LAW, IDENTITY AND VALUES

LAW, IDENTITY AND VALUES

2 2025

BUDAPEST | MISKOLC | 2025

CEA PUBLISHING

PUBLISHED BY
CENTRAL EUROPEAN ACADEMIC PUBLISHING
1122 Budapest, Városmajor St. 12.
Tímea BARZÓ, Director-General

LAW, IDENTITY AND VALUES

HU ISSN 2786-2542 (print)
HU ISSN 2786-3840 (online)

The Journal was established in 2021 in cooperation with the Budapest-based Ferenc Mádl Institute of Comparative Law. Volume 1 and Issue 1 of Volume 2 were co-published by the Ferenc Mádl Institute of Comparative Law and the Central European Academic Publishing.

TABLE OF CONTENTS

ARTICLES

ARTICLES

REFORM IMPERATIVES IN GERMANY'S DEBATE ON EU ENLARGEMENT: AN OVERVIEW OF PROPOSED CHANGES

Marie Beyrich[1]

ABSTRACT

This paper engages with the current debate on EU enlargement and the institutional changes deemed necessary to safeguard the Union's capacity to act. With the prospect of the EU potentially expanding from 27 to 37 member states, questions arise about whether its institutional framework is adequately equipped to manage such growth. In this context, the paper gives particular attention to the 2023 Franco-German expert report 'Sailing on High Seas – Reforming and Enlarging the EU for the 21st Century,' commissioned by the German and French governments and presented to their European affairs ministers in September 2023. Composed of scholars and policy experts from both countries, the group formulated reform proposals intended to make the EU enlargement-ready, including short- and long-term measures to improve institutional efficiency, strengthen democratic legitimacy, and uphold the rule of law. Their point of departure is the conviction that enlargement and reform must proceed hand in hand. This paper explores the core recommendations of the expert group and situates them within the broader German debate on EU reform.

KEYWORDS

EU enlargement
institutional reforms
governance challenges
German reform proposals
rule of law mechanisms
qualified majority voting
structural modernization

1. Introduction

The debate about the future of the European Union, particularly regarding its enlargement and related discussions on potential reforms, has gained new momentum in recent years. The catalyst for this renewed focus was Russia's attack on Ukraine in 2022.

1 | Postdoctoral Researcher, University of Regensburg, Germany; Marie.Beyrich@ur.de; ORCID: 0009-0003-9165-2038.

https://doi.org/10.55073/2025.2.9-25

In the aftermath, Ukraine applied for EU membership just days after the war began,[2] followed by Moldova[3] and Georgia[4]. The Western Balkan countries have been aspiring to join the EU for years,[5] while Turkey also remains on the candidate list.[6] This has revitalised the enlargement debate – not just geographically, but also politically.

Historically, 2004 marked the EU's largest enlargement to date, with the admission of ten new member states.[7] Now, the Union faces the challenge of potentially growing from its current 27 members to 37. This raises the question of whether the EU, in its current form, is ready to handle such a significant expansion, and if so, what institutional reforms might be necessary to ensure the EU's continued functionality. While these questions have become more urgent in the light of recent critical events – from the migration crisis and the COVID-19 pandemic to Russia's war against a direct EU neighbour – they are far from new. Reform debates have accompanied the EU's development for decades, driven by enduring concerns about its institutional architecture, such as the often-cited democratic deficit or the balance of competences between the Union and its member states. The current enlargement momentum thus brings longstanding questions back to the political forefront – now with greater urgency and heightened political relevance.

Among the most notable recent responses to this renewed reform pressure is the 2023 Franco-German expert report 'Sailing on High Seas – Reforming and Enlarging the EU for the 21st Century.' Commissioned by the German and French governments, the non-governmental expert group presented concrete reform proposals in September 2023 to address the institutional and political challenges of future enlargement.

This paper takes the expert group's proposals as a point of departure to examine current German perspectives on institutional reform in the context of EU enlargement.

2. Why bother with enlargement?

The reality is that not every country is rushing to join the European Union. The UK's exit with Brexit and growing skepticism in the EU show that EU membership isn't the straightforward choice it once was. A 2024 poll in Serbia revealed that less than 50% of the population supports joining the EU.[8]

2 | See European Commission, 2023b, p. 3.
3 | See European Commission, 2024c.
4 | See European Commission, 2024b.
5 | See Council, 2024a; Council, 2024b; Council, 2024e; Council, 2024d; Council, 2024f; European Parliament, 2024.
6 | See European Commission, 2024f.
7 | See Council, 2024c.
8 | See European Western Balkans, 2024.

From the Union's perspective, the primary objective of EU enlargement nowadays, especially since the war in Ukraine, is to promote stabilisation.[9] With conflicts unfolding on its doorstep, defending democracy and countering the influence of authoritarian regimes like Russia and China have become urgent. The EU's ability to act as a strong, united force is critical to managing these challenges. Thus, enlargement aligns with the EU's strategic interest: strengthening its global stance while maintaining internal cohesion, ultimately ensuring a stable and secure Europe.[10]

Before the war in Ukraine, the dominant vision of EU enlargement was rooted in the Union's foundational goal: to create a Europe united in values and a shared community of states. Although the idea of a 'completed Europe' has somewhat faded from the immediate agenda in recent years, it remains a guiding principle. The EU's aim is to expand its membership while deepening integration – carefully balancing growth with unity. This dual approach is essential for Europe to achieve its promise of 'completion': a continent that is united not only geographically, but also politically and institutionally, forming a truly cohesive whole.[11]

3. Why bother with reforms?

The process of expanding the European Union has always been inherently linked to significant debates about necessary reforms, which often became possible precisely because of enlargement. More or less in parallel with the EU's enlargement process, which increased the Union to 27 member states (after Brexit), efforts were also made to shape the deepening of the EU through treaty changes. This included key reforms such as the Maastricht Treaty (1992), the Amsterdam Treaty (1998), the Nice Treaty (2000), and the Lisbon Treaty (2009). Now, with the recent revival of enlargement ambitions a new opportunity for reform has emerged after years without significant changes. Notably, during the European Council meeting in Granada in October 2023, all member states reached a consensus on the need for reforms,[12] contrasting with previous resistance from some states.[13]

9 | EU leaders have increasingly emphasized stabilization as a primary goal of enlargement, particularly since the onset of the war in Ukraine. For instance, European Council President Charles Michel highlighted this in his speech at the Bled Strategic Forum, stressing the renewed momentum for enlargement driven by the conflict in Ukraine. He argued that the EU needs to be prepared for a significant enlargement by 2030, with stabilization being a critical component of this process (see Ocvirk, 2023). Similarly, European Commission President Ursula von der Leyen, speaking at the European Parliament, has repeatedly framed EU enlargement as a geopolitical necessity, particularly in light of the war in Ukraine. She pointed out that the EU must strategically manage its enlargement process to ensure stability and maintain a unified stance against external threats like Russia's aggression (See European Commission, 2024e).

10 | See Bertelsmann Stiftung, no date.

11 | See Statement by President von der Leyen on the 2023 Enlargement Package and the new Growth Plan for the Western Balkans (European Commission, 2023a); Calliess, 2023b; Karjalainen, 2023.

12 | See European Council, 2023.

13 | See Bulgaria et al., 2022.

Given the renewed push for EU enlargement, it is no surprise that a robust debate on reform has gained momentum. The prospect of expanding the Union comes with a host of complex challenges that make a strong case for rethinking the EU's current structure. Beyond the mere reopening of the window for reform, several compelling reasons – among a wide range of others – highlight why engaging in reform discussions is indeed justified.

The increasing heterogeneity within the Union poses a challenge. With the arrival of each new member state, the political, economic, and cultural diversity of the EU expands, making it more difficult to achieve consensus on key issues. The experience of managing a Union already consisting of 27 member states has shown that such diversity can lead to friction and inefficiency in governance.[14] This growing diversity brings back the critical question of 'absorption capacity' – defined as the EU's ability to integrate new members while maintaining its capacity to act.[15] If the EU becomes too large and/or too heterogeneous, it risks overstretching and weakening itself,[16] a concern that has driven past institutional reforms such as the Treaties of Nice and Lisbon.[17] Without further reforms, future expansion could overburden the EU's institutional framework, making it increasingly difficult to function effectively.

Additionally, the EU is grappling with a complex web of overlapping crises – ranging from climate change and migration to security threats and economic instability. These challenges transcend national borders and demand coordinated, unified responses from the EU. However, as the Union becomes more diverse, achieving the necessary cohesion for swift and effective action is likely to become increasingly difficult.[18]

Moreover, the expansion of the EU's competencies into sensitive policy areas traditionally managed by individual member states – such as defence, fiscal policy, and health – further complicates achieving consensus, raising concerns about sovereignty and the balance of power within the Union, making some member states wary of deeper integration.[19] As the EU continues to enlarge and crises continue to hit, these legal and political disputes are likely to increase, further complicating the balance between collective EU action and national sovereignty.

Finally, while the Union strives to welcome new members, this may come at the expense of deeper integration, as growing diversity within the EU makes consensus

14 | The European Council meeting in December 2023 highlighted once again the disruptive potential that a single member state can wield, as demonstrated by Hungary's blockade of EU financial aid for Ukraine. This incident underscored how individual national interests can complicate EU decision-making processes and strain the Union's ability to act cohesively. A summary of this incident is available at Joyner, 2024.

15 | See European Commission, 1993.

16 | Calliess refers to the threat of 'imperial overstretch', see Calliess, 2023b.

17 | See von Ondarza, 2022.

18 | It has already been identified as a state of permacrisis that Europe is stuck in, see Zuleeg, Emmanouilidis and Borges de Castro, 2021.

19 | This tension can be seen, for example, in the recent EU Pact on Migration and Asylum (see European Commission, 2024d), which sparked significant opposition from Poland and Hungary. These countries resisted the pact's 'mandatory solidarity' mechanism, arguing that it infringed upon their national sovereignty by potentially forcing them to accept asylum seekers against their will (see Liboreiro, 2024). The lengthy and contentious negotiations highlighted the deep divisions among member states and underscored how difficult it is to reach consensus on policies that deeply affect national interests.

on common policies more elusive. At the heart of this debate lies a critical question: how much sovereignty are member states willing to surrender for the vision of an 'ever closer Union'[20], and how much diversity can the EU truly sustain without compromising its functionality? The motto 'United in Diversity'[21] has long been celebrated as the EU's guiding principle, but the Union's expanding borders are testing the limits of this ideal. Enlargement without accompanying reforms risks pushing the EU towards a state where its ability to act decisively is hampered by internal disagreements.

4. A longstanding debate

The debate on how to reform the European Union is almost as old as the Union itself. In German legal discourse, this topic has remained consistently relevant, generating a rich and diverse body of literature.[22] The positions range from fundamental reflections on the EU's future shape and political trajectory to more technical considerations such as institutional balance, decision-making procedures, or the allocation of competences – with varying perspectives and approaches emerging across all these sectors.

At a broader level, one way of making sense of this diversity could be to see it as a tension between two guiding narratives: one rooted in a discourse of progress, which sees integration as a historical imperative and envisions an ever-deepening Union capable of addressing transnational challenges;[23] and one shaped by a more sceptical stance, emphasising national autonomy, local rootedness, and democratic proximity, and advocating consolidation before any further steps toward integration.[24] This contrast plays out not only in terms of overarching constitutional visions but also in discussions on concrete institutional questions, including how to address the EU's democratic deficit,[25] how to conceptualise the role of the European Court of Justice,[26] or how to design flexible models of differentiated integration.[27]

In recent years, these long-standing debates have gained renewed relevance.[28] Triggered by new geopolitical realities and the prospect of a significant enlargement, questions of institutional reform have once again moved to the center of academic and political attention. What follows is a closer look at one prominent contribution to this ongoing discourse: the proposals put forward by the Franco-German expert group in their 2023 report Sailing on High Seas – Reforming and Enlarging the EU for the 21st Century.

20 | See Article 1 of the Lisbon Treaty.
21 | See European Union, no date.
22 | The following references represent just a selection from the vast body of contributions published over the past decades.
23 | See for a detailed overview with further references Haltern, 2009, p. 283.
24 | See ibid.
25 | See for example Franzius and Preuß, 2012, p. 41; Schorkopf, 2018, p. 9.
26 | See for example Mayer, 2024, p. 219; Nettesheim, 2022, p. 525.
27 | See for a detailed overview with further references Ruffert, 2022, in: Calliess and Ruffert, EUV/AEUV, Article 20 EUV paras. 1.
28 | See for example Bickenbach, 2016, p. 741; Calliess, 2018, p. 1; Calliess, 2023a, p. 781; Weiß, 2022, p. 162; Kirchhof, Keller and Schmidt, 2020, p. 1.

5. The Franco-German Expert Group's reform proposals

Building on the broader patterns of the German reform debate, the following section focuses on one of the most recent contributions to the discussion: the reform proposals presented by the Franco-German expert group in their 2023 report Sailing on High Seas – Reforming and Enlarging the EU for the 21st Century.[29] Commissioned jointly by German Minister of State for Europe and Climate Anna Lührmann and French Secretary of State for European Affairs Laurence Boone, the report was developed by a non-governmental group of twelve legal and policy experts and officially presented in September 2023. Upon receiving the report, Lührmann remarked that it marks an important input into the ongoing reform discourse, offering concrete ideas on how the EU could be institutionally and politically prepared for enlargement.[30] This section takes a closer look at the suggestions laid out in the expert group's report.

The authors emphasise two central premises: first, that further enlargement is essential for maintaining stability and security across Europe, regardless of its complexity; and second, that institutional, policy-related, and budgetary reforms are needed either in advance of, or in parallel with that process. The report presents both short- and long-term suggestions aimed at enhancing the EU's operational capacity, upholding the rule of law, and preparing its institutions for future expansion. It also suggests that member states may progress at different speeds based on their readiness to adopt reforms, including potential Treaty changes.

5.1. Protection of the rule of law

The expert group firstly focuses on the protection of the rule of law. It argues that while the rule of law is fundamental to the EU's constitutional framework[31] and a requirement for accession[32], there is no effective mechanism to protect it once a country becomes a member. This issue has been notably discussed in the context of Hungary and Poland, yet the 2024 EU Commission Rule of Law Report indicates that rule of law challenges are observed across several member states.[33] They are spreading across the Union, highlighting growing concerns in numerous member states about upholding this core EU principle. Article 7 TEU, the expert group asserts, is inadequate in addressing rule of law violations effectively. The's enforcement tools lack sufficient impact, and crucially, there

29 | See Franco-German Working Group, 2023.
30 | See Auswärtiges Amt, 2023.
31 | The rule of law is primarily regulated in the EU Treaties under Article 2 TEU, which states that the EU is founded on values such as respect for human dignity, freedom, democracy, equality, and the rule of law. Additionally, Article 7 TEU outlines the procedure for addressing serious breaches of these values by member states.
32 | The requirement for respect of the rule of law as a condition for EU accession is outlined in the Copenhagen Criteria [Online]. Available at: https://eur-lex.europa.eu/EN/legal-content/glossary/accession-criteria-copenhagen-criteria.html (Accessed: 10 October 2025). This includes political criteria requiring candidate countries to have stable institutions guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities. These criteria are referenced in Article 49 TEU, which states that any European country wishing to join the EU must respect the values mentioned in Article 2 TEU.
33 | See European Commission, 2024a.

is no exclusion clause to expel members as a last resort. This brings us to the current reality: What is demanded of candidate countries cannot be effectively imposed on member states.

The expert group proposes the following reforms. They begin with the Conditionality Regulation[34], which currently allows (among other measures) the suspension of EU funds to member states[35] if 'breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way.'[36] In other words, rule of law breaches must have a direct impact on EU funds to trigger action. The experts suggest expanding the scope of this regulation, which was originally intended to protect the EU budget, not the rule of law directly. Currently, application of this regulation requires proof of a direct link between rule of law violations and the EU budget – a link narrowly interpreted by the ECJ.[37] If this link is missing, the regulation cannot be used, even if the rule of law is at risk. The group proposes transforming the regulation into 'an instrument to sanction breaches of the rule of law and, more generally, systematic breaches of the European values enshrined in Article 2 TEU (such as democracy, free and fair elections, freedom of the media, or the systematic abuse of fundamental rights, as expressed in the Charter of Fundamental Rights).'[38] This would eliminate the need to demonstrate a direct link to the EU budget, which currently restricts its application.

The expert group favours an amendment to Article 7 TEU though, allowing the Council and European Parliament to adopt regulations aimed at protecting EU values, thereby implementing the above proposal. If no consensus on this can be reached, they alternatively suggest extending the scope of the Conditionality Regulation to cover other behaviours that undermine sound financial management, such as money laundering – achievable without treaty change through ordinary legislative procedures. For future funds, the group proposes modelling them after the NGEU, integrating similar conditionality mechanisms.[39]

Next, the experts address Article 7 TEU, which has proven ineffective in defending the rule of law.[40] They recommend replacing the 'unanimity minus one'-requirement with a four-fifths majority in the European Council, addressing the issue of mutual protection between Poland and Hungary.[41] A six-month deadline for Council and European Council decisions is proposed to force action, along with automatic sanctions if, five years after the declaration of 'serious and persistent breaches' under Article 7 (2) TEU, no vote on sanctions has been taken, and such breaches continue. This would address Article 7's current weakness: the lack of an obligation for the Council to act even when procedures are initiated by the European Parliament or the Commission.[42]

34 | See Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.
35 | See Article 5 of the Regulation 2020/2092.
36 | See Article 4 (1) of the Regulation 2020/2092.
37 | See ECJ, Judgment of 16 February 2022, C-156/21; ECJ, Judgment of 16 February 2022, C-157/21.
38 | See Franco-German Working Group, 2023, p. 16.
39 | See ibid., p. 16 f.
40 | See ibid., p. 17.
41 | See Baade, 2023, p. 133.
42 | See Franco-German Working Group, 2023, p. 17.

5.2. Institutional reforms

5.2.1. Addressing enlargement challenges

The expert group begins by highlighting the institutional challenges that could arise from future EU enlargement. The fact is that the Union still operates with institutions that have seen little change since the 1950s. Despite repeated efforts to reform these institutions, especially to address the democratic deficit and prepare for further expansion, there remains a lack of flexibility, too many actors are involved, and the procedures are exceedingly complex. These issues would only be exacerbated by the potential accession of up to ten new member states.[43]

The group sets clear goals: to strike a balance between improved efficiency, the competencies and influence of small, medium, and large member states, democratic legitimacy in decision-making, and the protection of legitimate national interests.[44] This is crucial given the unique nature of the upcoming accessions: Ukraine would be the fifth largest member state and the largest new entrant since the UK joined in 1973, while other candidates would be among the smallest members.

To address these challenges, the expert group proposes:

1. Limiting the number of Members of the European Parliament to the current 751 and introducing a new system of seat distribution. The European Parliament is already one of the world's largest, and maintaining its size is seen as essential for ensuring its effectiveness.[45]
2. Modifying the Council's rotating presidency from the current trio format[46] to a 'Quintet Presidency,' involving five states over half of an institutional cycle. This would enable longer-term agenda setting and better coordination across decision-making periods, ensuring a consistent approach. In an expanded EU, this system would ensure that each quintet includes at least one larger member state with substantial administrative capabilities and prior experience, enhancing cooperation and strengthening horizontal relations between member states.[47]
3. Reducing the size of the European Commission to two-thirds of the member states or adopting a hierarchical model. As the Union enlarges, decisions on the size and organization of the Commission need to be made, especially since the rotation system outlined in Article 17 (5) TEU has never been implemented. Maintaining a 'one member state, one commissioner' model without differentiation is no longer seen as viable. The options under consideration are to either reduce the number of commissioners or to establish a distinction between 'lead commissioners' and 'commissioners'. Only Lead Commissioners would vote or attend meetings, or both could participate equally. This structure would enhance

43 | See ibid., p. 18.
44 | See ibid.
45 | See ibid., p. 18 f.
46 | The Trio Presidency system of the Council of the European Union, established by Article 16 (9) TEU and detailed in Council Decision 2009/937/EU, groups three consecutive rotating presidencies to ensure continuity over 18 months. Each Trio collaborates on a joint agenda, aligning long-term priorities and ensuring smoother transitions between six-month terms.
47 | See Franco-German Working Group, 2023, p. 19.

efficiency, ensure member state representation, and allow role-switching mid-term to balance representation.[48]

5.2.2. Decision-making in the council

The expert group proposes further significant reforms with regard to the Council's decision-making processes, aiming to replace unanimity with qualified majority voting (QMV) in all remaining policy areas. In all areas except Common Foreign and Security Policy (CFSP), this change should be paired with full co-decision making with the European Parliament through the ordinary legislative procedure to ensure democratic legitimacy. Constitutional matters, such as treaty changes, accession of new members, and adjustments to EU institutions, should continue to require unanimity.[49] Acknowledging the challenges of implementing such extensive reforms, an alternative has been suggested. Recognising the challenges of a full shift to QMV, the expert group recommends a gradual transition through three distinct policy packages: enlargement and rule of law, foreign and defence policy, and fiscal and tax policy. These grouped areas would serve as the foundation to allow movement towards QMV, balancing concessions among member states and facilitating a step-by-step approach towards the broader adoption of majority voting.[50]

Additionally, they propose creating a 'sovereignty safety net' allowing member states to invoke vital national interests under QMV, along with an opt-out mechanism to further reassure states. The recalibration of voting weights (60% of member states representing 60% of the population) addresses concerns of smaller states.[51] These measures aim to make QMV more acceptable and feasible.[52]

The rationale is clear: the remaining areas of unanimity are increasingly prone to blockades through vetoes often unrelated to the actual decision at hand. The urgency of reform is underscored by the potential for growing numbers of member states to lead to more vetoes and blockades, threatening the EU's capacity to act. The challenge is to implement these changes in sensitive areas central to national sovereignty, requiring at least concessions to reassure states that they retain control despite QMV. The proposed opt-out and voting weight adjustments (60/60 rule) are intended to address these concerns and make the reforms more palatable.

5.2.3. EU-level democracy

The democratic deficit is a well-known and widely discussed issue. To address this, the expert group proposes four key measures:

48 | See ibid., p. 19 f.
49 | See ibid., p. 21.
50 | See ibid., p. 21 f.
51 | The 60/60 voting rule addresses concerns of smaller member states by ensuring that decisions cannot be dominated solely by a few large states. By requiring a qualified majority to represent both 60% of the member states (ensuring broad geographical support) and 60% of the EU population (ensuring democratic legitimacy), the rule balances influence between large and small states. This prevents populous countries from unilaterally controlling outcomes and ensures that smaller states' perspectives are also considered, thereby making qualified majority voting more equitable and acceptable.
52 | See Franco-German Working Group, 2023, p. 22 f.

1. Harmonisation of Electoral Law: Standardisation of the electoral process for European Parliament elections across all member states, replacing 27 national elections with a more harmonised approach.[53]
2. Appointment of the Commission President: Interinstitutional agreement, or at least a political one, between the European Parliament and the European Council for appointing the Commission President. This ensures a balanced approach that reflects both the legitimacy of member state governments and the European electorate.[54]
3. Linking Participatory Tools with EU Decision-Making: Strengthening existing participatory instruments to involve citizens and candidate countries, including institutionalising high-visibility citizen forums and using participatory tools to prepare for EU enlargement.[55]
4. Probity, Transparency, and Anti-Corruption Measures: Establishing an independent office with broad powers to oversee the activities of all actors within or for EU institutions, safeguarding democratic integrity.[56]

5.2.4. Powers and competences

Since 1957, the EU's powers have significantly expanded, often sparking criticism that it overreaches or ignores subsidiarity. Yet, the expert group finds no proof of such overreach; existing checks work well, as evidenced by the lack of cases before the CJEU.[57] According to the expert group, the perception of EU overreach might well be a convenient excuse – complaining about the EU could win favour with citizens, allowing national politicians to shift blame and avoid responsibility for local issues by playing the 'EU card'. The group refrains from dictating where powers should lie,[58] focusing instead on clarifying competences in future treaties and ensuring emergency measures align with EU law and democratic standards. Additionally, they recommend creating a 'Joint Chamber of the Highest Courts and Tribunals of the EU' to formalise the dialogue between the EU and its member state courts without binding decisions, maintaining the CJEU's authority while fostering mutual understanding.[59]

5.2.5. EU resources

EU enlargement directly impacts the EU budget by increasing the number of member states that require funding. Additionally, growing expectations in areas such as financial stability, health, energy, digital transformation, and security create further demands on EU financing, especially in times of crisis. To equip the EU to respond quickly and effectively, the expert group proposes increasing the budget both nominally and relative to GDP, enhancing its flexibility, introducing new own resources, adopting qualified majority voting on expenditures, and allowing future joint debt issuance.[60]

53 | See ibid., p. 23.
54 | See ibid., p. 24 f.
55 | See ibid., p. 25 f.
56 | See ibid., p. 26 f.
57 | See ibid., p. 27.
58 | See ibid., footnote 14 on page 27.
59 | See ibid., p. 28.
60 | See ibid., p. 28 f.

5.3. How can these reforms be realistically implemented?

The expert group recognises that some proposed changes would indeed require treaty amendments, which demand unanimous approval from all member states.[61] While the group explores alternative methods to achieve reforms without treaty changes, it emphasises that treaty amendments are preferable due to their democratic legitimacy, transparency, coherence, and as a clear expression of the EU's intent to shape its future.[62]

Aware of the difficulty in reaching consensus, the group is exploring the concept of a multi-speed Europe, where reform-willing member states can progress without being held back by those less willing ('coalition of the willing' by an additional treaty law supplementing existing treaty law).[63] However, it cautions that such differentiation could lead to institutional and normative complexities. It recommends clear guidelines for opt-outs, stressing they should only apply when integration deepens or qualified majority voting expands, and never undermine fundamental EU values.[64]

The proposal envisions four layers of European integration: an inner circle of deepened cooperation, the EU itself, an associated member's circle involved in the single market, and a European Political Community (EPC) for political collaboration without binding EU law adherence.[65]

The advantage of this approach is clear: it allows member states that are not ready or willing to advance to avoid being forced into a deeper Europe they do not desire, while still enabling progress for those eager to move forward. This model ensures that integration does not stall due to differing national interests, allowing a flexible yet cohesive pathway for the EU's evolution, where each state can choose its level of participation without obstructing others.

5.4. What does German politics say about the enlargement and reform process?

5.4.1. 2021 coalition agreement of the previous German government

Under the previous government, formed in 2021 by the Social Democrats, Greens, and Liberals, support for EU enlargement was closely tied to the question of reform. The coalition agreement stated that Germany's challenges could not be managed nationally, emphasising the need for a 'strategically sovereign EU'.[66] The agreement reflected the government's support for reforms in line with the expert group's recommendations: 'We support an EU that protects its values and rule of law internally and externally',[67] supports institutional reforms like 'strengthening the European Parliament'[68] and 'replacing unanimity with qualified majority voting in foreign and security policy',[69] and even endorses

61 | 'Double unanimity' is necessary for treaty changes: unanimous agreement in the European Council on the proposed treaty changes and then successfully ratifying these changes in all member states.
62 | See Franco-German Working Group, 2023, p. 30; Wegener, 2022.
63 | See Franco-German Working Group, 2023, p. 32.
64 | See ibid., p. 32 f.
65 | See ibid., p. 35 f.
66 | See Traffic Light Coalition, 2021, p. 104.
67 | See ibid.
68 | See ibid.
69 | See ibid., p. 108.

treaty changes ('We support necessary treaty changes').[70] It acknowledged a multi-speed Europe ('We will prioritise the community method but move ahead with individual member states when necessary')[71] and underscored that 'EU accession must go hand in hand with improving the EU's absorption capacity'.[72]

5.4.2. Non-Paper by the German government on the ongoing discussions within the 'Conference on the Future of Europe' (March 1, 2022)

During the Conference on the Future of Europe, the German government took the opportunity to reiterate its position on EU enlargement and reform, echoing the commitments outlined in the coalition agreement. At this time, the war in Ukraine had already begun, adding further urgency to the discussions.[73] The German government emphasised the need for 'a solid foundation of values and a strong, unified legal community' to navigate ongoing crises.[74] It reaffirmed, 'The German government will put all its efforts into making the EU fit for the future, more democratically consolidated, capable of action, and strategically sovereign.'[75] The government also expressed support for citizens' proposals to 'replace the unanimity rule in the Common Foreign and Security Policy with qualified majority voting,'[76] and highlighted the importance of enhancing participatory elements at EU level.[77] It committed to 'further solidify European democracy [...] [and] to advance it through institutional reforms,'[78] and reiterated its intention to 'strengthen the directly elected European Parliament in the legislative process'[79] while supporting 'a unified European electoral law.'[80] Additionally, the government pledged to 'further develop the instruments to strengthen the rule of law within the EU.'[81]

5.4.3. 2025 coalition agreement of the current government

The new government, formed after the election in February 2025 by the Conservative and Social Democratic parties, has continued this line. Its coalition agreement states: 'The enlargement of the EU and its capacity to act must go hand in hand. That is why we need, at the latest during the next enlargement, internal consolidation and reform to strengthen the Union institutionally.'[82] The new government explicitly supports reforming the unanimity principle in the Council and endorses the idea of a multi-speed Europe. It has also signalled openness to treaty change – positions that are largely aligned with the proposals set out by the Franco-German expert group.

70 | See ibid., p. 104.
71 | See ibid.
72 | See ibid., p. 109.
73 | See German Government, 2022.
74 | See ibid., p. 1.
75 | See ibid.
76 | See ibid., p. 2.
77 | See ibid., p. 3.
78 | See ibid.
79 | See ibid.
80 | See ibid.
81 | See ibid., p. 4.
82 | See Conservatives and Social Democrats, 2025, p. 138.

5. Conclusion

The reform proposals put forward by the Franco-German expert group largely revolve around familiar themes. At the top of the list is the strengthening and safeguarding of the rule of law through more effective instruments, such as a reformed Article 7 TEU and conditionality mechanisms. Institutional reforms follow closely, with qualified majority voting taking centre stage. Finally, there is the recurring question of feasibility. The expert group openly acknowledges that treaty change will be difficult, pointing toward a future shaped by differentiated integration. A 'coalition of the willing' may appear to be the favoured path – not out of conviction, but out of necessity given the current European reality. Still, it reflects a clearer vision of what the group hopes to achieve: a Union that is cohesive and capable, yet pragmatic in navigating political fragmentation among its members.

As the debate intensifies, the stakes become increasingly apparent. We are facing a paradox: stability demands enlargement, yet enlargement without reform may endanger that very stability. Reform is necessary – but we remain trapped in a crisis of reformability, still dependent on unanimity to move forward.

In the end, it comes down to political will and the ability to find compromise – which should not be of any surprise. But the real question is: how can all member states be convinced of the need for reform, regardless of its eventual shape? Because if there is one point of emerging consensus, it is this: without reform, enlargement is risky – and arguably, reform would be desirable even without enlargement. To reach that consensus, a trade may be needed: something that gives each member state a reason to say yes. After all, reform means asking every country to give up something significant – as seen in the proposals discussed here. It is easy to criticise hesitant member states, but the fact that Germany, too, would have to give up its veto power if these changes were implemented should not be overlooked. That is a bitter pill, even for a country often assumed to be naturally in favour of deeper integration. Yet even within Germany, perspectives and opinions on reform diverge (see above. This illustrates just how complex and contested the question of institutional change really is.

What could help here? Perhaps it is time for some honest reframing of these reforms. Treaty amendments are not just about empowering EU institutions but also controlling them. Treaty reforms can be used to steer EU priorities and bind institutions to the mandates provided by the treaties, which means that Member states would hold the reins. And being totally upfront: treaty reform, at least in the version proposed here, would strengthen the EU's authority at the expense of national governments. So, how this be made to work in a better way for member states? What kind of grand institutional bargain could reassure member states that their voices would still matter?

In the end, this discussion is vital. Even if it is vigorous and intense – this is the political process that drives necessary change

Bibliography

Auswärtiges Amt (2023) 'Deutsch-französische Expertengruppe zu institutionellen Reformen der EU', *Auswärtiges Amt*, 23 January [Online]. Available at: https://www.auswaertiges-amt.de/de/newsroom/deutsch-franzoesische-expertengruppe/2574568 (Accessed: 14 November 2024).

Baade, B. (2023) 'Die Konditionalitätsverordnung: Erwartungen und Realität anlässlich ihrer ersten Anwendung auf Ungarn', *Neue Zeitschrift für Verwaltungsrecht*, 2023/3, pp. 132–137.

Bertelsmann Stiftung (no date) 'Programm „Europas Zukunft"' [Online]. Available at: https://www.bertelsmann-stiftung.de/de/ueber-uns/wer-wir-sind/organisation/vorstand/europas-zukunft (Accessed: 14 November 2024).

Bickenbach, C. (2016) 'Die Europäische Union beweglicher denken', *Die öffentliche Verwaltung*, 2016/18, pp. 741–750.

Calliess, C. (2018) 'Bausteine einer erneuerten Europäischen Union: auf der Suche nach dem europäischen Weg: Überlegungen im Lichte des Weissbuchs der Europäischen Kommission zur Zukunft Europas', *Neue Zeitschrift für Verwaltungsrecht*, 2018/1-2, pp. 1–9.

