings are conducted. This is a simplified approach to prosecution. It generally begins with judicial proceedings upon the filing of a private indictment by the victim.

It is worth noting that there is a group of criminal offences that, depending on whether certain prerequisites are met, will become offences prosecuted under public indictment. This is a very small group of criminal offences, which in Poland's criminal law system are called crimes prosecuted by the victim's complaint.[13] In the case of this type of criminal offence, which is about initiating and continuing criminal proceedings, the prosecution authorities (such as the state attorney and police) must necessarily obtain from the victim consent (in the form of a complaint) expressing his or her wish to initiate and continue prosecution.[14]An example of this type of criminal offence is theft against a relative or partner.[15] Article 278 of the CC provides for the classical offence of theft, stipulating that whoever takes away another person's movable property for the purpose of appropriating shall be liable to imprisonment for a term between three months and five years. However, this provision clearly states that if theft is committed to the detriment of the perpetrator's relative or partner, prosecution shall take place upon the victim's complaint. The consequence of this is that after such a complaint is filed, the proceedings are conducted in the same manner as in a case conducted on a public indictment, so the effect here is that the public prosecutor will eventually file a public indictment. This situation is regulated by Article 12 of the CPC which provides that in the case of criminal offences prosecuted upon the victim's complaint, the proceedings are conducted ex officio as soon as the complaint is filed.[16] The law enforcement authority instructs the person entitled to file a complaint about his or her rights. The public prosecutor must obtain a criminal complaint from the victim.

4. Public prosecution

The first was public prosecution (PP). This type of prosecution is related to the initiation and conduct of criminal proceedings in cases of criminal offences prosecuted on public indictment (public charge offences, offences prosecuted *ex officio*).

Public prosecution is brought in and represented by the public prosecutor before the court. As a rule, it is always the state attorney who acts as the public prosecutor before all courts in Poland.

13 Mozgawa – Saj, 2020 r., p. 113.
14 Grajewski, 1992, p. 56.
15 Gardocka, 1980, p. 73.
16 Grzeszczyk, 2016, p. 35.

Public prosecution always precedes the initiation and conduct of the first stage of criminal proceedings, the pre-trial stage. Pre-trial proceedings are distinguished by two phases: the *in rem* phase which involves only the issuance of a decision to initiate pre-trial proceedings without specifically identifying a suspect, and *in personam* phase which involves further operations, that is, identifying a specific perpetrator by issuing a decision to present charges.[17]

Pretrial proceedings have their own stages, as they are divided into investigation, which is the basic form of pretrial proceedings and is conducted in the case of more serious offences, and summary investigation, which is a simplified form of pretrial proceedings that is conducted in the case of less serious offences.[18]

The state attorney is the primary authority for pretrial proceedings. He conducted and supervised the pretrial proceedings. The main tasks of a state attorney in pre-trial proceedings involve initiating and conducting pretrial proceedings, directing another competent authority to initiate or conduct such proceedings, and acting as a public prosecutor before the court.

The police and other authorities, such as the Border Guard, the Internal Security Agency, the National Revenue Administration, the Central Anti-Corruption Bureau, and the Military Police, among others, perform the role of either authorities conducting pre-trial proceedings under the supervision of the state attorney in the form of a summary investigation or assisting the state attorney in conducting pre-trial proceedings in the form of an investigation. Their main operations include checking, recording, and detecting activities, or evidentiary activities.

The culminating and final moment of the pre-trial proceedings is, if evidence permits, the drafting of a public indictment by the public prosecutor, that is, the state attorney.

It is an indictment that takes the form of a pleading, which provides the basis for continuing criminal proceedings. It specifies the subjective scope, identifying the accused and the objective scope, specifying the act charged.

An indictment in cases prosecuted on public indictment should contain, among others, *first*; full name of the accused, other details of the accused, including telephone number, fax number, and e-mail address, or information that the accused does not have these or that these cannot be established, data on the application of a preventive measure, and bail; *second;* a precise definition of the act charged against the accused with an indication of the time, place, manner, and circumstances of its commission and the consequences, especially the extent of damage caused; *third*; an indication of whether the act was committed under conditions of recidivism; *fourth*;

17 Waltos, 2017, p. 463.
18 Wiliński, 2017, p. 454.

an indication of the provisions of the criminal law under which the alleged act falls; *and fifth;* an indication of the court with jurisdiction to hear the case.[19]

An indictment shall be accompanied by a statement of reason, setting out the facts and evidence on which the charges are based, and where necessary, explaining the legal basis for the charges and discussing the circumstances relied on by the accused in his defence. The indictment should also include attachments and additional elements, such as a list of persons to be summoned at the prosecutor's request, or a list of other evidence that the prosecutor requests to be taken at the main trial.

If an indictment complies with the formal conditions, the president of the court or court clerks immediately orders that a copy thereof be served on the accused, calling for evidence to be tendered within seven days of the indictment being served on the accused. The accused has the right to file a written reply to the indictment within seven days of the indictment being served on the same, wherein the accused must be informed.

5. Private prosecution

The second option is private prosecution. A private prosecutor, that is, a victim, is directly responsible for this type of prosecution. Vicicide is defined broadly in Polish criminal proceedings. According to Article 49 of the CPC, a victim is a natural or legal person whose legal interests are directly violated or threatened by a criminal offence. A victim may also be an unincorporated state, a local government institution, or another organisational entity to which separate regulations grant legal capacity. An insurance company is also considered a victim to the extent that it has compensated or is liable to compensate the victim for the damage caused by a criminal offence. Sometimes, in cases involving offences against employee rights, the authorities of the State Labour Inspectorate may exercise the victim's rights if, while acting within the scope of their competences, they have detected the crime or requested the initiation of the proceedings.[20]

Pursuant to Article 59 of the CPC, the victim, as a private prosecutor, may bring and support charges for criminal offences prosecuted in private indictments. Therefore, the victim may independently file and support a private indictment in a private complaint. Another victim of the same act may join the pending proceedings until the fact-finding stage commences in the main trial.

An interesting situation is one in which despite the fact that the proceedings are initiated on private indictments, it is possible for the state attorney to take over these

19 Grzeszczyk, 1998, p. 125.
20 Kulesza, 1995, p. 17.

proceedings.[21] This is because the state attorney's office in the Polish legal system is intended to serve as an advocate of the public interest.[22] This gives the state attorney's office the opportunity to participate in criminal proceedings in Poland, such as civil or administrative proceedings, but only to a certain extent. The position of the state attorney as an advocate of the public interest also provides the opportunity to interfere with criminal proceedings conducted on private indictments.[23] The point is that, in cases of offences prosecuted on private indictment, the state attorney initiates proceedings or joins proceedings already initiated if the public interest is required.[24] Proceedings are then conducted ex officio, and the victim who filed a private indictment beforehand enjoys the rights of a subsidiary auxiliary prosecutor (more details below). If the state attorney who joined the proceedings subsequently withdraws charges, the victim regains the rights of the private prosecutor in further proceedings. A victim who has not filed an indictment may, within a strict time limit of 14 days of being notified that the state attorney has withdrawn charges, file an indictment or a statement that he or she upholds the indictment as a private prosecutor; if he or she does not file such a statement, the court or court clerks discontinue the proceedings. There are several procedural guarantees. In the event of a private prosecutor's death, the proceedings remain and the deceased's relatives, partners, or dependents may step into the rights of the deceased. If the eligible person does not step into the rights of the deceased within the strict time limit of three months from the date of the private prosecutor's death, the court or court registrar discontinues the proceedings.

An indictment in privately prosecuted cases is much simpler in terms of structure. The requirements for this type of indictment are set out in Chapter 52 of the CPC, where the minimum elements of an indictment are envisaged pursuant to Article 487 of the CPC.[25] In this case, an indictment may be limited to identifying the accused, the alleged act, and the evidence on which the charges are based. A private prosecution may also be filed orally because the police, at the victim's request, will accept an oral or written complaint and, if necessary, secure evidence and will thereafter send the complaint to the competent court. Subsequently, under the court's direction, the police conduct evidentiary operations specified by the court, after which they pass on their results to the court.

Thus, it can be seen that in proceedings conducted on private indictment there is no pre-trial stage as in proceedings conducted ex officio. The entire criminal procedure conducted in relation to an offence prosecuted under a private indictment

21 Matusiak, 2013, p. 147.
22 Misztal – Konecka, 2017, p. 24.
23 Czarnecki, 2014, p. 271.
24 Nowikowski, 2010, pp. 150-163.
25 Kruk, 2012, p. 78.

is much simpler than that for offences prosecuted under a public indictment.[26] Proceedings conducted on private indictments began immediately at the judicial stage. Nevertheless, the main trial is preceded by a conciliation hearing conducted by a judge or court clerk.[27] Upon application, or with the consent of the parties, the court may set a suitable date for mediation proceedings in lieu of conciliation meetings. The conciliation hearing begins with the parties summoned for reconciliation. A record of a conciliation hearing should indicate the parties' responses to the summons for conciliation and the results of the conciliation hearing. Unexcused failure of the private prosecutor and his or her counsel to appear at the conciliation hearing is considered a withdrawal from charges; in such cases, the presiding judge discontinues the proceedings. In the event of an unexcused failure by the accused to appear, the conciliation authority refers to the main trial and, if possible, immediately sets a date for the same. If the parties were reconciled, the proceedings were discontinued. Reconciliation between parties is achieved through mediation. During a conciliation hearing or as a result of mediation, reconciliation may also extend to other cases of private indictments pending between the same parties.

Simultaneously, the parties may conclude a settlement agreement, the subject matter of which may also be claims related to the charges. In the absence of reconciliation, this case is referred to as the main trial. Proceedings in cases brought on by a private indictment are discontinued with the consent of the accused if the private prosecutor withdraws the charges before the proceedings are terminated with a final and non-appealable decision. The accused's consent is not required if the private prosecutor withdraws charges before the commencement of the fact-finding stage in the first main trial. The unexcused failure of the private prosecutor and his or her counsel to appear in the main trial is considered the withdrawal of charges.

An interesting institution in proceedings conducted on private indictments is the counter indictment. It is assumed that, in this situation, there is a merger of procedural roles in the form of an aggrieved accused.[28] Until the beginning of the fact-finding stage in the main trial, the accused may file a counter-indictment against the private prosecutor, who is the aggrieved party for an act prosecuted on a private indictment, in connection with the act charged to him or her. The court then hears both cases jointly. The withdrawal of charges by a private prosecutor results in the proceedings being discontinued only in part because of the charges brought by that prosecutor. Both private prosecutors enjoyed the rights of the accused. Priority to ask questions and give speeches was granted to the private prosecutor, who was the first to file an indictment. In its judgment, the court noted that the proceedings were

26 Markiewicz, 2018r, p. 98.
27 Banasiak, 2010, p. 223.
28 Olszewski, 2014, p. 51.

pending on a counter-indictment. A counter-indictment is inadmissible if the state attorney has previously initiated or joined the proceedings.

6. Auxiliary prosecution

The third option is auxiliary prosecution. There is an auxiliary prosecutor in the Polish criminal proceedings. This aggrieved party can act alongside or in lieu of the state attorney in criminal proceedings conducted for public indictment offences.

Hence, two types of auxiliary prosecutors can be distinguished. *The first* type is the one that acts alongside the public prosecutor in criminal proceedings. Thus, it is a situation in which there are simultaneously two prosecutors in one proceeding, that is, a public prosecutor (state attorney) representing the state and an auxiliary prosecutor, that is, a victim (harmed party), who acts in parallel alongside this prosecutor. In this case it is a collateral auxiliary prosecutor, and in order to become a collateral auxiliary prosecutor, the aggrieved party must make a statement to the court before which the case will be pending that he or she will act in this capacity. This is a very simple statement in terms of its structure, which must be made within the period from the filing of the indictment with the court until the same is read out in the main trial. If made late, the statement is ineffective and the time limit cannot be reinstated.[29]

The second is the subsidiary auxiliary prosecutor, also known as an autonomous prosecutor. This is a very interesting institution because, in this case, the aggrieved party acts independently, completely replacing the public prosecutor in a situation where the latter refuses to initiate proceedings or discontinue proceedings without referring the case to court.[30]

However, this is possible after the completion of a complicated procedure. In order to become an auxiliary subsidiary prosecutor, the following prerequisites must be met: *first;* the state attorney must at the outset refuse to initiate pre-trial proceedings or discontinue previously initiated proceedings by issuing an appropriate decision, *second;* this decision must be challenged by the aggrieved party with an appropriate complaint to the court, *third;* the court must allow this complaint and, as a result, cancel the challenged decision of the state attorney, providing the reasons for such cancellation, possibly also the circumstances that need to be clarified or the actions that need to be carried out, *fourth*; the state attorney conducting the proceedings again must continue to find no grounds for initiating the proceedings or again discontinue the previously initiated proceedings, which he also does by means

29 Papke-Olszauskas, 2000, p. 42.
30 Zagrodnik, 2005, p. 280.

of an appropriate decision, *fifth*; then the victim should challenge this decision by a complaint to the state attorney superior to that who issued the order, and *sixth*; the superior state attorney must affirm the latter decision.

Therefore, this procedure is rather difficult and lengthy. Only after this procedure has been exhausted can the aggrieved party, within one month of being served a notification of the state attorney's recent decision, file a subsidiary indictment, thereby becoming a subsidiary (autonomous) auxiliary prosecutor.[31] However, there is another important constraint: this subsidiary indictment must be drafted, signed, and brought to court by a professional attorney (i.e. an advocate or attorney-at-law). This is the 'obligatory representation by a professional attorney', which exists in Polish criminal proceedings. It consists of the fact that certain actions required by a party for criminal proceedings must necessarily be conducted by a professional attorney, who in the Polish legal system can be either an advocate or an attorney-at-law. The essence of obligatory representation by a professional attorney is to guarantee the best possible care from a professional tasked with drafting a pleading that requires expertise that, naturally, a party to criminal proceedings is lacking. It should be pointed out, however, that the obligatory representation by a professional attorney is not the rule, since in Polish criminal proceedings it only extends to certain actions – such as, among others, a subsidiary indictment discussed above.

7. Statistical data

Persons tried in district courts in Poland (excluding criminal fiscal cases).

	2017	**2018**	**2019**	**2020**	**2021**
Persons tried in Poland	291,881	307,616	316,907	275,926	315,973
Including on the basis of a private indictment (private prosecutor)	7,210	6,899	6,877	5,284	7,320
Including on the basis of a subsidiary indictment (subsidiary prosecutor)	1,489	1,282	1,359	1,031	851
Including on the basis of a public indictment (public prosecutor)	283,182	299,435	308,671	269,611	307,802

Compiled based on reports from the Polish Ministry of Justice[32] on persons tried in the first instance as per the subject matter's jurisdiction.

31 Całkiewicz, 2015, p. 35.
32 Report of the Polish Ministry of Justice, n. S6r.

8. Conclusions

The functioning of the three options of prosecution in Polish criminal proceedings depends, as can be seen, on the type of offence committed. Whether a crime is public or private depends on the choice of appropriate prosecution.

Insofar as there is no controversy over the functioning of public or private prosecution, here the very line of division and distinction between offences prosecuted under public indictment and those prosecuted under private indictment is clearly drawn. On the other hand, an interesting institution is subsidiary prosecution, especially auxiliary subsidiary prosecution.

It would be interesting to see what kind of interest or motivation for the action was presented by the auxiliary subsidiary prosecutor.[33] The public prosecutor, as an advocate of the public interest, represents the state, and as such, his role is to prosecute and charge. A private prosecutor is the victim of an offence prosecuted under a private indictment. He represented both an interest and motivation closely related to his well-being, which was violated by the offence prosecuted on a private indictment. Conversely, a collateral auxiliary prosecutor is similar to a private prosecutor in that, by joining the proceedings and acting alongside the public prosecutor, represents his interest and point of view on the proceedings pending public indictment, while assisting the public prosecutor.

However, it is not clear what the motivation of the subsidiary auxiliary prosecutor is, for he is the sole and main prosecutor in the case, as he is, after all, substituting for the public prosecutor in a case brought on by public indictment, in which the public prosecutor always has a monopoly on prosecution. However, in this type of prosecution, he represents his own interests and is motivated by personal motives. The subsidiary auxiliary prosecutor, despite the fact that he himself brings a subsidiary indictment in cases prosecuted on public indictment, is certainly not a prosecutor primarily pursuing the public interest. Therefore, an auxiliary subsidiary prosecutor joins the proceedings only when the public prosecutor is passive in that he, by refusing to initiate pre-trial proceedings or discontinuing these proceedings, prevents the aggrieved party from giving effect to one of the most important values of criminal proceedings: justice.[34] Thus, the filing of a subsidiary indictment by a subsidiary auxiliary prosecutor is an example of the pursuit of justice in criminal proceedings in a situation in which the state authority, acting through the public prosecutor, that is, the state attorney's office, is passive.

33 S.M. Przyjemski 2005, No. 3, p. 5; Dziergawka, 2019, p. 152; Zagrodnik, 2017, p. 5.
34 Wielec, 2017, p. 201.

Bibliography

- Banasiak. Z. (2010) Przyjęcie zawiadomienia o przestępstwie prywatnoskargowym w praktyce policyjnej. Prokuratura i Prawo. N. 2010/7-8.
- Bieńkowska. B. (1994) Stanowisko prawne oskarżyciela publicznego w polskim procesie karnym. Palestra. 1994/Nr 1-2.
- Bieńkowska. B., Kruszyński. P., Kulesza. C., Piszczek P. (2003) Wykład prawa karnego procesowego. Białystok.
- Boratyńska. K.T., Chojniak. Ł., Jasiński. W. (2016) Postępowanie karne. Warszawa.
- Całkiewicz. M. (2015) Pokrzywdzony jako oskarżyciel subsydiarny. In: Temidium. N. 2015/2.
- Czarnecki. P. (2014) „Interes społeczny" jako przesłanka ingerencji prokuratora w postępowanie prywatnoskargow. In: Światłowski A., Proces karny we współczesnym społeczeństwie. Kraków.
- Dziergawka. A. (2020) Subsidiary indictment in light of the amendments made by the law of July 19, 2019. Prosecution and Law. N. 2020/1.
- Gardocka. T. (1980) Wniosek o ściganie osoby najbliższej. In: Nowe Prawo. N. 1980/2.
- Gardocki. L. (2013) Pojęcie przestępstwa i podziały przestępstw w polskim prawie karnym. In: Annales Universitatis Mariae Curie-Sklodowska, Lublin – Polonia. N. 2013. Vol LX. 2 Sectio G.
- Gil. D. (2011) Proceedings in cases from private prosecution in the Polish criminal process. Warsaw.
- Grajewski. J. (1992) Ściganie na wniosek pokrzywdzonego w świetle projektów kodyfikacji prawa karnego. In: Państwo i Prawo 1992/6.
- Grzeszczyk. (1998) W. Postępowanie przygotowawcze w kodeksie postępowania karnego. Warszawa.
- Grzeszczyk. W. (2016) Postępowanie karne. Warszawa.
- Kalinowski. S. (1981) Polski proces karny w zarysie. Warszawa.
- Kruk. E. (2012) Skarga w postępowaniu prywatnoskargowym. In: Ius.Novum. N. 2012/4.
- Kulesza. C. (1995) Rola pokrzywdzonego o procesie karnym. Białystok.
- Makarewicz. J. (1924) Prawo karne. Wykład porównawczy. Lwów–Warszawa.
- Markiewicz. T. (2018) Sposoby inicjowania postępowania prywatnoskargowego. In: Studia Prawnicze. N. KUL 2018/1.
- Matusiak. A. (2013) Pojęcie interesu społecznego jako przesłanki udziału prokuratora w postępowaniu. In: Zeszyty Prawnicze. N. 2013/13.
- Misztal-Konecka J. (2017) Wzięcie udziału przez prokuratora w postępowaniu cywilnym jako gwarancja zapewnienia efektywności ochrony prawnej. In: Zeszyty Naukowe. N. KUL z 2017/ 3.

- Mozgawa-Saj M. (2020) Z problematyki trybów ścigania. Prawo w Działaniu. Sprawy Karne. N. 2020/41.
- Nowikowski. I. (2010) Interes społeczny jako powód zmiany trybu ścigania przestępstw z oskarżenia prywatnego – zagadnienia wybrane. Teka Komitetu Prawnego – OL PAN z 2010.
- Olszewski. R. (2014) Oskarżenie wzajemne w polskim procesie karnym In: Przegląd Sądowy. N. 2014/2.
- Papke-Olszauskas. K. (2000) Oskarżyciel posiłkowy w polskim procesie karnym – wybrane zagadnienia. In: Palestra. N. 2000/1. p.
- Pohl. Ł. (2019) Prawo karne, wykład części ogólnej. Warszawa.
- Przyjemski. S.M. (2005) The victim in the role of an auxiliary accuser. In: Military Legal Review. N. 2005/3.
- Skorupka. J. (2017) Proces karny. Warszawa.
- Stefanski. R.A. (2017) Proces karny. Warszawa.
- Waltos. S. P(2017) Proces karny. Warszawa.
- Wielec. M. (2017) Values – analysis from the perspective of the peculiarities of criminal proceedings. Lublin.
- Wiliński. P. (2017) Proces karny, Warszawa.
- Zagrodnik. J. (2005) Instytucja skargi subsydiarnej w procesie karnym. Warszawa.
- Zagrodnik. J. (2017) Participation of the prosecutor in court proceedings initiated by a subsidiary prosecutor. In: Prosecutor's Office and Law. N. 2017/2.

ARTICLES

Iva RAMUŠ CVETKOVIČ*

Introduction and Evaluation of Slovenian Space Activity, Policy, and Legislation Considering International Space Law

ABSTRACT: *The examination of the development of space activities on a global scale, identifies several trends. One of them is the transition from dualism to multilateralism – from the Cold War, when only the two world superpowers of the time were active in space, to a situation where several countries are joining the now already large circle of spacefaring nations. Recently, Slovenia has followed the trend, and has in the last three years successfully launched three satellites, drawn out its space policy, and adopted its first space legislation. As it was one of the first countries in the region to do so, it can serve as a learning tool for other states wishing to embark on the same journey, enabling them to take a critical perspective and optimise their efforts. This study briefly presents Slovenian space activity, policy, and legislation. This study focuses on the legislative part, which presents and examines the compliance with international law. Based on this, certain improvements can be made and other states can decide how to draw their own national legislation governing space activities.*
KEYWORDS: *space law, national legislation, liability, state responsibility, registration, space objects.*

1. Introduction

Only recently, Slovenia has joined the group of space active states, as it launched its first two satellites – Nemo HD and TRISAT – in 2020. Several developments of Slovenian engagement in space activities have occurred afterwards, including the strengthening of its relation with the European Space Agency (ESA) and the adoption of its first national legislation on the subject, in 2022 – the Space Activities Act adopted

* Young researcher at the Institute of Criminology at the Faculty of Law Ljubljana and PhD student at the Faculty of Law, University of Ljubljana. https://orcid.org/0000-0003-0135-7477.

https://doi.org/10.62733/2023.1.41-65

in March and a subsequent Decree on the Implementation of the Space Activities Act adopted half a year later.

This study aims to present an overview of all three aspects of Slovenian inclusion in the group of space active states, its space activity (Section 2), its space policy (Section 3) and its space legislation (Section 4). The study focuses on the legislative part, as here the national space legislation is both presented and explained, and to a certain extent evaluated considering international space law.

2. Slovenian space activity

Currently, the Slovenian space market is rapidly expanding. Its chief characteristic is diversification – a simultaneous engagement of different stakeholders – governmental bodies, public agencies and private actors. Oftentimes, the endeavours in space sector are conducted in cooperation between these stakeholders, covering various activities extending from collecting and processing satellite data to building and eventually procuring the launch of satellites into outer space. However, as the term 'space activity' in Slovenian legislation concerns merely activities related to space objects (see subsection 4.3.2.), this section predominantly focuses only on the three Slovenian satellites that have been launched into outer space, and not on other activities related to the use of outer space, such as satellite data processing.

The first two satellites named Nemo HD and TRISAT were launched in September 2020, on the Arianespace rocket Vega. At that time, Slovenia had not adopted national law governing space activities.

Nemo HD is the first Slovenian microsatellite. Its purpose is the observation of Earth, which is performed through a combination of interactive real-time video streaming and multispectral imaging. The satellite is operated by the Slovenian Centre of Excellence for Space Sciences and Technologies (SPACE-SI) and was developed in collaboration with the Space Flight Laboratory from University of Toronto Institute for Aerospace Studies.

TRISAT is a nanosatellite developed by the University of Maribor and partners aimed at remote sensing and Earth observation. The third Slovenian satellite, TRISAT-R, was launched two years later, in July 2022, by when Slovenia had already adopted its national space legislation.

TRISAT-R is again developed by the University of Maribor in cooperation with partners. Its goal is to provide valued ionizing radiation measurements from a Medium Earth orbit at an altitude of approximately 6000 km. Obtained data are planned to ensure information to characterise the space environment. Additional experiments on-board the TRISAT-R are aimed at demonstrating certain mitigation

techniques for protection of high-performance and high-density electronic components targeting the upcoming era of Artificial Intelligence in space exploration.

3. Slovenian space policy

Currently, Slovenia has not adopted an official space policy programme, however, in the beginning of 2023, it has made an important progress in that direction. In April 2023, the Ministry of the Economy, Tourism and Sport presented to the public a draft document titled Slovenian Space Strategy 2023-2030 and opened the floor for a public debate until 10 May 2023.[1] The draft Space Strategy outlines the future goals of Slovenian engagement in the space sector and sets out guiding principles, such as environmental sustainability, digital transformation, protection of space environment, economical sustainability and stimulation for the economic growth and investments, and international cooperation.[2] The feedback received during the phase of public debate of the Space Strategy may significantly change its content; thus, the precise scope of the document, and the chief principles included in it, remain uncertain.

As an official document outlining Slovenian space policy has not yet been finalised and adopted, therefore, space policy in a broader, general sense is presented here.

Slovenia does not have its own space agency, thus the decisions regarding its space policy are made by the governmental bodies, most often the Ministry of the Economy, Tourism, and Sport. Under its auspices operates a Slovenian Space Office (Slovenska vesoljska pisarna) which coordinates issues related to space technology with regard to Slovenia's membership of the European Union and the European Space Agency (ESA) and with other stakeholders in the national arena.

Slovenia concluded an Association Agreement in 2016 and became an associate member of the European Space Agency, which enables Slovenian companies and other institutions with the opportunity to participate in ESA's projects and space activities in the field of general support technology programmes, Earth observation, human and robotic exploration, and the scientific programme Prodex.[3]

Owing to the relatively small size of its market and economy, Slovenia for now, cannot afford to develop its space activity on a massive level. However, its space policy is strategically oriented towards niches in the space sector, such as developing nano- and picosatellites weighing from five to one hundred kilograms or advanced applications using breakthrough technologies such as artificial intelligence.

1 See Predlog Slovenske vesoljske strategije 2030, 2023.
2 Draft Slovenian Space Strategy, 2023, p. 8.
3 For more on Slovenian cooperation with ESA see: Cooperation with the European Space Agency, 2022.

One of the future goals of Slovenia in the field of space policy is to become a full member of the European Space Agency. In addition to strengthening the cooperation with ESA, Slovenia's ambition is to involve new companies in space activities and attract foreign investments in space sector.[4] This goal is clearly defined in the Draft Space Strategy.

4. Slovenian space legislation

This section presents the provisions of the newly adopted Space Activities Act (and, where appropriate, also the provisions of the Decree on the Implementation of the Space Activities Act) and evaluates them considering the applicable international law. The evaluation is conducted in two parts. First, identifying which international obligation binding upon the Republic of Slovenia a particular provision concretises or addresses. Second, examining where practicable and appropriate, whether this provision is compliant with the identified obligation and other potentially relevant obligations, by searching for any differences or inconsistencies and possible justifications for them.

Slovenia is a party to the four primary international space law treaties, Outer Space Treaty (hereinafter, OST),[5] Rescue Agreement (hereinafter, ARRA),[6] Liability Convention (hereinafter, LIAB),[7] and Registration Convention (hereinafter, REG);[8] therefore, the 2022 Space Activities Act is presented and evaluated primarily considering these treaties.[9] Slovenia is also a party to several other[10] international treaties concerning activities in outer space, however, as this study focuses on a

4 Catalogue of Slovenian Space Industry and Research Institutions, 2022.

5 *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*, 27 January 1967, 610 UNTS 205 (entered into force on 10 October 1967).

6 *Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space*, 19 December 1967, 672 UNTS 119 (entered into force on 3 December 1968).

7 *Convention on International Liability for Damage Caused by Space Objects*, 29 March 1972, 961 UNTS 187 (entered into force on 1 September 1972).

8 *Convention on Registration of Objects Launched into Outer Space*, 12 November 1974, 1023 UNTS 15 (entered into force on 15 September 1976).

9 However, Slovenia is not a party to the *Agreement governing the Activities of States on the Moon and Other Celestial Bodies,* 5 December 1979, 1363 UNTS 3 (entered into force on 11 July 1984).

10 These are, for example: *Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water*, 5 August 1963, 480 UNTS 43 (entered into force on 10 October 1963); *Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite*, 21 May 1974, 1144 UNTS 3 (entered into force on 25 August 1979); *Constitution and Convention of the International Telecommunication Union*, 22 December 1992, 1825/1826 UNTS (entered into force on 1 July 1994).

general overview of Slovenian legislation and a basic evaluation of its compliance with international law, these international treaties and other applicable[11] sources of international law such as customary international law, relevant general legal principles applicable in outer space, and relevant jurisprudence and soft law mechanisms are referred to only when absolutely necessary.

4.1. Subject of the Act

Article 1 of the Space Activities Act reads as follows:

> *This Act lays down the conditions and procedure for issuing licences to conduct space activities and governs the registration of launched space objects, the obligations of the operator, liability for any damage caused by space objects and the supervision of the implementation of this Act.*

Five different aims of the Space Activities Act can be deduced from the above text. First, the Act aims at laying down the conditions and procedure for issuing licences to conduct space activities. This is a concretisation of an international obligation set out in Article VI of the OST, which stipulates that State Parties to the Treaty shall bear international responsibility for national activities in outer space, irrespective of whether such activities are conducted by governmental or non-governmental entities, and that the activities of non-governmental entities require authorisation and continuing supervision by the appropriate State Party to the Treaty. Although there exist two distinct views on the legal nature of Article VI of the OST, one claiming that it concerns secondary rules on state responsibility as it represents a stricter rule of attributability to those enshrined in the 2001 Articles on State Responsibility,[12] and another claiming that it is a primary rule establishing a clear obligation of State Parties to the Treaty, the aim of laying down the conditions and procedure for issuing licences is compatible with both interpretations, and therefore, in accordance with Article VI of the OST.[13]

11 According to the Article III of the OST, the activities in the exploration and use of outer space, including the moon and other celestial bodies, must be conducted in accordance with international law, including the Charter of the United Nations. Thus, the corpus of international law applies to all human activities in outer space by means of Article III of the OST. However, it remains disputed to what extent. For more on this see Ribbelink, 2009, p. 67.

12 ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (November 2001) Supplement No. 10 UN Doc A/56/10.

13 For example, the author supporting the first view is Hobe, as presented in Hobe and Pellander, 2012, pp. 7-8. The author supporting the second view is Marchisio, in Marchisio, 2018, p. 201. For more on the distinction between these two views, see Ramuš Cvetkovič, 2021, pp. 19-20.

Second, the Space Activities Act governs the registration of launched objects. This incorporates the obligation set out by Article II of the REG, that 'when a space object is launched into earth orbit or beyond, the launching State must register that space object by means of an entry in an appropriate register which it shall maintain'. This register is also established with the Space Activities Act (See Article 14 below), although the establishment of the register is not listed in Article 1. Considering that the two satellites had been launched in 2020, the establishment of a register two years later may be considered too late. Although the REG does not contain a specific time frame in which the registration would be required, the phrase 'when a space object is launched into earth orbit or beyond' can be interpreted as, the registration is supposed to be conducted at the time of the launching of the space object at the latest. However, the interpretation of Article II in accordance with state practice is that the exact timing of recording of a space object in the national register is left to the discretion of each State.[14] States often establish registers several years after they have launched their first space objects into outer space, and the time gap between these two events can, in the most extreme cases, reach decades.[15] Thus, considering such state practice, Slovenia is not an exception.

Third, Article 1 of the Space Activities Act sets an aim of defining obligations of the operator of space activity. This is relevant considering the aforementioned Article VI, as according to this provision, Slovenia is responsible for all national activities in outer space. Thus, it is important that it regulates the obligations of operators of space activities, to minimise the potential breaches of international law that would trigger state responsibility.

Fourth, the aim of the Act is to regulate liability caused by space objects. Under international law, in particular, under Article VII of the OST and under the LIAB, the launching State is responsible for damage caused by space objects, even when the objects were operated by a private operator. Therefore, the Space Activities Act regulates the liability of the operator to Slovenia for the cases when Slovenia will be primarily liable to pay compensation under international law.

Finally, the aim of the Act is to establish supervision of the implementation of its own provisions, which ensures its practical effectiveness.

4.2. Scope of application

Article 2 of the Act sets out the scope of the application of this law:

14 Jakhu, Jasani and McDowell, 2018, p. 408.
15 Jakhu, Jasani and McDowell, 2018, p. 408.

> *(1) This Act shall apply to space activities taking place in the territory of the Republic of Slovenia and to space objects entered in the Republic of Slovenia's register of objects launched into outer space (hereinafter: the register).*
> *(2) This Act shall also apply to space activities taking place outside the territory of the Republic of Slovenia on a vessel or aircraft registered in the Republic of Slovenia and concerning space activities carried out by citizens of the Republic of Slovenia and legal persons established in the Republic of Slovenia.*

The Space Activities Act applies to four different categories of space activities: those occurring in the territory of Slovenia; those occurring outside its territory, but on a vessel or aircraft registered in Slovenia; those conducted by the citizens of Slovenia or legal persons established in Slovenia; and space objects registered in Slovenia's national register. Its scope of application is defined broadly, covering all activities with either territorial or personal link as well as all space objects in Slovenian register.

4.3. Meaning of terms

Article 3 of the Act provides several definitions of the terms that are used throughout the entire document. The most relevant terms that can directly impact the international obligations of Slovenia are discussed below.

4.3.1. Space object

> *[Space object] shall mean an object launched into outer space or an object intended to be launched into outer space, including the individual parts of this object that are either combined with or separated from the other components, or its launch vehicle and parts thereof.*

This definition of the term 'space object' is in part consistent with the definition of this term found in international space treaties, such as the identical Articles I(d) of the LIAB and of the REG, which states '[t]he term "space object" includes component parts of a space object as well as its launch vehicle and parts thereof'. However, the Slovenian definition contains another part, that a space object must be launched or at least intended to be launched into outer space. This addition does not create significant difference, as even the objects that are usually registered by states as space objects are launched or intended to be launched into outer space.

None of the definitions, neither the Slovenian national definition, nor the one from the LIAB and the REG contains any substantive criteria, for example, regarding the appearance or design of a space object or the type of material to be used or its complexity.[16]

4.3.2. Space activity

[Space activity] shall mean the launch of a space object into outer space, the operation and operational control of the space object in outer space, and the controlled termination of the space object's operation in outer space and/or its return to Earth, including the procedures for limiting the generation of space debris.

The term 'space activity' can also be found in the international space treaties, in the REG (see, for example, Article VII), and to some extent also in the OST which speaks about 'activities in outer space' (see Articles V, VI, VIII…), however, it is not further defined there. Therefore, the term is open to interpretation in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties.[17] The Slovenian definition of space activity is strongly related to the term space object, as it covers merely the following activities: launch of a space object, the operation and operational control of the space object in outer space, the termination of its operation and/or its return to Earth, as well as the procedures for limiting the generation of space debris. However, it does not explicitly cover activities that are not directly linked to the operation and operational control of the space object, for example, spacewalk of the astronauts. This limitation related only to space objects is clear considering Article VII of the OST, which regulated liability for damages caused by space object, however, is too narrow considering Article VI of the OST, which establishes responsibility of State Parties for all national activities in outer space, without any limitation related to space objects.

Thus, the narrow definition may prove to be insufficient in the future, and in that case new laws will need to be adopted to follow the advancements of space technology and successfully address the legal challenges they will bring (e.g. the question of space resources).

16 For more on the dilemma of the meaning of the term 'space object' see Sancin, Grünfeld and Ramuš Cvetkovič, 2021, pp. 58-60.

17 *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force on 27 January 1980).

4.3.3. Space debris

> *[Space debris] shall mean space objects that remain in outer space after the termination of the space activity or as a result of space activity or objects that return to Earth in an uncontrolled way.*

The term 'space debris' is not mentioned or defined in any of the international space treaties. However, there exist several technical definitions. Among those, the most known is the definition from the Space Debris Mitigation Guidelines (SDMG): 'space debris' are all man-made objects, including fragments and elements thereof, in Earth orbit or re-entering the atmosphere, that are non-functional.[18] The problem of the functionality criterium is that it can be interpreted broadly,[19] and therefore, enable States to claim that pieces were functional in a way (for example: their function was to serve as an important piece for statistical purposes), and therefore avoid the classification of such piece as space debris. From this viewpoint Slovenian definition is less problematic to interpret.

4.4. License and the conditions for its issuing

Paragraph 1 of Article 4 of the Act states that, '*Space activities shall be conducted on the basis of a licence issued by the ministry responsible for technology following an application by the operator*'. An operator wishing to conduct a space activity in Slovenia, meaning most of the time the launch of a space object, must apply for a license to the appropriate ministry responsible for technology. Article 5 of the Act further states the conditions for issuing such a license:

> *The licence shall be issued if the following conditions are met:*
> *a) the operator is professionally qualified and has the technical knowledge of space and similar technologies and the financial capacities to conduct space activities;*
> *b) space activities are conducted in accordance with the international standards and guidelines of internationally recognised standardisation organisations on the safety and technology of space activities;*
> *c) space activities do not pose a threat to national defence, public order, the safety of people or their property, national intelligence and security*

18 see Inter-Agency Space Debris Coordination Committee (IADC), Space Debris Mitigation Guidelines 2001, Revised 2007; approved by United Nations General Assembly (UNGA) Resolution 62/217.

19 See Sancin, Grünfeld and Ramuš Cvetkovič, 2021, p. 72.

operations, and protection against natural or other disasters and do not negatively affect public health, the environment or aviation;
č) space activities are not in contravention of treaties or rules of international law that are binding on the Republic of Slovenia;
d) space activities envisage the use of available frequencies in accordance with the applicable legislation governing radio spectrum management, except in the case of launch vehicles;
e) space activities envisage measures for limiting the generation of space debris in accordance with the applicable UN Space Debris Mitigation Guidelines and for limiting adverse environmental effects on Earth or in outer space or adverse changes in the atmosphere.

(2) In the application the operator shall demonstrate the meeting of conditions referred to in points a), b), d) and e) of the preceding paragraph and provide a risk assessment of space activity threats referred to in point c) of the preceding paragraph drawn up on the basis of the latest expert opinions generally accepted by the scientific community.

(3) The Government of the Republic of Slovenia shall determine, by way of a decree, the education, technical, financial, safety and environmental criteria to establish the meeting of criteria referred to in paragraph one of this Article, the supporting documents to be enclosed with the application, and the manner of issuing the licence.

As mentioned, Slovenia has already issued a Decree on the Implementation of the Space Activities Act, as demanded by Paragraph 3, therefore, the additional criteria from the Decree to those demanded by Article 5 of the Act is included in the following analysis.

It can be observed from the text of the first paragraph, that the Act places significant importance on respecting international standards. Point b) demands compliance with technical international standards, whereas Point č) demands compliance with international law (to the extent that is applicable to the Republic of Slovenia). Point e) demands compliance with SDMG and thus implements SDMG into Slovenian legal order. These provisions are without doubt important as the license should not be granted if operator fails to comply with international technical and legal standards, however, the problem may arise in the process of their concretisation. During that phase sufficient understanding and knowledge is extremely important on both sides, that is, the operator applying for a license and those deciding upon such application.

In this regard, the Decree (See Paragraphs 2, 4 and 6 of Article 3 of the Decree) further defines how such compliance shall be evaluated. For example, the compliance

with international technical standards is fulfilled if the operator submits evidence of compliance with international standards and guidelines of internationally recognised standardisation organisations on safety and technology in the field of space activities or certificates of these organisations for all parts used and for the entire space object as well (Point 1 of Paragraph 2), the entire space object was developed and made within the framework of projects at the European Space Agency, which were approved by the Slovenian delegation at this agency (Point 2 of Paragraph 2), or the opinion of the European Space Agency is provided that space activities are conducted in accordance with international standards and guidelines (Point 3 of Paragraph 2).

In addition to compliance with international standards, Article 5 provides for additional conditions for issuing a license.

Point a) of Paragraph 1 sets out the condition related to the operator, who must be professionally qualified and possess both the technical knowledge of space and similar technologies as well as the financial capacities to conduct space activities. Paragraph 4 of Article 3 of the Decree establishes further concretisation of these requirements. For example, an operator is professionally qualified as a natural person when having at least level VII[20] of education in natural science or technical fields; and as a legal entity when employing at least three persons with at least level VII of education in natural science or technical fields.

Furthermore, Point c) of Paragraph 1 states conditions for issuing a license with respect to the safety aspects, that is, space activities do not pose a threat to national defence, public order, the safety of people or their property, national intelligence and security operations, as well as protection against natural or other disasters. Moreover, they must not negatively affect public health, the environment or aviation. The Decree further concretises these threats (See Paragraph 3 of Article 3), stating, for example, that these threats are posed when the purpose of the space activity is the implementation of communication and navigation or the collection and exchange of data important for the defence or to the intelligence-security activity of the country and the resolution of the collected data will be higher than 30 cm/ pixel; or when there is a risk of an accident owing to the fall of a space object or its part to the surface of the Earth, or the airspace of the Republic of Slovenia which is greater than 1:10.000; or when space activity uses frequencies that would constitute harmful interference to air traffic in the airspace of the Republic of Slovenia. However, it is not clear from the Decree, whether the list of these examples is an open or a closed one. Considering that space technology is currently being significantly transformed, as artificial intelligence is connected to or incorporated into increasingly more space objects,[21]

20 This means university level or specialisation in higher professional programmes. See Slovenian Qualifications Framework Act (Zakon o slovenskem ogrodju kvalifikacij), Official Gazette of the Republic of Slovenia, No. 104/15 and 100/22.

21 See for example, Chien and Morris, 2014, p. 4; Garanhel, 2022; Bandivadekar and Berquand, 2021.

and considering the consequent concerns raised regarding the resilience of space objects to cyber- or terrorist attacks,[22] it would be wise to include the assessment of such threats as well.

Paragraph 2 additionally requires the operator to provide a risk assessment of the threats described in Point c) of Paragraph 1 (See subsection 4.4. above). This provision is relevant from the scope of international space law, that is, Article VI of the OST, and from the point of customary international law obligation to conduct a comprehensive environmental impact assessment (see subsection 4.6. below).

4.5. Insurance and liability

Article 6 of the Act in its Paragraph 1 provides:

> *Before the launch of a space object into outer space, the operator shall take out insurance to cover any damage caused by the space activity to persons or property in the minimum amount of EUR 60,000,000 per loss event for the duration of space activities.*

According to Article VII of the OST and the provisions of LIAB, launching States are liable to pay compensation for damages caused by the space objects. Some States decide for self-insuring of the space missions, whereas others demand operators to purchase the insurance.[23] According to the Article 6 of the Act, Slovenia falls into the second group.

Regarding the amount demanded for insurance, 60 million EUR, the comparative analysis[24] indicates that it is comparable to insurance fees in foreign legislations, as the same amount is, for example, requested in Austria and France. However, the United Kingdom, changed its legislation and removed the upper insurance amount as to allow more limits on the liability of the operator, with which more flexibility and international competitiveness are aimed to be achieved.[25]

Article 6 of the Act also provides two exceptions (Paragraphs 3 and 4) to the insurance rule:

> *(3) The operator shall not be obliged to take out insurance if it follows from the application for the issuing of the licence that:*

22 Martin and Freeland, 2020, pp. 3,7; Zekos, 2022, p. 368; Puttré, 2022; Hobe, 2019, p. 101; Miller, 2019, p. 39; Stuart, 2015.
23 Johnson, 2020, p. 26.
24 See Bhat, 2020, pp. 40-41.
25 See Commercial spaceflight: launch liabilities and insurance, 2021.

a) the space object does not have its own means of propulsion, has a mass of less than 150 kg, is not part of a constellation, is to be launched into an unoccupied low Earth orbit slot and is constructed from materials that ensure that the object will burn up when it re-enters the atmosphere or
b) the space object does not have its own means of propulsion, has a mass of less than 150 kg, is to be launched into orbits above the low Earth orbit, and will remain in orbits that do not encroach upon the geostationary orbit or orbits with an altitude between 19,882 and 20,482 km.

(4) If it follows from the application for the issuing of the licence that:
a) the space object does not have its own means of propulsion, has a mass of less than 150 kg, is part of a constellation of up to five satellites, is to be launched into an unoccupied low Earth orbit slot and is constructed from materials that ensure that the object will burn up when it re-enters the atmosphere or
b) the space object has its own means of propulsion, has a mass of less than 150 kg, is not part of a constellation, is to be launched into an unoccupied low Earth orbit slot and is constructed from materials that ensure that the object will burn up when it re-enters the atmosphere or
c) the space object has its own means of propulsion, has a mass of less than 150 kg, is to be launched into orbits above the low Earth orbit, and will remain in orbits that do not encroach upon the geostationary orbit or orbits with an altitude between 19,882 and 20,482 km,
the operator shall take out insurance to cover the damage caused by the space activity for the time covering the launch of the space object and for a period of one year following the launch of the space object.

However, Article 6 of the Act speaks about insurance for damage caused by *space activity*, not a space object. This choice of words creates inconsistency with Article VII of the OST as well as the provisions of LIAB. As explained above in the subsection 4.3.2., Slovenian definition of space activity is indeed strongly related to space object, and at first glance it may appear that the two terms almost overlap. However, this inconsistency is relevant when determining causation. To invoke international liability, it must be demonstrated that the damage was caused by space object. Proving causation between damage and the physical object is different from proving causation between damage and a particular *activity* related to such a space object – that being the launch, operation or the termination of its functioning. From a physical object the causation is moved to the activity, usually conducted by human(s). This could potentially become problematic. Causation is already difficult to establish, and

several issues emerge at a factual level,[26] however, the situation could occur, where a space object would cause damage for which Slovenia would be liable under Article VII of the OST and the provisions of LIAB; however, the insurance of the operator would not cover such damage, as the analysis of causation would indicate that it was not caused by space activity. This could occur when a space activity as defined in the Act would already cease to exist, however, the space object would remain in outer space as space debris and cause damage afterwards. This inconsistency could be resolved either by expanding the definition of the term 'space activity' accordingly, or by unifying terms and using the term 'space object' in Article 6 of the Act as well.

An explanation of such inconsistency could be that the choice of the word 'activity' instead of 'object' was a reference to Article VI of the OST, which refers to national activities in outer space, therefore covering also the activities not related to space objects (such as spacewalk of the astronauts). However, the remaining text of the Act provides minimal support to such explanation, as the only time the Act foresees a payment from the operator is in the case of liability.[27]

Liability is regulated by Article 16 of the Act:

> *(1) The operator shall be strictly liable for any damage caused by their space object on the surface of the Earth or to a vessel or aircraft in flight.*
> *(2) The operator shall be liable on the basis of fault for any damage caused by the space object in space.*
> *(3) If the Republic of Slovenia pays damages for the damage caused by the space object, it shall have the right to seek reimbursement of the damages paid from the operator.*
> *(4) The right of the Republic of Slovenia to seek reimbursement of the damages referred to in the preceding paragraph shall be limited by the total sum insured as defined in paragraph one of Article 6 of this Act. This restriction shall not apply if the operator causes damage intentionally or due to gross negligence, if the damage is the consequence of non-compliance with the conditions for the issuing of the licence referred to in Article 5 of this Act, or if the operator's conduct is in contravention of this Act.*

Paragraphs 1 and 2 of Article 16 of the Act follow the structure established by the LIAB, that is, its Articles II and III. Paragraph 1 follows Article II of the LIAB, as it establishes strict absolute liability in cases where damage occurs on Earth or to a vessel

26 Kerrest and Smith, 2009, pp. 140-142.

27 Technically, the payment of the operator is also foreseen in case of misdemeanours (see subsection 3.10. below), however, because it is difficult to claim in this particular case that the purpose of the insurance would be the payment for the breach of the law, this option has not been considered in this regard.

or an aircraft in flight. Paragraph 2 follows Article III of the LIAB as it establishes fault liability for damage occurring in outer space. However, it is noteworthy that the formulation in the Act differs from that in the LIAB, as Paragraph 2 of Article 16 of the Act covers all damage in outer space, whereas Article III of the LIAB only covers damage 'caused elsewhere than on the surface of the earth to a space object of one launching State or to persons or property on board such a space object'. Considering the recoverable damage, Slovenian Act is broader than the LIAB, to the benefit of the Republic of Slovenia. Another issue on the expenses of the operator apart from the broadness of Paragraph 2 is that Article 16 does not provide for any exoneration from absolute liability, as provided in Article VI of the LIAB.

However, Paragraph 3 of Article 16 appears to be a safeguard to mitigate these issues, as it states that reimbursement of the damage is only sought from the operator in cases where Slovenia has to pay itself. It could be interpreted that in case when Slovenia is not liable for the damage under international law, it will not hold the operator liable under Article 16.

4.6. Conducting assessment, obtaining opinions, and issuing a decision

This section describes relevant provisions of the Act which govern the process of evaluating the license application, conducted by the ministry responsible for technology, followed by a minister responsible for technology issuing a decision on the application.

Article 7 of the Act dictates: *'Based on the operator's application, the ministry shall prepare an assessment of the potential impact of space activities on aviation in the airspace of the Republic of Slovenia […]'.*

Therefore, the ministry must prepare an impact assessment related to aviation and airspace of Slovenia. This provision could be broader, to cover environmental impacts as well. The International Court of Justice has expressly confirmed the existence of the obligation of states to conduct environmental impact assessment in the *Pulp Mills* judgement from 2010, where the court elaborated also on the content of such assessment and concluded that as international law does not provide for the exact scope and content of the assessment, these two categories have to be determined in the national legislation or in the authorisation process of the project – with regard to the nature and magnitude of the proposed activity and its likely adverse impact on the environment.[28] Thus, the Act could confer upon the ministry also the obligation to conduct an assessment of risks posed to the environment, not only to the aviation and Slovenian airspace.

28 *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), 2010, I.C.J. Rep.14, para. 205.

It could be argued that there is no need for the ministry to conduct an environmental impact assessment, as such obligation is already conferred upon an operator in Paragraph 2 of Article 5 of the Act. However, it is essentially different whether a ministry or an operator conducts such an assessment. The operator will be inherently aiming towards the final goal of obtaining a license to conduct space activities, whereas the ministry should, *inter alia*, be aiming towards ensuring that Slovenia fully respects its international obligations. Therefore, the obligation of the operator cannot absolve a state organ from the obligation to assess environmental risks, however, it may serve as an informative tool in doing so.

To some extent, this issue is resolved by Article 8 of the Act, which states:

> *(1) On the basis of the risk assessment referred to in paragraph two of Article 5 of this Act, the ministry shall, except in cases referred to in paragraphs three and four of Article 6 of this Act, request the opinion on the meeting of the conditions referred to in point c) of paragraph one of Article 5 from the following competent authorities:*
> *a) the ministry responsible for defence regarding the condition that the space activity does not pose a threat to national defence or to protection against natural and other disasters;*
> *b) the ministry responsible for internal affairs regarding the condition that the space activity does not pose a threat to public order or to the safety of people and their property;*
> *c) the Slovene Intelligence and Security Agency regarding the condition that the space activity does not pose a threat to intelligence and security operations outside the area of defence;*
> *č) the ministry responsible for health regarding the condition that the space activity does not negatively affect public health;*
> *d) the ministry responsible for the environment regarding the condition that the space activity does not negatively affect the environment.*

According to Article 8, the ministry responsible for technology must request several opinions from competent bodies listed, including an opinion of ministry responsible for the environment that the space activity does not negatively affect the environment. Such an opinion is based on risk assessment provided by the operator, as prescribed by Paragraph 2 of Article 5 of the Act. This means that the opinion regarding environmental impacts could, to some extent, be considered as the fulfilment of an obligation to conduct an environmental impact assessment. However, there is an exception to the issuing of such opinion, such as for the objects described in the Paragraphs 3 and 4 of Article 6 of the Act – for example, objects that do not have their own means of propulsion, have mass of less than 150 kg, and are not part of a

constellation. The problem is that it cannot be excluded that even such objects can cause environmental damage.

Article 10 of the Act further establishes a commission, appointed by the minister responsible for technology, to examine the license application. The commission must be independent from the interests of the operator. At the end of the examination process, commission issues an opinion regarding the compliance with the requirements and sends it to the minister.

According to Article 11 of the Act, the final decision on the license application is issued by the minister responsible for technology.

After already being issued, the license may be revoked in cases prescribed by Article 12 of the Act.

4.7. Transferring the operation of a space object

Article 13 of the Act regulates the transferring of the operation of a space object to another operator:

> *(1) The operation of the space object for which the licence referred to in Article 4 of this Act was issued shall be transferred to another operator that is a citizen of the Republic of Slovenia or a legal person established in the Republic of Slovenia only with the ministry's permission if the new operator meets the conditions referred to in points a) and c) of paragraph one of Article 5 of this Act and if the operator to which the operation of the space object is to be transferred has insurance pursuant to Article 6 of this Act.*
> *(2) If the operation of the space object is transferred to an operator that is a citizen of another state or a legal person established in another state, the ministry shall grant permission provided that the Republic of Slovenia has signed with that State an international agreement regarding the regulation of liability for damage.*
> *(3) The operation of the space object shall be transferred from the operator that is a citizen of another state or a legal person established in another state to another operator that is a citizen of the Republic of Slovenia or a legal person established in the Republic of Slovenia only with the ministry's permission if the conditions referred to in Article 5 of this Act are met and if the operator to which the operation of the space object is to be transferred has insurance pursuant to Article 6 of this Act.*

As it can be observed from the text, the Article distinguishes between transferring of the operation to an operator who is a citizen of the Republic of Slovenia or a legal

person established in the Republic of Slovenia and all other operators, citizens of another state or legal persons established in another state. In both situations, the permission of the ministry is required. In the second situation, additional requirement is prescribed that the Republic of Slovenia has signed with that State an international agreement regarding the regulation of liability for damage. This is important with respect to the Article VII of the OST and the provisions of the LIAB. Such an agreement aims to regulate the issue in international space law that when transferring jurisdiction and control over a space object, there is no automatic transfer of liability.[29]

Although this Article mentions transferring the *operation*, not the ownership over a space object, and therefore does not directly address the phenomena called on-orbit transfers, it is relevant in that context as well, as transferring of the operation of a space object is mostly conducted on the basis of transferring of the ownership.

4.8. Register

Article 14 of the Act establishes Slovenian national register of space objects:

> *(1) The ministry shall establish and maintain a register for the purpose of collecting data on space objects launched into outer space, communicating this data to the United Nations Register of Objects Launched into Outer Space and conducting supervision of space activities.*
> *(2) The register shall be public and shall be kept as an electronic database of data on launched space objects.*
> *(3) The Republic of Slovenia shall be considered the state of registration if the space object is entered in its register. […]*

With this Article, Slovenia established a national register and fulfilled its obligation under Article II of the REG. As stated in Paragraph 3 of Article 14, Slovenia is thus considered a state of registration of all space objects entered into its register. This is relevant in relation to Article VIII of the OST, which claims that 'A State Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body'. Jurisdiction in the sense of that rule means the ability to legislate and enforce the laws and rules in relation to space objects or persons onboard, whereas control means the exclusive right and the possibility

29 See von der Dunk, 2017, pp. 33-36; Dasgupta, 2016, pp. 5-6. See also Grünfeld, 2021.

to supervise the activities of space object and personnel thereof.[30] However, these are limited by the obligation to conduct activities in outer space in accordance with international law, as provided by Article III of the OST.

4.9. Obligations of the operator

A chapter of the Act is titled 'Obligations of the operator' regarding the obligations after the issuing of the license. These obligations are regulated in Article 17 of the Act:

> *(1) The operator shall notify the ministry in writing within eight days of any event or fact that could affect the validity of the issued licence or of any change with regard to the meeting of conditions under which the licence was issued.*
> *(2) The operator shall promptly notify the ministry in writing or orally of any accident or emergency that poses a risk to the safety of people, the environment, or the maintenance of public order and national security and carry out appropriate measures to prevent or minimise the consequences of such accident or emergency and notify the ministry of such measures in writing.*
> *(3) The operator shall notify the ministry in writing within eight days of any circumstances that prevent the operation or operative control of the space object and of any change or termination of its space activity.*

Article 17 mostly regulates the obligation to notify, and that such an obligation concerns three distinct types of information that must be notified. Two of the categories, described in Paragraphs 1 and 3, must be notified within eight days of the occurrence of the event that would either affect the validity of the license issued or the conditions for issuing a license or could affect the operation or control over the space object or change the termination of its activity. These two categories appear to concern less dangerous situation. However, Paragraph 2 demands prompt notification about any accident or emergency that would pose a risk to the safety of people, the environment, or the maintenance of public order and national security. In the same paragraph, Article 17 sets out another obligation of the operator, which is to conduct appropriate measures to prevent or minimise the consequences of such accident or emergency (and notify about the measures adopted).