Calliess, C. (2023a) 'Erweiterung und Reform der Europäischen Union', *Europäische Zeitschrift für Wirtschaftsrecht*, 2023/17, pp. 781–788.

Calliess, C. (2023b) 'Reform the European Union for Enlargement!', *Verfassungsblog*, 6 July. [Online]. Available at: https://verfassungsblog.de/reform-the-european-union-for-enlargement/ (Accessed: 14 November 2024).

Calliess, C., Ruffert, M. (eds.) (2022) *EUV/AEUV, Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta, Kommentar*. München: C.H.Beck.

Conservatives and Social Democrats (2025) 'Coalition Agreement', *Conservatives and Social Democrats* [Online]. Available at: https://www.koalitionsvertrag2025.de/sites/www.koalitionsvertrag2025.de/files/koav_2025.pdf (Accessed: 30 June 2025).

European Commission (1993) 'European Council in Copenhagen - 21-22 June 1993- Conclusions of the Presidency' *European Commission*, 22 June [Online]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/DOC_93_3 (Accessed: 14 November 2024).

European Commission (2023a) 'Statement by President von der Leyen on the 2023 Enlargement Package and the new Growth Plan for the Western Balkans', *European Commission*, 8 November [Online]. Available at: https://neighbourhood-enlargement.ec.europa.eu/news/statement-president-von-der-leyen-2023-enlargement-package-and-new-growth-plan-western-balkans-2023-11-08_en (Accessed: 14 November 2024).

European Commission (2023b) 'Ukraine 2023 Report', *European Commission*, 8 November [Online]. Available at: https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-11/SWD_2023_699%20Ukraine%20report.pdf (Accessed: 14 November 2024).

European Commission (2024a) 'Communication – 2024 Rule of Law Report – the rule of law situation in the European Union', *European Council*, 24 July [Online]. Available at: https://commission.europa.eu/document/27db4143-58b4-4b61-a021-a215940e19d0_de (Accessed: 14 November 2024).

European Commission (2024b) 'Georgia', *European Commission* [Online]. Available at: https://neighbourhood-enlargement.ec.europa.eu/european-neighbourhood-policy/countries-region/georgia_en (Accessed: 14 November 2024).

European Commission (2024c) 'Moldova', *European Commission* [Online]. Available at: https://neighbourhood-enlargement.ec.europa.eu/european-neighbourhood-policy/countries-region/moldova_en (Accessed: 14 November 2024).

European Commission (2024d) 'Pact on Migration and Asylum', *European Commission,* 21 May [Online]. Available at: https://home-affairs.ec.europa.eu/policies/migration-and-asylum/pact-migration-and-asylum_en (Accessed: 14 November 2024).

European Commission (2024e) 'Speech by President von der Leyen at the European Parliament Plenary on the need for unwavering EU support for Ukraine, after two years of Russia's war of aggression against Ukraine', *European Commission*, 6 February [Online]. Available at: https://neighbourhood-enlargement.ec.europa.eu/news/speech-president-von-der-leyen-european-parliament-plenary-need-unwavering-eu-support-ukraine-after-2024-02-06_en (Accessed: 14 November 2024).

European Commission (2024f) 'Türkiye', *European Commission* [Online]. Available at: https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/turkiye_en (Accessed: 14 November 2024).

European Council (2023) 'The Granada declaration', *European Council*, 6 October [Online]. Available at: https://www.consilium.europa.eu/en/press/press-releases/2023/10/06/granada-declaration/ (Accessed: 24 November 2024).

European Council (2024a) 'Albania', *European Council* [Online]. Available at: https://www.consilium.europa.eu/de/policies/enlargement/albania/ (Accessed: 14 November 2024).

European Council (2024b) 'Bosnia and Herzegovina', *European Council* [Online]. Available at: https://www.consilium.europa.eu/de/policies/enlargement/bosnia-herzegovina/ (Accessed: 14 November 2024).

European Council (2024c) 'EU enlargement policy', *European Council* [Online]. Available at: https://www.consilium.europa.eu/de/policies/enlargement/ (Accessed: 14 November 2024).

European Council (2024d) 'Montenegro', *European Council* [Online]. Available at: https://www.consilium.europa.eu/de/policies/enlargement/montenegro/ (Accessed: 14 November 2024).

European Council (2024e) 'North Macedonia', *European Council* [Online]. Available at: https://www.consilium.europa.eu/de/policies/enlargement/republic-north-macedonia/ (Accessed: 14 November 2024).

European Council (2024f) 'Serbia', *European Council* [Online]. Available at: https://www.consilium.europa.eu/de/policies/enlargement/serbia/ (Accessed: 14 November 2024).

European Parliament (2024) 'The Enlargement of the Union', *European Parliament* [Online]. Available at: https://www.europarl.europa.eu/factsheets/en/sheet/167/die-erweiterung-der-europaischen-union (Accessed: 14 November 2024).

European Union (no date) 'EU motto', *European Union* [Online]. Available at: https://european-union.europa.eu/principles-countries-history/symbols/eu-motto_en (Accessed: 14 November 2024).

European Western Balkans (2024) 'IRI poll: Most Western Balkan countries support EU membership, but many citizens are sceptical of EU's seriousness', European Western Balkans, 16 May [Online]. Available at: https://europeanwesternbalkans.com/2024/05/16/iri-poll-most-western-balkan-countries-support-eu-membership-but-many-citizens-are-sceptical-of-eus-seriousness/ (Accessed: 14 November 2024).

Franco-German Working Group (2023) 'Sailing on High Seas – Reforming and Enlarging the EU for the 21st Century', *Franco-German Working Group*, 18 September [Online]. Available at: https://www.auswaertiges-amt.de/blob/2617322/4d0e0010ffcd8c0079e21329bbbb3332/230919-rfaa-deu-fra-bericht-data.pdf (Accessed: 14 November 2024).

Franzius, C., Preuß, U. (2012) *Die Zukunft der europäischen Demokratie.* Berlin: Heinrich-Böll-Stiftung.

German Government (2022) 'Non-Paper on the ongoing discussions within the 'Conference on the Future of Europe'', *German Government*, 1 March [Online]. Available at: https://www.auswaertiges-amt.de/blob/2516726/0508a57355d7214e585d1ca03c94872d/220311-non-paper-data.pdf (Accessed: 14 November 2024).

Haltern, U. (2009) 'Finalität' in Bogdandy, A., Bast, J. (eds.) *Europäisches Verfassungsrecht, Theoretische und dogmatische Grundzüge.* Berlin: Springer, pp. 279–334; https://doi.org/10.1007/978-3-540-73810-7_7.

Joyner, E. (2024) 'EU overcomes Orban's veto on €50 billion Ukraine aid deal', *Deutsche Welle*, 2 January [Online]. Available at: https://www.dw.com/en/eu-overcomes-orbans-veto-on-50-billion-ukraine-aid-deal/a-68147741 (Accessed: 14 November 2024).

Karjalainen, T. (2023) 'EU enlargement in wartime Europe: three dimensions and scenarios', *Contemporary Social Science*, 18(5), pp. 637–656 [Online]. Available at: https://doi.org/10.1080/21582041.2023.2289661 (Accessed: 14 November 2024).

Kirchhof, G., Keller, M., Schmidt, R. (2020) *Europa: In Vielfalt geeint!: 30 Perspektiven zur Rettung Europas vor sich selbst*. München: C.H.Beck.

Liboreiro, J. (2024) 'EU completes reform of migration rules despite Poland and Hungary voting against', *Euronews*, 14 May [Online]. Available at: https://www.euronews.com/my-europe/2024/05/14/eu-completes-reform-of-migration-rules-despite-poland-and-hungary-voting-against (Accessed: 14 November 2024).

Mayer, F. (2024) 'Judikativer Werteschutz in der Europäischen Union: Grundlagen und Chancen', *Europarecht*, 2024/3, pp. 219–240 [Online]. Available at: https://doi.org/10.5771/0531-2485-2024-3-219 (Accessed: 04 October 2025).

Movimento Europeo (2022) 'Non-paper on the outcome of and follow-up to the Conference on the Future of Europe', *Movimento Europeo*, 9 May [Online]. Available at: https://www.movimentoeuropeo.it/images/Documenti/Non_-paper_9.5.2022.pdf (Accessed: 14 November 2024).

Nettesheim, M. (2022) 'Die „Werte der Union": Legitimitätsstiftung, Einheitsbildung, Föderalisierung', *Europarecht*, 2022/5, pp. 525–546 [Online]. Available at: https://doi.org/10.5771/0531-2485-2022-5-525 (Accessed: 4 October 2024).

Ocvirk, M. (2023) 'Charles Michel's Speech on EU Enlargement: New Momentum or Wishful Thinking?', *Wilson Center*, 5 September [Online]. Available at: https://www.wilsoncenter.org/article/charles-michels-speech-eu-enlargement-new-momentum-or-wishful-thinking (Accessed: 14 November 2024).

Schorkopf, F. (2018) '„Europas neue Ordnung" – eine plurale Union', *Neue Zeitschrift für Verwaltungsrecht*, 2018/1-2, pp. 9–17.

Traffic Light Coalition (2021) 'Coalition Agreement', *Traffic Light Coalition* [Online]. Available at: https://www.spd.de/fileadmin/Dokumente/Koalitionsvertrag/Koalitionsvertrag_2021-2025.pdf (Accessed: 14 November 2024).

von Ondarza, N. (2022) 'Getting Ready', *Verfassungsblog*, 22 December [Online]. Available at: https://verfassungsblog.de/getting-ready/ (Accessed: 14 November 2024).

Wegener, B. (2022) 'Petrified Constitutions', *Verfassungsblog*, 11 November [Online]. Available at: https://verfassungsblog.de/petrified-constitutions/ (Accessed: 14 November 2024).

Weiß, W. (2022) 'Zur Zukunft Europas: Plädoyer für eine Vertragsreform', *Zeitschrift für Rechtspolitik,* 2022/5, pp. 162–165.

Zuleeg, F., Emmanouilidis, J., Borges de Castro, R. (2021) 'Europe in the age of permacrisis', *European Policy Centre*, 11 March [Online]. Available at: https://www.epc.eu/publication/Europe-in-the-age-of-permacrisis-3c8a0c/ (Accessed: 14 November 2024).

SOCIO-POLITICAL AND INSTITUTIONAL FRAMEWORK FOR HUMAN RIGHTS PROTECTION IN AFRICA: THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

Vlastimil Fiala[1]

ABSTRACT

This article discusses the institutional framework for the protection of human rights in Africa. The main focus is on the emergence, development and organisational and structural delineation of the African Commission on Human and Peoples' Rights. The analysis also highlights the historical circumstances of human rights violations on the African continent from the earliest times to the present day during four different phases (pre-colonial, colonial, post-colonial and modern). It then discusses the establishment, selection and replacement of the Commission, as well as the duties and rights of the candidates, their immunity and the possibility of terminating their membership. Particular attention is paid to the independence of Commission members and, where appropriate, their conflicts of interest. Then, the structure of the Commission is explained, defining its functions, as well as those of the Chairman, the Vice-Chairman and the role of the Secretariat. The study finally analyses the working procedures of the Commission and its relations with the African Union. It can be concluded that, due to the lack of democratisation in African countries, there is not enough political will among the ruling elites to respect human rights in these countries.

KEYWORDS

African Commission on Human and People's Rights
African human rights
working procedure

1. Introduction

The African continent, comprising 54 countries, remains a region where gross violations of human and civil rights are still pervasive. The inhumane behaviour of the colonisers towards the indigenous population started in the 17th–19th centuries, when the slave trade reached its peak and resulted in the virtual depopulation of large areas of Africa. Despite banning slave trade, the treatment of Africa's indigenous populations by

1 | Associate Professor, Faculty of Law, Palacky University, Olomouc, the Czech Republic; Vlastimil.fiala@upol.cz; ORCID: 0000-0001-9462-6300.

https://doi.org/10.55073/2025.2.27-56

colonisers did not improve. Some of the earliest documented instances of an entire people being subjected to genocide are the Herero and Nama uprisings in German Southwest Africa (present-day Namibia) between 1904 and 1907. During this genocide, 55,000 of the 80,000 Herero and half of the 20,000 Nama died.[2] The British in South Africa (Zulu Wars, Boer Wars) were similarly brutal towards the African indigenous population. Indeed, the British army was the first in the world to implement concentration camps, forcibly herding the Boer population into a confined and army-guarded area.

Several indigenous uprisings in the Belgian Congo, Kenya, Somalia, Angola, Mozambique and other African countries in the inter-war period were suppressed by brutal force to intimidate and deter indigenous populations from similar protests. This was done to maintain the status quo and prevent further unrest. The situation remained unaltered following the Second World War. Uprisings in Madagascar, Somalia, Kenya and Algeria were suppressed by brute military force, resulting in a significant loss of civilian African lives. As recently as the 1950s, the UN General Assembly addressed the appalling cases of slave labour in the Belgian Congo, a colony of a full member of the organisation.[3] At the UN, Portugal purposefully opposed the decolonisation policy, which resulted in a bloody national liberation war of the peoples of Portuguese colonies (Angola, Mozambique, Portuguese Guinea).

Many African countries (17) achieved political independence in 1960, which has become known as the Year of Africa. In the subsequent years, other former British, French and Belgian colonies gained political emancipation, with Sierra Leone becoming independent in 1961. The following countries attained political independence in the aforementioned period: Tanganyika (now Tanzania) in 1961; Algeria, Rwanda, and Uganda in 1962; Kenya and Zanzibar in 1963; Malawi in 1964; and Mauritius in 1968. In the mid-1970s, five additional African countries gained political independence, following the dissolution of the Portuguese colonial empire, namely Angola, Mozambique, Guinea-Bissau, Cape Verde, and São Tomé and Príncipe. The process of decolonisation continued in the 1980s, Zimbabwe achieving independence in 1980, and in the early 1990s, Namibia gaining its independence in 1990.

The initial political development of the newly independent African countries was characterised by highs of political instability, with a significant number of military and attempted coups. These were often accompanied by the brutal treatment of political opponents and, in some instances, entire ethnic groups. As such, ethnic conflicts and the struggles for political power have become a common occurrence on the African continent. Between January 1956 and December 2001, there were a total of 80 successful military and coup d'états, 108 failed military coup attempts and a further 139 planned and failed coups were prevented by the security forces of individual African countries.[4] The countries with the highest rates of political instability in Africa were Sudan (32 instances), Ghana (22), Uganda (17), Sierra Leone (16), Benin (15) and Burundi (14), among others.[5]

In addition to the numerous military coups, often characterised by violence, civil wars were also frequently driven by ethnic or separatist tensions. These conflicts often resulted in the murder of civilians, rape of women and children and brutal mutilation of

2 | Gewald, 2000, pp. 167, 209.
3 | Hrbek, 1966, pp. 518–521.
4 | McGowan, 2003, pp. 339–370.
5 | Thomson, 2002, pp. 132–133.

victims. For example, the civil war in Nigeria in the late 1960s resulted in tens of thousands of casualties, the genocide in Rwanda (1994) involved up to 800,000 victims from the Tutsi and moderate Hutu ethnic groups, and there were also civil wars in Sierra Leone and Liberia and the so-called 'wars of the Congo'. The latter is sometimes referred to as Africa's first world war, as it involved nine neighbouring African countries and 25 armed groups.[6] It is also important to mention the civil war in Sudan (1983–2005), which resulted in over two million deaths and was characterised by significant levels of violence.[7]

The 21st century has thus seen a proliferation of military and civil conflicts across numerous African countries, characterised by a pervasive culture of violence against innocent populations. The countries in West and Central Africa, including Burundi, Burkina Faso, Sudan, Gabon, Mali, Niger, Chad, Guinea, Guinea-Bissau and the Central African Republic, have been particularly prone to prolonged instability. A further civil war in Ethiopia between the central government and the Tigray province has been recently concluded, with the neighbouring country of Eritrea joining the conflict (the official Ethiopian government is reported to have invited Eritrea to assist in suppressing the Tigray rebellion).[8] These conflicts have resulted in, and continue to result in, considerable loss of human life, as well as violence against the civilian population, including numerous cases of rape, torture and murder of women and children. Additionally, the political and civil rights of the African population have been suppressed, while entire ethnic groups and peoples have been forcibly displaced and compelled to flee to neighbouring areas or countries.

This concise historical overview explains the prolonged and tragic experiences of the African population, not only during the colonial era and the struggle for political independence but also in the period following the political independence of African countries up to the present day. From this perspective, the protection of human and civil rights for African populations may appear as an entirely futile endeavour. However, the adoption of the African Charter on Human and Peoples' Rights (henceforth, the Charter) by the Organisation of African Unity in 1981 and the subsequent establishment of the African Commission on Human and Peoples' Rights (henceforth, the Commission) marked a pivotal turning point in the pursuit of their protection.

The Charter, which defines a substantial number of socio-economic, civil and human rights, came into force in 1986 and was followed in the subsequent year by the establishment of the Commission. As of 2016, 53 of the 54 member states of the African Union had ratified the Charter. The African Commission on Human and Peoples' Rights, which is officially based in The Gambia, oversees compliance with the Charter. The Commission is one of the many organs of the African Union, which was created by the transformation of the Organisation of African Unity in 2002. The Commission's work is complemented by the existence of the African Court on Human and Peoples' Rights, which began its work in 2004 under a 1998 protocol.

The following chapter, which primarily concerns the institutional framework for human rights protection in Africa through the establishment and operation of the African Commission on Human and People's Rights (ACHPR), is divided into two main subchapters. The first addresses the path to the establishment of the Commission and

6 | Nugent, 2004, pp. 460–464.
7 | For details, see LeRiche and Matthew, 2012.
8 | Nicholls, 2023.

the second deals with the legal background, scope of competence and procedure of the Commission. The remainder of this article will also focus on other issues related to the composition of the Commission or its basic agenda.

A large number of Euro-American authors, but also African ones, very often former members of the Commission or African lawyers (e.g. Fatsah Ouguergouz, U. Oji Umozurike, Vincent O. Orlu Nmehielle), have dealt with the issues of the Charter and the Commission.[9] In particular, the Commission's official websites and various databases that focus on the analysis of complaints and cases before the Commission and the African Court of Human Rights are of significant utility. One such database is the African Human Rights Case Law Analyser,[10] which is a freely accessible compilation of all decisions based on African supranational human rights mechanisms. It offers the most comprehensive access to African human rights law and the adopted relevant case law. Rather than merely offering a list of decisions and instruments, it presents them as interacting and interconnected texts, thereby facilitating research and enhancing comprehension of the complex textual and jurisprudential interactions within the African human rights system.[11]

Another noteworthy database is the website Data for Governance Alliance – African Voices for African Policy,[12] which is hosted by one of five partner organisations, namely *'Laws.Africa'*. This organisation's objective is to digitise legislation and policy and promote free access to African legislation from across the continent. *'Laws.Africa'* also aims to provide all users with free access to existing African legislation and judicial decisions, including those of the Commission and the African Court on Human and Peoples' Rights. However, additional information on African human rights compliance can be found in other databases, such as International Amnesty, Freedom House, V-Dem Democracy Indices, Polity IV and the Africa-only Ibrahim Index of African Governance.

2. The road to the African Charter on Human and Peoples' Rights and the African Commission on Human and Peoples' Rights

As previously stated, violations of human and peoples' rights on the African continent can be traced from the earliest times to the present day. If we were to attempt a categorisation of the historical periods in question, the main milestones are the period preceding European colonisation and the one following the attainment of political independence. In

9 | See Section Literature.

10 | African Human Rights Case Law Analyser [Online]. Available at: https://caselaw.ihrda.org (Accessed: 22 October 2024).

11 | As of 1 September 2024, the database comprises 863 cases and 1,159 documents. The largest number of cases are linked to human rights violations in Nigeria (117 documents), followed by Tanzania (111 cases), Togo (38), Mali (37) and Côte d'Ivoire (35). Only a handful of cases were linked to Namibia, Madagascar, Congo, Lesotho, and Swaziland. Notably, no documents addressed the Central African Republic and South Sudan, where human rights violations are prevalent.

12 | Data for Governance Alliance [Online]. Available at: https://dataforgovernance.africa (Accessed: 22 October 2024).

light of the characteristics of African post-colonial states, which have been shaped by the political culture of colonisers, it is possible to distinguish between two distinct phases in the post-political independence era: up to 1990 and after 1990. The latter period has been characterised by the advent of democracy and the near-total decline of single/one-party states across the continent. The aforementioned temporal milestones permit the division of this extensive period into the pre-colonial, colonial, post-colonial and modern periods of African societal functioning.

Setting precise temporal markers for these periods (with the exception of 1990) represents a significant challenge, primarily due to the fact that African regions were subjected to colonial rule over several centuries. The term 'Scramble for Africa' is used to describe the process of European colonialism in Africa, which is often thought to have begun in the 1880s and ended at the end of this century, but in fact extended into the 1920s, with the final control and consolidation of Portuguese colonial territories in Africa.[13] Additionally, the political independence of African states occurred between the 1950s and the 1990s, such as Libya in 1951, Morocco and Sudan in 1956, Ghana in 1957, Namibia in 1990, and Eritrea in 1993. However, South Sudan achieved political independence in 2011.[14]

The paucity of documentary evidence of African history, which has largely been transmitted orally from generation to generation, renders it challenging to document the suppression of human and peoples' rights in the pre-colonial period. Some African historians posit that pre-colonial Africa was structured according to a hierarchical caste system, but unified by a common set of mythical beliefs. The first to elaborate on the concept of human rights in the pre-colonial period is I. Nguema, who identified four basic groups: gregarious society, familial society, hierarchical society and the society en route to statehood.[15] However, there are also other concepts of the division of African pre-colonial society according to the nature of human rights in the literature.[16]

It is important to note that pre-colonial Africa was comprised of a diverse array of peasant agricultural, pastoral and fishing communities shaped by a multitude of environmental, topographical, climatic, vegetative and other prevailing factors. These conditions exerted varying influences on lifestyles even within the same ethnic groups. The practice of organising African societies into kinship groups undoubtedly influenced their specific behaviours with respect to human rights and the establishment of norms.[17]

Umozurike posited that pre-colonial Africa can be divided into two broad categories of societies. The first category comprises societies with advanced systems of government, exemplified by African kingdoms such as Yoruba, Benin, Ashanti, Monomotapa, the Zulu, Swazi and Lesotho. In these societies, executive, legislative and judicial power was typically concentrated in the hands of individual rulers. The second category encompasses the majority of Africa, which was comprised of small communities headed by chiefs, elders and other traditional leaders.[18]

Members of both such societies were typically afforded the full range of human rights, including the right to life and property. These rights were safeguarded by the kings

13 | For example, see Chabal et al., 2002.
14 | Compare Nugent, 2004; Meredith, 2005; LeRiche and Matthew, 2012.
15 | Nguema, 1990, pp. 261–277.
16 | For example, Busia, 1992, pp. 29–48.
17 | Closed clusters were formed based on extended family principles.
18 | Umozurike, 1997, p. 14.

or local tribal chiefs of both basic social groups. In contrast, the term 'outsiders' usually referred to members of different tribes or ethnic groups. This highlights the significant distinction between the universal concept of human rights in pre-colonial and modern times. It is also important to acknowledge that slave labour, typically involving captives from inter-tribal conflicts, was prevalent in pre-colonial Africa. Additionally, primitive customs such as human sacrifice during natural disasters to appease deities or ensure a bountiful harvest, the killing of newly born twins (mothers were expelled) and the persecution of individuals with albinism only ceased with the advent of colonial rule.

This relatively idyllic period was replaced by colonial expansion and the conquest of Africa by both Europeans and Arabs, which resulted in the direct involvement of these groups in the slave trade. It also led to the most egregious violations of human rights and freedoms on the African continent. As a result of the slave trade, young men, women and children became a scarce and valuable commodity. It is estimated that during the long period of slave trade, up to 80 million people from the African continent were lost,[19] with some estimates suggesting a figure as high as 70% of those transported from the African interior to the coast and then to the Americas did not survive the journey.[20]

The colonial conquests on the African continent, largely motivated by the pursuit of a new maritime route to India circumventing the African continent, precipitated a new era of severe human rights violations and the curtailment of freedoms on the African continent. The inhumane slave trade, which was initially tacitly endorsed by the Catholic Church, subsequently came under mounting pressure from European public opinion. In response, the world's dominant maritime power at the time, the Great Britain, initiated the persecution of slave ships in 1833. France did not join the ban on slavery until 1848. The first multilateral treaty, the Treaty of Berlin of 1885, which primarily served to divide the power interests of European countries on the African continent, was the first international treaty to declare slave trade illegal. However, the slave trade did not cease immediately. Indeed, Article VI of the treaty promised the indigenous peoples a limited protection of human rights, including freedom of religion, by the colonial authorities.[21]

As could be expected, the reality diverged significantly from the written promises of the colonial powers. This included the complex ideology of exporting the benefits of civilisation to the underdeveloped African population, which became a prominent political mantra for European political elites throughout the 19th century and beyond. In French, Portuguese and Belgian colonies, the concept of direct rule (the complete implementation of political and administrative administration in accordance with the 'mother' country) permitted selected individuals to acquire full citizenship under specific conditions (completion of comprehensive French or Portuguese education, completion of military service, monogamous marriage, payment of taxes, permanent residence, employment etc.). However, full political rights and access to public office remained inaccessible. A similar situation prevailed in German, Spanish and Italian colonies.[22]

In contrast to the approach taken by the British in their colonies, referred to as indirect rule, the British accepted the administration of local African chiefs subject to the control of colonial officials. This approach also involved the non-interference of the

19 | See, for example, Davidson, 1961.
20 | Curtin, 1964.
21 | Umozurike, 1997, p. 20.
22 | See, for example, Klíma, 2012.

British in the internal affairs of African communities, including the application of traditional customary law, the acceptance of local judicial systems, traditional ways of life, polygamy, and other practices. However, non-interference was only maintained unless it directly threatened British colonial interests.[23]

The primary objective of European colonisers, whether using direct or indirect rule, was to maximise the profits derived from the exploitation of human and material resources. The colonial legislation enacted by French, Belgian, Portuguese and other European powers permitted the utilisation of so-called forced labour in the public interest, which was used to increase the wealth of European settlers and facilitate the exportation of goods from the colonies to Europe.

The principles of freedom of speech, assembly, association and the right to self-determination became a source of contention with the colonial power when they were perceived as a potential threat to the colonial system. A considerable number of prominent African intellectuals and politicians were incarcerated (e.g. Kwame Nkrumah of Ghana, Jomo Kenyatta of Kenya, Nelson Mandela in South Africa, Agostinho Neto of Angola). All political activities in the Portuguese, Belgian and Spanish colonies were strictly forbidden and brutally persecuted. A significant number of political activists were imprisoned or forcibly conscripted to labour on plantations or to harvest tropical timber, which was essential for the European industry and shipbuilding sectors. In the 1950s, the international community was horrified by the images of black workers in shackles on Belgian plantations.[24]

The publicly proclaimed civilising role of European countries in Africa resulted in a select few dozen African students (predominantly from prominent collaborating African families) being permitted to pursue their studies at European universities. The education system in the colonies was severely inadequate and was primarily driven by the Roman Catholic and Protestant Churches through the provision of classes at their mission stations. The primary schools in towns were mainly for white settler children and civil servants, as were hospitals and other public services.

The general political, social and economic oppression of the indigenous African population, which had virtually no human civil and political rights or freedoms, had a detrimental impact on African traditional society, its existing way of life, African culture, religion (forced Christianisation) and led to deepening underdevelopment and reducing the development of African society as a whole.

The establishment of the UN after the Second World War and the subsequent adoption of the UN Charter, which enshrined the right to self-determination for oppressed people,[25] provided a crucial catalyst for the emergence of national liberation struggles across regions of the world where people were subject to colonial domination. The surge of national liberation movements in Southeast Asia culminated in the proclamation of independence in the Philippines, India, Pakistan, Burma, Sri Lanka, Indonesia and elsewhere. In the early 1950s, internal armed resistance precipitated the collapse of French colonial rule in Vietnam, Cambodia and Laos (1954).[26]

23 | See, for example, Curtin, 1964.
24 | Hrbek, 1966, pp. 518–521.
25 | United Nations Charter I, Article 1.2.
26 | Mrázek, 1980.

The success of the national liberation movement and the emergence of independent states in Southeast Asia gradually disseminated to other colonial countries, particularly in the Middle East and North and Sub-Saharan Africa. Furthermore, the direct involvement of African soldiers in World War II, particularly within the French army (e.g. the so-called Senegalese Rifles), was instrumental in the post-war national liberation struggle. In addition to military training, the majority of these soldiers received fundamental education, a range of technical skills, a more extensive international political outlook and were exposed to European political culture.[27] The declaration of political independence in a number of African countries was accompanied by considerable optimism regarding the potential for the restoration of African society, traditional culture and religion, the protection of human rights and freedoms and, most importantly, the restoration of African dignity, respect for life and equality. The new political elites have typically attained power through multiparty, free and democratic elections, adopting democratic constitutions based on the constitutional documents of their former 'mother' countries. Notably, former French colonies have even implemented the 1948 Declaration on the Right of Man and the Citizen and the Universal Declaration of Human Rights. At a first glance, the African people, seemed to have entered a new phase of their development.

It soon became evident that this assumption was erroneous. In most independent African countries, the emergent political elites effectively adopted the political culture of the former colonisers' rule. In the name of national unity, they began to gradually eliminate political opposition and ethnic minorities. This resulted in the banning of opposition political organisations, persecution of political opponents and declaration of one-party systems (single/one-party state). The ruling political party not only exercised control over all existing political institutions, including the presidency, government, parliament, and local governments, but also became the dominant force in all other areas of African society, such as the economy, civil society, and culture. The term 'post-colonial African society' has become a widely used concept in African studies literature.[28]

Corruption also became pervasive in political and economic life. Without the requisite political connections, it was impossible to engage in business or commerce. The financial gains from vast mineral and natural wealth resources did not contribute to national growth, but rather became the spoils of political and economic elites.

The deterioration of the economic situation, scarcity of employment opportunities, intensification of poverty and decline in living standards were a stark contrast from the expectations of the African population in relation to the expulsion of the colonisers and the proclamation of political independence. The political and economic elites displayed a high degree of arrogance and there was virtually no political opposition; this was often based on ethnic, regional and local interests. Furthermore, the police, and even the military, were responsible for brutal repression of all public expressions of protest, including student protests, demonstrations and strikes. There were also restrictions and suppressions of human rights and freedoms, as well as murders and arrests. The persecution of opponents of the regime and representatives of minor ethnic groups (Central African Republic during 1966–1979, Equatorial Guinea during 1969–1979, Idi Amin's Uganda during 1971–1979 etc.), as well as ethnic pogroms in Nigeria, Burundi and Rwanda, resulted in mounting frustration and discontent among the African population.

27 | In detail see e.g. Nugent, 2004, pp. 41–49.
28 | See, for example, Meredith, 2005.

The African population was characterised by a pervasive sense of discontent, which frequently manifested in the highest echelons of the armed forces. Between 1960 and 1989, members of these forces were responsible for either successful or unsuccessful military coups on hundreds of occasions.[29] The post-colonial history of the majority of African states is inextricably linked to the rise of military regimes. Some military coups were carried out with minimal civilian casualties and were met with enthusiasm by the domestic population. Conversely, other coups have been accompanied by violent clashes between different military factions, often resulting in prolonged and bloody civil wars and conflicts. The Congo crisis in the early 1960s is a notable example. The 1960s also saw military coups in Nigeria (1967–1970), Angola, Mozambique and Ethiopia, which resulted in hundreds of thousands of civilian casualties, famine and disease.

The UN Security Council, African Union and human rights organisations, which have been unable to prevent these incessant manifestations of brutal repression of human rights and freedoms on the African continent, have merely stood by and issued general verbal condemnations. The world powers at the time, the USA and the Soviet Union (Cuba), have also played roles in the political instability on the African continent (and not only) by providing military and material support to one of the warring parties in a number of civil conflicts (Congo, Nigeria, Mozambique, Angola, Ethiopia) and wars (Ethiopia–Somalia, South Africa–Angola). The Organisation of African Unity (OAU), founded in 1963 and committed to the protection of human rights and freedoms in its founding charter, has also played a negative role in this process. However, its declared policy of 'non-interference in the internal affairs' of its member states did little to prevent national political and military elites from brutally intervening against their own populations.

After the end of the Cold War in the late 1980s and the subsequent collapse of the Soviet Union, a new phase in the protection of human rights and peoples' rights started, which had an impact of the internal political developments on the African continent. The ruling political elites suddenly found themselves without the support of the strong world powers (USSR, USA) or the necessary financial resources to maintain an overstretched state apparatus and, above all, to meet the needs of members of the armed forces and the police. Both the International Monetary Fund and the World Bank linked their large financial loans to the political (also economic) conditions that the ruling political elites would abolish one-party systems in their countries, allow the formation of new political parties and hold free and democratic elections. Their conditions included developing the civil society, restoring the rule of law and ensuring the independence of the judiciary.[30]

The process of democratisation, which began in the early 1990s in the vast majority of African countries, brought enormous optimism to the African society and renewed the hope for the rule of law and the protection of human rights and freedoms, as well as the rights of peoples and ethnic groups. New democratic constitutions were adopted in several African countries, with articles guaranteeing human rights and freedoms, including the instruments and institutions of the rule of law, as an integral part of the constitution.[31]

Although it initially appeared that the basic principles of the rule of law were fully operational in African countries for the first time in their long history, it has once again

29 | Decalo, 1976.
30 | See, for example, Chazan, 1999.
31 | Bratton and van de Walle, 1997.

become apparent that the tragic past, historical injustices and grievances, unfairness and inequality in African society remained deeply entrenched and have gradually been reflected in the policies of the new political elites. As a result, the 1990s saw rising political instability on the African continent, which gradually translated into civil wars in Sierra Leone, Liberia, the Democratic Republic of Congo, Angola, Mozambique, the genocide in Rwanda and even the African World War in Central Africa, involving nine neighbouring African states.[32]

Political instability and the dissatisfaction with the old political elites have also led to dozens of successful and unsuccessful military coups, which have had a continuous negative impact on the politics of African states and the protection of human rights and freedoms (Gambia, Sudan, Mali, Niger, Burkina Faso, Chad, Zimbabwe, Central African Republic, Guinea-Bissau, Sierra Leone, Equatorial Guinea etc.).

The less-than-positive picture of the protection of human rights and freedoms in African countries, not only in the pre-colonial and colonial periods, but also after the attainment of political independence and the beginning of a promising democratisation process in the early 1990s, suggests that there has been little interest on the part of political elites on the African continent in accepting the basic principles of the rule of law, including the protection of the rights and freedoms of their people.

Despite the less than positive picture of the state and respect for human rights on the African continent, there have been attempts to address the situation since the 1960s. In 1961, the International Commission of Jurists held an important conference in Lagos, Africa, attended by 194 lawyers from 32 countries, including 23 African countries. In his opening address, the then Governor-General of Nigeria, Nnamdi Benjamin Azikiwe, who was subsequently the first President of Nigeria, called on African states to adopt the Human Rights Convention as an integral part of their belief in the rule of law. A year later, he articulated his position in his publication, 'The Future of Pan-Africanism'.[33]

The 1963 OAU Charter briefly mentions the importance of human rights in its preamble:

> Conscious of our responsibility to harness the natural and human resources of our continent… persuaded that the Charter of the United Nations and the Universal Declaration of Human Rights, to the Principles of which we reaffirm our adherence, provide a solid foundation for peaceful and positive cooperation among states.

This idea was further developed by the so-called Lusaka Manifesto of 1969, which stated that renewed

> faith in the belief that all men are equal and have equal rights to human dignity and respect, regardless of colour, race, religion or sex. We believe that all men have the right and duty to participate as equal members of the society, in their government.[34]

Other important documents on the protection of the human rights of refugees were defined by the OAU in the late 1960s.

32 | Stys, 2012.
33 | Azikiwe, 1962.
34 | Quoted from Hamalengwa, Flinterman and Dankwa, 1988, pp. 104–110.

During the 1960s and 1970s, a large number of international conferences were held to discuss human rights issues in Africa (Cairo: 1969, Addis Ababa: 1971, Dar-es-Salaam: 1973, Dakar: 1978, Monrovia: 1979). As a result of these, a special committee was set up in Dakar in 1978, whose members summarised the results of the previous meetings and prepared recommendations for the OAU to be presented by the Senegalese President, Leopold Senghor, at the Monrovia session in 1979. Following the discussion of these recommendations, the Monrovia Proposals for the Establishment of an African Commission on Human and Peoples' Rights were drawn up.[35]

The, a working group chaired by E. K. Wiredu (Ghana) prepared a document which was discussed at the OAU Ministerial Conferences in Dakar (1979) and Banjul (1980, 1981) and adopted as the Banjul Charter on Human and Peoples' Rights at the Nairobi Summit in 1981.[36] The Charter, which entered into force on 21 October 1986, included articles establishing the African Commission on Human and Peoples' Rights.

3. The African Commission on Human and Peoples' Rights

As mentioned above, the African Commission on Human and Peoples' Rights was established on the basis of the adopted Charter on Human and Peoples' Rights, Article 30, and inaugurated on 2 November 1987 in Addis Ababa, Ethiopia; its secretariat was located in Banjul, The Gambia. By virtue of the manner in which it was established, it must be regarded as a specialised commission and organ of the OAU/AU.[37]

As its name suggests, the Commission is concerned not only with the protection of human rights but also with awareness-raising and information activities and the interpretation of the African Charter on Human and Peoples' Rights as the fundamental document guaranteeing human rights on the African continent. The Commission thus acts primarily as a mediation body, offering individuals and non-profit organisations the opportunity to bring to its attention cases of human rights violations by signatories to the African Charter.[38]

The Commission is composed of 11 members elected by secret ballot by the members of the AU Assembly of Heads of State and Government from among experts nominated by the signatories to the Charter.[39] At least four months before each election, the AU Secretary-General invites all Signatory States to nominate candidates.

The AU Secretary-General then draws up an alphabetical list of the persons so nominated and transmit it to the Heads of State and Government at least one month before the election, who then elect them by secret ballot.[40] The candidates with the highest number of votes are elected to the Commission.[41]

35 | Ramcharan, 1992, pp. 307–413.
36 | Umozurike, 1997, p. 26.
37 | Nmehiele, 2001, p. 171.
38 | Chapter 30, African Charter on Human and Peoples' Rights.
39 | Chapters 31 and 33, African Charter on Human and Peoples' Rights.
40 | This election by the OAU/AU Assembly is specific compared to the European or American system, where the members of their human rights commissions are elected by the plenary of the regional organisations. See Ouguergouz, 2003, p. 487.
41 | Chapter 35, African Charter on Human and Peoples' Rights.

The proposed candidates (only one national of the same nationality may be a member of the Commission[42]) must be eminent African personalities of the highest repute, known for their high moral character, integrity, impartiality and competence in human rights and people's rights issues, with special consideration being given to individuals with legal experience.[43]

The wording of this article shows the intention of the signatories of the Charter to include among the candidates not only retired and experienced politicians or diplomats but, above all, key experts in human and political rights issues. According to this article, preference should be given to the candidates who have a long track record of working on human and political rights issues in their practical work (e.g. in national, regional or international human rights organisations), in judicial institutions or in academia. At the same time, this article suggests that preference is to be given to members of the Commission with a legal background and a focus on human rights or international law.

Between 1987 and 1995, a total of 16 jurists served on the Commission, including judges of the highest judicial and appellate institutions, advocates-general, lawyers, university professors, lawyers in various ministerial positions or in the state or local service, many of whom held diplomatic posts.[44]

The Assembly of Heads of State and Government also considers the geographical and gender balance when electing Commission members. However, it was not until 1993 that the first woman was elected. Even after that, this requirement was not always met. The situation began to change gradually at the beginning of the 21st century (e.g. the Commission had four female Commissioners starting in 2002); the current Commission (2024) includes six women and five men.

Article 34 of the Charter provides for the right of each State to nominate a maximum of two candidates, only one of whom may be a national.[45] This means that each country can nominate a candidate from another signatory country. The usual practice in the selection of members is to ensure equal representation, not of individual African states, but of all regions, North, West, East, Central and South, as well as the African islands. This requirement is based on the existence of different legal cultures in different parts of Africa.

Looking at the nationalities of the Commissioners, there were more than 30 countries represented per region, with some countries having double representation during the lifetime of the Commission (e.g. Egypt, Botswana, Zambia, Uganda, The Gambia, Nigeria, Mauritius); it is also not uncommon for some Commissioners to be re-elected for two six-year cycles. Somewhat surprisingly, representatives from Namibia, Morocco, Côte d'Ivoire, Madagascar, Niger, Chad etc. have never sat on the Commission.

The absence of representatives from countries with the worst crimes against humanity, such as Equatorial Guinea, Eritrea, the Central African Republic, Somalia, South Sudan, Guinea-Bissau and a few others, is not surprising. Representatives of smaller African states (Lesotho, Swaziland, Togo, Djibouti, Burundi etc.) have most likely failed in the past to gain the necessary diplomatic support from AU member states.

42 | Chapter 32, African Charter on Human and Peoples' Rights. It is interesting to note that other similar institutions (American Convention, European Convention, European Court of Justice etc.) do not have such restrictions.
43 | Chapter 31, African Charter on Human and Peoples' Rights.
44 | Umozurike, 1997, p. 67.
45 | Chapter 34, African Charter on Human and Peoples' Rights.

The two basic legal traditions in Africa are the common and civil law, which are based on the legal traditions of Africa's colonial authorities. Those countries who were under British rule imbibed the common law tradition, while the others adopted civil law.[46]

The Commission's use of several working languages is also linked to the legal culture, the choice of which was influenced by the colonial history (originally English, French, Arabic, Portuguese and Spanish). The most widely used languages in the Commission are English and French.[47]

Once the final list of candidates has been announced, the individual representatives of the signatory governments discuss among themselves the most suitable candidates and seek support for these candidates among other representatives of African governments. As such, the final election of the members of the Commission can be described as the result of previous complex political negotiations between individual signatory states, often resulting in difficult compromises and agreements.

Article 36 states that the members of the Commission are elected for a term of six years and be eligible for re-election.[48] In the first term (since 1987), four members retired after two years and the other three members served for four years. The remaining four elected Commissioners served for six years. The division of the elected members of the first Commission into these three groups was immediately decided by lot.[49] At the end of the two-year, four-year and six-year terms, new members are elected in two-year increments (four members, three members, four members etc.). The aim of this electoral system is to ensure the continuity of the Commission's existence and activities.

Upon election, members take a solemn oath to perform their duties impartially and faithfully and to exercise their functions in a personal capacity, not as representatives of their countries. The members of the Commission must act with complete independence in their dealings with representatives of the various parties to a conflict (states, national institutions, individuals). However, political practice has shown that their independence (especially for former and contemporary politicians) may be called into question because of their political backgrounds.

As the Commission is not full-time, its members may continue to work in their previous occupations. The Charter itself does not specify what professions members of the Commission may pursue or what government or state positions they may hold during their term. In practice, it holding a high-level government position (e.g. minister) could positively influence the Commission's agenda in promoting human rights in a particular African country.

However, the Charter clearly defines the full independence of the Commissioners, including the exercise of their functions independently of the country that nominated them. As noted above, the Commissioners speak for themselves, not for the state that nominated them and negotiated their election to the Commission through diplomatic channels.

46 | However, one needs to note that the notion of personal law is growing to be a major legal tradition in Africa. This class includes customary law or what is generally referred to as native law and customs. Sharia law is seen as personal law, being considers customary law in areas where common or civil law are predominant. There are also Islamic states in Africa, where Sharia is the main or major legal tradition. See, for example, Nmehiele, 2001, p. 174.

47 | Nmehiele, 2001, p. 174.

48 | Chapter 36, African Charter on Human and Peoples' Rights.

49 | Chapter 37, African Charter on Human and Peoples' Rights.

Since its inception, the independence of the Commission has been compromised to some extent by the fact that some of its members have previously held senior political positions at the national level. This political practice, that is, the appointment of retired or active politicians to Commission posts, has often been questioned since, with reference to the political history of leading national governments in suppressing the human and political rights of their country's citizens.

For example, Moleleke D. Mokama (Botswana) and Alexis Gabou (Congo), also served as their respective countries' Attorney General and Minister of the Interior while on the Commission. In the 1990s, Dr. Ali Badawi El-Sheikh was Egypt's ambassador to the Netherlands. Similarly, Mohammed Hatem Ben Salem was Tunisia's ambassador to Senegal. Other members were either presidents of their countries' constitutional courts or members of their supreme courts.

The general view on these retired and active politicians and judges was that such members could hardly act as independent experts in carrying out their functions. Moreover, as Nmehiele pointed out, the demanding nature of their roles in the Commission and their home countries complicates the work of the Commission. It is not uncommon for up to four or five Commissioners to be absent from some of the Commission's meetings.[50]

The participants at the second workshop on the participation of NGOs in the work of the African Commission, held in Tunis in February/March 1992 and organised by the International Commission of Jurists and the Commission, considered that the holding of high state and government positions (Prime Minister, Minister for International Affairs etc.) was contrary to the statute of the Commission.

Indeed, in the context of the Commission's agenda (complaints by individuals or interest groups about the suppression of human rights), situations in which a member of the Commission would be in an open conflict of interest could arise. The Charter does not provide rules for such a potential conflict (e.g. the actual decision to withdraw from a meeting because of an apparent conflict of interest). These and other procedural issues were subsequently addressed in the February 1988 and October 1995 revisions of the Rules of Procedure.

However, the situation did not change significantly in the following years. In response to this common reality, the AU issued a note verbale to member states in April 2005, setting out guidelines for nominating Commissioners.[51] This note suggested that senior civil servants and diplomats be excluded from national nominations. The Commission discussed this note and other proposals to improve the rules of procedure at its 47th Ordinary Session in Banjul (Gambia) in May 2010.[52]

At this meeting, the Commission members adopted a general amendment to the Rules of Procedure, which provides in Article 7 that the office of a member of the Commission is incompatible with any activity which may impair the independence or impartiality of

50 | Nmehiele, 2001, p. 173.

51 | African Commission on Human and People's Rights [Online]. Available at: https://web.archive.org/web/20241021210759/www.achpr.au.int/en/commission/overview/ (Accessed: 21 October 2024).

52 | This was the third amendment to the Rules of Procedure. The first Rules of Procedure were adopted by the African Commission on Human and Peoples' Rights during its 2nd ordinary session held in Dakar (Senegal) from February 2 to 13, 1988 and it was revised during its 18th ordinary session held in Praia (Cabo-Verde) from 2 to 11 October 1995. The last fourth amendment to the Rules of the Procedure ACHPR was made on 4 March 2020.

that member or the requirements of the office, such as being a member of a government, a minister or an under-secretary of state, a diplomatic representative, a director of a ministry or one of his subordinates, or a legal adviser to a foreign ministry, or performing any other politically binding function or any activity of such a nature as to impair independence and impartiality.[53] In case of incompatibility, the Commission Chairperson informs the African Union Commission Chairperson, who declares the seat vacant.[54]

The election of the members of the first Commission took place on 29 July 1987 at the 23rd ordinary session of the Assembly of Heads of State and Government in Addis Ababa.[55] Commissioners were elected for each region: North Africa: Ali Mahmoud Abou Hadiyah (Libya) and Badawi Ibrahim El Sheikh (Egypt); Southern Africa: M. D. Mokama (Botswana) and Mubanga-Chipoya C. L. C. (Zambia); Eastern Africa: Ibingira Stuart Grace (Uganda) and Robert Habesh Kisanga (Tanzania); Central Africa: Gabou Alexis (Congo) and Nguema Isaac (Gabon); West Africa: Blondin Beye Alioune (Mali), Youssoupha Ndiaye (Senegal) and Sourahata B. Semega Janneh (The Gambia).[56]

The Commission is headed by a Bureau consisting of a Chairperson and a Vice-Chairperson who exercises the functions provided for in the African Charter and the rules. The Chairperson and the Vice-Chairperson are elected by the members of the Commission from among their number. The election is by secret ballot and only members present vote. A member who receives a simple majority of the votes of the members of the Commission present and voting is elected. In accordance with Article 42, the Commission elects its Chairperson and Vice-Chairperson for a period of two years, renewable once. The Chairman and the Vice-Chairman are members of the Commission.[57]

The Bureau coordinates the activities of the Commission and prepares and approves the Commission's work programme. The Bureau also supervises and evaluates the work of the Secretariat of the Commission. The Bureau is also empowered to decide on urgent matters between meetings of the Commission. However, it is required to present a situation report to the members at the Commission's next meeting.

The Chairperson carries out the functions assigned to him or her by the Charter, the Rules of Procedure and the decisions of the Commission and the Assembly. In the exercise of his or her functions, the Chairperson is under the authority of the Commission.

The Chairperson presides over the meetings of the Commission; submit the assessment report referred to in Rule 13(3) to the competent organs of the African Union Commission, supervises the preparation of the budget by the Secretariat and its adoption by the Commission, presents and defends the budget before the relevant African Union bodies, presents a report to the Assembly and the Commission on the activities carried out during the intersession, performs any other functions that may be conferred upon him or her in the Rules of Procedure or other tasks entrusted to him or her by the Commission or the Assembly and delegates, when necessary, to the Vice-Chairperson or, if

53 | Rule 7.1 of the Rules of Procedure of the African Commission on Human and Peoples' Rights. Banjul, May 12 to 26, 2010 (hereinafter, the Rules of Procedure), p. 8.
54 | Rule 7.3 of the Rules of Procedure, p. 8.
55 | Nmehiele, 2001, p. 171.
56 | OAU DOC AFR/COM/HPR.2 (1), Annex II.
57 | Chapter 42, African Charter on Human and Peoples' Rights.

the Vice-Chairperson to is not available, another Commissioner, the abovementioned powers.[58]

The 2010 Rules of Procedure also clearly define the powers of the Vice-Chair:

> If the Chairperson is temporarily unable to perform his or her duties, the Vice-Chairperson shall perform the duties of the Chairperson. The Vice-Chairperson, acting in the capacity of the Chairperson, has the same powers and functions as the Chairperson. The Vice-Chairperson shall perform any other function delegated to him or her by the Commission or the Chairperson of the Commission. If both the Chairperson and the Vice-Chairperson are unable to carry out their duties at the same time, the duties of Chairperson shall be carried out by another Commissioner according to the order of precedence laid down in Rule 6.[59]

If a member of the Bureau of the Commission resigns from his or her position or ceases to be a member of the Commission, the remaining member represent the Bureau until the next session, when the Commission fills the position for the remainder of the term of office.[60]

According to Article 41, the AU Secretary-General appoints a Secretary of the Commission, who provides the staff and services necessary for the effective implementation of the mandate of the Commission.[61]

The activities of the Commission are ensured by the Secretariat of the Commission, whose members are selected and appointed by the President. The members of the Commission propose the organisational structure of the Secretariat and place it before the African Union for approval.

The Secretariat of the Commission is composed of the Secretary and the Commission's professional, technical and administrative staff. The Secretary is appointed by the Chairperson of the African Union Commission pursuant to Article 41 of the African Charter after consultation with the Chairperson of the African Commission. The African Union Staff Rules and Regulations govern the Status of the Secretary and the staff.[62]

The main task of the Secretariat is to provide the necessary conditions for the successful performance of the duties of the members of the Commission and provide administrative, technical and logistical support for the day-to-day running of the Commission. The members of the Secretariat are responsible to the President of the Commission for their activities.

In addition to ensuring day-to-day operations, the members of the Secretariat, in consultation with the Chair, prepare a draft agenda for each session; the Commission's strategic plan, annual work plan and annual budget; guidelines on missions for adoption by the Commission; present a written report to the Commission at the beginning of each session on the activities of the Secretariat since the preceding session; implement the decisions entrusted to him or her by the Commission or the Bureau; make available to the general public documents which are not confidential, including States Reports, by ensuring that they are posted on the website of the Commission; ensure the maintenance

58 | Rule 14 of the Rules of Procedure, 2010, p. 9.
59 | Rule 15 of the Rules of Procedure, 2010, p. 10.
60 | Rule 16 of the Rules of Procedure, 2010, p. 10.
61 | Chapter 14, African Charter on Human and Peoples' Rights.
62 | Rule 17 of the Rules of Procedure, 2010, p. 10.

and regular updating of the website of the Commission; and assess the performance of the staff of the Commission.[63]

The Secretariat has currently 13 staff members who provide administrative, legal (Senior Legal Officer, Legal Officer), archival, records management and technical services. The Secretariat also includes a Senior Administration and Human Resources Officer and is headed by the Acting Secretary of the Commission, who provides a full range of services to the President of the Commission. AU bears the cost of staff and services, including other support staff.

The Commission meets twice a year in ordinary session, which may be held at the headquarters of the Commission or, at its invitation, on the territory of another State Signatory. The host country bears all additional financial costs (e.g. travel expenses of members, accommodation) associated with this meeting on the basis of a contract concluded with the Commission.

With the approval of the Chairperson of the African Union Commission, meetings of the Commission may also be held at the headquarters of the African Union. The sharing of the costs for such a meeting is agreed with the Commission of the AU.

The length of each session varies from 10 to 15 days, depending on the needs and financial resources. The date of the ordinary session is fixed by the Commission on a proposal from the Chairperson of the Commission after consultation with the Secretary of the AU. The Secretary of the African Commission notifies the members of the date and venue of the ordinary session at least 60 days before the session.

The Commission may hold concurrent extraordinary sessions, which is convened by the Secretary of the Commission at the request of the Chairperson of the ACHPR Commission or a majority of the members of the Commission. An extraordinary meeting should be sent to members as soon as possible before the meeting.

In addition to attending regular and special sessions of the Commission and actively participating in the consideration of the Commission's agenda, members are expected to participate actively in raising the profile of the Commission's work between sessions and to speak out in defence of human rights and peoples' rights at various human rights conferences, seminars, in discussions in professional journals and the public and private media (television, radio, daily press etc.).

During their six-year mandate, the members are expected to be active instruments for the promotion of the human and political rights of the African population and to direct all their public activities towards the fulfilment of this primary objective.

The Commission is governed by its own rules of procedure and has a quorum when seven members are present. Decisions of the Commission are taken by a simple majority (in theory, the Commission is quorate when seven members are present and a majority of four votes can take a binding decision). In the event of a tied vote, the Chairperson has the casting vote.

The Secretary-General of the AU may attend meetings without the right to vote but may be invited to speak by the Chairperson of the Commission. His remuneration and allowances are part of AU's regular budget.[64]

In performing their duties and missions, the members of the Commission enjoy the diplomatic privileges and immunities provided for in the General Convention on the

63 | Rule 18f of the Rules of Procedure, 2010, p. 11.
64 | Chapter 44, African Charter on Human and Peoples' Rights.

Privileges and Immunities of the AU.[65] Complete immunity applies not only to activities carried out in the course of a specific mission in accordance with the Commission's agenda but also to Commissioners travelling to and from meetings.

The members of the Commission, similar to diplomatic representatives, share immune from detention, arrest, investigation or interrogation, search, seizure or confiscation of their personal effects and are issued diplomatic passports by the AU for the exercise of their functions.[66] In general, these privileges are not for personal gain, but in the interest of the organisation they represent.

For these reasons, the Commissioners should use these documents and privileges only in the performance of their duties under the Commission's agenda. In the exercise of their functions and duties, Commissioners are not agents and cannot authorise any person outside the Commission to invoke their immunity or to carry out on-the-spot investigations on their personal behalf.

It is not only the members of the Commission who enjoy immunity, but also the Commission itself. In the 1989 agreement between the OAU/AU and the host country (The Gambia), the host country undertakes to fully respect the immunity of its members and the Commission as a whole and the inviolability of the Commission's headquarters and all its other facilities.

In accordance with Article 3 of this treaty, the archives of the Commission and, in general, all documents belonging to and in the possession of the Commission, wherever they may be, are inviolable. This immunity also applies to all publications and moving pictures, films and sound recordings.[67]

In addition to the orderly termination of membership of the Commission at the end of a six-year term, the Charter provides for certain other circumstances which may lead to the termination of membership of the Commission, such as the resignation or removal of a member of the Commission. These matters are specified in Article 39 of the Charter, which deals with the early termination of the term of office of a member of the Commission.

There are several possibilities. A member of the Commission may resign at any time (often because of health problems, age or incompatibilities arising from taking up a public or government position). A Commissioner who wishes to resign of his or her own accord must do so in writing to the President of the Commission, with effect three months after the date of the letter of resignation.

Alternatively, in the event of the death or resignation of a Commissioner, the President of the Commission immediately informs the Secretary-General of the AU, who declares the post vacant from the date of death or the date on which the resignation takes effect.[68] Every seat declared vacant in conformity with the present Rules is filled in accordance with paragraph 3 of Article 39 of the African Charter.

If, in the opinion of the majority of the other Commission members, a member of the Commission has ceased to perform his or her duties for any reason other than temporary absence, the Chairperson of the Commission informs the Secretary-General of the AU, who declares the position vacant.

65 | Chapter 43, African Charter on Human and Peoples' Rights.
66 | Článek VIII of the General Convention on the Privileges and Immunities of the AU.
67 | Umozurike, 1997, p. 69.
68 | Rule 8.2 of the Rules of Procedure, 2010, p. 8.

In each of the above cases, the Assembly of Heads of State and Government replaces the member whose seat has become vacant for the remainder of his or her term of office, which is not less than six months. Each member of the Commission remains in office until his or her successor takes up his or her duties.[69]

The Charter does not define the conditions for the removal of a member of the Commission on the grounds of insufficient or poor professional qualifications for the performance of duties, and the member can only be removed if he/she himself/herself establishes the circumstances set out in Article 39 (death, voluntary resignation, unexcused prolonged absence from meetings or failure to perform other tasks assigned to the Commission).

The Chairperson of the Commission, in cooperation with all members, establishes an internal procedure to ensure that all members perform their functions and duties in accordance with the Charter in a responsible manner and with the required quality.

The independence of a member of the Commission is also ensured by the fact that, in the performance of his or her essential duties, he or she cannot be removed from office by the Chairperson of the Commission or its members, by the AU Assembly of Heads of State and Government or by the national government that nominated him or her. Furthermore, the Assembly has no means of evaluating the performance of the members of the Commission or the Commission.

The main tasks and functions of the Commission, which may be further expanded by the Assembly of Heads of State and Government of the African Union, are primarily the protection of human and peoples' rights, the promotion of human and peoples' rights and the interpretation of the African Charter on Human and Peoples' Rights (Article 45 of the Charter). This mandate elaborates on Article 45 of the Charter, under which the Commission adopted its Rules of Procedure in 1988, revised them in 1995 and 2010 to fill in gaps, remove bottlenecks and correct errors.[70]

At the beginning of each six-year cycle of the Commission (1987–1992, 1992–1997, 1997–2002 etc.), it has become customary for its members to adopt a six-year action programme to define the main priorities for the period in question.

While the first Commission had perhaps the most difficult task of implementing the basic articles of the Charter and launching the Commission's activities, opening the agenda, establishing the rules of procedure, making the OAU member states aware that a new institution had been created etc., the members elected in 1992 set priorities such as the creation of a documentation and information centre; the organisation of seminars, workshops, training courses; the publication of the Commission's annual reports; and the publication of the Review Bulletin, various promotional materials and brochures.

In October 1991, the first issue of the Review of the African Charter on Human and Peoples' Rights was published, all issues of which are available online to interested readers, as is the African Human Rights Law Journal.

At the same time, the Commission monitors human rights through annual reports on the current situation in territories prepared by the AU member states and submitted to the Commission. The Commission also sets up working groups and sends observer missions to assess the current situation of human rights violations in specific African countries and seeks to raise awareness of human rights in its work (promotion missions).

69 | Chapter 40, African Charter on Human and Peoples' Rights.
70 | Dankwa, 1990, pp. 29–34.

Cases that cannot be resolved out of court (by negotiation, resolution, elimination of the problem etc.) are referred by the Commission to the African Court on Human and Peoples' Rights.

If we take a closer look at the main functions and tasks of the Commission, the interpretation or interpretation of the provisions of the African Charter at the request of a State Party (signatory to the Charter), an organ of the AU (formerly the OAU), or any other institution recognised by that international organisation is probably one of the most important functions and tasks of the Commission.

Another important function of the Commission is promoting human and peoples' rights. The Commission collects documents, undertakes studies and research on African human and peoples' rights issues, organises seminars, symposia and conferences, disseminates information, supports national and local institutions dealing with human and peoples' rights, issues opinions or recommendations to governments where appropriate, and works closely with national and international institutions dealing with human rights issues.

In the decades since its establishment, the Commission has organised dozens of international conferences and seminars in cooperation with UNESCO, the International Commission of Jurists and the Raoul Wallenberg Institute for Human Rights and Humanitarian Law. Its representatives took part in the Second World Conference on Human Rights in Vienna in 1993, among others.

Otherwise, the Commission works closely with a wide range of African human rights NGOs that collect complaints and grievances about human rights violations in their countries and help individuals successfully bring these complaints and grievances to the Commission. These human rights NGOs are in close contact with the African people, being thus crucial to the Commission's advocacy work.

The Commission grants observer status to human rights NGOs, allowing their representatives to attend the public meetings of the Commission. Amnesty International, with which the Commission works closely, plays a major role in the ongoing documentation of human rights violations in African countries.

According to one of the members of the Commission, later its chairman, Umozurike, to spread awareness of human rights, in the 1990s, the Commissioners divided up the various member countries (including those that had not ratified the Charter) and, within the limits of their financial resources, undertook promotional visits to African countries between the regular and special sessions of the Commission, explained the importance, objectives and functions of the Commission in various meetings with key government and state officials, as well as made presentations on the work of the Commission at public seminars and conferences. However, this project has long been hampered by a lack of funding and the large number of countries on the African continent.[71]

Commission members have urged national governments to make human rights and freedoms an integral part of the school curriculum and focus on working closely with local human rights NGOs, which are in closer contact with their citizens and are much more credible institutions than some government agencies (e.g. the police).

The Commission also constantly appeals to African governments, which control the public media (radio, television, newspapers) in their countries, to use these media to raise awareness of human rights and civil liberties. Obviously, it is much easier to obtain

71 | Umozurike, 1997, pp. 71–72.

support for these activities in liberal democratic or more or less democratic African countries than in non-democratic ones with autocratic or outright dictatorial governments where human rights violations are commonplace.

The dissemination of information about the Charter and the Commission's activities in non-democratic countries is thus limited because the political elites of these countries are not interested in their citizens complaining about their human rights violations (arbitrary arrests, imprisonment, torture, unfair trials, restrictions on political freedoms, freedom of speech, assembly, association etc.).

However, it is important for the members of the Commission to maintain the pressure on these non-democratic countries in accordance with their international obligations and attempt to change the political climate step by step.

Some authors have criticised the work of the Commission, pointing out that promotional activities greatly dominate the work of their Commissioners and the Commission itself.[72] Unlike them, we believe that this activity is very important, perhaps more important than the adoption of unenforceable recommendations and verbal statements about the non-observance of human rights in some signatory countries when the AU intervenes, which are often not even made public.

The lack of the knowledge and awareness of human rights among African populations is often the reason why African governments can be lax in implementing and upholding human rights in their countries. The importance of the Commission's promotional role is well highlighted by Fr. Dankwa.[73]

The agenda for evaluating the protection of human rights in individual states is more complicated. The biennial reports of the signatory states on the status of human rights and progress in this field, which were submitted after the 5th session of the Commission, form the basis for the evaluation of the human rights record of individual states.

The members of the Commission thus responded to an earlier request and preliminary approval by the Assembly of Heads of Government of the OAU. As a result of this meeting, a document setting out how the annual report should look and what it should contain was published.[74]

According to the methodology, the annual reports should contain complete information on the human rights situation in each country during the previous two years, the constitutional enshrinement of human rights and the judicial decisions affecting human rights. The reports should also include information on the activities of state institutions to promote respect for human rights, a list of measures taken to ensure respect for human rights or the identification of problems in this area or the implementation of individual articles of the Charter.

In return, the Commission offers assistance and advice in dealing with these issues. It even organised several workshops and seminars in Banjul and Harare (1993), Tunis (1994) etc., at which the participants, representatives of the signatory countries of the Charter, explained the procedure for the preparation of annual reports.[75]

The annual reports are intended not only to provide an informative overview of the human rights situation in individual African countries over a given period but also

72 | Bello, 1988.
73 | Dankwa, 2003, pp. 335–352.
74 | AHG/1659(XXV), Annex XII, AFR/COM/HPR.5 (IV).
75 | Umozurike, 1997, p. 72.

become the basic working documents for the Commission's negotiations with the signatory countries. Based the information contained in the annual reports, the members of the Commission believed that it would be possible to discuss their human rights problems with the representatives of the member countries to suggest possible solutions and to offer assistance.

The annual reports were intended to become a basis for constructive dialogue between the Commission and the political representatives of the African states, with the common aim of implementing the Charter and contributing to the improvement of the human rights situation.

However, the exercise of the Commission's monitoring function in this area has been greatly hampered by the fact that signatory States have very often failed to submit reports and continue to do so despite the Commission's requests. In April 1995, only 16 African countries had submitted annual reports (Libya, Rwanda, Tunisia, Egypt, Tanzania, Gambia, Senegal, Zimbabwe, Togo, Nigeria, Benin, Ghana, Cape Verde, Mozambique, Mauritius and the Seychelles).[76] Perhaps unsurprisingly, the annual reports for this period (the 9th to the 17th sessions of the Commission) were mainly presented by representatives of the countries represented on the Commission during this period.

Although the guidelines specifying the content and formalities of the annual reports became part of the annexes to the Charter, no sanctions or mechanisms were established to enforce the annual report against signatory countries.[77] In particular, African states with a history of flagrant human rights violations have not complied with this requirement and have not submitted reports. The Commission's subsequent practice of tolerating summary reports over a longer period has become a kind of concession to this obligation. In fact, reports from signatory countries covering a 10-year period are no exception.

The evaluation process has several stages and results in a recommendation from the Commission, which a given State should implement in the following period. Unfortunately, the Commission has no powers to enforce and monitor this implementation, so the concrete impact of these recommendations is very problematic and generally questionable.[78]

The Commission members are not mere verbal critics of human rights but offer a series of recommendations to raise awareness of human rights in individual African countries. In particular, they attach great importance to the inclusion of the protection of human rights in the curricula of primary, secondary and higher education.