30 Schmidt-Tedd and Mick, 2009, p. 157.

4.10. Offences and fines

Finally, Article 18 of the Act regulates the offences and prescribes the fines accordingly:

> *(1) A legal person shall be fined from EUR 2,500 to EUR 250,000 and a legal person deemed to be a medium-sized or large company under the act governing companies shall be fined from EUR 5,000 to EUR 500,000 for the following offences:*
> *a) if they conduct space activities without a licence (paragraph one of Article 4);*
> *b) if their application intentionally contained false or incomplete information that was the basis for the issuing of the licence referred to in Article 5 of this Act;*
> *c) if they fail to submit proof of insurance for any damage caused by the space activity pursuant to Article 6 of this Act before the launch of the space object into outer space (paragraph two of Article 6);*
> *č) if they fail to implement measures set out in the decision to revoke the licence (paragraph two of Article 12);*
> *d) if they transfer the operation of the space object in contravention of Article 13 of this Act;*
> *e) if they fail to send the data for entry in the register within the time limit referred to in paragraph five of Article 14 of this Act;*
> *f) if they fail to notify the ministry within eight days of any changes or amendments to the data referred to in paragraph six of Article 14 of this Act (paragraph seven of Article 14);*
> *g) if they fail to notify the ministry within eight days in writing of any event or fact that could affect the validity of the issued licence or of any change with regard to the meeting of conditions under which the licence was issued (paragraph one of Article 15);*
> *h) if they fail to promptly notify the ministry in writing or orally of any accident or emergency that poses a risk to the safety of people, the environment, or the maintenance of public order and national security and fail to carry out appropriate measures to prevent or minimise the consequences of such accident or emergency (paragraph two of Article 15);*
> *i) if they fail to notify the ministry within eight days in writing of any circumstances that prevent the operation or operative control of the space object or of any change or termination of its space activity (paragraph three of Article 15);*

> *j) if they fail to provide the ministry with access to their business premises and facilities or fail to allow them to inspect their business documentation or fail to provide the required information (paragraph two of Article 17).*
>
> *(2) A fine of EUR 1,500 to EUR 150,000 shall be imposed on a sole trader or self-employed person who commits an offence referred to in the preceding paragraph.*
> *(3) A fine of EUR 200 to 10,000 shall be imposed on the responsible person of a legal person or the responsible person of a sole trader or self-employed person who commits an offence referred to in paragraph one of this Article.*
> *(4) A fine of EUR 100 to EUR 5,000 shall be imposed on an individual who commits an offence referred to paragraph one of this Article.*

The offences concern violations of the provisions of the Act. The fines are limited by minimum and maximum amount, varying in regard to the subject receiving the fine. The maximum amount is prescribed in accordance with Slovenian legislation regulating misdemeanours, however, it can be considered as disproportionately low when compared with the insurance required and the potential costs Slovenia will bear in case of liability for damage caused by space objects.[31]

5. Conclusion and way forward

The recent years mark the beginning of the development of Slovenian space activity, however, the ambitious space policy does not imply its entirety or end. The newly adopted Space Activities Act further provides for its continuation.

The Act contains the primary provisions aimed at fulfilling Slovenian international obligations under international space law, including the establishment of a national register of space objects in accordance with Article II of the REG and the regulation of authorisation licensing proceedings in accordance with Article VI of the OST. In general, it offers a solid basis for continuation of Slovenian space activities.

However, Space Activities Act could be improved in a manner that would ensure more consistency, as it can be observed from several subsections of Section 3 of this paper. Moreover, as technology advances, new legal challenges approach. This has already been demonstrated by the challenges brought forward by the use of artificial

31 Sancin, Grünfeld and Ramuš Cvetkovič, 2021, p. 75.

intelligence in space activities.[32] As Slovenia plans to engage in developing artificial intelligence for such purposes, legal regulation will have to be changed accordingly. Either the provisions related to the effects of artificial intelligence on the liability, data in the register of space objects, and other core matters will have to be amended, or a new law governing the use of artificial intelligence will have to be adopted. In that case the legislator will have to consider the existing Space Activities Act and examine all potential effects of artificial intelligence on its provisions to ensure that the legislation is effective and not contradictory.

Furthermore, as it became clear that sustainability of the use and exploration of outer space is crucial to fulfil the primary principles of space law, set out in the OST, and to ensure that future generations have access to outer space, national legislation must ensure sustainability. Slovenian space policy and legislation recognise the importance of sustainability, as sustainable environment is, for example, mentioned as one of the aims in the draft space strategy, and the Space Activities Act makes reference to SDMG and certain mechanisms for environmental protection, such as impact assessment. However, a greater highlight could be made in that regard. It is expected that the future development of Slovenian space policy and legislation will adopt more steps in that direction and provide some good practices and examples, compliant with the international guidelines, such as United Nations Office for Outer Space Affairs (UNOOSA) Guidelines for the Long-term Sustainability of Outer Space Activities,[33] that will be able to translate to other states or on the international level.

32 See, for example, Abashidze, Ilyashevich, and Latypova, 2022; Bratu, 2021; Bratu, Lodder and van der Linden, 2021.

33 Guidelines for the Long-term Sustainability of Outer Space Activities of the Committee on the Peaceful Uses of Outer Space 2019, approved by United Nations General Assembly (UNGA) Resolution 74/20.

Bibliography

- Abashidze, A.; Ilyashevich, M. & Latypova, A. (2022) 'Artificial Intelligence and Space Law', *Journal of Legal, Ethical and Regulatory Issues* 25(3), 1-13.
- Bandivadekar, D. & Berquand, A. (2021) Five ways artificial intelligence can help space exploration. [e-source]. Available at: https://theconversation.com/five-ways-artificial-intelligence-can-help-space-exploration-153664 (accessed November 30 2022)
- Bhat, S. B. (2020) 'Space Liability Insurance: Concerns and Way Forward', *Athens Journal of Law* 6(1), 37-50
- Bratu, I. (2021) 'Artificial Intelligence for Future Lunar Societies: A Critical Analysis of the Liability Problem', *5th Global Moon Village Workshop & Symposium*, December 6-8, Nicosia, Cyprus.
- Bratu, I.; Lodder, A. R. & van der Linden, T. (2021) 'Autonomous space objects and international space law: Navigating the liability gap', *Indonesian Journal of International Law* 18(3), 423-446.
- Catalogue of Slovenian Space Industry and Research Institutions (2022) [e-source]. Available at: https://www.sloveniabusiness.eu/assets/media/files/library/Slovenian_space_industry_January_2022.pdf (accessed December 7 2022)
- Chien, S. & Morris, R. (2014) 'Space Applications of Artificial Intelligence', *AI Magazine* 35(4), pp. 3-6
- Commercial spaceflight: launch liabilities and insurance (2021) [e-source]. Available at: https://www.gov.uk/government/publications/commercial-spaceflight-launch-liabilities-and-insurance/commercial-spaceflight-launch-liabilities-and-insurance (accessed April 13 2023)
- Cooperation with the European Space Agency (2022) [e-source]. Available at: https://www.gov.si/en/topics/sodelovanje-z-esa/ (accessed December 7 2022)
- Dasgupta, U. (2016) On-Orbit Transfer of Satellites between States: Legal Issues-with Special Emphasis on Liability and Registration. [e-source]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3471940 (accessed December 3 2022)
- Draft Slovenian Space Startegy (Osnutek Slovenske vesoljske strategije) (2023) [e-source]. Available at: https://www.gov.si/assets/ministrstva/MGTS/Dokumenti/ESA/slovenska-vesoljska-strategija-osnutek_slike.pdf (accessed April 13 2023)
- Garanhel, M. (2022) AI in space exploration. [e-source]. Available at: https://www.aiacceleratorinstitute.com/ai-in-space-exploration/ (accessed November 30 2022)
- Grünfeld, K. (2021) Prenos lastništva satelitov v vesolju: problematika jurisdikcije in odškodninske odgovornosti. [e-source]. Available at: https://www.tax-fin-lex.si/Dokument/Predogled?rootEntityId=028121ff-8034-41c5-894a-1d1e25e8cc

56&returnUrl=https%3A%2F%2Fwww.tax-fin-lex.si%2FDokument%2FPodrobnosti%3FrootEntityId%3D028121ff-8034-41c5-894a-1d1e25e8cc56%26utm_source%3Dportal%26utm_campaign%3DPortalPravniClanek%26utm_medium%3Dportal%26utm_content%3D028121ff-8034-41c5-894a-1d1e25e8cc56 (accessed December 52022).Hobe, S. (2019) *Space Law.* Baden-Baden: Nomos

- Hobe, S. & Pellander, E. (2012) 'Space Law: a "Self-Contained Regime"?' in: Hobe, S. & Freeland, S. (2012) *In Heaven as on Earth? The Interaction of Public International Law on The Legal Regulation of Outer Space.* Bonn: Institute of Air and Space Law of the University of Cologne, pp. 1-12
- Jakhu, R., Jasani, B. & McDowell, J. C. (2018) 'Critical issues related to registration of space objects and transparency of space activities', *Acta Astronautica* 143, pp. 406-420
- Johnson, K. (2020) 'Insurance Requirements for Space Missions', *Key Governance Issues in Space*, pp. 25-30
- Kerrest, A. & Smith, L. J. (2009) 'Article VII' in: Hobe S. *et al.* (eds.) (2009) *Cologne Commentary on Space Law, Vol 1*, Cologne: Carl Heymanns Verlag, pp. 126-145
- Marchisio, S. (2018) 'Il Trattato sullo spazio: passato, presente e futuro', *Rivista di diritto internazionale* 1, pp. 205-213
- Martin, A.-S. & Freeland, S. (2020) 'The Advent of Artificial Intelligence in Space Activities: New Legal Challenges', *Space Policy* 55
- Miller, G. D. (2019) 'Space Pirates, Geosynchronous Guerrillas, and Nonterrestrial Terrorists', *Air and Space Power Journal*, pp. 33-51
- Predlog Slovenske vesoljske strategije 2030 (2023) [e-source]. Available at: https://www.gov.si/zbirke/projekti-in-programi/predlog-slovenske-vesoljske-strategije-2030/ (accessed April 132023)
- Puttré, M. (2022) Satellites Are Likely Targets in the Next Major War. [e-source]. Available at: https://www.discoursemagazine.com/ideas/2022/09/22/satellites-are-likely-targets-in-the-next-major-war/ (accessed November 242022)
- Ramuš Cvetkovič, I. (2021) Space law as lex specialis to international law. [e-source]. Available at: https://repozitorij.uni-lj.si/Dokument.php?id=147587&lang=slv (accessed November 202022)
- Ribbelink, O. (2009) 'Article III' in: Hobe S. *et al.* (eds.) (2009) *Cologne Commentary on Space Law, Vol 1*, Cologne: Carl Heymanns Verlag, pp. 64-69.
- Sancin, V., Grünfeld, K. & Ramuš Cvetkovič, I. (2021) 'Sodobni izzivi mednarodnopravnega urejanja vesolja', *Pravnik* 138, pp. 45-80
- Schmidt-Tedd, B. & Mick, S. (2009) 'Article VIII' in: Hobe S. *et al.* (eds.) (2009) *Cologne Commentary on Space Law, Vol 1*, Cologne: Carl Heymanns Verlag, pp. 146-168
- Stuart, J. (2015) Comment: Satellite industry must invest in cyber security. [e-source]. Available at: https://www.ft.com/content/659ab77e-c276-11e4-ad89-00144feab7de (accessed November 242022)

- von der Dunk, F. (2017) 'Transfer of Ownership in Orbit: From Fiction t om Fiction to Problem' in: Hofmann, M & Loukakis, A. (eds.) (2017) *Ownership of Satellites: 4th Luxembourg Workshop on Space and Satellite Communication Law*, Baden-Baden: Nomos Verlagsgesellschaft and Hart Publishing, pp. 29–43
- Zekos, G. I. (2022) *Political, Economic and Legal Effects of Artificial Intelligence*. Cham: Springer.

Miroslav CHUPÁČ*

Current Development in the United States Case Law on Abortion and its Possible Impacts on the European Union and Continental Legal System

ABSTRACT: *This article aims to acquaint readers with the role and decision-making practice of the (Federal) Supreme Court of the United States of America in the matter of artificial abortion and a woman's right to abortion in general. Special focus is placed on jurisprudential development in 2022, as a landmark decision was issued in 2022, which significantly interferes with the right to abortion throughout the United States. Abortion and abortion policy is currently widely discussed across the United States. For several decades, it was clear beyond any doubt that abortion is, in essence, a fundamental human right arising from the Constitution itself (Fourteenth Amendment) and that a woman can – while respecting certain set rules – undergo abortion, particularly in the first trimester, at virtually any time, according to her will. However, what was regarded as a certain and fundamental women's right arising from the Constitution, has been overruled by the U.S. Supreme Court in 2022 for the first time in 50 years. In addition to the description of the current situation in the United States, this article briefly reflects on the possible effects of the current state of jurisprudence in the United States on the continental legal system. This article is created and reflects the legal status as of December 1, 2022.*
KEYWORDS: *Right to abortion, abortion policy, U.S. Supreme Court, the Constitution, landmark decision, human right, trimester, European Court of Human Rights*

1. Introduction

This article, which has also been presented in oral form at the international scientific conference 'I. ASCEA – Annual Scientific Conference of the Central European Academy' held from 6th to 7th October 2022, has got several goals. The article

* Ph.D. student, University of West Bohemia, Faculty of Law, Pilsen, Czech Republic. Attorney-at-law based in Pilsen, Czech Republic. https://orcid.org/0009-0000-8520-857X.

https://doi.org/10.62733/2023.1.67-82

briefly focuses on the federal Supreme Court of the United States (U.S. Supreme Court), its composition and the general procedural rules of proceeding. Further, it deals with the current jurisprudential development in 2022, as a landmark decision was issued, which significantly interferes with the right to abortion throughout the United States of America (USA). Furthermore, the article includes possible impacts on the European Union (EU) and continental legal system, arising from the latest landmark case, by which the U.S. Supreme Court overruled its own legal opinions held for almost 50 years. This article is created and reflects the legal status as of December 1, 2022.

2. U.S. Supreme Court, its Composition and Significance

The U.S. Supreme Court is the supreme judicial authority, superior to all state and federal courts. There are currently 9 judges in the U.S. Supreme Court. Each of them is appointed directly by the President and confirmed by the Senate. Judges are appointed for life.[1]

As the court itself states:

> *The Court is the highest tribunal in the Nation for all cases and controversies arising under the Constitution or the laws of the United States. As the final arbiter of the law, the Court is charged with ensuring the American people the promise of equal justice under law and, thereby, also functions as guardian and interpreter of the Constitution. The Supreme Court consists of the Chief Justice of the United States and such number of Associate Justices as may be fixed by Congress. The number of Associate Justices is currently fixed at eight. Power to nominate the Justices is vested in the President of the United States, and appointments are made with the advice and consent of the Senate.*[2]

Congress generally determines the jurisdiction of federal courts. However, in some cases, as in the example of a dispute between two or more U.S. States – the Constitution grants the Supreme Court its original jurisdiction, a power that Congress cannot deprive. The courts only hear real cases and controversies – to sue, a party must prove that he/she has been harmed. This implies that courts do not issue advisory opinions on the constitutionality of laws or the lawfulness of

1 Article III, section 2 of the Constitution of the United States of America.
2 U.S. Supreme Court website. *About the Supreme Court* [Online]. Available at: https://www.supremecourt.gov/about/about.aspx (Accessed: 28 November 2022).

proceedings if the decision has no practical effect. Cases brought before the courts are transferred from the district court to the appellate court and may even reach the U.S. Supreme Court, although the U.S. Supreme Court hears relatively few cases each year. Federal courts have exclusive jurisdiction to interpret the law, determine its constitutionality, and apply it to individual cases. Similar to Congress, courts can force evidence and testimony by subpoena. Lower courts are limited by U.S. Supreme Court decisions – once the U.S. Supreme Court interprets the law, lower courts must apply the U.S. Supreme Court's interpretation to the facts of a particular case.[3]

Although the Supreme Court can hear an appeal on any point of law, provided that it has jurisdiction, it does not usually conduct legal proceedings. Instead, it is for the U.S. Supreme Court to interpret the meaning of the law, to decide whether the law is relevant to a particular set of facts, or to decide how the law should be applied. Lower authorities – lower courts and states included – are obliged to follow the precedent set by the U.S: Supreme Court when deciding cases.[4]

When the U.S. Supreme Court rules on a constitutional issue, that judgement is virtually final; its decision can only be changed by the rarely used constitutional change procedure or by a new U.S. Supreme Court's decision. Therefore, the only authority which can change the U.S. Supreme Court's previous binding legal opinion, expressed in historical cases, is the U.S. Supreme Court itself. However, when the court interprets the law, a new legislative measure can be taken in the meantime.[5]

In my perspective, this is similar to role of the Supreme Court of the Czech Republic in interpretation of law, decision making, and unification of court decisions at the highest level. However, unlike American court system, in the Czech Republic there is also the Constitutional Court of the Czech Republic, which assesses, for example, the conformity of court decisions with the constitutional order, or conformity of general laws with the constitutional order. Therefore, the U.S. Supreme Court is essentially similar to the Supreme Court of the Czech Republic and the Constitutional Court of the Czech Republic, united into one.

3 The White House internet pages. *The Judicial Branch* [Online]. Available at: https://www.whitehouse.gov/about-the-white-house/our-government/the-judicial-branch/ (Accessed: 28 November 2022).

4 The White House internet pages. *The Judicial Branch* [Online]. Available at: https://www.whitehouse.gov/about-the-white-house/our-government/the-judicial-branch/ (Accessed: 28 November 2022).

5 U.S. Supreme Court website. *The Court and Constitutional Interpretation* [Online]. Available at: https://www.supremecourt.gov/about/constitutional.aspx (Accessed: 26 November 2022).

3. Right of Access to the U.S. Supreme Court, *Writ of Certiorari,* and a Brief Description of the Process

Parties who are not satisfied with the lower court's decision can apply to the U.S. Supreme Court to hear their case. The primary way to ask this court for a review is to ask for a *writ of certiorari*[6] court order. This is a request for the Supreme Court to order the lower court to send the case report for review. The U.S. Supreme Court has no obligation to hear these cases and usually does so only if the case could be of national importance, could harmonise conflicting decisions of federal district courts, and (or) could have precedent value. The U.S. Supreme Court accepts only about 100-150 from more than 7,000 cases it has to review each year. The court usually hears cases that have been decided in either the relevant U.S. courts of appeal or the highest court in the state (particularly if the state court has ruled on a constitutional issue). The U.S. Supreme Court has its own set of rules. According to these rules, four of the nine Justices (U.S. Supreme Court´s judges all called "Justices") must vote to accept a case. Five of the nine Justices must vote to grant a stay, for example, a stay of execution in a death penalty case.[7]

If the Justices decide to accept the case (the writ of certiorari is granted), the case is placed on the court file. According to the rules of the U.S. Supreme Court, the petitioner has an opportunity to write a short text, within 50 pages, to present his legal dispute concerning the issue decided by the court. Following the petitioner's application, the other party, known as the respondent, is provided a certain period of time to file the defendant's application. This short text should also not exceed 50 pages.[8]

The following oral arguments are open to the public. During the oral hearing, each party has approximately 30 minutes to present their case, however, lawyers do not have to use all the time. The petitioner argues first, and thereafter, the respondent.[9]

6 V. Knapp has already mentioned the system of *common law, equity* and the system of subjective rights of access to the court, called writs, from historical perspective. As it appears, some legal instruments, which continue to be used today, originate from the past times. Therefore, it is interesting that particularly in British-American law system there are legal instruments known (or used) for centuries of uninterrupted continuity. For more information, see: Knapp, V., 1995, pp. 96 – 97.

7 U.S. Courts website. *Supreme Court Procedures* [Online]. Available at: https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 (Accessed: 26 November 2022).

8 U.S. Courts website. *Supreme Court Procedures* [Online]. Available at: https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 (Accessed: 26 November 2022).

9 U.S. Courts website. *Supreme Court Procedures* [Online]. Available at: https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 (Accessed: 26 November 2022).

When the oral arguments are closed, the Justices must decide the case. It is conducted at a judicial conference, where Justices discuss the certain case. When each Justice presents his/her opinion, the Chief Justice casts the first vote, and then each Justice casts the vote in descending order of seniority. If any Justice agrees with the outcome of the case, but not with the reasoning of the majority, that Justice may write a favourable opinion. Each Justice can write a separate opinion, called *dissent*.[10]

4. Roe v. Wade and Related Case Law on Abortion

Before discussing the *Roe*[11] *v. Wade* case, it is necessary to mention two fundamental amendments to the United States Constitution for a better understanding. These are amendments that are directly related to the right to life and thus to the issue of abortion and abortion policy.

The Ninth Amendment[12] to the United States Constitution dates from 1791 and concerns all rights which the American Constitution does not mention explicitly. In essence, it states that people have the rights that the Constitution directly lists, as well as those that are not enumerated in the list of rights of the Constitution and that it is not exhaustive. Therefore, it also grants people rights that are not directly stated in the U.S. Constitution or the Bill of Rights.[13]

The Fourteenth Amendment[14] to the United States Constitution dates from 1868 and – among other things – in its first paragraph guarantees all people's equality before the law, regardless of race, gender, age or religion. However, from the perspective of the right to life and abortion policy, the passage is particularly important, stating that: '*... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws*'.

10 U.S. Courts website. *Supreme Court Procedures* [Online]. Available at: https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 (Accessed: 26 November 2022).

11 Roe is a fictitious name used to protect the woman from the public. However, her identity was eventually revealed.

12 The Ninth Amendment reads as follows: '*The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people*'.

13 The White House website. *The Constitution* [Online]. Available at: https://www.whitehouse.gov/about-the-white-house/our-government/the-constitution/ (Accessed: 26 November 2022).

14 Fourteenth Amendment to the Constitution, paragraph one reads as follows: '*All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws*'.

It is precisely this passage that is important for understanding the case of Roe v. Wade and subsequent decisions, set out below.

Now to the case of Roe v. Wade of 1973.[15,16] This U.S. Supreme Court decision is fundamental from the point of human rights. The U.S. Supreme Court ruled that all women have a constitutional right to have an abortion under certain conditions. The U.S. Supreme Court derived this right from the Ninth and Fourteenth Amendments, aforementioned.

Recapitulation of the case:

> *A pregnant single woman (Roe) brought a class action challenging the constitutionality of the Texas criminal abortion laws, which proscribe procuring or attempting an abortion except on medical advice for the purpose of saving the mother's life. A licensed physician (Hallford), who had two state abortion prosecutions pending against him, was permitted to intervene. A childless married couple (the Does), the wife not being pregnant, separately attacked the laws, basing alleged injury on the future possibilities of contraceptive failure, pregnancy, unpreparedness for parenthood, and impairment of the wife's health. A three-judge District Court, which consolidated the actions, held that Roe and Hallford, and members of their classes, had standing to sue and presented justiciable controversies. Ruling that declaratory, though not injunctive, relief was warranted, the court declared the abortion statutes void as vague and overbroadly infringing those plaintiffs' Ninth and Fourteenth Amendment rights. The court ruled the Does' complaint not justiciable. Appellants directly appealed to this Court on the injunctive rulings, and appellee cross-appealed from the District Court's grant of declaratory relief to Roe and Hallford.*[17]

Based on these facts, the U.S. Supreme Court has made many substantial partial decisions in Roe v. Wade judgement, which justify in significant detail the text of its decision, considering previous court cases, medical knowledge, ecclesiastical and historical traditions, and opinions of several associations, for example, the Bar Association.

15 The full text in the original version from 1973 can be found on the website of The Library of Congress of the United States. *Syllabus Roe et al. v. Wade, District Attorney of Dallas County* [Online]. Available online at: https://tile.loc.gov/storage-services/service/ll/usrep/usrep410/usrep410113/usrep410113.pdf (Accessed: 26 November 2022).

16 The text of the new case law can also be found on website of the U.S. Supreme Court. *Roe v. Wade, 410 U.S. 113 (1973)* [Online]. Available at: https://supreme.justia.com/cases/federal/us/410/113/ (Accessed: 28 November 2022).

17 Basic facts, Roe v. Wade, 410 U.S. 113 (1973). Library of Congress of the United States [online]. Available online at: https://tile.loc.gov/storage-services/service/ll/usrep/usrep410/usrep410113/usrep410113.pdf (Accessed: 26 November 2022).

Regarding the substantive assessment, the U.S. Supreme Court concluded in this case that if the laws of the State of Texas exempt from criminalisation only the medical procedure of the child's mother, then such laws deny the *due process*[18] under the 14th Amendment to the U.S. Constitution, which protects against state action the right to privacy.

As the U.S. Supreme Court explained, although the state could not override that right, it could have legitimate interests in protecting both the pregnant woman's health and the potential of human life, each of which interests grows and reaches a 'compelling' point at various stages of the woman's approach to term. Thus, the U.S. Supreme Court divided the options for abortion into three basic options (according to trimesters):

a) in the first trimester, it is entirely up to the woman to decide whether to keep the child;
b) around the end of the first trimester, individual states can select whether to regulate the abortion in a manner that is reasonably related to the mother's health;
c) in the viable phase of the fetus, the state may, in the pursuit of its interests, regulate or even prohibit abortion, however, except where this is necessary based on a medical assessment to preserve the mother's life or health.

Regarding individual trimesters, the U.S. Supreme Court describes its opinion in detail on page 163 *et seq.* According to the U.S. Supreme Court, the fundamental difference is particularly the viability of the fetus outside the mother's body.

Simultaneously, the U.S. Supreme Court ruled that if the states' law always prohibits the abortion (or if the circumstances for abortion are extremely narrowed), then such law is to be declared unconstitutional.[19]

It is noteworthy that this decision was revolutionary at the time – particularly in the southern, traditionally Christian-oriented American states. More than 15 persons or organisations have provided their *amicus curiae,*[20] including Attorney Generals

18 Due process is the legal requirement that the state must respect all legal rights that are owed to a person within the court proceeding. Due process balances the power of law of the land and protects the individual person from it. At the most general level, it can be said that "due process" means compliance with all procedural rules during the conduct of court proceedings.

19 Roe v. Wade, 410 U.S. 113 (1973), p. 166. The full text in the original version from 1973 can be found on the website of The Library of Congress of the United States. *Syllabus Roe et al. v. Wade, District Attorney of Dallas County* [Online]. Available online at: https://tile.loc.gov/storage services/service/ll/usrep/usrep410/usrep410113/usrep410113.pdf (Accessed: 26 November 2022).

20 Means a person or group who is not a party to an action, but has a strong interest in the matter, will petition the court for permission to submit a brief in the action with the intent of influencing the court's decision. *Amicus curiae* is a legal instrument used in an American or British legal system.

of several other states. Not all Justices of the U.S. Supreme Court were united in this decision (dissenting opinions can be found at the end of the written decision).

The Roe v. Wade case is further developed in more detail and followed by several other landmark decisions which, while modifying in some way the rules laid down in the Roe v. Wade judgement, never annulled the original decision, as a whole.

In the next case, *Planned Parenthood of Southeastern Pa. v. Casey,*[21] in which the U.S. Supreme Court narrowed the possibilities of mothers for abortion (respectively supported the legislation of states in this area), it ruled that, although everyone has the right to abortion, based on the Roe v. Wade case, the state's convincing interest in protecting a viable fetus may outweigh the mother' s interest in abortion, unless the mother's life is in danger.

In another case, *Whole Woman's Health v. Hellerstedt,*[22] the U.S. Supreme Court found Texas law, which constituted binding and extremely strict rules for abortion, as unconstitutional. For example, that local legislation stipulated for a doctor performing an abortion to (must) have active admitting privileges at a medical facility no more than 30 miles from the place of the abortion. Further, the legislation set significantly much higher standards for facilities (surgical centres) in which abortion could be performed. After such provisions, the number of medical facilities that met the new requirements dropped from approximately 40 to 8 in entire Texas. Therefore, as the U.S. Supreme Court ruled, such conditions were undue burdens on access to abortion, and there was also no persuasive evidence that they protected women's health more effectively than existing laws.[23]

In the case of *June Medical Services L.L.C. v. Russo*[24] the U.S. Supreme Court found Louisiana's state legislation as unconstitutional because it required an abortion doctor to have active admitting privileges at a medical facility no more than 30 miles from the scene of the procedure. Moreover, similar to the Texas law aforementioned, it enacted several new regulations for medical facilities and set up much higher medical standards for such centres to be able to conduct an abortion (this legislation was very similar to that of Texas mentioned above). It is noteworthy there was a six days bench trial during the district court proceeding

21 U.S. Supreme Court website. *Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992)* [Online]. Available at: https://supreme.justia.com/cases/federal/us/505/833/ (Accessed: 26 November 2022).

22 U.S. Supreme Court website. *Whole Woman's Health v. Hellerstedt, 579 U.S. ___ (2016)* [Online]. Available at: https://supreme.justia.com/cases/federal/us/579/15-274/ (Accessed: 26 November 2022).

23 Just to give an idea by comparison with European states, it should be mentioned that the United Kingdom is about a third of Texas in area. France is slightly larger than Texas.

24 U.S. Supreme Court website. *June Medical Services L.L.C. v. Russo, 591 U.S. ___ (2020)* [Online]. Available at: https://supreme.justia.com/cases/federal/us/591/18-1323/ (Accessed: 26 November 2022).

where factual findings were presented. Later, the district court declared such legislation (Act 620) unconstitutional because it was not proved that such regulations would offer significant health benefit; it was also found that such provisions created substantial obstacles for women seeking an abortion (which was prohibited by Roe v. Wade case). The Fifth Circuit (court of appeal) reversed, disagreeing with those factual findings. The U.S. Supreme Court then reversed the legal opinion of the Fifth Circuit, as stated above.

Therefore, the decisions of the aforementioned cases summarise the following. The right to abortion cannot simply be restricted either at the federal level or at the level of individual U.S. states, because it is a fundamental right arising from the Constitution. It has been derived from right to privacy in *Roe v. Wade* case and later also from "liberty" protected by the Fourteenth Amendment's Due Process Clause. Therefore, any limitation of such a right must be necessary and must have a substantial reason. The aforementioned conclusions persisted until 2022.

5. The Current Development of the U.S. Supreme Court's Decision-Making Practice (in 2022)

Over 50 years there was a persisting opinion that a woman in the United States could undergo an abortion particularly within the first trimester without any significant problems or obstacles (see *Roe v. Wade, Planned Parenthood of Southeastern Pa. V. Casey, and Whole Woman's Health v Hellerstedt* cases aforementioned). As the legal opinions expressed in these cases came from the U.S. Supreme Court, the states were supposed to follow them (legally binding conclusions).

However, what was regarded as a certain and fundamental women's right arising from the Constitution, has been overruled by the U.S. Supreme Court in 2022. According to the latest landmark decision, the same U.S. Supreme Court, which insisted on its previous conclusions, has overruled its own long lasting case law on abortion.

In 2021 the U.S. Supreme Court began hearing the case of *Dobbs v. Jackson Women's Health Organization.*[25] In this case, the laws of the State of Mississippi, passed in 2018, prohibited any abortions after the 15th week of pregnancy. Mississippi's Gestational Age Act[26] provided that:

25 U.S. Supreme Court website. *Dobbs v. Jackson Women's Health Organization, 597 U.S. ___ (2022)* [Online]. Available at: https://supreme.justia.com/cases/federal/us/597/19-1392/ (Accessed: 30 November 2022).

26 Justia website (US Law, Case Law, Codes, Statutes & Regulations). *2018 Mississippi Code, Title 41 – Public Health, Chapter 41 – Surgical or Medical Procedures; Consents Gestational Age Act § 41-41-191. Gestational Age Act.* [Online]. Available at: https://law.justia.com/codes/mississippi/2018/title-41/chapter-41/gestational-age-act/section-41-41-191/ (Accessed: 30 November 2022).

> *Except in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform . . . or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks.*[27]

This implies that there is no legal possibility to conduct an abortion apart from the two extremely narrow exceptions.

Although this legislation was in clear conflict with the binding legal opinions of the U.S. Supreme Court mentioned in *Roe v. Wad*e and *Planned Parenthood v. Casey* legal cases, Mississippi lawmakers allegedly passed this law intentionally to reach the U.S. Supreme Court. Moreover, three of the nine U.S. Supreme court Justices, who are said to be conservative,[28] were appointed by President Trump, making the majority of conservative Justices the predominant part in the U.S. Supreme Court. By passing this law, the Mississippi lawmakers allegedly expected that it would reach the U.S. Supreme Court and that the court would change its original binding legal opinions, particularly in the *Roe v. Wade and Planned Parenthood v. Casey* cases.

Before the U.S. Supreme Court ruled over this matter, the Court of the Fifth Circuit (lower court) originally affirmed an injunction, thus prohibiting enforcement of the Mississippi's Gestational Age Act because it was contrary to the previous binding opinions of the U.S. Supreme Court.

The U.S. Supreme Court's judgement in this case was issued on 24 June 2022. In this decision, the U.S. Supreme Court explicitly mentions that it is overruling its own precedents and arriving at a new conclusion:

> *We do not pretend to know how our political system or society will respond to today's decision overruling Roe and Casey. And even if we could foresee what will happen, we would have no authority to let that knowledge influence our decision. We can only do our job, which is to interpret the law, apply longstanding principles of stare decisis, and decide this case accordingly. We therefore hold that the Constitution does not confer a right to abortion. Roe and Casey must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives.*[29]

27 U.S. Supreme Court website. *Dobbs v. Jackson Women's Health Organization, 597 U.S. ___ (2022)* [Online]. Available at: https://supreme.justia.com/cases/federal/us/597/19-1392/ (Accessed: 30 November 2022).

28 Justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett.

29 U.S. Supreme Court website. *Dobbs v. Jackson Women's Health Organization, 597 U.S. ___ (2022)* [Online]. Available at: https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf (Accessed: 30 November 2022).

Thus, the 'revolutionary' idea and the 'overruling' of the previous decisions resulted in the conclusion that the right to abortion does not arise from the Constitution and that the individual state can therefore regulate the right to abortion themselves. Therefore, U.S. Supreme Court originally derived a right to abortion from the Constitution; however, this idea has now been revoked with the result that the right to abortion does not arise from the Constitution (meaning from Fourteenth Amendment).

Considering the fact that the right to abortion does not newly arise from the Constitution and considering the fact that this right is no more guaranteed at a federal level, the individual U.S. states can now regulate the matter of access to abortion at its own legislative level.

The approach differs from state to state as the individual states have different historical backgrounds, favour different political party (the well-known difference between southern states and the rest of the U.S. are religious matters, whereas in southern states the religious matters and a question of protecting the life of the fetus arising from religion play much more important role in society in general, for example, as opposed to the State of New York where the more liberal access to abortion has prevailed). On the map,[30] the clear differences among states can be seen with the description of how liberal or against abortion each individual state is.

It is noteworthy that this landmark decision has not been accepted by all U.S. Supreme Court Justices. As stated in the U.S. Supreme Court official information:

> *Alito, J., delivered the opinion of the Court, in which Thomas, Gorsuch, Kavanaugh, and Barrett, JJ., joined. Thomas, J., and Kavanaugh, J., filed concurring opinions. Roberts, C. J., filed an opinion concurring in the judgment. Breyer, Sotomayor, and Kagan, JJ., filed a dissenting opinion.*[31]

Therefore, as it follows from official information, the vote of the Justices was far from unanimous. Contrarily, this decision was taken by a narrow majority.

6. Possible Impacts on the EU and the Continental Legal System

This section discusses the possible impacts on the EU and the continental legal system. First, the author does not believe that the current case-law development in the U.S. will have any significant impact on the continental legal culture in near

30 Center for Reproductive Rights´ website. *After Roe Fell: Abortion Laws by State* [Online]. Available at https://reproductiverights.org/maps/abortion-laws-by-state/ (Accessed: 30 November 2022).

31 U.S. Supreme Court website. *Dobbs v. Jackson Women's Health Organization, 597 U.S. ___ (2022)* [Online]. Available at: https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf (Accessed: 30 November 2022).

future, as the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights based on it does not have a direct connection (and are not even closely dependent) with the legislative development in the United States. Similarly, this 'European' development is not dependent on the jurisprudence of U.S. courts. The European Court of Human Rights monitors (only) compliance with the European Convention on Human Rights, it is not dependent on anything else.

The following paragraphs briefly describe the view of the European Court of Human Rights on the given issue. Article 2 (Right to life) and Article 8 (Right to respect for private and family life) of the European Convention on Human Rights are essential. It is noteworthy that the right to abortion does not arise from the European Convention on Human Rights. The specific circumstances for determining the conditions under which an abortion can be conducted under those two articles are entrusted to individual states (in this case, to contracting parties to the European Convention on Human Rights). In general, the state's legal regulation of artificial abortion must not be in conflict with the European Convention on Human Rights, that is, it must not be in conflict with Article 2 or Article 8 of the European Convention on Human Rights. Therefore, legislation at the level of individual state should not contradict the jurisprudence of the European Court of Human Rights, as it is the only judicial authority authorised to interpret the European Convention on Human Rights. However, the European Court of Human Rights does not define specific requirements, as it does not have that authority, unlike the U.S. Supreme Court.[32,33]

32 It is appropriate to recall that the European Court of Human Rights does not have the authority to annul the decisions of state courts. Thus, the European Court of Human Rights can only declare that a specific decision has violated the European Convention on Human Rights. The only statement that is directly binding for states (and is therefore legally constitutive) is the part of the decision of the European Court of Human Rights on the state's obligation to pay the compensation. It is then up to the activity of the parties to the proceedings and the decision of the national courts whether – on the basis of the decision of the European Court of Human Rights – they proceed to cancel the original court decision. Based on this, further legal steps may be taken. For details, see KMEC, J., KOSAŘ, D., KRATOCHVÍL, J., BOBEK, M. (eds.) (2012) *European Convention on Human Rights*. Commentary. 1st edition. Prague: C.H. Beck, p. 323.

33 In the event that the European Court of Human Rights concludes that the decision of the state's courts is in conflict with the European Convention on Human Rights, then it is up to the participants of the legal original legal dispute to – based on the decision of the European Court of Human Rights – demand annulment of the original decision through the national courts, for example, by renewal of the original proceeding or by a new trial (the specific procedural regulation depends on the legal system of the given state). Therefore, the European Court of Human Rights does not itself have cassation jurisdiction. Its authority results from the contractual agreement – from the European Convention on Human Rights. Therefore, the obligation to comply with the decision of the European Court of Human Rights is essentially a contractual obligation to which individual states (as contracting parties) have committed themselves. For details, see Articles 34, 41, 42, 43, 44, 45, 46 of the European Convention on Human Rights.

Jurisprudence of the European Court of Human Rights does not (and cannot) even comment whether individual states should accept abortion legislation in the national legal order, as the European Court of Human Rights does not have jurisdiction. Therefore, the European Court of Human Rights is in accordance with the European Convention on Human Rights, only authorised to assess whether there has been a violation of the European Convention on Human Rights in a given specific case. The European Court of Human Rights in its jurisprudence came to the conclusion that if states allow artificial termination of pregnancy, or if they allow to do so but under certain conditions, then they are obliged to adopt such measures that the women are really able to undertake abortion (therefore, if the state allows abortion under certain conditions, then it must ensure abortion will be available under such conditions). The legislative framework of states should be created such as to consider both the mother's interest in health and the child's interest in the protection of human life, and finally the interest of the given state in the protection of fundamental rights and freedoms, and simultaneously such as to respect the obligations of states arising from the European Convention on human rights.[34] This requirement has been present in European Court of Human Rights jurisprudence for several decades. Although such requirements may appear vague or general, with regard to the limited jurisdiction of the European Court of Human Rights, this is a relatively fundamental and important interpretation of the European Convention on Human Rights. It is essential for the reason that it results in direct (albeit more generally defined) obligations for individual states. Based on this interpretation, states are thus obliged to fulfil certain obligations to protect fundamental rights and freedoms. Otherwise, they expose themselves to the fact that the European Court of Human Rights, based on the applications, will repeatedly disagree with the decisions of the state courts and will impose an obligation on the state to provide adequate compensation.

As is clear from this extremely brief description, the roles and jurisdictions of the U.S. Supreme Court and the European Court of Human Rights are different. The jurisdiction of the U.S. Supreme Court follows directly from the U.S. Constitution and the Court can directly intervene in the decision-making practice of individual U.S. courts, but the jurisdiction of the European Court of Human Rights is based on a contractual consensus in the form of the European Convention on Human Rights, which does not have the direct power to intervene in the decision-making practice of national courts (and there are many other differences, not restricted to the matter of abortion).

34 In details see ECHR, case of A, B and C v. Ireland, judgement of the Grand Chamber, application no. 25579/05, and EHCR, case of Tysiąc v. Poland, judgement of the Fourth Section, application no. 5410/03.

Despite the above, it is noteworthy that the USA is one of the most developed countries in the world, where liberty prevails. Therefore, if the highest possible and respected court authority in one of the most developed countries concludes that right to abortion does not arise from the Constitution (and is not therefore protected by the Constitution), the national courts in any of the EU states (or even the European Court of Human Rights itself) may follow this idea in future.

Furthermore, the Constitutional Court of the Republic of Poland arrived at a conclusion with similar impacts (meaning widely restricting the access to abortion) in its decision file no. K 1/20 of 22 October 2020.[35]

Such ideas have no physical boundaries, and therefore, there exists a possibility that they could be accepted one step at a time by courts of the individual EU states in future, or even by European Court of Human Rights.

The author believes such legal opinions would present a significantly incorrect and unwanted move towards ultra-conservatism in the relatively liberal EU, derived from absurd religious standards of human life protection at all costs even in situations where the fetus is not medically capable of existing on its own (particularly the first trimester of pregnancy). Such a way of thinking, i.e. legal opinions, where even a part of the arguments (thoughts) could come from religion and from the opinion that human life should be protected at all costs, sometimes without regard to the decision and the life of the mother, should not be widely accepted in author´s personal opinion.

7. Conclusion

The U.S. Supreme Court is the highest judicial authority that can be reached within the United States judiciary. Its decision is final and irreversible. However, the U.S. Supreme Court has ruled in the past that it may change its previous decisions under certain circumstances. This approach is logical, because if a previous decision of the

35 The Polish Constitutional Court has been discussing an abortion law which, in its original form, has severely restricted women's right to abortion. Until autumn of 2021, women were only allowed to undergo abortions in cases where they became pregnant as a result of rape or incest. Exceptions were also made for women who would endanger their health or life during pregnancy or if there was a suspicion of serious harm to the fetus. However, following a review of the abortion law, the Polish Constitutional Court concluded that abortion owing to fetal damage or developmental defects was contrary to the Polish Constitution. According to the Court's ruling, this would be a violation of the Constitution, even if it was such a serious case that the chances of the child's survival after birth would be minimal which resulted in country-wide demonstrations. The original text of this decision is available on the website of the Polish Constitutional Court, via bookmark '*Wyrok z dnia 22 października 2020*'. Polish Constitutional Court website [Online]. Available at: https://ipo.trybunal.gov.pl/ipo/view/sprawa.xhtml?&pokaz=dokumenty&sygnatura=K%201/20 (Accessed: 30 November 2022).

U.S. Supreme Court were once and for all binding and unchangeable even for the U.S. Supreme Court itself, the legal system could hardly evolve, and adapt to the right of the people and the times.

Abortion and abortion policy is currently widely discussed across the United States. For several decades, it was clear beyond any doubt that abortion is, in essence, a fundamental human right arising from the Constitution itself (Fourteenth Amendment) and that a woman can – while respecting certain set rules – undergo abortion, particularly in the first trimester, at virtually any time, according to her will. In the second and third trimesters, under current rules, the right to abortion decreases according to the stage of the woman's pregnancy (in general, the longer the fetus develops, the more American law protects life and the more difficult the abortion). The U.S. Supreme Court in the *Roe v. Wade* and *Planned Parenthood of Southeastern Pa. v. Casey* cases, which was corrected by some other cases, concluded from the Ninth and Fourteenth Amendments to the U.S. Constitution that the right to abortion is a fundamental right, and therefore, must be granted adequate protection at the federal level. Thus, the legislatures of the individual states were forced to amend their legislation to comply with the *Roe v. Wade* and *Planned Parenthood of Southeastern Pa. v. Casey* judgements.

However, what was regarded as a certain and fundamental women's right arising from the Constitution, has been overruled by the U.S. Supreme Court in 2022. According to the latest landmark decision, the same U.S. Supreme Court, which insisted on its previous conclusions, has overruled its own long lasting case law on abortion. Therefore, the 'revolutionary' idea and the 'overruling' of the previous decisions resulted in the conclusion that the right to abortion does not arise from the Constitution, and therefore, individual states can regulate the right to abortion.

According to the legal opinion of the U.S. Supreme Court, expressed in this decision, and as the right to abortion does not arise from the U.S. Constitution anymore, each U.S. state can now apply different rules regarding the right to abortion. Some of the states, particularly southern states, legally narrowed the right to abortion, whereas some have applied rules with exceptions. Contrarily, some of the states have set wider legal boundaries and made abortion more liberal than ever.

Nevertheless, *Dobbs v. Jackson Women's Health Organization* is one of the most important decisions of recent times, which will continue to give rise to many professional discussions.

Bibliography

- A, B and C v. Ireland, Application no. 25579/05, Judgement of the Grand Chamber 16. December 2010.
- Center for Reproductive Rights website: https://reproductiverights.org/.
- Constitution of the United States of America.
- Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.
- Decision of the Polish Constitutional Court, file no. K 1/20 of 22th October 2020.
- Dobbs v. Jackson Women's Health Organization, 597 U.S. (2022).
- Gestational Age Act, Mississippi Code § 41-41-191 (2018).
- June Medical Services L.L.C. v. Russo, 591 U.S. (2020).
- Kmec, J., Kosař, D., Kratochvíl, J., Bobek, M.K (2012) *European Convention on Human Rights*. Commentary. 1st edition. Prague: C.H. Beck.
- Knapp, V. (1995) *Theory of Law*, 1. edition. Prague, C.H.Beck, ISBN 80-7179-028-1.
- Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).
- Polish Constitutional Court website: https://ipo.trybunal.gov.pl.
- Roe v. Wade, 410 U.S. 113, (1973).
- The Constitution of Poland, April 2, 1997.
- The Library of Congress of the United States website: https://www.loc.gov/.
- The White House website: https://www.whitehouse.gov/.
- U.S. Courts internet website: https://www.uscourts.gov.
- U.S. Courts internet website: https://www.uscourts.gov.
- Whole Woman's Health v. Hellerstedt, 579 U.S. (2016).

Ivan JOKANOVIĆ*

Lack of conformity of goods with the contract and sustainability issue – Directive (EU) 2019/771

ABSTRACT. *This paper analyses the provisions of Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods from the sustainability perspective. In order to determine whether the legal solutions enshrined in the mentioned Directive represent a novelty, the paper also focuses on the provisions of Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees. This article aims to assess the contribution of Directive (EU) 2019/771 to achieving more sustainable consumption patterns. The issues covered concern the requirements of conformity, the legal guarantee period, the obligation to provide spare parts, the primary and secondary set of remedies, the commercial guarantee, and the expected future steps toward the amendments to Directive (EU) 2019/771.*

ALTHOUGH Directive (EU) 2019/771 explicitly mentions achieving more sustainable consumption patterns and a circular economy and encouraging sustainable consumption, it may be stated that these notions are not considered to a sufficient extent. Namely, the right to repair is not prioritised over the right to a replacement, while the obligation to provide spare parts is not included among the objective requirements of conformity. The opportunity granted to the Member States to allow the consumer to opt for a specific remedy if the lack of conformity appears within a period not exceeding 30 days after the delivery may be considered another example of neglecting the mentioned notions.

KEYWORDS: *consumer protection, Directive (EU) 2019/771, Directive 1999/44/EC, sustainability, more sustainable consumption patterns, circular economy.*

1. Introduction

The issues of consumer protection and sustainable development are included in the Treaty on the Functioning of the European Union. It stipulates that 'consumer

* PhD Candidate at the University of Miskolc and Researcher at the Central European Academy, Budapest. https://orcid.org/0000-0003-3016-6178

https://doi.org/10.62733/2023.1.93-102

protection requirements shall be taken into account in defining and implementing other Union policies and activities.'[1] The fundamental importance of sustainability is accentuated by the particular attention devoted to promoting sustainable development in integrating environmental protection requirements into the definition and implementation of the European Union's policies and activities.[2] Considering the European Union's endeavour to ensure consistency between its policies and activities,[3] it may be stated that a shift toward more sustainable consumption seems possible.[4] Concerning the consumer's legal position when the goods purchased do not conform to the contract, the first step towards the achievement of a high level of consumer protection was taken in 1999 with the adoption of Directive 1999/44/EC of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees (hereinafter referred to as 'Directive 1999/44/EC'), that touched the core of consumer sales.[5] This Directive established a basic common standard to be applied in the Member States.[6] It is worth noting that it followed the minimum harmonisation approach, allowing Member States to adopt or maintain more stringent provisions to ensure a high level of consumer protection.[7] Directive 1999/44/EC was repealed by Directive (EU) 2019/771 of the European Parliament and of the Council on certain aspects concerning contracts for the sale of goods (hereinafter referred to as 'Directive (EU) 2019/771'). This Directive is characterised by maximum harmonisation, precluding Member States from maintaining or introducing divergent provisions in their national law, including either more or less stringent provisions aimed at ensuring a different level of consumer protection unless otherwise provided for in the same Directive.[8] The gist of this article is the assessment of specific legal solutions contained in Directive (EU) 2019/771 from the sustainability perspective. To determine whether the contribution of the way of regulation of a particular issue present in Directive (EU) 2019/771 to the achievement of more sustainable consumption patterns represents a novelty, the provisions of Directive 1999/44/EC are considered as well. This article analyses issues such as requirements of conformity, the legal guarantee period, the availability of spare parts, the primary and secondary set of claims, and the commercial guarantee. Finally, it also includes the expected future steps in this field expressed by the European Commission and the European Parliament documents. This paper

1 Treaty on the Functioning of the European Union, Art. 12.
2 Treaty on the Functioning of the European Union, Art. 11.
3 Treaty on the Functioning of the European Union, Art. 7.
4 Van Gool and Michel, 2021, p. 137.
5 Howells et al., 2018, p. 187; Capilli, 2007, pp. 1682-1683.
6 Twigg-Flesner, 2001, p. 115.
7 Directive 1999/44/EC, Art. 8, Sec. 2.
8 Directive (EU) 2019/771, Art. 4.

aims to determine whether Directive (EU) 2019/771 brought a significant change from the point of view of sustainability.

2. Requirements of conformity

The European legislator in Directive (EU) 2019/771 introduced differentiation between objective and subjective requirements for conformity. Objective requirements apply to each sales contract, even when nothing specific was agreed upon between the contractual parties in the particular case, while subjective requirements supplement them, depending on the will of the parties expressed through the sales contract.[9] The application of the subjective requirements for conformity directly derives from the specific relationship between the contractual parties.[10] It may be stated that sustainability was taken into account in this part by explicitly referencing the notion of durability.

Primarily, Directive (EU) 2019/771 defines durability as 'the ability of the goods to maintain their required functions and performance through normal use.'[11] The essence of this definition is that the goods should remain in conformity with the sales contract during a certain period following the delivery, i.e., not only at the exact moment of delivery.[12] However, it should be noted that such a definition is rather meagre since it does not contain any direct reference to the passing of time.[13]

Furthermore, the European legislator specifies, among the necessary objective requirements for conformity, that the goods shall be

> 'of the quantity and possess the qualities and other features, including in relation to durability, functionality, compatibility, and security normal for goods of the same type and which the consumer may reasonably expect given the nature of the goods 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.'[14]

In this case, assessing the notion of durability is linked to determining the nature of the goods of the same type and the consumer's reasonable expectations. Directive

9 Twigg-Flesner, 2020, p. 56.
10 Mišćenić et al., 2021, p. 55.
11 Directive (EU) 2019/771, Art. 2, Sec. 13.
12 Zoll et al., 2020, p. 534; Cárcamo, 2022, p. 151.
13 Goldar, 2021, p. 99.
14 Directive (EU) 2019/771, Art. 7, Sec. 1 (d).

(EU) 2019/771 also offers more indications in Recital 32, apart from acknowledging the importance of ensuring longer durability of goods for 'achieving more sustainable consumption patterns and a circular economy.' Namely, when assessing the durability in the sense of the objective requirement for conformity, 'the possible need for reasonable maintenance of the goods, such as the regular inspection or changing of filter in a car', together with 'all other relevant circumstances, such as the price of the goods and the intensity or frequency of the use that the consumer makes of the goods' should be taken into consideration. It can be said that the notion of durability is relatively flexible because the period in which the goods should maintain their required functions and performance depends on the nature of the specific goods and the circumstances of the case.

Regarding the subjective requirements for conformity, there is no obstacle for the contractual parties impeding them from inserting any claim concerning durability in the sales contract. Directive (EU) 2019/771 in the above-mentioned Recital 32 enables the consumer to rely on any specific durability information if it is indicated in any pre-contractual statement forming part of the contract as a part of the subjective requirement for conformity. However, it should be stressed that there is no obligation to include any specific durability information in the sales contract; it is subjected exclusively to the will of the contractual parties.

Moreover, the question arises whether the inclusion of the notion of durability can successfully combat planned obsolescence, defined as 'a situation in which goods are deliberately made or designed so they do not last for a long period of time.'[15] This practice is detrimental to the environment since it causes a substantial waste of resources and energy due to the accelerated replacement of goods coupled with population growth.[16] Certain authors give an affirmative answer to this question, stating that the notion of durability encompasses 'repairability.'[17] On the other hand, some authors underline that the circumstance that the seller is not obliged to provide any specific durability information or information on the lack of planned obsolescence to the consumer mitigates the effectiveness of the public statements made by the seller, stressing the need for the creation of an index of the durability of goods.[18] It is important to mention that including the notion of durability is an essential novelty since Directive 1999/44/EC did not contain this term. Nevertheless, on a practical level, introducing this notion as a part of the objective requirements for conformity cannot be considered 'a real novelty' but rather 'a symbolic milestone.'[19] Namely, Directive

15 https://dictionary.cambridge.org/dictionary/english/planned-obsolescence (accessed on 14 January 2023)
16 Michel, 2018, p. 208.
17 Van Gool and Michel, 2021, p. 138.
18 Cárcamo, 2022, p. 153.
19 Van Gool and Michel, 2021, p. 138.

1999/44/EC contained a general obligation imposed on the seller to deliver goods to the consumer that are in conformity with the sales contract, establishing a rebuttable presumption of conformity if certain prescribed requirements are satisfied.[20] The presumption of conformity subsisted, *inter alia*, when the goods showed the quality and performance which were considered normal in goods of the same type and that the consumer could reasonably expect, given the nature of the goods and taking into account any public statement on the specific characteristics of the goods made about them by the seller, the producer, or his representative, particularly in advertising or in labelling.[21] Although the term durability was absent from this provision, legal theory deemed that it was implicitly covered by the consumer's reasonable expectations regarding quality.[22] However, the explicit reference to durability in Directive (EU) 2019/771 is laudable.

3. Legal guarantee period

The legal guarantee period is connected to the notion of durability. The European legislator states that the seller is liable to the consumer for any lack of conformity that exists when the goods are delivered, which becomes apparent within two years of that time.[23] The legal guarantee period is longer for goods with digital elements when the contract provides a continuous supply for more than two years.[24] However, Directive (EU) 2019/771 permits the Member States to maintain or introduce longer time limits.[25] It is important to underline that this provision represents an exception from the maximum harmonisation clause. Furthermore, as stipulated by Recital 42 of the same Directive, the Member States can envisage only a limitation period for the consumer's remedies without being obliged to introduce a specific period within which the lack of conformity has to become apparent for the seller to be liable.

The chosen minimal harmonisation approach can be deemed beneficial to sustainability and a circular economy since a longer legal guarantee period may enhance the production of goods with greater durability and increase the chance that consumers will demand repairs of the flawed goods instead of purchasing new ones.[26] On the other hand, it can be argued that a unique two-year legal guarantee period is not appropriate for all types of goods, relatively protecting their durability.

20 Directive 1999/44/EC, Art. 2.
21 Directive 1999/44/EC, Art. 2, Sec. 2 (d).
22 Howells et al., 2018, p. 183; Twigg-Flesner, 2001, p. 120.
23 Directive (EU) 2019/771, Art. 10, Sec. 1.
24 Directive (EU) 2019/771, Art. 10, Sec. 2.
25 Directive (EU) 2019/771, Art. 10, Sec. 3.
26 Van Gool and Michel, 2021, p. 141.

It is too short for expensive products considered more durable, while it is sufficient or excessive for cheaper products.[27]

Directive 1999/44/EC also restricted the seller's liability for any lack of conformity that became apparent within two years of the delivery of the goods.[28] The Member States could also extend this two-year guarantee period due to the minimum harmonisation character of the mentioned Directive.[29] The same argument that it was too short for more expensive, durable goods also applied to the legal solution in this Directive.[30] Considering this, it can be said that on a practical level, Directive (EU) 2019/771 did not bring any tangible change in this regard.

4. Spare parts

Before discussing the remedies available to the consumer, the issue related to spare parts should be examined. Namely, Directive (EU) 2019/771 does not explicitly impose on the seller the obligation to provide spare parts throughout a period as an objective requirement for conformity. In Recital 33 of the same Directive, the European legislator states that sellers may make use of spare parts to fulfil their obligation to repair goods in the event of a lack of conformity that existed at the time of delivery. Moreover, it envisages that the absence of the specific obligation imposed on the seller to provide spare parts does not affect other provisions of national law obliging the seller, the producer, or other persons constituting a link in the chain of transactions to ensure that spare parts are available or to inform consumers about such availability. Therefore, the duty to provide spare parts is linked to the parties' agreement. It may be said that the fact that the European legislator did not insert the obligation to provide spare parts as part of the objective requirements for conformity demonstrates the lack of will to incentivise or prioritise repair over replacement.[31]

Albeit this kind of obligation may be desirable from the point of view of sustainability as a measure of prioritising repair, it, on the other hand, can be considered disproportionate for small entrepreneurs since it is easy to imagine that they often may not have enough space to store the spare parts for the sold goods nor may they have the necessary instruments for bringing the good into conformity by repair.[32]

Conversely, Directive 1999/44/EC did not make any reference to spare parts. Thus, the mere mention of this term in Directive (EU) 2019/771 is a novelty, although without

27 Cárcamo, 2022, p. 153.
28 Directive 1999/44/EC, Art. 5, Sec. 1.
29 Howells et al., 2018, p. 196.
30 Bourgoignie, 2020, p. 35.
31 Cárcamo, 2022, p. 154.
32 Zoll et al., 2020, p. 536.

any practical change. Namely, taking into account the minimum harmonisation character of Directive 1999/44/EC, the Member States could introduce or maintain provisions on after-sale services or the availability of spare parts.[33] For example, the Irish Sale of Goods and Supply of Services Act of 1980 introduced an implied warranty that spare parts and an adequate after-sale service would be made available by the seller in such circumstances as stated in an offer, description, or advertisement by the seller on behalf of the manufacturer or his own behalf and for such period as stated or, if no period is stated, for a reasonable period.[34]

5. Primary set of claims

Before examining the specific regulation of the remedies available to the consumer, the focus will be placed on repairing the goods. The repair can be considered 'an inherently sustainable remedy.'[35] It can be said that, compared to other recycling methods, it is more efficient in conserving embodied energy, materials, and water, while the transportation costs needed to put the goods back into use are lower.[36] Moreover, the repair activity can benefit local communities, particularly small businesses and individual repairers, with the possibility of enhancing the growth of large repair providers.[37] However, it is important to mention that increased repairability can have a negative financial impact on specific economic sectors. It is to be expected that it can harm manufacturers' turnover due to the reduction in the sale of new goods, which the increased production of spare parts can partially neutralise.[38]

From the consumer's point of view, the repair is not always the most desired legal remedy compared to its counterpart, replacement. First, the consumer may prefer the replacement because the repair requires time for its completion, during which the consumer cannot use the goods. Additionally, replacement is seldom performed simultaneously, and the consumer will get completely new goods.[39] The rapid development of the goods expressed through putting new products on the market in a relatively short time influencing the consumer's will to buy them, as well as consumers' confidence in the successful completion of the repair, is also relevant.[40] All these factors represent a notable impediment to the prioritisation of the repair

33 Bourgoignie, 2020, p. 35.
34 The Sale of Goods and Supply of Services Act (1980), Part II, Sec. 12, p. 1.
35 Van Gool and Michel, 2021, p. 14.
36 Ellen MacArthur, 2016, p. 6.
37 Deloitte, 2016, p. 67.
38 Deloitte, 2016, p. 69.
39 Van Gool and Michel, 2021, p. 144.
40 McCollough, 2009, cited in Terryn, 2019, p. 854.

in a society where consumption is the most important field of life and an individual should act as 'a dissolute, recklessly hysterical consumer.'[41] It is also well-known that (multinational) companies spend a large sum of money 'to whet consumers' appetites for the most recent products with the newest design features.'[42]

Directive (EU) 2019/771 in Recital 48 stresses the fundamental importance of repairs, stating that 'enabling consumers to require repair should encourage sustainable consumption and could contribute to the greater durability of products.' However, this statement can be considered a mere homage to the sustainable benefits of the right to repair. The mentioned Directive indeed distinguishes repair and replacement as the primary and appropriate price reduction and the termination of the contract as the secondary set of claims, establishing a hierarchy of consumers' rights in the event of a lack of conformity of the goods with the contract.[43] Substantially, the consumer is free to choose between repair and replacement.

The consumer's liberty of choice is excluded when the chosen remedy is impossible or, compared to the other remedy, imposes costs on the seller that are disproportionate, taking into consideration all circumstances, including the value the goods would have if they were in conformity with the contract, the significance of the lack of conformity, and whether the alternative remedy could be provided without significant inconvenience to the consumer.[44] The impossibility of the chosen remedy may be legal or factual, as stated by Recital 48. It should be noted that the disproportionate nature of the costs is to be interpreted in economic terms. Although the fundamental importance of the right to repair is accentuated in the mentioned Recital 48, the reasons connected to sustainability or sustainable consumption seem not to be taken into account in this regard.[45] It can be stated that the European legislator gave precedence to the protection of the consumer over environmental protection.[46] The legal theory affirms that the explicit insertion of the environmental impact as a circumstance to be taken into account while assessing whether the remedy chosen imposes disproportionate costs on the seller would be 'a step forward.'[47] Moreover, it may also be said that the absence of the explicit obligation to provide spare parts as the objective requirement for conformity can contribute to an easier limitation of the consumer's freedom of choice due to the factual impossibility of performing the repair.

Compared to the repealed Directive 1999/44/EC, apart from merely stressing the importance of the right to repair in terms of sustainability, Directive (EU) 2019/771 did

41 Antonić, 2013, p. 274.
42 McCollough, 2009, cited in Terryn, 2019, p. 854.
43 Directive (EU) 2019/771, Art. 13, Sec. 1.
44 Directive (EU) 2019/771, Art. 13, Sec. 2.
45 Imbruglia, 2022, p. 360; Cárcamo, 2022, p. 156; Terryn, 2019, p. 856; Zoll et al., 2020, p. 542.
46 Cárcamo, 2022, p. 156.
47 Terryn, 2019, p. 856.

not bring any novelty in this respect. Namely, Directive 1999/44/EC also gave equal merit to the rights of repair and replacement as the primary set of remedies, limiting the consumer's liberty of choice because of the same reasons as those contained in Directive (EU) 2019/771 (impossibility or disproportionality).[48] The disproportionality criterion was apparently to be interpreted in economic terms or, more precisely, in terms of disproportionate costs.[49] The sustainability issues were not taken into consideration. However, the Member States could alter the Directive's provisions due to its minimum harmonization character. For example, Croatia did not transpose the provisions limiting the consumer's freedom of choice, while the hierarchy of rights was divergent, consisting of repair, replacement, and appropriate price reduction as the primary set of claims with the termination of the contract as the sole subsidiary remedy.[50] An attractive legal solution was present in Hungary where the consumer was entitled to, *inter alia*, repair the lack of conformity himself/herself or to have it repaired at the seller's expense.[51] The self-repair may be beneficial from the point of view of environmental protection since it saves transportation costs and renders the use of regenerated spare parts possible.[52] Due to the maximum harmonisation character of Directive (EU) 2019/771, the existence of specific remedies, including self-repair, is not admissible anymore in the general consumer sales context.

Finally, the possibility of remanufacturing as a remedy available to the consumer should be examined at this point. Remanufacturing can be defined as 'the process of returning a used product to like-new condition with a warranty to match,' which 'includes sorting, inspection, disassembly, cleaning, reprocessing and reassembly', while 'parts which cannot be brought back to original quality are replaced, meaning the final remanufactured product will often be a combination of new and reused parts.'[53] In this regard, the Quelle judgment rendered by the Court of Justice of the European Union (hereinafter referred to as the CJEU) may be relevant. In the mentioned judgment, the CJEU ruled that Art. 3 of Directive 1999/44/EC, titled Rights of the Consumer,

> 'is to be interpreted as precluding national legislation under which a seller who has sold consumer goods which are not in conformity may require the consumer to pay compensation for the use of those defective goods until their replacement with new goods.'[54]

48 Directive 1999/44/EC, Art. 3, Sec. 3.
49 Twigg-Flesner, 2001, p. 123.
50 Meškić et al., 2010, p. 530; Petrić, 2006, p. 118.
51 Chapter VI, Sec. 6 (159), p. 2 (b) of the Civil Code of Hungary
52 Zoll et al., 2020, p. 540.
53 Vito, 2018, p. 18.
54 Case C-404/06 of 17 April 2008, para. 43.

The European legislator incorporated this solution in Directive (EU) 2019/771,[55] which stipulates that the consumer is not liable to pay for normal use made of the replaced goods during the period preceding their replacement.[56] Although the CJEU did not consider sustainability arguments, it seems that the replacement is to be performed exclusively with new goods, which implies that remanufacturing is not admissible.[57] On the other hand, there are voices in legal theory asserting that remanufacturing would be a permitted remedy if remanufactured goods had been initially acceptable under the contractual conformity requirements.[58] A preliminary question addressed to the CJEU would dispel any doubt on this subject.[59]

6. Secondary set of claims

As previously mentioned, the secondary set of claims consists of the appropriate price reduction and the termination of the contract. Directive (EU) 2019/771 stipulates that the price reduction shall be proportionate to the decrease in the value of the goods that the consumer received compared to the value the goods would have if they were in conformity.[60] On the other hand, Directive 1999/44/EC did not define this remedy or provide guidance on its calculation.[61] It can be said that the price reduction can be beneficial from the point of view of sustainability. Namely, it allows the contractual parties to avoid costs or externalities connected to the transportation, the performance of repair, or the management of the goods that are not in conformity with the contract.[62] On the contrary, nothing hinders the consumer from purchasing alternative goods, causing, in that manner, new product lifecycle externalities.[63] Moreover, if the violation of eco-standards causes a lack of conformity, the appropriate price reduction may be ecologically inefficient. That is why legal theory recommends excluding this remedy in cases where its realisation would cause disproportionate environmental costs, leaving the consumer with the termination of the contract as the only secondary remedy.[64] It is important to underline that Directive (EU) 2019/771, as mentioned in the previous chapter, limits the consumer's freedom of choice between repair and replacement due to the disproportionate nature of the

55 Carvalho, 2020, p. 46.
56 Directive (EU) 2019/771, Art. 14, Sec. 4.
57 Terryn, 2019, p. 861.
58 Van Gool and Michel, 2021, p. 146.
59 Mak and Lujinović, 2019, cited in Van Gool and Michel, 2021, pp. 145-146.
60 Directive (EU) 2019/771, Art. 15.
61 Howells, Twigg-Flesner and Wilhelmsson, 2018, p. 194.
62 Zoll et al., 2020, pp. 542-543.
63 Van Gool and Michel, 2021, p. 146.
64 Zoll et al., 2020, p. 543.

costs, seemingly without taking into account the environmental impact. A preliminary question addressed to the CJEU on the possibility of prohibiting the use of the appropriate price reduction due to environmental inefficiency would also remove any doubt on this subject.

Regarding the termination of the contract, it can be said that the obligation imposed on the consumer has significant potential environmental consequences. Namely, Directive (EU) 2019/771 obliges the consumer to return goods to the seller at the seller's expense.[65] On the other hand, the seller must reimburse the consumer the price paid for the goods upon receipt of the goods or evidence provided by the consumer of having sent them back.[66] The consumer's obligation to make restitution for the goods opens the environmental issues connected to their transportation to the seller, their subsequent disposal, diminished use, and the above-mentioned risk that the consumer will buy alternative goods, causing new product lifecycle externalities.[67] However, it may be said that the environmental issue related to the disposal of the returned goods is partly mitigated by a novelty introduced by Directive (EU) 2019/771.[68] Namely, the European legislator established a general rule for a situation when the lack of conformity concerns only part of the delivered goods. In this case, the consumer can terminate the contract solely in relation to flawed goods. The contract can be terminated in relation to other goods purchased together with the non-conforming goods as well if it is not reasonable to expect the consumer to accept to keep only goods that conform to the contract.[69] This legal solution may influence the disposal of the returned goods on a quantitative level by reducing its environmental costs.[70]

Moreover, Directive (EU) 2019/771 envisages that the consumer is not entitled to terminate the contract if the lack of conformity is only minor.[71] The identical provision was also contained in Directive 1999/44/EC.[72] The lack of guidance on which lack of conformity is to be considered minor can be a source of disagreements.[73] The CJEU gave an important indication in Case C-145/20. Namely, the Austrian Supreme Court of Justice referred for the preliminary ruling, *inter alia*, the question of whether the

65 Directive (EU) 2019/771, Art. 16, Sec. 3 (a).
66 Directive (EU) 2019/771, Art. 16, Sec. 3 (b).
67 Van Gool and Michel, 2021, p. 146.
68 Zoll et al., 2020, pp. 543-544.
69 Directive (EU) 2019/771, Art. 16, Sec. 2.
70 Zoll et al., 2020, p. 544.
71 Directive (EU) 2019/771, Art. 13, Sec. 5.
72 Directive 1999/44/EC, Art. 3, Sec. 6.
73 Howells et al., 2018, p. 195.

equipping of a vehicle with a defeat device[74] which is prohibited under Regulation (EC) No 715/2007 because it reduces the effectiveness of emission control systems, must be regarded as minor in the sense of the above-mentioned Art. 3, Sec. 6 of Directive 1999/44/EC if the purchaser acquired the vehicle albeit he/she was aware of the presence and operation of that device.[75] Taking into account the importance of environmental protection and the need to reduce nitrogen oxide emissions from diesel vehicles to improve air quality and comply with limit values for pollution, as emphasised by Recitals 1 and 4 to 6 of Regulation (EC) No 715/2007, the CJEU ruled that the presence of such a defeat device cannot be classified as being a minor lack of conformity. Additionally, the condition that 'the consumer would still have purchased that vehicle if he or she had been aware of the existence and operation of that device' does not make any difference in this regard.[76]

Ultimately, Directive (EU) 2019/771 does not limit the freedom of Member States to allow consumers to choose a specific remedy if the lack of conformity appears within a period not exceeding 30 days from the delivery.[77] In this case, the existence of the hierarchy of remedies is not mandatory.[78] This provision is the fruit of political compromises aiming to preserve the internal regulations of certain Member States that foresee a divergent set of remedies when a lack of conformity becomes apparent immediately after the delivery of the goods.[79] However, from the point of view of sustainability, this legal solution implying the possibility of immediate termination of the contract is not recommendable, since it seems to enhance impulsive consumption, cause additional externalities related to transportation, and raise the issue of disposal of the returned goods.[80]

7. Commercial guarantee

Directive (EU) 2019/771 defines the commercial guarantee as

74 Regulation (EC) No 715/2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information in Art. 3 (10) defines the defeat device as 'any element of design which senses temperature, vehicle speed, engine speed (RPM), transmission gear, manifold vacuum or any other parameter for the purpose of activating, modulating, delaying or deactivating the operation of any part of the emission control system, that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use.'
75 Case C-145/20 of 14 July 2022, para. 45 (3).
76 Case C-145/20 of 14 July 2022, para. 95, 96 and 97.
77 Directive (EU) 2019/771, Art. 3, Sec. 7.
78 Pomar, 2019, p. 5.
79 De Cristofaro, 2022, p. 9.
80 Van Gool and Michel, 2021, p. 143.

> 'any undertaking by the seller or a producer (the guarantor) to the consumer, in addition to the seller's legal obligation relating to the guarantee of conformity, to reimburse the price paid or to replace, repair or service goods in any way if they do not meet the specifications or any other requirements not related to conformity set out in the guarantee statement or in the relevant advertising available at the time of, or before the conclusion of the contract.'[81]

Essentially, it is a voluntary undertaking by a seller or producer in respect of the goods.[82] Commercial guarantees can be beneficial in terms of sustainability and circular economy if they provide for more sustainable remedies and a longer guarantee period compared to the legal guarantee.[83] However, regarding the length of the guarantee period, the ECC-Net Report named 'Commercial Warranties – Are They Worth the Money' related to the average duration of the commercial warranties for televisions, washing machines, and photo cameras showed that in this regard in a considerable number of cases, the benefits for the consumers are minor.[84] The commercial guarantee may also have detrimental sustainability effects. For example, it is known that certain companies offer a 'direct replacement guarantee': 'do not wait for repair but get your new product for free immediately.'[85] Such a solution that privileges replacement over repair is, undoubtedly not sustainable.

Moreover, Directive (EU) 2019/771 explicitly enables the producer to offer the consumer a commercial guarantee of durability for certain goods for a certain period, in which case the producer will be directly liable to the consumer for repair or replacement of the goods during the entire period of the commercial guarantee of durability.[86] This provision implies that the consumer can choose whether to request repair or replacement from the seller or the producer.[87] Additionally, the same Directive stipulates that the producer may offer the consumer more favourable conditions in the commercial guarantee of durability statement.[88] It is important to underline that the producer's liability depends on his/her free will to offer the commercial guarantee of durability. This legal solution represents the main novelty in this respect compared to Directive 1999/44/EC, which, as mentioned before, did not contain the notion of durability.

81 Directive (EU) 2019/771, Art. 2, Sec. 1 (12).
82 Howells et al., 2018, p. 198.
83 Van Gool and Michel, 2021, p. 146.
84 ECC-Net, 2014, pp. 62-63; DiMatteo and Wrbka, 2019, p. 519.
85 Terryn, 2019, p. 862.
86 Directive (EU) 2019/771, Art. 17, Sec. 1.
87 Marín López, 2019, p. 19; Cárcamo, 2022, p. 158.
88 Directive (EU) 2019/771, Art. 17, Sec. 1.

8. Future steps

The same Directive (EU) 2019/771 obliged the European Commission to review the application of this Directive, not later than 12 June 2024, including its provisions on remedies available to the consumer and the producer's commercial guarantee of durability and submit a report to the European Parliament, to the Council, and to the European Economic and Social Committee that should be accompanied, where appropriate, by legislative proposals.[89]

In this regard, it is important to mention that the European Commission adopted a new Circular Economy Action Plan named 'For a Cleaner and More Competitive Europe' in March 2020. This document accentuates the crucial importance of the circular economy for citizens, stating that it will 'provide high-quality, functional, and safe products, which are efficient and affordable, last longer, and are designed for reuse, repair, and high-quality recycling.'[90] The European Commission expresses its will to include in its sustainable product policy legislative initiative, *inter alia*, proposals aiming at improving 'product durability, reusability, upgradability, and reparability, addressing the presence of hazardous chemicals in products, and increasing their energy and resource efficiency.'[91] Furthermore, the new Circular Economy Plan mentions the planned future changes directly connected to Directive (EU) 2019/771, whose objective is empowering the consumer's position in the circular economy. First, the European Commission proposes revising EU consumer law to ensure that 'consumers receive trustworthy and relevant information on products at the point of sale, including on their lifespan and the availability of repair services, spare parts, and repair manuals.'[92] Additionally, creating 'a new right to repair' and considering 'new horizontal material rights for consumers' concerning, *exempli causa*, the availability of spare parts or access to repair, form part of the European Commission's agenda.[93]

Another important document in this respect is the European Parliament Resolution of 25 November 2020 – Towards a more sustainable single market for business and consumers (hereinafter: 'The Resolution'). The Resolution in Recital H explicitly mentions the need to review Directive (EU) 2019/771 by assessing measures to create the right conditions for increasing product durability and ensuring a high level of consumer protection. The European Parliament invites the European Commission to devise a broad strategy to tackle planned obsolescence by engaging with sustainable production and consumption patterns. The mentioned strategy should, *inter alia*,

89 Directive (EU) 2019/771, Art. 25.
90 The Circular Economy Plan, p. 2.
91 The Circular Economy Plan, p. 4.
92 The Circular Economy Plan, p. 5.
93 The Circular Economy Plan, p. 5.

include measures to specify the pre-contractual information to be provided on the estimated lifespan and reparability of the goods, as well as to develop and introduce mandatory labelling aimed at providing clear and easy-to-understand information to consumers on the estimated lifetime and reparability of the goods at the time of purchase.[94] It is important to stress that the estimated lifespan is to be expressed in years and/or use cycles and determined before the placement of the goods on the market utilising an objective and standardised methodology based on real-use conditions, differences in terms of intensity of use, and natural factors, among other metrics.[95] The Resolution also states that the possibility of bringing the duration of legal guarantees more into line with the estimated lifespan of the goods is to be assessed during the preparation of the review of Directive (EU) 2019/771.[96]

Furthermore, the European Parliament invites the European Commission to establish a more attractive and efficient right to repair. First, the Resolution proposes significant changes related to the availability of spare parts consisting of the encouragement of their standardisation for the sake of interoperability and innovation, setting a mandatory minimum period for the provision of spare parts that should reflect the estimated lifespan of the goods and ensuring that the price of a spare part is reasonable and cost-efficient compared to the price of the whole product and that repairers and consumers have access to the necessary spare parts without unfair hindrances.[97] The European Parliament proposes the prioritisation of repair over replacement by extending guarantees or zeroing guarantee periods for consumers who decide to choose this option and by ensuring that sellers always inform consumers about the availability of this right.[98] Finally, the Resolution calls for the assessment of the ways to facilitate repairs by establishing a legal guarantee for the parts replaced by a professional repairer when the goods are not covered by legal or commercial guarantee anymore during the preparation of the review of (EU) 2019/771, as well as for encouraging Member States to introduce incentives which promote repairs.[99]

It is essential to mention that the European Commission adopted two new proposals directly related to the topic of this paper, respectively, in March 2022 and March 2023 – Proposal for a Directive of the European Parliament and of the Council amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information (hereinafter referred to as 'The Green Transition Proposal') and Proposal

94 The Resolution, Art. 5 (a) and (b).
95 The Resolution, Art. 5 (a).
96 The Resolution, Art. 5 (e).
97 The Resolution, Art. 6 (b), (c), (d).
98 The Resolution, Art. 6 (e).
99 The Resolution, Art. 6 (f) and (g).

for a Directive of the European Parliament and of the Council on common rules promoting the repair of goods and amending Regulation (EU) 2017/2394, Directives (EU) 2019/771, and (EU) 2020/1828 (hereinafter referred to as 'The Repair of Goods Proposal'). The Green Transition Proposal amends Directive 2005/29/EC by, *inter alia*, classifying a commercial practice containing false information on the product's main characteristics, such as environmental or social impact, accessories, durability, reparability, after-sale customer service, and complaint handling as misleading.[100] Moreover, it amends Directive 2011/83/EU obliging the seller (trader) to provide the consumer information that the goods benefit from a commercial guarantee of durability and its duration in units of time, where that guarantee covers the entire good and has a duration of more than two years when the producer makes it available. This obligation applies to both contracts other than distance or off-premises contracts and distance and off-premises contracts.[101]

The Repair of Goods Proposal primarily applies to the repair of goods purchased by consumers in case of a lack of conformity that emerges outside the seller's liability established by Art. 10, Sec. 1 of Directive 2019/771.[102] However, it amends the mentioned Directive by introducing the rule stipulating that where the costs for replacement are equal to or greater than the costs for repair, the seller shall repair the goods to bring them into conformity.[103] This provision essentially thwarts the consumer's liberty of choice, enabling the seller to frustrate the consumer's request to replace the goods and repair them instead each time the repair costs are equal to or lower than the replacement costs. The prioritisation of the repair depends upon its economic price compared to the replacement. Substantially, the consumer can obtain replacement of defective goods only when replacement costs are lower than repair costs. This Proposal does not indicate how repair and replacement costs should be calculated.

9. Conclusion

Directive (EU) 2019/771, unlike its predecessor Directive 1999/44/EC, explicitly mentions more sustainable consumption patterns, sustainable consumption, and a circular economy. It defines the notion of durability, including it among the objective requirements for conformity and envisaging the possibility for the producer to offer the consumer a commercial guarantee of durability. The direct reference to these notions is laudable. However, the legal theory stressed that the notion of durability

100 The Green Transition Proposal, Art. 1, Sec. 2 (a).
101 The Green Transition Proposal, Art. 2, Sec. 2 (ea), Art. 2, Sec. 3 (ma).
102 The Repair of Goods Proposal, Art. 1, Sec. 2.
103 The Repair of Goods Proposal, Art. 12.

was implicitly covered in Directive 1999/44/EC by the consumer's reasonable expectations related to the quality of the goods.

Regarding other issues analysed in this paper, it can be stated that Directive (EU) 2019/771 did not bring significant novelties in terms of sustainability. First, the right to repair is not prioritised over the right to replace the goods. Sustainability or environmental impact seems not to be included among the reasons that exclude the consumer's liberty of choice between repair and replacement. At the same time, the obligation to provide spare parts is not part of the objective requirements for conformity. Moreover, the opportunity granted to Member States to allow the consumer to choose a specific remedy without being obliged to obey the hierarchy of claims and, therefore, being able to terminate the sales contract immediately when the lack of conformity becomes apparent within a period not exceeding 30 days from the delivery of the goods is not concordant with the spirit of sustainability and sustainable consumption patterns. On the other hand, the provision stipulating that, in a situation where the lack of conformity affects only some of the delivered goods, the consumer can terminate the contract solely concerning the flawed goods is considered beneficial from the sustainability perspective. Finally, the minimal harmonisation approach to the legal guarantee period permitting the Member States to maintain or introduce longer time limits can also be deemed positive in this respect. It is important to underline that the maximum harmonisation clause, which is the main feature of Directive (EU) 2019/771, precludes the Member States from altering the legal solutions toward a more sustainable model unless otherwise provided for in the same Directive.

In sum, the contribution of Directive (EU) 2019/771 to achieving more sustainable consumption patterns, compared to Directive 1999/44/EC, seems fragile and limited. The legal theory qualified it as 'ocasión perdida/lost opportunity.'[104] Taking into account the documents and proposals adopted by the European Commission and the European Parliament, it is to be expected that future amendments to Directive (EU) 2019/771 will bring more sustainable solutions by prioritising repair over replacement, imposing on the seller the obligation to provide spare parts, together with the obligation to give pre-contractual information on the estimated lifespan and reparability of the goods.

104 Goldar, 2021, cited in Cárcamo, 2022, p. 158.

Bibliography

- Antonić, S. (2013) "Pink tranzicija u Srbiji – šest teza za razumevanje naših kulturnih prilika [Pink Transition in Serbia – six theses for concerning our cultural situation], *Kultura*, 2013/140 pp. 272-292. doi. 10.5937/kultura1340272A
- Bourgoignie, T. (2020) "Sustainable Consumption and Obsolescence of Consumer Products" in Do Amaral Junior, A., De Almeida, L., Klein Vieira, L. (eds.) *Sustainable Consumption the Right to a Healthy Environment,* Cham: Springer Nature Switzerland AG, pp. 27-48. doi: 10.1007/978-3-030-16985-5_3
- Capilli, G. (2007) "Las garantías en la venta de bienes de consumo", *Anuario de derecho civil*, 60(4), pp. 1679-1728.
- Cárcamo, R. B. (2022) "Garantías en las ventas de consumo y economía circular: ¿El inicio de un nuevo paradigma?", *Revista de Derecho Civil*, 9(2), pp. 141-186.
- Carvalho, J. M. (2020) "Introducción a las Nuevas Directivas sobre Contratos de Compraventa de Bienes y Contenidos o Servicios Digitales" in Amayuelas, E. A., Lapuente, S. C. (eds.) *El derecho privado en el nuevo paradigma digital*, Madrid: Colegio Notarial de Cataluña, pp. 31-48.
- De Cristofaro, G. (2022) "Il recepimento della Direttiva 2019/771/UE nel diritto italiano. Le opzioni fondamentali del legislatore nazionale. I limiti "soggettivi" ed "oggettivi" posti all'ambito di operatività della nuova disciplina" in De Cristofaro, G. (ed.) *La nuova disciplina della vendita mobiliare nel codice del consumo,* Torino: G. Giappichelli Editore, pp. 1-34.
- Deloitte (2016) *Study on Socioeconomic impacts of increased reparability – Final Report*. Prepared for the European Commission, DG ENV.
- DiMatteo, L. A., Wrbka, S. (2019) "Planned Obsolescence and Consumer Protection: the Unregulated Extended Warranty and Service Contract Industry", *Cornell Journal of Law and Public Policy*, 2019/28, pp. 483-544.
- ECC-Net (2014) *Market study: Commercial warranties: Are they worth the money?* [Online]. Available at: https://www.eccbelgium.be/publications (Accessed: 13 January 2023).
- Ellen MacArthur Foundation (2016) *Empowering Repair* [Online]. Available at*:* https://emf.thirdlight.com/link/cm1ae9odloe1-s53z5b/@/preview/1?o (Accessed: 12 January 2023).
- Goldar, M. G. (2021) "Propuestas para garantizar modalidades de consumo y producción sostenibles", *Revista de Fomento Social*, 76(1), pp. 91-114. doi: 10.32418/rfs.2021.299.4582
- Howells, G., Twigg-Flessner, C. and Wilhelmsson, T. (2018) *Rethinking EU Consumer Law*, London and New York: Routledge, Taylor & Francis Group. doi: 10.4324/9781315164830

- Imbruglia, D. (2022) "La sostenibilità dei rimedi consumeristici nella Direttiva 771/2019/UE e oltre", *Actualidad Jurídica Iberoamericana,* 2022/16, pp. 354-371.
- Marín López, M. J. (2019) "La Directiva 2019/771/UE, de 20 de mayo, sobre contratos de compraventa de bienes con consumidores", *Centro de Estudios de Consumo*, 2019, pp. 1-19.
- Meškić, Z., Zdraveva, N., Dabović-Anastasovska, J., Gavrilović, N. (2010) "Consumer Sales Directive (99/44)" in: *Civil Law Forum for South East Europe – Volume III – VII EU Consumer Contract Law*, Cavtat: Forum za građansko pravo za jugoistočnu Evropu, pp. 518–550.
- Michel, A. (2018), "La directive 1999/44/CE sur la garantie des biens de consommation: un remède efficace contre l'obsolescence programmée?", *Revue européenne de droit de la consommation*, 2016 (2), pp. 207-236.
- Mišćenić, E., Kunda, I., Petrić, S., Butorac Malnar, V., Vrbljanac, D., Winkler, S. (2021) *Europsko privatno pravo–posebni dio [European Private Law – Special Part]*, Zagreb, Školska knjiga.
- Petrić, S. (2006) "Odgovornost za materijalne nedostatke stvari prema novom Zakonu o obveznim odnosima" [Liability for Material Defects According to the New Law on Obligations]", *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, 27(1), pp. 87–128.
- Pomar, F. G. (2019) "El Nuevo derecho europeo de la venta a consumidores: una necrológica de la Directiva 1999/44", *Indret: Revista para el Análisis del Derecho*, 2019/4, pp. 1-7.
- Terryn, E. (2019) "A Right to Repair? Towards Sustainable Remedies in Consumer Law", *European Review of Private Law,* 27(4), pp. 851-874. doi: 10.54648/erpl2019044
- Twigg Flesner, C. (2020) „Conformity of Goods and Digital Content/Digital Services" in Amayuelas, E. A., Lapuente, S. C. (eds.) *El derecho privado en el nuevo paradigma digital*, Madrid: Colegio Notarial de Cataluña, pp. 49-78.
- Twigg-Flesner, C. (2001) "The EC Consumer Sales Directive: a lot still to do", *Canterbury Law Review*, 8(1), pp. 113-128.
- Van Gool, E. and Michel, A. (2021) "The New Consumer Sales Directive 2019/771 and Sustainable Consumption: A Critical Analysis", *Journal of European Consumer and Market Law*, 4/2021, pp. 136-148. doi: 10.2139/ssrn.3732976
- Vito (2018) *Repairability criteria for energy related products – Study in the BeNeLux context to evaluate the options to extend the product life time – Final Report, ?* [Online]. Available at: https://www.benelux.int/files/7915/2896/0920/FINAL_Report_Benelux.pdf (Accessed: 13 January 2023).
- Zoll, F. A., Południak-Gierz, K. M., Bańczyk, W. K. (2020) „Sustainable consumption and circular economy in the Directive 2019/771", Правоведение, 64(4), pp. 526-550. doi: 10.21638/spbu25.2020.406

Legal Sources

- Act V of 2013 (Civil Code of Hungary)
- Circular Economy Action Plan – For a Cleaner and More Competitive Europe
- Directive 1999/44/EC of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees
- Directive (EU) 2019/771 of the European Parliament and of the Council on certain aspects concerning contracts for the sale of goods
- Regulation (EC) No 715/2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information
- Resolution of the European Parliament of 25 November 2020 – Towards a more sustainable single market for business and consumers
- The Irish Sale of Goods and Supply of Services Act (1980)
- Treaty on the Functioning of the European Union

Decisions of the CJEU

- Case C-404/06 of 17 April 2008
- Case C-145/20 of 14 July 2022

Other Sources

- https://dictionary.cambridge.org/dictionary/english/planned-obsolescence (accessed on 14 January 2023)

Irena KLEMENČIĆ*

Financial autonomy of local self-government in Croatia

ABSTRACT: *The paper examines the notion and determinants of financial autonomy of local self-government in Croatia. The right to local and regional self-government as well as the competencies of local government units have been granted by the Constitution. Accordingly, the local government units are entitled to their own revenue, which they freely dispose of in performing their activities. However, financial autonomy is not clearly stated or defined, either at the constitutional level or at the statutory level. The primary source of local units' revenues are taxes, followed by aid, 'own source', and earmarked revenues. The special emphasis of the paper is on 'local' taxes and the role of local government units in the formal aspects of financial autonomy, i.e. designing the local taxes' notions and features. The paper also contains research on other local government units' revenues, their legislative basis and normative design, and their role in local financial autonomy. Following the setting of the normative framework, the paper goes on to investigate the substantive aspect of fiscal autonomy, i.e. the fiscal role of local government taxes and other local revenue. The conclusions of the paper sum up the findings of the research and provide recommendations with the aim of making the system more sustainable in designing and achieving the financial autonomy of local government units in Croatia.*
KEYWORDS: *financial autonomy, fiscal autonomy, local units, local taxes, Croatia*

1. Introduction

The paper deals with aspects of financial autonomy in local self-government in Croatia, with an emphasis on a narrower notion of fiscal autonomy, i.e. a focus on local taxes. In Croatia there are three levels of government: the central government and two levels of local self-government (regional, which includes counties, and

* Research and teaching assistant, Faculty of Law, University of Zagreb. https://orcid.org/0000-0003-3804-946X.

https://doi.org/10.62733/2023.1.103-124

local, which includes cities and municipalities). In this regard, the term 'financial autonomy of local self-government' encompasses all levels (local and regional) of local self-government. Following a brief constitutional provision on the right to local and regional self-government, which should involve freely disposing of their own revenue when performing their tasks, provisions with more details are contained in statutory provisions. The statutes regulating this area, namely the Local and Regional Self-government Act, as systemic act, and the accompanying Act on Financing of Local and Regional Self-Government Units, were guided by the provisions of the European Charter on Local Self-Government, especially Art. 9 thereof. Local taxes are regulated by two additional pieces of legislation.

The financial autonomy of local self-government is a logical consequence of the process of decentralisation, i.e. vertical division of government and limitation of political power, resulting in increased efficiency of public administration.[1] 'Finance follows function'.[2] The aim of decentralisation is making government more efficient, flexible, and responsive.[3] The process of decentralisation is followed by the corresponding financial effects. Accordingly, the notion of fiscal federalism describes the division of taxation and spending powers between the central and sub-national levels of government. The process of decentralisation allows governments to consider local preferences in providing public services. Improper design of decentralisation makes intergovernmental fiscal systems more complex and less equitable.[4]

Bird and Slack[5] suggest following the two principles in assigning revenues to local governments: first, 'own source' revenues should provide sufficient funding at least for the richest self-government units to cover all locally provided services used primarily by residents; second, local revenue should be collected from residents proportionately to benefits they receive from public services.

Fiscal or tax autonomy of sub-national levels of government represents an important part of financial autonomy. Besides local taxes, there are other important factors, such as non-tax revenue, financial equalisation, borrowing, and the participation of sub-national levels of government in decision-making processes. Normatively, tax autonomy is best defined in the European Charter on Local Self-Government, as it includes various aspects of the notion.

The OECD[6] discusses various methods of assessment of the degree of tax autonomy of the sub-central levels of governments. First, the revenue from state and local taxes (own and shared taxes) may be expressed as a percentage of the total revenue

1 Kregar, 2011, p. 1.
2 Bird and Slack, 2014, p. 361.
3 Bird and Slack, 2014, p. 368.
4 OECD, 2022.
5 Bird and Slack, 2014, p. 364.
6 OECD, 1999, p. 10.

(which includes taxes, non-tax revenue, and grants) of lower levels of government. This method does not consider differences in the discretion over the tax base and tax rates provided to states and local authorities, hence this method is limited to the assessment of the tax autonomy of the lower layers of government. Second, it is possible to measure the share of state and local taxes in the total tax revenue of the general government. Tax revenue, in that case, belongs fully or partly to the state or local level. The greatest level of fiscal discretion is granted to sub-central governments if they are free to determine both the taxable base and tax rates, without any limits on the revenue, base, or rate enforced by the central government. The opposite case would be the central government deciding on the tax base and tax rates for the taxes collected by sub-central governments, allowing hardly any fiscal autonomy apart from administrative discretion regarding collection procedures. When observing tax-sharing options between government levels, the degree of tax autonomy of the sub-central levels of government varies. It is crucial to determine whether the consent of lower layers of government is required when deciding on the share in total proceeds from certain taxes.

Taking this context into account, the OECD[7] states that sub-central government taxes can be divided into categories (ranked by decreasing control of the sub-central levels of government over revenue sources):

1. Sub-central government is entitled to set the tax rate and tax base
2. Sub-central government is entitled to set the tax rate only
3. Sub-central government is entitled to set the tax base only
4. Tax-sharing arrangements (sub-central government determines revenue-split; revenue-split may only be changed with consent of sub-central government; revenue-split fixed in legislation and may unilaterally be changed by central government; revenue-split determined by central government in annual budget process)
5. Central government sets the rate and base of sub-central government tax.

The sub-central level of government plays an important role in situations 1-3, as well as a part in situations under 4. In other situations, tax autonomy is limited or does not exist.

Discussions about the tax autonomy of local units and in particular local taxes can go in many directions and may involve investigating, most importantly, the competence to introduce local taxes, to set the tax rate and tax base as well as tax relief, and, finally, determine who will benefit from tax revenue – the central or local government. The paper is an investigation of what kind of taxes are appropriate to be enacted at the local level – income, property, or consumption taxes?

7 OECD, 1999, p. 11.

Besides local taxes, there are other sources of revenue for local units, such as shared taxes, fiscal equalisation funds, funding of decentralised functions, charges, fees, and contributions, which are all briefly reflected upon in the paper.

The structure of the paper is as follows. After the introductory remarks, the second part of the paper covers financial autonomy and its normative framework, the third is an analysis of the financial provisions of the European Charter of Local Self-Government, and the fourth is an examination of the financial sources of local and regional self-government. The fifth part of the paper deals with local taxes as a source of local units' funding, followed by fees and contributions as well as charges in the sixth part. The seventh part contains the case law from the Constitutional Court, followed by concluding remarks in the final chapter.

2. Financial autonomy and its normative framework

The Croatian Constitution[8] provides for a legislative framework for sub-national administrative organization by recognising the autonomy of territorial self-government. Chapter VI of the Croatian Constitution sets out provisions on community-level, local, and regional self-government. The Constitution guarantees the right to local and regional self-government to the citizens. This right is exercised through local and/or regional representative bodies whose members are elected in free elections based on direct, equal, and general suffrage. Other forms of citizen participation in the administration of local affairs are meetings, referenda, and other forms of direct decision-making.

There are two levels of self-government in Croatia. Municipalities (Croatian: općine) and towns (Croatian: gradovi) are units of local self-government[9], while counties (Croatian: županije) are units of regional self-government. The capital city of Zagreb has the status of a county. It is also possible to establish community-level self-government (Croatian: mjesna samouprava) in a community (Croatian: naselje)

8 The Croatian Constitution, OG 56/90, 135/97, 113/00, 28/01, 76/10 and 5/14. An English version is available at https://www.usud.hr/sites/default/files/dokumenti/The_consolidated_text_of_the_Constitution_of_the_Republic_of_Croatia_as_of_15_January_2014.pdf

9 In accordance with Art. 129A of the Constitution, units of local self-government administer affairs of a local nature, fulfilling the needs of citizens directly: organisation of localities and housing, zoning and urban planning, public utilities, child care, social welfare, primary health services, early and primary education, culture, physical education and sports, technical culture, consumer protection, protection and improvement of the environment, fire protection, and civil defence. On the other hand, regional self-government administers affairs of regional significance related to education, public health, zoning and urban planning, economic development, transportation and the transportation infrastructure, planning, and the development of the network of educational, health, social, and cultural institutions.

or a part of a community. Units of local and regional self-government are autonomous in administering the affairs in their jurisdiction and subject only to the review of constitutionality and legality by authorised state bodies.

The Local and Regional Self-Government Act[10] primarily contains provisions on the organisation and competencies of local and regional self-government and represents a systemic act for this area. The Act sets out in Art. 68 that the local and regional self-government units have revenue over which they have free discretion, in line with their competencies. The revenue must be proportional to the activities performed by their bodies. The revenue sources include

- municipal, city, and county taxes, surtaxes, charges, contributions, and fees;
- revenue based on ownership;
- revenue from companies and other legal persons in a local unit;
- revenue from concession charges;
- penalties and property seized during offence procedures;
- share in shared taxes;
- aid from the central government;
- other revenue, as set out by law.

The provision of Art. 68(a) contains an obligation of publicity and transparency of information on planning, drafting, adopting, and executing local budgets. The basic financial act of local and regional self-government units is the budget. Upon the proposal of a budget by the head of a municipality, mayor, or head of a county, it must be adopted by the representative body of the local/regional self-government unit. The Act contains some further provisions regarding missing the deadlines for the adoption of a budget and the implementation of a temporary budget.

The normative framework of financing local and regional self-government units in Croatia encompasses several legal sources: the Constitution, European Charter on Local Self-Governance, Local and Regional Self-Government Act, Act on Financing Local and Regional Self-Government Units, and Budget Act.

The Constitution contains scarce provisions on the financial autonomy of local self-government. Art. 131 states that the units of local and regional self-government are entitled to their own revenue, which they must have the right to dispose of freely, in the performance of their tasks. The revenue of local and regional units of self-government has to be proportional to their powers, in accordance with the Constitution and law. In that regard, the state must provide financial assistance to weaker units of local and regional self-government.

10 Local and Regional Self-Government Act, OG 33/01, 60/01, 129/05, 109/07, 125/08, 36/09, 36/09, 150/11, 144/12, 19/13, 137/15, 123/17, 98/19, 144/20.

The three principles (the right to own revenue, principle of proportionality of revenue and responsibilities, and principle of solidarity) correspond to the principles enshrined in the European Charter of Local Self-Government (see Chapter 3). This leads to the compliance of Croatian legislation with the standards and requirements of the Charter. However, improvements are possible and necessary.[11]

The Constitution remains silent on defining the type of revenue or 'own' resources of local government units. However, there is a separate piece of legislation dedicated to local government units' financing – The Act on Financing Local and Regional Self-Government Units.[12] This act is the central legal source for this issue. The Act was passed in 2017 and replaced the previous act of the same name.

3. European charter of local self-government

The Republic of Croatia is a party to the European Charter of Local Self-Government. The Charter was ratified and published in Croatia in 1997[13] and it entered into force on 1 February 1998.[14] Croatia ratified all paragraphs of Art. 9 of the Charter, relating to financial resources of local authorities.[15]

In short, the Charter provides its parties' local authorities with the right to adequate financial resources of their own, of which they may dispose freely. Their financial resources must be commensurate with their constitutional and statutory responsibilities. Local taxes and charges have been emphasised as an indispensable source of revenue. Local units should have the power to determine the tax rate. Sufficiently diversified and buoyant financial systems must enable local authorities to keep pace with the real evolution of the cost of carrying out their tasks. Financially weaker local authorities enjoy the protection of financial equalisation procedures, with the aim of correcting the effects of the unequal distribution of potential sources of financing and of the financial burden. Local authorities must be consulted on the way in which redistributed resources are allocated to them. Grants to local authorities must not be earmarked for the financing of specific projects to protect the basic freedom of local authorities to exercise policy discretion within their own jurisdiction. Local authorities must have access to the national capital market to borrow for capital investment.

11 Rogić Lugarić, 2011, p. 65.
12 The Act on Financing Local and Regional Self-Government Units, OG 127/17, 138/20.
13 Act on Confirming European Charter on Local Self-Government, OG MU 14/97.
14 Announcement on the entering of European Charter on Local Self-Government into force, OG MU 2/2007.
15 See also Dobrić, Gadžo and Bodul, 2016, p. 313.

As the implementation of the Charter provisions in Croatia goes, there are many challenges, some of which are mentioned with the aim of possible improvements. The first concern relates to paragraph 1 and the earmarked character of local units' revenues. As the purpose of local units' revenue is mostly set in advance, local units may not freely dispose of the financial resources, which limits their financial independence. The second concern is related to paragraph 2, i.e. that local units should have financial resources commensurate with their responsibilities. This is also not the reality as the local units' responsibilities surpass their financial resources. Finally, paragraph 6, which sets out the obligation to consult local units on how redistributed resources are allocated to them, has not been used in practice. Local units were never co-creators of financial policy and have not been consulted on financial issues.

4. The Act on Financing Local and Regional Self-Government Units

The Act on Financing Local and Regional Self-Government Units thoroughly lists local and regional self-government units' revenue sources. One of the most important aspects in this regard is the normative framework of tax autonomy. Rogić Lugarić[16] refers to the fiscal power of local units as delegated or derivative, since local units are not independent in designing and introducing local taxes. They are only authorised to set the local taxes' tax rates, which often makes local taxes an insufficient source for financing delegated activities.

According to the Act on Financing Local and Regional Self-Government Units, the funds necessary for performing local units' tasks must be contained in their budget. The sources of local units' funding are, as set out by Art. 3(1), tax revenues, aid, as well as 'own' and earmarked revenue.[17] As far as tax revenue goes, the provision related to joint taxes and local taxes covers it.

4.1. Revenue from contractual annual fees for concessions

The revenue from contractual annual fees for concessions represents shared revenue of the state, municipalities, and cities. These funds are collected for extracting mineral, geothermal, and natural spring water and for the use of water for the public water supply system. This revenue is shared between the state, the municipality,

16 Rogić Lugarić, 2021, p. 65.
17 For additional information on financing local and regional self-government units in Croatia, see Šinković, 2019.

and the city where the extraction is performed or the water is used. The share of the municipality and the city in revenues from the concession for extracting mineral, geothermal, and natural spring waters is 50% and the share of the state 50%. In case of the fee for concession for the use of water for public water supply system, the share of the municipality and the city is 30% and the share of the state is 70%.

4.2. Shares in personal income tax revenues

In accordance with Art. 5 of the Act, personal income tax is a shared tax whose revenues are shared between municipalities, cities, and counties. This is the only shared tax in the Croatian tax system. The share of a municipality or a city is 74%, the share of a county 20%, and the remaining 6% is used for decentralised functions.

Municipality, city, county, and the City of Zagreb, which take part in funding decentralised functions, distribute the part for decentralised functions by using 1.9% for primary education, 1.3% for secondary education, 0.8% for social care (0.2% for social care centres and 0.6% for nursing homes, 1.0% for health, and 1.0% for public firefighting teams. The Ministry of Finance, Tax administration is entitled to 1% of charged revenue for the administration of personal income tax.

4.3. Distribution of fiscal equalisation funds

Municipalities, cities, and counties whose capacities for tax revenue are lower than the referent value of capacity for tax revenue are entitled to receive funds of fiscal equalisation. The capacity for tax revenue is calculated by considering a five-year average of total revenue from personal income taxes and surtaxes, which would be charged had the highest statutory surtax rate been applied, per capita for a local unit. The referent value of the capacity for tax revenue is a five-year average of all the personal income tax revenue of all local units and revenue from surtaxes, which would be charged had the highest statutory surtax rate been applied, per capita for a local unit, increased by 50%.

Fiscal equalisation funds are non-earmarked and are considered current aid (Croatian: tekuće pomoći) from the state budget. They are calculated as the difference between the referent value of capacity of tax revenue and capacity for tax revenue of a local unit, multiplied by the number of inhabitants of that local unit.

4.4. Funding of decentralised functions

The Government may decide on the minimal amount of funds necessary for the funding of the decentralised functions of primary and secondary education, social care, healthcare, and firefighting. The funds are covered from the personal income tax revenue intended for decentralised functions. If the collected funds are lower than the amount determined by the Government, local units are entitled to aid of equalisation for decentralised functions, in the amount necessary to achieve minimum financial standard for each decentralised function.

5. Fiscal autonomy and local tax autonomy

5.1. Tax autonomy of local and regional self-government units

Bronić[18] discusses the types of taxes suitable to be entrusted to lower levels of government. Property tax, vehicles tax, and various user charges and fees, as well as local corporate income tax, are easily administered by lower levels of government over local populations without causing harmful tax competition. Bronić emphasises that the attribution of taxes to local units should depend on their expenditures (e.g. local units responsible only for collection of rubbish should be granted a user charge or a low-rate general local tax; however, if they have competencies in social services, such as health or education, they should have a more abundant source of revenue with clear political accountability). Significant tax autonomy for lower levels of government would allow them to independently decide on their own tax policy, especially on tax rates. The probability is that sub-central governments would more efficiently spend and control their own expenditures if they had control over their revenue and were accountable for their actions.

Bird[19] provides a list of the characteristics of a good sub-national tax. The tax base should be relatively immobile, giving local authorities space in setting tax rates without danger of losing their tax base. Tax revenue should be adequate to fund local needs, as well as relatively stable and predictable. The tax burden should not be put on non-residents. The tax base should be visible, which would contribute to accountability. Taxpayers should consider the tax fair and the tax should be relatively easy to administer.

18 Bronić, 2013, p. 627.
19 Bird, 2010, p. 3.

In Croatia, local taxes are not a constitutional category, and they have been regulated by two statutes. The first one, the Local Taxes Act,[20] and the other one, The Real Estate Transfer Tax Act,[21] fall into this category because their revenue belongs to local self-government units, i.e. cities and municipalities. The local units are not authorised to introduce any other taxes apart from those enumerated by these acts. Rogić Lugarić[22] explains that local self-government units (cities and municipalities) have the right to choose which local taxes to introduce (out of those set out by the statute) and prescribe the tax rates (within statutory limits). Regional self-government units (counties), however, do not enjoy any such authority – they may not choose which taxes are to be introduced, nor may they influence the tax rates.

Both the previously mentioned statutes are adopted at the national level by the Croatian Parliament. The statutes regulate most of the features of local and regional taxes; however, certain elements of taxes whose revenues belong to local self-government units may be designed by local units. Cities and municipalities may choose whether they will introduce local taxes. Also, the power of deciding on certain taxes' elements allows the local units' representative body to set out the following:

- tax rate of surtax to personal income tax;
- tax rate and competent body for assessing and collecting consumption tax;
- amount of holiday home tax, dependent on the infrastructure and other circumstances relevant for the use of the house, as well as the competent body for assessing and collecting the holiday home tax;
- for the purpose of taxes on the use of public land, define public land, the amount and conditions of paying the tax, and the competent body for assessing and collecting taxes on the use of public land.

The local units' decisions on local taxes must be delivered to the Tax Administration to be published and implemented.

The Local Taxes Act entered into force on 1 January 2017 and regulates the system of assessing and collecting the local taxes which serve as source of local units' financing. Some of the taxes included in this act were formerly regulated by The Act on Financing Local and Regional Self-Government Units. The Act introduced a new tax in the Croatian tax system – the real estate tax which was due to enter into force on 1 January 2018; however, the subsequent amendments[23] abolished this tax before its entry into force.

The administration of assessing and collecting of local taxes (apart from surtax on personal income tax and tax on slot machine games) is performed by competent

20 Local Taxes Act, OG 115/16, 101/17, 114/22.
21 Real Estate Transfer Tax Act, OG 115/16, 106/18.
22 Rogić Lugarić, 2011, p. 66.
23 The amendments on the Act on Financing Local and Regional Self-Government Units OG 101/17.

local and regional self-government units' bodies. The administration of the surtax on personal income tax and tax on slot machine games is performed by the Tax Administration. Exceptionally, local units' representative bodies may decide on delegating the assessing and collecting of local taxes to other local unit's body, under the condition that the other local unit's representative body accepts this delegation (art. 41).

In accordance with Art. 79 of the Local and Regional Self-Government Act,[24] the supervision over the legality of general acts passed by the representative bodies of municipalities, cities, and counties is performed by competent state bodies, which is in this case the Tax Administration, in accordance with Art. 53 of the Local Taxes Act. If determined that the local self-government units' general act is not in accordance with the Constitution or the statute or that there were some procedural faults upon its adoption, it may decide to put the general act or some of its parts aside. In that case, the Tax Administration continues the procedure before the High Administrative Court, which should evaluate its legality (Art. 82). The most frequent violations relate to timeframes for passing a decision, acting outside the competencies of a local unit's body, failing to submit the decisions to the Tax Administration, or passing multiple contradictory decisions.[25]

5.2. Regional taxes

The taxes belonging to regional self-government units (counties)[26] are the inheritance and gifts tax, read motor vehicles tax, vessels tax, and tax on slot machine games, as set out by Art. 3-19 of the Local Taxes Act.

The inheritance and gifts tax is paid on money, securities, and movable property with a value higher than 6,636.14 EUR. Taxpayers are natural and legal persons who inherit or receive a gift in Croatia. The tax base is the amount of money or market value of securities and movable property, and the tax rate is set at 4%. Close relatives and state bodies are exempt from paying the tax. Tax is the revenue of a regional unit where the taxpayer resides or, alternatively, where the testator or the donor resides.

The road motor vehicles tax is paid annually by legal and natural persons who register their car. The tax is assessed by considering engine power and the age of the vehicle. Vehicles owned by state and public bodies are exempt. It is the revenue

24 The Local and Regional Self-Government Act, OG 33/01, 60/01, 129/05, 109/07, 125/08, 36/09, 36/09, 150/11, 144/12, 19/13, 137/15, 123/17, 98/19, 144/20.

25 Tax Administration (2020) Odluke jedinica lokalne samouprave kojima se propisuje plaćanje lokalnih poreza, 28 August 2020, Klasa: 410-01/17-01/700, available at: https://www.rrif.hr/odluke_jedinica_lokalne_samouprave_kojima_se_propi-3791-misljenje/ (28.11.2022)

26 For more informational on regional self-government units' taxes, see Marić & Stipić, 2019a.

of a regional government unit in accordance with the seat or residence of the vehicle owner.

The tax on vessels is paid by natural or legal persons owning a vessel. It is paid annually, and the amount of tax due depends on the length of the vessel, whether the vessel has a cabin, and the motor power. It is the revenue of the county of registration of a vessel.

The tax on slot machine games is paid for the use of slot machines in entertainment clubs, catering facilities, public objects, and other public premises. The taxpayer is a natural or a legal person who provides for the use of slot machines. The tax is paid in the amount of 13.27 EUR per month per machine and it is the revenue of the regional government unit where the machine is located.

5.3. Local taxes

Local self-government units (municipalities and cities) are authorised to levy a surtax on income tax, consumption tax, tax on holiday houses, and tax on the use of public land.[27] The provisions on local taxes are contained in Art. 20-29 of the Local Taxes Act

A surtax on income tax may be imposed on personal income taxpayers. The maximum tax rate is 18%, depending on the size of a local unit, as decided by the representative body. Tax revenue belongs to the local unit of the taxpayers' residence.

The consumption tax is paid for the consumption of alcoholic beverages, natural wines, special wines, beer, and non-alcoholic beverages in catering facilities. The taxpayer is the person providing catering services. The tax base is the retail price of the beverage without VAT. Tax is paid at a rate of 3%. It is paid monthly, and the revenue belongs to the local unit where the sale occurred.

The tax on holiday houses is paid by natural and legal persons owning a holiday house. It is paid in the amount of 0.66 – 1.99 EUR/m2 of the house's surface, as set out by the local unit's representative body. The tax is the revenue of the local unit where the house is set.

The tax on the use of public land is paid by natural or legal persons using the public land. The amount and the conditions are determined by the local unit. The tax is the revenue of the local unit where the public land is used.

Additionally, as set out by a separate act, the Real Estate Transfer Tax Act,[28] real estate transfer tax is paid on the transfer of real estate, i.e. acquiring ownership (by

27 For more information on city and municipality taxes, see Marić & Stipić, 2019b.
28 Real Estate Transfer Tax Act, OG 115/16, 106/18.

purchase, inheritance, exchange, gift, etc.) over a property in the Republic of Croatia. The taxpayer is the person acquiring the real estate. The tax base is the market value of real estate at the moment of transfer. The tax rate is set at 3%. The tax is not paid by the Republic of Croatia and its bodies, diplomatic and consular representatives, close family members, etc. The tax obligation occurs at the moment of signing a contract on the transfer of real estate, or a final judgement. The real estate transfer tax return is submitted by a notary public. Tax revenue belongs to the local self-government unit where the real estate is located.

5.4. Local and regional self-government units' revenue

Table 1: Share of total tax revenue compared to the total revenue of the local and regional self-government units

	Total revenue (2020, HRK mill)	Tax revenue (2020, HRK mill)	Revenue from PIT and Surtax (only PIT is shared revenue)	Revenue from property taxes (local taxes)
All local units	27.860	15.187	13.679	1.143
Local self-government units	23.043	13.276	11.962	1.137
–cities	17.751	10.745	9.784	811
–municipalities	5.292	2.531	2.178	326
Regional self-government units	4.817	1.911	1.717	5

Source: the author, using data from the Ministry of Finance, https://mfin.gov.hr/istaknute-teme/lokalna-samouprava/financijski-izvjestaji-jlp-r-s/pr-ras-i-ras-funkc-za-razdoblje-2014-2020/3173?trazi=1&=&page=3

Table 1 contains information on local units' total revenue, tax revenue, revenue from personal income tax and surtax, and revenue from property taxes. Tax revenue represents over 50% of total local units' revenue. The largest share of revenue comes from the personal income tax and surtax. Income from property taxes plays a less important role. The share of regional self-government units (counties) in total local units' revenue represents 20% or less.