The Commission also recommends the incorporation of the articles of the Charter into the basic constitutional documents of each African country and encourages nation states to establish human rights commissions at the national, regional and local levels to effectively ensure human rights awareness among broad segments of the African population.

Since 21 October has been designated as African Human Rights Day, the members of the Commission call upon states and their political representatives, as well as existing human rights organisations, to pay special attention to human rights issues in the public media, schools and government institutions on that day.[79]

76 | Umozurike, 1997, p. 73.
77 | Viljoe, 2000, pp. 110–118.
78 | For details, see Murray and Long, 2015.
79 | The Charter entered into force on 21 October 1986.

Probably the most important function and work of the Commission at its ordinary and extraordinary sessions is the evaluation of complaints (so-called communications) from states or individuals, which is regulated by Articles 47 et seq. of the Charter. In the case of complaints from member states and individuals, all national remedies must already have been exhausted, but while the Commission examines all complaints from member states, complaints from individuals are only considered if a majority of the members of the Commission agree.

If the Commission is unable to resolve a dispute amicably, it issues a report stating whether the right in question has been infringed. It can also recommend certain measures to be taken in the event of an infringement and propose that the state pays appropriate compensation. However, this decision is not legally enforceable and, if the state refuses, the situation can only be reported to the Assembly of Heads of State and Government of the African Union.

According to the statistics on ACHPR decisions and recommendations, the most typical cases are related to fair trial (47.5%), equality before the law (28.85%), arbitrary arrest and detention (27.4%), cruel and degrading treatment (26. 07%), freedom from discrimination (24.91%), right to property (22.01%), compensation and reparation (21.08%), torture and ill-treatment (21.08%), right to life (20.74%), personal liberty (20.39%) etc. Most cases fall into one of the above categories.[80]

Articles 46–59 of the Charter set out the working procedures of the Commission. Under Article 46, the Commission may use any appropriate method of investigation, including interviewing the AU Secretary-General or any other person who may provide information. Article 47 sets out the procedure for a written complaint by a signatory state of a violation of the Charter by another member state, to be addressed to the AU Secretary-General and the Chairperson of the Commission.[81]

Within three months of the receipt of the communication, the accused State needs to provide a written explanation or statement clarifying the matter. It should include as much relevant information as possible concerning the law and procedural rules applied and applicable and the remedies already granted or available. If the state fails to do so within three months of the lodging of the complaint, or if the matter is not resolved to the satisfaction of both states concerned through bilateral negotiations or other peaceful means, the complaining state can refer the matter to the Commission through the Chairman and informs the other states concerned.[82]

However, under Article 49, if a state considers that another state has violated the provisions of the Charter, it may, notwithstanding the provisions of Article 47, refer the matter directly to the Commission by sending a communication to the Chairperson, the Secretary-General of the AU and the state concerned. The Commission does not deal with a matter referred to it until it is satisfied that all local remedies have been exhausted, unless it is clear that the process of obtaining such remedies would be unduly protracted.[83]

80 | African Human Rights Case Law Analyser [Online]. Available at: https://caselaw.ihrda.org (Accessed: 22 October 2024).
81 | Chapter 47, African Charter on Human and Peoples' Rights.
82 | Chapter 48, African Charter on Human and Peoples' Rights.
83 | Chapter 50, African Charter on Human and Peoples' Rights.

Articles 51 and 52 set out the procedure to be followed by the Commission, which may request the concerned state to provide it with all relevant information, which may be represented by the concerned states and may make written or oral submissions during the examination of the case.[84]

After obtaining from the concerned states and from other sources all the information it considers relevant and necessary, and after seeking by all appropriate means an amicable solution based on respect for human and peoples' rights, the Commission, within a reasonable time after the notification referred to in Article 48, prepares a report to the states concerned and transmit it to the Assembly of Heads of State or Government. In submitting its report, the Commission may make recommendations to the Assembly of Heads of State or Government as it deems useful.[85]

The agenda and the order of business of an ordinary session of the Commission are normally prepared by the Secretary of the Commission after consultation with the Bureau of the Commission, in particular based on requests and complaints from the member states. Items proposed at the previous session are also included in the proposal, and the Chairperson, members of the Commission, States Parties, AU organs, NHRIs, NGOs and any UN specialised agency may propose additional items to be included on the agenda.

However, the Bureau of the Commission has the final say in deciding which items will ultimately be placed on the provisional agenda. The members of the Commission decide by majority vote which items will be considered by the Commission at the relevant session.[86]

Article 56 defines the nature and content of communications from member states and other institutions. Communications relating to human and peoples' rights are considered if they conform with the AU Charter or the African Charter on Human and Peoples' Rights; are not written in defamatory or insulting language directed against the State and its institutions or the AU, are not based solely on reports disseminated through the mass media, are submitted after local remedies have been exhausted, are submitted within a reasonable time after the exhaustion of local remedies or after the date on which local remedies were exhausted, are submitted within a reasonable time after the exhaustion of local remedies or the date on which the Commission took up the matter, and do not deal with cases that have been resolved by the States concerned in accordance with the principles of the Charter of the United Nations or the Charter of the AU or the provisions of the African Charter on Human and Peoples' Rights.[87]

For extraordinary meetings, only the items listed in the invitation issued by the President are included on the provisional agenda. The provisional agenda is circulated to the members of the Commission at least 60 days before the meeting and to other interested parties at least 45 days before the meeting. However, certain items on the provisional agenda and related documents may be circulated 30 days before the meeting.

According to Article 58 of the Charter, if, after consideration by the Commission, one or more communications appear to relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, the

84 | Chapters 51 and 52, African Charter on Human and Peoples' Rights.
85 | Chapter 53, African Charter on Human and Peoples' Rights.
86 | Chapter 55, African Charter on Human and Peoples' Rights.
87 | Chapter 56, African Charter on Human and Peoples' Rights.

Commission brings these special cases to the attention of the Assembly of Heads of State or Government.

The Assembly of Heads of State or Government may then request the Commission to examine such cases in depth and prepare a substantive report, accompanied by its findings and recommendations. An exceptional case duly brought to the attention of the Commission is submitted to the President of the Assembly of Heads of State or Government, who may request an in-depth study.[88]

Any action taken pursuant to the provisions of this Chapter remains confidential unless the Assembly of Heads of State or Government decides otherwise. However, the report is made public by the President of the Commission following a decision by the Assembly of Heads of State or Government. The report on the activities of the Commission is made public by the President of the Commission after consideration by the Assembly of Heads of State or Government.[89]

Each year, the Commission reports to the Ordinary Session of the AU Assembly on its activities during and between sessions.[90] The report submitted by the Chairperson of the Commission or his/her representative is considered by the Executive Council on behalf of the AU Assembly.

The Commission may not publish the report until the Executive Council and the Assembly have adopted it. The Executive Council has withdrawn its authority to publish the Commission's last two activity reports. Prior to the adoption of the Activity Report by the AU Assembly, the Commission normally issues a communiqué immediately after the meeting.

Articles 60 to 63 of the African Charter on Human and Peoples' Rights also set out the basic premises, documents and instruments on which the Commission bases its work and takes its decisions. Article 60 provides that the Commission is inspired by international law on human and peoples' rights, in particular the provisions of the various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the African Union, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and African countries in the field of human and peoples' rights, as well as the provisions of the various instruments adopted within the framework of the United Nations specialised agencies of which the parties to the Charter are members.

According to Article 61, the Commission also considers, as an aid to the determination of legal principles, other general or specific international conventions which lay down rules expressly recognised by the Member States of the African Union, African practice which is consistent with international human and peoples' rights standards, customary practices generally recognised as law, general principles of law recognised by African States, as well as legal precedents and doctrine.

Article 62 requires each State Party to report every two years from the date of entry into force of the Charter on the legislative and other measures taken to give effect to the

88 | Chapter 58, African Charter on Human and Peoples' Rights.
89 | Chapter 59, African Charter on Human and Peoples' Rights.
90 | African Commission on Human and Peoples' Rights. 'Reports´. [Online]. Available at: https://achpr.au.int/en/documents/reports (Accessed: 20 September 2024).

rights and freedoms recognised and guaranteed in the Charter. Finally, Article 63 deals with ratification and the deposit of instruments of ratification.[91]

4. Conclusions

It is very difficult to objectively assess the work of the African Commission on Human and People's Rights given the current political environment on the African continent. Over the past almost 40 years, the members of the Commission, in collaboration with other organs of the AU, have defined the main objectives; functions and purpose of the Commission; established a solid structure; clearly defined the composition, competencies, selection of members, duration of mandate, circumstances of termination, working procedures etc.; and repeatedly addressed their revision according to suggestions from within and outside the Commission. On the face of it, the Commission has been institutionalised in the necessary manner and has taken a firm place in the architecture of the AU and in the structure of international human rights institutions.

Unfortunately, the human rights situation in Africa remains poor. The main weakness of the Commission is the lack of an enforcement mechanism, which means that its members can only make recommendations, draw attention to violations by signatory states, issue alarming reports on human rights violations or, in the most flagrant cases, refer them to the African Court of Human and Peoples' Rights. In short, its decisions are not legally binding.

The current state of the respect for human rights by the signatory countries is absolutely abysmal and shows that, despite the good intentions of the AU when the Commission was established, it is failing to achieve its main objectives of improving the quality and preventing violations of human rights in African countries. We could mention a certain negative double track, whereby two AU institutions (the Commission and the African Court on Human and Peoples' Rights), both mandated to interpret the African Charter, are dealing with the issue and situations can arise where there are multiple interpretations or jurisprudence. Any individual can virtually approach the Commission with a complaint of human rights violations, while the African Court does not allow individuals to do so. As the work of both institutions is hampered by a lack of funding, it is common for members to derive their main source of funding from other jobs. This also slows down the decision-making processes of the two institutions.

Another major problem is the partial curtailment of the independence of the Commission by the AU, which has the ultimate authority to decide whether to publish the measures taken under the Charter's provisions on the Commission's procedures.[92] Considering the selection and recruitment of the members of the Commission, the appointment of the Secretary of the Commission and the fact that the AU decides on the full funding of the Commission and its activities (members of the Commission regularly point to the lack of funds to carry out their duties), it is fair to conclude that the

91 | Chapter 62, African Charter on Human and Peoples' Rights.
92 | Nmehiele, 2001, p. 170.

Commission is in a completely subordinate position to the AU, as the political body, which severely limits the effectiveness of the Commission.[93]

Addressing these problems would not be too difficult, but it would most likely not improve the performance and outcomes of the Commission (or the African Court). As we have argued in the introduction and in the following sections, the main problem with human rights in Africa is the current political culture and the lack of political will on the part of African political elites to create a truly effective and enforceable human rights protection system. The prevalence of non-democratic governments on the African continent (by our estimate, more than 80% of all African countries) means that their leaders are often only willing to sign up to a control mechanism that is not legally enforceable.

The lack of the sufficient political will on the part of the rulers of these undemocratic regimes complicates the established system of human rights protection, which may be well defined or structurally set up, but is completely ineffective in current African political practice. Moreover, the legal unenforceability of the Commission's recommendations or the African Court's ruling is one of its weakest points.

The incompetence of the AU institutions and the lack of mechanisms to take action against the full members that do not comply with the articles of the Charter are alarming. Recent political developments on the African continent (military coups in Niger, Central African Republic, Mali, Burkina Faso, Guinea etc.) indicate that the situation is unlikely to change in the short term. The human rights situation (not only in these two countries) continues to deteriorate, as demonstrated by the political elites in some signatory countries (Rwanda and Tanzania), who in 2016 and 2019, respectively prevented individuals and NGOs from bringing cases before the Commission.

The promising start of the democratisation process in the early 1990s raised expectations not only among the global and African public but also among the representatives of human rights organisations, academics, political scientists and Africanists. However, it gradually became apparent that the new African political elites were, for the most part, 'inflecting' the word democracy only to secure their political ambitions and positions of power.

As political practice in functioning European and American societies shows, the respect for human rights is closely linked to the functioning of the rule of law and closely intertwined with the basic principles of a democratic society. This is one of the main reasons why the respect for human rights in Africa cannot possibly work and why the activities of the Commission and the African Court are doomed to failure.

93 | Welch, 1992, pp. 47–49.

Bibliography

African Commission on Human and Peoples' Rights: 'Decisions on Communications' [Online]. Available at: https://achpr.au.int/en/category/decisions-communicatios (Accessed: 20 September 2024).

African Commission on Human and Peoples' Rights 'Reports' [Online]. Available at: https://achpr.au.int/en/documents/reports (Accessed: 20 September 2024).

African Commission on Human and Peoples' Rights (2010) 'The Rules of Procedure of the African Commission on Human and People´s Rights', *African Commission on Human and Peoples' Rights*, 12 May [Online]. Available at: https://www.african-court.org/wpafc/wp-content/uploads/2020/10/25-RULES-OF-PROCEDURE-ON-THE-AFRICAN-COMMISSION-ON-HUMAN-AND-PEOPLES-RIGHTS.pdf (Accessed: 4 August 2025).

African Commission on Human and Peoples' Rights (2020) 'Rules of Procedure of the African Commission on Human and Peoples' Rights of 2020', *African Commission on Human and Peoples' Rights*, 4 March [Online]. Available at: https://achprindependence.org/wp-content/uploads/2020/07/Rules_of_Procedure_2020_ENG.pdf (Accessed: 4 August 2025).

African Court on Human and Peoples' Right (2020) 'Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights', *African Court on Human and Peoples' Right*, 2020 [Online]. Available at: https://www.african-court.org/wpafc/wp-content/uploads/2020/10/2-PROTOCOL-TO-THE-AFRICAN-CHARTER-ON-HUMAN-AND-PEOPLES-RIGHTS-ON-THE-ESTABLISHMENT-OF-AN-AFRICAN-COURT-ON-HUMAN-AND-PEOPLES-RIGHTS.pdf (Accessed: 4 August 2025).

Azikiwe, N.B. (1962) *The Future of Pan-Africanism*. London: Nigeria High Commission.

Bello, E. (1988) 'The Mandate of the African Commission on Human and People Rights', *African Journal of International Law*, 1(1), pp. 31–64.

Bratton, M., van de Walle, N. (1997) *Democratic Experiments in Africa. Regime Transitions in Comparative Perspective.* Cambridge: Cambridge University Press; https://doi.org/10.1017/CBO9781139174657.

Busia, N.K.A., (1992) 'The Right of Self-determination. The State and the Quest for Democracy in Africa: An Exploratory Analysis' in *Annual Conference - African Society of International and Comparative Law*, 1992/4, pp. 29–48.

Chabal, P., Birmingham, D., Forrest, J., Newitt, M. (2002) *A History of Postcolonial Lusophone Africa*. London: Hurst & Company; https://doi.org/10.2979/1926.0.

Chazan, N. (ed.) (1999) *Politics and Society in Contemporary Africa*. 3rd edn. Boulder: Lynne Riener Publishers; https://doi.org/10.1515/9781685859695.

Curtin, P.D. (1964) 'Image of Africa. British Ideas and Action, 1780-1850', *History and Theory*, 4(3), pp. 387–397 [Online]. Available at: https://doi.org/10.2307/2504356 (Accessed: 4 August 2025).

Dankwa, E.V.A. (1990) 'Commentary on the Rules of Procedure of the African Commission on Human and People´s Rights', *Proceedings of the Second Annual Conference of the African Society of International and Comparative Law*, pp. 29–34.

Dankwa, V. (2003) 'The promotional role of the African Commission on Human and Peoples´ Rights' in Evans, M.D., Murray, R. (eds.) *The African Charter on Human and Peoples´ Rights. The System in Practice, 1986-2000*. Cambridge: Cambridge University Press, pp. 335–352.

Davidson, B. (1961) *Black Mother: The Years of the African Slave Trade*. Boston: Little Brown.

Decalo, S. (1976) *Coups and Army Rule in Africa*. New Have and London: Yale University Press.

Evans, M.D., Murray, R. (eds.) (2002) *The African Charter on Human and People´s Rights. The system in Practice, 1986-2000*. Cambridge: Cambridge University Press.

Hamalengwa, M., Flinterman, C., Dankwa, E.V. (eds.) (1988) *The International Law of Human Rights in Africa*. Dordrecht: Martinus Nijhoff Publishers; https://doi.org/10.1163/9789004638167.

Hrbek, I. (1966) *Dějiny Afriky*. Praha: Nakladatelství Svoboda.

Klíma, J. (2012) *Dějiny Afriky*. Praha: Nakladatelství Lidové noviny.

LeRiche, M., Matthiew, A. (2012) *South Sudan. From Revolution to Independence*. London: Hurst & Company.

McGowan, P. (2003) 'African military coups d´état, 1956-2001: frequency, trends and distribution', *The Journal of Modern African Studies*, 41(3), pp. 339–370 [Online]. Available at: https://doi.org/10.1017/S0022278X0300435X (Accessed: 4 August 2025).

Meredith, M. (2005) *The State of Africa: A History of Fifty Years of Independence*. London: Free Press; Simon and Schuster.

Mrázek, R. (1980) *Jihovýchodní Asie ve světové politice 1900-1975*. Praha: Svoboda.

Murray, R., Long, D. (2015) *The Implementation of the Findings of the African Commission on Human and People´s Rights*. Cambridge: Cambridge University Press.

Nguema, I. (1990) 'Human Rights Perspectives in Africa', *Human Rights Law Journal,* 11(3-4), pp. 261–277.

Nicholls, C. (2023) 'Eritrean Defense Forces committed was crimes and possible crimes against humanity in Tigray, Amnesty International alleges', *CNN,* 6 September [Online]. Available at: https://edition.cnn.com/2023/09/04/africa/amnesty-eritrea-allegations-intl (Accessed: 4 August 2025).

Nmehiele, V.O. (2001) *The African Human Rights System. Its Laws, Practice, and Institutions*. The Hague: Kluwer Law International; https://doi.org/10.1163/9789004481060.

Nugent, P. (2004) *Africa Since Independence. A Comparative History*. London: Palgrave, Macmillan; https://doi.org/10.1007/978-0-230-21286-2.

Organization of African Unity (1981) 'African Charter on Human and Peoples' Rights', *African Union*, 1 June [Online]. Available at: https://au.int/en/treaties/african-charter-human-and-peoples-rights (Accessed: 4 August 2024).

Ouguergouz, F. (1993) *The African Charter on Human and People´s Rights. A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*. The Hague/London/New York: Martinus Nijhoff Publishers.

Ouguergouz, F. (2003) *The African Charter on Human and People´s Rights. A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*. The Hague/London/New York: Martinus Nijhoff Publishers; https://doi.org/10.1163/9789004501010.

Ramcharan, B.G. (1992) 'The Travaux Préparatoires of the African Commission on Human Rights', *Human Rights Law Journal,* 5(13), pp. 307–413.

Ssenyonjo, M. (2018) 'The African Commission and Court on Human and Peoples´ Right' in Oberleitner, G. (eds) *International Human Rights Institutions, Tribunals, and Courts. International Human Rights*. Singapore: Springer, pp. 479–509; https://doi.org/10.1007/978-981-10-5206-4_18.

Šturma, P. (2010) *Mezinárodní a evropské kontrolní mechanismy v oblasti lidských práv*. Praha: C. H. Beck.

Stys, P. (2012) *Civil Wars in the Democratic Republic of Congo: 1960-2010*. London: Lynne Rienner Publishers; https://doi.org/10.1093/afraf/adt035.

Thomson, A. (2002) *An Introduction to African Politics*. London and New York: Routledge.

Umozurike, U.O. (1997) *The African Charter on Human and People´s Rights*. The Hague: Martinus Nijhoff Publishers; https://doi.org/10.1163/9789004636491.

Viljoe, F. (2000) 'State Reporting under the African Charter on Human and Peoples´ Rights: a boost from the South', *Journal of African Law,* 44(1), pp. 110–118 [Online]. Available at: https://doi.org/10.1017/S0021855300012080 (Accessed: 4 August 2025).

Welch, C.E. (1992) 'The African Commission on Human and Peoples' Rights: A Five-Year Assessment', *Human Rights Quarterly,* 14(1), pp. 43–61 [Online]. Available at: https://doi.org/10.2307/762551 (Accessed: 4 August 2025).

Záhořík, J. (2012) *Dějiny Rwandy a Burundi*. Praha: Nakladatelství Lidové noviny.

CAN IMPROVEMENTS IN THE ROMANIAN LEGISLATION ON MEDICALLY ASSISTED REPRODUCTION ALLEVIATE THE DEMOGRAPHIC CRISIS?

Emese Florian[1] **– Marius Floare**[2]

ABSTRACT

Romania, in line with the other European countries, has a country-wide demographic problem due to a below-replacement level fertility rate and decline in the total number of children. Infertility is a major societal problem that plagues numerous families. This unfulfilled potential of infertile couples and single women to have children has contributed to the demographic crisis, which can be alleviated by helping willing parents have children instead of trying to persuade reluctant childless adults to have children or to have more children than they originally planned to have. Fertility treatments and in-vitro fertilisation are expensive procedures that are not covered by public health insurance; consequently, government policy and financing can play a major role in helping couples pay for fertility treatments, thereby increasing Romania's birth rate. Public funds remain limited in this regard, so legal norms are defining which couples or single women are eligible to receive money for fertility treatments. The purpose of public policy should be to increase the efficiency of spending public funds for the best fertility results, without an ideological bias in regard to the recipients' traditional or non-traditional family structures.

KEYWORDS

family
fertility
parents
children
medically assisted reproduction

1 | Full Professor, Private Law Department, Faculty of Law, Faculty of Babeș-Bolyai University in Cluj-Napoca, Romania; emese.florian@law.ubbcluj.ro.

2 | Assistant Professor, Private Law Department, Faculty of Law, Babeș-Bolyai University in Cluj-Napoca, Romania; marius.floare@law.ubbcluj.ro; ORCID: 0000-0002-8244-3467.

https://doi.org/10.55073/2025.2.57-72

1. OECD Report on the Living Arrangements of Children and the Ideal Number of Children

The Social Policy Division of the 38-country international Organisation for Economic Co-operation and Developments (OECD) has published several studies, through its Directorate of Employment, Labour, and Social Affairs, on family structures and attitudes regarding the ideal number of children in its member and partner countries.[3] The most recent OECD data on family structures in Romania mostly pertain to 2021. The data show a below-replacement level total fertility rate of 1.81 (still one of the highest in Europe, surpassed only by Czechia and Iceland at 1.82), a mean age of women at childbirth of 28.2 years, a growing share of births outside marriage (32.5% in 2020), a declining crude marriage rate of 4.2 marriages per 1,000 people in 2020 (between 5.2 and 7.4 in the pre-pandemic decades since 1995, with the exception of the European Union (EU) accession year of 2007 when it reached 9.1), and a crude divorce rate of 1.2 per 1,000 people in 2020, with 85.9% of children living with both parents and 11% living with a single parent in 2018.[4]

A 2016 OECD study on the mean personal ideal number of children, based on the Eurobarometer surveys from 2011, found that Romanian women and men between 15 and 64 years of age considered having two children as ideal, with less than 2% of women considering childlessness as a personal preference, 8% declaring a single child as preferable, and about 70% considering two children as their ideal. Additionally, 10% of women between 15 and 64 years old considered three or more children to be their ideal, while an equal number of women expressed no preferred or ideal number of children.[5] The same study found considerable discrepancies between the ideal and current number of children across all the surveyed countries, with many women between 25 and 39 years old having not yet realised their childbearing intentions.[6] We can only speculate that one of the reasons for this discrepancy might be infertility.

2. Increase in the number of infertile couples in Romania

The Romanian Association for Human Reproduction conducted two sampling or polling studies on infertility in 2018 and 2023. The 2018 poll was conducted online and included 4,680 respondents, of which 3,331 were considered the fertile demographic contingent: women between 25 and 45 years of age and men between 25 and 60 years of age in relationships with partners in the appropriate age range. In the fertile demographic group, 16.8% were affected by infertility, either currently or in the past. Considering only

3 | All studies in the OECD Family Database [Online]. Available at: https://www.oecd.org/els/family/database.htm (Accessed: 21 January 2024).
4 | OECD Family Database [Online]. Available at: https://stats.oecd.org/Index.aspx?DataSetCode=FAMILY (Accessed: 21 January 2024).
5 | OECD, 2016, pp. 2–3.
6 | Ibid., p. 3.

those who wanted children as soon as possible (29.1%), 27% of the couples failed to have a child despite trying for between one and five years, while 11% failed to have a child despite trying for more than five years.[7]

The 2023 follow-up study on infertility in urban environments reached similar conclusions. On average, 18% of pregnancies between 2018 and 2023 were the result of some form of fertility treatment, and 17.1% of the responding couples were either still or had been in an infertility situation. Only 21% of the interviewed couples wanted a child as soon as possible; among them, 40% had been trying unsuccessfully for children between one and five years, while 10% had been trying for more than five years.

In January and February 2023, 23% of extant pregnancies were the result of fertility treatments. Between 2018 and 2023, there were approximately 102,000 successful fertility treatments, leading to an average of 20,000 per year. We can assume that the total number of fertility treatments required to get this result was at least twice or possibly three times higher (40,000–60,000 per year) because the reasonable target success rate for public funding is 30%.[8]

3. The legal concept of infertility

Infertility is caused by both woman- and man-related factors. For women, the most common medical issues causing infertility are vaginal infections, endometriosis, obstructed or surgically removed fallopian tubes, lack of ovulation, high levels of prolactin, polycystic ovaries, uterine fibrosis, the side-effects of medication, and thyroid issues. For men, the most common medical issues are a lack of sperm cells, reduced number of sperm cells, reduced mobility or structurally deficient sperm cells, and genetic disease. Other issues that can affect fertility are related to lifestyle: nutrition, stress, radiation exposure, or exposure to toxic factors.[9] Infertility is medically defined for a woman below 35 years of age as not having conceived after one year of vaginal sexual activity without contraception.[10]

The Work and Social Solidarity Minister and Family, Youth, and Equal Opportunities Minister gave a joint order (no. 2155/20917/2022) on regulations concerning the implementation of the social national interest programme to support couples and single individuals to increase the number of childbirths. This order broadly defines infertility as having an affliction that is incompatible with natural reproduction, diagnosed by an obstetrician gynaecologist with a further specialisation in medically assisted reproduction (Art. 4).

7 | Asociația Pentru Reproducere Umană Din România, 2018.
8 | Neagu, 2023.
9 | Iordăchescu, 2020, p. 169.
10 | Vlădăreanu and Onofriescu, 2019, p. 8.

4. Legality and accessibility of assisted reproductive procedures

In Romania, assisted reproductive procedures (ARPs) are disparately regulated mainly by the Civil Code of 2009, the Law on Healthcare Reform no. 95/2006, the Law on the Rights of the Patient no. 46/2003, as well as lower-level regulations such as the Health Minister's Order on Therapeutical Transplants no. 1763/2007; the Health Minister's Order no. 377/2017 on the Implementation of National Public Health Programmes; the Work and Social Solidarity Minister and Family, Youth, and Equal Opportunities Minister's joint Order no. 2155/20917/2022 on regulations concerning the implementation of the social national interest programme to support couples and single individuals to increase the number of childbirths; Government Decree no. 423/2022 on the approval of national health programmes; and the Health Minister's Order no. 964/2022 on the approval of technical norms for implementing the national health programmes. There is no coherent and cohesive statute in Romanian domestic law regarding fertility treatments and assistive reproductive procedures, so their legal regime has to be inferred from a host of regulations pertaining to adjacent issues.

Assisted reproductive procedures are not extensively regulated – neither in primary legislation, which comprises laws enacted by the parliament and governmental decrees or emergency decrees, nor in secondary legislation such as ministerial orders. Therefore, we could not identify any bans on specific ARP techniques and concluded that both intracytoplasmic sperm injection and in-vitro fertilisation (IVF) are allowed. Most restrictions pertaining to ARPs are the general restrictions included in the Civil Code of 2009, which came into force on 1 October 2011.

The relatively recent Romanian Civil Code has a special section on natural persons' rights to life, health, and physical integrity.[11] Art. 61 guarantees the 'inherent' rights of a human being by equally safeguarding the life and physical and psychological health of any human being. The well-being and interests of any human being should take precedence over the sole interests of society.[12] Art. 62 of the Civil Code bans eugenics and any attempts to alter the human species, which is understood to refer to the altering of the human genome. Eugenics is legally defined as any practice that intends to manage the selection of persons, while the scientific definition refers to the practical application of hereditary biology in the genetic improvement of individuals.[13]

The Civil Code also bans any medical interventions on genetic characteristics to modify the person's descendance, with the sole exception of curative and preventative interventions for genetic diseases (Art. 63 para. 1). The legal ban extends to human cloning with the purpose of creating an identical human being and creating human embryos solely for research purposes (Art. 63 para. 2). Human medically ARPs are not allowed for choosing the sex of the future child unless it is to avoid a gender-related genetic disease (Art. 63 para. 3).[14]

11 | Diaconescu and Vasilescu, 2022, pp. 303–307.
12 | Chelaru in Baias et al., 2021, pp. 77–78.
13 | Chelaru in Baias et al., 2021, pp. 78–79.
14 | Chelaru in Baias et al., 2021, pp. 79–81.

The contemporary civil regulation also regulates the sanctity of the human body (Art. 64); restricts the examination of genetic characteristics only for medical, research, and judicial purposes (Art. 65); and forbids attributing a monetary value to the human body or to its component parts (Art. 66). It also states the broad principles for medical interventions on a person and transplants from a living person (Arts. 67–68 Civil code).[15]

5. Medically assisted reproduction with a third-party donor

The Civil Code of 2009 includes a specific seven-article section on medically ARPs with a third-party donor. These general provisions were supposed to be followed by a new special and detailed law on medically ARPs with a third-party donor, but more than a decade has passed to no avail.[16] The general provisions of Art. 441 para. 3 of the Civil Code specifically determine that both heterosexual couples and single women have access to medically assisted reproduction with a third-party donor. The law does not distinguish between a male or female third-party donor, so it can be broadly construed to include both and simultaneous donations of sperm and oocytes for the same receiving couple or single woman.[17]

6. The history of failed attempts to legislate on medically assisted reproduction

Prior to the most recent Civil Code of Romania, one of the first contemporary attempts to adopt a comprehensive statute concerning medically assisted reproduction was from 2009 (PL-x no. 690/2009[18]). This 26-article project affirmed the right to reproduction as the right of couples and individuals to 'freely and responsibly decide the number, frequency, and time when they wish to have children' as well as their right to have access to information, education, and the means to reach such a decision Art. 2). Medically assisted human reproduction was reserved only for married couples or consensual partners who could prove at least two years of cohabitation; moreover, both individuals had to be alive (inseminating a woman with her dead husband's sperm being expressly forbidden) and fulfil the general health and biological age criteria for procreation (Art. 4).

This project included a list of allowed human medically assisted reproduction techniques, such as artificial insemination, IVF, and embryo-transfer (ET), and a list of banned techniques, such as *post-mortem* artificial insemination, *post-mortem* ET, interventions when infertility is due to old age, and fertility interventions for couples who cannot prove a stable cohabitation (Art. 8). The 2009 project regulated both endogenous fertilisation

15 | Chelaru in Baias et al., 2021, pp. 82–87.
16 | Florian and Floare, 2024, p. 468; Avram, 2022, p. 309.
17 | Motica, 2021, p. 224; Florian in Baias et al., 2021, pp. 594–595; Hageanu, 2023, pp. 211–212.
18 | The 2009 project, in its senate-approved version [Online]. Available (in Romanian) at: https://www.cdep.ro/proiecte/2009/600/90/0/se690.pdf (Accessed: 29 January 2024).

and reproduction with a third-party donor (Arts. 10–12). Filiation was established, according to this project, by the simple declaration of parents at the time of birth, with the child having the same rights as a naturally conceived child (Art. 14). This 2009 project was rejected by the lower Chamber of Deputies in 2010, with the Health Committee's rejection report[19] stating that the project had serious technical drafting deficiencies and gaps in its rules about a sensitive topic – gaps that could lead to constitutionality issues. There were at least two attempts to regulate this area in greater detail since the Civil Code came into force on 1 October 2011, but both law projects were rejected, despite being initiated by the government and as a cross-party private members' bill.

The first project to be promoted after the new Civil Code came into force originated from the government in 2012 (PL-x no. 63/2012). This project was quite short (12 articles)[20] and stated that human medically assisted reproduction with a third-party donor is organised and controlled by the Health Ministry and supervised and coordinated by the National Transplant Agency. The purpose of the procedure is either to be a remedy for pathological infertility or to prevent the passing on of a serious affliction to the offspring (Art. 5).

The crucial question of who would be eligible to take part in this kind of medical procedure remained unanswered because the medical criteria for both physical and mental health were supposed to be adopted later by a Health Minister's Order (Art. 6). Infertility cases that allowed someone to take part in this kind of procedure were exemplified as including immunological incompatibility between parents, unknown causes, or the impossibility of contact between two reproductive cells (Art. 7). Medically assisted reproduction with a third-party donor covers both artificial insemination with biological material from said donor or IVF with reproductive material from a third-party donor (Art. 9). Parents who wished to take part in such a procedure had to demand it from an authorised medical facility; undergo counselling from medical professionals regarding the chances of success, the risks, and adoption possibilities; and be checked for their motives (Art. 8). The project subjected a woman's access to medically assisted reproduction with a third-party donor to the written consent from both her and her husband.