Table 2: Structure of municipal revenues in 2020

Type of revenue	Amount (2020; in HRK mill.)	Share in total revenue
Total revenue	5.292	100
Tax revenue	2.531	47.8
Aid from abroad and the general budget	1.425	26.9
Income from property	367	7
Income from administrative fees	909	17.2
Income from sales of goods and services	42	0.8
Penalties	17	0.3

Source: the author, using data from the Ministry of Finance, https://mfin.gov.hr/istaknute-teme/lokalna-samouprava/financijski-izvjestaji-jlp-r-s/pr-ras-i-ras-funkc-za-razdoblje-2014-2020/3173?trazi=1&=&page=3

Table 2 shows the structure of municipal revenue in 2020. Tax revenue represented almost 50%, followed by aid and income from fees. Income from property, sales of goods and services, and penalties contributed with smaller amounts.

As shown in Tables 1 and 2 above, over a half or local units' revenues are tax revenue. Local taxes play a less significant role than a share of personal income tax. Surtax on personal income tax is the most abundant of the tax revenue. It should be emphasised that local units have no impact on determining the share of personal income tax revenue allocated to them. Therefore, despite a significant share of local taxes in local units' revenues, their fiscal autonomy remains limited to determining only certain aspects of local (city and municipality) taxes.

Bronić[29] concludes that tax autonomy is low, as municipalities and cities only decide independently on tax rates and the tax base of tax on the use of public land. Her overall estimate is that the collected local taxes in Croatia are very low and in the 2002-2010 period, they amounted to only 0.7% of total tax revenue at the level of the general government.[30] Over half of that amount was revenue from surtax on personal income tax, and over 80% of tax revenue was collected in only 33 local units (out of 556 local units).[31] The author's overall evaluation is that local taxes in Croatia are underrepresented and account for only one fifth of the local tax revenue in OECD countries. This leads to the conclusion that a part of cities and municipalities do not

29 Bronić, 2013, p. 629.
30 Bronić, 2013, p. 639.
31 Bronić, 2013, p. 641.

try enough – they often do not introduce local taxes or when they introduce them, they set out below average tax rates. The amount of collected revenue relates to the level of development of a city or a municipality, hence higher revenue is achieved by developed and tourism-oriented municipalities and cities.[32]

Similar conclusions are brought by Rogić Lugarić,[33] who reflects on the fiscal capacities of local units and claims that local units have not been using sufficiently fiscal authority to increase their fiscal capacity. Many local units do not introduce all the possible taxes or they prescribe minimal tax rates. Hence, their potential fiscal capacity is larger than what is implemented. This leads to pressure towards central authorities to redistribute budget funds, leading to unnecessary political tensions. Additionally, Rogić Lugarić discusses limited disposal over local budgets' revenues insofar as non-tax revenues are earmarked, and the revenues from a shared tax are related to financing decentralised functions.[34]

Dobrić, Gadžo, and Bodul[35] consider the fiscal effects of local taxes and conclude that the fiscal potential of most of them is negligible, apart from the surtax to personal income tax, which contributes the most to the local self-government units' revenues.

6. Non-tax revenue: fees, contributions, and charges as a source of local units' funding

6.1. Utility contribution and utility fee

A very important area which requires attention from the financial perspective are utility services. In Croatia, they are regulated by Utility Services Act.[36] As set out in Art. 2, utility services represent a system of activities, building and maintaining utility infrastructure and keeping utility order in local units. Utility services are performed in line with the principles of protecting the public interest, proportional benefits, solidarity, public services, non-profit, subsidiarity, universality and equal approach, adjustability, continuity, quality, efficiency, protection of users, environment and cultural goods, security, publicity, affordability, and protection of endangered citizens (Art. 4). In accordance with Art. 21, utility services are activities which enable building or maintaining utility infrastructure as well as utility services which provide individual users with services necessary for everyday living

32 Bronić, 2013, p. 651.
33 Rogić Lugarić, 2011, p. 66.
34 Rogić Lugarić, 2011, p. 70.
35 Dobrić, Gadžo and Bodul, 2016, p. 316.
36 Utility Services Act, OG 68/18, 110/18, 32/20.

and working in a local unit. Utility services are performed by utility companies founded by a local unit, public institution founded by a local unit, service founded by a local unit, natural or legal person based on concession agreement, or natural or legal person based on a contract on performance of utility services (Art. 33). Utility services are funded from the price of utility services, local units' budgets, and other revenues.

Another important issue is the building and maintaining of utility infrastructure (e.g. roads, parking lots, garages, green surfaces, buildings and appliances for public use, public lighting, cemeteries, and public transportation buildings (Art. 59). Those are public goods, owned by one or more local units or a person performing utility services, and they have a special legal status (Art. 61). The Act prescribes that the building and maintaining of utility infrastructure is funded from utility contribution (Croatian: komunalni doprinos), utility fee (Croatian: komunalna naknada), price of utility services, concession fee, local units' budgets, EU funds, other contracts, and fees and donations.

Art. 76-90 deal with the utility contribution, which is charged for using utility infrastructure in a local unit, as well as the benefits of a construction site when a building is built. It represents the local unit's revenue and it is earmarked only for funding construction and maintaining utility infrastructure. It is paid by the owner of the land where the building is built, in one instalment with a possibility of deferral of payment. The representative body of a local unit must decide on utility contribution zones, single unit value of utility contribution per zones, methods and timeframes for payment, and exemption of from paying utility contribution. The utility contribution is calculated by multiplying the volume of a building in construction with single unit value of utility contribution in a zone of construction.

The utility fee[37] (Art. 91-102 of the Act) is a monetary public payment for the maintenance of utility infrastructure. It is the revenue of a local unit, and it is earmarked, with a possibility of using the funds for building objects for education, social services, sports, and culture as well as improving the energy efficiency of public buildings. It is paid for using living area, garages, business premises, building land used for business purposes, and unbuilt building land. The fee is paid in the areas which are equipped at least with a road and public lighting, power network, and water supply. It is paid by the owner of a piece of real estate, i.e. its user. The representative body of a local unit must decide on the zones where the utility fee is paid, coefficient of a zone, purpose coefficient, time frame for payment, as well as exemptions for payment. The representative body also determines the value of a utility fee point per square meter, in accordance with estimates of the costs of maintaining utility infrastructure. The fee is calculated per square meter of a piece

37 For more details on utility fees, see Žunić Kovačević & Gadžo, 2014.

of real estate by multiplying the zone coefficient, purpose coefficient, and value of the utility fee point.

In 2020, local units collected 3.18 billion HRK in utility fees and contributions. Utility contributions brought 800 million HRK, and utility fees were 2.4 billion HRK. This represents 11.4% of total local units' annual revenues,[38] making this an important source of local units' financing.

6.2. Charges

Charges (Croatian: pristojbe) are another source of public revenue important for local governments in Croatia. Charges which are of importance for the local budgets are administrative charges (Croatian: upravne pristojbe). In accordance with the Administrative Charges Act,[39] the charges are paid for the submission of documents and actions before state bodies, diplomatic and consular missions, local units' bodies, and legal persons with public authorities, in the amount determined by the tariff. Charges are paid by the person who initiates the procedure or performs an action for which charges are prescribed. Recently, the system of e-charges was introduced. In case no prescribed charge has been paid, no actions will be taken by state bodies. The revenue from duty stamps is the shared revenue of the state budget and local budget of the unit where the duty stamp was sold, in equal parts. Charges paid on the transaction account for submission of documents or actions before local or regional units' bodies are the local or regional units' revenue. Charges paid directly on the transaction account for the submission of documents or actions before legal persons with public authorities are also local units' budget revenue, determined where the approval to the legal person was issued or according to the seat of the local unit where the action was performed.

7. Case law from the Constitutional Court

Although the Constitutional Court rarely deals with tax-related cases, there are two local-taxes-related cases worth mentioning. In the first case[40], the proposal for determining compliance with Art. 18(1) of the Real Estate Transfer Tax Act[41] from 1997 with the Constitution claimed that the 20% increase in the real estate transfer tax if

38 More on https://mfin.gov.hr/istaknute-teme/lokalna-samouprava/financijski-izvjestaji-jlp-r-s/pr-ras-i-ras-funkc-za-razdoblje-2014-2020/3173?trazi=1&=&page=3
39 Administrative Charges Act, OG 115/16.
40 Arbutina, 2012, p. 1300.
41 Real Estate Transfer Tax Act, OG 69/97.

the tax return had not been filed on time was unconstitutional because the Act set out the minimum amount of increased tax obligation (no less than 1.000 HRK). The plaintiff invoked Constitutional provisions on equality, social justice, and the rule of law. The Court held that the proposal was justified and abolished the provision.[42] The Court claimed that the 20% tax increase was in fact punitive taxation, not in line with Art. 51 of the Constitution. The Real Estate Transfer Tax implementation is related to the Personal Income Tax Act, which at the time prescribed a misdemeanour fine of 1.000-10.000 HRK for failing to file a tax return on time. This puts taxpayers with a higher tax base into a more favourable position, as low-income taxpayers end up paying the punitive tax at a rate higher than 20% because of the minimum amount of fine prescribed (1,000 HRK).

The second case relates to the Financing of Local and Regional Self-Government Units Act, which included the introduction of a tax on unused agricultural land, tax on unused entrepreneurial real estate, and tax on unbuilt construction land.[43] The plaintiffs contested the constitutionality of those taxes. The taxes were introduced in the Croatian tax system in 2001 and had some non-fiscal goals – they were supposed to 'punish' real estate owners who had not used their real estate in line with its purpose. The second purpose was fiscal, as the revenue was to be used for the funding of municipalities. The plaintiffs disputed those taxes by stating that they were opposed to principle of equality. Real estate should be taxed based on the fact of ownership over it, not on how the real estate is used, and the tax should be imposed on all owners of a certain kind of real estate, not just those who do not use the property in the way the legislator thinks it should be used. Those taxes are in fact punitive taxes because they are designed to force the owners into a certain behaviour, which is both unconstitutional and unlawful. The Court accepted the proposals and abolished provisions regulating those taxes.[44] The Court emphasised the importance of right of ownership and stated that owners may not be forced to use their property in a certain way and be punished if they do not obey. The principle of legal certainty applies, as the provisions do not instruct the owners on what kind of use would exempt them from paying taxes. The provisions are also held to be derogating from Art. 51 of the Constitution as they had not followed the ability to pay principle, nor the principles of equality and equity in the tax system, as the taxpayers were some, but not all, real estate owners.

42 The Constitutional Court decision (Odluka Ustavnog suda Republike Hrvatske broj U-I-1023/1999. od 23. veljače 2000.), OG 26/00.

43 Arbutina, 2012, p. 1301.

44 The Constitutional Court decision (Odluka Ustavnog suda Republike Hrvatske broj:U-I-1559/2001 i U-I-2355/2002 od 21. veljače 2007.), OG 26/07.

8. Conclusion

The paper contains an overview of sources of financing for local and regional self-government units in Croatia. Starting from the Constitutional level, as well as the relevant international treaty, the European Charter of Local Self-Government, the paper presents the main features of sub-central government systems. Continuing to the statutory level, the systemic Local and Regional Self-Government Act is analysed, along with accompanying Act on Financing Local and Regional Self-Government Units.

The central part of the paper deals with sources of local and regional self-government units' revenues. Local taxes play the most important role in this regard. The paper deals with the concept of financial autonomy by looking into the competences of central and local governments to introduce, design, and charge local taxes. The theoretical concept is applied in the case of Croatia, where two sub-central levels of government (local and regional) have different types of authority regarding local taxes. While the regional self-government units only apply taxes as set out by the statute, local self-government units enjoy wider authority and may determine which taxes to apply and set out tax rates or the amount of taxes.

Shared tax revenue from personal income taxes represents an important local revenue source, along with fiscal equalisation funds and decentralised functions funds. Fees, contributions, and charges are an additional local revenue source.

In the revenue structure, local taxes, particularly the surtax to personal income tax, hold the highest share of local revenue, while the other taxes mostly represent taxes of minor importance which bring lower revenues. They are followed by transfers and other earmarked/quasi-fiscal public revenue sources, which may be negatively evaluated from the transparency standpoint.

The paper examines the practice of the Constitutional Court of Croatia and discusses two cases which influenced the changes in the real estate transfer tax as well as led to abolishing taxes on unused agricultural land, taxes on unused entrepreneurial real estate, and taxes on unbuilt construction land. The court held that the statutory provisions departed from principles of equality, social justice, and the rule of law.

The recommendations for designing a more sustainable financing system primarily go towards strengthening the role of local self-government units in decision-making process on local taxes. Apart from a few notable examples, most local taxes' elements in Croatia have been set out by statutory provisions at the state level. However, a more active role of local units might make them more invested in local tax policy issues. Also, along this line is encouraging local units in more active use of local taxes, especially in cases where no taxes were introduced despite the possibility thereof. The dependence of local units on transfers from the central government

without exercising the possibility of ensuring the funds from local taxes should be frowned upon. This might even lead to occurrence of 'local tax havens' because of tax competition between the local units and a race to the bottom in attracting investments by providing a more favourable tax treatment. Finally, the current balance between earmarked and non-earmarked revenue should be significantly shifted towards non-earmarked revenue by replacing several charges with a property tax, i.e. real estate tax. This idea was already adopted in the Local Taxes Act; however, due to the political pressures and calling upon the land registry not being up to date, the real estate tax was abolished before it entered into force.

Bibliography

- Arbutina, H. (2012) 'Ustavna i nadnacionalna ograničenja ovlaštenja na oporezivanje', *Zbornik Pravnog fakulteta u Zagrebu*, 62(5-6), pp. 1283-1322.
- Bird, R. (2010) 'Taxation and Decentralization', *The World Bank Economic Premise*, no. 38. Available at: openknowledge.worldbank.org/handle/10986/10140 (Accessed: 30 November 2022).
- Bird, R. M., Slack, E. (2014) 'Local Taxes and Local Expenditures in Developing Countries: Strengthening the Wicksellian Connection', *Public Administration and Development*, 34(5), pp. 359-369.
- Bronić, M. (2013) 'Analiza fiskalnog značaja općinskih i gradskih poreza u Hrvatskoj', *Hrvatska i komparativna javna uprava*, 13(2), pp. 625-658.
- Dobrić, D., Gadžo, S., Bodul, D. (2016) 'Problem „bankrota" hrvatskih lokalnih jedinica: stanje i perspektive u kontekstu europeizacije sustava višerazinskog upravljanja', *Godišnjak Akademije pravnih znanosti Hrvatske*, 7(1), pp. 290-340. Available at: https://hrcak.srce.hr/164178 (Accessed: 28 November 2022).
- Kregar, J. (2011) 'Decentralizacija' in Kregar, J. (ed.) *Decentralizacija,* Zagreb: Centar za demokraciju i pravo Miko Tripalo, pp. 1-33.
- Marić, M., Stipić, B. (2019b) 'Gradski ili općinski porezi', *Porezni vjesnik*, 28(9), pp. 112-131.
- Marić, M., Stipić, B. (2019a) 'Županijski porezi', *Porezni vjesnik*, 28(6), pp. 95-105.
- Ministry of Finance (2022) *PR-RAS i RAS-funkc za razdoblje 2014 – 2020* [Online]. Available at: https://mfin.gov.hr/istaknute-teme/lokalna-samouprava/financijski-izvjestaji-jlp-r-s/pr-ras-i-ras-funkc-za-razdoblje-2014-2020/3173 (Accessed: 23 November 2022).
- OECD (1999) *Taxing Powers of State and Local Government, OECD Tax Policy Studies* No. 1, Paris: OECD. Available at: https://www.oecd-ilibrary.org/taxation/taxing-powers-of-state-and-local-government_9789264174030-en (Accessed: 20 November 2022).
- OECD (2022) *Fiscal Federalism 2022: Making Decentralisation Work*, Paris: OECD. Available at: https://www.oecd.org/publications/fiscal-federalism-2022-201c75b6-en.htm (Accessed: 23 November 2022).
- Rogić Lugarić, T. (2011) 'Financiranje jedinica lokalne i regionalne (područne) samouprave' in Kregar, J. (ed.) *Decentralizacija*, Zagreb: Centar za demokraciju i pravo Miko Tripalo, pp. 63-83.
- Šinković, Z. (2019) 'Financiranje jedinica lokalne i područne (regionalne) samouprave', *Zbornik radova Pravnog fakulteta u Splitu*, 56(1), pp. 223-250.
- Tax Administration (2020) *Odluke jedinica lokalne samouprave kojima se propisuje plaćanje lokalnih poreza*, 28 August 2020, Klasa: 410-01/17-01/700. Available at:

https://www.rrif.hr/odluke_jedinica_lokalne_samouprave_kojima_se_propi-3791-misljenje/ (Accessed: 28 November 2022).
- Žunić Kovačević, N., Gadžo, S. (2014) 'Komunalna naknada u RH i njezino pozicioniranje u odnosu na teoretske i normativne koncepte financijskog prava', *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, 35(1), pp. 245-270.

Legal sources

- Act on Confirming European Charter on Local Self-Government, OG MU 14/97.
- Act on Financing Local and Regional Self-Government Units, OG 127/17, 138/20.
- Administrative Charges Act, OG 115/16.
- Announcement on entering of European Charter on Local Self-Government into force, OG MU 2/2007.
- The Croatian Constitution, OG 56/90, 135/97, 113/00, 28/01, 76/10, 5/14. English version available at: https://www.usud.hr/sites/default/files/dokumenti/The_consolidated_text_of_the_Constitution_of_the_Republic_of_Croatia_as_of_15_January_2014.pdf (Accessed: 26 September 2022).
- Constitutional Court decision (Odluka Ustavnog suda Republike Hrvatske broj U-I-1023/1999. od 23. veljače 2000.), OG 26/00.
- Constitutional Court decision (Odluka Ustavnog suda Republike Hrvatske broj U-I-1559/2001 i U-I-2355/2002 od 21. veljače 2007.), OG 26/07.
- Local and Regional Self-Government Act, OG 33/01, 60/01, 129/05, 109/07, 125/08, 36/09, 36/09, 150/11, 144/12, 19/13, 137/15, 123/17, 98/19, 144/20.
- Local Taxes Act, OG 115/16, 101/17.
- Real Estate Transfer Tax Act, OG 115/16, 106/18.
- Utility Services Act, OG 68/18, 110/18, 32/20.

Denisa KOTROUŠOVÁ*

The Relationship and Differences Between Surrogacy and Adoption in the Czech Republic

ABSTRACT: *Surrogacy is a phenomenon that is receiving increasing attention all around Europe (but not limited to it). Some countries have already managed to incorporate it into their legal systems through explicit regulations or bans of such practice, whereas others remain reluctant about it. This unique mechanism of establishing a family has an interesting bond with another mechanism for family establishment – adoption. Although one may believe the difference between the two is clear as adoption has always been described as 'accepting a foreign natural person as one's own', in reality, it is somewhat complicated, particularly in a country, whose legal regulations almost pretend that surrogacy does not relate to it. This study aims to analyse the two institutions, their differences, and the relationship between them. The key question is 'Is there any difference, and if so what is the difference, between surrogacy and adoption of a minor child right after it has been born?' This question entails other interesting questions, such as 'Who can be a surrogate?' or 'Can she be already pregnant at the time she agrees to be one?' Considering surrogacy is being broadly understood as based on a type of contract between the intended parent(s) and the surrogate, what characteristics should the surrogate have with respect to the close connection with adoption? Can she be already pregnant? All those questions are analysed primarily with respect to the Czech Republic and its blurred approach to surrogacy and missing special legislation. However, other countries and their approach to surrogacy are mentioned as well to provide additional context.*
KEYWORDS: *Adoption, surrogacy, Civil Code, children, the Czech Republic*

List of abbreviations

CC	Act No. 89/2012 Coll., Civil Code, as last amended
CRC	Convention on the Rights of the Child

* PhD student, Faculty of Law, University of West Bohemia in Pilsen, dkotrous@kpo.zcu.cz, https://orcid.org/0000-0001-7168-4989.

https://doi.org/10.62733/2023.1.125-149

ECAC	European Convention on the Adoption of Children from 1967
ESHRE	European Society on Human Reproduction and Embryology
HFEA	Human Fertilisation & Embryology Authority
IVF	in vitro fertilisation
SLPC	Act no. 359/1999 Coll., on the Social and Legal Protection of Children, as last amended
UN	United Nations

1. Introduction

This study focuses on two interesting institutions of family law. Both are connected to children in a certain way. The first is adoption, a respectable institution with an ancient history, known and used in all European and other countries. Second, surrogacy is much more recent and controversial. Several key issues ethical or medical, and legal are often discussed regarding surrogacy. This study focuses on the legal aspects.

This study aimed to examine the mutual relationships and differences between adoption and surrogacy. The outcome may not be the same depending on the country in which the law is being discussed. This study, focuses on the laws in the Czech Republic. In many countries, the relationship between these two is clear, however, the case of the Czech Republic is different and interesting. This study elucidates the origin of this distinction and assesses its causes. The key question here is whether there is a difference (and if so, what it is) between surrogacy and adoption in the Czech Republic, particularly regarding the direct adoption of a newborn child. The following two sections examines the regulations of adoption and surrogacy in the Czech Republic. The next section deals with the primary issues of this study. The final section summarises the previous sections and suggests topics for further discussion.

2. Adoption in the Czech Republic

2.1. The Concept and Principles of Adoption in the Czech Republic

Adoption is an institution of family law with a long and rich history in many countries, including the Czech Republic. Its history and roots can be traced back to the ancient Roman times. The modern concept of adoption is somewhat different from the ancient one, however, its basic definition and understanding are the same: accepting a foreign person as one's own.

Considering the long tradition of adoption, many important international conventions have dealt with it. The Czech Republic is also a party to them. The significant conventions are the European Convention on the Adoption of Children from 1967,[1] the Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption from 1993 (the Haag Adoption Convention),[2] and the Convention on the Rights of the Child,[3] and the Convention for the Protection of Human Rights and Fundamental Freedoms from 1950 (the European Convention on Human Rights).[4] It is interesting to mention that the Czech Republic was a party only to the original version of the ECAC from 1967 and not to its revised version from 2008. However, the principles in the revised version of the ECAC were implemented in the Czech Civil Code,[5] which came into force on 1 January 2014.

The primary source of adoption regulations in the Czech Republic is the Civil Code. The provisions regarding adoption are S 794-854 CC. Complementary regulations can be found in the Act on the Social and Legal Protection of Children,[6] which deals primarily with the public law aspects of adoption, such as maintaining a register of prospective adoptive parents, mediation of adoption, or immediate help to the child's natural family so that the child can stay with them and does not have to be adopted. Another important statute is the Act on Special Civil Proceedings,[7] which regulates court proceedings accompanying the adoption process. The entire adoption process occurs in multiple shorter court proceedings which follow previous ones. The Civil Code and the Act on Special Civil Proceedings are closely linked to adoption. The former lays down the rules for adoption and the latter ensures that these rules are respected and fulfilled.

What are these rules? The regulation of adoption within the CC includes a definition of adoption in its first provision (S 794): '*Adoption is to be understood as taking a person of another to be one's own*'. Thus, adoption is a substitute for natural

1 The European Convention on the Adoption of Children from 24 April 1967, promulgated in the Czech Legal Order as a Notice of the Ministry of Foreign Affairs, No. 132/2000 Int. Coll. (hereinafter 'ECAC').
2 The Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, promulgated in the Czech Legal Order as a Notice of the Ministry of Foreign Affairs, No. 43/2000 Int. Coll.
3 The Convention on the Rights of the Child from 2 September 1990, promulgated in the Czech Legal Order as a Notice of the Federal Ministry of Foreign Affairs, No. 104/1991 Coll. (hereinafter 'CRC').
4 The Convention for the Protection of Human Rights and Fundamental Freedoms from 4 November 1950, promulgated in the Czech Legal Order as a Notice of the Federal Ministry of Foreign Affairs, No. 209/1992 Coll.
5 Act No. 89/2012 Coll., Civil Code, as last amended (hereinafter 'CC').
6 Act No. 359/1999 Coll., on the Social and Legal Protection of Children, as last amended (hereinafter 'SLPC').
7 Act No. 292/2013 Coll., on Special Civil Proceedings, as last amended.

(biological) parenting. Moreover, the definition distinguishes between adoption and determination of parentage, where the determination of parentage is a manner of establishing a legal relationship between (usually and presumably) biologically related persons in a direct line, and adoption is a manner of establishing a similar relationship between foreign persons.[8] The chief consequence of adoption is a change in the status of the adoptee. For the adoption decision, the adoptee is considered the natural child of the adoptive parent(s) (i.e. the adoption of a minor as the most common type). Upon adoption, the family relationship between the adoptee and his/her natural family, and the rights and duties arising from this relationship are terminated [S 833(1) CC]. The Czech regulation of adoption is generally based on several basic principles derived from the aforementioned conventions. These principles are subsidiarity, the best interests of the child, voluntariness, a sufficient relationship between the adoptee and prospective adoptive parents, non-profit, and the court's decision.

The principle of 'subsidiarity' and the principle of 'the best interests of the child' are closely connected and are the most important. Adoption is usually used in situations where there is a problem with the child's natural family. However, it can and should only be used when there is no other less severe solution. For example, if a child's natural parents cannot take care of the child properly, however, are attempting to do their best, or if the family is in a bad financial situation or lives in an unsatisfactory home, adoption should not be a solution to that particular problem. Instead, the State and its bodies (particularly the Child Legal and Social Protection Authorities) should intervene and adopt such measures to solve the initial problem in the family (e.g. counselling, influencing the natural parents to exercise their parental responsibility properly). It is always better for a child to remain in his or her natural family rather than be removed from it. Remaining with the family is usually in the best interests of the child. The principle of the best interests of the child is derived from art. 3(1) and 9(1) of the Convention on the Rights of the Child. Adoption cannot occur if it is not in the best interests of the child. This principle is explicitly mentioned in the last sentence of the S 795 CC.

One principle that is closely related to the previous ones is the principle of 'voluntariness'. All the parties involved must provide consent for adoption. The prospective adoptive parents must agree to become one; no one can force them to adopt a child. However, no one can force the child's biological parents to provide their consent for adoption. Their consent is so important that even in cases where they cannot provide consent, it must be replaced by a special guardian appointed solely for this purpose. Finally, the child to be adopted should also provide consent for adoption. This principle also represents art. 9(1) of the CRC within the Czech legal order.

8 Sedlák and Kyselovská, 2020, p. 560.

S 795 CC expresses another principle related to the required 'quality of the relationship between the child and his or her prospective adoptive parents'. Even if the circumstances of a particular situation suggest that adoption is generally possible and that it is necessary to remove the child from his/her natural family, it is not possible to match any child with any prospective adoptive parent. It is essential to determine the right adoptive parents. One way of determining this is to carefully consider both the prospective adoptive parent and the child and whether they are an appropriate match. Moreover, there always exists a mandatory period of pre-adoption care during which prospective adoptive parents become familiar with the prospective adoptee and vice versa. This is aimed to monitor and evaluate mutual relationships. Therefore, the Civil Code stipulates that an adoption can only occur if there is a relationship between the adoptee and prospective adoptive parents that is similar to the relationship between natural parents and their child, or a basis for such a relationship. This implies that the child must perceive the prospective adoptive parent as his/her natural parent. These relationships should also be mutual. If there is no such relationship, or even its basis (on either side), the child should not be adopted, not by the prospective adoptive parent in question.

Adoption is strictly 'non-profit'. No one can ask for remuneration or any other profit for granting their consent to adoption, or 'giving up' their child for adoption. No one can be paid for becoming an adoptive parent; nor can anyone, including the State bodies involved in the adoption process, demand an unreasonable profit for arranging adoption. These rules reflect efforts to prevent the trafficking of children and exploitation of both children and their natural parents. The provision of this principle is contained in S 798 CC. It does not prohibit any profit; it is only an unreasonable profit. The important question is what is a reasonable profit? First, it is necessary to indicate that the mediation of adoption is allowed only for the Child Legal and Social Protection Authorities. Other authorities, natural persons, and legal persons are prohibited from this activity [S 19a(1)d SLPC]. The profit that can be demanded by the Child Legal and Social Protection Authorities is usually administrative fees.

Finally, adoption must always be decided by the court during proper court proceedings. The adoption procedure comprises several shorter procedures, each of which deals with specific issues such as a decision to conceal the adoption, a decision to place the child in the care of a prospective adoptive parent before adoption, or a decision on the adoption itself.[9] This principle is closely related to all the previous principles. In particular, the court must ensure that the best interests of the child are met and that the rights of all concerned people are protected and not violated.

9 All of those 'shorter' proceedings relating to adoption are regulated in S 427 – S 451 of the Act No. 292/2013 Coll., on Special Civil Proceedings, as last amended.

2.2. Types of Adoption

There is more than one type of adoption. Contrarily, adoption can be divided into many categories based on different factors. First, it is possible to distinguish different types of adoption based on the age of the adoptee. There is the classic adoption of a minor, and the adoption of an adult. The adoption of a minor concerns children under the age of 18 who have not yet acquired full legal capacity. This is traditional and much more common than adult adoption. The adoption of an adult, which essentially means the adoption of any other person over the age of 18, may appear unusual or new. However, the adoption of an adult was possible and legal in former Czechoslovakia (based on Act No. 56/1928 Coll., on Adoption) until 1950, when the new Act on Family Law came into force.[10] There are two subtypes of adult adoption: the adoption of an adult which is the adoption of a minor-like and the adoption of an adult which is not the adoption of a minor-like. The first can be used only in cases set down in S 847(1) Civil Code if:

a) the natural sibling of the adoptee has been adopted by the same adoptive parent;
b) the adoptee was a minor at the time of submission of the adoption application, and the adoption process was not completed by the time he/she reached the majority.
c) the adoptive parent has taken care of the adoptee, even in the adoptee's minority, as if he/she has been his/her own child.
d) the adoptive parent intends to adopt the child of his/her spouse.

However, the adoption of an adult, which is not similar to the adoption of a minor, can occur if there are special circumstances; it is beneficial to both the adoptee and the adoptive parent and does not conflict with the important interests of the adoptee and the adoptive parent's descendants. The consequences are also different in the two cases; for example, in the areas of property rights and kinship of the adoptee and his/her descendants towards the adoptive parent's family.[11] The provisions on the adoption of an adult apply by analogy if the child is a minor who has been granted full legal capacity (S 854 CC).

The second method of classifying the different types of adoption is based on the number of adoptive parents. There can be a single-parent, joint, or step-parent adoption. The preferred type of adoption is joint adoption, in which there are two adoptive parents. This type of adoption is only available to spouses, who according to S 655 CC, can only be men and women. Same-sex couples, whether registered or not, and opposite-sex cohabiting couples cannot be joint adoptive parents. However,

10 Kornel, 2020, p. 694.
11 ibid., pp. 694-696.

single-parent or individual adoption is available to any person, married or not, if he or she meets all other requirements. Section 800(1) of the Civil Code states that single-parent adoption should preferably be conducted by one of the spouses and only in exceptional cases by other persons. Both this and the rule on joint adoption clearly demonstrate that Czech legislators prefer marriage as an ideal family environment for adoptees. This conclusion is supported by the judicial practice of the Constitutional Court of the Czech Republic.[12] In the case of step-parent adoption, the adoptive parent of the child is the spouse of the child's natural parent (S 833 [2]). This is the only type of adoption in which original kinship with the natural parent is preserved (relative to the spouse of the prospective adoptive parent). Similar to joint adoption, this type of adoption is available only to the spouses.

The third classification of adoption is based on how adoptive parents are sought out. There are direct and indirect (or State-mediated) adoption. The child's biological parents select the prospective adoptive parents in direct adoption, whereas the State and its bodies determine suitable adoptive parents in indirect adoption. However, even if natural parents select someone they prefer to be their child's prospective adoptive parent, this does not automatically imply that the selected person will be the child's adoptive parent. The court can decide otherwise, particularly if the intended person's adoption is against the child's best interests. The intended person may also refuse to become an adoptive parent.

2.3. Conditions for Adoption

2.3.1. Conditions for the Adoptee

For adoption to occur, several requirements (apart from respecting basic principles) must be met. They can be divided into three groups, each relating to one of the parties involved: the adoptee, adoptive parents, and the child's biological parents.

The most important condition is adoptee consent. From the age of 12 years, the child must provide his or her consent unless there is no doubt that such a measure is fundamentally contrary to his or her best interests or if the child is unable to understand and consider the consequences of his or her consent [S 806(1) CC]. The child should always be properly informed by the court regarding the content and consequences of providing consent for adoption. If the child is under 12 years old,

12 See, for example, the Constitutional Court's decision No. Pl. ÚS 10/15, of 19 November 2015. The Constitutional Court stated that it was not unconstitutional nor contrary to the CRC that the legal regulation of adoption did not allow joint adoptions of cohabitants because: 1. marriage is a more stable relationship than cohabitation, and 2. the child's situation would be better after the termination of marriage than of cohabitation.

consent for adoption is provided by a specially appointed guardian. The guardian is obliged to first ascertain all the relevant facts that lead him or her to the conclusion that the adoption is in the best interest of the child (S 807 CC). The child may also revoke the consent until the final decision on adoption is made. Both granting and revoking consent for adoption should be performed before the court.[13]

Moreover, it is important to assess the child's specific needs. For example, a child's health is extremely important. If a child has a serious illness or disability (mental or physical), adoptive parents should be selected carefully, as not everyone will be able to properly care for a child with special needs. The same applies to the child's ethnicity, cultural background and religion. Finally, there should be a reasonable age difference between the child and adoptive parent, usually at least 16 years (S 803 CC). The age difference should help create a parent-child relationship in which there is usually a natural age difference between the parents and the child (at least 16 years, but usually more). The upper age limit is not specified, although this is important as the adoptive parent should also consider the future and whether he/she will be able to raise the child until he/she reaches the age of majority. The upper limit is then left to the court's discretion.[14]

2.3.2. Conditions for the Adoptive Parent(s)

First, the adoptive parent must be an adult and have full legal capacity. His or her personal characteristics and way of life should also guarantee that he or she will be a good parent for the adoptee [S 799(1) CC]. The court must thoroughly and carefully examine the prospective adoptive parents. It aims to find a 'new parent and family' for a child who has recently lost his or her natural parents. Therefore, even the small details of personal characteristics play a crucial role. What is assessed? For example, the motivation to become an adoptive parent, reputation at work and in the neighbourhood, household, financial situation, debts, whether they have children of their own, addiction, and health. The aim is to find the right adoptive parent for the child and not vice versa. Therefore, while in some cases the prospective adoptive parent may be older, in other cases, they will not be suitable if they are significantly older or disabled (e.g. if the child to be adopted is very young). S 799(2) CC states that *'the state of health of one or both of the adoptive parents must not significantly limit their ability to care for the adopted child'*. However, in the case of joint adoption, if one is ill or disabled and the other is healthy, both can be joint adoptive parents.

13 Sedlák, 2020a, p. 607.
14 Sedlák, 2020b, p. 595.

A prospective adoptive parent cannot be closely related to the adoptee. However, there is an exception. According to S 804 CC, this does not apply to surrogate motherhood (for more information on surrogacy, see Section 3). Similar to the conditions of the adoptee's, the consent of the adoptive parent is required. If only one spouse is an adoptive parent, the other spouse must also provide consent. These conditions must be simultaneously fulfilled. In particular, in the case of the personal characteristics and health of the prospective adoptive parent, the final decision rests with the court, which should assess each case separately, considering its specific circumstances. However, it is possible to imagine a few characteristics that would almost automatically rule out the possibility of becoming an adoptive parent: drug addiction, gambling, habitual drinking or criminalisation. These personal characteristics are definitely not in the best interests of the child.[15]

2.3.3. Conditions for the Child's Natural Parents

Finally, consent of the child's natural parents is an important criterion. This is the only condition; however, if it is not met, adoption cannot occur. Parental consent must be provided to the court and must be free, serious, and cannot be subject to a condition. It must also be specific; the specific child or children to be adopted must be named or identified. It is not possible to provide blanket consent for the adoption of all of your future children. Parents must provide it freely, and be informed of the consequences of their consent. The father can provide consent for adoption from the birth of the child. The mother of the child can provide her consent to adoption only six weeks after the birth of the child [S 813(1) CC]. The consent is valid for six years from the date it is provided. If the child is not adopted within this period, informed consent must be provided again. Both parents may also revoke consent within three months of providing it. Under special circumstances,[16] it is possible to revoke consent even after three months.

Consent for adoption is so important that it cannot be omitted in any situation, even if the parent has not yet acquired full legal capacity, or is unknown. However, in the case of the partial legal capacity of a minor, the parent must be at least 16 years old to provide consent; if he/she is younger, he/she cannot provide consent, and therefore, adoption is excluded. Parents whose legal capacity has been limited can undertake juridical acts only to the extent that their legal capacity has not been limited. There

15 Sedlák, 2020c, pp. 582-583.

16 According to S 817(2) CC those special circumstances are: a) the child hasn't not been handed over to the pre-adoption care yet; b) according to the court's decision issued on the application of the natural parents, the child should be handed over by the person to whom it was entrusted because it is in the best interest of the child to be with its natural parents.

may also be a special situation where natural parents are unknown, deceased, incapable of expressing their will, recognising the consequences of their actions, or have been deprived of their parental responsibility and the right to consent to adoption, or where legal parentage has not been established. If such circumstances exist on the part of both natural parents, their consent must be replaced by a guardian or specially appointed tutor during court proceedings. The guardian or tutor is obliged to find all relevant facts about the child, his/her family, and close relatives before deciding whether to provide consent to adoption. In another situation, the consent of the natural parent may be substituted if the natural parent is obviously uninterested in his or her own child (continuously fails to demonstrate genuine interest in his or her own child).[17]

3. Surrogacy

3.1. Surrogacy in a Broader Global Context

Surrogacy is discussed here in a broader context. It is receiving popularity in many countries, including European countries. Although, many definitions exist, most are similar. They all agree that surrogacy is a process whereby a woman carries and gives birth to a child for another person and then gives up the child born as a result of surrogacy pregnancy. Usually, there is a contract between the surrogate and the intended parents. In this contract, the parties lay down rules for their mutual relationship, the surrogacy process, etc.

According to the HFEA (Human Fertilisation & Embryology Authority): '*Surrogacy is when a woman carries and gives birth to a baby for another person or couple*'.[18] The UN (United Nations) Special Rapporteur generally agrees with that definition when he says that it is '*…a reproductive practice on the rise. It refers to a form of third-party reproductive practice in which intending parent(s) contract a surrogate mother to give birth to a child*.[19] The ESHRE definition provides more or less the same answer; however, it is more detailed because it is the chief European body dealing with human reproduction issues. According to ESHRE (European Society on Human Reproduction and Embryology): '*A "surrogate" is a woman who becomes pregnant, carries and delivers a child on behalf of another couple (intended or commissioning parents). The term surrogacy covers several situations. In the first situation (full surrogacy), the gestating woman has no genetic link to the child. In that case, (i) the gametes of both*

17 Sedlák and Šohajdová, 2020, p. 632.
18 No date, 'Surrogacy', *Human Fertilisation & Embryology Authority* [Online].
19 No date, 'Surrogacy: Special Rapporteur on the sale and sexual exploitation of children', *UN Special Rapporteur* [Online].

commissioning parents are used; (ii) both gametes come from donors (donation of either supernumerary or de novo-created embryos); or (iii) one of the commissioning parents provides the gametes and a gamete donor the other. In the second situation (partial surrogacy), the surrogate mother has a genetic link by providing the oocyte. In either case, the gestating woman intends to relinquish the child to the commissioning parents, who want to assume parental responsibility'.[20]

In general, there are three primary approaches to surrogacy. Countries that belong to the first group impose an explicit and unyielding ban on surrogacy (e.g. Germany), while[21] the second group of countries approach surrogacy in exactly the opposite manner. They have adopted proper legal regulations of surrogacy (e.g. the United Kingdom,[22] the Netherlands, Greece, Ukraine, and India)[23] Some of them only allow altruistic surrogacy, whereas others allow its commercial version. The third group of countries lies in between. Countries in this group do not ban surrogacy however, do not sufficiently regulate it. The Czech Republic is one example of such a country. Despite its simplicity, this approach has several limitations. Some of them will be described in the following subsections. Apart from the commercial-altruistic categories, surrogacy is commonly divided into two other classes: gestational and traditional. Gestational (or host) surrogacy implies that the surrogate is not genetically related to the child she carries. The embryo is created in vitro using the intended mother's (or donor's) eggs and the intended father's (or donor's) sperm. In traditional (or natural) surrogacy, a surrogate is inseminated with the intended father's (or donor's) sperm. The fertilised egg is her own. Therefore, she is both the genetic and gestational mother of the child she carries.[24]

3.2. Regulation of Surrogacy in the Czech Republic

As the previous subsection suggests, the Czech Republic has an indifferent approach to surrogacy. The Czech legislature is aware that surrogacy exists, however, its awareness does not extend to the idea of properly dealing with the issue. The only provision of the Civil Code, and indeed of the Czech legal system, that mentions surrogacy is S 804. This provision bans the adoption by close relatives or siblings. The only exception to this ban is surrogate motherhood. This provision is relatively new and was introduced for the first time in the current Civil Code in 2014. There are no

20 Shenfield et al., 2005, p. 2705.
21 Vacová, 2020, pp. 62-69 [online].
22 See e.g. Surrogacy Arrangements Act 1985 c. 49 (hereinafter 'Surrogacy Arrangements Act 1985').
23 Vacová, 2020, pp. 62-69 [online]. See also, Herts, 2019, pp. 421-422.
24 Banerjee, 2013, p. 439 [online].

other provisions that suggest whether there are any requirements or conditions for surrogacy, nor who can participate in it, and not even its legal definition.

This is a tricky part because the legislators undoubtedly knew that such an institution exists however, apparently believed that it did not concern the Czech Republic or did not want to regulate it further. The latter idea is somewhat understandable, particularly considering the serious and complicated legal, ethical, and social issues raised by surrogacy practices in many countries. However, the legislature's position was dichotomous. While it does not want to regulate it, it admits that it exists, and the background story of why the mention of surrogacy was included in S 804 CC clearly indicates that it occurs, has occurred, and will probably continue to occur in the Czech Republic. The background story is as follows: A young woman suffered serious medical problems that prevented her from safely carrying and giving birth to a child. Her mother, who wanted to help her, offered to carry her daughter's child in her place. The process was conducted by IVF with the daughter's egg, and the child was born. As the Czech Republic respects the ancient Roman principle of '*Mater semper certa*', the older woman who gave birth to the child became its legal mother. Therefore, the younger woman (the child's genetic mother) is the legal sister. If there were no exceptions to the general ban on adoption between close relatives and siblings, their mutual relationship could not be levelled.[25]

Apart from S 804 CC, there are other provisions that are closely related to surrogacy, although they do not explicitly mention it. The first is S 775 CC. This provision addresses the determination of maternity. The (legal) mother of the child is the woman who gave birth. No exceptions are permitted. The second provision, or a group of provisions, is located within the Criminal Code. S 168(1) and S 169(1) of the Criminal Code describe two primary criminal offences that can be committed during surrogacy. The first is human (or child) trafficking, which occurs when a surrogate mother is paid to give up and hand over the child. The second involves entrusting the child to the care of another person, which can occur when someone places the child in the care of another person for adoption or similar purposes. However, despite the possibility of prosecuting those involved in a surrogacy agreement, to the best of the author's knowledge there has been no criminal case involving the prosecution of either the surrogate or the intended parents (despite the obvious practice and general knowledge of this institution among the public; see the following section). According to some authors, despite the theoretical possibility of prosecuting those who participate in surrogacy, this may not be easy in practice. In their article from 2019, Svatoš and Konečná analysed some of the criminal law aspects of surrogacy (primarily in relation to the offence of entrusting a child to another person). They admit that the characteristics of the aforementioned offence are fulfilled in the case of surrogacy.

25 Králíčková and Kyselovská, 2020, p. 493.

However, they believe that a special circumstance may apply that excludes illegality (consent of the injured person) and that in some cases, there would be no harm to the surrogate mother's act that could otherwise be labelled as entrusting the child to the care of another person.[26] There is no space to discuss their opinion in this article, however, they are right in that Czech Criminal Law lacks regulation concerning surrogacy, similar to Civil Law, and that the Czech legislature should deal effectively with the issue of surrogacy.[27]

Moreover, it is important to add that any surrogacy contract normally concluded within this institution will be deemed invalid because it is manifestly contrary to the law, public order, and good morals. The court will consider such invalidity ex officio, without the need to point it out. Such an agreement would be contrary to the law because the Civil Code states that the parent of the child cannot renounce his or her rights and obligations towards the child, and that the subject of the obligation must have the nature of property. A child or any other natural or legal person cannot be owned as property. Simultaneously, the rules for determining maternity are binding. They cannot be omitted or excluded, not even by contracts. This is another reason why, according to the Czech law, a surrogacy agreement is invalid if it is in obvious contradiction to the law.[28] Being invalid simultaneously means being unenforceable.

Finally, surrogacy itself has not been the subject of court cases. From time to time, surrogacy appears to be one of the many other factors in court decisions, however, there is no decision dealing with a specific issue arising from surrogacy alone, such as disputes arising from surrogacy agreements, declaring a surrogacy agreement null and void, or the surrogate's refusal to hand over the child. Surrogacy was a key factor in the 2017 decision of the Czech Republic Constitutional Court. The applicants were a same-sex couple who became parents of a child born in California through surrogacy (under the law of the State of California). They applied for recognition of their parentage in the Czech Republic because one of them had Czech citizenship. However, State authorities refused to register the two men as the child's parents on the grounds that this would be contrary to Czech law and public policy. However, the Constitutional Court stated that abstract principles cannot be placed above the best interests of the child in a particular case and allowed the recognition of same-sex parentage in this particular case. Surrogacy was not the subject of the court's decision; it simply stated that the family life between the applicants and the child, established in accordance with the law abroad, must be respected in the Czech Republic.[29]

26 They specifically mention a situation where the surrogate receives only a reasonable and proportionate amount for her action, e.g. the actual cost of her pregnancy and delivery. For further details, see Svatoš and Konečná, 2019, pp. 7-13.

27 ibid.

28 Králíčková, 2015, pp. 725-732.

29 Decision of the Constitutional Court of the Czech Republic No. I. ÚS 3226/16-2, of 29 June 2017.

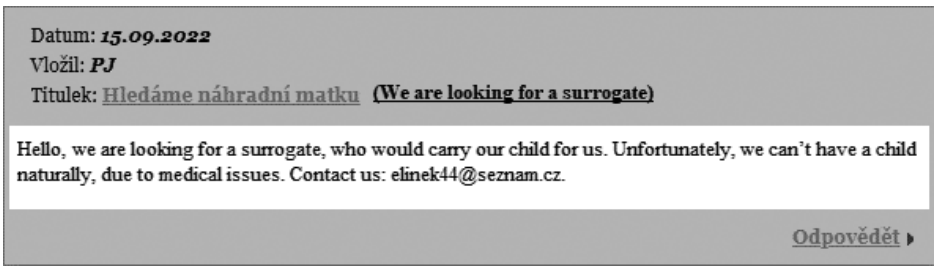
Apart from this decision, surrogacy may be one of the many factors in some adoption cases. However, one can only guess the true number, as the parties are not obliged to admit that they have undergone surrogacy, nor do they specifically search for this fact. This aspect corresponds to the general approach of the legislator, State, and its bodies to surrogacy in the Czech Republic.

3.3. The Practice of Surrogacy in the Czech Republic

The aforementioned case suggests that the legislators expected surrogacy to occur, although rarely, and between close relatives within one family. Moreover, it is strange that they took an indifferent and overlooking approach. However, practice suggests that the Czech legislators were incorrect in both assumptions. Surrogacy exists and even flourishes unnoticed in the Czech Republic, and usually occurs between strangers, not within a family or between close relatives.

Although surrogacy is not regulated and is not even a part of the enumerated assisted reproduction techniques and purposes, several fertility clinics openly offer surrogacy as one of their services. This is the case for a fertility clinic in Brno, called Reprofit, which has a section on its website dedicated to surrogacy and procedures. They offer it as a purely medical service, similar to the classic assisted reproduction methods in cases of infertility or subfertility. The only service that Reprofit does not offer is the search for surrogate mothers. This is left to the intended parents.[30]

Surrogacy is well-known, and popular in the Czech society. There are special websites and private and public Facebook groups about surrogacy. People search for surrogates, and women offer themselves as surrogates. A few examples of advertisements from mid-September of this year can be found on one of the special websites translated into English:


Datum: **15.09.2022**
Vložil: **PJ**
Titulek: Hledáme náhradní matku **(We are looking for a surrogate)**

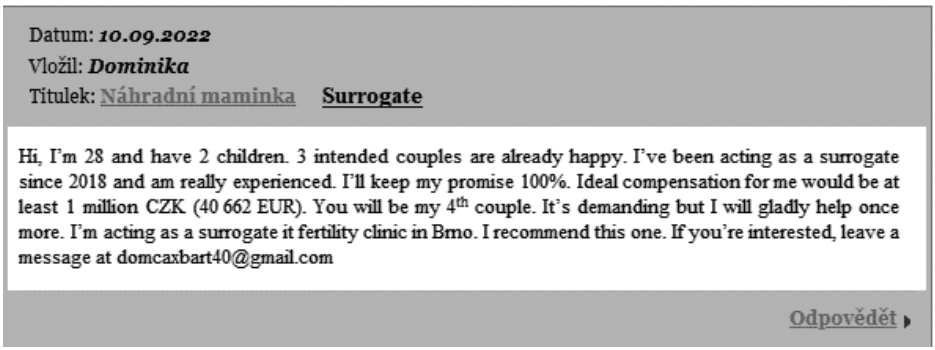
Hello, we are looking for a surrogate, who would carry our child for us. Unfortunately, we can't have a child naturally, due to medical issues. Contact us: elinek44@seznam.cz.

Odpovědět

Figure 1: Example of an advertisement which poses a demand for surrogacy.[31] This can be described as a common example of advertisements made by infertile couples (married or

30 No date, 'Surrogate motherhood', *Reprofit*, [Online].
31 PJ, 15 September 2022, *Hledáme náhradní matku* [Online].

living together) who have serious health problems and are unable to conceive a child naturally or through assisted reproduction methods.


Datum: ***10.09.2022***
Vložil: ***Dominika***
Titulek: Náhradní maminka **Surrogate**

Hi, I'm 28 and have 2 children. 3 intended couples are already happy. I've been acting as a surrogate since 2018 and am really experienced. I'll keep my promise 100%. Ideal compensation for me would be at least 1 million CZK (40 662 EUR). You will be my 4th couple. It's demanding but I will gladly help once more. I'm acting as a surrogate it fertility clinic in Brno. I recommend this one. If you're interested, leave a message at domcaxbart40@gmail.com

Odpovědět

Figure 2: Example of surrogacy offered by potential surrogate.[32] This also proves that surrogacy is deeply rooted in the Czech society, as some women have extensive experience acting as surrogates. Moreover, it can be considered as an example of commercial surrogacy, because the woman offering her 'services' as a surrogate is charging a fairly reasonable amount of money and appears to be doing so on a fairly regular basis. Note that the term 'regularly' should be understood in the context of a woman's ability to repeat several pregnancies in a row. Therefore, the time frame in which she is doing this may be much longer than the term 'regular basis' would normally suggest.

In practice, all advertisements demonstrate that surrogacy exists in various ways and in both altruistic and commercial versions. As written in the description of Figure 2, Czech women who act as surrogates know 'their price' and are not afraid to ask for reasonable sums of money, which would probably not fit into the altruistic scheme.[33] However, as Figure 1 suggests, an altruistic version is also present, usually among those searching for a surrogate. There is also quite a lot of supply and demand. These are not the most recent advertisements on the site. At the time of writing (second half of November 2022), there were advertisements in both October and November that year. The history of these advertisements go back a long way. Some advertisements were repeated, however, new ones were generally added every month.

32 Dominika, 10 September 2022, *Náhradní maminka,* [Online].

33 It is extremely difficult to determine what sum is within the altruistic range. The example of the UK makes this clear. Although the UK allows only altruistic surrogacy, in some cases supposedly 'unreasonable' payments for surrogates have already been authorised by courts. See, for example, the case of X & Y (Foreign Surrogacy) [2008] EWHC 3030 (Fam).

4. Relationship Between Adoption and Surrogacy

4.1. Adoption as a Tool for Surrogacy

It is clear that both institutions are known and used in the Czech Republic, and that they are different. How do they relate to one another? In general, there are two dimensions to their relationships. The first is evident and has already been mentioned. Adoption serves as a surrogacy tool. This dimension results from S 804 CC, which prohibits adoption by close relatives and siblings, with the exception of this prohibition in the case of surrogacy. This provision assumes that adoption is involved in the surrogacy process because it states that adoption between close relatives and siblings is allowed in the case of surrogacy. However, adoption must be present in all surrogacy cases that occur in the Czech Republic.

One of the problems associated with surrogacy is the difficulty of handing over the child and transferring legal parentage. The mother of a child is always the woman who gives birth, and the father is the man to whom one of the presumptions of paternity points. Particularly, when it comes to mothers, it is difficult to change their position. There are two ways to achieve this goal. The first is to deny and establish maternity. However, the reasons why it is possible to deny motherhood are limited. However, surrogacy is not one of these. The situation of the child's father is much easier because the intended father can become the child's legal parent even if the legal mother is a surrogate. The intended father can use the presumption of consent for the artificial insemination of an unmarried woman or the presumption of a joint declaration of paternity. However, these mechanisms only apply if the surrogate is unmarried. Therefore, the only way to change the parent (or rather the mother) is through adoption. The surrogate provides her consent for adoption, and the intended parents adopt the child as their own. This applies similarly in cases where the intended father has already been established as the child's legal father. In this case, step-parent adoption can be used, however, only if the intended parents are married.

Unlike other countries, the Czech Republic does not have a mechanism to change the parent. There is no divided parentage or parental responsibility which allows a child to have more than one parent. Unlike the United Kingdom, there is no parental order.[34] Parental responsibility, a set of mutual rights and duties between parents and children, is inseparable from parentage. The parents of a child are always the carriers of parental responsibility. As a rule, they are also executors, however, this is not necessary, and they can also be executed by other persons. These changes are closely related to the ways in which parental responsibility can be affected by a court's suspension, limitation or deprivation. The court may suspend parental responsibility

34 See more, No date, 'Parental orders (surrogacy law)', *NGALaw* [Online].

if serious circumstances prevent the parent from exercising it. In the case of a minor parent who has not yet acquired full legal capacity, parental responsibility is legally suspended until the parent acquires full legal capacity [S 868(1) CC]. Similarly, in the case of an adult parent whose legal capacity has been limited, or the parental responsibility is suspended for the duration of the limitation [S 868(2) CC]. The court may limit parental responsibility if the parent is not exercising parental responsibility properly and if such a measure is in the best interests of the child (S 870 CC). Finally, the court can deprive the parent of parental responsibility if he/she seriously neglects or abuses parental responsibility or if he/she has committed an offence against the child, used the child to commit an offence, etc. (S 871 CC). It is clear that the suspension of parental responsibility is an instrument for the protection of both the parent and the child, whereas the other measures, particularly the deprivation of parental responsibility, are primarily punishments for the parent.

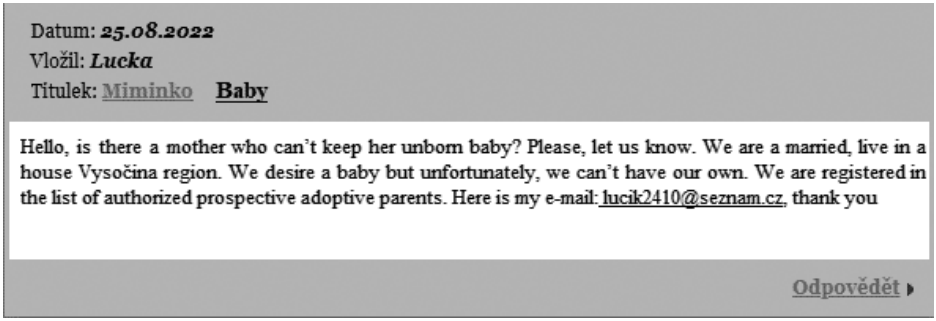
4.2. Thin Line Between Surrogacy and Direct Adoption of a Newborn

4.2.1. Explanation of the Problem

The second dimension of the relationship between adoption and surrogacy is subtle and discrete. Both adoption and surrogacy involve young children, surrogacy exclusively and adoption partially. However, notably the children best suited for adoption, those with the highest possibility of being adopted (soon), are young and healthy. It is a sad fact that the older the child, the more problems they have, health problems, behavioural problems, or ethnicity, and the less adoptable they are. This is supported by the current statistics of the Ministry of Labour and Social Affairs of the Czech Republic for 2021, when 369 children were enrolled. The vast majority (271) were aged 0-2 years. Only 36 were 3-5 years, 30 were 6-9 years, 19 were 10-14 years old, and only 7 were disabled.[35] Therefore, the line between surrogacy and adoption is blurred and unclear. However, in countries with proper surrogacy regulations, this issue is usually easily overcome because of the precise definition of surrogacy and its processes. Is this the case under the Czech law?

There is no definition of surrogacy. Each author who writes about surrogacy usually creates his own version, often drawing inspiration from foreign articles and definitions. In practice, we can come across unusual advertisements that combine aspects of both surrogacy and the direct adoption of newborns. An example:

35 Ministerstvo práce a sociálních věcí, no date, *Roční výkaz o výkonu sociálně právní ochrany dětí za rok 2021* [online].


Datum: **25.08.2022**
Vložil: ***Lucka***
Titulek: Miminko **Baby**

Hello, is there a mother who can't keep her unborn baby? Please, let us know. We are a married, live in a house Vysočina region. We desire a baby but unfortunately, we can't have our own. We are registered in the list of authorized prospective adoptive parents. Here is my e-mail: lucik2410@seznam.cz, thank you

Odpovědět

Figure 3: Example of an advertisement which removes barriers between surrogacy and direct adoption of a newborn.[36] The woman who wrote the advertisement specifically searched for a woman (mother) whose baby has not yet been born, but who will not be able to keep it.

Such a situation can be briefly summarised as follows: an infertile couple, intended parents find and meet a woman who agrees to be their surrogate mother and carries the child for them. She states that she is already pregnant but does not want the baby. The intended parents agree that they do not mind having a child not genetically related to them (they would have to use donor-assisted reproduction). The direct adoption process occurs after the baby is born. Can this situation be referred to as surrogacy? Certainly not in many countries where surrogacy is not properly regulated.

4.2.2. Examination under the Czech Law – Surrogacy 'Largo Sensu'*?*

However, this situation differs in the Czech Republic. Two primary questions need to be answered (under the conditions of Czech law) to provide a proper examination and a final answer. The first question is whether the surrogate was already pregnant. The second issue is whether the surrogacy agreement must include a promise to undergo IVF to become pregnant.

These two questions can be considered simultaneously because the arguments and answers are similar, if not identical. It is important to realise that there is no legal definition of surrogacy. The only explanation in the Czech language is that this motherhood is substitutive or surrogate. The mother of the child is the woman who gives birth. If she is a surrogate mother, then we can say that she is the mother instead (in the place) of someone else. However, this explanation does not define a surrogate mother, except that the term 'surrogacy' or 'surrogate motherhood' implies that the surrogate must be a woman (female).

36 Lucka, 25 August 2022, *Miminko* [online].

Another important point is the general constitutional principle expressed in art. 2(3) of the Charter of Fundamental Rights and Freedoms of the Czech Republic: *'Everyone may do what is not prohibited by law, and no one may be compelled to do what is not required by law'*. A similar provision is contained in the Civil Code S 2(2): '*Unless expressly prohibited by a statute, persons can stipulate rights and duties by way of exclusion from a statute;...*' As there are no requirements for the surrogate or the content of the surrogacy agreement, there is no reason why a pregnant woman cannot be a surrogate. Similarly, the surrogacy agreement does not have to include any obligation to undergo IVF or become pregnant. Although there are some definitions in various articles of Czech jurisprudence, none of them are legal, and usually, each of the authors creates his/her own or finds inspiration abroad and in foreign (proper) surrogacy regulations.

Therefore, there is limited or no difference between surrogacy and direct adoption of a newborn child. Adoption is necessary for achieving surrogacy. However, regarding the adoption of newborn children, when the legal mother of the child designs its future adoptive parents long before the child is born, there is almost no difference from surrogacy. Therefore, it can be called 'surrogacy *largo sensu*'.

One question that remains unanswered is whether this situation is optimal. One may consider this as only a theoretical problem without any real impact. However, 'surrogacy *largo sensu*' has the potential to partially replace regular adoption or create competition between the two. Another reason for considering this issue is the manner in which the intended parents and surrogates are found. The Child Legal and Social Protection Authority is the only institution that mediates adoption. However, regarding surrogacy, even for the *largo sensu* type, there are many online groups of like-minded people searching for surrogates, intended, and adoptive parents. Overall, this inability to clearly distinguish between the direct adoption of a newborn child and surrogacy adds to the general problem of surrogacy, which is the lack of regulations in the Czech legal system.

5. Conclusion and Discussion

In general, there are definite differences between adoption and surrogacy. Adoption is understood as accepting a foreign person as one's own, whereas surrogacy is usually understood as subsidiary infertility treatment. Adoption concerns children of all ages, and sometimes even adults, whereas surrogacy concerns only newborn babies. Adoption is postnatal, it occurs after the birth of the child, whereas surrogacy is prenatal, as the surrogacy agreement and most of the process occurs before the child is conceived. Adoption is a well-known, protected, and established institution, whereas surrogacy is highly controversial and problematic in many ways.

As far as the Czech Republic is concerned, there are other differences between the two: adoption is an independent, sovereign institution, whereas surrogacy depends on the existence of adoption. Adoption is well regulated in the Civil Code, whereas surrogacy depends on the existence of adoption and remains ignored. Adoption is legal, whereas surrogacy carries a high risk of being prosecuted for the crime of human trafficking if there is any payment for handing over the child or providing consent for adoption.

However, the two institutions are closely connected. Surrogacy, its practice, and its existence in the Czech Republic depend on adoption. Owing to the principle of *mater semper certa est*, and the impartible concept of parentage, adoption is the only way to complete the process of surrogacy. This close relationship has several dimensions. Owing to the lack of a definition of surrogacy and surrogate mothers and proper regulation of surrogacy, surrogacy and the adoption of young children and babies are almost indistinguishable, which can cause some problems. This is another reason for reconsidering the current (non-)regulation of surrogacy in the Czech Republic. Thus, there should be a clear and undisputed line between surrogacy and adoption. This may be achieved by adopting a surrogacy regulation that either bans it completely or sets reasonable rules and definitions. The choice depends on the legislature and whether such change will occur in future. There are several examples of inspiration from the literature. One is the UK surrogacy law, which has been a model for many countries in the past. For example, the inspiration can be drawn from S 1(2) of the Surrogacy Arrangements Act 1985, which states that a surrogate mother is '*a woman who carries a child in pursuance of an arrangement made before she began to carry the child and with a view to any child carried in pursuance of it being handed over to, and parental responsibility being met (so far as practicable) by, another person or other persons*'.[37] This provision further states that a woman, who carries the baby should be treated as the surrogate '*as beginning to carry it at the time of the insemination or of the placing in her of an embryo, of an egg in the process of fertilisation or of sperm and eggs, as the case may be, that results in her carrying the child*'.[38]

The aforementioned provision from the Surrogacy Arrangements Act 1985 makes the British regulation of surrogacy an excellent model for the Czech legislature. There are several laws and court rulings on surrogacy, including the Surrogacy Arrangements Act of 1985, the Human Fertilisation and Embryology Act of 2008, and the Adoption and Children Act of 2002. In general, surrogacy arrangements are not enforced. The legal mother of a child is always the woman who gives birth, similar to the Czech Republic. However, the mechanism for transferring legal parenthood to intended parents is different. It is not done by adoption, but by parental order. The

37 S 1(2) Surrogacy Arrangements Act 1985.
38 S 1(6) Surrogacy Arrangements Act 1985.

order transfers parental responsibility exclusively to the applicant(s).[39] The application for a parental order can be made by a married couple, civil partners, or two people living in an enduring relationship, and single person. The applicants should be at least 18 years old and the gametes of at least one of them should have been used to create the embryo. The application can be made within the period between the child's birth and six months after that.[40] However, the case law relativized this requirement, stating that the deadline can be relaxed and a parental order can be granted, even in the case of much older children.[41] Children must also live in a home with one or both applicants. It is also necessary that the woman who carries and gives birth to the child (and the other legal parent, if he is not the applicant) fully understands, freely, and unconditionally consents to the order. Therefore, even if she has given birth, she can refuse consent. Clearly, the court must decide whether issuing an order complies with the child's welfare being a paramount consideration.[42]

The UK's surrogacy regulation only allow for an altruistic version of surrogacy, in which only reasonably incurred expenses can be paid to the surrogate for handing over the child, granting her consent, or concluding the arrangement. Payments exceeding this limit can be authorised by courts. Case law in the UK soon developed the attitude that even unreasonable payments could be authorised retrospectively. The key questions for authorising such payments were:1) whether the sums paid had been disproportionate to reasonable expenses, 2) whether the applicants had been acting in good faith in their dealings with the surrogate, and 3) whether they had been party to any attempt to defraud the authorities.[43] Beginning with this decision, some UK academics remark that English Law does not view commercial surrogacy as an intrinsic wrong through case law development.[44] Similar to the issue of excessive payments, other requirements for a parental order may be waived if the issuance of the order is in the best interests of the child (e.g. the applicant couple has separated or the surrogate mother could not be found and, therefore, could not provide her consent). Generally, only a situation indicating a clear abuse of public policy can rebut the primacy of a child's welfare.[45]

No third party can be involved in the process of making the surrogacy arrangement, although since 2008, non-profit organisations have initiated negotiations with a view to making such arrangements. The body can only charge reasonable costs

39 Herring, 2019, p. 374.
40 The case of Whittington Hospital NHS Trust v XX [2020] UKSC 14.
41 See, for example, the case of Re X (A Child) (Surrogacy: Time limit) [2014] EWHC 3135 (Fam).
42 Herring, 2019, pp. 374-375.
43 The case of X & Y (Foreign Surrogacy) [2008] EWHC 3030 (Fam). A similar decision was stated in the case of Re C (Parental Order) [2013] EWHC 2408 (Fam).
44 The case of Whittington Hospital NHS Trust v XX [2020] UKSC 14.
45 Herring, 2019, p. 376.

for its activities. Commercial surrogate agencies are prohibited. Advertisements indicating that someone is searching for a surrogate/is willing to enter into a surrogacy arrangement/wants to act as a surrogate are banned, with the exception of advertisements by non-profit organisations, which are not covered by the ban.[46]

There is no need to introduce parental order as an entirely new practice into the Czech Family Law, particularly when there is adoption which appears to work well in most cases for the completion of surrogacy. The same applies to the definition of, the intended parent. As the UK and the Czech Republic are in slightly different positions on the issue of parenthood (particularly same-sex parenthood), there is no need to introduce the possibility of surrogacy for same-sex couples, particularly if Czech experts consider it as another subsidiary way of infertility treatment.[47] However, inspiration can be drawn from the strong position of the surrogate, and the allowed form of surrogacy and the case law on reasonable and unreasonable payments can certainly provide inspiration. It is advisable to focus on the precise definition of who can be a surrogate and the requirements, rights, and obligations of both the surrogate and intended parents. However, it would be useful to consider that the UK regulations are tailored to the common law legal system, whereas the Czech Republic belongs to the continental legal system, and therefore does not mechanically copy every single rule and provision on surrogacy in the UK. Another important and closely connected point to consider is the different approaches to the best interests of the child (or child's welfare in the UK). However, in the Czech Republic, this is the primary consideration, whereas in the UK, this is the paramount principle. We can see that the UK case law has developed a practice in which the child's welfare is the strongest, and the winning argument. The Czech judicial practice of dealing with family law matters does not place the child's best interests above all else; there may be other interests or arguments of equal importance that justify a decision against the child's best interests. Therefore, although it is an excellent idea to examine UK surrogacy legislation and case law, it is highly advisable not to copy every provision in force in the UK as it may not be in accordance with the legal tradition of the Czech Republic. The legislature could also opt to ban surrogacy altogether, however, even that would be better than the current grey area of the law, which creates legal uncertainty for all parties involved, particularly for the child.

46 The case of Whittington Hospital NHS Trust v XX [2020] UKSC 14.
47 See, for example, Konečná and Charamza and Prudil et al., 2020, pp. 1-14 [Online].

Bibliography

- Act no. 359/1999 Coll., on the Social and Legal Protection of Children, as last amended.
- Act no. 40/2009 Coll., Criminal Code, as last amended.
- Act no. 89/2012 Coll., Civil Code, as last amended.
- Act no. 292/2013 Coll., on Special Civil Proceedings, as last amended.
- Banerjee, S. (2013) 'Gestational surrogacy contracts: Altruistic or commercial? A contract theoretic approach'. *The Manchester School,* 81 (3), pp.438-460 [online]. Available at: https://onlinelibrary.wiley.com/doi/full/10.1111/j.1467-9957.2011.02287.x(Accessed: 22 April 2023)
- Decision of the Constitutional Court of the Czech Republic no. Pl. ÚS 10/15, from the 19th of November, 2015.
- Decision of the Constitutional Court of the Czech Republic no. I. ÚS 3226/16-2, from the 29th of June, 2017.
- Dominika (10 September 2022). *Náhradní maminka*[online]. Available at: https://nahradni-materstvi.webnode.cz/dojmy/discussioncbm_619142/20/(Accessed: 20 November 2022).
- Herring, J. (2019) 'Who is a parent?' in Herring, J. *Family Law.* 9th edn. Harlow: Pearson, pp. 358-436. ISBN 978-1-292-25116-5.
- Herts, A. A. (2019) 'Surrogate motherhood in Ukraine: method of infertility treatment, judges' activism and doctrine' in Mostowik, P. (eds.). *Fundamental legal problems of surrogate motherhood. Global prospective.* Warszawa: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, pp. 421-447. ISBN 978-83-66344-06-8.
- Human Fertilisation & Embryology Authority (no date). *Surrogacy* [online]. Available at: https://www.hfea.gov.uk/treatments/explore-all-treatments/surrogacy/ (Accessed: 20 November 2022).
- Konečná, H. and Charamza, P. and Prudil, L. et al. (2020) 'Regulace náhradního mateřství v ČR: expertní názor' *Časopis zdravotnického práva a bioetiky*, 10 (1), pp. 1-14 [online]. Available at: http://medlawjournal.ilaw.cas.cz/index.php/medlawjournal/article/view/193/158 (Accessed: 13 January 2023).
- Kornel, M., (2020) '§ 846 [Soulad s dobrýmimravy]' in Králíčková, Z., Hrušáková, M., Westphalová, L. et al. *Občanský zákoník II. Rodinné právo (§ 655-975). Komentář.* 2ndedn. Prague: C. H. Beck, pp. 693-697. ISBN 978-80-7400-795-8.
- Králíčková, Z. (2015) 'Mater semper certa! O náhradním a kulhajícím mateřství', *Právní rozhledy,* 2015/21, pp. 725-732.
- Králíčková, Z., Kyselovská, T. (2020) '§ 775 [Mateřství]' in Králíčková, Z., Hrušáková, M., Westphalová, L. et al. *Občanský zákoník II. Rodinné právo (§ 655-975). Komentář.* 2ndedn. Prague: C. H. Beck, pp. 484-499. ISBN 978-80-7400-795-8.

- Lucka (25 August 2022). *Miminko* [online]. Available at: https://nahradni-materstvi.webnode.cz/dojmy/discussioncbm_619142/30/ (Accessed: 27 November 2022).
- Ministerstvo práce a sociálních věcí (no date). *Roční výkaz o výkonu sociálně právní ochrany dětí za rok 2021* [online]. Available at: https://www.mpsv.cz/statistiky-1 (Accessed: 30 November 2022).
- NGA Law (no date). *Parental orders (surrogacy law)* [online]. Available at: https://www.ngalaw.co.uk/knowledge-centre/parental-orders-surogacy-law/ (Accessed: 30 November 2022).
- PJ (15 September 2022). *Hledámenáhradnímatku* [online]. Available at: https://nahradni-materstvi.webnode.cz/dojmy/discussioncbm_619142/10/ (Accessed: 20 November 2022).
- Re C (Parental Order) [2013] EWHC 2408 (Fam).
- Re X (A Child) (Surrogacy: Time limit) [2014] EWHC 3135 (Fam).
- Reprofit (no date). *Surrogate motherhood* [online]. Available at: https://www.reprofit.cz/en/surrogacy/ (Accessed: 20 November 2022).
- Sedlák, P., Kyselovská, T. (2020) '§ 794 [Definice osvojení]' in Králíčková, Z., Hrušáková, M., Westphalová, L. et al. *Občanský zákoník II. Rodinné právo (§ 655-975). Komentář.* 2ndedn. Prague: C. H. Beck, pp. 558-572. ISBN 978-80-7400-795-8.
- Sedlák, P. (2020a) '§ 808 [Odvolání souhlasu dítěte]' in Králíčková, Hrušáková and Westphalová et al. *Občanský zákoník II. Rodinné právo (§ 655-975). Komentář.* 2ndedn. Prague: C. H. Beck, pp.606-607. ISBN 978-80-7400-795-8.
- Sedlák, P. (2020b) '§ 803 [Přiměřený věkový rozdíl]' in Králíčková, Hrušáková and Westphalová et al. *Občanský zákoník II. Rodinné právo (§ 655-975). Komentář.* 2ndedn. Prague: C. H. Beck, pp. 594-596. ISBN 978-80-7400-795-8.
- Sedlák, P. (2020c) '§ 799 [Požadavkyna osvojitele]' in Králíčková, Hrušáková and Westphalová et al. *Občanský zákoník II. Rodinné právo (§ 655-975). Komentář.* 2ndedn. Prague: C. H. Beck, pp.581-586. ISBN 978-80-7400-795-8.
- Shenfield, F. et al. (2005) 'ESHRE Task Force on Ethics and Law 10: Surrogacy', *Human Reproduction*, 20(10) [online]. Available at: https://www.researchgate.net/publication/7763799_ESHRE_Task_force_on_ethics_and_law_10_Surrogacy(Accessed: 20 November 2022).
- Surrogacy Arrangements Act 1985. 1985 c. 49.
- Svatoš, R., Konečná, H. (2019). 'Náhradní mateřství v trestněprávních konsekvencích', *Trestněprávní revue,* 2019/1, pp. 7-13.
- The Convention for the Protection of Human Rights and Fundamental Freedoms from the 4th of November 1950, promulgated in the Czech Legal Order as a Notice of the Federal Ministry of Foreign Affairs, no. 209/1992 Coll.
- The Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, promulgated in the Czech Legal Order as a Notice of the Ministry of Foreign Affairs, no. 43/2000 Int. Coll.

- The Convention on the Rights of the Child from the 2nd of September 1990, promulgated in the Czech Legal Order as a Notice of the Federal Ministry of Foreign Affairs, no. 104/1991 Coll.
- The European Convention on the Adoption of Children from the 24th of April 1967, promulgated in the Czech Legal Order as a Notice of the Ministry of Foreign Affairs, no. 132/2000 Int. Coll.
- UN Special Rapporteur (no date). *Surrogacy: Special Rapporteur on the sale and sexual exploitation of children*[online]. Available at: https://www.ohchr.org/en/special-procedures/sr-sale-of-children/surrogacy (Accessed: 20 November 2022).
- Vacová, R. (2020). 'Náhradní mateřství napříč světem: Rusko, Ukrajina, Indie', *Iurium Scriptum,* 2020/1, pp. 62-69 [online]. Available at:https://www.beck-online.cz/bo/chapterview-document.seam?documentId=nrptembsgbpws427gfpxgxzwgi&groupIndex=2&rowIndex=0&refSource=search# (Accessed: 22 April 2023).
- Whittington Hospital NHS Trust v XX [2020] UKSC 14.
- X & Y (Foreign Surrogacy) [2008] EWHC 3030 (Fam).

Enikő KRAJNYÁK*

Protection of the Environment in National Constitutional Law in Light of the Jurisdiction of the ECtHR – A Hungarian Perspective

ABSTRACT: *The article gives a comparative analysis of the protection of the environment in the European human rights framework and at the constitutional level through the example of Hungary. The contribution analyses two judgements of the ECtHR in connection with the country and presents the Hungarian constitutional framework for the protection of the environment. The starting point of the analysis is the fact that the different levels of regulations – international and national – tend to focus on different aspects of protection, yet they significantly influence each other. The presentation of the two Hungarian cases is particularly topical in light of the fact that the Fundamental Law of Hungary, which introduced several unique provisions for the protection of the environment, was adopted between the finalisation of the two judgements.*
KEYWORDS: *right to a healthy environment, right to respect for private and family life, right to a fair trial, ECHR, Fundamental Law of Hungary*

1. Introduction

The protection of the environment, regardless of the level of regulation, shall be the centre of concern for legislators both at the national and international levels, given that the environment provides living circumstances for all living beings on the planet; therefore, its maintenance and preservation are crucial for the survival of all species. Although international and national laws offer similar solutions, for instance, the protection of the environment through human rights, they tend to focus on the different aspects of these approaches. International human rights law builds on the nexus between the first and second generations of human rights and inherent

* Enikő Krajnyák, Ph.D. Candidate at the Ferenc Deák Doctoral School of the University of Miskolc and Researcher at the Central European Academy, Budapest. https://orcid.org/0009-0003-2457-9491.

https://doi.org/10.62733/2023.1.151-177

environmental aspects, whereas the majority of national constitutions formulate a substantive right to a healthy or favourable environment. Furthermore, goals and principles are declared at both international and national levels, however, their content, role, and interpretation may differ, which could be explained by the diverse tools that are at the disposal of the international community of States and within the relations between the State and its citizens.

The Hungarian perspective is worth examining for several reasons. First, the European Court of Human Rights (hereinafter the ECtHR) delivered two major cases from its greening case law, contributing to a deeper understanding of the seemingly non-environmental provisions of the European Convention on Human Rights (hereinafter the ECHR). Second, the Hungarian constitutional framework, which provides various unique solutions not only for the protection of the environment but also for future generations, was established after the occurrence of the facts of the cases and during the finalisation of the two decisions. The Fundamental Law substantially changed the constitutional framework for the protection of the environment and introduced several concepts which could serve as examples for other national constitutions. In addition, an examination of the judgements delivered in connection with the country in the context of the new constitutional framework offers a comprehensive perspective on the complementarity of national and international levels of environmental protection.

2. Theoretical Approaches to Environmental Protection in Human Rights Law

2.1. Environment and Human Rights in International Law

International environmental law has by now become an independent field of public international law with increasing importance. The interlinkages with human rights law form an inherent part of the legal protection of the environment, however, there is no consensus on the precise legal place of the environment in the human rights discourse at a global level. Currently, there are several approaches towards environmental protection within human rights law. First, the 1992 Rio Declaration established the procedural rights-based approach to the protection of the environment, i.e. the use of procedural rights to address environmental issues.[1] The 1998 Aarhus Convention and the 2018 Escazú Agreement could be regarded as the implementation

1 These rights are access to information, public participation and effective access to judicial and administrative proceedings in environmental matters. See: Principle 10 of the Rio Declaration on Environment and Development, 1992. See also: Shelton, 1992.

of Principle 10 of the Rio Declaration in the European and Latin-American continents, respectively, guaranteeing access to information, public participation, and justice in environmental matters.

Second, environmental aspects appear in the interpretation of certain substantive human rights as a precondition for their enjoyment, implying that the state of the environment can affect the realisation of rights,[2] such as the right to life or the right to respect for private and family life. In other cases, particularly in relation to property rights, environmental considerations may precede enjoyment of rights. Apart from using human rights as tools to address environmental issues, either procedurally or substantively, a new approach has been developed in recent decades that aims to elaborate a new substantive right to a healthy environment.[3] Considering that international environmental law was developed after the adoption of international human rights documents, such a right was not included in any binding document that would ensure its enforceability. Nevertheless, the adoption of a resolution by the United Nations General Assembly on 28 July 2022[4] that recognises the right to a clean, healthy, and sustainable environment is certainly forward-looking and may serve as a catalyst for action in the field.

2.2. The Protection of the Environment in the European Human Rights Framework

The cornerstone of the European human rights framework, the ECHR does not provide any specific right for the protection of the environment, nor does it refer to the environment. However, the ECtHR has developed its case law in environmental matters through the interpretation of certain human rights guaranteed by the ECHR, which is often referred to as the 'greening' of the ECHR[5] resulting from the Court's approach to the Convention as a 'living instrument'.[6] Owing to the extensive and evolutive interpretation of human rights, environmental aspects play a crucial role in the adjudication of cases and enable flexibility in understanding these rights.

The interlinks between the protection of human rights and the environment could be observed in the case laws of several human rights guaranteed by the Convention.[7] First, the protection of the environment serves as a precondition for the enjoyment of the right to life (Article 2),[8] the prohibition of inhuman or degrading treatment

2 Boyle, 2012, pp. 617–618; Shelton, 2006, pp. 130–131.
3 Birnie, Boyle and Redgwell, 2009, pp. 277–278.
4 See: UN GA Resolution A/76/L.75.
5 Hajjar Leib, 2011, pp. 71–80.
6 See: Letsas, 2013.
7 For an overview of the environmental case law of the ECtHR, see: Raisz and Krajnyák, 2022.
8 See: *Öneryildiz v. Turkey; Budayeva and Others v. Russia; Özel and Others v. Turkey.*

(Article 3),[9] the right to liberty and security (Article 5),[10] freedom of expression (Article 10),[11] and the right to respect for private and family life (Article 8),[12] meaning that the degradation of the state of the environment could result in the violation of these substantive rights. Second, procedural rights, such as the right to a fair trial (Article 6)[13] and the right to an effective remedy (Article 13),[14] which provide robust support for the right to access to justice in environmental matters, as laid down in the Aarhus Convention, are often used as tools to address environmental issues. Finally, the protection of the environment could also constitute a legitimate aim of general interest for interference with the protection of property (Article 1 of Protocol No. 1 of the Convention).[15] This implies that interference with property rights may be justified by the public interest, such as protecting natural sites or managing forests. However, environmental protection in this context is interpreted in a restrictive sense, which limits environmental reasoning per se.

3. Applicability of Articles 6 and 8 of the ECHR in Environmental Matters

3.1. The Right to a Fair Trial and its Environmental Implications

In the framework of Article 6, the ECHR declares that *'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'*. The case law of the right to a fair trial is extensive in the Court's practice: it is divided into civil and criminal limbs, both of which encompass (a) the right of access to court; (b) the institutional requirements of a tribunal, including establishment by law, independence, and impartiality; and (c) procedural requirements, such

9 See: Florea v. Romania; Elefteriadis v. Romania.
10 See: Mangouras v. Spain.
11 See: Steel and Morris v. the United Kingdom; Vides A*izsardzības Klubs v. Lativia; Rovshan Hajiyev v. Azerbaijan; Bumbeș v. Romania.*
12 See: Guerra and Others v. Italy; Roche v. the United Kingdom; Vilnes and Others v. Norway; Brincat and Others v. Malta; Lopez Ostra v. Spain; *Taşkın* and Others *v. Turkey; Fadeyeva v. Russia; Giacomelli v. Italy; Tătar v. Romania; Dubetska and Others v. Ukraine; Cordella and Others v. Italy; Mileva and Others v. Bulgaria; Yevgeniy Dmitriyev v. Russia; Grimkovskaya v. Ukraine; Kapa and Others v. Poland; Dzemyuk v. Ukraine; Solyanik v. Russia; Brânduse v. Romania; Di Sarno and Others v. Italy; Kotov and Others v. Russia.*
13 See: *L'Erablière* A.S.B.L. *v. Belgium; Howald Moor and Others v. Switzerland; Karin Andersson and Others v. Sweden; Apanasewicz v. Poland; Bursa Barosu Başkanlığı and Others v. Turkey.*
14 See: *Öneryildiz v. Turkey; Cordella and Others v. Italy; Di Sarno and Others v. Italy*
15 See: Papastavrou and Others v. Greece; N.A. and Others v. Turkey; Turgut and Others v. Turkey; Dimitar Yordanov v. Bulgaria; National Movement Ekoglasnost v. Bulgaria.

as fairness, public hearing, and a reasonable time requirement.[16] Article 6 is primarily applied in cases relating to the enforcement of judicial decisions, access to courts to challenge measures affecting the environment, access to documents, and access to information in environmental matters.

The role of the ECtHR is outstanding in guaranteeing procedural rights of individuals in environmental matters, despite the fact that the Convention itself does not expressly refer to environmental aspects. However, the Aarhus Convention, even though it incorporates procedural environmental rights, does not provide a judicial framework for the enforcement of these rights. While there is no direct legal relationship between the two conventions, it is noteworthy that several judgements referred to the Aarhus Convention in their reasoning[17] and therefore interpreted Article 6 of the ECHR in light of the requirements laid down in the Aarhus Convention. The consideration of the aspects enshrined in the latter convention, or even of the fact that a State is a party to it, certainly enables the channelling of an environmental approach to the interpretation of the right to a fair trial in the ECtHR's practice. However, the human rights framework also has its limits, which are particularly indicated by the limited access of environmental non-governmental organisations to judicial proceedings: under the Aarhus Convention, such organisations undoubtedly have standing before a court,[18] whereas within the framework of the ECHR, environmental associations have access to a tribunal under specific circumstances, such as when the association was a party to domestic proceedings,[19] or when the violation does not stem from an environmental disturbance that can only be felt by natural persons (such as health considerations under Article 8).[20]

Particular importance shall be placed on the understanding of the 'reasonable time' requirement, as it was a decisive element in both Hungarian cases examined in this study. By the term 'reasonable time', the Court generally understands administering justice without delays which may jeopardise its effectiveness and credibility,[21] so that the courts are able to guarantee everyone's right to a final decision on disputes

16 See: Guide on Article 6 (civil limb), 2022, and Guide on Article 6 (criminal limb).

17 See, for instance, Tătar v. Romania, 118; Grimkovskaya v. Ukraine, 69; Di Sarno and Others v. Italy, 107; *Taşkın* and Others *v. Turkey, 99. The literature indicates that the reference to the Aarhus Convention in a case concerning Turkey that has not ratified the Convention may raise the question of whether the Convention has become part of international customary law. However, in Okyay and Others v. Turkey, the Court failed to mention the Aarhus principles, which suggests caution for considering the Aarhus Convention as customary law. Nonetheless, the mention of the Convention as applicable law to a non-party may imply that these norms are consistent with the emerging principles of law with more universal application. See: Duvic-Paoli, 2012; Eicke, 2022.*

18 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), 1998, Article 9.

19 Gorraiz Lizarraga and Others v. Spain, 36.

20 Greenpeace E.V. and Others v. Germany.

21 H. v. France, 58; Katte Klitsche de la Grange v. Italy, 61.

concerning civil rights and obligations within such a time frame. The reasonableness of the length of the proceedings shall be assessed on a case-by-case basis in light of the specific circumstances, with special regard to the complexity of the case, the applicant's conduct, the conduct of the competent authorities, and what is at stake in the dispute, as laid down in *Frydlender v. France*.[22] One may conclude that this requirement is particularly relevant in environmental cases, as the degradation of the environment tends to worsen over time and a timely judicial response could end harmful practices. However, one may also observe that Article 6 could be used for adjudicating environmental matters in exceptional cases, and thus applicants tend to allege the violation of Article 8 when referring to Article 6 in environmental cases.[23]

3.2. The Right to Respect for Private and Family Life in an Environmental Legal Context

The right to respect for private and family life is guaranteed under Article 8 of the Convention. According to the provision, the scope of the application extends to private and family life, home, and correspondence, and thus, to the sphere of personal or private interest. Moreover, the Convention provides that there shall be no interference by a public authority with the exercise of this right, with the exception of cases,

> *'[i]n accordance with the law and to the extent that is necessary in a democratic society in interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'*

A wide range of environmental cases fall under the scope of Article 8, primarily noise pollution, industrial emissions, and waste management, considering that the right to respect for private and family life implies respect for the quality of private life and enjoyment of the amenities of one's home, which are impacted by the degradation of the environment. However, such degradation only constitutes a violation of Article 8 if it directly and seriously affects one's private and family life and home, because, as mentioned above, the Convention is not an environmental legal document; thus, it does not guarantee environmental protection per se.[24]

22 Frydlender v. France, 43. See also: Kyrtatos v. Greece, 41.
23 Kecskés, 2021, pp. 214–215.
24 Guide on Article 8, pp. 46–47.

The ECtHR developed an extensive interpretation of Article 8 in environmental cases and has a well-established practice of determining what constitutes a violation of the right to private and family life. To assess whether the complaint violates Article 8, the Court applies a two-stage test. First, it shall be determined whether the complaint falls within the scope of application of Article 8, thus, whether it affects 'private life', 'family life', 'home' or 'correspondence' in light of specific circumstances.[25] The violation of 'home' and 'private life' is frequently alleged in environmental cases, considering that environmental problems are localised and tend to affect the surrounding area more, which are often inhabited places, where peoples' homes are situated. After determining whether the complaint falls within the remittances under Article 8, the second stage examines whether there has been interference with the above concepts. In this regard, apart from imposing a negative obligation on the State – interpreting this right from a liberal perspective and requiring the State to impinge only in well-founded circumstances – the Court may also find a violation of this article in case the State fails to implement positive measures to guarantee the right.[26]

The adjudication of issues related to noise pollution is at the centre of concern of this study, because the two highlighted Hungarian cases fall under this category and the Court has a well-established case law and interpretation of these issues, even within the environment-related case law of Article 8. The inclusion of noise pollution within the framework of Article 8 was established in *Powell and Rayner v. the United Kingdom* and *Hatton and others v. the United Kingdom*. In both cases, the applicants argued that the noise generated by Heathrow Airport violated their rights under the ECHR. In both cases, the State had to strike a fair balance between public and private interests: the economic interest of the State related to the functioning of airports, and the private interest of the inhabitants to effectively enjoy their homes which were situated in the vicinity of the airport. Although 10 years had passed between the delivery of the two judgements, the Court found no violation of Article 8 in any of the cases, holding that the State did not overstep its margin of appreciation by failing to strike a fair balance between the rights of the individuals and the conflicting interests of the community as a whole. On the other hand, the Court found a violation of Article 13, given that the judicial review was not an effective remedy in relation to the rights under Article 8.[27]

25 Roagna, 2012, pp. 10–11.
26 Connelly, 1986, p. 570.
27 See: Powell and Rayner v. the United Kingdom; 37–46; Hatton and Others v. the United Kingdom, 84–104.

4. Environmental Jurisdiction of the ECtHR on the Example of Two Hungarian Cases

The cases *Deés v. Hungary* and *Bor v. Hungary* produced fundamental outcomes for the interpretation of noise pollution arising from road and railway traffic, thus counterbalancing the interpretation of conflicting public and private interests.[28] As presented below, the Court adjudicated in favour of the private interest in these cases, which is contrary to the aforementioned cases concerning air traffic and aircraft noise. Therefore, the analysis of these cases serves to introduce Hungarian environmental case law in the practice of the ECtHR, and demonstrate its important role in the interpretation of Article 8 regarding the protection of the environment.

In *Deés v. Hungary*, the applicant complained about an increasing volume of cross-town traffic passing through the street on which his house was situated. The road was used as an alternative route for the neighbouring privately owned motorway M5 to avoid the high toll charge that had been introduced for the usage of the motorway. To counter this situation, several mitigation measures were adopted, including the construction of three bypass roads, a speed limit at night, the introduction of traffic lights at nearby intersections, and the prohibition of access of vehicles weighing over 6 tons. The measures implemented did not appear to produce an effective solution for the environmental harm suffered by the inhabitants of the area. The applicant, supported by the opinion of a private expert, complained that the noise and pollution originating from the exhaust fumes produced on the motorway caused damage to the walls of his house and brought an action before the first instance court. The application was dismissed and challenged before the second instance in which the expert opinion confirmed that the level of noise outside the applicant's house was above the statutory limits. Despite this, the court found no causal link between the measures adopted by the authorities and the damage to the house, and thus concluded that the respondent managed to strike a fair balance between the interests of road users and inhabitants, stating that the measures adopted were proportionate and sufficient to protect the applicant's interests.[29]

Before the ECtHR, the applicant alleged the violation of Articles 8 and 6, arguing that the noise, vibration, pollution and odour caused by the heavy road traffic nearby rendered his home virtually uninhabitable and that the measures adopted by the Hungarian authorities were insufficient and breached the 'reasonable time' criteria. In the framework of Article 8, the ECtHR relied on the findings of *Moreno Gómez v. Spain*, in which the Court stated that a violation of the right to respect for private and

28 Kecskés, 2011, p. 2.
29 Deés v. Hungary, 5–14.

family life may be found when the case concerns interference by public authorities with the right, as well as when they fail to act to stop third-party breaches of the right in question.[30] In this regard, the Court reiterated that breaches to the right to respect the home are not confined to concrete breaches but may also include those that are diffused, such as noise, emissions, smells, or other similar forms of interference, as in the given case, resulting in a breach preventing a person from enjoying the amenities of his home. The Court further considered that the noise pressure was significantly above statutory levels, and failure to respond by appropriate State measures may amount to a violation of Article 8. The extensivity of the noise levels was proven by an expert opinion in the domestic proceedings, which was acknowledged by the Hungarian court. However, contrary to the domestic court's decision, the link between the insufficiency of the measures adopted and excessive noise disturbance was held by the ECtHR. Accordingly, the Court pronounced a violation of the right to respect for private and family life in the given case.

Furthermore, the Court considered the length of the proceedings in light of Article 6, that is, the 'reasonable time' requirement. Considering that the two levels of jurisdiction at the domestic level lasted six years and nine months, and the lack of any fact or convincing argument from the Government that would explain the necessity of such lengthy proceedings, the Court held the violation of the right to a fair trial in the failure to meet the 'reasonable time' requirement.[31]

The importance of *Deés v. Hungary* is manifold. First, it is notable for being the first environment-related application in the case law of the ECtHR in relation to Hungary. Second, the case proved that the Court may also find a violation of Article 8, not for the lack of positive measures by the State, but for the inadequacy and inefficacy of the measures adopted. Third, the case provides a counterbalance for decisions related to aircraft noise. Similar to the aforementioned cases of *Powell and Rayner* and *Hatton*, *Deés* also dealt with some type of nuisance related to traffic, in which the State had to strike a fair balance between public and private interests. However, in comparison with these applications, *Deés* was successful in the sense that the Court pronounced the violation of Article 8 and placed more weight on private interests, that is, the interests of the inhabitants. The probable reason underlying the different approaches to finding the balance between the two groups of cases is related to concrete establishments (such as the Heathrow Airport) or to a cross-country network of traffic roads, while the provision of rapid means of travel and communication is of vital importance to the economic well-being of the country. For commercial, industrial, and touristic reasons, the economic impact of traffic roads may not be as significant and tangible.[32]

30 Moreno Gómez v. Spain, 53–56.
31 Deés v. Hungary, 25–27.
32 Fodor, 2011, pp. 90–93.

Regarding heavy railway noise, the Court's approach to adjudicating the balance between public and private interests is similar to that in the case of road traffic noise; namely, the Court placed more weight on the private interests of the inhabitants. In *Bor v. Hungary*, the applicant complained about the impossibility of enforcing the competent authority's obligation to keep the noise levels under control near his home in an effective and timely manner.[33] The applicant's house was situated across a railway station in front of the train's starting position. According to the applicant, owing to the replacement of steam engines with diesel engines, the noise level in the neighbourhood significantly increased, which led to excessive and unbearable noise, hindering the enjoyment of the amenities of his home. Moreover, the applicant argued that the railway company failed to take the necessary measures to keep its noise emissions under control, which could have been achieved by constructing a noise barrier wall, modernising the railway station, preheating the engines in another place, and avoiding the use of certain engines. The claims were accepted before the domestic court, which confirmed that the noise level had exceeded the limit and ordered the railway company to construct a noise barrier wall. On appeal, the second-instance court dispensed with the obligation to build the protection wall, considering it unnecessary to prohibit noise pollution and ordered the railway company to pay compensation for the loss of value of the applicant's house. Despite the fact that, similar to the case of *Deés*, several noise-mitigating measures were implemented, such as a reduction in the number of trains passing through the station, minimisation of the stay of freight trains, and renovation of engines, the applicant argued that the noise continued to exceed the statutory limits and thus violated Articles 8 and 6 of the Convention.[34]

Consonant with the argumentation in *Deés*, the ECtHR noted that the State has a positive obligation under Article 8 to strike a fair balance between the interest of the applicant in having a quiet living environment and the conflicting interests of others and the community as a whole in having rail transport, and emphasised that the mere existence of a sanction system, as in the given case, does not constitute a sufficient solution for noise disturbance if it is not applied in a timely and effective manner. Considering the failure of the domestic courts to determine any enforceable measures to guarantee the applicant the enjoyment of his home and the disproportionate length of the proceedings – 15 years and 7 months of the two levels of jurisdiction – the Court held a breach of both the right to respect for home and the right to a fair trial.

These applications from Hungary drew attention to two severe problems: (a) the length of the proceedings and (b) the fact that environmental aspects were often marginalised in the implementation of the laws.[35] The length of the proceedings is often

33 Bor v. Hungary, 5–17.
34 Bor v. Hungary, 28–31.
35 Fodor, 2011, p. 90.

challenged before the ECtHR in connection with Hungary, which, in environmental cases, has outstanding importance in providing timely solutions for pollution and draws attention to the necessity of the proper implementation of the Aarhus Convention, which also provides the obligation to ensure access to justice in environmental matters through fair, equitable, *timely* and not prohibitively expensive.[36] Although the Aarhus Convention was not mentioned by the Court, and as indicated above, it does not have a direct legal link with the ECHR, the effective implementation of environmental measures should also be analysed in the context of the rights and principles laid down in Aarhus, within the framework of the European Convention. Furthermore, as for the problem of marginalising environmental problems, it shall be mentioned that the Hungarian framework for environmental protection significantly improved since the adoption of the two decisions, particularly owing to the adoption of the new Fundamental Law in 2011.[37]

5. Protection of the Environment at the Constitutional Level

5.1. Different Approaches to Environmental Protection in the Constitutions – an Overview

As discussed above, the current international human rights framework does not provide a self-standing human right to a healthy environment for two major reasons. First, the role of environmental law strengthened after the establishment of the international human rights framework. The 1972 Stockholm Conference on the Human Environment[38] – the first world conference on the environment – was organised several decades after the adoption of the major human rights treaties at global or regional levels; thus, in the absence of a concrete international environmental legal framework, such aspects could not be emphasised in the elaboration of human rights.[39] The second reason could be the lack of consensus regarding the recognition of the substantive right to a healthy environment. Resolution A/76/L.75 passed at the General Assembly on 28 July 2022 was adopted with 161 votes in favour, zero against, and eight abstentions.[40] Abstaining States have fundamentally different

36 Aarhus Convention, Article 9 (4).
37 For an in-depth analysis on the drafting and adoption of the Fundamental Law considering the provisions relating to the environment, see: Raisz, 2012.
38 The Stockholm Declaration on the Human Environment, 1972 adopted at the Conference recognises '*the right to freedom, equality and adequate conditions of life, in an environment of a quality […]*'. See: Principle 1 of the Stockholm Declaration.
39 See: Weiss, 2011, pp. 15–17.
40 See: UN Press, 2022.

understandings of the human rights discourse, which may hinder the recognition of such a right at the global level.[41]

Although environmental protection requires supranational cooperation, individual States may contribute significantly to a higher level of protection through legislation and jurisdiction. The fundamental legal framework of national constitutions was elaborated on the basis of the international framework, thus, after the adoption of such key human rights treaties, and many constitutions were adopted after the establishment of the international environmental legal framework or were amended in light of its latest developments. Furthermore, consensus on the position of the country's approach to environmental protection is clearly less complicated to reach than consensus at the global level, as indicated by the fact that more than 100 States have incorporated it into their constitutions.[42] In addition to indicating States' commitment to environmental protection, constitutional provisions may serve as a starting point for the development of a constitutional courts' jurisprudence through the interpretation of such provisions.[43]

National constitutions may incorporate similar approaches to environmental protection as the international human rights framework; however, the importance of these approaches may differ at the national or international level. First, in contrast to the international human rights framework, the self-standing right to a healthy environment forms an inherent part of the fundamental legal framework provided by national constitutions. The constitutions adopted after the aforementioned 1972 Stockholm Declaration, were certainly inspired by the adoption of the Declaration: the 1976 Constitution of Portugal, followed by the 1978 Constitution of Spain declared the right to a healthy environment for the first time at the constitutional level.[44] In the absence of an international consensus on this right, particularly considering the time of adoption of the constitutions, States have considerable freedom in determining the phrasing and content of this right.[45] The aforementioned Portuguese Constitution guarantees the 'right to a healthy

41 The problem of the lack of a common understanding on the content and scope for the right to a clean, healthy and sustainable environment also emerged in connection with the antecedent of the above Resolution, with Resolution 48/13, adopted by the Human Rights Council on 8 October 2021. For instance, the Russian Federation impugned the quality of the Human Rights Council to promote the right to a healthy environment. In addition, China considers human rights protection as essentially an internal affair, rather than a global one, which approach certainly poses challenges to the effective implementation of this right. See: Tang and Spijkers, 2022, pp. 90–92.

42 Boyd, 2019, p. 33.

43 Boyd, 2011, pp. 171–172.

44 Aragão, 2019, p. 248.

45 It shall be noted that the concept of the right to a clean, healthy and sustainable environment was formulated in the years 2021–2022. Therefore, the constitutions may operate with different denominations – e.g. the right to a healthy/favourable/sustainable/etc. environment.

and ecologically balanced human living environment',[46] the Spanish Constitution refers to the 'right to enjoy an environment suitable for personal development',[47] and further alternative formulations include rights to a 'clean', 'safe', 'favourable' or 'wholesome' environment.[48]

Similar to the practice of the ECtHR, which, in the absence of an explicit right relating to the environment, developed its case law in environmental matters in the framework of other human rights recognised under the Convention, domestic (supreme or constitutional) courts may also rule that such a right is implicitly guaranteed in other constitutional provisions and thus forms an inherent part of the interpretation of those rights. The right to a healthy environment may be an essential element of other fundamental rights; thus, it is an enforceable, constitutional right even if the constitution does not explicitly provide for it. For instance, among the countries whose constitutions do not expressly recognise the right to a healthy environment, the Indian jurisdiction could serve as the best example: the Supreme Court mentioned the 'right of the people to live in a healthy environment with minimal disturbance of the ecological balance',[49] and further pronounced that the right to live includes 'the right to the enjoyment of pollution-free water and air for full enjoyment of life'.[50]

In addition to the explicit or implicit recognition of an environment-related substantive right, constitutions may also include procedural environmental rights. The three pillars of the Aarhus Convention – access to information, public participation in the decision-making, and access to justice in environmental matters – constitute a solid foundation for such constitutional provisions. The 1996 Constitution of Ukraine was the first constitution to implement procedural environmental rights, namely the right of free access to information about the environmental situation.[51] Although the right to access to information in environmental matters is certainly the most common pillar of the Aarhus Convention, the right to participate in the public

46 See Article 66 (1) of the Constitution of the Portuguese Republic: *'Everyone shall possess the right to a healthy and ecologically balanced human living environment and the duty to defend it'*. Cf. Art. 50 of the Constitution of Costa Rica: *'All persons have the right to a healthy and ecologically balanced environment [...]'*

47 See Article 45 (1) of the Constitution of Spain: *'Everyone has the right to enjoy an environment suitable for personal development, as well as the duty to preserve it'*.

48 Boyd, 2019, pp. 32–33.

49 Rural Litigation and Entitlement Kendra v. Uttar Pradesh, AIR 1985 SC 652; AIR 1987 SC 359.

50 Subhash Kumar v. State of Bihar, AIR 1991 SC 420.

51 May, 2013, p. 34; Art. 50 of the Constitution of Ukraine: *'[...] Everyone is guaranteed the right of free access to information about the environmental situation, the quality of food and consumer goods, and also the right to disseminate such information. No one shall make such information secret'*. See also: Rezie, 1999, p. 179.

decision-making process and access to justice in environmental matters could also be found in some constitutions.[52]

Compared with the protection of the environment in international law, the human rights framework may not provide the only solution for better enforcement of protective measures. Constitutions, similar to major international environmental legal instruments,[53] express States' commitments to protect or conserve the environment, which are formulated as a duty of the State, government, or citizens. The subject matter of such obligations may include responsibility for future generations, the promotion of sustainable development, and financial sustainability. Further miscellaneous provisions may address specific issues that reflect the environmental characteristics of a given country. Such provisions encompass, for instance, the constitutional recognition of the rights of nature in the constitutions of Bolivia and Ecuador; the prohibition of the importation of toxic and hazardous waste in the constitutions of Benin, Chad, the Democratic Republic of the Congo, and Niger; and the prohibition of nuclear testing or the deployment of nuclear weapons within the territories of the countries in the constitutions of Micronesia and Palau.[54]

5.2. The Hungarian Constitutional Framework for the Protection of the Environment

The Fundamental Law of Hungary was adopted on 25 April 2011 and entered into force on 1 January 2012. In light of this, it is noteworthy that the *Deés* judgement was delivered on 2 February 2011[55] and the *Bor* judgement was delivered on 18 September 2013.[56] These facts should be considered when analysing the newly adopted constitutional provisions in a broader context. However, the author does not claim that there would be any direct link between the ongoing procedure at the ECtHR and the adoption of the Fundamental Law, but rather suggests that a judgement of an international court shall be interpreted not only in light of the legal framework in force at the time, but also in light of whether and – if so – how these frameworks have changed since the time of the delivery of such judgements. Therefore, the uniqueness of the environment-related provisions of the Fundamental Law and

52 For example, Article 7 of the French Charter for the Environment provides *'the right [...] to have access to information pertaining to the environment in the possession of public bodies and to participate in the public decision-taking process likely to affect the environment'*. See also: May, 2013, pp. 34–36.

53 See, for instance, the Rio Declaration, the Kyoto Protocol, and the Paris Agreement.

54 Boyd, 2013, pp. 17–20.

55 See: Deés v. Hungary, Judgement, Final, 09/02/2011.

56 See: Bor v. Hungary, Judgement, Final 18/09/2013.

their interpretation may serve as a topical example for understanding the connection between the protection of the environment in international and national law.

Article XXI of the Fundamental Law guarantees the substantive right to a healthy environment.[57] This right was the only environmental provision that was included in the former constitutional framework: the constitutional amendment of 1989 introduced this right in Article 18 of the Constitution.[58] The Constitutional Court of Hungary thoroughly interpreted this right in Decision No. 28/1994 (V.20). According to it, the right to a healthy environment is a third-generation fundamental right, with the differentia specifica of having a stronger objective and institutional side which is underpinned by the State's obligation to recognise and endorse a framework for the protection of the environment. Moreover, the right is special from the perspective of its scope of subjects; considering the unidentifiable nature of the right, all humans shall be entitled to it. Contrary to social rights, in the case of which the subjects could be concretised, these subjects – similar to animals, plants, or 'unborn generations' – may not stand up for their rights.[59] Consequently, the right to a healthy environment may not be interpreted in such a manner that individuals can directly establish a claim before the court demanding environmental conditions that would correspond to their subjective perception.[60]

The Constitutional Court enhanced its former findings on the right to a healthy environment after the adoption of the Fundamental Law and enhanced them with further principles, such as the principle of non-derogation and the precautionary principle. The principle of non-derogation poses limitations to State actions in the context of the protection of the environment as a State task and establishes the prohibition of derogation from the previously achieved level of protection in substantial, procedural, and institutional norms.[61] Second, the Constitutional Court added the precautionary principle to the interpretation of the right to a healthy environment. This principle may be applicable either jointly with or independently of the non-derogation principle. In the first case, the legislator is required to verify that the proposed regulation, which may affect the state of the environment, is not

57 Article XXI of the Fundamental Law reads as follows: *'(1) Hungary shall recognize and endorse the right of everyone to a healthy environment. (2) Anyone who causes damage to the environment shall be obliged to restore it or to bear the costs of restoration, as provided for by an Act. (3) The transport of pollutant waste into the territory of Hungary for the purpose of disposal shall be prohibited'.*

58 It is noteworthy that the right to live in a dignified environment first appeared in Act II of 1976 on the protection of the human environment (Article 2 (2), however, since the right was not enshrined in the Constitution at the time, it was not implemented into practice. Nevertheless, the regulation was certainly progressive as it was based on the philosophy of the Stockholm Conference. See: Bándi, 2011, p. 72.

59 Decision No. 28/1994 (V.20.) III.

60 Fodor, 2015, pp. 104–105.

61 Decision No. 28/1994 (V.20.) IV.1.; Decision No. 16/2015 (VI.5.) [109].

a step back and does not cause irreversible damage. The independent application of the precautionary principle may apply to cases not previously regulated, however, continue to influence the condition of the environment.[62]

In addition to declaring a substantive right to a healthy environment, the Hungarian constitutional framework recognises the environmental dimension of other fundamental rights. First, Article XX (2) provides that the effective application of the right to physical and mental health should be guaranteed through agriculture free of genetically modified organisms, ensuring access to healthy food and drinking water, safety at work, healthcare provision, as well as by ensuring the protection of the environment.[63] These requirements are defined as State tasks, which can also be regarded as preconditions for the enjoyment of the right to health. Second, the Fundamental Law may provide an implicit link between environmental protection and other fundamental rights pronounced by the Constitutional Court. In the framework of interpreting the right to a healthy environment in the aforementioned Decision No. 28/1994 (V.20), the Court stated that the right to a healthy environment had the strongest link to the right to life among the constitutional rights; namely, the right to the environment was understood as part of the institutional side of the right to life, and the State's obligation to maintain the natural conditions for human life was thus phrased as an independent constitutional right.[64] Further, the Constitutional Court recognised the environmental aspect of the right to a fair trial under Article XXVIII (1) of the Fundamental Law.[65] However, despite numerous attempts to include procedural environmental rights in the constitutional text, particularly the right to participate in the decision-making process in environmental matters,[66] such provisions were not adopted in the final version of the Fundamental Law.

Furthermore, as in the practice of the ECtHR, the environment and fundamental (or human) rights could also be observed from the perspective of the restriction of certain rights for environmental reasons at the constitutional level. According to Article XIII of the Fundamental Law, the right to property may be subject to

62 Decision No. 13/2018 (IX.4.) [20]. On the interpretation of the precautionary principle in the Hungarian law, see: Szilágyi, 2018.

63 Article XX (2) of the Fundamental Law reads as follows: *'(1) Everyone shall have the right to physical and mental health. (2) Hungary shall promote the effective application of the right referred to in paragraph (1) through agriculture free of genetically modified organisms, by ensuring access to healthy food and drinking water, by organising safety at work and healthcare provision and by supporting sports and regular physical exercise as well as by ensuring the protection of the environment'.*

64 Decision No. 28/1994 (V.20.) III. 3. a).

65 See: Decision No. 4/2019 (III.7.) [66].

66 The former Ombudsman for Future Generations expressed his opinion in connection with the draft of the Fundamental Law, and suggested the incorporation of the right to participate in the environmental decision-making process. See: A jövő nemzedékek országgyűlési biztosának javaslatai az új alkotmány koncepciójának kidolgozásához, 2010.

restrictions for reasons of public interest, including the right to a healthy environment as a public task.[67]

As one may conclude, Hungarian constitutional law incorporates different approaches to the protection of the environment within the framework of fundamental rights. First, and most importantly, the Fundamental Law guarantees the right to a healthy environment, which is the cornerstone of the protection of the environment in human rights law domestically and internationally. As indicated above, endeavours to elaborate an independent and substantive right to a healthy environment at a global level face numerous challenges; thus, the introduction of this right in national constitutions plays a crucial role in guaranteeing a higher level of environmental protection in practice. Owing to the extensive interpretation of the Constitutional Court, the right to a healthy environment has normative content that implies active State behaviour in ensuring environmental protection. the protection of the environment is strongly connected to other fundamental rights, such as, the right to physical and mental health, and the right to property. In addition, corresponding to the procedural rights-based approach established in international environmental law, the Constitutional Court acknowledged the prevalence of environmental aspects in the interpretation of the right to a fair trial.

5.3. Protection of the Environment as a State Task and Other Related Provisions

Apart from the fundamental rights framework, the protection of the environment appears in various contexts of state responsibility. First, the protection of the environment explicitly appears as a state task for promoting the effective application of the right to physical and mental health. GMO-free agriculture, as well as ensuring healthy food and drinking water, which are implicitly connected to environmental protection, are also state tasks that aim to ensure the proper implementation of the right to health.[68]

Furthermore, responsibility for future generations is declared by the Preamble, particularly Articles P and 38. The Preamble acknowledges the responsibility for future generations and thus the obligation to protect the living conditions of future generations by making prudent use of material, intellectual, and natural resources, thereby providing a solid foundation for the interpretation of the provisions regarding

67 Article XIII of the Fundamental Law reads as follows: *'(1) Everyone shall have the right to property and inheritance. Property shall entail social responsibility. (2) Property may only be expropriated exceptionally, in the public interest and in those cases and ways provided for by an Act, subject to full, unconditional and immediate compensation'.*

68 For further information on the interpretation of the GMO-free agriculture in the Fundamental Law, see: Szilágyi, Raisz, and Kocsis, 2017, pp. 167–175.; Raisz, 2022, pp. 192–194.

the protection of future generations. Article P (1), which is notable for the protection of natural resources, provides that *'it shall be the obligation of the State and everyone to protect and maintain them, and to preserve them for future generations'*. Thus, future generations appear as beneficiaries of this obligation, while, in contrast to the right to a healthy environment, in cases where the obligation of the State is more accentuated, present generations have a triple obligation in light of this provision.[69] Article P (1) was interpreted by the Constitutional Court in Decisions No. 16/2015 (VI.5.) and No. 28/2017 (X.25.), which adopted the internationally accepted theory of intergenerational equity and introduced it to the Hungarian constitutional law. According to this theory, the protection of the environment is amended with the obligation of maintenance, which could be interpreted as the maintenance of the previous level of protection, and as the harmonization of environmental protection and sustainable development. Furthermore, the obligation of preservation translates into preserving the possibilities of choice, quality, and access.[70] Regarding Article P, the Constitutional Court further pronounced the constitutional manifestation of the public trust doctrine, conferring fiduciary duties on the State to act as a trustee over the natural heritage of the nation for the benefit of future generations, to the extent that it does not jeopardise the long-term existence of natural and cultural assets that are worthy of being protected on account of their inherent values.[71]

Additionally, the Constitutional Court found that the protection of future generations could be deduced from the Preamble, Article P and Article 38 (1), which provides that *'the management and protection of national assets shall aim at [...] preserving natural resources, as well as at taking into account the needs of future generations'*. Thus, Article 38 (1) is founded on the importance of material, i.e. financial resources for upcoming generations which was also reflected in the Preamble. Such a perspective is prevalent in the rules concerning public funds. Article 36 (4) provides that the central budget may not be adopted if government debt exceeds half of the total gross domestic product. These rules implicitly protect the interests of future generations by aiming to avoid indebtedness which would pose an intolerable burden on them by prioritising the current needs of interest.[72] Present generations thereby express their responsibility towards the next generations in the financial field.