The medical criteria for selecting the third-party donor regarding the quality and quantity of reproductive material as well as the physical and mental health of the donor that could influence the offspring were delegated by the law project in a later Health Minister's Order Art. 10). Confidentiality of the procedure was mentioned specifically only in relation to the health personnel involved in the procedure (Art. 11).

This project was finally rejected by the lower house of parliament in 2016 because the draft was considered poorly written from a technical point of view, with the rejection report of the parliamentary commission drawing from the objections of the Legislative Council. This project was considered too vague and confusing, with no practical solutions to a delicate and important societal issue.[21]

19 | Available (in Romanian) at: https://www.cdep.ro/comisii/sanatate/pdf/2010/rp690_09.pdf (Accessed: 29 January 2024).

20 | The failed 2012 project, in its senate-approved version [Online]. Available (in Romanian) at: https://www.cdep.ro/proiecte/2012/000/60/3/se99.pdf (Accessed: 29 January 2024).

21 | The joint rejection report of the Chamber of Deputies' Judiciary and Health Committees [Online]. Available (in Romanian) at: https://www.cdep.ro/comisii/juridica/pdf/2016/rp063_12.pdf (Accessed: 29 January 2024).

A later project, the cross-party private members' bill PL-x no. 462/2013[22], was made up of 19 articles. It had similar provisions regarding the roles of the Health Ministry and the National Transplant Agency as the previous project (Art. 2). The project generously stated fundamental principles such as the parents' right to access medically assisted human reproductive techniques; right to informed consent; respecting the best interests of the child; safeguarding human dignity and body autonomy; and preserving the human species, individuality, and diversity (Art. 3).[23]

The allowed reproductive techniques were artificial insemination, IVF, and ET (Art. 7). This project specifically banned the simultaneous transfer of embryos from different donors (Art. 7 para. 4). The project included a more expansive list of banned activities in the field of medically assisted human reproduction: altering the human genome and species cross-breeding, selecting the sex of the future child except for reasons related to a sex-related genetic disease, creating human embryos only for research purposes, human cloning, using reproduction embryos that were previously used in research, using eugenics criteria to select the donor, harvesting reproductive material from a deceased person, and intentionally using reproductive material from donors closely related to the beneficiary (Art. 8).

A novelty of this later project, compared with the previous one, was an age restriction for oocyte harvesting by limiting the woman's age to between 18 and 45 years (Art. 10 para. 2). The law project also stipulated that ETs and IVFs were only allowed for women between 18 and 50 years of age (Art. 10 para. 3). There was also a novel 10-year time limit for embryo and gamete storage (Art. 13), after which the parents had to express an option about what to do with the stored biological products.

This 2013 project was also structurally incomplete, with the statute requiring further details about the enforcement of the law that would have been provided by later governmental decrees drafted by the Health Ministry (Art. 19). It was also rejected by the lower house of parliament in 2022, with a similar reasoning as for the previous project: too vague, lacking enforcement sanctions, being elliptically written, not offering practical solutions to a delicate social problem, and lacking specific financing resources for the stipulated expenses.[24]

7. Lower-level ministerial regulations on reproductive techniques

Regarding the regulation of reproductive techniques other than medically assisted reproduction with a third-party donor, we could only identify secondary legislation concerning transplants, such as the Health Minister's Order no. 1763/2007, which

22 | The failed 2013 project, in its senate-approved version [Online]. Available (in Romanian) at: https://www.cdep.ro/proiecte/2013/400/60/2/se790.pdf (Accessed: 29 January 2024).
23 | See also Irinescu, 2014, pp. 16–18.
24 | See the joint rejection report of the Chamber of Deputies' Judiciary and Health Committees [Online]. Available (in Romanian) at: https://www.cdep.ro/comisii/sanatate/pdf/2021/rp462_13.pdf (Accessed: 29 January 2024).

tangentially references access to these procedures. This secondary legislation only mentions different-sex couples in a (declared) intimate relationship as having access to reproductive cell transplants between partners.

Romanian legislation is extremely traditional and restrictive with regard to civil partnerships or same-sex marriages. The Civil Code only recognises traditional marriage between a man and a woman and specifically bans (Art. 277) the recognition of any effects of a foreign civil partnership of any kind or a foreign same-sex marriage in Romania, with the exception of freedom of travel provisions derived from European Union law. There are no specific legal limitations on access to ARPs besides the broad Civil Code restrictions on eugenics (Art. 62) and genetic alteration (Art. 63) as well as general transplant regulations and general patient consent requirements.

Publicly funded IVF with ET is subject to a national public health subprogramme since 2011,[25] with extended funding from 2022. It is restricted to infertile heterosexual couples, defined as couples diagnosed (by a certified specialist MD) with an affliction incompatible with natural reproduction or unable to reproduce after one-year of unprotected sexual relations, with no third-party donations allowed for sperm or oocytes and excluding surrogacy in what is perhaps the only specific mention of this procedure in Romanian domestic law.[26] To receive public funding for IVF, both partners must have public health insurance and the woman must be between 24 and 40 years of age, with a body mass index between 20 and 25 and an ovarian reserve determined to be within the normal limits.[27]

The 2009 Civil Code specifically allows for third-party donations of reproductive material, but this is a general regulation comprising merely seven articles to be detailed by a special ulterior statute, which has as yet not been adopted. The Civil Code (Art. 441 para. 3) defines parents for the purposes of ARPs with third-party donations as either a couple or a single woman. This provision is not restricted to married couples but specifically refers to heterosexual couples (a man and a woman).[28] The legal doctrine debates whether a single woman refers only to women that do not have a partner or if it also includes women whose partner has not consented to the medical procedure. Further provisions that allow the husband to deny paternal filiation if he had not previously agreed to the medically assisted reproduction with a third-party donor tend to suggest that this procedure is also available for women who are not technically single but whose partner does not wish to agree to such procedures.[29]

8. Anonymity in third-party donations

All ARPs are considered confidential according to the general provisions of Art. 445 para. 1 of the Civil Code – requirements which were construed to safeguard the identity of the parents or the single parent, the identity of the child born out of these procedures or the identity of the third-party donor, as well as the notarised parental agreement to

25 | Brodeala, 2016, p. 64.
26 | Brodeala, 2016, pp. 64–65; Florian and Floare, 2024, p. 473.
27 | Florian and Floare, 2024, p. 473.
28 | Motica, 2021, p. 224.
29 | Florian and Floare, 2024, pp. 474–475; Avram, 2022, pp. 310–311.

undergo the procedure; this confidentiality was considered an integral part of the constitutional right to private life.[30] Because it is also a medical procedure, the assisted reproduction is covered by the right of the patient to the confidentiality of medical information, which is stipulated by Art. 21 of Law no. 46/2003 on the rights of the patient.[31]

The only specified exceptions to the confidentiality requirements are made in Art. 445 para. 2 of the Civil Code for the court-authorised transmission of information to a physician or the competent authorities to prevent serious harm to the health of the children born from these procedures or to their descendants.[32] Confidentiality can also be curtailed on the request of the descendants of the child born out of this procedure to avoid serious harm to their health or their close ones, according to Art. 445 para. 3 of the Civil Code. The legal doctrine has interpreted this provision as only the children or their descendants having the legal standing to demand this kind of information.[33]

All the details about ensuring the confidentiality pertaining to medically assisted reproduction should have been included, according to Art. 447 of the Civil Code, in a special statute on the matter of ARPs with third-party donors, which has yet to be adopted even after 13 years since the Code came into force on 1 October 2011.

For transplants of reproductive cells (other than from the recipient's partner), the Health Minister's Order on transplants mentions the requirement to register information about the donor's age, health, medical history, medical risks for themselves or others, tests for transmissible diseases (which specifically include HIV, syphilis, hepatitis B or C, human T-cell lymphotropic virus, and chlamydia), supplemental tests depending on risk factors (which could include malaria, cytomegalovirus, and *Trypanosoma cruzi*), and genetic screening for autosomal-recessive genes.

Currently, there are only the general regulations on patient information confidentiality and the Civil Code provisions on the court-authorised transmission of information to a physician or authority to prevent serious harm to the children or their descendants because the specific regulations on information transmission with regard to this procedure have not yet been enacted.

9. Public funding of assisted reproductive procedures

Assisted reproductive procedures have been financed intermittently from public funds with special national health programmes since 2011[34] as they are not normally covered by the standard public health insurance. To date, existing financing programmes do not distinguish between public and private fertility facilities. The national health programmes that have financed IVF with ET for couples were targeting a 30% success rate. Health facilities that had previously received public funding for IVF continued to be included in the programme only if they had reached the 30% success rate in previous years when they had received public funding.

30 | Florian and Floare, 2024, pp. 470–471; Hageanu, 2023, p. 216.
31 | Florian and Floare, 2024, p. 471.
32 | Avram, 2022, p. 312.
33 | Florian and Floare, 2024, p. 471.
34 | Brodeala, 2016, p. 64.

Public funding from 2022 onward is theoretically available for three procedures per year for each couple or single woman, depending on the very limited availability of funding. Funding was usually limited to 1,000 procedures per year in previous fiscal years, but in 2022, Government Decree no. 1103/2022 disbursed funding for at least 2,500 procedures per year and a further 10,000 procedures per year from 2023 onward on a 'first come, first served' basis. Between 2017 and 2021, public funding was available only for IVF with ET and only for couples, with no financing whatsoever provided for gamete donations or surrogacy.

The joint Work and Social Solidarity Minister and Family, Youth, and Equal Opportunities Minister's Order no. 2155/20917/2022 on regulations concerning the implementation of the social national interest programme to support couples and single individuals in order to increase childbirths defines the conditions under which the state will help pay for fertilisation treatments. The beneficiaries are defined as couples or single infertile women who were diagnosed by a fertility specialist as having an affliction that is incompatible with natural reproduction (Art. 4). They can receive financial support of up to 15,000 lei (the equivalent of 3,000 euros), with 5,000 lei (approximately 1,000 euros) for the necessary medicines and 10,000 lei (approximately 2,000 euros) for medical procedures. The beneficiary can get this special financial support up to three times a year for the duration of the programme. The cumulative conditions for receiving the financial support are as follows: both members of the married or unmarried couple or the single woman have to be Romanian citizens domiciled in Romania; they all have to be insured in the Romanian public health insurance system; the fertility treatment and procedures must take place in an authorised medical unit in Romania that is a partner in the programme; and the age of the participating women must be between 20 and 45 years at the time of the request filing (Art. 5).

The publicly funded fertility programme started in December 2022 with 2,500 beneficiaries for the current year, with a further 10,000 beneficiaries for each subsequent year, starting in 2023 (Art. 6). The financial support is granted on a 'first come, first served' basis (Art. 7). The funded procedures include the harvesting of oocytes from the beneficiary woman, the processing of sperm, artificial insemination, embryo cultivation for between 72 and 120 hours, ET, the health monitoring of the case evolution, and the necessary drug treatments (Art. 16).

This social fertility programme explicitly excludes several fertility-related medical procedures from public funding: preliminary laboratory investigations; genetic diagnosis of the embryos; the cryopreservation of oocytes, sperm, or embryos; the surgical harvesting of sperm; general intra-venous anaesthesia for oocyte harvesting; intracellular sperm injection; and the harvesting of donated oocytes (Art. 26). If the costs of the specific medical procedures are greater than the publicly funded allowance, the beneficiaries have to bear the supplemental costs (Art. 27).

10. Issues regarding the preservation of biological material

The cryopreservation of gametes or embryos is legally allowed in Romania, although it is specifically excluded from public funding from the IVF with ET national public health programmes since 2017, even in the more generous recent fertility programme that

started in 2022. In Romania, there are no specific legal conditions for the cryopreservation of gametes or embryos. The only general conditions are the informed consent of the donor and a contract with the authorised medical institution that harvests and deposits the biological material.[35]

This lack of regulation gave rise to serious legal issues when the 'ownership' of the frozen embryos was questioned in a case involving a criminal inquiry and asset seizure implicating a fertility clinic: were the embryos mere material goods or living beings?[36] This case (*Knecht v. Romania,* application no. 10048/10) reached the European Court of Human Rights,[37] which rendered a decision in 2012 stating that the case involved the applicant's (the mother) right to a private life, not her property rights.

11. Legal parenthood as a consequence of medically assisted reproduction

The gamete donor can only be the parent of a child conceived through ARPs if there is a reproductive cell transplant between partners, which can be construed as IVF. Third-party gamete donations – male or female – do not give rise to the issue of legal parenthood because maternal filiation depends solely on giving birth to a child, in a similar manner to natural motherhood.[38] The fatherhood of the third-party donor (genetic father) is specifically excluded by Art. 441 para. 1 of the Civil Code, which states, in broad terms, that medically assisted reproduction with a third-party donor does not give rise to any filiation between the child and donor.

There are no special presumptions of parenthood for ARPs: the mother is the person giving birth; and the father is presumed to be the mother's husband at the time of birth,[39] the former husband at the time of conception, or the mother's cohabiting partner at the time of conception (the latter presumption is applied only during paternity trials). The true source of paternal filiation in the case of medically assisted reproduction with a third-party donor is the consent given by the mother's husband or consensual partner to undergo the procedure. Paternal filiation can be contested only for the lack of prior consent from the father or if a pregnancy did not arise from the medically assisted procedure.[40] A consensual partner who gave his consent to this procedure is liable to recognise paternal filiation after birth[41] if there is no intervening marriage between the parents.

35 | Tec, 2017, p. 246.
36 | Tec, 2017, pp. 236–239.
37 | Case of Knecht v. Romania, European Court of Human Rights, Application no. 10048/10 – Decision [Online]. Available at: https://hudoc.echr.coe.int/#{%22fulltext%22:[%22knecht%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-113291%22]} (Accessed: 29 January 2024).
38 | Florian and Floare, 2024, p. 475.
39 | Ibid.
40 | Florian and Floare, 2024, pp. 476–477; Motica, 2021, p. 228.
41 | Florian and Floare, 2024, pp. 478–480.

12. Controversies regarding the legal status of surrogacy in Romania

Surrogacy is not expressly forbidden, but neither is it specifically allowed or regulated in Romania.[42] The provisions that the mother is the one giving birth (irrespective of genetic relationship), even in medically ARPs,[43] and parental authority cannot be voluntarily transferred to another person make surrogacy legally difficult.[44] Art. 408 para. 1 of the Civil Code makes no distinctions in stating that motherhood is derived from the fact of birth, thus making no special provisions for medically assisted pregnancies, artificial insemination, or IVF.[45] The source of the biological material is not relevant, and genetic testing for motherhood is used only as a proxy for determining who gave birth to a certain child.

Parental authority is usually exercised by both biological parents, and they can usually agree between themselves how to 'divide' it in practice; however, a mere parental agreement cannot voluntarily relinquish parental authority or transfer it to a third party. Only through court-approved adoption can parental authority be permanently transferred from the biological parents to the adoptive parents. All other court decisions regarding the exercise of parental rights, even the most dramatic ones concerning the removal of the exercise of parental rights, are essentially temporary in nature and can later be reversed when the parents' situation improves. Thus, there are no certain legal means to 'contractually' transfer parental authority from the birth mother to another woman, even if she is the genetic parent of the child.

Both types of surrogacies, gestational and traditional,[46] are equally impeded by the legal provisions on birth motherhood and the impossibility of voluntarily relinquishing or transferring parental authority. Altruistic surrogacy is not explicitly banned but heavily impeded. Commercial surrogacy falls foul of multiple legal bans on trading the products of the human body, trading biological products,[47] or human trafficking. Surrogacy is heavily impeded in all cases, but medical infertility or gestational impediments sometimes bring undeclared sympathy from the courts in trying to overcome the legal hurdles to its recognition.

A few published court cases have recognised the effects of surrogacy.[48] Here, a circumvented legal reasoning is observed, with the paternal filiation (fatherhood) usually being voluntarily recognised by the genetic parent and maternal filiation (motherhood) being recognised, on demand, as an effect of the possession of civil status (status by habit and repute) and genetic filiation, with a special regard to the provisions of Art. 8 of the European Convention of Human Rights regarding the right to private and family life.[49]

42 | Sztranyiczki, 2020, p. 268.
43 | Florian and Floare, 2024, p. 469.
44 | Dobozi, 2013, pp. 64–65.
45 | Sztranyiczki, 2020, p. 268.
46 | Predescu, 2020, p. 477.
47 | Sztranyiczki, 2020, pp. 269–270.
48 | Brodeala, 2016, pp. 70–73.
49 | Irinescu, 2019, pp. 213–214.

13. Issues regarding cross-border surrogacy for Romanian parents

Filiation in Romanian private international law, regulated by Book VII, Chapter 2, Section 2 of the Civil Code, is subject to either the law that governs the general effects of the parents' marriage for children born or conceived during marriage (Art. 2.603) or to the national law of the child at the time of birth for children born out of wedlock (Art. 2.605).[50] There are no special provisions in Romanian private international law for surrogacy because there are scant references to this procedure in the entire domestic legislation.

In cases concerning surrogacy performed abroad or with a foreign element, Romanian courts would probably apply either the national law of the woman giving birth, which would be the surrogate mother, if she is single or the law that governs the general effects of her marriage. If these foreign laws allowed for surrogacy and the voluntary transfer of parental authority from the birth mother to the intended parents owing to their previously concluded agreement, we could speculate that only international public order grounds could lead to the refusal to recognise the lawful consequences of these procedures in Romania.

In Romanian domestic law, a genetic link is required only for paternal filiation (fatherhood) out of wedlock, while maternal filiation (motherhood) is intrinsically dependent on giving birth. Paternal filiation (fatherhood) is legally presumed for the current husband at the time of birth or the former husband at the time of conception, which is presumed to be between 300 and 180 days prior to giving birth. An apparent maternal filiation, even if it is based on a birth certificate, coherent with habit and repute could still be challenged if the listed mother is not the woman who gave birth. On a domestic birth certificate, the woman having given birth is automatically listed as the mother of the child, while her current or former husband or the person who voluntarily recognises the child is listed as the father. The civil status of a person is subject to their national law according to Art. 2.572 para. 1 of the Civil Code.[51] Foreign birth certificates are registered in Romania if they concern any person born abroad.

14. The Romanian criminal law approach to surrogacy issues

Because it is not a regulated procedure, surrogacy could give rise to criminal charges for each of its constituent acts for the participating parties (surrogate mother, gamete, donor, and facilitator), either as an author, instigator, or accessory. The Healthcare Reform Law no. 95/2006 criminalises donating cells or tissues for material gain (Art. 156 para. 1), advertising for cell or tissue donation for material gain (Art. 156, para. 3), and organising or harvesting cells or tissues for transplant for material gain for either the donor or the person who organises the process (Art. 157, para. 1).

50 | Macovei, 2017, pp. 343–345; Popescu and Oprea, 2023, pp. 463–480.
51 | Ibid., p. 195.

There were several well-publicised cases involving oocyte trafficking in 2009–2014, some culminating in jail time for the owners of private fertility clinics in Bucharest and Timisoara that were carrying out IVF procedures without proper authorisations. They were found guilty of purchasing oocytes from poor women and using IVF to implant them in foreign infertile couples. The most common publicly recorded unlawful practices were related to the remuneration of gamete (female) donors and selling the gametes to couples for IVF procedures. There were also attempts to circumvent the restrictions on surrogacy by making the surrogate mother give birth outside medical institutions and declaring the birth in the special procedure for the late registration of births, which involves a DNA-test for the mother that could allow for the genetic mother to be registered as such by hiding the fact that she did not give birth to the child.[52]

15. Conclusions

In Romania, the regulation of human reproductive procedures tends to be limited and general. Although the Civil Code attempted to go further by regulating medically assisted reproduction with a third-party donor while banning eugenics and genetic manipulation without a therapeutic purpose, the special legislation that was meant to implement these generous principles is lagging behind. There are detailed provisions on transplants, including reproductive cell transplants, and firm regulations on patient confidentiality and informed consent for any medical procedure, but these regulations lack a specific focus on reproductive issues. The public financing for reproductive procedures is limited, and the regulations that surround it tend to be very restrictive and with a traditionalist approach to reproductive health.

In relation to Romania's demographic challenges, derived from strong emigration and the below-replacement level fertility, medically assisted reproduction represents an insufficiently valued resource. For all families to reach their desired numerical composition, the widespread infertility issues must be tackled head on. For an ageing parental population, overcoming infertility is one of the major answers to the demographic challenge.

The state cannot assert that it has done everything in its power to tackle the issue of its decreasing indigenous population as long as there are couples or single women who cannot afford medically recommended fertility treatments. The current annual funding for only 10,000 fertility treatments seems to be insufficient for a total population of approximately 19 million. By estimating a 30% success rate for fertility treatments, the 10,000 publicly funded treatments per year will result in only 3,000 children yearly. The public demand for state-funded fertility treatments and the demographic requirements of a decreasing population of 19 million cannot be fulfilled with only 30 million-euro funds every year.

52 | Dobozi, 2013, pp. 65–66.

Bibliography

Asociația Pentru Reproducere Umană Din România (2018) 'Primul studiu de analiză a problemelor de infertilitate din România', *APRUDR*, 1 June. [Online]. Available at: https://www.arur.ro/2018/06/18/855/ (Accessed: 1 June 2023).

Avram, M. (2022) *Drept civil. Familia.* Bucharest: Hamangiu Editions.

Baias, Fl.-A., Chelaru, E., Constantinovici, R., Macovei, I. (eds.) (2021) *Codul civil – Comentariu pe articole.* 3rd edn. Bucharest: C.H. Beck Editions.

Brodeala, E. (2016) 'The Legal Status of Assisted Human Reproduction in Romania. A Brief Discussion on Surrogacy', *Romanian Journal of Comparative Law,* 7(1), pp. 56–74.

Diaconescu, Ș., Vasilescu, P. (2022) *Introducere în dreptul civil. Volume 1.* Bucharest: Hamangiu Editions.

Dobozi, V. (2013) 'Les methodes modernes de procreation et leur influence sur le Code civil', *Studia Universitatis Babes-Bolyai – Iurisprudentia,* 58(2), pp. 59–71.

Florian, E., Floare, M.I. (2024) *Dreptul familiei – Căsătoria. Regimuri matrioniale. Filiația.* 9th edn. Bucharest: C.H. Beck Editions.

Iordăchescu, D.-A. (2020) 'Rolul intervențiilor psihologice în tratamentul infertilității', *Revista de psihologie*, 66(2), pp. 167–177 [Online]. Available at: https://www.journalofpsychology.ro/index.php/RP/article/view/16 (Accessed: 29 July 2025).

Hageanu, C.C. (2023) *Dreptul familiei.* 3rd edn. Bucharest: Hamangiu Editions.

Irinescu, L. (2014) 'O nouă perspectivă asupra filiației: reproducerea umană asistată medical cu terț donator', *Analele ştiinţtifice ale Universităţii Alexandru Ioan Cuza din Iaşi, seria Ştiinţe Juridice*, 60(1), pp. 15–22.

Irinescu, L. (2019) 'Copilul, un dar sau un drept?', *Revista de Dreptul Familiei*, 2019/1-2, pp. 208–218.

Macovei, I. (2017) *Tratat de drept international privat.* Bucharest: Universul Juridic Editions.

Motica, A.R. (2021) *Dreptul civil al familiei – Raporturile nepatrimoniale. Curs teoretic și practic.* 3rd edn. Bucharest: Universul Juridic Editions.

Neagu, A. (2023) 'Infertilitatea în mediul urban din România', *HotNews*, 7 March. [Online]. Available at: https://www.hotnews.ro/stiri-sanatate-26126822-infertilitatea-mediul-urban-din-romania-4-din-10-cupluri-nu-reusesc-obtina-sarcina-desi-incearca-acest-lucru-1-5-ani-una-din-4-sarcini-obtinuta-urma-unui-tratament.htm (Accessed: 25 June 2023).

OECD (2016) 'OECD – Social Policy Division – Directorate of Employment, Labour and Social Affairs. Ideal and actual number of children', *OECD*, 17 December. [Online]. Available at: https://www.oecd.org/content/dam/oecd/en/data/datasets/family-database/sf_2_2-ideal-actual-number-children.pdf (Accessed: 11 September 2023).

OECD (2024) 'Family Database', *OECD*, 27 March. [Online]. Available at: https://stats.oecd.org/Index.aspx?DataSetCode=FAMILY (Accessed: 21 January 2024).

Popescu, D.A., Oprea, E.A. (2023) *Drept internațional privat*. Bucharest: Hamangiu Editions.

Predescu, N.-R. (2020) 'Soluții Legislative și Practici Judiciare în Materia Reproducerii Asistate Medical cu Mama Surogat', *Curierul Judiciar*, 19(8), pp. 476–481.

Sztranyiczki, S. (2020) 'Se impune reglementarea legală a procedurii maternității surogat în România?', *Revista de Dreptul Familiei,* 2020/2, pp. 267–281.

Tec, L. (2017) 'Soarta embrionilor umani congelați – nouă provocare pentru Drept', *Revista Română de Drept Privat*, 2017/4, pp. 234–250.

Vlădăreanu, R., Onofriescu, M. (2019) *Ghid de bună practică în infertilitate*. Bucharest: Societatea de Obstetrică şi Ginecologie din România şi Colegiul Medicilor din România.

LIMITS AND TENSIONS OF THE PRINCIPLE OF SUBSIDIARITY IN THE CONTEXT OF THE EUROPEAN UNION

Alena Krunková[1]

ABSTRACT

The Maastricht Treaty introduced the principle of subsidiarity within the European Union with the intention to declare a clear position in the exercise of the competences of the Member States and the European Union. Over time, it has become a popular concept, often used across the wide range of legal facts on which the European Union is built. However, its originally clear concept was subject to certain limitations that have sooner or later manifested in individual Member States. This paper highlights the legal and factual level of implementation of the principle of subsidiarity and its consequences, which are not always manifested directly. This causes certain tensions to develop into limitations in the application of European Union law by the Member States. Subsidiarity is also an essential aspect of federalism, reflecting its centralised and decentralised levels. Thus, the first part of this paper examines this issue from a theoretical perspective with an emphasis on the link with federalism, and the second part analyses selected aspects of the practical level based on experience in the Slovak Republic.

KEYWORDS

subsidiarity
competences of the European Union
limits of European Union law
legitimacy

1. Introduction

The concept of subsidiarity is widely known in legal theory as it is often used by both the professional and lay public. Its conceptual definition reflects the substance of supportiveness, that is, help when it is required. Conversely, in its negative definition, a characteristic of subsidiarity is not intervening in those areas that do not need help or support. For example, subsidiarity can be perceived on different planes, for example, in public administration, in the judiciary, in the elements of direct democracy, and in correlations with the European Union (hereinafter referred to as the 'Union' or 'EU'). The

1 | Associate Professor, Department of Constitutional Law and Administrative Law, Faculty of Law, Pavol Jozef Šafárik University, Košice, Slovakia; alena.krunkova@upjs.sk; ORCID: 0000-0002-4327-4795.

https://doi.org/10.55073/2025.2.73-88

principle of subsidiarity is anchored as the opposite of centralism, deepening the idea of democracy and decentralisation. It is often presented as a political principle, whose purpose is to move decision-making mechanisms to the lowest level possible, which also seems to be the most effective.[2] This paper aims to draw on the theoretical foundations of the principle of subsidiarity and also shift its perception to other areas. It first specifies this principle in the light of the legitimacy of power and then highlights the latent tensions of not respecting it, thus analysing it slightly differently. In this way, we can specify both the formal and legal frameworks at the theoretical level of the examined issue by defining specific provisions governing the principle of subsidiarity. We also consider it essential to establish a material and legal framework defining the scope of real implementation based on certain customs, general legal principles, or traditions applied. For completeness, it is also necessary to point out the possible negative definition of the framework, that is, the setting of limits within which the principle of subsidiarity must not be found either formally or materially.

2. Subsidiarity in the light of the Lisbon Treaty

According to Article (hereinafter referred to as Art.) 5 Paragraph (hereinafter referred to as para.) 3 of the Treaty on European Union,[3] we can characterise subsidiarity as the principle underpinning the exercise of certain competences of the EU.[4] Its aim is to ensure that decisions are taken at a level that is as close to the citizen as possible and that constant scrutiny is carried out to verify whether action at the EU level is justified in view of the options available at the national, regional, or local level.[5] Thus, European law

2 | Pursuant to Art. 10, para. 3 of the Treaty on European Union, every citizen has the right to participate in the democratic life of the Union and all decisions should be taken as openly as possible and as closely to the citizen as possible.

3 | Consolidated version of the Treaty on European Union and the Treaty on the Functioning of the European Union (as amended by the Treaty of Lisbon).

4 | Although the principle of subsidiarity first appeared in the Maastricht Treaty, its origin predates the Treaty itself. While not under this name, the subsidiarity criterion was already included in the area of the environment by the Single European Act of 1987. In its judgment of 21 February 1995 (T-29/92), the Court of First Instance of the European Communities held that prior to the Treaty on European Union's entry into force, the principle of subsidiarity was not a general principle of law under which the legality of Community measures was to be assessed. (Hvišč, 2016, p. 42).

5 | Undoubtedly, as European integration and the EU institutions have evolved, the institutional framework has evolved, too, both formally and materially. At the beginning of the European groupings of the 1950s, there was no need to address the issues of the relationship of the European Communities with the levels of public administration. The European Communities, established and functioning mainly on the basis of economic cooperation, respected the organisation of public administration in their Member States. Moreover, even in the further development of integration, the issue of levels of public administration was not one of those areas in which states would entrust decision-making powers exclusively to the Community, and this is still the case today in accordance with the applicable EU legislation. Therefore, the principle of subsidiarity has been enshrined in this area.

specifies subsidiarity in the form of a 'principle.'[6] On that basis, the EU law restricts the Union in terms of adopting any decision concerning a Member State unless its adoption would be more effective at the level of the Union than at the level of that Member State. In this sense, subsidiarity does not exclude decision-making at a common EU level; it only limits it.

According to the abovementioned Article, the principle of subsidiarity applies only to those areas that do not fall within the exclusive competence of the Union. Under the Treaty on the Functioning of the European Union, the Union has exclusive competence in the following areas: (a) the customs union; (b) the establishment of the economic competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; (e) the common trade policy. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope.[7]

The application of the principle of subsidiarity is explicitly excluded from the exercise of exclusive powers by primary law and can, therefore, be used a contrario for all other competences. For the Union's supporting action, the principle of subsidiarity will be maintained only to the extent that and only when the objectives envisaged by the activity intended cannot be sufficiently achieved by the Member States at the central level or at the regional and local levels. Thus, by reason of the scale or effects of the activity proposed, they can be better achieved at the Union level.[8]

The specification of the principle of subsidiarity in relation to its application by EU institutions is laid down in the Protocol on the application of the principles of subsidiarity and proportionality (hereinafter referred to as the 'Subsidiarity Protocol').[9] National parliaments are also required to adhere to this Protocol to ensure compliance with the principle of subsidiarity.[10] The importance of the principle of subsidiarity is underlined by

6 | Some authors cite subsidiarity as a principle that simply means decentralizing and deconcentrating as many powers as possible from the central government to the local and regional level. The principle of subsidiarity is one of the foundations of European democracy and is applied in EU countries in a way that means that each problem that arises is primarily solved at the level where it arose and where the conditions for its objective assessment and solution are best. The prerequisite for the application of the principle of subsidiarity is the decentralization of competences associated with the decentralization of finances and the decentralization of political power. (Hvišč, 2016, pp. 38–47).

7 | Art. 3, paras. (1) and (2) of the Treaty on the Functioning of the European Union.

8 | Art. 5, para. 3 of the Treaty on European Union.

9 | The principle of subsidiarity is closely linked to the principle of proportionality, which requires that any EU action should not go beyond what is necessary to achieve the objectives of the Treaties. They are also closely linked to the principle of conferral of powers, which stipulates that any policy areas not explicitly agreed upon by all EU Member States in the Treaties remain within their remit.

10 | Pursuant to Protocol No. 1 (Protocol on the Role of National Parliaments in the European Union) annexed to the Treaty of Lisbon, it is in the interest of the Union 'to encourage national parliaments to engage in EU activities and to require that EU documents and proposals be forwarded to them promptly in order to enable them to examine them before the Council of the European Union takes a decision'.

the fact that the Subsidiarity Protocol also focuses on the process of drafting EU legal acts. This is by its introduction of an obligation to justify draft European legislative acts defining the expected application of the principles of subsidiarity and proportionality. Any draft European legislative act should contain a detailed explanatory statement to help assess compliance with the principles of subsidiarity and proportionality. This explanatory statement should contain estimates of the proposal's financial impact and, in the case of a European framework law, its implications for the rules to be set by Member States, including, where necessary, regional legislation.[11]

At the same time, it lays down the obligation to deliver draft legal acts of the Union to the national parliaments of the Member States as follows:

- The Commission shall forward its draft European legislative acts and its amended drafts to national parliaments at the same time as it relays them to the Union legislator.
- The European Parliament shall forward its draft European legislative acts and its amended drafts to national parliaments.
- The Council shall forward draft European legislative acts originating from a group of Member States, the Court of Justice, the European Central Bank, or the European Investment Bank and amended drafts to national parliaments.
- After the adoption of legislative resolutions by the European Parliament and the position by the Council (already at the stage of discussion of legal acts), the Council and the European Parliament shall forward their positions again to the national parliaments.