In addition to the protection of the environment as a state task, the Fundamental Law provides various miscellaneous provisions on this issue. For instance, Article XXI (2) declares responsibility for damage caused to the environment, and Article

69 Decision No. 28/1994 (V.20.) [III.3.].
70 Decision No. 16/2015 (VI.5.), [92]; Decision No. 28/2017 (X.25.) [33]. For an in-depth analysis of the interpretation of the latter decision, see: Szabó, 2019.
71 Decision No. 14/2020 (VII.6.) [22]. For an in-depth scientific analysis on the application of the public trust doctrine in this decision, see: Sulyok, 2021.
72 Explanatory Memorandum of Article 36 of the Fundamental Law.

XXI (3) prohibits the transport of pollutant waste into the territory of Hungary for the purpose of disposal.[73] The first provision incorporates – thus, does not declare in its entirety – the polluter-pays principle, which would require reference to prevention or precaution.[74] The second provision is the expression of the public will about a concrete case: the illegal waste import from Germany in 2006 to Hungary.[75] Furthermore, the Fundamental Law declares certain value choices which could be indirectly linked to the protection of the environment or future generations, such as the protection of Christian culture (Article R(4))[76] and the commitment to have children (Article L (2)).[77] Christian theory considers the values of the environment and human responsibility for its protection as part of human dignity. Numerous religious leaders expressed concerns about the sustainability of the planet and the created world, including Pope John Paul II, Benedict XVI, Pope Francis, and Bartholomew of Constantinople.[78] The affirmations of the Encyclical Letter Laudato Si' issued by Pope Francis and the ecological views of Bartholomew were explicitly referred to by the Constitutional Court in Decision No. 28/2017 (X.25).[79] Additionally, the State's strong support for bearing children is intertwined with the responsibility towards future generations. According to the constitutional provision, family is the basis of the survival of the nation, which, similar to what is reflected in the Preamble,[80] indicates the legislator's commitment to the protection of future Hungarians.

Based on the above, one may conclude that the Hungarian Fundamental Law encompasses a comprehensive approach to environmental protection and that it constitutes an inherent part of the fundamental rights framework (through declaring a substantive right to a healthy environment and other related fundamental rights); the protection of the environment also appears as an obligation for the State and everyone by the protection of natural resources and the needs and interests of future generations. Furthermore, the Fundamental Law declares several unique provisions specific to Hungarian legislation, including the protection of Christian culture and the commitment to bear children.

73 See above.
74 Bándi, 2020a, p. 16.
75 Horváth, 2013, p. 231.; Csák, 2014, p. 34.
76 Article R (4) of the Fundamental Law reads as follows: '*The protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State*'.
77 Article L (2) of the Fundamental Law reads as follows: '*Hungary shall support the commitment to have children*'.
78 Bándi, 2013, p. 84. For a detailed analysis on the moral considerations of environmental protection, see: Bándi, 2006; Bándi, 2020b.
79 Decision No. 28/2017 (X.25.) [36].
80 See the Preamble of the Fundamental Law: '*We believe that our children and grandchildren will make Hungary great again with their talent, persistence and moral strength*'.
'*[The Fundamental Law] shall be an alliance among Hungarians of the past, present and future*'.

6. Concluding Remarks

By analysing two judgements of the ECtHR concerning Hungary and providing an overview of the recent constitutional changes in Hungary, the author aimed to present the complexity of the legal protection of the environment and the necessity of a complementary understanding of the regulation and jurisdiction of the national and international levels. As presented above, national and international laws operate with similar concepts for environmental protection, however, emphasis is placed on different aspects at these levels.

The Hungarian Constitution, along with the majority of national constitutions in the world, recognises the independent right to a healthy environment and the environmental perspective of other fundamental rights, particularly the right to physical and mental health. Furthermore, the ECHR does not provide any *expressis verbis* formulation for the protection of the environment, yet environmental aspects were deduced from the articles of the Convention in the case law of the ECtHR in various contexts. This was the case in connection with heavy traffic noise that constituted the merits of the cases in *Deés v. Hungary* and *Bor v. Hungary*: the Court adjudicated on the basis of the right to respect for private and family life under Article 8 of the ECHR. However, had a substantive environment-related right been recognised by the Convention, the two cases would certainly have fallen within the scope of such a right, as it could easily have happened under domestic law. Nevertheless, from a practical perspective, the fact that there is some kind of possibility for seeking remedies for environmental harms under the aegis of the human rights framework seems more important than the *expressis verbis* phrasing of these rights.

The scope of certain substantive human rights and the environmental aspects inherent in them, in comparison with the content and understanding of an independent right to a healthy environment, do not cover the same. In the author's opinion, the recognition of an environment-related human right is more likely to guarantee a higher level of protection (in case it is recognised in a binding document) than what the current system could offer, primarily because it would cover environmental harm that does not interfere with another right. However, in addition to substantive human rights, an equally important aspect of environmental protection is offered by the margin of appreciation of procedural rights, particularly the right to a fair trial. Although constitutions may also provide procedural environmental rights, the Hungarian Fundamental Law does not recognise a direct link between the protection of the environment and the right to a fair trial. As the two case examples have indicated, the ECtHR has a well-established interpretation of the 'reasonable time' criteria, which has particular importance in adjudicating environmental cases, particularly when the environmental aspect is not expressly declared in the right to a fair trial in the domestic system.

In conclusion, regulations and jurisprudence at domestic and international levels remarkably complement each other. Therefore, the strengths of one system could be better understood in the context of how the given issue is regulated and interpreted in another system, and, conversely, the possible development paths may also be inspired by a comparative analysis of the two levels.

Bibliography

- Aragão, A. (2019) 'Environmental Standards in the Portuguese', in Turner, S. J., Shelton, D. L., Razzaque, J. et al. (eds.) Environmental Rights – The Development of Standards, Cambridge: Cambridge University Press, pp. 247–264; https://doi.org/10.1017/9781108612500.011
- Bándi Gy, (2020) Interests of Future Generations, Environmental Protection and the Fundamental Law, *Journal of Agricultural and Environmental Law* 15(29), pp. 7–22, https://doi.org/10.21029/JAEL.2020.29.7
- Bándi, Gy. (2006) 'Környezetvédelem az életért' ['Environmental protection for the life'], *Iustum Aequum Salutare*, 2(3–4), pp. 32–42.
- Bándi, Gy. (2011) *Környezetjog [Environmental Law],* Budapest: Szent István Társulat.
- Bándi, Gy. (2013) 'A környezethez való jog értelmezése a fenntartható fejlődési stratégia és az Alaptörvény fényében' ['The interpretation of the right to healthy environment in the light of the Sustainable Development Strategy and the Fundamental Law'], *Acta Humana*, 1(1), pp. 67–92.
- Bándi, Gy. (2020a) Interests of Future Generations, Environmental Protection and the Fundamental Law, *Journal of Agricultural and Environmental Law* 15(29), pp. 7–22, https://doi.org/10.21029/JAEL.2020.29.7
- Bándi, Gy. (2020b) 'A Teremtés védelme és az emberi jogok' ['Protecting Creation and Human Rights'], *Acta Humana*, 8(4), pp. 9–33 [Online]. Available at: https://doi.org/10.32566/ah.2020.4.1 (Accessed: 4 August 2022).
- Birnie, P., Boyle, A., Redgwell, C. (2009) *International Law & the Environment*. Oxford: Oxford University Press.
- Boyd, D. R. (2011) 'The Implicit Constitutional Right to Live in a Healthy Environment', Review of European Community & International Environmental Law, 20(2), pp. 171–179.
- Boyd, D. R. (2013) The Status of Constitutional Protection for the Environment in Other Nations. Report Paper #4, David Suzuki Foundation.
- Boyd, D. R. (2019) 'The Right to a Healthy and Sustainable Environment', in Aguila, Y., and Viñuales, J. E. (eds.) A Global Pact for the Environment: Legal Foundations, Cambridge: C-EENRG, pp. 30–36.
- Boyle, A. (2012) 'Human Rights and the Environment: Where Next?', *The European Journal of International Law*, 23(3), pp. 613–642; https://doi.org/10.1093/ejil/chs054
- Connelly, A.M. (1986) 'Problems of Interpretation of Article 8 of the European Convention on Human Rights', *The International and Comparative Law Quarterly*, 35(3), pp. 567–593; https://doi.org/10.1093/iclqaj/35.3.567
- Csák, Cs. (2014) 'A „felügyelt szabadság" – avagy az információszolgáltatási kötelezettség terjedelme a határon átnyúló hulladékszállítások esetén' ['The

"supervised freedom" – or the scope of the obligation to provide information in the case of cross-border waste transports'], *Journal of Agricultural and Environmental Law*, 9(17), pp. 22–38.
- Duvic-Paoli, L. A. (2012) 'The Status of the Right to Public Participation in International Environmental Law: An Analysis of the Jurisprudence', *Yearbook of International Environmental Law,* 23(1), pp. 80–105; https://doi.org/10.1093/yiel/yvt062
- Eicke, T. (2022) 'Climate Change and the Convention: Beyond Admissibility', *European Convention on Human Rights Law Review,* 3(1), pp. 8–16; https://doi.org/10.1163/26663236-bja10033
- Fodor, L. (2011) 'Az Emberi Jogok Európai Bíróságának ítélete a zajterhelés csökkentésére tett intézkedésekről és a bírósági eljárás időtartamáról' ['Judgment of the European Court of Human Rights on the measures taken to reduce noise pollution and the duration of the court proceedings'], *Jogesetek Magyarázata*, 2011/3, pp. 86–92.
- Fodor, L. (2015) *Környezetjog [Environmental law]*, Debrecen: Debreceni Egyetem Kiadó.
- Hajjar Leib, L. (2011) *Human Rights and the Environment: Philosophical, Theoretical and Legal Perspectives.* Leiden/Boston: Martinus Nijhoff Publishers.
- Horváth, G. (2013) 'Az Alaptörvény környezetjogi előírásai' ['Environmental provisions of the Fundamental Law'] in Szoboszlai-Kiss, K., Deli, G. (eds.) *Tanulmányok a 70 éves Bihari Mihály tiszteletére ['Studies in honor of the 70-year old Bihari Mihály']*, Győr: Universitas-Győr, pp. 222–234.
- Kecskés, G. (2011) 'Deés v. Magyarország ügy az Emberi Jogok Európai Bírósága előtt', Jogi Iránytű, 2011/1, pp. 1–2.
- Kecskés, G. (2021) 'A környezeti jogok értelmezése az Emberi Jogok Európai Egyezményébe foglalt jogok körében' ['Interpretation of Environmental Rights within the Practice of the European Court of Human Rights'], Acta Humana, 9(2), pp. 207-220; http://doi.org/10.32566/ah.2021.2.9
- Letsas, G. (2013) 'The ECHR as a living instrument: its meaning and legitimacy', in Føllesdal, A., Peters, B., and Ulfstein, G. (eds.) *Constituting Europe: The European Court of Human Rights in a National, European and Global Context.* Cambridge: Cambridge University Press (Studies on Human Rights Conventions), pp. 106–141; doi: 10.1017/CBO9781139169295.005
- May, James R. (2013) 'Constitutional Directions in Procedural Environmental Rights', Widener Law School Legal Studies Research Paper Series no. 14–05, pp. 27–58.
- Raisz, A. (2012) 'A Constitution's Environment, Environment in the Constitution – Process and background of the New Hungarian Constitution', *Revue Est Europa numéro special*, 2012/1, pp. 37–70.
- Raisz, A. (ed.) (2022) *Környezetjog. Különös rész [Environmental Law. Specific Part].* Miskolc: Miskolci Egyetemi Kiadó.

- Raisz, A., Krajnyák, E. (2022) 'Protection of the Environment in the European Human Rights Framework: A Central European Perspective', in Szilágyi, J. E. (ed.) *Constitutional Protection of the Environment and Future Generations – Legislation and Practice in Certain Central European Countries,* Budapest/Miskolc: Central European Academic Publishing, pp. 73–125; https://doi.org/10.54237/profnet.2022.jeszepefg_3
- Rezie, R. C. O. (1999) 'The Ukrainian Constitution: Interpretation of the Citizens' Rights Provisions', Case Western Reserve Journal of International Law, 31(1), pp. 169–210.
- Roagna, I. (2012) *Protecting the right to respect for private and family life under the European Convention on Human Rights*. Strasbourg: Council of Europe Publishing.
- Shelton, D. (1992) 'What Happened in Rio to Human Rights?', *Yearbook of International Environmental Law*, 3(1), pp. 75–93, https://doi.org/10.1093/yiel/3.1.75
- Shelton, D. (2006) 'Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized', *Denver Journal of International Law & Policy*, 35(1), pp. 129–171.
- Sulyok, K. (2021) 'The Public Trust Doctrine, the Non-Derogation Principle and the Protection of Future Generations. The Hungarian Constitutional Court's Review of the Forest Act', *Hungarian Yearbook of International Law and European Law,* 9(1), pp. 359–375
- Szabó, M. (2019) 'A biológiai sokféleség jogi védelmének jelentősége. Gondolatok a 28/2017 (X.25.) AB határozat nyomán' ['The importance on the legal protection of biodiversity. Thoughts on CC Decision no. 28/2017 (X.25.)'], *Iustum Aequum Salutare*, 15(2), pp. 89–105.
- Szilágyi, J. E. (2018) 'Az elővigyázatosság elve és a magyar alkotmánybírósági gyakorlat – Szellem a palackból, avagy alkotmánybírósági magas labda az alkotmányrevízióhoz' ['The precautionary principle and the jurisdiction of the Hungarian Constitutional Court'], *Miskolci Jogi Szemle*, 13(2), pp. 76–91.
- Szilágyi, J.E., Raisz, A., Kocsis, B.E. (2017) 'New dimensions of the Hungarian agricultural law' in respect of food sovereignty, *Journal of Agricultural and Environmental Law*, 12(22), pp. 160–201; https://doi.org/10.21029/JAEL.2017.22.160
- Tang, K., Spijkers, O. (2022) 'The Human Right to a Clean, Healthy and Sustainable Environment', *Chinese Journal of Environmental Law,* 6(1), pp. 87–107; https://doi.org/10.1163/24686042-12340078
- Weiss, E. B. (2011) 'The Evolution of International Environmental Law' *Japanese Yearbook of International Law*, 2011/54, pp. 1–27.

Legal Sources

- A jövő nemzedékek országgyűlési biztosának javaslatai az új alkotmány koncepciójának kidolgozásához [Proposal of the Parliamentary Commissioner for Future Genrations for the development of the concept of the new Constitution], 2010.
- Charter for the Environment, 2004.
- Constitution of Costa Rica, 1949.
- Constitution of Spain, 1978.
- Constitution of the Portuguese Republic, 1976.
- Constitution of Ukraine, 1996.
- Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), 1998.
- Explanatory Memorandum of Article 36 of the Fundamental Law.
- Guide on Article 6 of the European Convention on Human Rights, Council of Europe (civil limb) (2022).
- Guide on Article 6 of the European Convention on Human Rights, Council of Europe (criminal limb) (2022).
- Guide on Article 8 of the European Convention on Human Rights, Council of Europe (2022).
- Kyoto Protocol to the United Nations Framework Convention on Climate Change, 1997.
- Paris Agreement, 2015.
- Rio Declaration on Environment and Development (1992).
- Stockholm Declaration on the Human Environment (1972).
- United Nations General Assembly Resolution A/76/L.75. The human right to a clean, healthy and sustainable environment (2022).

ECtHR cases

- *Apanasewicz v. Poland, Application no. 6854/07, Judgment of 3 May 2011.*
- *Bor v. Hungary,* Application no. 50474/08, Judgment of 18 June 2013.
- *Brânduse v. Romania, Application no. 39951/08, Judgement of 27 October 2015.*
- Brincat and Others v. Malta, Applications nos. 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11, Judgment of 14 July 2014.
- *Budayeva and Others v. Russia,* Application Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, Judgment of 20 March 2008.
- *Bumbeș v. Romania,* Application No. 18079/15, Judgment of 3 May 2022.
- *Bursa Barosu Başkanlığı and Others v. Turkey, Application no. 25680/05, Judgment of 19 June 2018.*

- *Cordella and Others v. Italy,* Applications nos. 54414/13 and 54264/15, Judgment of 24 January 2019.
- *Deés v. Hungary,* Application No. 2345/06, Judgment of 9 November 2010.
- *Di Sarno and Others v. Italy,* Application no. 30765/08, Judgment of 10 January 2012.
- Dimitar Yordanov v. Bulgaria, Application no. 3401/09, Judgment of 6 September 2018.
- *Dubetska and Others v. Ukraine, Application no. 30499/03, Judgment of 10 February 2011.*
- *Dzemyuk v. Ukraine, Application no. 42488/02, Judgment of 4 April 2014.*
- *Elefteriadis v. Romania, Application no. 38427/05, Judgment of 25 January 2011.*
- *Fadeyeva v. Russia, Application no. 55723/00, Judgment of 9 June 2005.*
- *Florea v. Romania, Application no. 37186/03, Judgment of 10 December 2015.*
- *Frydlender v. France, Application no. 30979/96, Judgment of 27 June 2000.*
- *Giacomelli v. Italy, Application no. 59909/00, Judgment of 2 November 2006.*
- *Gorraiz Lizarraga and Others v. Spain, Application no. 62543/00, Judgment of 27 April 2004.*
- *Greenpeace E.V. and Others v. Germany, Application no. 18215/06, Judgment of 10 May 2009.*
- *Grimkovskaya v. Ukraine, Application no. 38182/03, Judgment of 21 July 2011.*
- *Guerra and Others v. Italy, Application No. 14967/89, Judgment of 19 February 1998.*
- *H. v. France, Application no. 10073/82, Judgment of 24 October 1989.*
- *Howald Moor and Others v. Switzerland, Applications nos. 52067/10 and 41072/11, Judgment of 11 March 2014.*
- *Kapa and Others v. Poland,* Applications Nos. 75031/13 and 3 others, Judgment of 14 October 2021.
- *Karin Andersson and Others v. Sweden, Application no. 29878/09, Judgment of 25 September 2014.*
- *Katte Klitsche de la Grange v. Italy, Application no. 12539/86, Judgment of 27 October 1994.*
- *Kotov and Others v. Russia, Applications nos. 6142/18, 51015/18, 51020/18 et al., Judgment of 11 October 2022.*
- *Kyrtatos v. Greece, Application No. 41666/98, Judgment of 22 May 2003.*
- *L'Erablière A.S.B.L. v. Belgium, Application No. 9230/07, Judgment of 24 February 2009.*
- *Lopez Ostra v. Spain, Application no. 16798/90, Judgment of 9 December 1994.*
- *Mangouras v. Spain, Application no. 12050/04, Judgment of 28 September 2010.*
- *Mileva and Others v. Bulgaria, Applications Nos. 43449/02 and 21475/04, Judgment of 25 November 2010.*
- *N.A. and Others v. Turkey, Application no. 37451/97, Judgment of 9 January 2007.*
- *National Movement Ekoglasnost v. Bulgaria, Application no. 31678/17, Judgment of 15 December 2020.*

- *Okyay and Others v. Turkey, Application no. 36220/97, Judgment of 12 July 2005.*
- *Öneryildiz v. Turkey, Application No. 48939/99, Judgment of 30 November 2004.*
- *Özel and Others v. Turkey, Application Nos. 4350/05, 15245/05 and 16051/05, Judgment of 17 November 2015.*
- *Papastavrou and Others v. Greece, Application no. 46372/99, Judgment of 10 April 2003.*
- *Roche v. the United Kingdom, Application no. 32555/96, Judgment of 19 October 2005.*
- *Rovshan Hajiyev v. Azerbaijan, Applications nos. 19925/12 and 47532/13, Judgment of 9 December 2021.*
- *Solyanik v. Russia, Application no. 47987/15, Judgment of 10 May 2022.*
- *Steel and Morris v. the United Kingdom, Application no. 68416/01, Judgment of 15 May 2005.*
- *Taşkın and Others v. Turkey, Application no. 46117/99, Judgment of 10 November 2004.*
- *Tătar v. Romania, Application No. 67021/01, Judgment of 27 January 2009.*
- *Turgut and Others v. Turkey, Application no. 4860/09, Judgment of 26 March 2013.*
- *Vides Aizsardzības Klubs v. Lativia, Application no. 57829/00, 27 May 2004.*
- *Vilnes and Others v. Norway, Applications nos. 52806/09 and 22703/10, Judgment of 5 December 2013.*
- *Yevgeniy Dmitriyev v. Russia, Application no. 17840/06, Judgment of 1 December 2000.*

Other Court Decisions

- Decision No. 13/2018 (IX.4.) Constitutional Court of Hungary.
- Decision No. 14/2020 (VII.6.) Constitutional Court of Hungary.
- Decision No. 16/2015 (VI.5.) Constitutional Court of Hungary.
- Decision No. 28/1994 (V.20.) Constitutional Court of Hungary.
- Decision No. 28/2017 (X.25.) Constitutional Court of Hungary.
- Decision No. 4/2019 (III.7.) Constitutional Court of Hungary.
- *Rural Litigation and Entitlement Kendra v. Uttar Pradesh, (1986) INSC 272, 18 Dec 1986.*
- *Subhash Kumar v. State of Bihar, AI 1991 SC 420, 9 January, 1991.*

Online Sources

- *'With 161 Votes in Favour, 8 Abstentions, General Assembly Adopts Landmark Resolution Recognizing Clean, Healthy, Sustainable Environment as Human Right', UN Press, 28 July 2022 [Online]. Available at:* https://press.un.org/en/2022/ga12437.doc.htm *(Accessed: 24 January 2023).*

Dominika MORAVCOVÁ*

Lack of conformity of the goods with the contract under Slovak legislation

ABSTRACT: *Consumer protection is a fundamental issue covered by the EU acquis in internal markets. Despite the efforts to approximate the legal regulations of the Member States in this area, there are still disparities between their legal systems regarding selected consumer protection issues. A relatively new EU directive has established a minimum standard around lack of conformity of the goods within the EU. The Slovak Republic has not yet transposed the directive into its national legislation. Is the legislation in this area in Slovakia set in a Euro-conform manner or is it necessary to adopt new provisions in this field? This study addresses the current legislation in Slovakia concerning lack of conformity of the goods. We also identify the shortcomings of the current legislation and address the issue of the amendment, which should change the status quo.*
KEYWORDS: *lack of conformity of the goods, liability for defects, the Slovak Civil Code, warranty, the Slovak Consumer Protection Act.*

1. Introduction

The completion of the EU internal market brings several challenges to its Member States. We agree with the opinion that consumer protection is a key issue in economic integration as it points to the opening of borders within the internal market. Concurrently, it is linked to the intervention by Member States in the bona fide protection of legitimate social goals and values and thus interferes with the rules of the internal market.[1] The dynamic area of consumer protection has an increasingly important role to consider, not only from the perspective of the internal market but also because of the growing importance of e-commerce. E-commerce within the internal market further blurs the borders between Member States, and consumers shopping from

1 Weatherill, 2013, p.1.

* PhD canididate, Faculty of Law, Paneuropean University, Bratislava, Slovakia. https://orcid.org/0000-0003-0936-6749.

https://doi.org/10.62733/2023.1.179-196

the comfort of their homes may often not even be aware that they are entering into a contract with an entity from another Member State. The EU aims to ensure that all consumers across the EU benefit from a high level of consumer protection within the internal market and a wide range of possibilities for defending their interests.[2] The purpose of the determination of consumer rights is per se to create real equality.[3] Consumer protection at the union level is among the strongest worldwide.[4] The Founding Treaties established consumer protection as a shared competency of the Union and the Member States.[5]

Shared competences can also be referred to as joint or parallel competences, as both the EU and the Member States are equally able to adopt legally binding acts in this area. As long as the EU has not yet fully exercised its competence in this area, Member States can adopt legal acts; but they are also bound by the EU *acquis*, which means that they must not, in exercising this competence, infringe legislation already adopted by the EU in the area concerned.[6] It is precisely in consumer protection; therefore, despite the disparities in the national legislation of the Member States, the EU is consistently striving for and aiming at the gradual harmonisation of the legal systems of the Member States in this area, and it is adopting a series of legal acts of secondary law, which are bringing about a progressive harmonisation of the level of consumer protection across Member States.

One of the issues addressed concerning consumer protection at the EU level is the lack of conformity of the goods to contracts. This area is the focus of this study. This study analyses how this area is covered by Slovak legislation and identifies potential gaps in the current legislation. A partial aim is to determine the challenges facing Slovak legislation in this area as well as the planned amendment.

Starting with the EU *acquis*, as in the fundamental judgment in the case of Costa v ENEL, the CJEU established that the founding treaties have created a legal system, which has become an integral part of the legal systems of the Member States and takes precedence over the national legislation of the Member States.[7] Within the EU *acquis*, a key act in this area was adopted: the relatively new Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods, which became applicable on 1 January 2022 (hereinafter referred to as the 'Directive'). It replaced the Consumer Sales and Guarantees Directive (1999/44/EC). The Directive is a legally binding EU Act within the meaning of Article 288(3) TFEU and binds Member States as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national

2 European Parliament, 2022.
3 Mészáros, 2018.
4 Šajn, 2019.
5 Art. 4(2)(f) TFEU.
6 Siman and Slašťan, 2012, p. 84.
7 Case 6-64 *Flaminio Costa v E.N.E.L.* [1964] ECLI:EU:C:1964:66.

authorities the choice of form and methods.[8] Thus, it is necessary to begin the analysis of Slovak legislation with an introduction to the directive in question. The core of this study focuses on the legislation currently in force in Slovakia. The last part focuses on the planned amendment, which should reflect the results set out in the Directive.

2. Directive on certain aspects concerning contracts for the sale of goods

As mentioned in the Introduction, the key directive adopted at the EU level is the directive on certain aspects concerning contracts for the sale of goods. The aim of this directive was to establish certain rules on sales contracts between sellers and consumers to establish common standards for consumer sales contracts in cases of a lack of conformity of the goods with the contract. This Directive seeks to reflect the current needs of the digital market regarding e-commerce as a key driver of growth within the internal market.[9] In general, within the meaning of Article 3, sales contracts between a consumer and a seller and those for the supply of goods to be manufactured or produced fall within the *ratione materiae* of the Directive. The Directive then specifies the contracts that are excluded from the material scope, including certain contracts for the supply of digital content or digital services, as well as other exceptions.[10] Under this Directive, the seller is liable to the consumer for any lack of conformity that exists when the goods are delivered, which becomes apparent within two years. Generally, if the seller delivers to the buyer goods that do not conform with the contract, the buyer has various available remedies.[11]The directive, *inter alia* defines precise remedies if there is no conformity of the goods with the contract and also ways to exercise them.[12] They also addressed the issue of commercial guarantees. This institute is a voluntary service offered by the seller or producer, and even in practice, by a third party. However, consumer rights are not affected under legal guarantees.[13] In addition to the above-mentioned directive, there is another important directive, Directive (EU) 2019/770, on certain aspects concerning contracts for the supply of digital content and digital services entered into applications on the same date. This Directive gave consumers the right to remedy faulty digital content or services.

The Directive is a legally binding EU Act in which Member States are obliged to transpose their national legislation. However, as noted on the EUR-Lex website, the

8 Art. 288(3) TFEU.
9 Point 4 of the preamble to the Directive.
10 Art. 3 of the Directive.
11 Värv, A., Karu, P., 2009.
12 EUR-Lex, 2019.
13 ECC-Net, n.d.

Slovak Republic has not yet transposed the Directive into national legislation[14]. If we look at the text of the directive and compare it with the Slovak law, we cannot say that the content of the directive does not need to be transposed. The Directive also contains new notions that need to be implemented in the Slovak legal order. The European Commission shares the same opinion, initiating infringement proceedings against the Slovak Republic in the case of a lack of transposition of both directives.[15] To support Slovakia on this matter, we already begun to amend our legislation so that these key directives can be transposed into our legal system. The interministerial comment procedure ended on 15 February 2022, and its evaluation is still ongoing. This study discusses how this area is currently covered by our legal order; briefly discusses the planned amendment, which we believe will soon be in force; and establishes legislation that will correspond with EU law.

3. Current Slovak legislation

As an explanatory memorandum to the proposed amendment, general consumer protection institutions are currently fragmented into several legal acts. The orientation of their interrelationship and their subsequent correct application are made more difficult from the point of view of both the consumer and entrepreneurs, thus undermining the principle of legal certainty.[16] The Civil Code covers the most extensive material[17], as in the *lex generalis* provision. The second key source is the Consumer Protection Act[18], which provides for *lex specialis*. Consumer protection issues are also partially regulated by other legal acts, such as the Act on Consumer Protection in the Sale of Goods or Providing of Services under a Distance Contract, the Act on Alternative Dispute Resolution, and many others[19]. This study focuses on the lack of conformity of the goods and the way they are regulated in the Slovak legal

14 EUR-Lex, 2021.
15 European Commission, 2022.
16 Explanatory memorandum to the planned amendment.
17 Act No. 40/1964 Coll. Civil Code (hereinafter referred to as the Civil Code).
18 Act No. 250/2007 Coll. on Consumer Protection and on Amendments to Act of the Slovak National Council No. 372/1990 Coll. on Offences, as amended (hereinafter referred to as the Consumer Protection Act).
19 Act No. 102/2014 Coll. on Consumer Protection in the Sale of Goods or Providing of Services under a Distance Contract or a Contract Concluded Outside the Seller's Premises and on Amendments and Additions to Certain Acts, as amended, Act No. 391/2015 Coll. on Alternative Dispute Resolution of Consumer Disputes and on Amendments and Additions to Certain Acts, as amended, Act No. 299/2019 Coll. on supervision and assistance in resolving unjustified geographic discrimination of customers in the internal market and amending, Act No. 128/2002 Coll. on state control of the internal market in matters of consumer protection and on amending and supplementing certain as amended.

order; therefore, we will not go deeper into the sources that do not concern the area in question.

Currently, the Slovak legal system knows only about the Institute of Liability for Defects. Current legislation does not refer to this institute, in the sense of the Directive, as a lack of conformity of the goods, but as a general and objective liability for defects. This liability arises as an ancillary legal relationship, provided that the object of the main relationship is the performance under consideration. The seller is liable for the existence of the agreed characteristics of the object, for its usability, and for the fact that the assigned object is free from legal defects.[20] Slovak civil law has regulated this institute primarily in parallel with several legal acts. The main source of law in this field is the Civil Code, which contains general legal and specific provisions for selected contract types.[21] A general rule for this liability can be found in both the section on general liability and the general provisions related to the sale contract. In the Civil Code, we also find *lex specialis* provisions for the sale of goods in stores (consumer contracts of sale).[22] In addition, we find a regulation concerning the area we are analysing in the Consumer Protection Act, in which the complaint procedure is regulated. In the following section, we will briefly address the basic notions from the analysed area, and then we will discuss both the Civil Code and Consumer Protection Act provisions in more depth.

3.1. Fundamental notions

This subchapter defines the basic notions that, from our perspective, are not defined in full compliance with EU law. Therefore, in the amendment, most notions will already be defined in accordance with Union Law, with the Directive, or even new notions will be incorporated into our legal system.

Consumer contract

The basic notions are defined in the Civil Code, under which 'a consumer contract is any contract, regardless of its legal form, concluded between a supplier and a consumer. A supplier is a person who, in concluding and fulfilling a consumer

20 Dufalová and Križan and Skorková, 2017, p. 152.
21 For example, works contract and others.
22 The Civil Code – part 1 (General provisions) – Chapter 5 on consumer contracts, Part 8, Chapter 2, the contract of sale, Section 4 of this Part, specifically on consumer contracts of sale + as *lex generalis*, the general
provisions on the contract of sale will also apply.

contract, is acting within the scope of his/her commercial or other business activity.' Contrastingly, 'a consumer is a natural person who, when concluding and fulfilling a consumer contract, is not acting within the scope of his commercial activity or other business activity'.[23] Further definitions can be found alongside the Consumer Protection Act: 'For the purposes of this Act a consumer shall be a natural person who, when concluding and fulfilling a consumer contract, does not act within the scope of his or her business activity, occupation or profession'; and 'a seller who, when concluding and fulfilling a consumer contract, is acting within the scope of his business activity or profession, or a person acting on his behalf or his account',[24] In addition, *the lex specialis* regulation is concerned with distance contracts.

Goods

Concerning 'goods', the Consumer Protection Act defines only a product. A product or service includes property, rights, and obligations.[25] The word product is used twice here because, in Slovak, we have two different terms for it: one reflecting the product and the other reflecting the manufactured product. Goods are defined only for the purposes of the VAT Act and are understood to be tangible goods, which are movable property and immovable property, including land, electricity, water, cold, heat, banknotes, and coins, if they are sold for collection at a price other than their nominal value.[26]

3.2. Liability for defects under the Civil Code

The current situation is based on liability for defects in the Civil Code and the complaint procedure in the Consumer Protection Act. To simplify, consolidate, and harmonise the regulation of liability for defects in goods, digital services, and digital content with EU law, the planned amendment proposes leaving only the regulation in the Civil Code. However, at present, the situation persists in which the area under analysis is fragmented into several legal acts, and parallel regulations concerning liability for defects can also be discussed. As already stated, liability for defects is generally dealt with in the Civil Code, both in the section on general liability, the general provisions on the contract of sale, and the *lex specialis* provisions on the sale of goods in the store (consumer contracts of sale).

23 §52 of the Civil Code.
24 §2 of the Consumer Protection Act.
25 §2(zd) of the Consumer Protection Act.
26 §8 of the Act No. 222/2004 Coll. on value added tax.

Civil law theory divides liability for defects into legal, contractual, and possibly other types, which includes liability unilaterally declared by the seller.[27] Naturally, the minimum standard guaranteed by a legal guarantee must be met. General liability for defects[28] states that, 'Whoever transfers to another a thing for consideration is liable for the fact that the thing at the time of performance has the qualities expressly mentioned or customary, that it can be used according to the nature and purpose of the contract or according to what the parties have agreed, and that the thing is free from legal defects'.[29] The commercial guarantee is also mentioned here in the sense that the parties could agree on periods of liability for defects according to stricter principles than those provided by the law. The obliged party shall issue a written confirmation of such an agreement with the authorised person (a letter of guarantee). The acquirer must point out the defect without undue delay after having had the opportunity to inspect the item. The general deadline for reprimanding is six months from the time of inspection/discovery (subjective deadline) but within an objective deadline of up to 24 months unless the law provides otherwise.[30] This is a timeframe of a preclusive nature; therefore, if the buyer does not point out the defect within this period, his/her right will expire.[31]

Regarding the regulation of further steps, it is provided under the general regime that if the defect cannot be remedied, and if because of the defect, the object cannot be used properly in the way it should be, the acquirer could claim cancellation of the contract. The acquirer could also seek a proportionate price reduction, replacement, repair, or completion of what is missing.[32] The right to a proportional discount is available to the buyer if the defect is remediable even if it is irremediable. As noted by Lazar et al., according to the judicial practice in Slovakia, if the buyer was aware of the defects and nevertheless concluded the contract, he/she is no longer entitled to the above-mentioned rights of liability for defects in the case of this object.[33] Under the Civil Code, liability claims could also be asserted in court within a general limitation period of three years from the time the defect was discovered. Regarding the exercise of the right to liability for defects, the beneficiary is entitled to compensation for the necessary costs incurred in connection with the exercise of the right to liability. This right must be exercised with the party liable within one month of the expiration of the period in which the defects must be noted. This was a preclusive deadline. Therefore, the buyer has an obligation to notify the seller. In addition, a claim for

27 Dufalová and Križan and Skorková, 2017, p. 153.
28 §499-§510 of the Civil Code.
29 §499 of the Civil Code.
30 §502 and §505 of the Civil Code.
31 Lazar et al., 2014. p. 111.
32 §507 of the Civil Code.
33 Lazar et al., 2014. p. 111.

compensation for damage resulting from the defect was still considered. A defect that appears within six months of acceptance shall be deemed to have existed on the date of acceptance unless it is contrary to the nature of the item or the seller proves otherwise.[34] This provision provides a general framework within the general part of the Civil Code.

Sales contracts are also regulated.[35] This section imposes a general notification obligation on the seller to notify the buyer of defects that they are aware of at the time of negotiating the contract of sale.[36] If the defect only comes to light afterwards and the buyer has not been warned of it, the buyer has the following possibilities and rights:

- The right to a proportional discount on the agreed price corresponding to the nature and extent of the defect.
- If the defect makes an item unusable, they have the right to withdraw from the contract.
- The buyer could withdraw if the seller has assured them that the item has certain characteristics or is free from defects, and this turns out not to be true.
- The buyer is entitled to the reimbursement of the necessary costs in connection with the exercise of rights of liability for defects (together with the notification obligation).
- The right to compensation for damages is not affected.[37]

Defects must be claimed without undue delay; the buyer can only take action before the court if he has raised them within the warranty period of 24 months from the acceptance of the goods.[38]

In the Civil Code, there is also a *lex specialis* regulation in the section dedicated to special provisions for the sale of goods in a store.[39] This is a *lex specialis* regulation of consumer sales contracts. These provisions refer to the aforementioned general regulation on contracts of sale. First, we find a provision, which states that the seller is obliged to cover all costs (return, delivery, and others) arising for the buyer.[40] Then follows a broad provision of §616 defining the terms quality and quantity. The object sold must be of the required or legally prescribed quality, quantity, measure, or weight, and must be free from defects; in particular, it must comply with binding technical standards. Foodstuffs must be marked with a use-by date or date of minimum expiry.

34 §101, §508-§510 of the Civil Code.
35 Part 8, Chapter 2 'The contract of sale' of the Civil Code.
36 §596 of the Civil Code.
37 §597, §598 and §600 of the Civil Code.
38 §599 of the Civil Code.
39 Part 8, Chapter 2, Section 4 of the Civil Code.
40 §612 and §614a) of the Civil Code.

If necessary, according to the nature of the item, the seller must inform the buyer of the instructions or technical standards. Within the meaning of §618, there is an obligation to sell items that have defects that do not prevent proper use at prices lower than the price of a normal faultless item. Of course, a prerequisite exists for the buyer to be notified of this.[41] These are the basic rules on liability for defects established in this section for consumer sales contracts:

- The seller is liable for defects which the goods have on acceptance,
- The seller is not liable for defects of used items caused by the usage,
- If a lower price is agreed upon because of a defect, the seller is no longer liable for that defect.[42]

The time limits are as follows: unless the goods are perishable (e.g. foodstuffs) or second-hand, the seller is liable for defects that occur after receipt within the warranty period. The general warranty period is set to 24 months. A shorter period can be agreed upon for an item, but not less than 12 months. Further, for items intended for longer use, specific regulation could provide for a warranty period longer than 24 months, which can also be applied to a part of a product, as is common practice in electronics for selected components. The warranty period commences from the buyer's date of acceptance of the item. At the buyer's request, the seller must provide a guarantee in writing; in other words, a warranty certificate or some proof of purchase if the nature of the item allows it. This includes invoices.

The so-called commercial warranty is also regulated here very briefly. A warranty certificate or advertisement could also refer to a warranty that goes beyond that provided by law. The seller defines the terms and scope of the guarantee in the warranty certificate.[43] Naturally, as already mentioned, this guarantee must not give consumers less protection than a legal guarantee. This also applies to unilateral declarations made by sellers.

The provisions of §622 and §623 subsequently address, how the situation of defects in consumer sales contracts can be resolved. Defects are classified as remediable or irremediable. These are the basic rules regulating the resolution:

- If it is possible to remove the defect, the buyer has the right to remove it free of charge, promptly, and properly (the seller is obliged to remove it without undue delay).
- The buyer could demand replacement of the item instead of removal, or if it concerns only one part, replacement of the part (if this does not incur unreasonable costs for the seller regarding the price of the item and severity of the defect).

41 §616-§618 of the Civil Code.
42 §619 of the Civil Code.
43 §620-§621 of the Civil Code.

- The seller could always replace the defective item with a defect-free item instead of removing the defect (this cannot cause difficulties for the buyer).
- If there is a defect that cannot be remedied and prevents the proper use of the item, the buyer has the right to exchange the item or withdraw from the contract (this also applies if the defect occurs again or if multiple defects and the item cannot be used properly).
- In the case of irremediable defects, the buyer is entitled to a reasonable discount on the item price.[44]

If a replacement occurs, the warranty period will start again from the acceptance of the new item, which applies equally if only part of the product is changed. If there is a defect in an item sold at a lower price or as used, but the seller is responsible for this defect because—for example, he or she did not inform the buyer about it—the buyer is also entitled to an additional adequate discount. Further, the law addresses the question of where the rights of liability for defects are exercised. It is primarily with the seller but possibly also with the entrepreneur listed in the warranty certificate as the intended repairer. However, this entrepreneur should be in the place of the seller or closer to the buyer. Finally, these liability rights are no longer available if they are not exercised within the warranty period. For perishable goods, this must not occur later than the day after the purchase.[45] These provisions provide a subchapter on the regulations under the Civil Code.

3.3. Complaints procedure under the Consumer Protection Act

In addition to the aforementioned complaint procedure, the Consumer Protection Act sets out the seller's obligations. Such a basic obligation is, of course, to issue proof of purchase that contains all the prescribed particulars; whereas in the case of the sale of a second-hand product or a product that has been modified, a defective product, or a product whose utility is otherwise limited, these facts must be clearly indicated in this document. Among other things, the seller is obliged to sell products in the required weight, measure, and quantity, and sell products and services of standard quality. If the quality is below the normal or prescribed quality, consumer attention must be drawn to the differences. As part of the information obligations, before concluding the contract or before sending the order, they must inform the consumer if the information is not obvious regarding the nature of the goods about its main characteristics and the nature of the service. They must also inform consumers about

44 §622 and §623 of the Civil Code.
45 §624 – §627 of the Civil Code.

the functionality and, in the case of electronic content, about the compatibility with hardware and software. Regarding the commercial guarantee, the customer must be informed of the existence and details of a commercial guarantee, if the seller provides such a guarantee. The provision addresses additional requirements. Accordingly, the following provision sets out the obligation to inform the consumer about the characteristics of the product sold or the nature of the service provided: the manner of use, assembly, and maintenance of the product; dangers arising from its improper use; conditions of preservation and storage; and risks associated with the service provided. Further, the information obligations across the supply chain are specified. When the manufacturer or importer does not enter a direct relationship with the seller, they are obliged to inform the supplier truthfully about the characteristics of the product. The supplier is obliged to inform the seller about the characteristics of the product truthfully and completely. The information provided by the manufacturer, importer, or supplier shall include a full description of the potential risks posed by the product, measures to avoid them, and information relevant to the use of the product.[46] Regarding liability across the supply chain, this is precisely the area that the planned amendment will clarify because today, we can only imagine a standard action for damages or an action brought based on negotiated terms in a contract.

In the area under discussion, in addition to the information obligations, we are also interested in the complaint procedure as regulated by the Consumer Protection Act. In its introductory provisions, the Act defines a complaint as the application of liability for defects in a product or service. The resolution of a complaint involves the termination of the complaint procedure by handing over a repaired product, replacing the product, refunding the purchase price of the product, paying a proportional discount on the price of the product, a written notice to take over the product, or a reasonable refusal to accept the complaint.[47]

The liability for defects is enshrined in Section 18 of the Consumer Protection Act, which addresses complaints. This provision starts with the seller's information obligation to inform the consumer about the conditions and method of complaint and the addresses where the complaint can be submitted. The seller or his authorised employee shall inform the consumer of his rights under the general rule, which is the Civil Code as a *lex generalis* rule. The complaint procedure is as follows: based on the rights of the consumer under the Civil Code, the consumer shall specify the rights he/she is claiming. Subsequently, the seller determines the method for processing complaints. The complaint should preferably be processed immediately in complex cases within three working days of application. In justified cases, particularly where a complex technical assessment of the condition of the product or service is required, no later than 30 days

46 §4, §10a), §11, §12 and §16 of the Consumer Protection Act.
47 §2(l)(m) of the Consumer Protection Act.

from the date on which the complaint is made. These 30 days are the maximum when the seller fails to comply, the consumer's position is strengthened, and the consumer is given more rights. After the expiry of this period, the consumer has the right to withdraw from the contract or exchange the product for a new product.

The procedure for dealing with a complaint also depends on the time interval between the purchase and complaint date. If the consumer has submitted a complaint within the first 12 months of purchase, the seller may only reject the complaint based on a professional assessment; regardless of the outcome of the expert review, the consumer may not be required to pay the costs of the expert review or any other related costs to the expert review. The seller shall provide the consumer with a copy of the expert review justifying the rejection of the complaint no later than 14 days after its date. If the consumer has submitted a complaint 12 months after the purchase of the product and the seller has rejected it, the person who handled the complaint is obliged to indicate in the complaint-handling document to whom the consumer can send the product for expert review. If the product is sent to a designated person for expert review, the costs of the expert review, as well as any other costs reasonably incurred in connection with it, shall be covered by the seller regardless of the outcome of the expert review. If the expert review proves that the seller is liable for a defect, the consumer could resubmit the claim; the warranty period will not expire while the expert review is being conducted. The seller shall refund the consumer within 14 days of the date of resubmission of the complaint, all costs incurred for the expert review, and all costs reasonably incurred in connection with the complaint. The reasserted complaints cannot be rejected. In this case, the consumer's position is strengthened, supported by the reimbursement of costs. The seller is obliged to issue a confirmation to the consumer when claiming to issue a written document on the handling of the claim no later than 30 days from the date of the claim and is obliged to keep a record of claims. Moreover, unless a special regulation specifies otherwise, the settlement of a complaint shall be without prejudice to the consumer's right to compensation for damages.[48] If we are discussing remedial issues, in addition to the possibility of claiming damages, these issues also include the consumer's ability to turn to an alternative dispute resolution body to protect their consumer rights; in the case of a cross-border dispute, the consumer has the right to turn to the European Consumer Centre, and[49] the section concerning the complaint procedure concludes the chapter dealing with the current legislation in Slovakia. As we believe that the entry into force of the planned amendment in this area regarding the above-mentioned EU directives is a matter of the near future, we consider it necessary to discuss this amendment briefly.

48 §18 of the Consumer Protection Act.
49 European Consumer Centre Slovakia, 2022.

4. Planned amendment in the area under analysis

As mentioned, less-than-ideal parallel regulation fragmented into several legal acts will be resolved through the planned amendment. The most significant changes brought about by the new legislation are the comprehensively reworked provisions on liability for defects in a Euro-conforming manner within the limits of the key directives. The draft bill introduces new general consumer protection legislation to replace the current Consumer Protection Act. Among the most significant changes are the unification of terminology used in accordance with EU legislation, the updating of information obligations for contracts concluded at a distance or away from the trader's business premises in connection with digitisation, and the new regulation of information obligations for operators of online markets. For example, the term supplier has been replaced by the term trader. Simultaneously, the draft law eliminated duplication, application problems, internal contradictions of individual provisions, and terminological differences.[50]

In particular, the provisions on liability for defects have been modified. As previously mentioned, *the status quo* is based on the regulation of liability for defects in the Civil Code and on the regulation of the complaint procedure in the Consumer Protection Act. To simplify, consolidate, and harmonise the regulation of liability for defects, digital services, and digital content with EU law, it is proposed that only the regulations in the Civil Code, as amended by the draft-amending article, be retained. The seller's liability in the event of defects caused by incorrect installation is also regulated in the context of the digital era. In the article mentioned §596 and §598 should be omitted from the Civil Code. In the provisions on consumer sales contracts under the Civil Code, the most significant changes pertain to the lack of conformity of the goods. Present §618–§648 will be extended to cover in detail all aspects of liability, warranty, buyer's rights, counterclaims, the institution of remedying defects, the requirements for claiming a defect, and the burden of proof. Further, a series of provisions will be added in the articles of §852, in which liability for defects will be addressed in depth in the *lex specialis* regulation of consumer contracts with digital performance.[51] In addition to transposing the above-mentioned directives, this new legislation is also intended to consider the area of continuous digital content delivery.[52] Parallel regulations under the Consumer Protection Act will be deleted and the Act will deal more with the issue of e-commerce and distance contracts.

Finally, the proposal for new legislation modernises the current consumer legislation, brings it into line with EU law, and updates our legislation for the modern digital

50 Explanatory memorandum to the planned amendment.
51 Draft Civil Code.
52 Explanatory memorandum to the planned amendment.

era. When checking the table of conformity between the planned amendment and the aforementioned key Directive, we find that in the immanent part of the Directive's provisions, a change in the Slovak legal system will be necessary in the light of the correct transposition of this directive.[53] We consider Slovak legislation insufficient concerning commercial guarantees. Few legal provisions specify the basic obligations of the seller, but we would have welcomed a more in-depth discussion of this area, especially in a single provision and not in parallel in several sections.

5. Conclusion

This study addresses the lack of conformity of the goods with contracts under Slovak legislation. Currently, the analysed area is covered by the Institute of Liability for Defects in the Slovak legislative order. The liability for defects, as shown in this study, is regulated in parallel by several provisions of Slovak legal acts. The most extensive legal liability regulations for defects are found in the Civil Code. This regulation is general and discusses several *lex specialis* provisions for selected contract types. This study primarily focuses on consumer contracts.

After a brief introduction to EU law, we mainly focused on the Civil Code, followed by the Consumer Protection Act. Finally, we discuss the planned amendments in this area. The aim was to analyse the current legislation in force in Slovakia and identify its possible shortcomings. One of the main problems is the lack of transposition of a key directive in this area, which undermines harmonisation with other EU Member States and thus potentially weakens the level of consumer protection under this issue. The lack of transposition is also a source of problems with different regulations of key notions, in which a revision is necessary. We see as a weakness the current fragmented parallel regulation in several provisions and legal acts, which, in our opinion, could cause uncertainty, not only on the consumer side. Naturally, the Slovak legislation, as well as the EU *aquis*, in the sense of Article 169 TFEU, primarily focuses on increased consumer protection, as well as on the protection of consumers' information rights.[54] It is necessary to mention the issue of information about entrepreneurs. Therefore, we believe that if the relevant authorities in EU Member States address the issue of information on the sellers' side, this could ultimately have a positive impact on increased consumer protection. Today, even regarding e-commerce, it is not difficult for small entrepreneurs to enter the market, and these actors may often not be sufficiently informed about all the rights of the consumers they contract with. Of course, their lack of knowledge of the law does not discount them, but we

53 The table of conformity between the planned amendment and the Directive.
54 Article 169 TFEU.

think that a campaign aimed at raising awareness among businesses would have a positive impact on the whole area of consumer protection.

However, we see the positive aspect of the current legislation as a relatively clear regulation, which, although fragmented into several regulations, is not contradictory in its wording, and the fact that some obligations and rights are regulated in several provisions underlines, to some extent, their importance and positive impact on the issue of information. Nevertheless, Slovak legislation requires an amendment concerning liability for defects. It should be added that consumer law is consistently evolving dynamically as it must respond to new market impulses, business models, or technological advances, including digitalisation. We believe that the amendment in this area planned for August 2023 will soon come into force, and that the Slovak Republic will address the transposition of the directives into its legal order in an effective manner, as is required for a modern EU Member State.

Bibliography

- Act No. 40/1964 Coll. Civil Code.
- Act No. 250/2007 Coll. on Consumer Protection and on Amendments to Act of the Slovak National Council No. 372/1990 Coll. on Offences, as amended.
- Act No. 102/2014 Coll. on Consumer Protection in the Sale of Goods or Providing of
- Services under a Distance Contract or a Contract Concluded Outside the Seller's Premises and on Amendments and Additions to Certain Acts, as amended.
- Act No. 391/2015 Coll. on Alternative Dispute Resolution of Consumer Disputes and on Amendments and Additions to Certain Acts, as amended.
- Act No. 299/2019 Coll. on supervision and assistance in resolving unjustified geographic discrimination of customers in the internal market and amending.
- Act No. 128/2002 Coll. on state control of the internal market in matters of consumer protection and on amending and supplementing certain as amended.
- Act No. 222/2004 Coll. on value added tax.
- Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 onMcertain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC.
- Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.
- Dufalová, L., Križan, M., Skorková, V. (2017) *Repetitórium občianskeho hmotného práva*. 2nd edn. Bratislava: Iuris libri, 2017. 272 p. ISBN 978-80-89635-33-7.
- Draft Civil Code and Draft Consumer Protection Act [Online]. Available at: https://www.slov-lex.sk/legislativne-procesy/-/SK/dokumenty/LP-2022-39 (Accessed: 23 November 2022).
- ECC-Net (n.d.) *Commercial warranties are they worth the money? Summary.* Help and advice for consumers in Europe [Online]. Available at: https://assets.ctfassets.net/yhw377pukdz9/7ihmKyoH6ZWLaySneottqR/2e929792d3c c d c a 7 5 7 d 0 e d - 4d57cc8074/Commercial_warrenties_____are_they_worth_the_money_____summary.pdf (Accessed: 20 April 2023).
- European Commission (2022) *Infringement decisions* [Online]. Available at:
- https://ec.europa.eu/atwork/applying-eu-law/infringements- p r o c e e d i n g s / infringement_decisions/index.cfm?lang_code=EN&typeOfSearch=false& active_only=1&noncom=0&r_dossier=&decision_date_from=&decision_date_to=&E M=SK&title=&submit=Search (Accessed: 23 October 2022).
- European Consumer Centre Slovakia (2022) *How can the ECC Slovakia can help you?*
- [Online]. Available at: https://esc-sr.sk/en/ (Accessed: 14 October 2022).
- European Parliament (2022) *Consumer protection measures* [Online]. Available at:

- https://www.europarl.europa.eu/factsheets/en/sheet/47/consumer-protection-measures (Accessed: 11 October 2022).
- European Union – EUR-Lex (2019) *Rules on contracts for the sale of goods between sellers and consumers* [Online]. Available at: https://eur-lex.europa.eu/EN/legal-content/summary/rules-on-contracts-for-the-sale-of-goods-between-sellers-and-consumers.html (Accessed: 22 October 2022).
- European Union – EUR-Lex (2021) *National transposition measures communicated by the Member States concerning: Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (Text with EEA relevance.)* [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=celex:32019L0771 (Accessed: 22 October 2022).
- Explanatory memorandum to the planned amendment. [Online]. Available at: https://www.slov-lex.sk/legislativne-procesy/-/SK/dokumenty/LP-2022-39 (Accessed: 25 October 2022).
- Judgment of the Court of 15 July 1964, Flaminio Costa v E.N.E.L., C-6-64, ECLI:EU:C:1964:66.
- Lazar, J. et al. (2014) *Občianske právo hmotné*. 1st edn. Bratislava: Iuris libri, 2014. 1302 p. ISBN 978-80-89635-08-5.
- Mészáros, P. (2018) *Ochrana zdravia spotrebiteľa*. In NOVOTNÁ, M. (ed.) Zásady európskeho súkromného práva v aplikačnej praxi. Spotrebiteľský kódex: áno či nie? Praha: Leges, 2018, ISBN 978-80-7502-324-7. [Online]. Available at: https://www.truni.sk/sites/default/files/uk/f000222.pdf (Accessed: 23 Jun 2023).
- Siman, M., Slašťan, M. (2012) *Právo Európskej únie*. 1st edn. Bratislava: Euroiuris, 2012. 1232 p. ISBN 978-80-89406-12-8.
- Šajn, N. (2019). *Protecting European consumers.* European Parliamentary Research Service,2019. [Online]. Available at: https://what-europe-does-for-me.eu/data/pdf/focus/focus22_en.pdf (Accessed: 22 April 2023).
- The table of conformity between the planned amendment and the Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [Online]. Available at: https://www.slov-lex.sk/legislativne-procesy/-/SK/dokumenty/LP-2022-39 (Accessed: 25 November 2022).
- Treaty on the Functioning of the European Union.
- Värv, A., Karu, P. (2009) *The Seller's Liability in the Event of Lack of Conformity of Goods.* JURIDICA INTERNATIONAL [Online]. Available at: https://www.juridicainternational.eu/public/pdf/ji_2009_XVI_85.pdf (Accessed: 23 April 2023).

• Weatherill, S. (2013) EU *Consumer law and policy.* 2nd edn. Cheltenham: Edward Eglar, 2013.E-ISBN 978-0-85793-698-1. [Online]. Available at: https://books.google.sk/books?hl=sk&lr=&id=rfYBAQAAQBAJ&oi=fnd&pg=PR1&dq=info:O8JoKQxFbjcJ:scholar.google.com/&ots=i48kG7Kdou&sig=yLHZjsPSMJWPgltP0IZTmVAAcuU&redir_esc=y#v=onepage&q&f=false (Accessed: 23 April 2023).