Any national parliament or chamber of a national parliament may send a reasoned opinion to the Presidents of the European Parliament, the Council, and the Commission, stating why it considers that the draft in question does not comply with the principle of subsidiarity, within six weeks from the date of service of the draft European legislative act.

In matters where an advisory opinion of the Committee of the Regions is required, the legislative authorities are also obliged to attach this opinion.[12]

The protection of the principle of subsidiarity is also contained in another Protocol on the Role of National Parliaments in the European Union (hereinafter also referred to as the 'Protocol on national parliaments'). According to some theorists, it is a political check of the principle of subsidiarity through yellow cards and orange cards, but also a proposal

11 | The reasons leading to the conclusion that the Union objective can be better achieved at the Union level shall be substantiated by qualitative and, whenever possible, quantitative indicators. Draft European legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators, and citizens, to be minimised and commensurate with the objective to be achieved. (Art. 5 of the Protocol on the application of the principles of subsidiarity and proportionality).

12 | In accordance with the rules laid down in the said Article, the Committee of the Regions may also bring such actions against European legislative acts for the adoption of which the Constitution provides that it be consulted. (Art. 8 of the Protocol on the application of the principles of subsidiarity and proportionality).

for the use of the green card.[13] While the national parliaments originally could participate directly in decision-making only in cases of the enlargement of the EU by approving the accession treaties, the Lisbon Treaty gave them the power to intervene directly in the legislative process, through the aforementioned opinion on the compliance of draft legislative acts of the EU with the principle of subsidiarity. Compared to the previous political dialogue, this also brought benefits for national parliaments in that they were entrusted with the power to ensure compliance with the principle of subsidiarity at the political level, including the right to bring an action for violation of this principle by a legislative act before the Court of Justice of the European Union.[14]

Thus, in accordance with the principle of subsidiarity on the basis of primary law, the Union gives vertical priority to all levels of government in the Member States in the decision-making process: central (nationwide), regional, local.[15]

The Maastricht Treaty establishing the EU also institutionalised the Committee of the Regions as an advisory body to the European Commission, the Council of the European Union, and the European Parliament. The Committee of the Regions began its activities in 1994 with its headquarters in Brussels. To this day, it plays the most important role in presenting the regional interests of individual Member States. The functioning of the Committee of the Regions is complex, primarily due to the broad area of interest and the existence of different levels of decision-making. A common thread through the work of the Committee of the Regions is its operation in accordance with the three principles of proximity to citizens, partnership, and subsidiarity. One of the tasks of the Committee of the Regions is to convey the views of Member States' local and regional authorities in relation to EU legislation. The Union has thereby transferred the issue of the regional level

13 | The so-called yellow cards are issued by a group of national parliaments, or their chambers, if the reasoned opinions on the non-compliance of the draft legislative act with the principle of subsidiarity represent at least one third of all votes allocated to national parliaments. The draft legislative act must then be reconsidered. This threshold shall be a quarter of votes in the case of a draft legislative act submitted on the basis of Art. 61 of the Treaty on the Functioning of the European Union on the area of freedom, security, and justice. After such reconsideration, the Commission or, where appropriate, the group of Member States, the European Parliament, the Court of Justice, the European Central Bank, or the European Investment Bank may decide to maintain, amend, or withdraw the draft legislative act if it originates from them. The so-called orange cards are issued by a group of national parliaments, or their chambers, if the reasoned opinions on the non-compliance of the draft legislative act with the principle of subsidiarity under the ordinary legislative procedure represent at least a simple majority of all votes allocated to national parliaments. A proposal for a legislative act returned in this way must also be reconsidered. After such reconsideration, the Commission may decide to maintain, amend, or withdraw the proposal. If it chooses to maintain the proposal, the Commission will have, in a reasoned opinion, to justify why it considers that the proposal complies with the principle of subsidiarity. (Balog, 2016, p. 49).

14 | Balog, 2016, p. 48.

15 | The Subsidiarity Protocol annexed to the Lisbon Treaty directly requires the European Commission to take into account the regional and local dimension of all draft legislative acts and to draw up an explanatory memorandum on how it respects the principle of subsidiarity. This protocol allows national parliaments to object to a proposal on the grounds that it is contrary to that principle. The proposal must then be reviewed and may be maintained, amended, or withdrawn by the Commission or blocked by the European Parliament or the Council. In the event of a breach of the principle of subsidiarity, the European Committee of the Regions or the Member States may refer the adopted act directly to the Court of Justice of the European Union.

from the Member States to its Community level, thus fulfilling the requirement of the principle of subsidiarity.

The principle of subsidiarity is also closely related to the principle of efficiency in the sense that decentralised administration creates space for central authorities to deal with substantive and conceptual matters, thereby streamlining public administration and making it more efficient. Recognising the importance of regional matters on the one hand and the need for horizontal interconnection of cooperation between individual regions of the EU on the other hand, the Union law introduces a specific form of addressing cooperation issues beyond the borders of the Member States yet allowing the development of cooperation within the external borders of the Union (European Grouping of Territorial Cooperation).

Perceiving the principle of subsidiarity solely from the position of primary law would be highly limiting and ineffective. Undoubtedly, its anchoring is a necessity, and subsidiarity itself is supposed to limit the Union; however, just as the Court of Justice became bold in implicitly extending its powers,[16] the implementation of the principle of subsidiarity sometimes encounters less correct application within the Union. Assumptions and principles that could have been invoked for some time are losing their relevance. Thus, with a certain generalisation, we can distil the factors that support subsidiarity and also those that suppress its application. Factors supporting subsidiarity include, for example, the legitimacy of power, decentralisation, delegation of power, supervisory powers with an advisory voice, and non-interference with the powers conferred. As a rule, the opposing factors are the factors suppressing subsidiarity, namely the dispute over the legitimacy of power, centralisation, usurpation of powers, decision-making power, control power with a cassation principle, or the extension (implicit, but often also explicit) of the powers conferred. These factors emerge as several controversies of a theoretical and application nature. Therefore, we again perceive the need to raise several elementary questions, of which the prominent ones seem to be: What is the adequate balance between the source and the executor of power? To what extent of decentralisation can we apply the principle of subsidiarity? What is the nature of the supervisory power of the authorities of a higher level of administration? What can still be considered the supplementation of competences and what is already the usurpation of powers? It holds that, in general, the purpose of the principle of subsidiarity is to limit the interference of a higher body if the lower body is able to perform the intended functions. However, the extent of this limitation remains unclear. There are even opinions on the prohibition of the interference of a higher institution in relation to lower units or vice versa regarding the obligation of intervention of a higher institution if specific criteria are met.[17]

16 | Orosz, 2003, pp. 325–337.

17 | The most accurate definition of the principle of subsidiarity can be considered the provision of Art. 4 para. 3 of the European Charter of Local Self-Government (No. 336/2000 Statutes), according to which in general, public administration is carried out primarily by those bodies that are closest to the citizen. The attribution of competence to another body should take into account the scope and nature of the task as well as the requirements of efficiency and economy. Strangely, the Slovak Republic has not committed itself to comply with Art. 4 para. 3 and Art. 9 (1) and (5) (on the principle of subsidiarity) of this Charter, which creates an interesting situation from the point of view of regional self-government, because Art. 7 para. 2 of the European Charter of Regional Self-Government stipulates that 'in relation to local self-government, regions respect the principle of subsidiarity'. (Hvišč, 2016, pp. 38–47).

The aim of this paper is not to summarise theoretical knowledge about the principle of subsidiarity in a comprehensive way. This is not even possible due to the admissible wordcount of the paper. For the same reason, the paper does not even analyse relevant court decisions. Rather, it focuses on partial issues and seeks connections across the vertical division of power between the EU and its Member States. This naturally complements the discussion by allowing space for other perspectives on the issue examined.

2.1. Subsidiarity versus legitimacy

Understanding the principle of subsidiarity requires broader circumstances to be accounted for. In the transfer of competences, subsidiarity is understood from several perspectives. It may involve the transfer of competences between individual public administration entities; however, it can also be understood in a state-law arrangement as the division of competences among individual states in a federal arrangement or, on an international scale, among individual states within a certain international community. The principle of subsidiarity mainly means the rule for determining competences in the implementation of the common good. The main belief behind this principle is that an individual does everything s/he can of their own initiative and through their own efforts, and what s/he no longer can provide for themselves should be left (transferred) to society. This principle is understood, first, as the non-interference of public authority with the autonomy of individuals and, second, as the right or obligation of a public authority to help the individual (intervene) where the individual alone can no longer manage. For example, in France, the principle of subsidiarity is applied in the sense that the higher-level exercises only those powers that cannot be exercised by the lower levels, or in Germany, where the inalienable powers of the lower levels are established. In Poland, the principle of subsidiarity is even expressed directly in the preamble to the Constitution so that the Constitution of the Republic of Poland as the fundamental law of the state is based 'on … the synergy of powers, social dialogue and the principle of subsidiarity, strengthening the rights of citizens and their community'.[18]

However, in connection with the overreach to federalism, the first question that arises is that of the legitimacy of power. The basic feature of the federation as a superstructure of the Member States is its supportive action in the vertical plane of public authority. Naturally, adequate legitimacy is the aspect that gives the mandate for the final decision when applying the principle of subsidiarity. Federal authorities, as decision-makers, are therefore mostly created directly. In the case of the European dimension of subsidiarity, the decision-making of EU bodies is equally fundamental. However, the creation and functioning of the Union's bodies (or institutions) run into the limits of legitimacy. As such, legitimacy is most closely tied to power, that is, to the existence of public power. However, can we talk about public power in the EU? If so, will the legitimacy of the EU given to it in 1992 (enshrining the principle of subsidiarity) correspond to that of the current one?

One of the measurable indicators of public power is its link to the source of power, that is, the people or citizens. Given this, it is impossible to ignore the so-called conferred EU citizenship, which is tied to the citizenship of the Member States. Undoubtedly, there are more limits associated with legitimacy; however, we will focus on the decision-making processes of the Union bodies, as it is through these processes that they have the opportunity to interact with the principle of subsidiarity.

18 | Hvišč, 2016, pp. 38–47.

The principle of majority decision-making, which makes it possible to override – and thus negate – the national will, has dealt a fundamental blow to the exclusive legitimacy of the decision-making process at the EU level, calling it into question. If this national will were to be tied to the people of a particular Member State (as the only source of legitimacy), then, the acting of the EU against this will expressed by the representation of the state in the Council of the European Union could probably be qualified as illegitimate with respect to that state. The will of the state would not have been transferred to the level of the Council of the European Union and the legitimate chain would have been broken. Opinions are emerging that this problem 'can be overcome by a theoretical construction according to which the current will of the political nation is negated by a will expressed earlier to submit to majority decisions'.[19] In the event of a similar conflict of will at the state level, the current will always applies; therefore, the effort to push through the national interest in the majority decision would have to be based on the belief in the existence of a common interest, which, however, also presupposes the existence of a common will of the European people. However, such assumption already departs from the system of external legitimisation because it is based on the existence of its own legitimising source. The existence of a community formed in this way presupposes its own legitimacy foundation not derived only from the legitimacy foundation of the state. However, the question of legitimacy does not end with the decision-making process in the EU. The other side of the same problem is the significant impact of the supranational decision-making system on the legitimacy of national will formation at the state level. In the case of implementation of indirectly applicable secondary acts, their transposition into national law is required under the constitutional rules of the Member States. In terms of the application of the representative mandate of representative bodies, it should be undesirable to expect the transposition (approval by the Members of European Parliament [MEPs]) of all secondary acts of European law (including those that would be against the will of the MEPs). There is a problem of a conflict of the state's obligation under the Treaty, that is, the earlier will of the state, with the current national will on the matter. It is unacceptable to force an MEP to vote in a certain way under an international (community) commitment, given the principle of prohibition of an imperative mandate. Certainly, this cannot be compared to a classic violation of the state's international legal obligation because, in this case, 'the state has committed itself in advance to the adoption of legislative acts in a certain area by parliamentary means, and thus establishes a latent conflict with the will of its people as a source of legitimacy'.[20] National constitutional courts tend to consider the necessity of opening up the internal law as one of the proofs of the ultimate primacy of constitutional law, in addition to competence in the area of the creation of primary law.[21] However, this concept is not shared by the Court of Justice of the European Union. Thus, the possibility of legal enforcement of the implementation of a secondary legal act conceals a threat to the essence of the functioning of parliamentarism and is evidence of the transfer of decision-making powers to executive institutions. The possibility of considering the legitimacy of the EU as being derived from the Member States is highly problematic because in such cases, the will of the parliament would have to be final and unquestionable.[22]

19 | Belling, 2009, p. 125.
20 | Belling, 2009, p. 131.
21 | Haack, 2007, p. 58.
22 | For more discussion on this, see, for example, Fasone, 2020, pp. 707–732.

The tendency of the EU to close itself into an autonomous political system can be understood as a tendency to enshrine its own competency power, that is, the authority to assume competence on the basis of the decision of European political bodies. Although, to date, this has only been hinted at, reflected in the considerations towards a federal arrangement, in the context above, this hint cannot be underestimated. If the original political power of the Union arises in this way, there is also a logical demand for its underived legitimacy. In this context, it is appropriate to consider the dual legitimisation of the EU by both the Member States and EU citizens. The concept of legitimacy is based on competence as the last foundation of acting and leads to the ultimate source from which the existing political order can be justified. The concept of double legitimisation is based on the parallel existence of two sovereigns: national and supranational, which relate once to the old nation of a Member State and once to the people – the citizenship of the EU. As a result, however, it must lead to the prioritisation of one or another legitimate source as essential in justifying power, and this is inevitable, particularly in the event of a conflict between the two sources. For this reason, legitimisation by two sources is unlikely to be sustainable over the long run. The most visible example is the European Parliament. In a democratic system, the parliament is associated with the idea of representation and, thus, with the idea of a political nation. The very idea of a parliament is based on the concept of a nation-state, which assumes the existence of a politically homogeneous whole, capable of being represented. Otherwise, even a free mandate as part of the essence of parliament makes no sense. What then is the purpose of the free mandate in the European Parliament, which 'represents' individual nations? It is impossible to talk about the representation of the whole and we can hardly expect MEPs to focus on the general interest of the EU if there is no European political nation. We do not mean a nation in the narrow sense of the word, but the so-called 'political public', which would be constituted around common topics of European policy. Even an analogous society is missing here. The effort to create it from above – by educating towards Europeanism, has not brought any significant success, e.g., Belling talks about the government's obligation to get citizens excited about, or at least interested in Europe. Thus, the transfer of democratic mechanisms from the state to the supranational level is accompanied by the necessary question of what legitimacy foundation these mechanisms rely on. If the whole nation is represented by a parliament at the national level created on the basis of democratic elections, at the supranational level, only particular interests are represented by the European Parliament according to its anchorage in the respective Treaties. Such a model is a far cry from classical democratic legitimacy because it lacks the element of representation.[23] The debate also tends to focus on the question of how the nation state is still able to be the main concept for structuring power relations on a global scale and for justifying power. It is also essential

23 | While in nation states, the retreat of representative elements and the increase in the real influence of political parties on parliamentary decision-making can be compensated for by elements of representation in political parties oriented towards the national interest, such compensation is impossible at the supranational level. Efforts to bridge this gap with the concept of representation of an imaginary European people would run into the missing reality. Although the empirical personnel substrate of the political nations of the Member States of the Union is of course identical to the personnel substrate of the Union as a whole, the socio-psychological significance of the idea of a political nation in political reality, i.e., the role played by the very conviction of the population about the existence of a political nation with a united will, cannot be overlooked. (Belling, 2009, p. 134).

to answer whether the heterogeneity of decision-making factors of a collectively binding decision-making process forces us to abandon the model of state sovereignty as a key starting source of power. It should be remembered that the concept of legitimacy is so tied to the concept of sovereignty that the resignation from one of them automatically leads to the questioning of the other.

To achieve legitimacy, there are processes of rationalisation and justification, which we call legitimisation (sometimes also legitimation). Simultaneously with legitimacy, but at the same time distinctly, it is necessary to perceive legality, which simply means the legitimacy to act, or rather the manner of acting in accordance with applicable laws. However, the problem of the principle of subsidiarity in its state and European dimension is not whether it is explicitly enshrined in normative texts, that is, constitutions or relevant international treaties, but whether it is actually being implemented. It can be considered more expedient to emphasise the fact that the principle of subsidiarity in its original version inspired by classical philosophy is not only applied to the arrangement of the mutual relations of higher and lower-level political units but also applies to the relationship between the individual and the organised society, and, thus, includes the protection of the individual against the increasingly expanding state power and bureaucracy.[24] The outlined analyses logically lead to the conclusion that the EU functions as a unique, specific, and autonomous political and legal system with its own will-making process. Notably, at present, it tends to rely on its own legitimation concept, independent of the legitimacy of nation states and their constitutional orders. It remains an open question to determine the origin of this 'own' legitimacy, since, despite the existence of 'Euro-citizenship'[25] in the EU, there is no 'European people' — the original public (personnel substrate) as in the state; therefore, it is not possible, for example, to create a discourse on problems in society, nor can solutions be adequately sought at the civil society level. This component is considerably fragmented. It is not only division according to nation states, nations, and ethnicities but mainly distrust, which is combined with the disinterest of people, which is currently a certain wound for integration processes. Perceiving the position of the state, its development in every respect, and its place in European structures naturally forces us to specify the status of the modern state to determine its role or strength within a new, supranational organisation. However, this will most likely not be possible without recalling its traditional features, operating and established at every stage of the state's development.

3. The principle of subsidiarity in concreto

The application of the principle of subsidiarity can also accelerate latently. Often, seemingly unrelated circumstances may become supportive of similar cases of addressees that had not started as such.

24 | Hvišč, 2016, p. 41.

25 | In accordance with Art. 9 of the Treaty on European Union, a citizen of the Union is any person who holds the citizenship of a Member State. Citizenship of the Union shall be additional to national citizenship, which it shall not replace.

In this context, we would like to point out the recent decision of the Constitutional Court of the Slovak Republic (hereinafter referred to as the 'Constitutional Court'), Case No. PL. ÚS 10/2022, Decision of 24 October 2023. It was a proceeding on the compliance of legal regulations, where the Constitutional Court assessed the so-called chain-linking of tenures of university teachers in accordance with Act No. 131/2002 Statutes on Institutions of Higher Education, as amended (hereinafter referred to as the 'Higher Education Act') and Act No. 311/2001 Statutes, the Labour Code, as amended (hereinafter referred to as the 'Labour Code'). Entering into employment contracts with university teachers for a fixed tenure and its subsequent extension or non-renewal has been a longer-term problem, resonating across Slovak society.

The petitioners considered the contested provisions of the Labour Code and the Higher Education Act regulating the conclusion of fixed-term employment contracts (chain-linking of tenures of university teachers) to be inconsistent with the provisions of the Constitution because of their conflict with the principles of a democratic state ruled by law and because of their discriminatory nature in relation to university teaching staff. At the same time, they were based on the realistic state of affairs, which would be unsustainable in the long run. They objected to the inconsistency of the contested legislation with the principle of equality and the prohibition of discrimination under Art. 12 para. 1 and 2 of the Constitution of the Slovak Republic (hereinafter referred to as the 'Constitution') in conjunction with the fundamental right of employees to fair and satisfactory working conditions, namely protection against arbitrary dismissal and discrimination in employment (Art. 36 para. (1) (b) of the Constitution). In addition, the petitioners objected to the incorrect transposition of Clause 4 (1) and Clause 5 (1) (a) of the Framework Agreement on Fixed-term Work, which is set out in the Annex to Council Directive 1999/70/EC on the Framework Agreement on Fixed-term Work contested by the legislation. They pointed to the inconsistency with the conclusions of the Court of Justice pronounced in its judgment in Case No. C-307/05 (Judgment of 13 September 2007, Del Cerro Alonso, C307/05, EU:C:2007:509), in which the Court of Justice recognised the social policy of the State as objective grounds for extending the validity of fixed-term employment contracts or employment relationships, but according to the petitioners, the status of university teachers cannot be subsumed under these grounds because the pursuit of their activities does not fulfil that objective.

However, the constant case-law of the Court of Justice has been upholding the opposite conclusions. The Court of Justice concluded that the fact that universities have a permanent need to employ such staff does not mean that this need cannot be satisfied by the use of fixed-term employment contracts (Judgment of the 3rd of June 2021, EB, C-326/19, EU:C:2021:438, clause 67). The above conclusions can undoubtedly also be applied to pedagogical employees of universities, or university teachers, whose employment serves to cater to both pedagogical and scientific-research tasks of universities. In addition, the Court of Justice has already posited (Judgment of the 3 June 2021, EB, C-326/19, EU:C:2021:438, Clause 69) that if the extension of fixed-term contracts is subject to a positive assessment of the teaching and scientific activities carried out, the 'special needs' of the industry concerned may adequately consist, as regards the field of scientific research (similarly also the field of pedagogical activity, note), of the need to ensure the career progression of individual scientific (similarly also pedagogical, note) workers, depending on their respective merits, which, in the view of the foregoing, must be assessed. A provision that would oblige the university to conclude a contract for an indefinite period with a

scientific (similarly also with a pedagogical, note) worker, regardless of the evaluation of the results of their scientific (similarly also pedagogical, note) activities would not meet the aforementioned requirements. Therefore, the Court of Justice concluded (Judgment of 3 June 2021, EB, C-326/19, EU:C:2021:438, Clause 71), that

> Clause 5 of the Framework Agreement is to be interpreted as not precluding national legislation, which provides for fixed-term contracts in the recruitment of university scientific (similarly also pedagogical) staff... whereby the conclusion of such contracts is subject to the condition that resources are available for planning and carrying out scientific and teaching activities, supplementary teaching activities and services to students and, at the same time, the extension of such contracts is subject to a positive assessment of the scientific and teaching activities carried out without it being necessary to establish objective and transparent criteria for verifying whether the conclusion and renewal of such contracts indeed corresponds to a real need, whether they are capable of achieving the objective pursued and whether they are necessary for that purpose.[26]

In their arguments, the petitioners stated that they were aware of a contradiction with the conclusions of the Court of Justice announced in its judgment in Case No. C190/13 (Judgment of 13 March 2014, Márquez Samohano, C-190/13, EU:C:2014:146), according to which the renewal of repeatedly concluded fixed-term employment contracts should not be used to meet the permanent and long-term needs of universities in the field of employment of teaching staff. The activities provided by the university teacher (pedagogical and scientific research activities) are not temporary but permanent. However, the Court's findings in that judgment concern the renewal of fixed-term employment contracts with external professors without any limitation as to the maximum length and number of renewals of such contracts.

Nevertheless, the Constitutional Court has (as has been the case several times before) sided with the Court of Justice, respecting the conclusions of its constant (established) case law. According to the Constitutional Court, the contested legislation is in line with the above-mentioned conclusions of the Court of Justice, as the reason for which it was adopted lies in the precise and specific circumstances characterising the activities of university teachers, that is, the performance of high-quality pedagogical and scientific research activities, which result from the specific nature of their tasks in educational

26 | In Clause 53 of the judgment in Case No. C-307/05, Alonso, the Court of Justice stated that the concept of 'objective reasons' under Clause 5 (1) (a) of the Framework Agreement on fixed-term work, as set out in the Annex to Council Directive 1999/70/EC concerning the framework agreement on fixed-term work, must be understood as referring to the precise and specific circumstances characterising the activity in question and may therefore justify, in that particular context, the use of renewed fixed-term employment contracts, such circumstances being apparent in particular from the specific nature of the tasks for which such contracts have been concluded and the characteristics associated with them or, as the case maybe, from the pursuit of a legitimate social policy objective of a Member State' (see Adeneler et al., paras. 69 and 70). The concept of 'objective reasons' under Clause 5 (1) (a) of the Framework Agreement on fixed-term work, set out in the Annex to Council Directive 1999/70/EC on the framework agreement on fixed-term work, is therefore to be interpreted by analogy with the same concept of 'objective reasons' under Clause 4 (1) of that Framework Agreement (Judgment of 13 September 2007, Del Cerro Alonso, C-307/05, EU:C:2007:509, Clause 56).

and scientific research activities. The pursuit of a legitimate social policy objective of a Member State is recognised by the Union legislation as an alternative objective ground for concluding fixed-term contracts. Therefore, the pursuit of that objective alone does not necessitate the national legislation to be compatible with it. The fact that the pursuit of such objective is mentioned in the explanatory report to the contested legislation ipso facto does not constitute its possible incompatibility with the requirements arising from the designated EU legislation.[27]

4. Conclusion

The Böckenförde paradox, which consists of the tension between the nature of the constitution (which is characterised by universality, incompleteness, and the fact that, in particular, in the part setting out fundamental rights and freedoms, it contains only principles and not standards) and the paradigm of its direct applicability (which, in turn, assumes the existence of an application capable of a standard)[28] can also be recalled in connection with the principle of subsidiarity.

The development of the EU is clearly progressive; however, it sometimes conveys the impression of uncontrollability. This naturally causes an increase in the limits by which individual Member States define the boundaries of their sovereignty. At its inception, the principle of subsidiarity introduced by the Maastricht Treaty was identified as a fundamental principle of Union law, the application of which inspired certain hopes. At that time, opponents of integration even referred to subsidiarity as the word that saved its continued existence.

However, more than twenty years of application of this principle have failed to give a clear answer to the question of how subsidiarity can actually work in practice for the benefit of Member States. The theoretical concept shows that it is impossible to effectively exist in complex state formations without subsidiarity. It must be found, in a more or less centralised form, in every federal state. However, we must remember that the EU is not a state unit. It must pay much more attention to the limits and bounds of subsidiarity, so that it can use its supportive effect only where it has a legal foundation for it. The principle of subsidiarity is enshrined in the form of a binding rule of law as a principle of the EU and its observance is de jure a condition for the legality of any legal act of the Union in areas outside its exclusive competence. In the exercise of their powers, all the Union's institutions are obliged to ensure compliance with this principle and the Court of Justice is to declare invalid those legal acts that violate the principle of subsidiarity. However, the example used in the second part of this paper does not support these conclusions. Through the settled case law of the Court of Justice, the Union also ensures the uniform

27 | According to the Constitutional Court, the contested national legislation is not limited to general and abstract authorisation for the use of renewed fixed-term employment contracts (cf. Judgment of 13 September 2007, Del Cerro Alonso, C6 307/05, EU:C:2007:509, Clauses 54 and 55), as it allows for concluding agreements with a precisely defined group of persons—university teachers, with regard to the specific content of their work and its specificities, that is, on the basis of objective reasons, or in order to achieve a specifically defined goal — the implementation of high-quality pedagogical and scientific research activities.

28 | Böckenförde, 1991, p. 17.

application of its law in the area (education), which does not fall within the exclusive competences conferred thereon by the Treaty. In addition, the regulation takes the form of a directive, whose form of implementation is to be left to individual Member States. The Constitutional Court adopted the designated line of interpretation of the law from the Court of Justice, thus de facto excluding the possibility of further remedy of law in the field of higher education, which has been the discussion topic in the field for a long time. Unfortunately, the situation cannot be viewed as other than a latent non-compliance with the principle of subsidiarity. Its application thus remains de jure only at the theoretical level, which is a far cry from its factual level. Then it remains questionable whether the 'phenomenon of the principle of subsidiarity' really remains only a theoretical concept in the sense of the words of Václav Klaus, who described it as an empty, 'escape' word that means nothing and allows everyone to imagine something different thereunder.[29]

29 | Břicháček, 2007, p. 1.

Bibliography

Alexy, R. (2009) *Pojem a platnosť práva*. Bratislava: Kalligram.

Balog, B. (2016) 'Národné parlamenty v záležitostiach Európskej únie – stále hľadanie sa' in Krunková, A. (ed.) *Európska únia a jej vplyv na organizáciu a fungovanie verejnej správy v Slovenskej republike – perspektívy a výzvy spojené s predsedníctvom Slovenskej republiky v Rade Európskej únie.* Košice: Univerzita Pavla Jozefa Šafárika v Košiciach, pp. 38–47.

Belling, V. (2009) *Legitimita moci v postmoderní době: Proč potřebuje Evropská unie členské státy?*. Brno: Muni Press.

Böckenförde, E.-W. (1991) *Staat, Verfassung, Demokratie: Studien zur Verfassungstheorie und zum Verfassungsrechts*. Frankfurt am Mein: Suhrkamp.

Břicháček, T. (2007) 'Princip subsidiarity 15 let od podpisu Maastrichtské smlouvy', *Revue Politika*, 2007/8 [Online]. Available at: https://www.cdk.cz/princip-subsidiarity-15-let-od-podpisu-maastrichtske-smlouvy (Accessed: 11 March 2024).

Břicháček, T. (2008) 'Přístup Evropského soudního dvora k principu subsidiarity', *Právník,* 147(2), pp. 145–159.

Constitution of the Slovak Republic of 1992 (460/1992 Coll.).

Fasone, C. (2020) ''Constitutional amendments' theory and troubles at supranational level: Constitutional change in the EU from the perspective of Richard Albert's analysis', *Revista de Investigações Constitucionais,* 7(3), pp. 707–732 [Online]. Available at: https://doi.org/10.5380/rinc.v7i3.74848 (Accessed: 11 December 2024).

Finding of the Constitutional Court, Case No. PL. ÚS 10/2022, Decision of 24th of October 2023.

Georgiev, J. (2007) *Princip subsidiarity v právní teorii a praxi*. Praha: CEVRO Institut.

Hloušek, V. (2008) *Politologické systémy*. Brno: Barrister & Principal.

Hodža, M. (2008) *Federácia v strednej Európe: a iné štúdie.* Bratislava: Kalligram.

Holländer, P. (2009) *Základy všeobecné státovědy.* Plzeň: Aleš Čenek.

Holländer, P. (2012) 'K rozdielu medzi právnym princípom a právnou normou' in Holländer, P. (ed.) *Filosofie práva*. 2nd edn. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, p. 49.

Hvišč, O. (2016) 'O princípe subsidiarity a decentralizácie v Európskej únii z pohľadu organizácie verejnej správy' in Krunková, A. (ed.) *Európska únia a jej vplyv na organizáciu a fungovanie verejnej správy v Slovenskej republike – perspektívy a výzvy spojené s predsedníctvom Slovenskej republiky v Rade Európskej únie.* Košice: Univerzita Pavla Jozefa Šafárika v Košiciach, pp. 38–47.

Jánošíková, M. (2021) 'Právne princípy v práve Európskej únie' in Bröstl, A., Breichová Lapčáková, M. (eds.) *Nové dimenzie metodológie právnej argumentácie: Úloha právnych princípov vo viacúrovňovom právnom systéme*. Praha: Nakladatelství Leges, pp. 174–191.

Kukliš, P. (2003) 'O princípe subsidiarity vo verejnej správe', *Právny obzor: teoretický časopis pre otázky štátu a práva*, 86(6), pp. 636–649.

Kupcová, Z., Pecníková, M. (2003) 'Ústavný súd Slovenskej republiky a princíp subsidiarity', *Justičná revue,* 55(6-7), pp. 612–628.

Mazák, J., Dobrovičová, G., Orosz, L., Jánošíková, M. (2014) 'Odkaz Súdneho dvora EÚ vnútroštátnym súdom o aplikovateľnosti a pôsobnosti Charty základných práv EÚ: Rozsudky vo veciach Aklagaren Fransson a Melloni', *Právny obzor: teoretický časopis pre otázky štátu a práva*, 97(2), pp. 115–130.

Orosz, L. (2003) 'Všeobecné ústavné princípy - základná charakteristika, význam a spôsob ich vyjadrenia v ústavnom systéme Slovenskej republiky', *Právny obzor: teoretický časopis pre otázky štátu a práva*, 86(4), pp. 325–337.

Orosz, L. (2019) 'O (posilňovaní) súdnej moci' in Bárány, E. (ed.) *Zmeny v chápaní práva: pluralita systémov, prameňov, perspektív.* Bratislava: Ústav štátu a práva SAV, Slovak Academic Press SAP, pp. 94–106.

Orosz, L. (2021) *Základy teórie ústavy*. Košice: Univerzita Pavla Jozefa Šafárika v Košiciach.

Orosz, L. (ed.) (2009) *Ústavný systém Slovenskej republiky (doterajší vývoj, aktuálny stav, perspektívy).* Košice: Univerzita Pavla Jozefa Šafárika v Košiciach.

Orosz, L., Svák, J., Balog, B. (2012) *Základy teórie konštitucionalizmu*. Žilina: Eurokódex, s.r.o.

Žofčinová, V., Barinková, M. (2020) 'Public law aspects of work-life balance in Slovak republic from the perspective of European legislation', *The Lawyer Quarterly: international journal for legal research,* 10(4), pp. 381–392.

WHY TWELVE? – THE HISTORY AND THE MEANING OF THE TWELVE STARS ON THE EU'S FLAG

György Marinkás[1]

ABSTRACT

More than fifty years after its adoption by the Council of Europe and some thirty years after its adoption by certain institutions of the then European Communities – the predecessor of the European Union –, there are doubts about the origin and meaning of the European Union's flag and also about the connection with today's European Union. The author of the current article strives to answer these questions by examining the alleged Catholic symbolism of the flag and the circumstances and motivations of its adoption by the European Communities.

KEYWORDS

Flag of Europe
Marian flag
twelve stars
Council of Europe
European Union
Catholic symbol
Strasbourg
Heitz
Lévy
Delors

1. The history of the flag and its meaning

1.1. The underlying questions

More than fifty years after its adoption by the Council of Europe (CoE) and some thirty years after its adoption by certain institutions of the then European Communities, there are still some doubts about the meaning of the flag of the European Union (EU) and the exact origin of the design. Why does the flag of the European Union only have 12 stars instead of 27?[2] What do the stars in the flag symbolise? Also, the identity of the designer

1 | PhD, Associate Professor, Faculty of Law, University of Miskolc, Hungary; gyorgy.marinkas@uni-miskolc.hu; ORCID: 0009-0008-1013-7306.

2 | The actual number of states in the EU as of March 2024.

https://doi.org/10.55073/2025.2.89-110

can be established only with a high probability according to statement of Paul-Henri Spaak – one of the CoE's Founding Fathers –, who claimed that the idea of the circle of stars was the outcome of parallel proposals, and so it was not possible to attribute the design to one specific person.[3] – However, the latter can be refuted as elaborated on below.

What makes the history of the flag more interesting is its adoption by the European Economic Community (EEC), the predecessor of the EU: while the CoE recommended its own flag for adoption from the very beginning – that is a few days after its adoption by the CoE – for the then already existing European Coal and Steel Community (ECSC) and repeated the recommendation for the EEC after its establishment, the latter searching for its own identity refused it, despite some of its leaders were in favour of the idea of the common symbol. The then pros and cons are still valid: a common symbol that expresses Europe's unity versus the risk that common people confuse these organisations. The EEC only adopted it as its own symbol in the 1980's, when Jacques Delors – probably the most influential Commission president up to this date – decided to do so. In the same time the CoE – the original owner of the design – decided to include a distinctive mark, namely a stylised 'E' letter into its emblem – but not in the flag – in order to make it distinct. The choice was not without historic precedents: the flag with the letter 'E' was one of the first symbols of the European project, however it was never adopted officially.

1.2. Historical oversight of the 'procurement procedure'

In order to answer the above questions, one has to 'travel back' to 1949, when the CoE was established, since the official flag of the EU was designed under the CoE's aegis. The CoE was established with the strong backing of Winston Churchill. Its aim was 'to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress'. Ten states signed the initial declaration: Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom. By 1955 there were 14 full members (with the addition of Turkey, Greece, Iceland and West Germany) and one associate member (the Saarland).[4] – The status of the latter played a role in the choice on the number of the stars.

After its creation, the CoE wanted an emblem or a flag to represent itself. The 'procurement procedure' of the flag can be well-traced due to the fact that CoE's website offers a rich archive with notes, memorandums of the then leaders and also recommendations and resolutions of CoE bodies.[5] On 23 November 1949 Baron Paul Michel Gabriel Lévy, the then Director of Information at the CoE sent a minute[6] to Jacques-Camille Paris, the first Secretary General of the CoE in which Lévy shared his thoughts about the pressing need for an emblem for the CoE. In his view, the lack of an emblem poses the risk of the further use of the flag of the European Movement attributed to Baron Duncan-Sandys.[7] The problem with the flag of Duncan-Sandys lied in the fact that it represented a federalist

3 | Curti-Gialdino, 2005a, p. 81.
4 | Curti-Gialdino, 2005a, p. 81.
5 | The CoE Archive is available on the CoE's website [Online]. Available at: https://www.cvce.eu/en/collections/eisc/european-organisations (Accessed: 28 March 2024).
6 | Minute of Paul Michel Gabriel Lévy, the then Director of Information at the CoE to Jacques-Camille Paris, the first Secretary General, 23 November 1949. (CoE Archive).
7 | A conservative politician and the son-in-law of Winston Churchill.

organisation, which strived for the creation of the United States of Europe. – Therefore, this flag is also called as the 'federalist flag'.

The 'federalist flag'[8]

The CoE invited suggestions from the public. Several proposals were submitted. Hereby the author introduces some of the most notable designs. Count Richard Coudenhove-Kalergi – the president of the Pan-European Movement – in a Memorandum of July 1950[9] presented to the CoE, argued in favour of his design with the Blue Sky, the Sun and the Red Cross. In his opinion the future flag of the CoE should comply the following conditions: should be a symbol of common civilisation and present a European emblem instead of provoking any national rivalry, should represent tradition and should be beautiful and dignified. In his view the flag of the Pan-European Movement designed back in the twenties complied these criteria. In his view the Blue Sky is the natural background of the Sun and represents peace, while the Sun is the eternal symbol of light, spirit, progress, prosperity and truth. The Red Cross is the word-wide recognised symbol of charity and brotherhood of man. In his view the Cross is the symbol of Europe's moral unity and inseparable from Europe's history and civilisation,[10] which could not be opposed by the non-Christian minority. Although he did not name them, but he most probably referred to the Turkish,[11] who opposed the use of cross from the very beginning. In his letter of February 1952 Filippo Caracciolo – the then Deputy Secretary General of the CoE – suggested that a crescent could be added in the upper left-hand by Muslim countries.[12] While initially it did have a support among the decision makers, later it was decided that using a cross

8 | Old flag of the European movement. Madden, Public Domain. Source of picture: https://commons.wikimedia.org/wiki/Flags_of_the_European_Union#/media/File:Old_flag_of_the_European_Movement.svg.

9 | Memorandum presented to the Council of Europe by Richard Coudenhove-Kalergi, President of the Pan-European Movement, Secretary General of the European Parliamentary Union (Gstaad, 27 July 1950) (CoE Archive).

10 | In the Memorandum he also claims that the Sun with the Cross has Celtic and Germanic origins.

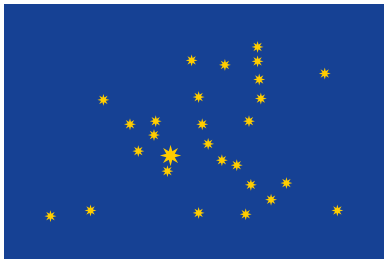
11 | As the Christian minorities in the Near East do not oppose the national symbols of the Crescent and the Star of David. – He added.

12 | Letter from Filippo Caracciolo to the Representatives of the Parliamentary Assembly of the CoE, Strasbourg, 7 December 1951. (CoE Archive).

– an overtly Christian symbol which is unacceptable for Muslims[13] – is contraindicated given that the CoE was supposed to create international unity and reconciliation.[14]

The flag proposal of Coudenhove-Kalergi[15]

It also appears that, by means of two letters dated, respectively, 25 January 1952 and 13 February 1952, the former Spanish diplomat, Salvador de Madariaga, who at the time was President of the European Centre for Culture, put forward a design for a flag with a blue background on which there were a number of gold stars on an imaginary map of Europe, indicating the capitals of the Member States – which were independent in 1938 –, with a larger star denoting Strasbourg.



The flag proposal of Salvador de Madariaga[16]

While the CoE Secretariat criticised the proposal for being too intellectual – that is being hard to be understood by an average citizen – it welcomed the colour combination of gold and blue, which led to another design: a wrath of fifteen golden stars on a blue background. The number of the stars would represent the actual number of the Member States just like in case of the United States' flag. Germany objected because the 15th star

13 | For a theological explanation please see: Cliteur, 2019, pp. 195–196; see also: Fatoohi, 2023, p. 70.
14 | Curti-Gialdino, 2005a, p. 82.
15 | Coudenhove-Kalergi's Europe Flag Proposal. Swiãtopôłk, CC0 1.0 Universal Public Domain. Source of picture: https://commons.wikimedia.org/wiki/File:Coudenhove-Kalergi%27s_Europe_Flag_Proposal.svg.
16 | Salvador de Madariaga Flag Proposal (01 December 1951). Germenfer, CC0 1.0 Universal Public Domain. Source of picture: https://commons.wikimedia.org/wiki/File:Salvador_de_Madariaga_Flag_Proposal_(01_December_1951).svg.

would have stood for the Saarland, which Germany claimed it as its own sovereign territory. The Germans argued that there should only be 14 stars. France insisted that the Saarland must get its own star. After months of argument, it was agreed as a compromise that the number of the stars should not represent the number of the Member States.[17]

A flag proposal with 15 stars[18]

Having considered the above, one has to conclude that the stars do not stand for individual countries. They never did. So, where do the 12 stars come from and who is the intellectual father of the design? The CoE Archives hold numerous designs attributed to Arsène Heitz,[19] an employee in the internal mail service of the CoE. His sketches show blue flags with yellow stars in various numbers (from 11 to 15) and arranged in various ways. One of the designs shows the current one,[20] which Heraldic description is the following: 'On an azure field a circle of twelve golden mullets, their points not touching.'

In January 1955, the Committee of Ministers meeting at Deputy level decided to select just two designs, one with the circle of twelve stars, attributed to Heitz, and the other with the constellation of stars proposed by de Madariaga. The preferred choice of the Deputies was Heitz's design, which was finally adopted by the Assembly and by the Council of Ministers on 8 December 1955.[21]

17 | Curti-Gialdino, 2005a, p. 82.
18 | Proposed 15-star flag of Europe (1953). Alsachti, CC BY-SA 4.0. Source of picture: https://commons.wikimedia.org/wiki/File:Proposed_15-star_flag_of_Europe_(1953).png.
19 | The flag proposals of Heitz are available in the CoE Archive [Online]. Available at: https://www.cvce.eu/en/obj/proposals_for_european_flags_from_arsene_heitz_1952_1955-en-3c8f111a-6be6-4111-a433-20f1a7f9fdba.html (Accessed: 28 March 2024).
20 | Curti-Gialdino, 2005a, p. 81.
21 | Curti-Gialdino, 2005a, p. 82.

The winner design and its geometric description[22]

Credit for the design of the flag is given basically to Heitz, who in any case did the artwork for the first flag produced, according to the CoE's own website. Arsène Heitz himself, in 1987, claimed that his role in designing the flag was of paramount importance. Father Pierre Caillon, who refers to a meeting with Arsène Heitz tells of having met the former CoE employee in August 1987 at Lisieux in front of the Carmelite monastery. It was Heitz who stopped him and declared 'I was the one who designed the European flag'. Carlos Eduardo Cossermelli also credits Heitz with being the author of the design. Following in the footsteps of Father Caillon, Cossermelli went to Strasbourg on 13 February 1998 and met the 84-year-old widow of Arsène Heitz, who did not deny the role played by her husband in the design of the flag. Moreover, the issue of three postage stamps by the French postal services in 1975 – on the twentieth anniversary of the flag's adoption – could be seen as further confirmation of Arsène Heitz's involvement: a photograph of Heitz and the caption 'Coauthor and designer of the European flag' appeared on the stamps.

Who was the other co-author? Paul Lévy, the Director of Press and Information Services of the CoE at the time claimed the credit too. Actually, Lévy claimed all the credit for the proposal himself and tried to portray Heitz's efforts as insignificant: 'Arsène Heitz, who was an employee in the mail service, put in all sorts of proposals, including the 15-star design. But he submitted too many designs.'[23] In a 1995 video-interview[24] taken in front of the Palace of Europe (*Palais de l'Europe*) Lévy answering the reporter's question neither denied that the flag was his design nor wasted a single word to credit Heitz's efforts. However, evidence show that Lévy could not be credited with the design. Instead, he should be credited with being a firm supporter of the idea of adopting a flag and the one who had the patience and determination to carry out the whole symbolic operation of the choice of flag by the CoE between 1949 and 1955. Also, he was the one, who pursued his efforts up until 1966 trying to get the European Communities to adopt the flag. Some others argue that the credits for the design should be attributed to Gerard Slevin, at that time assistant to the Chief Herald of Ireland and one of the heraldry experts of the

22 | Left picture: Flag of the European Union. Council of Europe, Public Domain. Source of picture: https://commons.wikimedia.org/wiki/File:Flag_of_Europe.svg#Licensing. Right picture: EU Flag specification. Ssolbergj, CC BY-SA 3.0. Source of picture: https://commons.wikimedia.org/wiki/File:EU_Flag_specification.svg.

23 | Curti-Gialdino, 2005a, p. 82.

24 | European Parliament: Interview by Paul M. G. Levy on the creation of the European flag – Part 2 [Online]. Available at: https://multimedia.europarl.europa.eu/en/video/interview-by-paul-mg-levy-on-the-creation-of-the-european-flag-part-2_EP091626 (Accessed: 28 March 2024).

Council of Ministers of the CoE. However, that theory does not hold firm, because Slevin's involvement in the work on the European flag certainly postdates the designs of Heitz. It is most likely that Slevin 'only' contributed to the drafting of the heraldic description of the European flag.[25]

That is to sa y, crediting Arsène Heitz with the original design and Lévy for his determined 'lobby work' seems to be the soundest conclusion.

1.3. What does the twelve stars symbolise? – The alleged Catholic symbolism in the EU flag

> [The flag] is the symbol not only of the European Union but also of Europe's unity and identity in a wider sense. The circle of gold stars represents solidarity and harmony between the peoples of Europe. The number of stars has nothing to do with the number of Member States. There are twelve stars because the number twelve is traditionally the symbol of perfection, completeness, and unity.[26]

As the above citation from the EU's webpage shows, the contemporary explanation of European Union officially points to secular interpretations, without explicitly denying any religious meaning of the flag. The CoE's webpage on the other hand mentions some religious examples: '[the twelve stars] bringing to mind the apostles, the sons of Jacob, the labours of Hercules, the months in the year, etc.'[27] The flag's Catholic symbolism took on greater meaning for many who examined its origins. Some argue that there are too many 'coincidences':[28] first of all, both the 'Spiritual Fathers' of the flag – Arsène Heitz and Paul Lévy – and the vast majority of the Founding Fathers of the CoE were devout Catholics. Some of the latter experienced the versatility of the modern nation states' borders,[29] therefore according to some opinions they were pursuing the creation of a united Europe[30] based on anti-communism, democracy and Catholic social principles[31] with the Vatican's explicit support.[32] Also the flag was adopted on a day important for

25 | Curti-Gialdino, 2005a, pp. 81–82.
26 | European Flag [Online]. Available at: https://european-union.europa.eu/principles-countries-history/symbols/european-flag_en (Accessed: 28 March 2024).
27 | The European flag [Online]. Available at: https://www.coe.int/en/web/about-us/the-european-flag (Accessed: 24 March 2024).
28 | Guth and Nelsen, 2014, pp. 1–2; pp. 9–11; Jenkins, 2014; Gogolashvili, 2021.
29 | Robert Schuman and Alcide de Gasperi both found their national identities changed by border shifts after the First World War, which suddenly made Schuman French and De Gasperi Italian. – Jenkins, 2014.
30 | As some argue the Catholic Church always preferred periods when the political order was closer to an imperial model as the Holy Roman Empires than to nation states and that the long-time 'natural political order' of Europe is not the rather young system of nation states, but empires. – Driessen, 2020; see also: Commission of the Bishops' Conferences of the European Community, 2005; see also: Szabó, 2015, pp. 155–164; see also Jacques-Camille Paris' address on 24 February 1950, in Rome, on the role of the Council of Europe in the policy for European unification (CoE Archive).
31 | Jenkins, 2014.
32 | Pope Pius XII welcomed the signing of the Treaty of Rome as 'the most important and significant event in the modern history of the Eternal City' – See: Maillard, 2015; see also: Tombiński and Maria, 2017.

Catholics. – More on that later. – Based on the first point, it is not surprising that according to a research done by Guth and Nelsen the Catholics seem to display more positive attitude towards the integration than the Protestants. At least in the 'old' Member States. This is however not true for the 'newer' Member States[33] and the Holy See is seemingly displaying a less Europe-centric attitude recently.[34]

Secondly, the shade of blue chosen for the flag is associated with Mary and the gold or yellow is often used to represent the eternal glory by Catholic artists.[35] Last, but most importantly the wrath of the twelve golden stars resembles to a passage from Revelation 12:1: 'A great sign appeared in heaven: a woman clothed with the sun, with the moon under her feet and a crown of twelve stars on her head. […]'[36]

Heitz, who according to sources was member of the Order of the Medal of the Immaculate Conception,[37] held that his inspiration came directly from the above cited passage. While there is no direct mention of Mary's name in the above-mentioned passage, Catholic theologists clearly identify the woman as the mother of Jesus.[38] At other occasion too – in August 1987 –, he emphasised the religious inspiration of his flag design: 'the flag of Europe is the flag of Our Lady' – as he once stated. As Father Caillon recalled a conversation with Heitz, the latter told him: 'I suddenly had the idea of putting the 12 stars of the Miraculous Medal of the Rue du Bac on a blue field.'[39]

Thirdly, as mentioned above, the day of the flag's adoption also seems to underline Catholic symbolism: the Council of Ministers adopted the flag – a day earlier than originally planned – on December 8, the Feast of the Immaculate Conception.[40] Lévy in a 1995 video-interview claimed that it was the then Secretary-General who proposed that the resolution should be adopted on the 8 December 1955. – This in Lévy's opinion contradicted the practice according to which final decisions were made on the closing day, which should have been the 9th of December.

Anyhow, neither the October 1955 Recommendation of the Parliamentary Assembly of the CoE[41] nor the 8 December Resolution of the Committee of Ministers that adopted the flag[42] mention any confessional explanation for the design. The latter explains the symbolical description as follows:

33 | However, this correlation is not that straightforward in case of the 'newer' Member States, where the EU's contemporary liberal social policies are met with frown. Guth and Nelsen, 2014, pp. 2–3; for a detailed analysis on the Polish perspective, please see: Konieczna-Sałamatin and Sawicka, 2023, pp. 105–120.

34 | Relations are currently in a change between secularised Europe and the Catholic Church lead by a non-European, thus less Euro-centric Pope. See: Maillard, 2015.

35 | Guth and Nelsen, 2014, p. 9.

36 | Holy Bible, New International Version, 2011 by Biblica, Inc. [Online]. Available at: https://www.biblegateway.com/passage/?search=Revelation%2012&version=NIV (Accessed: 28 March 2024).

37 | Guth and Nelsen, 2014, p. 10.

38 | Die Welt: Der Sternenkranz ist die Folge eines Gelübdes, 1998.

39 | Curti-Gialdino, 2005a, p. 82.

40 | Guth and Nelsen, 2014, p. 10.

41 | Recommendation 88 (1955) of the Parliamentary Assembly of the CoE on the Emblem of the Coe, 25 October 1955 (CoE Archive).

42 | Resolution (55) 32 of the Committee of Ministers of the Council of Europe, 8 December 1955. (CoE Archive).

> Against the blue sky of the Western world, the stars symbolise the peoples of Europe in the form of a circle, the sign of union. The stars are twelve in number and are invariable, the figure twelve being the symbol of perfection and entirety.

Actually, all of those allegations pointing to confessional reasons by Heitz were made much later: by the time of designing and adopting the flag neither Heitz nor Lévy mentioned any Catholic connection. Later, Lévy denied religious inspirations. However, some sources allege that he was 'obsessed' with creating a twelve-star flag after he saw statue of St. Mary in Strasbourg Cathedral. The most probable reason for not revealing Catholic religious inspirations is given by an interview taken with Heitz's widow who explained the 'discretion' about the flag's Catholic origins:

> It was necessary to keep the secret, because there is not only the Catholic religion in Europe. Not to mention all the atheists who would have had his project rejected, starting with France, a secular state by nature.[43]

Her words are justified by the reluctance of some Scandinavian countries to join the EU's predecessor, claiming that it is a Catholic organisation under the Vatican's influence.[44] While it is hard to deny the Catholic influence on the integration project[45] it is worth mentioning that this is an oversimplification of the issue: e.g. in the case of Finland other considerations too, played a role.[46] As a further example for the Catholic symbolism of the flag, in the contemporary France certain members of the parliament regularly try to remove the EU flag from the National Assembly of France. In 2017 Jean-Luc Melenchon – leader of the far-left 'La France Insoumise' – wrote to President Macron:

> Mr. President, you do not have the right to impose a confessional European emblem on France. The refusal of the 2005 Constitutional Treaty, in which this emblem was proposed, is worth the decision of the French people on the subject.[47]

43 | Vandel, 2014.
44 | Guth and Nelsen, 2014, pp. 1–2.
45 | Driessen, 2020.
46 | The model of 'Finlandisation' was named after the Finns who – after the Second World War in a 1948 treaty with the Soviet Union (Ystävyys-, yhteistyö- ja avunantosopimus) – in exchange for Moscow's promise to respect Finland's independence undertook to pursue a neutral foreign policy. The latter was not only a military neutrality, but also the renunciation of European integration. See: Britannica: Finland – The postwar period [Online]. Available at: https://www.britannica.com/place/Finland/Nordic-cooperation (Accessed: 28 March 2024).
47 | Fofana [Online]; Durand, 2017.

It is also worth mentioning that the Joy to Ode – the non-official hymn of the EU[48] – is often mistaken with the Catholic hymn Joyful, Joyful We Adore Thee and perceived as another proof of the integration's Catholic roots by the Protestants. Furthermore, Guth and Nelsen argue that the prevalence of religious iconography on the Euro banknotes and coins are also a sign of the religious origins.[49]

What is more interesting that the Turkish delegation, while showed determined opposition of featuring a cross on the flag – as an offensive symbol for those with Islamic faith –, never opposed the chosen flag design with the wrath of twelve golden stars on an azure background. One may wonder if they did not realise its alleged Catholic symbolisms, or they realised and accepted it as the Islam also acknowledges Mary as the mother of Jesus, a prophet in the Islamic religion.[50]

Not everybody sees the flag as a confessional symbol, however. In 1990 Václav Havel – who was the President of the former Czechoslovakia at that time – gave a more modest interpretation in his address to the Parliamentary Assemble of the CoE:

> To me, the 12 stars in your emblem do not express the proud conviction that the Council will build heaven on this earth. There will never be heaven on earth. I see these 12 stars as a reminder that the world could become a better place if, from time to time, we had the courage to look up at the stars.

As Eckart Klein notes in his writing on the CoE's symbols: 'it is certainly true for this emblem as well as for all other symbols that they not only tend to reflect what has already been done but what should still be achieved.'[51]

1.4. The symbols of the Cathedral of Strasbourg as possible inspirations

As mentioned in the above point, Heitz claimed that he took the inspiration from religious artefacts. First of all, from the European stained-glass window that is the altar window of the Cathedral of Strasbourg (*Cathédrale Notre-Dame-de-Strasbourg*), which represents the Virgin dressed in blue. Seated on her lap, Baby Jesus wears a red outfit – a symbol of royalty – and in his hand, he holds a lily, an emblem of the city of Strasbourg. The upper part of the stained-glass window features the flag of the European Union: twelve gold-coloured stars on an azure blue background.[52]

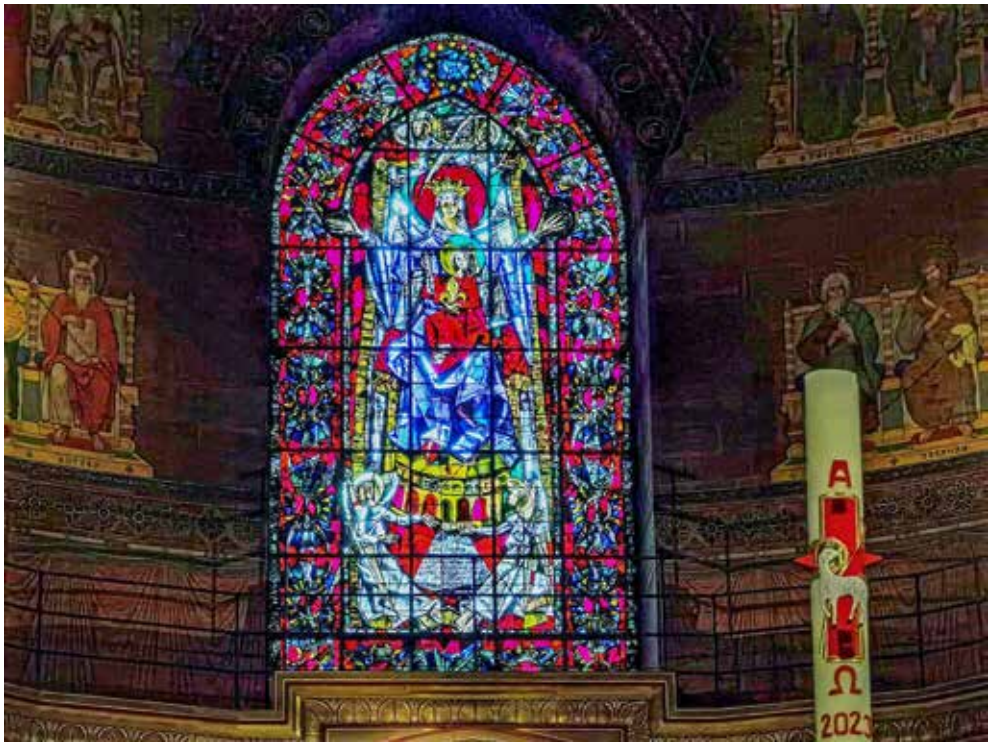
48 | While the Treaty Establishing a Constitution for Europe – which never came into force – contained a provision on the symbols of the Union, the Lisbon Treaty is silent on the matter. However, sixteen States – namely Belgium, Bulgaria, Germany, Greece, Spain, Italy, Cyprus, Lithuania, Luxemburg, Hungary, Malta, Austria, Portugal, Romania, Slovenia and the Slovak Republic – declared in declaration No. 53. that 'The flag with a circle of twelve golden stars on a blue background, the anthem based on the 'Ode to Joy' from the Ninth Symphony by Ludwig van Beethoven, the motto 'United in diversity', the euro as the currency of the European Union and Europe Day on 9 May will for them continue as symbols to express the sense of community of the people in the European Union and their allegiance to it.' (OJ 2007 C 326/337).

49 | Guth and Nelsen, 2014, p. 11.

50 | However, her story and its interpretation differ from that offered by the Bible, including the significance of Jesus. For a detailed theological explanation please see: Leghaei, no date; see also: Samaha, no date.

51 | Klein, 2017, p. 6.

52 | Guernie, 2023.



The window above the main altar made by Max Ingrand[53]

Some theories suggest that Heitz was inspired by the 'European stained-glass window' of the Cathedral of Strasbourg, however these allegations do not stand firm if one considers that the flag was adopted in 1955 and the glass stained window was a gift of the CoE in 1956 – an idea attributed to Jacques-Camille Paris – to replace the old one, which was destroyed during the Second World War, and that the new altar window is not a replica of the old one, it is a contemporary piece of art – made by Max Ingrand[54] – showing a different motif[55].

53 | Strasbourg - Notre-Dame de Strasbourg - Choir - Le vitrail de l'Europe (The Europe Stained Glass Window) 1956 by Max Ingrand (1908-1969). Txllxt TxllxT, CC BY-SA 4.0. Source of picture: https://commons.wikimedia.org/wiki/File:Strasbourg_-_Notre-Dame_de_Strasbourg_-_Choir_-_Le_vitrail_de_l%E2%80%99Europe_(The_Europe_Stained_Glass_Window)_1956_by_Max_Ingrand_(1908-1969).jpg.

54 | For an introduction of the artist, please visit: Max Ingrand: French designer, glassworker, and decorator. [Online]. Available at: https://www.casatigallery.com/designers/max-ingrand/ (Accessed: 28 March 2024).

55 | Please see the original altar window: Massiot, G., & cie. (1910). Strasbourg Cathedral: View of nave looking towards apse and altar. [Online]. Available at: https://curate.nd.edu/show/1c18df68770 (Accessed: 28 March 2024).

Based on the CoE's press release from 1956 the CoE's intention with the gift was to symbolise a unified Europe:

> It will be both an important landmark in the work of restoration of the Cathedral and a historical reminder of the efforts towards European union made at Strasbourg and of the first Secretary-General of the Council of Europe, the late Jacques-Camille Paris.[56]

It is also clear from the press release that, the CoE tried to emphasise the secular nature of this symbol and the event by – somewhat surprisingly for an inauguration ceremony held in a church – dispensing with a mass: 'The ceremony in the Cathedral will be partly secular and partly religious. It will not be a Mass, the Chapter[57] having agreed to change the hours of Sunday services.'[58]

There are other Marian symbols both inside and on the facade of the Cathedral, which Heitz could have seen and could have been served as an inspiration: there is a statue of St. Mary with a halo of 12 golden stars around her head inside the Cathedral. There is another Marian statue on the Cathedral's outside facade. Heitz himself claimed that he was inspired by the religious motif of these statues when creating the flag.[59] – This time there is no anachronism in the story, since these artefacts were created well before the December of 1955.

Statue of St. Mary inside (left) and outside (right)[60]

56 | CoE Press Release IP/1009 PL/MG 17/10/56 (CoE Archive).
57 | According to both Catholic and Anglican canon law, a cathedral chapter is a college of clerics (chapter) formed to advise a bishop.
58 | CoE Press Release IP/1009 PL/MG 17/10/56.
59 | Gogolashvili, 2021.
60 | Left picture: Statue of Virgin Mary in the transept of the cathedral of Strasbourg, France. Created 1858/9, restored 1899, 1934, 1954 and 1998. Tangopaso, Public Domain. Source of picture: https://hu.m.wikipedia.org/wiki/F%C3%A1jl:Statue_of_Virgin_Mary_in_the_Cathedral_of_Strasbourg.jpg. Right picture: Statue de la Vierge et l'Enfant Cathédrale de Strasbourg. André Alliot, CC0 1.0 Universal Public Domain. Source of picture: https://commons.wikimedia.org/wiki/File:Statue_de_la_Vierge_et_l%27Enfant_Cath%C3%A9drale_de_Strasbourg.jpg.

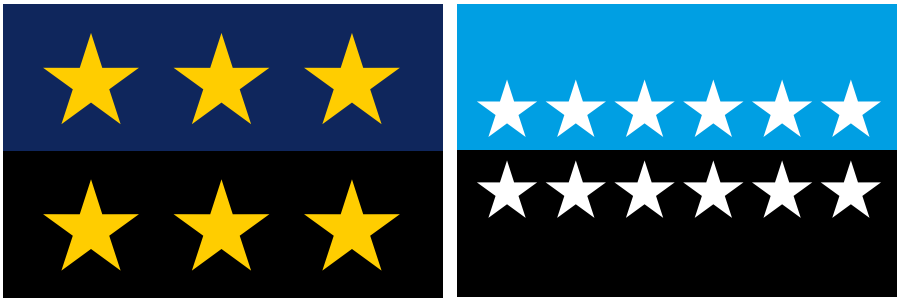
2. 'Grand Theft Flag' or rather the acceptance of a long-standing offer?

Just like CoE, the newly established ECSC and the EEC eagerly sought for a symbol, which could represent the idea of Europe for every European people independently from their nationality and religion. The problem was that the 'perfect flag' was already owned by another institution. While the CoE always advocated that the other European integrational organisations should adopt its flag, both the ECSC and the EEC was reluctant to adopt the CoE flag in the beginning since they wanted a unique and distinctive symbol. While the ECSC found one and used until its winding-up, the EEC after almost thirty years of reluctance opted for the full-fledged adoption of the CoE flag.

2.1. The early years

Shortly after the adoption of the flag with the blue background and the golden stars on the Feast of the Immaculate Conception – namely 8th December –, the then Secretary General of the CoE – Léon Marchal – sent letters to René Mayer, the then President of the ECSC High Authority and René Sergent, the then Secretary-General of the Organisation for European Economic Cooperation (OEEC) informing them on the choice of the flag. He also expressed his hope that their organisations would adopt similar emblems.[61] The ECSC, perceiving itself as supranational organisation working towards a federation, did not want to adopt the symbol of a 'simple' intergovernmental organisation such as the CoE. The OEEC refused to adopt the emblem for quite the opposite reason: in its view the CoE was aimed at creating a political union that did not respect national sovereignty. Instead of the CoE flag, the ECSC adopted a flag with six gold stars on a half black, half blue background. The ECSC chose the 'American-way' of increasing the number of the stars with the new entries ending up with twelve silver stars by the time it was lowered on 23 July 2002 on the day of the ECSC Treaty's final expiry.

61 | Guth and Nelson, 2014, p. 9.



The original and the final version of the ECSC flag.[62]

Walter Hallstein, the first president of the EEC Commission, proposed the examination of the adoption of an official symbol for the Communities, that is the ECSC, the EEC and the Euratom. In his view a flag was needed not only for prestige reasons, but for practical and operational ones. As he pointed out: the lack of any symbol of identity had been particularly apparent during the official events where the Presidents of the three European executives took part.[63] Marinus Van der Goes van Naters, was appointed as rapporteur to examine this issue in his report. In his first report of November 1959,[64] the rapporteur focused on the right of legation, the question of flag was a secondary issue in the report. However, a note of the then Secretary-General of the CoE – Lodovico Benvenuti – was attached to the report in which the Secretary-General claimed that the CoE in no way claims exclusive right to the use of the flag with blue background and the twelve golden stars, since it is the symbol of whole Europe. On the contrary: he suggested that the EEC should not adopt a flag with six stars, since than a comparison would surely be made between the number of the stars and the number of the Member States. He concluded that the number of the stars should be symbolic – that is twelve – while at the same time, every institution should be free to place symbols or acronyms on the flag. In his supplementary report of October 1960[65] Van der Goes van Naters placed greater emphasis on the flag claiming that it was a mistake not devoting the necessary attention to the issue of the flag in the previous report and confuted Lodovico Benvenuti's arguments annexed

62 | Left picture: Flag of the former European Coal and Steel Community, six star version. Holek, Public Domain. Source of picture: https://commons.wikimedia.org/wiki/File:Flag_of_the_European_Coal_and_Steel_Community_6_Star_Version.svg.
Right picture: Flag of the former European Coal and Steel Community, twelve star version used since 1986 onwards. Holek, Public Domain. Source of picture: https://commons.wikimedia.org/wiki/File:Flag_of_the_European_Coal_and_Steel_Community_12_Star_Version.svg.