Ádám PÁL*

Financial Autonomy of Local Self-Governments Considering the European Charter of Local Self-Government

ABSTRACT: *The article is devoted to the Council of Europe's European Charter of Local Self-Government as a unique international document serving as a basis on which the systems of local self-government are built all over Europe. The author aims to provide insight into the processes within the Council of Europe, which led to its adoption, to describe its character, to identify its advantages and shortcomings, and to evaluate its overall significance as a vital benchmark for measuring the degree of local self-government across the continent. The focus of this article is on the importance of the Charter from the perspective of local authorities' financial autonomy. The author investigates how the issue of financing is generally perceived by the Charter and the related documents, while most of this study is dedicated to the individual provisions of the Charter concerning the various aspects of financial autonomy, from the general adequacy of funds to more specific issues such as the equalisation mechanisms or the right to borrow from the capital market. Using the documents issued by the Council of Europe bodies, and the opinions of scholars dealing with the topic, the author scrutinises, what kind of obligations arise from the respective provisions, also touching upon how well the ratifying states implement these obligations.*
KEYWORDS: *local self-government, Council of Europe, European Charter of Local Self-Government, local authorities, financial autonomy, The Congress of Local and Regional Authorities.*

* PhD candidate, University of Miskolc and Researcher at the Central European Academy, Budapest. https://orcid.org/0000-0002-6221-9572.

https://doi.org/10.62733/2023.1.197-220

1. Introduction

Administrative relations and structures have always been areas in which states viewed themselves as the only authority to lay down rules.[1] Moreover, the administrative build-up of states can be fairly different, even in countries with similar legal systems. Considering these circumstances, it is not surprising that there are not many international conventions on the principles of local self-government. However, there is one notable exception. The European Charter of Local Self-Government (hereinafter referred to as the 'Charter'), adopted by the Council of Europe in 1985, is the only treaty with binding effects under international law.[2] This study introduces this unique international document by briefly elaborating on the circumstances and events leading up to its adoption, character, and monitoring mechanism. The main objective is to present the provisions through which the Charter intends to secure financial stability and autonomy for local authorities.

2. The origins of the Charter

It is no coincidence that the Charter was adopted under the auspices of the Council of Europe. The organisation seeking to promote human rights, democracy, and the rule of law in Europe has a long tradition of channelling the opinions and interests of local communities. As early as 1957, the Conference of Local Authorities of Europe was established within its framework as an advisory body to address local government issues.[3] This institution, re-established several times under different names[4] over the decades, has pursued the adoption of a binding treaty on local self-governance since the earliest stages of its existence. There were several such attempts in the 1960s, but all were rejected by the Committee of Ministers for various reasons, including the fact that they designated the European Court of Human Rights (hereinafter also referred to as 'ECHR') as a body endowed with the authority to resolve legal disputes between local authorities and state parties, which turned out to be an overly ambitious idea.[5]

The breakthrough occurred over a decade later. At the beginning of the 1980s, a new draft proposal was formulated under the leadership of Lucien Harmegnies, the

1 Boggero, 2018, p. 287.
2 Himsworth, 2015, p. 5; Congress of Local and Regional Authorities, 2005, p. 2.
3 Boggero, 2018, p. 17.
4 In 1975, the Conference of Local Authorities of Europe was first reorganized into the Conference of Local and Regional Authorities of Europe, later to become the Standing Conference of Local and Regional Authorities of Europe in 1979, and finally, in 1994 the Congress of Local and Regional Authorities (hereinafter referred to as 'Congress'). See Himsworth, 2015, p. 9.
5 Boggero, 2018, p. 20.

former Belgian Minister of the Interior and the Mayor of Charleroi. This time, the proposal used more restrained terminology and excluded any provisions on the involvement of the ECHR. Still, the proposal needed further softening to become acceptable for adoption: after lengthy debates resulting in the weakening of the obligations arising from the text and the significant weakening of its monitoring mechanism, the Charter was finally adopted by the Committee of Ministers in 1985.[6]

The idea of protecting the prerogatives of local authorities at the international level did not emerge out of thin air. It is often argued that the European Charter of Municipalities[7]—a political declaration adopted by the Council of European Municipalities—served as an important source of inspiration for the Charter's preparation. A document characterised by very ardent and ambitious wording, the European Charter of Municipalities consequently uses the term 'freedom', emphasising the inherent character of the rights of local communities to govern themselves and the need to protect this right from any intervention or impediment by superior authorities.[8] As the basis of rights listed in the document, the drafters expressly referred to 'centuries-old traditions' of municipal liberty in Europe.[9] Consequently, the rich historical roots of local governance provided a major philosophical basis for the drafters of the European Charter of Local Self-Government, either directly or indirectly, through the European Charter of Municipalities. Some authors argue that the decision to label a document as a 'Charter' can be attributed to this fact.[10]

3. The Charter as a constitutional basis of local self-government in Europe

The aim of the Charter is concisely stated in its Explanatory Report: to lay down *'common European standards for measuring and safeguarding the rights of local authorities'*. It contains rules for guaranteeing their *'political, administrative, and financial independence'*. The legally binding nature of the Charter is emphasised in its first Article stating that *'Parties undertake to consider themselves bound by the following article in the manner and to the extent prescribed in Article 12 of this Charter'*. While the ability to impose legal obligations on state parties is indeed the quality

6 Ibid., 2018, p. 22.
7 The whole text of the European Charter of Municipalities can be found at the following address: https://www.ccre.org/img/uploads/piecesjointe/filename/charter_municipal_liberties_en.pdf. Some authors refer to the document as the 'European Charter of Municipal Liberties', see Boggero, 2018, pp. 6, 19, 36.
8 Boggero, 2018, p. 6.
9 See the Preamble of the document.
10 Boggero, 2018, pp. 6–12.

that distinguishes the Charter from other non-binding declarations in the field, the second part of the quoted provision foreshadows that the assurances provided by the Charter might not be categorical. This is confirmed in Article 12, to which Article 1 is referring. Article 12 enables state parties not to commit themselves to certain provisions of the Charter by stating that every ratifying state must be bound by at least 20 provisions of the document, 10 of which must be selected from the 14 core provisions listed in the article. This unique construction creates a situation in which there is no single provision in the Charter that state parties must ratify unconditionally. The rules allowing for extensive reservations regarding the obligations introduced constitute a major weakness of the Charter.

After its adoption, a monitoring procedure was gradually developed within the framework of the Council of Europe to oversee the implementation of Charter obligations. The reason a process is mentioned in this regard is that the text of the Charter itself contains only very weak grounds for establishing a monitoring mechanism. The only provision that can be of some relevance from this perspective is Article 14 requiring state parties to '*forward to the Secretary General of the Council of Europe all relevant information concerning legislative provisions and other measures taken by it for the purposes of complying with the terms of this Charter*'. The Charter thus differs considerably from the European Convention on Human Rights or the European Social Charter, as it does not create an institutional system of control, it does not authorise a specific body to oversee the implementation of the document, and it does not determine any concrete competencies in the field of monitoring.

To fill the gap left by the text of the Charter, the rules and principles articulated in the Statue of the Council of Europe,[11] as well as the theory of 'implied powers', had to be used as a legal basis for the creation of a meaningful monitoring mechanism.[12] Already at the beginning of the 1990s, the Standing Conference of Local and Regional Authorities of Europe (the predecessor of the Congress of Local and Regional Authorities, hereafter referred to as the 'Standing Conference') made two efforts to establish a monitoring system for Charter compliance.[13] Immediately after the creation of the latter, the Committee of Ministers commissioned the Congress of Local and Regional Authorities to '*submit proposals to the Committee of Ministers in order to promote local*

11 See Arts. 3, 8, and Art. 15 para. b of the Statute, which establish the requirement of sincere and effective collaboration in the realization of the aim of the Council (Art. 3), the consequences of the violation of Art. 3 (Art. 8) and the right of the Committee of Ministers to issue recommendations and to request information from the member states on the actions taken by them with regard to such recommendations (Art. 15 para. b).

12 See Boggero, 2018, pp. 52–55.

13 See Resolution no. 223 on the role of local and regional authorities in integration policy between Western and Eastern Europe and Resolution no. 233 on the implementation of the European Charter of Local Self-Government.

and regional self-government'.[14] The authorisation was further elaborated in 2000 by ordering the Congress to *'prepare on a regular basis country-by-country reports on the situation of local and regional democracy in all member states and in states which have applied to join the Council of Europe, and shall ensure, in particular, that the principles of the European Charter of Local Self-Government are implemented'*.[15] Thus, the Committee of Ministers solved the issue of Charter monitoring by delegating its supervisory competencies to the Congress in the field of local and regional democracy (which is a broader concept than the Charter itself).[16]

The above-mentioned development resulted in the establishment of a thriving system of follow-up activities to the Charter, which intensified and systematised over time.[17] Along with country-by-country reports prepared by rapporteurs assisted by independent experts following their monitoring visit, recommendations suggesting possible ways of improvement were also adopted. The goal is to trigger continuous political dialogue with state parties, through which the quality of local democracy can be improved.[18] As may be evident from the nature of the whole process and the terms used for them, the outputs of the monitoring process are essentially non-binding instruments, meaning that the degree of the dialogue's success ultimately depends on the willingness of the state party under scrutiny.[19] Nevertheless, these outputs have emerged as valuable sources documenting the state and development of local democracy in ratifying countries, including its financial aspects.

A further archetypal feature of the Charter is the vagueness of its provisions, which seriously undermines its binding force.[20] Although there is no doubt that the Charter is binding on an international level, the judicial authorities of several state parties have denied (or significantly restricted) the direct effect of the Charter within the domestic legal order, referring precisely to the overly general nature of its provisions. The decisions of the Constitutional Courts of Austria,[21] Italy,[22] or Poland[23] could serve as examples. The linguistic generality used in the Charter makes it difficult to draw definite conclusions during the monitoring process because imprecise provisions render it difficult to justify overly critical verdicts. Contrastingly, the vague wording was not a result of a mistake or negligence but

14 Committee of Ministers, 1994, Art. 2, para. 1, b).
15 Committee of Ministers, 2000, Art. 2, para. 3.
16 Himsworth, 2015, p. 99.
17 Ibid., p. 119.
18 Ibid., p. 110.
19 Boggero, 2018, p. 65.
20 Congress of Local and Regional Authorities, 2005, p. 3.
21 Verfassungsgerichtshof (VfGH). Case no. B1407/91.
22 Corte costituzionale. Decision no. 325/2010 and Decision no. 50/2015.
23 Trybunał Konstytucyjny. Case no. K 24/02.

a conscious decision during the drafting process, which was intended to ensure that the document received the widest possible support from the Council of Europe member states.[24]

This intention turned out to be successful, as all member states of the Council of Europe signed and ratified the Charter.[25] Notwithstanding the deficiencies touched upon above, the positive development in the field brought about by the monitoring activity demonstrates that the Charter became a document earnestly respected by participating countries.[26] It is not by accident that a decade ago, the Council of Europe itself classified the treaty as belonging to the most prominent category of its documents *('Conventions with numerous ratifications and considered as key').*[27]

Although the overly abstract provisions of the Charter could be seen as a weakness from a certain perspective, this feature meant that (instead of being directly applied in concrete cases) it was often used by the judiciary as an interpretative tool or reference standard in cases concerning local self-government.[28] However, the Charter played an indispensable role from another perspective in Central and Eastern Europe, where countries were looking to be part of European integration. As there was no (real) system of local or regional self-government during the socialist period, the Charter served as a comprehensive template on which rules concerning local governance could be based in these countries.[29] The general nature of the Charter's provisions was an advantage in this case as they made the document sufficiently flexible to adapt to the peculiarities of each country.[30]

Since its adoption, the Charter has been endorsed by 46 European countries, inspiring and influencing legislation on local self-government throughout the continent. Over time, it became a unique yardstick and established minimal international standards in this field.[31] Given its success and the fact that it is the only treaty of its kind, no other document comes close to embodying general principles in the sense of European law in the given sphere. It is therefore not an overstatement that the principles encompassed in the Charter act as the nucleus of a common European 'constitutional' basis of local government law.[32] Moreover, this basis is consistent and comprehensive, and deals with various aspects of local self-government. The

24 Himsworth, 2015, p. 121.
25 All signature and ratification dates of the Charter can be found at https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=122
26 Himsworth, 2015, p. 171.; Boggero, 2018, p. 277.
27 Council of Europe. Secretary General, 2012.
28 Boggero, 2018, pp. 77–78
29 Himsworth, 2015, p. 148.
30 Ibid.
31 Boggero, 2018, p. 71.
32 Ibid., 2018, p. 288.

following part of the paper offers a more detailed look at one of the most important dimensions: the financial dimension of local autonomy.

4. Financial autonomy of local self-governments in the Charter

The importance of financial aspects of local self-governance was not underestimated by the responsible bodies of the Council of Europe. Shortly after the adoption of the Charter, the Standing Conference proposed protecting the financial interests of local authorities through another legally binding international convention specifically drafted for this purpose. The result of this effort was the European Charter of Local and Regional Finance, which was meant to supplement the financial guarantees of local authorities in the European Charter of Local Self-Government with more elaborate provisions.[33] However, the project turned out to be unsuccessful. The convention was never opened for signature and was completely called off after the European Charter of Local Self-Government went into effect in 1988.[34]

With the failure to extend the guarantees of local authorities' financial autonomy through a special treaty, the provisions in the Charter remained the only legally binding international rules on the given matter. While the respective provisions in the Charter are understandably more concise than those meant to constitute a separate convention, it cannot be said that the Charter would turn a blind eye to the financial aspects of local self-government.

The question of financing received substantial attention from charters. This is already apparent in the final paragraph of the preamble, which implies the essential qualities of local self-governance.[35] It also stresses the importance of local authorities possessing the resources required to fulfil their responsibilities.[36] The appearance of this note in the preamble means that the elementary rule of local government financing; that is, the need to accompany the tasks and responsibilities of local authorities with corresponding funding, is already emphasised in the initial part, explaining the rationale behind the whole treaty.

The Explanatory Report to the Charter follows up on this idea, stating at one point that *'the legal authority to perform certain functions is meaningless if local authorities are deprived of the financial resources to carry them out'*.[37] In addition, the Explanatory

33 Maier, 1989, p. 205.
34 Boggero, 2018, pp. 24–27.
35 Himsworth, 2015, pp. 32–33.
36 Preamble of the European Charter of Local Self-Government, para. 1.
37 Explanatory Report, Part C. Commentary on the Charter's provisions, Article 9.

Report mentions financing questions twice in its general remarks. It first clarifies that the principal aim of the document is to commit states to guarantee the political, administrative, and financial independence of local authorities. Further, when introducing a rough sketch of the Charter, it states that a *'major article'* in the document is meant to ensure that local authorities have adequate financial resources at their disposal.

5. Article 9 as the cornerstone of the local self-governments' financial autonomy

The 'major article' to which the Explanatory Report is referring to is Article 9 of the Charter. The article deals exclusively with questions concerning the financial condition of municipalities and does so in a comprehensive way. With eight paragraphs, it is the most extensive among all the substantive articles of the Charter. It was also the most controversial and problematic article during the adoption of the document. The paragraphs of Article 9 were subject to the lengthiest debates during the drafting process, as states were reluctant to sanction any legal assurances concerning the financial autonomy of local authorities.[38]

To secure the eventual approval of the States, tough compromises had to be made, causing a significant softening of the wording of the article. Most paragraphs could remain part of the Charter only after the removal of certain lines or the insertion of phrases that relativised the obligations arising from them, such as *'within the limits of statute'*, *'within national economic policy'*, *'in an appropriate manner'*, or *'as far as practically possible'*.[39] The following parts of the paper will provide a more detailed look at all eight paragraphs of Charter 9, presenting their final wording and outlining their interpretation, scrutinising the obligations stemming from them, and evaluating their overall significance.

5.1. Paragraph 1

> *'Local authorities shall be entitled, within national economic policy, to adequate financial resources of their own, of which they may dispose freely within the framework of their powers'.*

38 Boggero, 2018, p. 202.; Himsworth, 2015, p. 60.
39 Himsworth, 2015, pp. 61-62.

This paragraph is a broad provision that practically imposes recognition of the principles of fiscal decentralisation[40] and fiscal equivalence[41] on state parties.[42] This requires that state parties enable local authorities to acquire their own financial revenue and spend it according to their own preferences.[43]

As is evident from its wording, the paragraph contains dual authorisation. While the Explanatory Report to the Charter reflects only one of them, stating that the *'paragraph seeks to ensure that local authorities shall not be deprived of their freedom to determine expenditure priorities',* the contemporary commentary to the Explanatory Report[44] (hereinafter referred to as 'Commentary')—a document issued recently by the Congress reflecting the experiences from the normative and monitoring work done so far—clarifies that paragraph 1 establishes the entitlement of local authorities to own resources,[45] and also the freedom to dispose of (at least) these own resources.[46]

Here, the question arises: what should be understood by the term *'financial resources of their own*'? In the context of the Charter, those resources fall into this category, which are either raised upon the independent decision of the local authority, without any possible intervention of higher authorities in the process, or resources of a local nature that are not immediately levied by local authorities; however, the revenue stemming from them cannot be discretionally altered by the state.[47] By this logic, central transfers and shared taxes assigned to local authorities cannot be categorised as 'own resources', and an overly high dependence of local self-governments on these resources to the detriment of their own resources is a potential breach of Article 9, paragraph 1.[48] This distinction seems to be supported by the Council of Europe's Steering Committee on Local and Regional Democracy (hereinafter referred to as the 'Steering Committee'), which, in one of its studies on local finances and

40 The World Bank understands the principle of fiscal decentralization as the transfer of (certain) expenditure responsibilities and revenue assignments to lower levels of government. http://web.worldbank.org/archive/website01061/WEB/0__CO-11.HTM

41 The principle of fiscal equivalence requires that the territorial incidence of the benefits of a public policy coincide with the geographical boundaries of the government operating and financing the program. See: von Hagen, 2002. The Committee of Ministers perceives fiscal equivalence at the local authority level as a requirement according to which a given local authority should be able to finance the expenditures it decides on from its own resources to the greatest possible extent. See Committee of Ministers, 2005, Appendix, Part I, Art. 2, para. 6. For a more detailed look at the principle of fiscal equivalence, see Olson Jr., 1969.

42 Boggero, 2018, p. 204.

43 Akkermans, 1990, p. 296.

44 Congress of Local and Regional Authorities, 2020.

45 Commentary, para. 142.

46 Commentary, para. 147.

47 Schaffarzik, 2002, p. 512.

48 Commentary, para. 148.

taxation, contrasted 'own resources' with 'transferred resources'. The latter category included, inter alia, shared taxes and central transfers.[49]

The second dimension of paragraph 1, the freedom of local authorities to freely dispose of their own resources, means that states must refrain from influencing decisions on how to use these funds. This rule renders the earmarking of resources contradictory to the Charter. Article 9, paragraph 1, has a strong connection to Article 8, paragraph 2 at this point, as the latter prohibits expediency controls in the sphere of competencies.[50]

The contracting parties must ensure that local authorities have the capability to use the rights assigned to them under Article 9, paragraph 1. This means not only legal and budgetary capacity but also the fiscal capacity to finance their own activities. At this point, the third aspect of paragraph 1 enters the picture: adequacy of resources.

While the term 'adequate' in paragraph 1 should be understood in a quantitative sense, as it solely relates to the amount of funds available to local authorities,[51] one would look in vain for a precise guide in the Explanatory Report or the Commentary to determine what exactly is to be understood by this term. The reason for this ambiguity can be found in the activities of some countries during the drafting process of the Charter, which sought to remove the phrase 'adequate' from the wording of the paragraph. Although they failed in its complete removal, they managed to render the formulation of the paragraph so fluid and open to the interpretation that it is practically impossible to establish an objective quantitative rule for the assessment of whether funding is adequate under Article 9, paragraph 1.[52]

However, comments regarding what can almost certainly be deemed satisfactory from the perspective of adequacy do exist. The above-mentioned study of the Steering Committee on local finances and taxation states that *'when own resources are not less than grants (general and specific grants) it may be considered that financial autonomy has a solid base'*.[53] While it would be hard to dispute this affirmation, the problem is that a situation in which the municipalities' own resources account for most total financial resources is rare across European countries. As the Congress noted in its recommendation from 2000, *'local authorities can boast a proportion of own resources equal to or greater than 50% of their total financial resources in only 8 Council of Europe member states'*.[54]

Some conclusions can be drawn from the monitoring activities of the Congress. In one of its previous recommendations connected to a monitoring report, it concluded

49 Steering Committee on Local and Regional Democracy, 1999, p. 5.
50 Boggero, 2018, p. 205.
51 Boggero, 2018, pp. 208–209.
52 Himsworth, 2015, p. 63.
53 Steering Committee on Local and Regional Democracy, 1999, p. 55.
54 The Congress of Local and Regional Authorities, 2000, Appendix 1, Art. 2, a, para. i.

that the situation, in which the own resources of municipalities amount to 15% of all revenue is not in conform to Article 9 of the Charter.[55] Still, the Congress does not seem to be particularly consequent in following the previously mentioned benchmarks, and it (along with other Council of Europe bodies) completely refrains from establishing a general formula for evaluating the adequacy of municipal own resources.[56]

According to the Commentary, the right to adequate resources is not absolute. Adequacy under Art. 9 para. 1 must be interpreted 'within national economic policy'. In accordance with this, the Committee of Ministers stated that in times of economic hardship, the amount or the ratio of resources at the local authorities' disposal could be shortened, provided that it does not impede the very essence of the principle of local self-government, and the criteria for such limitations remain *'clear, objective, and quantifiable*'. The Committee added that the limitations must above all be *'proportionate to the desired aim'* and *'lifted once they have achieved their aim'*.[57]

5.2. Paragraph 2

> *'Local authorities' financial resources shall be commensurate with the responsibilities provided for by the constitution and the law'.*

The second paragraph of Article 9 contains the principle of concomitant financing[58] (also known as the principle of commensurability[59]), which prescribes a proportionate relationship between the tasks executed by local authorities and the financial resources available for their proper fulfilment. The basic purpose of this provision is to prevent countries from diverting the costs of providing certain services from the state to local authorities.[60] However, there have been long-standing debates about what kind of obligation is precisely imposed on state parties by this provision.

A restrictive interpretation of this provision is supported by certain authors[61] and naturally by contracting parties. According to this view, Article 9, paragraph 2 does not mean that any increase in the administrative expenses of local authorities

55 The Congress of Local and Regional Authorities, 1999, para. 47.
56 Boggero, 2018, p. 209.
57 For more details see Committee of Ministers, 2004, Appendix, Part 1, paras. 8–16.
58 Boggero, 2018, p. 210.
59 Commentary, para. 149.
60 Boggero, 2018, p. 213.
61 Akkermans, 1990, p. 295.

must automatically be accompanied by an increase in revenue. It only requires that the resources of these authorities be proportionate to the mandatory, delegated, and voluntary tasks they perform. If the resources of municipalities can be deemed proportionate, a change in funding will not have to occur even after acquiring an additional task.[62] This approach is also reflected in the Explanatory Report to the Charter, which—rather cautiously—only states that *'there should be an adequate relationship between the financial resources available to a local authority and the tasks it performs'*.[63]

In contrast, a more progressive approach to this provision strictly suggests that any new task assigned to a local authority must come with appropriate financial compensation from the state. This interpretation is generally favoured by the Congress, which is also apparent from the text of the Commentary on this provision declaring that *'any new task assigned or transferred to local authorities must be accompanied by the corresponding funding or source of income to cover the extra expenditure'*.[64]

In 2011, the Committee of Ministers issued a recommendation dedicated to funding new competencies for local authorities through higher-level authorities.[65] Surprisingly, despite being the more reserved body in the Council of Europe that usually voices the opinion of member states, the Committee inclined towards the more progressive interpretation of paragraph 2 in this document, by articulating a rule according to which *'when higher-level authorities take decisions which impose or could result in additional net costs for local authorities, compensation should be given by the higher-level authorities to local authorities'*.[66] The recommendation also contains rules on the amount of compensation, stating that when a new competency is assigned to local authorities, the amount of compensation must be based on the estimated net costs connected to their fulfilment.[67]

Within the framework of its monitoring activity, the Council uncovered shortcomings related to Article 9, paragraph 2 in numerous countries. Difficulties in compliance with this provision are particularly widespread in Central and Eastern European countries, which could indicate insufficient funding from the local self-government sector.[68]

62 Boggero, 2018, p. 213.
63 Explanatory Report, Art. 9. para. 2.
64 Commentary, para. 150.
65 Committee of Ministers, 2011.
66 Ibid. Part A, Art. 1, para. i.
67 Ibid. Part A, Art. 3, para. i.
68 Boggero, 2018, p. 214.

5.3. Paragraph 3

> *'Part at least of the financial resources of local authorities shall derive from local taxes and charges of which, within the limits of statute, they have the power to determine the rate'.*

At first glance, the third paragraph of Article 9 seems to be more specific than the first two paragraphs because it only concerns local taxation. This provision is closely connected to the first paragraph: it is specifying and complementing it. It specifies the line *'financial resources of their own'* by clarifying that part of these own resources should stem from local taxes. Consequently, under Article 9, para. 3, state parties must grant local authorities the possibility of introducing local taxation on their administrative territories. It also complements paragraph 1 in the sense that while it grants local self-governments the right to decide on their expenditures, paragraph 3 secures them the freedom to decide on at least a certain part of their revenues.[69]

However, to have a genuine influence on such revenues, it is not enough for local authorities to decide merely on the introduction of the local tax. Under Article 9, para. 3, only those taxes can be regarded as local, for which they can determine the rate.[70] This requirement is also reflected in para. 157 of the Council's Commentary to the Charter. The reason behind this condition is that by these means, local representatives obtain a tool for making crucial political decisions; in this case, the setting of the local tax burden paves the way for political accountability[71] and creates the possibility of tax competition between different municipalities.[72] In addition, the Commentary mentions that local authorities should also have the opportunity to decide on other aspects of local taxes, such as tax relief or deductions.[73]

Notwithstanding, the right of local authorities to influence revenue from local taxes is not absolute under the Charter. Governments can impose statutory restrictions on the freedom of local authorities to determine the rates. In practice, such restrictions can be realised in the form of minimum or maximum permissible tax rates, a requirement for approval by higher authorities, or a decision stemming from a procedure involving consultations between local authorities and the central government.[74]

However, the restrictions introduced by the central government should be limited as well. The Explanatory Report provides; for example, that *'such restrictions must not*

69 Boggero, 2018, pp. 218–219.
70 Schaffarzik, 2002, p. 515; Weiss, 1996, pp. 197–198.
71 Commentary, para. 159.
72 Boggero, 2018, p. 219.
73 Commentary, para. 157.
74 Boggero, 2018, p. 221.

prevent the effective functioning of the process of local accountability', meaning that the restrictive rules cannot narrow the local representatives' freedom of decision to an extent that would practically prevent them from having a meaningful influence on the local tax burden. Another limitation is that such restrictions cannot render the local authorities' own financial resources inadequate, as this would result in a breach of Article 9, paragraph 1.[75]

Unfortunately, para. 3 of Article 9 is characterised by feeble wording using the formulation of *'part at least',* which results in a weak obligation placed on state parties.[76] Neither the Charter, nor the Explanatory Report does contain any information on what is to be understood by the phrase *'part'* appearing in the paragraph. A more concrete share is not offered even by the Commentary to the Charter, indicating that the Council may have been either unable or unwilling to formulate a specific benchmark within the framework of its monitoring activity. Sadly, the weak obligation contained in Article 9, para. 3 contributes (or at least does not help to improve) to the situation in which, in most state parties, local authorities either do not have the opportunity to introduce local taxes, which would fulfil the conditions laid down by the Charter, or these kinds of taxes have a marginal impact on their budgets.[77]

Nevertheless, the amount of resources stemming from local taxes in a given country serves as a valuable source of information for the Congress during its monitoring activities, as it expressly states that the ratio of local tax income compared to overall revenues or overall tax income is a critical indicator of the quality of local self-governments' financial autonomy.[78]

5.4. Paragraph 4

> *'The financial systems on which resources available to local authorities are based shall be of a sufficiently diversified and buoyant nature to enable them to keep pace as far as practically possible with the real evolution of the cost of carrying out their tasks'.*

The fourth paragraph of Article 9 aims to prevent local authorities from being excessively dependent on a single or very few types of resources, which would limit their ability to respond to various economic challenges. Therefore, resources responsive to inflation play an important role in the local revenue system.[79] As indicated in the

75 M. W. Schneider, 2004, p. 324.
76 Himsworth, 2015, pp. 61–62.
77 Boggero, 2018, pp. 223–224.
78 Commentary, para. 154.
79 Explanatory Report, Art. 9 para. 4.

text, responsiveness to challenges can be enhanced by offering local authorities a diverse scale of revenues. An exemplative list of such revenues is contained in the Commentary, which enumerates transfers, local taxes, charges, profits under private law, interest in bank accounts and deposits, penalties and fines, sales of properties and goods, and the provision of services.[80]

The other key term in paragraph 4 is buoyancy. By this, the Charter means that the resources available to local authorities should be adaptable to the increasing expenditures resulting from the fulfilment of their responsibilities. For example, this can mean that the transfers provided by higher authorities should be revised periodically to keep up with increasing costs, or that local authorities should be able to increase the tax rates of various local taxes if necessary owing to inflation.[81]

5.5. Paragraph 5

> *'The protection of financially weaker local authorities calls for the institution of financial equalisation procedures or equivalent measures which are designed to correct the effects of the unequal distribution of potential sources of finance and of the financial burden they must support. Such procedures or measures shall not diminish the discretion local authorities may exercise within their own sphere of responsibility'.*

The fifth paragraph aims to mitigate naturally occurring financial inequality among different local authorities. For various reasons, some municipalities inevitably have more limited possibilities of raising revenue than others. While these authorities have fewer financial resources, they are often required to fulfil the same tasks as their better-positioned counterparts, which could lead to serious financial difficulties or an inability to fulfil certain tasks properly. At this point, higher authorities should intervene and redistribute funds to offset imbalances.[82] This is exactly what is imposed by the paragraph below.

There are two basic types of equalisation mechanisms: vertical and horizontal. Horizontal equalisation refers to the redistribution of the local revenues of certain (wealthier) municipalities to financially weaker ones, whereas vertical equalisation involves grants and transfers from central or regional authorities. While the Congress does not seem to clearly prefer any of the two types, mentioning the advantages of both solutions in the Commentary,[83] the Committee of Ministers favours vertical

80 Commentary, para. 161.
81 Commentary, para. 164.
82 Committee of Ministers, 2005, paras. 37–39.
83 Commentary, para. 167.

equalisation since horizontal redistribution could trigger a sense of resentment from the side of richer municipalities. The Committee holds that horizontal equalisation should only be used if *'local fiscal capacity varies so greatly that the decided level of equalization of resources cannot be achieved solely by means of government grants'*.[84]

Apart from choosing the right type of equalisation mechanism, a further crucial task of the state parties is to strike an ideal balance in the functioning of the equalisation mechanism: the amount of aid should effectively help financially vulnerable local authorities but must not be over-dimensioned. Equalisation cannot supplement the revenue sources of local authorities, which otherwise should have been levied by them, for example, in the form of local taxes.[85] The second sentence in para. 5 clarifies that equalisation mechanisms must not be used to even out financial differences between local authorities.[86] Excessive equalisation will dissuade wealthier local authorities from exploiting their possibilities to raise their own revenue,[87] resulting in an economically suboptimal situation.[88] Finally, financial equalisation mechanisms must not be used to interfere with local authorities' freedom to act autonomously in the sphere of their own responsibilities.[89]

5.6. Paragraph 6

> *'Local authorities shall be consulted, in an appropriate manner, on the way in which redistributed resources are to be allocated to them'.*

At first glance, this paragraph may seem superfluous, as para. 6 of Article 4 ensures the right of municipalities to be consulted on any matter concerning them.[90] However, Article 9, para. 6 is meant to ensure a higher standard of the right to be consulted than para. 6 of Article 4. While according to the latter the general right to be consulted should be granted *'insofar as possible'*, Art. 9 para. 6 does not contain such a limitation. This means that under the sixth paragraph of Article 9, state parties are always obliged to consult local authorities whenever they decide on the redistribution of resources between them.

84 Committee of Ministers, 2000, Appendix, Part 2 Art. b).
85 Boggero, 2018, p. 227.
86 Schaffarzik, 2002, p. 523; Schneider, 2004, p. 327.
87 Congress of Local and Regional Authorities, 2000, Appendix 1, Art. 2, b, para. viii.
88 Steering Committee on Local and Regional Democracy, 1999, p. 51.
89 Boggero, 2018, p. 233.
90 The exact wording of the paragraph goes: *'Local authorities shall be consulted, insofar as possible, in due time and in an appropriate way in the planning and decision-making processes for all matters which concern them directly'.*

The Commentary makes it clear that the duty to consult applies not only to situations in which the legislature is implementing the redistribution of funds but also to all decisions on the question.[91] The requirement that the consultation must be conducted '*in an appropriate manner*' means that local authorities must be informed adequately in advance on the topic to be consulted, and state parties must ensure that they have sufficient time to express their views and formulate their observations during the process.[92] The Commentary adds that regional or statewide associations of local self-governments are suitable partners for these consultations.[93]

5.7. Paragraph 7

> *'As far as possible, grants to local authorities shall not be earmarked for the financing of specific projects. The provision of grants shall not remove the basic freedom of local authorities to exercise policy discretion within their own jurisdiction'.*

The penultimate paragraph of Article 9 prescribes a preference for non-earmarked grants over earmarked grants. The reason behind this provision is the presumption that earmarked grants enable higher authorities to acquire influence over the decisions of local authorities as they restrict their freedom of action, which contradicts the basic idea of the Charter.[94] Still, the Charter does not rule out the possibility of using earmarked grants. Both the Explanatory Report and the Commentary acknowledge that it would be unreasonable to expect state parties to completely discontinue the funding of local authorities via earmarked grants; for example, they may be justified in the case of major capital investment projects or as a way of implementing austerity measures.[95] However, the Commentary expressly states that using earmarked grants to cover operating costs (such as salary payments) is worrisome from the perspective of local autonomy.[96]

Neither the Charter nor the Explanatory Report offers a specific ratio of earmarked to non-earmarked grants that would be deemed acceptable from the perspective of the provision, and such a ratio was not generally articulated by the Congress during its monitoring activity either. However, some authors argue that

91 Commentary, para. 173.
92 Commentary, para. 174.
93 Ibid.
94 Explanatory Report, Art. 9 para. 7.
95 Ibid.; Commentary, paras. 180 and 181.
96 Commentary, para. 180.

more than half of all transfers should be at the free disposal of local authorities.[97] In opposition to this view, the Explanatory Report states that *'a higher ratio or project-specific grants to more general grants could be considered reasonable where grants as a whole represent a relatively insignificant proportion of total revenue'*. This reasoning has been disputed by certain authors, claiming that Article 9, para. 7 only regulates the relationship between earmarked and non-earmarked grants and should not be linked to the relationship between grants and other types of revenues,[98] or that it is practically impossible for grants and transfers to represent only an insignificant part of the local authorities' total revenues.[99] Nevertheless, the Council considers that a tendency to favour earmarked grants represents a clear threat to local authorities' policy discretion, and may thus easily be contrary to Article 9, para. 7.[100]

5.8. Paragraph 8

> *'For the purpose of borrowing for capital investment, local authorities shall have access to the national capital market within the limits of the law'.*

The last paragraph of Article 9 concerns the local authorities' right to borrow freely as a supplementary tool for financing certain expenditures. According to this provision, local self-governments should be able to access the national capital market for this purpose. However, according to the Explanatory Report, this holds true only in relation to financing capital investment; loans from the capital market should not be used to fund current expenditure.[101]

Local authorities should borrow under their own responsibility; therefore, the central authorities should only offer guarantees for their loans under exceptional circumstances.[102] As implied by the text of the provision, the rights contained in paragraph 8 are not absolute. States can limit the access of local authorities to capital markets to prevent excessive indebtedness.[103] Accordingly, local authorities should not be allowed to conduct speculative investments and should also be prohibited from using any kind of financing technique that hides the real level of their indebtedness.[104] Although the economic crisis in 2008–2009 triggered many austerity measures,

97 Schaffarzik, 2002, pp. 525–526.
98 Schneider, 2004, p. 328.
99 Schaffarzik, 2002, p. 527.
100 Commentary, para. 180.
101 Committee of Ministers, 2004, Appendix, Part 1, para. 24; Committee of Ministers, 2005, paras. 73–74.
102 Committee of Ministers, 2005, para. 76.
103 Commentary, para. 186.
104 Committee of Ministers, 2004, Appendix, Part 1, paras. 21–22.

causing the enhancement of restraints on local self-government borrowing, it remains applicable that these restraints established by the state must be justified and proportionate, as the arbitrary prohibition of borrowing can be seen as a disguised form of control over local self-government.[105] The fulfilment of the latter requirement seems to be problematic in many countries throughout Europe, where local authorities are either completely banned from borrowing in financial markets or such a possibility is generally subject to governmental approval.[106]

6. Conclusion

Although the Council of Europe eventually dropped the project of adopting an international treaty devoted specifically to the question of local self-government financing, its more general relative, the European Charter of Local Self-Government, still contains considerably broad regulations on the topic. Its longest provision, Article 9 regulates a variety of aspects connected to the financial autonomy of local authorities, such as the general adequacy of funds available to them (para. 1), the requirement that these funds are commensurate with their tasks and responsibilities (para. 2), the possibility to introduce local taxes (para. 3), the diversity and buoyancy of resources at the local self-governments' disposal (para. 4), financial equalisation for vulnerable municipalities (para. 5), the right of local authorities to be consulted in the matters of financial redistribution (para. 6), the preference of non-earmarked grants (para. 7), and the right of local authorities to have access to the national capital market (para. 8).

Thanks to the uniqueness and overall importance of the document as well as the nature of its provisions, the system established by the Charter is seen by certain authors as a reference framework for designing the constitutional scheme of local government systems and measuring the degree of local autonomy across Europe.[107] Analogously, the rules and principles set forth in Article 9 of the Charter serve the aforementioned purposes regarding the financial autonomy of local self-government. Unfortunately, as is observable from the monitoring activity of the Council, the level of implementation of the obligations arising from the Charter is far from ideal, which also applies to provisions concerning financial autonomy[108] and is par-

105 Commentary, para. 186.
106 Congress of Local and Regional Authorities. Chamber of Local Authorities, 2014, para. 99.
107 Boggero, 2018, p. 280.
108 See Boggero, 2018, pp. 214, 222–224, 231–232, 238, 244–245.

ticularly true for Central and Eastern European countries.[109] It is thus clear that while the Charter is a suitable tool for creating an environment favourable enough for local self-governments, many ratifying states still have a long way to go in this regard.

109 See Boggero, 2018, pp. 214, 231; Pál & Radvan, 2022, pp. 1164–1165 regarding the countries of the Visegrád Group, Hoffmann, 2021, p. 241 regarding Hungary; Radvan, Mrkývka & Schweigl, 2018, pp. 904–905 regarding the Czech Republic; and Hintea, Moldovan & Țiclău, 2021, pp. 348–350 regarding Romania.

Bibliography

- Akkermans, P. (1990) 'The European Charter of Local Self-Government' in Institut du Fédéralisme, Fribourg, Suisse (ed.) The Territorial Distribution of Power in Europe. Fribourg: Institut du Fédéralisme, Université de Fribourg.
- Boggero, G. (2018) Constitutional Principles of Local Self-Government in Europe. Leiden, Boston: Brill.
- Corte costituzionale. *Decision no. 325/2010* from 17 November 2010. Available at: https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2010&numero=325 (Accessed: 29 November 2022)
- Corte costituzionale. *Decision no. 50/2015* from 24 March 2015. Available at: https://www.cortecostituzionale.it/actionSchedaPronuncia.do?param_ecli=ECLI:IT:COST:2015:50 (Accessed: 29 November 2022)
- Council of Europe. *Statute of the Council of Europe.* European Treaty Series – No. 1, London, 5 May 1949. Available at: https://rm.coe.int/1680306052 (Accessed: 29 November 2022)
- Council of Europe. *European Charter of Local Self-Government*. European Treaty Series – No. 122. Strasbourg, 15 October 1985. Available at: https://rm.coe.int/168007a088 (Accessed: 29 November 2022)
- Council of Europe. *Explanatory Report to the European Charter of Local Self-Government*. European Treaty Series – No. 122. Strasbourg, 15 October 1985. Available at: https://rm.coe.int/16800ca437 (Accessed: 29 November 2022)
- Council of Europe. Committee of Ministers (2000). *Recommendation Rec(2000)14 of the Committee of Ministers to member states on local taxation, financial equalisation and grants to local authorities.* 6 September 2000. Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804ff8e7 (Accessed: 29 November 2022)
- Council of Europe. Committee of Ministers (2004). *Recommendation Rec(2004)1 of the Committee of Ministers to member states on financial and budgetary management at local and regional levels.* 8 January 2004. Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805de0df (Accessed: 29 November 2022)
- Council of Europe. Committee of Ministers (2005). *Recommendation Rec(2005)1 of the Committee of Ministers to member states on the financial resources of local and regional authorities.* 19 January 2005. Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805db09e (Accessed: 29 November 2022)
- Council of Europe. Committee of Ministers (2011). *Recommendation CM/Rec(2011)11 of the Committee of Ministers to member states on the funding by higher-level authorities of new competences for local authorities.* 12 October 2011. Available at: https://search.

coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805afc97 (Accessed: 29 November 2022)
- Council of Europe. Committee of Ministers (1994). *Statutory Resolution (94) 3 relating to the setting up of the Congress of Local and Regional Authorities of Europe*. 14 January 1994. Available at: https://rm.coe.int/09000016804efe6c (Accessed: 29 November 2022)
- Council of Europe. Committee of Ministers (2000). *Statutory Resolution (2000) 1 relating to the Congress of Local and Regional Authorities of Europe.* 15 March 2000. Available at: https://rm.coe.int/09000016804fc2ca (Accessed: 29 November 2022)
- Council of Europe. The Congress of Local and Regional Authorities (2005). *20th Anniversary of the European Charter of Local Self-Government, Explanatory Memorandum.* CG (12) 6 Part II, 27 April 2005. Available at: https://rm.coe.int/20th-anniversary-of-the-european-charter-of-local-self-government/168071a502 (Accessed: 29 November 2022)
- Council of Europe. The Congress of Local and Regional Authorities (2020). *A contemporary commentary by the Congress on the explanatory report to the European Charter of Local Self-Government*. Report CG-FORUM(2020)02-05, 7 December 2020. Available at: https://rm.coe.int/a-contemporary-commentary-by-the-congress-on-the-explanatory-report-to/16809cbf8c (Accessed: 29 November 2022)
- Council of Europe. The Congress of Local and Regional Authorities. Chamber of Local Authorities (2014). *Adequate financial resources for local authorities.* CPL(27) FINAL, 16 October 2014. Available at: https://rm.coe.int/1680718ef4 (Accessed: 29 November 2022)
- Council of Europe. The Congress of Local and Regional Authorities (1999). *Recommendation 55 (1999) on the situation of local and regional democracy in the Netherlands*. 16 June 1999. Available at: https://search.coe.int/congress/Pages/result_details.aspx?ObjectId=0900001680719efa (Accessed: 29 November 2022)
- Council of Europe. The Congress of Local and Regional Authorities (2000). *Recommendation 79 (2000)1 on "The financial resources of local authorities in relation to their responsibilities: a litmus test for subsidiarity" based on the 4th general report on political monitoring of the implementation of the European Charter of Local Self-Government*. Available at: https://search.coe.int/congress/Pages/result_details.aspx?ObjectId=0900001680718b1f (Accessed: 29 November 2022)
- Council of Europe. Secretary General (2012). *Report by the Secretary General on the review of Council of Europe conventions*. SG/Inf(2012)12, 16 May 2012. Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805ca7b0 (Accessed: 29 November 2022)
- Council of Europe. Standing Conference of Local and Regional Authorities of Europe (1992). *Resolution no. 223 on the role of local and regional authorities in integration policy between Western and Eastern Europe.*

- Council of Europe. Standing Conference of Local and Regional Authorities of Europe (1992). *Resolution no. 233 on the implementation of the European Charter of Local Self-Government.*
- von Hagen, J. (2002) *Fiscal Federalism and Political Decision Structures.* Forum of Federations [Online]. Available at: http://www.forumfed.org/libdocs/IntConfFed02/StG-vonHagen.pdf (Accessed: 29 November 2022)
- Himsworth, C. M. G. (2015) *The European Charter of Local Self-Government. A Treaty for Local Democracy.* Edinburgh: Edinburgh University Press.
- Hintea, C. M., Moldovan, B. A., Țiclău, T. C. (2021) 'Local Self-Government in Romania' in Brezovnik, B., Hoffman, I., Kostrubiec, J. (eds.) *Local Self-Government in Europe*. Maribor: Institute for Local Self-Government Maribor, pp. 325-353.
- Hoffman, I. (2021) 'Local Self-Government in Hungary' in Brezovnik, B., Hoffman, I., Kostrubiec, J. (eds.) *Local Self-Government in Europe*. Maribor: Institute for Local Self-Government Maribor, pp. 207-243.
- Maier, O. (1989) 'Die Ergänzung der Europäischen Kommunalcharta durch eine 'Europäische Charta der kommunalen und regionalen Finanzen' in Knemeyer, F.L. (ed.) *Die Europäische Charta der kommunalen Selbstverwaltung. Entstehung und Bedeutung*. Baden-Baden: Länderberichte und Analysen.
- Olson Jr., M. (1969) 'The Principle of "Fiscal Equivalence": The Division of Responsibilities among Different Levels of Government', *The American Economic Review*, 59(2), pp. 479-487.
- Pál, Á., Radvan, M. (2022) 'Financial Autonomy of the Local Self-governments in the Countries of the Visegrad Group in the Context of the European Charter of Local Self-Government', *Lex Localis*, 20(4), pp. 1143-1169.
- Radvan, M., Mrkývka, P., Schweigl, J. (2018) 'Challenges of the Implementation of the European Charter of Local Self-Government in Czech Legislation', *Lex Localis*, 16(4), pp. 895-906.
- Schaffarzik, B. (2002) *Handbuch der Europäischen Charta der kommunalen Selbstverwaltung*. Stuttgart: Boorberg.
- Schneider, M.W. (2004) *Kommunaler Einfluss in Europa: die Einflussnahme der Kommunen beim Europarat als Modell für die Europäische Union; KGRE, AdR und EKC als Säulen eines europäischen Kommunalschutzes*. Frankfurt am Main: Peter Lang GmbH, Internationaler Verlag der Wissenschaften.
- Steering Committee on Local and Regional Democracy (1999). *Limitations of local taxation, financial equalisation and methods for calculating general grants*. Strasbourg: Council of Europe Publishing. Available at: https://rm.coe.int/1680748092 (Accessed: 29 November 2022)
- Trybunał Konstytucyjny. *Case no. K 24/02* from 18 February 2003. Available at: https://ipo.trybunal.gov.pl/ipo/Sprawa?&pokaz=dokumenty&sygnatura=K%2024/02 (Accessed: 29 November 2022)

- Verfassungsgerichtshof (VfGH). *Case no. B1407/91* from 16 October 1992. Available at: https://www.ris.bka.gv.at/VfghEntscheidung.wxe?Abfrage=Vfgh&Dokumentnummer=JFT_10078984_91B01407_00&IncludeSelf=True (Accessed: 29 November 2022)
- Weiss, B. (1996) *Einführung und Umsetzung der Europäischen Charta der kommunalen Selbstverwaltung in Deutschland: insbesondere in Bayern und Nordrhein-Westfalen*. Frankfurt am Main: Peter Lang GmbH, Internationaler Verlag der Wissenschaften.
- The World Bank. *Fiscal Decentralization* [Online]. Available at: http://web.worldbank.org/archive/website01061/WEB/0__CO-11.HTM (Accessed: 29 November 2022)

Manja SKOČIR*

Legislative Framework of the Crime of Torture in the Regulation and Jurisdiction of Slovenia

ABSTRACT: *The article aims to explore the Slovenian regime on the crime of torture by presenting the genesis of the Slovenian incrimination of torture and its adequacy in the light of international law. The overview of the Slovenian legislative framework and case law involving the crime of torture begins with a presentation of the relevant international and national legal acts. This is followed by an analysis of the content of the relevant provisions in the Slovenian Constitution and in the Criminal Code, which is examined considering the international legal sources that bind Slovenia. By closely examining the genesis and the content of incrimination of torture, as it is known in the Slovenian Criminal Code, the article presents to foreign readers and the international professional audience the specific features of Slovenian incrimination of torture and its deviations from the international legal framework. In the following, the sanction system and the actors in the process of enforcement of particular norms aiming at the crime of torture are presented. The article concludes with an analysis of the case law on torture. Slovenian courts have not yet encountered the crime of torture. Therefore, the focus is on Slovenia's convictions before the European Court of Human Rights for violation of Art. 3 of the Convention on Human Rights.*
KEYWORDS: *torture, crime of torture, incrimination of torture, Slovenian criminal legislation, Convention against Torture*

1. Introduction

The first part of the article is devoted to a brief introduction of the concept of torture and the history of its regulation at the international level. Since the 20th century, torture has been prohibited by all major international legal instruments but has not been eradicated.

* Master of Law, Research Assistant at the Institute of Criminology at the Faculty of Law, Ljubljana, and PhD candidate at the Faculty of Law, University of Ljubljana.

https://doi.org/10.62733/2023.1.221-238

1.1. Brief history of torture and its prohibition within the framework of international human rights law

Tortures have been widely practiced throughout human history and have been legally and morally acceptable for a long period. It was particularly used as a form of punishment following victory in the war and as an interrogation tool, especially with respect to accusations of state crimes, sexual offences, heresy, and witchcraft.[1] European governments (e.g. Sweden, Germany, Scotland, and France) formally abolished torture in the eighteenth and nineteenth centuries;[2] in the twentieth century, the universal prohibition of torture began to be established and regulated, along with the development of human rights. However, some scholars oppose this type of torture[3]. One such scholar was Italian philosopher, criminologist, and jurist Cesare Beccaria. In his famous work *On Crimes and Punishments* (originally published in 1764), Beccaria notes that the torture of a criminal, which is 'cruelty accepted by most nations, whether to compel him to confess a crime, to exploit the contradictions he runs into, to uncover his accomplices [...] or to expose other crimes of which he is guilty but has not been charged',[4] is not a proper means for discovering the truth.

Although the 20th century saw the prohibition of torture becoming a universal human right protected by several international treaties, the same century saw a revival in the use of torture. Torture was first revived by totalitarian states, while some liberal democracies followed suit in the 21st century.[5] It can be argued that torture has never really disappeared, and many reliable reports have testified that it continues to be practiced worldwide.[6] The former United Nations Special Rapporteur on Torture has noted that 'torture is practiced in more than 90 percent of all countries and constitutes a widespread practice in more than 50 percent of all countries'.[7]

In the present century, the debate on the use of torture has been revived, especially within the framework of the post-9/11 attacks of the global war on terror.

1 Greer, 2015, p. 7.
2 Einolf, 2007, p. 101; Greer, 2015, p. 7.
3 Some authors claim that the merits of interrogational torture have been debated since antiquity. See, for example, Maio, 2001, p. 1609.
4 Beccaria, 1995, p. 39.
5 Among them, the United States stands out in particular. In the article 'Liberal Democratic Torture', Lukes claims that although it is not publicly admitted, we know that since the attacks of 11 September 2001, officials of the United States at various locations worldwide, from Bagram in Afghanistan to Guantanamo in Cuba to Abu Ghraib in Iraq, have been torturing prisoners. For more, see: Lukes, 2006, pp. 1-2.
6 Einolf, 2007; Danner 2004.
7 Nowak, 2012, pp. 313-314.

In recent decades, we have begun to examine the concerns of theorists who have begun to question the absolute nature of the prohibition against torture. In moral philosophy and legal theory, the debate on whether it is possible to define exceptions in which torture would be justified or excusably intensified in the context of terrorist attacks has revived interest in possible moral and legal justifications for torture suspects in 'ticking bomb scenarios'. The other reason why the 'absoluteness' of the prohibition against torture has recently come under critical scrutiny was shattered by the case of *Gäfgen v Germany*,[8] judged by the European Court of Human Rights (later on as 'ECtHR'). Faced with an extremely morally difficult consideration, police officers can threaten to torture a suspect if they believe this may save the life of an innocent child. The ECtHR clearly indicates that they may not. However, many wonder whether the ECtHR, in deciding that the German court's decision on the admissibility of evidence obtained under the threat of torture was not contrary to the ECHR, has slightly softened the absolute nature of the prohibition against torture. In the article 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law', Greer observes that despite the massive amount of literature, which the Gäfgen case prompted, there is no consensus about legally and morally very pressing issue of whether torture is ever justified. In such cases, the purpose is to elicit information that can save innocent lives during terrorist attacks.

1.2. Torture as a legal phenomenon within the framework of international law

As a legal phenomenon, the prohibition of torture evolved from the common law prohibition of the inhuman treatment of prisoners of war as part of efforts to humanise war. Although the concept of torture does not appear in the Hague Conventions (1899-1907)[9], several provisions, in substance, require the humane treatment of persons in war. Theorists of international criminal law consider this a key historical antecedent of the modern conventional regulation of torture.[10] In 1948, the Universal Declaration of Human Rights declared the prohibition of torture a fundamental human right.[11] Thirty years later, the United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, adopted by the

8 Gäfgen v. Germany, 22978/05, 1 June 2010.
9 Hague Conventions of 1899 and 1907. Signed July 29, 1899 and October 18, 1907. Entered into force on various dates.
10 See, for example: Korošec, Filipčič and Zdolšek, 2018, pp. 616-617.
11 Universal Declaration of Human Rights, Art. 5.

General Assembly, came into effect.[12] Article 19 of the Convention established the Committee against Torture,[13] which monitors the implementation of the Convention by state parties.

Today, the prohibition of torture is a fundamental principle of customary international law and a prohibited practice under international treaties. It is one of the most complex concepts in international human rights law and constitutes one of the most serious human rights violations.

As is well known, human rights define the limits of a state's power over individuals. International law has two important features. First, human rights are accepted for the benefit of the people, not the states. This means that the human rights obligations states accept are not subject to reciprocity and, therefore, may not be restricted by one state even if the restriction has occurred in another. Second, human rights are expressions of human dignity that cannot simply be abolished by the state. While the State may derogate from some of them (e.g. freedom of movement, freedom of expression) in certain cases and under conditions provided in international treaties, it may not derogate from certain internationally protected rights, even in situations where the existence of the State is threatened.[14] Similar to the prohibition of slavery or genocide, the prohibition of torture is absolute—no exception can be accepted, defended, justified, or tolerated under any circumstance, including war or any other public emergency.[15] Nevertheless, as indicated above, some theorists have recently begun to argue that the absolute nature of the torture prohibition may be problematic.

As a concept of international human rights law, torture has become limited to acts for which it is possible to hold public officials responsible, either by committing to torture themselves or by participating in it actively (perpetration) or passively (omission). In international criminal law, it is now generally accepted that the relevant intent must be shown by a public official at the time the torture is committed.[16,] Below, the definitions of torture will be used as they are known in international legal sources to show how Slovenian law differs from international law in its understanding of torture.[17]

In addition to torture, the prohibition of certain practices related to torture, such as cruel treatment, inhuman treatment, degrading treatment, cruel punishment,

12 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).
13 *Ibid*
14 Türk, 2018, pp. 112-113.
15 APT and CEJIL, 2008, p. 2.
16 Korošec, Filipčič and Zdolšek, 2018, p. 617.
17 Author's note: A different understanding of torture can be found in the jurisprudence of the ECtHR, which I will draw attention to below.

inhuman punishment, and humiliating punishment, has appeared for a long period in codified international law and international legal theory in parallel with the prohibition of torture. Simplistically, these prohibitions refer to practices that differ from torture mainly because the degree of pain is lower.

2. Relevant legal acts dealing with the crime of torture in the Republic of Slovenia

First, the international legal sources Slovenia has ratified and is bound by are discussed, followed by the national legislative framework on the (crime of) torture. Particular attention has been paid to the definition of torture, especially in terms of who the perpetrator may be. It will be shown that Slovenian legislation differs slightly from international legislation in this respect.

2.1. International legal sources

As a member of the European Union and the United Nations, Slovenia is a party to all the most important international legal instruments prohibiting torture—the Universal Declaration of Human Rights, the Rome Statute of the International Criminal Court, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter, Convention against Torture), the European Convention on Human Rights (ECHR), and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

International legal sources hold a special position in the Slovenian legal order. In accordance with Article 8 of the Constitution of the Republic of Slovenia, statutes and executive regulations must comply with the generally accepted principles of international law and treaties binding on Slovenia. All ratified and published international treaties are applied directly—every person can base their claim on a right acknowledged in an international treaty, although such a right might not exist in the Slovenian legal order. If a statute does not conform to internationally accepted obligations, the Constitutional Court can reject the law. (Article 21: Constitutional Court Act).[18] Additionally, all individual legal acts of state bodies (local and public authorities), including criminal judgments, must comply with international treaties ratified by the National Assembly.[19]

18 Türk, 2018, p. 61; Grad, Kaučič and Zagorc (2018), p. 148.
19 Koročec, 2000, p. 770.

2.1.1. Convention against torture and other cruel, inhuman, or degrading treatment or punishment

In the academic literature, it is undisputed that the Convention against Torture is the central international legal instrument in the fight against torture and its related treatment.[20] Owing to this Convention, the prohibition of torture and related treatments has developed into one of the most widely recognised individual rights. Slovenia ratified the Convention against Tortures in 1993.[21] As Slovenia is a State governed by the rule of law under Article 2 of the Constitution and is bound by the norms mentioned in the previous paragraph, public authorities at all levels must endeavour to adopt acts and decisions in such a way that they conform to the provisions of the Convention against Torture.

The Convention against Torture defines torture under Article 1.[22] For the purpose of convention, torture is

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

The cited provision makes the motive of a person to inflict 'severe pain and suffering', which is essential for the definition of torture. This provision also explicitly states that a victim's suffering can be physical or mental. Moreover, it makes it indisputably clear that only a public official or another person acting in their capacity can be a perpetrator of torture within the meaning of the convention.

The Convention does not define other forms of degrading treatment, which are mentioned in the title of the Convention ('other cruel, inhuman or degrading

20 Korošec, Filipčič and Zdolšek, 2018, p. 617.

21 Act Ratifying the Convention against Torture and Other Cruel, Unhuman or Degrading Treatment or Punishment [Zakon o ratifikaciji konvencije proti mučenju in drugim krutim, nečloveškim ali poniževalnim kaznim ali ravnanju, MKPM], Official Gazette of the Republic of Slovenia, no. 7/93.

22 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

treatment or punishment'), although it prohibits them. Article 16 of the Convention provides for the following:

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

2.1.2. Rome Statute of the International Criminal Court

The Rome Statute of the International Criminal Court,[23] which established the International Criminal Court (ICC), is the central source of international criminal law. It contains a comprehensive general section and a catalogue of criminal incriminations under international criminal law.

The Slovenian National Assembly ratified the Rome Statute of the International Criminal Court[24] in 2001, which has been in force in Slovenia since 1 July 2002. The Rome Statute classifies torture as a crime against humanity, a war crime, or serious violation of the Geneva Conventions. The definition of torture in Article 7.1(f) differs slightly from that in the Convention. The Roman Statute defines torture as

> *Intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.*

The definition of torture in the Rome Statute is much more streamlined than that in the Convention. Strikingly, the definition does not explicitly require the offender to be an official or someone acting in an official capacity. As already indicated, there is no doubt in theory that torture, at a conceptual level, originated as an act of public authorities, regardless of whether they conducted the torture or actively or passively participated in it. As noted above, the Convention against Torture builds the concept

23 The Rome Statute was adopted at a diplomatic conference in Rome, Italy on 17 July 1998 and entered into force four years later.

24 Rome Statute of the International Criminal Court, 17 July 19998, 2187 UNTS 38544 (entered into force on 1 July 2002).

of torture on the discriminatory intent of public officials and envisages public officials as the only possible perpetrator of torture. This element of torture fades from the Rome Statute's definition of a criminal offence. However, the logic of human rights violations has not entirely disappeared there due to the contextual circumstances required for criminality.[25]

2.1.3. European Convention of Human Rights

The third major international legal instrument prohibiting torture is the European Convention on Human Rights ratified by Slovenia in 1994.[26] As is well known, the ECtHR has jurisdiction to rule on individual or state applications alleging violations of the rights set out in the ECHR by states that have ratified the Convention, where the applications concern matters that fall within the competence of state authorities. In this sense, the ECHR builds the concept of torture on the act of state authority and envisages public officials as the only possible perpetrators of torture. The manner in which the human rights enshrined in the ECHR are enforced and possibly violated relies on the state's functioning.[27]

The prohibition of torture and other forms of ill treatment is enshrined in Article 3 of the ECHR, one of the shortest provisions of the Convention, which simply states the following:

> *No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*

This provision must be read together with Article 15 of the ECHR, which, by stating that no derogation from the provision of Article 3 can be made, imposes an absolute prohibition of torture and inhuman and degrading treatment or punishment. As Article 3 does not define torture or other forms of ill treatment, a complex and extensive body of case law has emerged from the European Court of Human Rights (and other European Human Rights judicial bodies) that sets out the definitional aspects of torture and other forms of abuse.[28] The ECtHR has developed different definitions of the forms of ill treatment in two seminal cases: the Greek case[29] and Ireland vs. the

25 Korošec, Filipčič and Zdolšek, 2018, p. 620.
26 Act ratifying the Convention on Human Rights and Fundamental Freedoms [Zakon o ratifikaciji Konvencije o varstvu človekovih pravic in temeljnih svoboščin], Official Gazette of the Republic of Slovenia, no. 7/94.
27 Hassanová, 2023, p. 59.
28 Long, 2002, p. 3.
29 Greek Case, 3321/67, 3322/67, 3323/67, 3344/67, 5 November 1969.

United Kingdom[30]. Within its jurisprudence, the Court has clarified that ill treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 and that it has to be a deliberate form of abuse by agents of the state in the performance of their duties.[3132]

2.2. National legal sources

2.2.1. Constitution of the Republic of Slovenia

In the Slovenian legal system, torture is prohibited at the constitutional level. Article 18 of the Constitution of the Republic of Slovenia prohibits torture, inhumanity, and degradation of punishment or treatment.[33] It provides as follows:

> *No one may be subjected to torture or to inhuman or degrading punishment or treatment. The conducting of medical or other scientific experiments on any person without his free consent is prohibited.*

Article 21 of the Constitution prohibits the use of violence by state authorities against people whose liberties are restricted, including during the execution of criminal sanctions. The Article also prohibited the extortion of confessions and statements. Notably, the Slovenian Constitution does not contain a definition of torture or other forms of ill treatment, whereas the absolute nature of the prohibition of torture is established at the constitutional level.[34]

The prohibition of torture also includes positive obligations for the state. The State must ensure an effective and impartial investigation and prosecution of persons who have interfered with the prohibition of torture and must not rely on evidence obtained through torture. Furthermore, the State may not extradite an individual to another state if they are subjected to torture or prosecuted based on evidence obtained by torture against them or against third parties.[35] According to the Constitution, the prohibition of torture is an absolute individual right that is directly enforceable, does

30 Ireland v. United Kingdom, 5310/71, 18 January 1978.
31 For more on the implementation of Art. 3 of the European Convention on Human Rights, see Reidy, 2002.
32 It will be pointed out below that the ECtHR also recognises a violation of the Art. 3 of the Convention in some cases where there is no intention to torture.
33 The Constitution of the Republic of Slovenia, Official Gazette of the Republic of Slovenia, no. 33/91-I.
34 This follows from Article 16(2) of the Constitution, which specifies which rights cannot be suspended or restricted.
35 Grad, Kaučič and Zagorc, 2018, p. 780-781.

not need to be further defined by law, knows no exception, and must not be subject to a balance of values.

At the legislative level**,** the Slovenian legal order does not have a specific legal act dealing with torture. Nevertheless, the present Criminal Code of the Republic of Slovenia,[36] adopted in 2008 (hereinafter referred to as the 'CC-1'), criminalises torture as a separate incrimination and as a method of enforcement of two other incriminations—the crimes against humanity (Art. 101) and war crimes (Art. 102).

2.2.2. Criminal code

As torture is one of the most recent incriminations in the Slovenian Criminal Code, this section briefly presents its history.

Slovenia became independent in 1991. The National Assembly adopted the Criminal Code and Criminal Procedure Act in September 1994, which entered into force in January 1995. The Slovenian Criminal Code in force between 1995 and 2008[37] did not include torture incrimination. Torture was only incriminated as a method of enforcing crimes against humanity and war crimes. Despite this deficiency, it was possible to cover all the cases under the Convention against Torture with the use of '*combination of offences*' (e. g. the incrimination of aggravated and grievous bodily harm) and the broad definition of a public official.

The Committee against Torture (CaT) first considered the situation in Slovenia in light of the Convention against Torture at its session in May 2000. In its public observations at the end of the session, the CAT expressed a positive opinion on the positive legal situation in Slovenia, as well as on Slovenia's implementation of the relevant provisions. However, the Committee expressed concern that Slovenian substantive criminal law does not provide for specific incrimination of the crime of torture[38, 39]

In 2008, Slovenia adopted a new CC-1. In addition to several other trends, the adoption of the new Criminal Code was motivated by a desire to align Slovenian legislation more closely with international instruments such as the Convention against Torture and the Rome Statute. The Slovenian legislature followed the aforementioned recommendation of the Committee against Torture and criminalised torture as a

36 Criminal Code, Official Gazette of the Republic of Slovenia, no. 95/04.

37 Criminal Code, Official Gazette of the Republic of Slovenia, no. 95/04.

38 Consideration of Reports Submitted by States Parties under Art. 19 od the Convention (CAT/C/CR/30/4)

39 Korošec points out that the same recommendation was made by the UN Committee against Torture to every country that did not have such a specific incrimination of torture. At that time, this was the vast majority of all countries, including most countries on the European continent. See: Korošec, 2000, p. 769.

specific form of incrimination in Article 265. The Slovenian legislature copied the definition of the Convention against Torture. The incrimination of torture was placed in the chapter entitled 'Offences against official duty and public authority'.

In 2012, the Slovenian legislature (in an amendment to CC-1B) moved the incrimination of torture to another chapter without changing the content of the incrimination. This is rare in Slovenian criminal law. The legislature deleted Article 265 and created Article 135a of CC-1. The incrimination of torture is now placed in the sixteenth chapter of CC-1, titled 'Crimes against human rights and freedoms'. Below is an English translation of the full incrimination of torture under current legislation.

Article 135.a (Torture)

> *(1) Whoever intentionally causes severe pain or suffering to another person, either physical or mental, in order to obtain information or a confession from him or a third person, punish him for an act committed by himself or a third person, or which is suspected as having been committed by him or a third person with a view of intimidating him or putting him under pressure, or to intimidate a third person or put such person under pressure or for whichever reason which is based on any form of violating equality, shall be sentenced to imprisonment for not less than one and not more than ten years.*
>
> *(2) If the pain and suffering referred to in the preceding paragraph is caused or committed by an official or any other person who possesses official status or on his initiative or upon his expressed consent or tacitly, he shall be sentenced to imprisonment for not less than three and not more than twelve years.*

The incrimination of torture, as is known in the current Slovenian legislation, is analysed below.

2.2.3. Criminal Procedure Act

Slovenian criminal procedure law, both at the constitutional and legislative levels, protects the accused against the extortion of confessions by state authorities within the framework of two legal principles: the right to silence and privilege against self-incrimination.[40] In Article 227/7 in conjunction with Article 266/3, the Slove-

40 See Šugman Stubbs and Gorkič, 2011, p. 248-251.

nian Criminal Procedure Act[41] prohibits the interrogation of an accused person by all means which may be used to influence their will. This study does not conduct a detailed analysis of the abovementioned procedural guarantees. Nevertheless, the prohibition of torture and degradation treatment is a threshold the state must never cross when obtaining evidence during the criminal procedure. Moreover, the prohibition of torture, inhuman, and degrading treatment cannot be waived, just as other procedural guarantees can, and the accused cannot consent to torture.

3. Analysis of the content of the incrimination of torture

As already indicated, torture originated as an act committed by the state or public officials, whether they conducted the torture themselves or actively or passively participated in it. It was shown above that the Convention against Torture builds the concept of torture on the discriminatory intent of public authorities. Although very faded, this conception of torture is also found in the Roman Statute and ECHR. Therefore, the offender of the crime of torture under the Convention, the Rome Statute, and the ECHR may only be a public official or someone acting in an official capacity, at the official person's initiative, or with the official person's consent.

The regime of the Slovenian Criminal Code is different. The incrimination in torture (as cited above) is divided into two paragraphs which determine the different penal frames based on different offenders. Paragraph 1 of Article 135 of the Slovenian Criminal Code a repeats the wording of what should be considered torture in the Convention against Torture. Thus, among other things, the Slovenian provision explicitly considers psychological torture as a form of torture. However, the Slovenian regime differs significantly from the international regime in at least one respect. The offender of the crime of torture under paragraph 1 can be anyone, not only a public official, as provided for in the Convention against Torture. Nevertheless, in the second paragraph, the Slovenian legislature provides an aggravated form of the crime of torture, for which a person who meets the criteria of a public official[42] is punished with a longer prison sentence than an offender who is not a public official.

In this sense, the Slovenian legislation goes beyond the Convention's definition of torture. This becomes even more complicated because the incrimination of torture is placed in a chapter that traditionally includes incriminations that can only be committed by public officials. Some scholars have expressed concerns regarding such definitions. Professor Korošec is particularly critical in this respect, pointing out that

41 Criminal Procedure Act, Official Gazette of the Republic of Slovenia, no. 176/21.

42 The Criminal Code defines an official in Article 99. From the comparative law perspective, the definition of an official is relatively broad.

the Slovenian legislature is changing the established concept of torture as it is known in international law.[43]

Korošec notes that from a comparative law perspective, it is surprising that the criminal offence of torture in Slovenian CC-1 is described in its general form as a general offence with regard to the possible offender (*delictum commune*). In Korošec's view, the incrimination of torture in its general form in CC-1 is redundant, as the substance of this provision is covered by a number of other offences in CC-1 (in particular, offences against life and the body, human rights and freedoms, and sexual integrity).[44]

Notably, torture is understood as an act of the state in the legal and sociological contexts. Chirstopher Einolf defines torture in terms of behaviour as an *act in which severe physical pain is intentionally inflicted on a person by a public official while that person is under the custody of control of that official, where there has not been, or has not yet been, a formal finding of guilt*.[45]

4. Sanction system and Actors in the Process of Enforcement

As indicated in the previous section, the punishment for torture depends on the offender. More severe punishment is imposed if the offender is a public official. Such an offender is sentenced to a minimum of 3 years and a maximum of 12 years of imprisonment. If the offender is not an official, they will be sentenced to a minimum of one and a maximum of ten years of imprisonment. In the Slovenian legal order, there are no specific legislative rules on the persecution for torture crimes. This offence is prosecuted ex officio, and like every other criminal offence, this one is being investigated by the police and the public prosecutor in pre-trial proceedings, while the judicial investigation is conducted by the investigating judge.

However, a special public body deals with preventive controls related to torture crimes. The Act of Ratification of the Optional Protocol to the Convention[46] against Torture designated the Ombudsmen of the Republic of Slovenia as a national preventive mechanism. The Ratification Act states that the powers and tasks of the state preventive mechanism under the Optional Protocol are to be exercised by the Ombudsman and, in agreement with the Ombudsman, by non-governmental

43 Korošec, Filipčič and Zdolšek, 2018, p. 615-620.
44 See Korošec, Filipčič and Zdolšek, 2018, p. 615-638.
45 Einolf, 2007, p. 103.
46 Act of Ratification of the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Official Gazette of the Republic of Slovenia, no. 114/2006; Art. 17, 18, 19, 20, 21, 22, 23.

organisations registered in Slovenia, and by organisations that have acquired the status of humanitarian organisations in Slovenia.

The Ombudsman of Slovenia publishes annual reports on the implementation of tasks and powers of the National Preventive Mechanism ('NPM'). The task of the NPM is, for example, to visit all locations in a country where people are deprived of their liberty and inspect how such persons are treated to strengthen their protection against torture and other cruel, inhuman, or humiliating treatments or punishments. While observing suitable legal norms, the NPM makes recommendations to the relevant authorities to improve the conditions and treatment of people, and prevent torture and other forms of cruel and inhuman treatment or punishment. In this regard, the NPM may also submit proposals and comments on applicable or drafted acts.

6. Case law and doctrine related to the issue

The Slovenian courts, including the Constitutional Court, have not yet dealt with the crime of torture under Article 135. a of the Slovenian Criminal Code.

However, Slovenia was convicted several times before the ECtHR violated Article 3 of the Convention. Therefore, this section presents some of the most important and earliest convictions of Slovenia before the ECtHR for violating Article 3 of the Convention.

Within the case law of the ECtHR, the prohibition of torture in Article 3 is not limited to torture in the narrow sense but has gradually become, *inter alia,* a central instrument for assessing the adequacy of living conditions in prison.[47] Statistically, this provision is the basis for the majority of prisoner complaints.[48] Therefore, it is not surprising that in almost all cases of violation of Article 3 of the Convention, Slovenia was convicted of inadequate living conditions in prisons.

Under Article 3 of the Convention, States must ensure that a person deprived of liberty is detained in conditions consistent with human dignity, that the manner in which the measure is conducted does not place them in such distress or hardship as to exceed the unavoidable level of suffering inherent in the deprivation of liberty and that their health and well-being are adequately protected. As Ambrož and others point out, the ECtHR does not define the meaning of 'human dignity', nor does it define the 'unavoidable level of suffering'.[49]

47 In addition to Art. 3, Art. 8 (Right to respect for private and family life) and Art. 13 (Right to an effective remedy) are relevant to the situation of persons in prison.
48 Ambrož, Cvikl and Oštir, 2013, p. 346.
49 Ibid.

The substance of these concepts must be recognised in the jurisprudence of the ECtHR, and the Convention must be understood as a dynamic instrument whose interpretation evolves and changes with the evolution of society. Thus, in the course of this century, the Court began to recognise unacceptable violations of human dignity, even where suffering was not intentionally inflicted but was the result of poor material conditions and inadequate organisation.

6.1. Rehbock v. Slovenia

The first Slovenian conviction for the violation of Article 3 does not concern living conditions in prisons but police brutality. German national Ernst Rehbock was arrested by the Slovenian police. The circumstances of the arrest, during which he suffered injuries, were disputed between parties. However, the court concluded that the force used by policemen during Mr. Rehbock's arrest was excessive and unjustified. Such use of force caused injuries, which, in turn, caused serious suffering to the applicant of nature, amounting to inhuman treatment. The Court ruled that Article 3 of the Convention was violated.[50]

In subsequent years, Slovenia was convicted of police brutality several more times; see, for example, *Matko v. Slovenia*.[51]

6.2. Mandić and Jović v. Slovenia, Štrucl and others v. Slovenia

In the cases of *Mandić and Jović v. Slovenia*[52] and *Štrucl and others v. Slovenia*[53], the Court examined the conditions of detention and imprisonment at the Ljubljana Prison. The applicants alleged a violation of the prohibition of torture, degradation, and inhuman treatment under Article 3, a violation of the right to private and family life under Article 8, and the right to an effective remedy under Article 13 of the Convention. In 2011, the chamber found that all complainants had suffered violations of their rights under Articles 3 and 13 of the Convention. In particular, they complained of severe overcrowding, which led to a lack of personal space, poor sanitary conditions, and inadequate ventilation. They also complained of excessive restrictions on out-cell time, high cell temperatures, inadequate healthcare and psychological assistance, and exposure to violence from other inmates due to insufficient security. The applicants complained that the conditions of their detention in Ljubljana Prison

50 Rehbock v. Slovenia, 29462/95, 28 November 2000.
51 Matko v. Slovenia, 43393/98, 2 November 2006.
52 Mandić and Jović v. Slovenia, 5774/10, 5985/10, 20 October 2011.
53 Štrucl and others v. Slovenia, 5903/10, 6003/10, 6544/10, 20 October 2011.

amounted to a violation of Article 3 of the Convention. Particularly, they complained of severe overcrowding, which led to a lack of personal space, poor sanitary conditions, and inadequate ventilation. They also complained of excessive restrictions on out-cell time, high cell temperatures, inadequate healthcare and psychological assistance, and exposure to violence from other inmates due to insufficient security.

The Court accepted that there was no indication of a positive intention to humiliate the applicants. Nonetheless, the court considered that the distress and hardship endured by the applicants exceeded the unavoidable level of suffering inherent in detention, exceeded the threshold of the severity of Article 3, and amounted to degrading treatment.

7. Conclusions

Tortures have been widely used throughout human history as a form of punishment after winning a war and as a tool for interrogation. European governments abolished torture at the legislative level in the eighteenth and nineteenth centuries, and in the twentieth century, the prohibition of torture became a universal human right. However, in the last century, torture has been resumed by some totalitarian regimes and revived by some liberal democracies (especially within the framework of the post-9/11 debate) as well.

By presenting an international legal framework for torture, this article shows that the Republic of Slovenia has established an appropriate legislative framework for the crime of torture. Current Slovenian legislation provides for the crime of torture, which is essentially regulated in the same way as at the international level. It deviates from the international framework only in the sense that it envisages any individual as a possible perpetrator of the offence of torture and not only officials, as provided for by international sources.

A survey of the jurisprudence of the European Court of Human Rights—several cases in which Slovenia has been convicted of violating Article 3 of the Convention—revealed that Slovenia, whose courts have not yet encountered the crime of torture in the sense of the Criminal Code, has difficulty ensuring adequate conditions in prisons.

Bibliography

- Ambrož, M., Cvikl, L., Oštir, A. (2013) 'Problemi slovenskega zaporskega Sistema v luči judikature Evropskega sodišča za človekove pravice', *Revija za kriminalistiko in kriminologijo* 64(4), pp. 345-357.
- Association for the Prevention of Torture (APT) and The Center for Justice and International Law (CEJIL) (2008) *Torture in International law – A Guide to Jurisprudence.* Geneva and Washigton D. C., APT and CEJIL.
- Beccaria, C. (1995) *On Crimes and Punishments and Other Writings.* Cambridge, Cambridge University Press.
- Bhat, M. Y. (2006) 'Menace of Torture', *The Indian Journal of Political Science* 67(3), pp. 553-572.
- Elinolf, C. J. (2007) 'The Fall and Rise of Torture: A Comparative and Historical Analysis', Sociological Theory 25(2), pp. 101-121.
- Grad, F., Kaučič, I., Zagorc, S. (2018) *Ustavno pravo, 2., spremenjena in dopolnjena izdaja*. Ljubljana: Pravna fakulteta, Univerza v Ljubljani.
- Greer, S. (2015) 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really "Absolute" in International Human Rights Law?', *Human Rights Law Review*, pp. 1-37. doi: 10.1093/hrlr/ngu035
- Hassanová, R.L. (2023) 'The Prohibition of Torture and its Implications in the European Legal Sphere', *Central European Journal of Comparative* Law.pp-51-71. doi.org/10.47078/2023.1.51-71.
- Korošec, D. (2000) 'Slovensko materialno kazensko parvo v luči konvencije proti mučenju', *Pravnik, Revija za pravno teorijo in prakso* 55(11-12), pp. 769-791.
- Korošec, D., Filipčič, K., Zdolšek, S. (2018) *Veliki znanstveni komentar posebnega dela Kazenskega zakonika (KZ-1), 1. knjiga*. Ljubljana, Uradni list Republike Slovenije, Pravna fakulteta Univerze v Ljubljani.
- Long, D. (2002) *Guide to Jurisprudence on Torture and Ill-Treatment*. Geneva: Association for the Prevention of Torture.
- Lukes, S. (2006) 'Liberal Democratic Torture,' *British Journal of Political Science* 36(1), pp. 1-16.
- Maio, G. (2001) 'History of Medical Involvement in Torture – Then and Now,' *Lancet* 357, pp. 1609-1611.
- Nowak, (2012) 'What's in a name? The prohibitions on torture and ill treatment today', *The Cambridge Companion to Human Rights Law* 307, pp. 307-328.
- Reidy, A. (2002) *The Prohibition of Torture – A Guide to the Implementation of Article 3 of the European Convention on Human Rights.* Strasbourg, Council of Europe Publishing.

- Šugman Stubbs, K., Gorkič, P. (2011) *Dokaznovanje v kazenskem postopku*. Ljubljana, GV Založba.
- Türk, D. (2018) *Temelji mednarodnega prava, 2., pregledana in dopolnjena izdaja*. Ljubljana, GV Založba.

Maria SKWARCAN*

Protection of the Environment in Polish Constitutional Law in the light of the Jurisdiction of the ECHR

ABSTRACT: *Over the past decades, a global trend of constitutionalising environmental protection has been observed in connection with the attribution to this issue of key importance and value deserving special legal status. This practice has not bypassed the Republic of Poland; the current constitution provides an extensive range of environmental provisions. The aim of the paper is to review the Polish constitutional law in terms of provisions guaranteeing environmental protection. The article presents the specific legal framework and analyses the role of the Polish Constitutional Court in interpreting constitutional provisions. Based on the legal analysis, the author aims to identify best practices and solutions included in the Polish Constitution, as well as to indicate existing shortcomings of environmental regulation with some remarks de lege ferenda. An important part of the paper provides an assessment of the impact of the ECtHR's case law on the practice and jurisprudence of Polish courts dealing with violations of the right to the environment. In this regard, attention is given to civil cases involving violations of personal rights in the form of health, privacy, and the ability to enjoy life in an uncontaminated environment. The outcome is a consideration of the connections between the construction of the right to the environment and the subjective rights guaranteed by the Polish Constitution.*

KEYWORDS: *right to the environment, constitutional law, Poland, ECHR, environmental protection, human rights*

* Maria Skwarcan, Ph.D. Candidate at Cardinal Stefan Wyszynski University in Warsaw, Poland, Institute of International Law, European Union and International Relations, Department of Human Rights Protection and International Humanitarian Law. https://orcid.org/0000-0003-1924-0402.

https://doi.org/10.62733/2023.1.239-255

1. Introduction

Faced with the problem of the contemporary, extremely exploitative market economy, which does not provide for an internal mechanism to control the negative impact of human activity on the environment, state law turns out to be one of the few effective 'brakes', instruments for restoring the balance between the need for economic development and the very protection of the environment (Nowakowski, 2007, p. 42). The function of the law is to enforce, on the one hand, human behaviour aimed at preserving or restoring environmental equilibrium, and on the other hand, to impose specific obligations on states, the performance of which serves to achieve this goal.

In this context, the increasingly important role of legal regulations in environmental protection must be noted. A special role in establishing the importance of such regulations is the constitutionalisation of environmental protection, which involves assigning this issue a constitutional rank and giving rise to specific legal consequences[1]. The primary implication of its constitutionalisation is that environmental protection has become an important element of state lawmakers' axiology, emphasising the weight and significance of the values associated with this matter[2]. Despite the significant anchoring of environmental protection to human rights in recent decades through the recognition and guarantee of the right to the environment in numerous instruments of international law and the domestic laws of many states, the sources, scope, and existence of the right are still disputed in the literature[3]. There was no consensus on the scope of such rights, which involved the adoption of different adjectives to define the type of environment at stake[4]. These factors certainly had an impact on the restraint in recognising the subjective right to a healthy environment in the Polish legal order. Nevertheless, the example of the Republic of Poland represents an interesting case of the broader constitutionalisation process of environmental protection.

When analysing the constitutionalisation of environmental protection in Polish law, attention should be paid to its origins in the era of the People's Republic of Poland. In the first half of the 1970s, the People's Republic of Poland developed a comprehensive environmental protection program that also assumed the development of a draft

1 The right to environment has been recognised in 110 States according to a 2019 report by the UN Special Rapporteur on Human Rights and the Environment: 'There are 110 States where this right enjoys constitutional protection[...] 101 States where this right has been incorporated into national legislation[...]In total, more than 80 percent of States Members of the United Nations (156 out of 193) legally recognize the right to a safe, clean, healthy and sustainable environment'. See Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/43/53 , p. 3.
2 Rakoczy, 2021, p. 122.
3 Stoczkiewicz, 2021, p. 309; Cf. Hannum, 2019, p. 56; Cf. Knox, 2020, p. 85.
4 Tang and Spijkers, 2022, p. 102.

law on the protection and shaping of the environment[5]. In accordance with the political will at the time to give fundamental legal status to the regulation of environmental protection, the Constitution of the People's Republic of Poland was finally amended in 1976 to introduce the issue of environmental protection. Two editorials were added to the revised manuscript. Article 12 declares that the Polish People's Republic provides protection and rational development of the natural environment, and Article 71 creates a specific subjective right for citizens, stating that citizens of the People's Republic of Poland have the right to use the value of the environment and protect it. In particular, the content of Article 71 may come as a surprise, even more so from the perspective of a comparative view with the current Polish Constitution[6], which does not provide such guarantees for individuals; that is, it does not guarantee the general right of the individual to live in a healthy environment. However, one should bear in mind the questionable exercise of rights and freedom in practice under communist regimes. Taking this fact into account and analysing the scope of the regulation, it should be assessed that the current Basic Law of 2 April 1997 contains a much broader and more consistent regulation of environmental issues. Current constitutional regulations consist of five provisions in Articles 5, 31(3), 68(4), 74, and 86. This will be discussed in detail in the following section. The following section focuses on the role of the Polish Constitutional Court in interpreting the constitutional regulations of environmental protection. Therefore, the object of the analysis is the relationship between Polish constitutional regulations and the ECHR, with particular emphasis on the impact of the ECtHR's jurisprudence on the application of the law in the national order.

2. Provisions of the Constitution of the Republic of Poland on environmental matters

Simultaneously, the fundamental provision of the Polish Basic Law, which demonstrates the approach of the Polish legislature to environmental protection, is Article 5 of the Polish Constitution, which states that the Republic of Poland shall ensure (among others) the protection of the natural environment pursuant to the principles of sustainable development**.** This fundamental task of the state is listed alongside the duty to safeguard the independence and integrity of its territory and guarantee the freedoms and rights of persons and citizens, as well as the security of citizens. The inclusion of environmental protection among the core values of preserving each state

5 The need to adopt regulations in this regard was noted at the Seventh Congress of the Polish United Workers' Party in 1975.

6 Constitution of the Republic of Poland of April 2, 1997 (Journal of Laws No. 78, item 483, as amended).

clearly demonstrates Polish lawmakers' exceptionally far-reaching recognition of the need to respect the environment.

All tasks enumerated in Article 5 are formulated in the form of programmatic principles, which means that they set the directions of the state's activity; however, they do not specify the means and ways of their implementation[7]. Their importance is further evidenced by the systematics of the Constitution[8]. Article 5 is placed after the provision expressing the principle of the nation's supremacy and the determination of the means of exercising supreme authority, thus designating the most important objectives of the state as indicated by the sovereign. This implies that ensuring environmental protection is among the Republic of Poland's most basic and highest priority objectives.

Article 5 explicitly links environmental protection with the principles of sustainable development. Although this is a basic constitutional principle, it has no legal definition in Polish state law. The Constitutional Court played a key role in indicating the appropriate understanding of the concept of 'sustainable development', which has addressed the content of this principle several times in its jurisprudence[9]. In its judgment on 6 June 2006 the Court stated that public authorities should take action to improve the current state of the environment and program further development, which is precisely what sustainable development entails. According to the Constitutional Court, this principle means not only the protection of nature or the shaping of spatial order but also due care for social and civilizational development associated with the need to build appropriate infrastructure. As the Constitutional Court notes, the idea of sustainable development includes the need to consider various constitutional values and balance them appropriately.

Another important constitutional provision that, like Article 5 discussed above, emphasises the importance of environmental protection as a constitutional value is paragraph 3 of Article 31, which states that any limitations on the exercise of constitutional freedoms and rights may be imposed only by statute and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health, or public morals, or the freedoms and rights of other persons. However, these limitations do not violate the essence of the free domain and rights. Interestingly, the Polish Constitutional Court not only confirmed the admissibility of the limitations on the exercise of constitutional rights and freedom for the sake of environmental protection but also the need to establish such limitations in certain circumstances. Stating so, the court emphasised that the

7 Tuleja, 2021, p. 40.

8 Sarnecki, 2016.

9 See Judgment of Constitutional Court of 13 May 2009, Ref. No. Kp 2/09, M. P. of 2009, No. 32, position 477; Judgment of Constitutional Court of 6 June 2006, Ref. No. K 23/05, OTK-A 2006, no. 6, position 62.

environment constitutes a constitutional value of particular importance and indicated the spheres in which such limitations could be introduced, that is, freedom of economic activity and property rights[10].

The next two provisions of the Constitution which address the problem of environmental protection, focus on the state's duties related to the environment. Article 68 (4) states that public authorities must combat epidemic illnesses and prevent negative effects of environmental degradation on health. This is one element of the construction of the right to health guaranteed by Article 68. This provides evidence of a clearly discernible relationship between human health and the state of the environment. Thus, the legislature gives expression to a hierarchy of values, placing environmental protection in a secondary position to the essential good of human life and health. However, it indicates that human health cannot be effectively protected without caring for the environment. The Constitutional Court also highlighted the relationship between health and the environment. In its view, the compilation of the content of Articles 68(4), 74 and 86 'makes it possible to recognise that a 'healthy' environment is a constitutional value, the realisation of which should be subordinated to the process of interpreting the Constitution'. Nevertheless, simultaneously, the Polish Constitution 'does not guarantee the subjective right to "live in a healthy environment"'[11]. Scholars mostly share the firm stance of the Constitutional Court[12]. As Professor Lech Garlicki notes, the Polish Constitution does not grant persons under the jurisdiction of the Republic the right to live in a healthy environment because of the legislature's desire to avoid the introduction of a clause of an unrealistic nature and because it is difficult to define legal consequences[13].

Article 74 is devoted entirely to the State's tasks related to the environment. First, public authorities are charged with 'pursuing policies that ensure environmental security for present and future generations' (paragraph 1) and 'supporting the activities of citizens to protect and improve the quality of the environment' (paragraph 3). This formulation is typical in defining the principles of state policy but does not directly create any subjective rights on the part of the individual. The state's tasks are formulated quite vaguely and generally, all the more emphasised by the use of terms not defined in the Constitution, such as 'ecological security'. The Constitutional Court again proved helpful in interpreting this term. In its judgment dated 6 June 2006 Ref. no. K 23/05, the Court expressed the view that ecological security should be understood as a state of the environment in which an individual can not only stay safely but also use the resources of the environment in a manner that guarantees his development. Simultaneously, it was emphasised that the notion of environmental

10 Judgment of Constitutional Court of 15 May 2006, ref. No. P 32/05, OTK-A 2006, no. 5, position 56.
11 Judgment of the Constitutional Court of 13 May 2009, Kp 2/09, TK-A 2009, no. 5, position 66.
12 Banaszak, 2009, p. 438; Cf. Garlicki, 2003, p. 2; Cf. Surówka, 2012, p. 162
13 Garlicki and Derlatka, 2016.

protection falls within the scope of ecological security. The tasks of the authorities are extended in this case: first, to improve the current state of the environment; second, considering the benefits for future generations, they plan further development in accordance with the principle of sustainable development.

In another judgment referring to the content of Article 74, the Constitutional Court additionally noted that the duty of public authorities to protect the environment includes two elements: prevention and actions aimed at improving the current state with a view toward future generations[14].

Another category of constitutional provisions related to the environment guarantees individual rights. As already indicated, the Polish Constitution does not guarantee the right to live in a healthy environment. However, Article 74(3) grants and protects the right to information on the state and environment. Therefore, it is included in the form of a subjective right, giving rise to certain claims on the part of an individual and capable of constituting the basis of a plea in a constitutional complaint. The subject of the right to information is 'everyone', i.e. it applies to both citizens and foreigners, and there are no obstacles to considering that legal persons are also entitled to it, provided, of course, that environmental issues fall within their sphere of activity. However, there is no requirement that a person requesting information have a legal or factual interest in obtaining it. However, it should be noted that pursuant to Article 81, the scope of the assertion of this right is determined by statutes, primarily the Act of 3 October 2008 on Providing Information on the Environment and Environmental Protection, Public Participation in Environmental Protection, and Environmental Impact Assessment[15]. What is important is that Article 74(3) does not indicate the scope of information that must be made available; hence, especially against the background of Article 81, it can be assumed that the legislator is left with considerable regulatory freedom in this regard.

The question arises as to whether environmental protection can be linked to other subjective rights guaranteed by the constitution. Certainly, an apparent link appears to exist between the abovementioned rights to health[16]. In Article 68 (1), the Constitution states that everyone shall have the right to have their health protected, and further, in paragraph 3, that public authorities shall combat epidemic illnesses and prevent the negative health consequences of environmental degradation. These actions are directed towards the implementation of the duty to protect the environment and protect the constitutional value of the health of individuals.

In the case of other rights, the situation is no longer as obvious, as the Constitution and Constitutional Court are silent on other possible links with environmental

14 Judgment of Constitutional Court of 13 May 2009, Ref. No. Kp 2/09.
15 Journal of Laws no. 199, item 1227.
16 Majchrzak, 2022, pp. 263-264.

protection. However, there is a theory that, in the context of enjoying the protection created by other constitutional subjective rights, an individual can invoke the right to the environment, understood as a reflection of a subjective right[17]. There is a potential link with the legal protection of life (Article 38), freedom of movement, freedom to choose one's place of residence and domicile (Article 52(1), e.g. the right of access to the elements constituting the natural landscape of value), and following the ECtHR case law, the right to private life of individuals and the right to property (Articles 47 and 64).

The last category of provisions are those creating duties on the part of 'everyone'. According to Article 86, everyone should care about the quality of the environment and should be held responsible for causing its degradation. The addressees of this provision are both natural persons (citizens, foreigners, stateless persons) and legal persons, as well as organisational units without a legal personality, as long as these entities remain under the authority of the Republic of Poland.

3. Impact of ECtHR case law on further environmental protection in Poland

Although, as described in detail in the previous section, the Constitution of the Republic of Poland itself refers directly to the environment and its protection in 5 different provisions, there is no provision which would be the basis for claims arising from the individual's right to the environment (apart from the right to information). The need to single out such a subjective right has been a constant subject of doctrine discussion[18]. For example, according to Drzewicki, it could bring 'practical benefits to every citizen'[19]. In turn, A. Bodnar, the Polish Ombudsman from 2015 to 2021, notes that 'the individual right to live in a clean environment is of fundamental importance for the protection of human rights. This is because the recognition of this right as an individual right will allow for the effective protection of other fundamental rights of the individual, particularly the right to (protect) health'[20]. As D. Kuźniar rightly comments, guaranteeing the right to a healthy environment is not beyond the capabilities of the state, nor does such regulation lead to legal consequences that are difficult to determine[21], as best evidenced by the numerous national constitutions containing such guarantees.

17 Krzywoń, 2012, p. 16.
18 Majchrzak, 2022, p. 261.
19 Drzewicki, 1985, p. 54.
20 Bodnar, 2020.
21 Kuźniar, 2021, p. 208.

Without further in-depth analysis of academic discussions, it should be noted that, at the level of practice, there is a certain trend of more frequent references in Polish court proceedings to the case law of the Strasbourg Court in the field of violations of individual rights related to environmental pollution, in particular, the reference to the ECtHR's interpretation of Article 8 of the European Convention on Human Rights.

Apanasewicz v. Poland[22] was one of the key cases before the ECtHR in which the Court commented on the interrelationship between environmental protection and the right to private and family life. The Court reaffirmed its theses, *inter alia*, that the adverse effects of environmental pollution must reach a certain minimum level if they fall within the scope of Article 8. The assessment of this minimum is relative and depends on all circumstances of the case, such as the intensity and duration of the nuisance and its physical or mental effects.

In the following years, not only did the ECtHR decide on similar cases concerning the violation of the right to privacy of Polish citizens caused by environmental pollution[23], but a number of cases were also brought before Polish courts to compensate for violations of personal property (primarily health and privacy) in connection with environmental pollution and the failure of authorities to respond to it. Repeatedly, the outcomes of these cases and the justifications for the verdicts suggest a significant influence of ECtHR jurisprudence. For example, the District Court for Warsaw-Srodmiescie in Warsaw ruled in its judgment of 24.01.2019[24], that the plaintiff's personal interests had been violated as a result of air pollution and the state's liability in connection with this violation. The case was brought by a noted Polish actor against the State Treasury – Ministry of the Environment and the municipal government of Warsaw–for the ineffective and delayed fight against smog, leading to a persistently harmful state of air. The plaintiff pointed out that due to severe air pollution, she could not pursue her passions and interests (cycling and Nordic walking) and often experienced psychological and emotional discomfort. State and municipal inaction in combating smog has led to the infringement of her personal interests, such as the right to enjoy the values of an uncontaminated natural environment, the right to respect private life, and the place of residence. The defendant argued that in Polish law, there is no personal interest in the right to enjoy the qualities of an unpolluted natural environment. Ultimately, the Court agreed on the plaintiff's position. Moreover, the District Court linked the issue of personal interests set out in Article 23 of the Polish Civil Code with the right to respect the home and privacy guaranteed in Article 8 of the ECHR. Here, the court fully shares the case law of the European

22 Apanasewicz v. Poland, no. 6854/07 judgment of 3 May 2011.
23 See Kapa and Others v. Poland, no. 75031/13, judgment of 14 October 2021.
24 Judgment of the District Court for Warsaw-Śródmieście, 24 January 2019, case no. VI C 1043/18.

Court of Human Rights cited by the plaintiff, primarily concerning the violation of the Convention for the Protection of Human Rights and Fundamental Freedoms, from which it follows that severe environmental pollution constitutes a violation of the right to respect the home and the right to privacy in connection with the failure of public authorities to take preventive measures. In the Court's view, there is no doubt that the state of air pollution, which has persisted for years, has adversely affected the plaintiff's quality of life (...). Eventually, the court upheld the claim in its entirety, ordering the State Treasury to pay the sum of 5000 PLN for the social purposes indicated in the claim. The judgment of the court of first instance was appealed to by the State Treasury. On 10 September 2021 a final judgment was issued by the Regional Court in Warsaw, which dismissed the appeal, holding that the Polish State was liable for poor air quality by virtue of its legal obligations in this respect. According to the court, the State, by omission, violated the plaintiff's personal interests, including her right to privacy[25].

What should be noted in the context of the recent judgments mentioned above is that the courts found the plaintiffs' allegations to be well founded; in each case, the court confirmed the violation of the plaintiffs' privacy and home as a result of the state's inaction in maintaining/restoring clean air. Moreover, the judgments were issued after a long-awaited Polish Supreme Court resolution (Case No. III CZP 27/20),[26] in which the court ruled on the question of whether the value of the enjoyment of clean air may constitute a personal interest and thus may be protected by means of civil law measures[27].

The answer to the question was fundamental, since the recognition of such value as a personal interest would entail a significant change in the perception of environmental protection in Polish law as merely the subject of the regulation of programmatic norms and would finally link the positive obligations of the state in this field with a correlated subjective right of the individual.

Although the Supreme Court expressed a negative stance that the right to live in a clean environment uncontaminated by air pollution cannot constitute a personal interest, as it is a common good, the care of which is the duty of every member of

25 Similar rulings with analogous arguments have been made in other cases, including Judgment of the District Court for the capital city of Warsaw in Warsaw of 1 October 2019, case ref. no. II C 661/19 as well as the judgment of the Regional Court in Gliwice of 9 December 2021, Case ref. III Ca 1548/18.

26 The resolution of the Supreme Court of 28 May 2021, Case No. III CZP 27/20, LEX no. 3180102.

27 Radecka, 2022, p. 112. The precise wording of the legal question was as follows: 'Does the right to live in a clean environment enabling one to breathe in atmospheric air which meets the quality standards set out in generally binding legislation, in places where a person stays for a sustained period of time, in particular in his or her place of residence, constitute a personal interest subject to protection under Article 23 of the Civil Code, in conjunction with Articles 24 and 448 of the Civil Code?'

society, just as it is the duty of the state, as an organised community and its authorities, it did not close an indirect way of benefiting from legal protection in situations of violations or threats resulting from environmental pollution. Namely, the Supreme Court stated that 'subject to protection as a personal interest are health, freedom, and privacy, the infringement of (or threat to) which can lead to the violation of air-quality standards specified in the legal regulations'. Thus, it has adopted (in a certain simplification) a logic similar to that of the European Court of Human Rights, which has consistently taken the view that the Convention does not provide general protection of the environment as such[28] but contains provisions that allow for the constant development of case law in environmental matters on account of the fact that the exercise of certain rights may be violated because of environmental risks and environmental harm.

A similar approach has emerged in the recent case law of Polish courts. Indeed, civil action may still be available and effective as long as the plaintiffs prove the infringement of their personal interests, such as privacy or health, resulting from their inability to enjoy life in a clean environment. Such indirect linkage of personal interests with environmental values also seems to relate to the above-mentioned A. Krzywoń's concept of the right to the environment understood as a reflection of other subjective rights.

In the context of these considerations, it is also worth noting the ECtHR judgment of 14 October 2021 in the case of Kapa and Others v. Poland, which was issued a few months after the Supreme Court resolution. The application was submitted by residents of Smolice who were disturbed by years of heavy traffic owing to the motorway project. The applicants raised allegations of violation of Article 8 of the Convention. In the judgment itself the ECtHR stated that it 'notes the finding of the domestic courts that the applicants' right to health and the peaceful enjoyment of their home had been infringed because the noise in their places of residence caused by traffic had gone beyond the statutory norms'. This is evidence that Polish courts follow the ECtHR practices. A violation related to the environment, such as noise pollution, can be the basis for recognising the infringement of the right to peaceful enjoyment of one's home. However, in the case under review, the Polish regional court stated that the authorities 'could not be held liable for the infringement of the applicants' personal rights' due to taking effective noise mitigation measures. This again indicates a link between the category of personal rights under Polish civil law and the human right to a healthy environment, which becomes a gateway to the indirect recognition of such rights under Polish law.

As B. Majchrzak points out, the analysed ECtHR judgment is a key example of a case which may significantly influence the shape of the legal framework for

28 Kyrtatos v. Greece, no. 41666/98, judgment of 22 May 2003, § 52.

environmental protection in Poland, especially in light of doubts about the existence of an individual's right to the environment in the Polish normative system[29].

4. Role of the Constitutional Court in the interpretation of the constitutional provisions

As demonstrated above, the Constitutional Court has played an extremely important role in the provision of its interpretations because of the use of numerous undefined terms in the Constitution in the context of the environment. In this way, the Court indicated how even the basic concepts of 'environment' and 'environmental protection' are to be understood. Despite the general principle that constitutional concepts with their autonomous meanings should not be assessed solely through the prism of statutory terms, the court stated that a reference to them does not constitute an error in itself. Therefore, it may be assumed, following the Environmental Protection Law[30], that 'the environment' is the totality of natural elements, including those transformed as a result of human activity, in particular the earth surface, minerals, waters, air, landscape, climate and other elements of biodiversity, as well as interactions between these elements[31], and 'environmental protection' is the totality of activities (or omissions) enabling maintenance or restoration of natural balance, in particular those consisting in rational shaping of the environment and management of its resources in accordance with the principle of sustainable development[32].

The key principles for environmental protection developed by the Constitutional Court are ecological security and sustainable development. The Court commented on several occasions on how to understand these terms properly[33]. Complementing the comments in the section above, in one of its judgments[34], the Constitutional Court noted that the principle of sustainable development includes not only the protection of nature or the shaping of spatial order, but also due care for social and civilisational development, connected with the need to build an appropriate infrastructure necessary for human and individual community life, taking into account civilisational needs. Therefore, sustainable development requires considering various

29 Majchrzak, 2022, p. 253.
30 The Act of 27 April 2001, The Environmental Protection Law (i.e. Journal of Laws 2021, item 1973, as amended) hereafter referred to as 'Environmental Protection Law'.
31 Article 3 point 39 of the Environmental Protection Law .
32 Article 3 point 13 of the Environmental Protection Law.
33 Some elements of the interpretation of the terms can be found in the following: Judgment of the Constitutional Court of 6 June 2006, ref. No. K 23/05, Judgment of the Constitutional Court of 28 November 2013, ref. No. K 17/12, Judgment of the Constitutional Court of 10 July 2014, ref. No. P 19/13, Judgment of the Constitutional Court of 28 September 2015, ref. No. K 20/14
34 Judgment of the Constitutional Court of 6 June 2006, ref. No. K 23/05.

constitutional values and balancing them appropriately. The requirement to comply with the principle of 'sustainable development' means that wherever there would be interference with the 'environment', care should be taken not only to ensure that the interference is as small as possible (least harmful), but also that the social benefits achieved are at least proportionate, socially appropriate to the losses incurred.

Certainly, the Constitutional Court has had and continues to have a significant impact on the understanding of constitutional provisions related to environmental protection. Given the case law output and the clarification function associated with it, it can be noted that the interpretation used is consistent with the way these terms (such as sustainable development) are understood in international law.

5. Strengths and shortcomings of the Polish constitutional framework for environmental protection

The Polish Constitution contains several provisions that explicitly mention the environment, among which are the provisions mentioning the protection of the environment as a fundamental objective of the Republic of Poland, the provisions establishing the state's obligations in this respect, guaranteeing the subjective rights of individuals, and establishing a constitutional obligation for all to care for the environment. The solutions adopted in Polish Basic Law demonstrate that the problem of environmental protection is treated seriously, and its weight and significance are taken into account[35].From a historical perspective, it can be unequivocally assessed that the constitution in force represents the most far-reaching recognition of the need to protect the environment of all Polish constitutions to date[36]. The value of the natural environment was assigned a constitutional rank. The greatest proof of the value of environmental protection in the Polish legal order is provided by Article 5, in which environmental protection is enumerated as a crucial general objective and principle of the Republic of Poland, pursued in accordance with the principle of sustainable development.

Also noteworthy and to be appreciated is the fact that a number of obligations of the state related to environmental protection and ecological security have been included at the level of the Constitution. However, the provisions that create these obligations raise questions regarding their interpretation. According to some scholars, because there is an obligation to ensure ecological security, a correlation of this obligation is the right to environmental protection and indirectly to the right to the

35 Rakoczy, 2021, p. 129.
36 Leśniak, 2013, p. 282.

environment[37]. However, most academics reject this concept as being inconsistent with the literal wording of Article 74 (4) of the Constitution which implies a program norm addressed to public authorities[38].

Nevertheless, some doubts and questions are repeatedly raised by the fact that the constitutional provisions do not give rise to specific legal obligation, but rather to political ones, have no correlated rights of individuals, such as right to a healthy, clean, favourable environment, to ecological security or to assistance from public authorities in actions for the protection and improvement of the state of the environment. The fundamental difficulty, therefore, lies in determining the proper normative content of such provisions containing the state's duties and answering the question of whether they can be attributed and realised with the use of other constitutional rights of individuals.

As demonstrated in this study, both doctrine and jurisprudential practice show that such an indirect derivation of the right to the environment from the other rights of individuals is possible and has great potential. The analysis of the so far case law of Polish courts and the extent to which the courts deal with a certain inconsistency of the national lawmaker, who simultaneously established in the Constitution a value in the form of a of a 'healthy' and 'ecologically safe' environment, which is placed high in the hierarchy of all constitutional values[39], but did not supplement it with a subjective individual's right, leads to the conclusion that there is much room for improvement under domestic law.

The literature highlights several merits, including *expressis verbis* a subjective right to the environment in national constitutions. For instance, according to Boyd, the constitutionalisation of the right to a healthy environment has led to the enactment of strong environmental laws in all studied regions[40]. Moreover, this resulted in stronger enforcement[41] and public involvement in society[42]. Access to justice has also noticeably increased, particularly in Latin America[43]. In addition, the experiences of the culturally and geographically countries closest to Poland in Central Europe provide relevant examples of successful revisions of the constitution in this regard. Of particular note is the experience of Hungary, which not only ensures the right to a healthy environment in the Hungarian Fundamental Law at the level of the state declaration, but through the development of a rich case law of the Hungarian Constitutional Court based on the provisions of the Constitution, Hungarian environmental

37 Korzeniowski, 2012, pp. 381-382.
38 Majchrzak, 2022, pp. 266-267.
39 Majchrzak, 2022, p. 296.
40 Boyd, 2010, p. 233.
41 Ibid, p. 237.
42 Ibid, p. 239.
43 Ibid.

law has been developed in recent years, particularly by developing non-derogation and precautionary principles[44].

The above comments lead to the *de lege ferenda* conclusion that, at the level of Polish domestic law, the inclusion in the Basic Law of an individual right to healthy environment would be to the benefit of the Polish legal order and would constitute an expression of a strong state commitment both to protecting the interests of future generations and to protecting the environment., Such a solution certainly lies within the scope of social expectations and current trends in constitutional regulation around the world.

44 Szilágyi, 2022, pp. 497-499.

Bibliography

- Banaszak, B. (2012), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa: C.H. Beck;
- Bodnar, A. (2020), *Jakość powietrza a prawo do zdrowia* [Online]. Available at: https://bip.brpo.gov.pl/pl/content/prawo-do-ochrony-srodowiska-odetchnijmy-pelna-piersia (Accessed: 18 November 2022);
- Drzewicki, K. (1985), 'Koncepcja prawa do środowiska jako prawa człowieka', *Państwo i Prawo,* no. 10, pp. 52-62;
- Garlicki, L. (2003), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. 1, Warszawa: Wydawnicktwo Sejmowe;
- Garlicki, L., Derlatka M. (2016), 'Art. 74' in Zubik, M. (eds.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom II*, ed. II, Warszawa Wydawnictwo Sejmowe, [Online]. Available at: https://sip.lex.pl/#/commentary/587744284/541724/garlicki-leszek-red-zubik-marek-red-konstytucja-rzeczypospolitej-polskiej-komentarz-tom-ii-wyd-ii?cm=URELATIONS (Accessed: 18 November 2022);
- Hannum, H. (2019), *Rescuing Human Rights: A Radically Moderate Approach*. Cambridge: Cambridge University Press; https://doi.org/10.1017/9781108277730;
- Knox, J.H. (2020), 'Constructing the Human Right to a Healthy Environment', *Annual Review of Law and Social Science*, 2020/16; pp. 79-95; https://doi.org/10.1146/annurev-lawsocsci-031720-074856;
- Krzywoń, A. (2012), 'Konstytucja RP a środowisko', *Państwo i Prawo*, 2012/8, [Online]. Available at: https://sip.lex.pl/#/publication/151147922/krzywon-adam-konstytucja-rp-a-srodowisko?keyword=krzywo%C5%84%20%C5%9Brodowisko&cm=SFIRST (Accessed: 18 November 2022);
- Kuźniar, D. (2021), 'Prawo do zdrowego środowiska jako konstytucyjnie gwarantowane prawo podmiotowe', *Przegląd Prawa Konstytucyjnego*, 3(61), pp. 201-216; https://doi.org/10.15804/ppk.2021.03.13;
- Majchrzak, B. (2022), 'Poland: One of the Most Protected Values of the Constitution and its Limited Conceptualization in the Practice of the Constitutional Court.' in Szilágyi, J.E. (ed.) *Constitutional Protection of the Environment and Future Generations: Legislation and Practice in Certain Central European Countries*, Miskolc–Budapest: Central European Academic Publishing, pp. 249-308; https://doi.org/10.54237/profnet.2022.jeszcpefg
- Nowakowski, M. (2007), 'Rozwój zasad polskiego prawa ochrony środowiska – uwagi na tle porównawczym', *Państwo i Społeczeństwo*, VII(4), pp. 41-60;
- Radecka, E. (2022), 'Is the Right to Live in an Environment with Clean Air a Personal Interest? Selected Issues', *Acta Universitatis Carolinae. Iuridica*, 68(1), pp. 107-114; https://doi.org/10.14712/23366478.2022.7;

- Rakoczy, B. (2021), 'Constitutionalisation of Environmental Protection in Poland', *Journal of Agricultural and Environmental Law*, 2021/31, pp. 121-129; https://doi.org/10.21029/JAEL.2021.31.121;
- Sarnecki, P. (2016), 'Art. 5' in Garlicki, L., Zubik, M. (eds.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom I*, ed. II, Warszawa: Wydawnictwo Sejmowe, [Online]. Available at: https://sip.lex.pl/#/commentary/587734533/531973 (Accessed: 18 November 2022);
- Surówka, A. (2012), 'Bezpieczeństwo ekologiczne a gospodarowanie odpadami w świetle prawa konstytucyjnego', *Przegląd Prawa Konstytucyjnego,* 2012/4, pp. 151-167; https://doi.org/10.15804/ppk.2012.04.08;
- Szilágyi, J. E., ed. (2022) *Constitutional Protection of the Environment and Future Generations : Legislation and Practice in Certain Central European Countries*. Miskolc, Budapest: Central European Academic Publishing; https://doi.org/10.54237/profnet.2022.jeszcpefg;
- Tang, K., Spijkers, O. (2022), 'The Human Right to a Clean, Healthy and Sustainable Environment', *Chinese Journal of Environmental Law*, 6 (1), pp. 87-107; https://doi.org/10.1163/24686042-12340078;
- Tuleja, P. (2021), 'Art. 5 [Zasada niepodległości państwa, ochrony praw człowieka, strzeżenia dziedzictwa narodowego i zrównoważonego rozwoju]' in Czarny, P., Florczak-Wątor M., Naleziński, B., Radziewicz, P., Tuleja P. (eds.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz,* ed. II, LEX/el. 2021, [Online]. Available at: https://sip.lex.pl/komentarze-i-publikacje/komentarze/konstytucja-rzeczypospolitej-polskiej-komentarz-wyd-ii-587806595 (Accessed: 18 April 2023).

Case law

- Apanasewicz v. Poland, no. 6854/07 judgment of 3 May 2011;
- Judgment of the District Court for the capital city of Warsaw in Warsaw of 1 October 2019, case ref. no. II C 661/19;
- Judgment of Polish Constitutional Court of 15 May 2006, ref. No. P 32/05, OTK-A 2006, no. 5, position 56;
- Judgment of Polish Constitutional Court of 6 June 2006, Ref. No. K 23/05, OTK-A 2006, no. 6, position 62;
- Judgment of Polish Constitutional Court of 13 May 2009, Ref. No. Kp 2/09, M. P. of 2009, No. 32, position 477;
- Judgment of the Regional Court in Gliwice, 9 December 2021, case no. III Ca 1548/18;
- Judgment of the District Court for Warsaw-Śródmieście, 24 January 2019, case no. VI C 1043/18;
- Kapa and Others v. Poland, no. 75031/13 judgment of 14 October 2021;

- Kyrtatos v. Greece, no. 41666/98, judgment of 22 May 2003;
- Resolution of the Supreme Court of 28 May 2021, Case No. III CZP 27/20, LEX no. 3180102;

Acts of law

- Act of 27 April 2001, The Environmental Protection Law (Journal of Laws of 2021 item 1973 as amended);
- Act of 3 October 2008 on Providing Information on the Environment and Environmental Protection, Public Participation in Environmental Protection and on Environmental Impact Assessment, (Journal of Laws no. 199, item 1227);
- Constitution of the Republic of Poland of April 2, 1997 (Journal of Laws No. 78, item 483, as amended).