63 | Curti-Gialdino, 2005b, p. 2.

64 | Marinus Van der Goes van Naters, Report on behalf of the Political Affairs and Institutional Affairs Committee of the European Parliamentary Assembly on the problems posed by the European Communities' external relations, in particular the right of legation and flag (9 November 1959) (CoE Archive).

65 | Supplementary note to the Report on the problems posed by the relations of the European Communities with the outside world, in particular the right of legation and flag (October 1960) presented by Mr van der Goes van Naters (Doc. No. 87) (CoE Archive).

to the previous report. The rapporteur argued that the flag with the blue background and the twelve golden stars is not the symbol of Europe: it is the symbol of the CoE. – This allegation is supported by Lévy's statement in the above cited 1995 interview, where he said that the ministers insisted that it is not the symbol of Europe, but the symbol of the CoE. – Furthermore, Benvenuti's idea to use the flag with distinctive symbols or acronyms would confuse the public and would lead to assumptions that the EEC institutions are part of the CoE.[66] The rapporteur argued in favour of the six yellow stars on a blue background and suggested the CoE's stability practice that is keeping the number of the stars constant regardless of later accessions to the community.

A month later the issue was discussed during a plenary debate in the European Parliamentary Assembly of the EEC – called as the European Parliament since 1962 – where the majority of the representatives could only agree in one thing: organising a competition in order to select a distinctive flag for the European Communities.[67] While some initial steps were taken – namely a meeting took place with the potential experts who would sit as the jury[68] – the competition was never realised and for some twenty years the issue was off the agenda.[69] – It is not hard to see how this time almost coincides with the twenty years of the so called 'Eurosclerosis'.

| *2.2. The Impetus in 1979 and the 'Battle of Commissions'*

The issue of the flag gained momentum in 1979, when the European Parliament was first elected by universal and direct suffrage. A motion for a resolution was tabled on 31 October 1979 by Ingo Friedrich and other MEPs from the Christian-Democratic Group (EPP).[70] The motion concerned the adoption of a European flag for the EEC. The heraldic description was absolutely identical to the CoE flag although neither the CoE nor the CoE resolution adopting that flag was mentioned in the proposal. On 5 November 1979, the motion for a resolution was put before the Political Affairs Committee. The committee's report suggested that the European Parliament should reach an agreement with the Parliamentary Assembly of the CoE with a view to the complementary and cooperative

66 | 'No one can be expected to wear the tie of another club' – as the rapporteur quoted a member of the British Parliament.

67 | Curti-Gialdino, 2005b, pp. 4–5.

68 | Note for the Chairman of the Political Affairs Committee of the European Parliamentary Assembly (Brussels, 13 February 1961) (CoE Archive).

69 | By all means, on certain occasions, the issue of a common flag was raised: at the 1970 Universal Exhibition in Osaka (Japan), the EEC was represented by a flag with six gold stars. In 1973, the European Parliament adopted its own emblem with a blue background and the letters 'EP' and 'PE' placed at the centre of a golden laurel wreath linked by three rings. It was later replaced by the twelve stars. – It is hard not to see the similarity with the CoE's suggestions. – In May 1975, a flag was flown at the Palais des Congrès in Brussels. The flag featured twelve stars at its centre, plus a thirteenth having double the diameter of the others. It is also worth mentioning two initiations: first, the Commission launched a competition in late 1972 open to professional graphic designers and draughtsmen in the Member States and the candidate countries. In this case, the purpose was not to design a flag but an emblem to be used largely for publicity purposes. As the second initiation, in 1978 the MEPs Colette Flesch and Hans Jürgen Klinker proposed that the Community should be represented by a European flag at the Olympic Games in Moscow in 1980. The Commission cast a chill over the company: it reiterated that there were no plans in this respect. See: Curti-Gialdino, 2005b, pp. 5–6.

70 | European Parliament, session documents 1979-1980, doc.1-454/79 (CoE Archive).

nature of the two institutions. In the opinion of Kai-Uwe von Hassel separate symbols may jeopardise the sense of unity. Others were of different opinion, however: some claimed that adopting the same flag would result in confusion and that it is the proof of the lack of ideas.

A resolution was adopted by the European Parliament almost four years later, on 11 April 1983,[71] with 50 votes in favour, 19 against and four abstentions. It was decided to ask the Chairman of the Political Affairs Committee to contact the chairman of the appropriate committee of the Parliamentary Assembly of the CoE on the issue. On 28 April 1983, the Secretary-General of the European Parliament, Hans-Joachim Hopitz, forwarded the resolution to Franz Karasek the Secretary-General of the CoE. Karasek welcomed the European Parliament's resolution on the adoption of the flag. The Bureau of the European Parliament decided on 2 February 1984 to seek the opinions of the Political Affairs Committee and the Legal Affairs Committee. While the Political Affairs Committee was in favour[72] of the CoE's suggestion, namely that the institutions of the European Communities should adopt the CoE flag with their distinctive marks, the Legal Affairs Committee chaired by *Simone Veil*[73] was on a different opinion.[74] The opinion highlighted the risk of confusion, if the European Communities adopted the same flag as the CoE. As Veil emphasised, the public was already confused enough by the use of names that were difficult to differentiate – Council of the European Communities, European Council, CoE – and by the fact that at that time the Parliamentary Assemblies of the two organisations held their plenary sittings in the same building in Strasbourg. She stressed furthermore that while the CoE and the Communities undoubtedly had 'parallel and complementary interests' and the Community treaties expressly provided for cooperation between them, they were 'distinct and independent political entities which each member of the European public should be able to recognise and distinguish'.[75]

In the meantime, the matter of the flag was brought before the Council of the European Communities. The German delegation – which initiated the issue before the Council –, in a view with the closeness to the end of the European Parliament's term suggested that the Council should consider adopting the CoE's flag as the flag of the Communities if an appropriate agreement could be reached between the European Parliament and the CoE. Despite the initial enthusiasm in the Council, the negative opinion of the 'Veil Committee', persuaded the Council formation not to decide on the matter before the European Parliament had come to a final decision.[76]

The Fontainebleau European Council[77] considered that it was important to promote the identity and the image of the Communities among the people of Europe. In their view

71 | OJEC 1983, C 128, p. 18.
72 | Opinion of the Political Affairs Committee, 21 March 1984 (Source: Historical Archives of the European Parliament).
73 | The first woman ever to preside the European Parliament.
74 | Opinion on the adoption of a flag for the European Community for the Bureau of Parliament, rapporteur Mrs Simone Veil, 26 April 1984, doc. PE 90.049/fin., Annex to 7 BE, meeting of the enlarged Bureau 23 May 1984, (Source: Historical Archives of the European Parliament).
75 | Curti-Gialdino, 2005b, pp. 7–8.
76 | Curti-Gialdino, 2005b, p. 9.
77 | 25–26 June 1984.

symbolic instruments like a flag and an anthem would have been appropriate tool.[78] At the same time, it was decided to set up an ad hoc Committee called 'People's Europe' chaired by Professor Pietro Adonnino – also a MEP at that time – made up of representatives of heads of state or government.[79] The Parliamentary Assembly of the CoE, welcomed[80] the decision of the Fontainebleau European Council to set up an ad hoc Committee on a 'People's Europe'. However, it expressed its concerns about the creation of new symbols of European identity that would add to the confusion among European citizens. Therefore, it emphasised that the symbols of the CoE 'are available for use by the Communities'.[81] As a 'response' to the Adonnino Committee, the Consultative Assembly of the CoE set up a Commission of Eminent Statesmen chaired Emilio Colombo.[82] In its first report,[83] the 'Colombo Commission' recommended that the Communities should adopt the CoE's European flag and the organisations should adopt other common symbols such as the European anthem and Europe day.

3.'We are going to take it!'

As Jacques Delors – president of the Commission 1985-1995 – mentions it in his Mémoires:[84]

> On arriving at the Commission, I discovered that the institutions could not agree on the choice of a European flag. Without even trying to find out more, I accepted the proposal from the Parliament [...] I had been told that it was the flag with twelve stars of the Council of Europe. We are going to take it! [I said].

On 12 March 1986, during an 'interinstitutional' working lunch in Strasbourg attended by Pierre Pflimlin, the then President of the European Parliament, Hans Van den Broek, the then Dutch Foreign Minister and President-in-Office of the 'Foreign Affairs' of the Council, and Jacques Delors the issue of the flag was speedily resolved. Paul Collowald – who at that time served as the Director-General for Information and Public Relations of the European Parliament – has reconstructed the conversation anecdotally:

78 | The European Council also suggested considering the formation of European sports teams and the minting of a European coin, the ECU (Presidency Conclusions, Bull. EC, suppl. 7/85, p. 5).
79 | Adonnino, 1985, pp. 438–449; Barbi, 1986, pp. 79–93; Tousignant, 2005, pp. 41–59.
80 | Recommendation 994 (84) of 3 October 1984 on the future of European cooperation (CoE Archive).
81 | CoE, Parliamentary Assembly, Recommendation 994(1984), part. A(iv), reproduced by M. Göldner, Politische Symbole der europäischen Integration, annex 1. 28. (CoE Archive).
82 | The Commission, chaired by Emilio Colombo, had the following members: Hélène Ahrweiler, José Maria de Areilza, Pieter Dankert, Maurice Faure, Knut Frydenlund, Kai-Uwe von Hassel, Alois Mock and Geoffrey Rippon.
83 | The Report of the Colombo Commission is reproduced in Annex I to the General policy of the Council of Europe – Future of European cooperation – Examination of the first report of the Committee of Eminent European Statesmen (Colombo Commission), Rapporteur Harald Lied, Parliamentary Assembly of the Council of Europe, doc. 5455 of 13 September 1985, pp. 16–25 (especially p. 20).
84 | Arnaud, 2004, p. 632.

> Delors, turned to Pflimlin and asked: 'Where shall we start, Mr President?'
> Pflimlin replied: 'Let's start with the flag'.
> Delors grasped the opportunity: 'Why not? What do you propose?'
> Pflimlin then said: 'I propose that we take the flag as such, with no epsilon, no EP, no palms, as the flag of Europe, since the institutional details are not of much interest to European citizens …'
> Delors replied: 'Agreed. I'll try to get it through …'[85]

Delors's firm stance and the way in which he speeded up the issue of the symbols subdued those who – even within the European Commission itself –, had reservations about the advisability of a flag identical to the flag of the CoE.[86] The decision was made. On 20 March 1986, the Secretary-General of the European Parliament, the representative of the Secretary-General of the Council and the Secretary-General of the Commission, to whom the matter had been delegated by their respective Presidents, met in Brussels. They adopted provisions on the use of the flag, the emblem and the anthem. As for the flag they decided that the Community and its institutions would be represented by the same flag. Any flags in use until then was withdrawn according to the decision. On 15 April 1986, the European Parliament's Bureau decided to approve the provisions establishing that the flag of the Community was the same as CoE's flag. On 29 May 1986, the European flag was the first time raised on a thirteenth mast alongside the flags of the twelve Member States before the Berlaymont in the presence of the Presidents of the European Commission, the European Parliament, and the Dutch Ambassador H. J. Charles Rutten, representing the President-in-Office of the Council. The official speeches stressed the values of peace, freedom and the importance of symbols. Pflimlin noted:

> If Europe is built on law and institutions, it also needs symbols. The work of Europe will only be completed if it matters to the peoples of Europe. Throughout history, the flag has been always been the symbol of nations. It is now the symbol of Europe. For nations, the flag has been a symbol of combat. Let the European flag be the symbol of the peaceful fight for the European Union![87]

4. Conclusion

Based on the above written, one may conclude that Arsène Heitz was clearly inspired by his Catholic faith, when he designed the flag. Paul Lévy, who supported Heitz's flag proposal was most probably likewise inspired despite his denial on religious considerations in the design. Similarly, it is hard to believe that the devout Catholic Founding

85 | Van den Broek does not seem to have advanced any objection on behalf of the Council. See: Collowald, 1993, pp. 47–48.
86 | In the European Parliament, a motion for a resolution on common European symbols had been tabled by Werner Münch (CDU) and other MEPs on 21 March 1985. Again, a socialist MEP expressed sceptical opinion: P Lieselotte Seibel-Emmerling asked, however, what value symbols such as the anthem and the flag could have for citizens who saw the EEC drowning in unsaleable production surpluses. Collowald, 1993, pp. 47–48.
87 | Pflimlin, 1991, p. 412.

Fathers of the CoE did not realise the Catholic symbolism of the twelve stars against blue background and the significance of the day on which it was adopted. However, it is not that obvious that they intended to publicly emphasise the Catholic symbolism of the flag. On the contrary, they discarded flag designs that featured Christian symbolism with a view to Turkey – a country with an almost 100% Muslim population – and also with a view to the atheist citizens of Europe. Following this logic, a flag that would display a purely Catholic symbol would have been unacceptable for the Protestants as it is proven by the reluctance of some Scandinavian states to join the EEC before the 1990s. In the author's view even if someone sees Catholic symbolism in the chosen design, its greatness lies in the fact that twelve is an important symbol for almost every culture and religion, past and present. Thus, almost everybody independently from religious, political or cultural background may identify with the flag of Europe.

Bibliography

Adonnino, P. (1985) 'L'Europa dei cittadini: considerazioni e prospettive', *Affari esteri*, 68, pp. 438–449.

Barbi, P. (1986) 'L'Unione europea da Fontainebleau a Lussemburgo. Storia di una grande occasione mancata', *Società editrice napolitana*, pp. 79–93.

Cliteur, P. (2019) 'The Crucifix and the Ideal of a Religiously Neutral State Get access Arrow', *Journal of Church and State,* 61(2), pp. 181–199 [Online]. Available at: https://doi.org/10.1093/jcs/csy029 (Accessed: 13 March 2025).

Collowald, P. (1993) 'La 'Trajectoire' Strasbourg-Luxembourg-Bruxelles' in Dassetto, F., Dumoulin, M. (eds.) *Naissance et développement de l'information européenne*. Brussels: Peter Lang, pp. 47–48.

Commission of the Bishops' Conferences of the European Community (2005) *The Evolution of the European Union and the Responsibility of Catholics*. COMECE [Online]. Available at: https://www.comece.eu/wp-content/uploads/sites/2/2022/04/20050509-The-evolution-of-the-EU-and-the-Responsability-of-Catholics.pdf (Accessed: 28 March 2024).

Curti-Gialdino, C. (2005a) 'Origin of the Design for the European Flag' in Curti-Gialdino, C. (ed.) *The Symbols of the European Union*. Roma: Istituto Poligrafico e Zecca dello Stato S.p.A., pp. 80–85.

Curti-Gialdino, C. (2005b) 'The European Committees and the Choice of the Flag (1955-1986)' in Curti-Gialdino, C. (ed.) *The Symbols of the European Union*. Roma: Istituto Poligrafico e Zecca dello Stato S.p.A.

Delors, J., Arnaud, J.L. (2004) *Mémoires*. Paris: Plon.

Die Welt: Der Sternenkranz ist die Folge eines Gelübdes (1998) 26 August [Online]. Available at: https://www.welt.de/print-welt/article625491/Der-Sternenkranz-ist-die-Folge-eines-Geluebdes.html (Accessed: 28 March 2024).

Driessen, M. D. (2020) 'The surprisingly Catholic roots of the European Union', *America – The Jesuit Review*, 23 April [Online]. Available at: https://www.americamagazine.org/politics-society/2020/04/23/surprisingly-catholic-roots-european-union/ (Accessed: 28 March 2024).

Durand, A-A. (2017) 'Le drapeau européen a-t-il une origine catholique?', *Le Monde*, 12 October [Online]. Available at: https://www.lemonde.fr/les-decodeurs/article/2017/10/12/le-drapeau-europeen-a-t-il-une-origine-catholique_5200019_4355770.html (Accessed: 28 March 2024).

Fatoohi, L. (2023) 'The Non-Crucifixion Verse: A Historical, Contextual, and Linguistic Analysis', *American Journal of Islam and Society*, 40(1-2), pp. 39–76 [Online]. Available at: https://doi.org/10.35632/ajis.v40i1-2.3143 (Accessed: 13 March 2025).

Gogolashvili, K. (2021) 'The symbolism of the EU flag and why a true Christian would not tear it down and burn it', *Rondeli Foundation*, 13 July [Online]. Available at: https://gfsis.org.ge/events/blog/view/1284 (Accessed: 28 March 2024).

Guernie, P. (2023) 'Strasbourg Cathedral: discover the Gothic masterpiece!', *French Moments*, 14 December [Online]. Available at: https://frenchmoments.eu/strasbourg-cathedral/ (Accessed: 28 March 2024).

Guth, J.L., Nelsen, B.F. (2014) 'Religion in the Creation of European Identity: The Message of the Flags' *The Review of Faith & International Affairs*, 14(1), pp. 80–88 [Online]. Available at: https://doi.org/10.1080/15570274.2016.1145476 (Accessed: 28 March 2024).

Jenkins, P. (2014) 'Is the EU's Flag Really A Marian Emblem with the Central Figure Removed?', *Aleteia*, 27 August [Online]. Available at: https://aleteia.org/2014/08/27/is-the-eus-flag-really-a-marian-emblem-with-the-central-figure-removed/ (Accessed: 28 March 2024).

Klein, E. (2017) 'Seat and Symbols of the Council of Europe' in Schmahl, S., Breuer, M. (eds.) *The Council of Europe: Its Law and Policies*. Oxford: Oxford Scholarly Authorities on International Law, pp. 93–107; https://doi.org/10.1093/law/9780199672523.003.0004.

Konieczna-Sałamatin, J., Sawicka, M. (2023) 'Europe Is here: The European Union in the eyes of catholic-nationalist circles in Poland' in Kuczyński, P. (ed.) *The Virus of Radicalization*. Warsaw: Collegium Civitas, pp. 105–120; https://doi.org/10.6084/m9.figshare.22129571.

Leghaei, M. (no date) 'Mary, the Mother of Jesus, not the Mother of God Ancient Prophets for a Modern World – The True Story of Jesus', *Al-Islam.org* [Online]. Available at: https://www.al-islam.org/ancient-prophets-modern-world-true-story-jesus-p-mansour-leghaei/mary-mother-jesus-not-mother-god (Accessed: 14 April 2024).

Maillard, S. (2015) 'The Vatican's outlook on Europe: from firm encouragement to exacting support – Correspondent in Rome for La Croix', Policy Paper, 135, pp. 1–14 [Online]. Available at: https://institutdelors.eu/wp-content/uploads/2020/08/vaticaneu-maillardjdi-june15-1.pdf (Accessed: 28 March 2024).

Pflimlin, P. (1991) *Mémoires d'un Européen – De la IVe à la Ve République*. Paris: Fayard.

Samaha, J. M. S.M. (no date) 'Qur'an: Mary's Place. The Virgin Mary in the Qur'an', *University of Dayton* [Online]. Available at: https://udayton.edu/imri/mary/q/quran-marys-place.php (Accessed: 14 April 2024).

Szabó, M. (2015) 'Univerzalitás és Európaiság' in Sáry, P. (ed.) *Decem anni in Europaea Unione I*. Miskolc: Miskolci Jogtudományi Műhely, pp. 155–164.

Tombiński, J., Maria, G. (2017) *The Popes and Sixty Years of European Integration*. Vatican City: L'Osservatore Romano [Online]. Available at: https://www.eeas.europa.eu/sites/default/files/the_popes_and_sixty_years_of_european_integration.pdf (Accessed: 28 March 2024).

Tousignant, N. (2005) 'L'impact du Comité Adonnino (1984-1986). Rapprocher les Communautés européennes des citoyens', *Études internationales*, 36(1), pp. 41–59 [Online]. Available at: https://doi.org/10.7202/010731ar (Accessed: 3 March 2025).

Vandel, P. (2014) 'If you have never scrutinised the European flag, now is the time or never: because of the elections, we see it everywhere!', *Franceinfo*, 25 May [Online]. Available at: https://www.francetvinfo.fr/replay-radio/les-pourquoi/pourquoi-le-drapeau-europeen-est-il-bleu-avec-12-etoiles-dorees-en-cercle_1762029.html (Accessed: 28 March 2024).

A REVIEW OF THE CONSTITUTIONALITY OF THE ECTHR CASE LAW IN THE CONTEXT OF THE STATES PARTIES' OBLIGATION UNDER ART. 46(1) ECHR: A STUDY BASED ON THE EXAMPLE OF POLAND

Mariusz Muszyński[1]

ABSTRACT

International courts are part of institutional solutions that are an answer to the necessity to solve various new problems affecting global society. However, for state, democracy and the rule of law this kind of role of the case law of international courts creates a problem. On the one hand it exists in competition to national judicial power and can verify its actions, and on the other hand it influences the content of provisions contained in international agreements, which is a clear example of the development of law (as to its substance) which bypasses the legislative power.

Therefore, judgements of international tribunals have no direct effects, and their execution takes place by the actions of proper state organs on the basis of their national (constitutional) powers. This guarantees that the state has an impact on the manner in which aforementioned judgments are executed, and that it indicates the boundaries within which the state undertakes to abide by such a judgment.

The possibility of the constitutional review of judgments delivered by international courts plays an important role in the process of their execution. It indeed deals with answering the question of whether broadly understood effects of a judgment can lead to a breach of the Constitution.

A constitutional review is particularly advisable in the case regarding judgments of the ECtHR. They are indeed a tool by means of which the ECHR constitutes a living instrument. Thus, the probability of violating constitutional boundaries is higher than in the case of an ordinary international agreement.

The consequence of this phenomenon in Poland is the activation of a review mechanism, such as that allowed by the existing legal system. It is a constitutional control of judgements of the ECtHR, although only in the formula of control of norms on which the judgement is based.

In ongoing practice, the CT has made such a control twice, in the case ref. no. K 6/21 and K 7/21. And twice the CT decided that norms derived by judgements of ECtHR from art. 6 ECHR, are contrary to the Constitution. Poland has not executed judgments of the ECtHR based on unconstitutional norms.

1 | dr hab., University Professor, Faculty of Law and Administration, Cardinal Stefan Wyszynski University in Warsaw, Poland; m_muszynski@uksw.edu.pl; ORCID: 0000-0002-3499-2437.

https://doi.org/10.55073/2025.2.111-143

KEYWORDS
review of the constitutionality
ECtHR case law
international obligations
Constitution
Constitutional Tribunal

1. Introduction

International courts are institutions rooted in the history of international law. Although for centuries their impact on global reality had been overrated, significant changes took place in that regard at the turn of the 20th and 21st centuries. On the one hand, the number of such courts has increased over the years; and on the other hand, they went beyond their ordinary role of an arbiter solving specific disputes which had arisen from international-law contracts and joined the process of the strategic development of international law.

They owe this last change to the increased number of agreements aimed at the creation of laws and to the specificities of their judgments, which not only make up a simple act declaring an infringement of an international obligation, or setting a dispute related to a classic contract, but also serve as a subsidiary means for the determination of rules of law[2]. In the literature, these are even presented as one of the sources of international law.

It is certainly misleading to suggest that the judgments of international courts are normative. These acts are not formal sources of law and do not constitute a direct legal basis for action. They merely indicate that a judgment is based on an existing norm with a specific content. In this way, the feature of a source of law is only of a cognitive[3] and auxiliary character. A judgment does not create but solely reveals a legal norm, or confirms its existence.

One of international courts which, by means of its judgments, significantly impacts the standards of law in the States of contemporary Europe is the European Court of Human Rights (the ECtHR), a body of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),which was founded in Rome on 4th November 1950 'to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto (...)'[4].

The ECtHR has been operating since the mid-20th century. Its significance results have been possible due to the emergence of three prerequisites:

1. the efforts made by the ECtHR to redefine, by way of its case-law, its treaty-based position, to acquire the status of a quasi-constitutional court for Europe;
2. the transformation of the ECHR's character from a simple legal act into a so-called living instrument, and the progressive effects of case law based on that concept;

2 | Art. 38(1)(d) of the Statute of the International Court of Justice.
3 | Cf. Pellet, 2006, p. 677; Hoof, 1983, p. 169.
4 | Art. 19.

3. the redefinition of the conception of judgments, from those of a determining character into possible judgments interfering with the legal system by way of a direct requirement that specific changes be made to the law.

What is meant in the first context is breaking the will of States, by way of case law, as regards to them being bound by the ECHR, the beginnings of which reach back as early as the latter years of the 20th century[5]. The second one concerns the evolution related to the understanding of the content of ECHR-based obligations, which – considering their general formulation – makes it possible not only to re-interpret the normative content in accordance with socio-political, cultural or legal conditions that are changing with the passage of time[6], but also to encroach with judgments on spheres of a systemic or political character[7]. Finally, what is concerned in the third context are so-called pilot judgments, which are not envisaged in the ECHR but have been developed in the case-law practice[8]. They received their official basis in 2012 in the Rules of the ECtHR[9]. Their delivery is not even based on specified cases but depends on the will of the adjudicating panel of the ECtHR. Although one may have doubts as to the legality of such an action[10], some representatives of scholarship even refer to this as the formalisation of that institution[11].

For states bound by such a unique treaty-based regime, the existence of the ECtHR plays an existential role. This court is namely an external body of supervision over state authority, acting on the basis of the law via international treaties, the content of which it shapes by itself in an increasingly liberal manner. At the same time, it is vested with the powers enabling it to assess ex post actions of a state with the expectation that those actions will be cancelled, and that national law will be amended. In this way, it impacts the independence of such states to conduct foreign and internal policy, thereby impacting their sovereignty. Hence, not only does it create a ECHR-based narrative but even conducts a case-law policy. Considering these quickly rising legislative ambitions of the ECtHR, we are one step away from the situation where its judgment will reveal the existence in ECHR-based standards of a norm violating the core (foundation) of the constitutional ordre public of a State Party to ECHR. Thus, the following question is natural: if a state, while concluding an agreement with the ECHR, had known what normative content the ECtHR would ascribe to a provision in a judgment delivered many years after the accession to ECHR, would this state have agreed on that accession?

This is a serious problem, all the more so as the fact that the norms of the ECHR clash with those of the Constitution is no longer a theoretical issue. In recent years it has become

5 | Judgment of the ECtHR, Belilos v Switzerland; Report of the Commission of Human Right, Metropolitan Chrysostomos and Georgius Papachrysostomou; judgment of the ECtHR, Loizidou v Turkey. More: Frowein, 1999, p. 145.
6 | Report of the Commission of Human Rights and judgment of the ECtHR, Tyrer v United Kingdom, para. 93.
7 | Judgment of the ECtHR, *Verein KlimaSeniorinnen v Schweiz.*
8 | The pilot judgment was created on the basis of the case *Broniowski v Poland,* see para. 189.
9 | Art. 61 Para. 1.
10 | The question arises about the scope of the content of the Rules. It may not create obligations for State Parties to ECHR; nor may it create bases for the ECtHR to infer new ECHR-based obligations of State Parties in its case law.
11 | Kamiński, Kownacki and Wierczyńska, 2011, p. 101.

a real case for example in Poland. The ECtHR issued a series of judgments concerning the judiciary system and the Constitutional Tribunal (CT) in Poland[12].

As a result of these judgements, at the request of the Prosecutor General, Art. 6 of ECHR was subject to constitutional review in the national forum. The proceedings resulted in two judgments of the CT declaring within a certain scope the non-conformity of Art. 6 of ECHR to the Constitution.[13] The CT inferred the said non-conformity, by applying the judgments of the ECtHR as an instrument revealing the norms contained within the content of a provision, which were the basis of those judgments. It held that those norms were inconsistent with the Constitution. Consequently, the judgments of the ECtHR, being delivered on an unconstitutional legal basis, were deprived of the attribute of enforceability and up until the change of power in Poland, which took place on 13th December 2023, they had not been executed.

Although the aspect of refusal to execute judgments of the ECtHR is not entirely unknown in its history[14], a new dimension emerged from the legal and political perspective. What is of concern here is the possibility and manner of conducting the review of the constitutionality of those judgments rather than the refusal to execute them from the perspective of the political power. This corresponds to the blunt opinion expressed by Martti Koskenniemi a dozen years ago – It is high time that 'international adjudication' were made the object of critical analysis instead of religious faith[15].

This text will attempt to answer the question about the possibility, manner and consequences of conducting such a review. The analysis will be conducted using the basis of Poland's example.

2. The systemic position of judgments of international courts from a theoretical perspective

The specificities concerning the operation of international courts are based on the terminology typical of the national justice system. Judgments are the crucial kind of decisions delivered by international courts[16]. Such a perspective often leads to common simplifications and mistakes, as a result of which international courts are automatically treated as national courts or even as an extension of the national justice system, and their judgments are seen as acts constituting an element of national legal relations.

12 | E.g., judgments of ECtHR: Xeroflor v Poland; Broda and Bojara v Poland; and Dolińska-Ficek and Ozimek v Poland.

13 | Judgments of the CT, K 6/21 and K 7/21.

14 | Judgement of the ECtHR, Hirst v the United Kingdom. The United Kingdom refused to execute the judgment due to a breach of the state's 'constitutional tradition'. The ECtHR tried to enforce this action by the pilot judgment in the case Greens and M.T. v the United Kingdom. The execution of the judgment ended in a compromise in 2017.

15 | See Koskenniemi, 2008, pp. 127–152.

16 | As a rule, international courts adjudicate in the form of judgments and advisory opinions. Sometimes the catalogue of their operation embraces the possibility of delivering interim orders (measures).

This is not true. Above all, any judgment by an international court is an act of an international body. It thus belongs to the system of international law. Such a judgment is an international obligation of the so-called second rank, that is, the obligation to execute it does not follow from its own power, but solely from the power of another obligation – a provision of an agreement binding on the state. This is a result of the *pacta sunt servanda* principle. If an agreement does not contain a provision imposing on the state the obligation to execute a judgment, then a judgment is not an international-law obligation, but merely a recommendation. This shows that both with regard to the legal character of a judgment and the obligation to execute it by the state, the crucial role is taken by the provisions of the treaty which establishes such a court.

The status of a judgment by an international court in the national legal system is a reflection of the relationship between international law and national law as defined by each state (as a rule) at the level of the state's constitution. The need for such a general solution arises from the fact that although the two regimes are formally distinct, at the substantive level international law often sets standards that require not only the mere action of state authorities within their national competences, but increasingly the amendment of existing national law.

This enforces the existence of systemic constructions of an organising nature. Indeed, in such instances, the state may adopt a dualist or monist construction (or alternatively a mixed one) and appropriately apply tools of reception or incorporation (soft incorporation or hard incorporation).

In dualist legal systems, the obligation to enforce a judgment is reinforced by the principle of the primacy of international law. It directs the state to ensure the effectiveness of international law in the domestic legal order and to achieve the objective indicated by that law, regardless of the obstacles and consequences for the domestic legal system.

However, this principle does not operate automatically. The emergence of an international obligation (judgment) does not give rise to direct effects at a national level. For those effects to arise the action of proper state organs is necessary, undertaken on the basis of and in accordance with the procedures of national law.

If monist solutions are adopted, what may even take place is the attribution of the national feature of enforceability to a judgment of an international court, although this requires a proper imperative arising from a provision. The judgment will then take advantage of the legal force of a treaty-based norm which was incorporated into the national legal order.

3. The systemic position of judgments of international courts from the perspective of the Constitution of the Republic of Poland[17]

The Constitution is perceived as favourable towards international law. Its solutions are based on the dualist conception of relations with international law, which is partially

17 | English version of the Constitution see: Trybunał Konstytucyjny: The Constitution of the Republic of Poland [Online]. Available at: https://trybunal.gov.pl (Accessed: 14 July 2024).

broken by monism. The adopted standard is defined by Art. 9 (dualism), Art. 87 and Art. 91(1) and (2) (monism). The first provision introduces at a constitutional level the imperative addressed to Poland to abide by international law binding with it. It is of a general character, which refers to all kinds of international-law obligations. The second provision places within the catalogue of the sources of law universally binding in Poland's territory one of the sources of international law, namely international agreements, although only those which become binding on the state by way of ratification[18]. The third one assigns to those agreements the attribute of direct applicability and introduces a conflict-of-law rule in accordance with which ratified international agreements, albeit those which are ratified with prior consent granted by statute, have the primacy of application in the event of a conflict with a statute[19].

The Constitution does not in any way directly refer to international courts[20] in a practical sense. No one should be misled by the fact that Poland's submission to the case law of international courts is based precisely on ratified international agreements. This has no impact on the position of international courts, as:

1. it is not an international agreement, but the Constitution that creates judicial power and the Polish justice system (Art. 10 and Art. 175 Constitution);
2. the direct application of ratified international agreements refers to substantive provisions of such an agreement, and not to institutional constructions[21].
3. ratification itself only triggers, in relation to an international agreement, the aforementioned effect of Art. 87 and Art. 91(1) of the Constitution, and the statutory consent to ratification adds to this agreement the attribute of primacy in the event of a conflict with a statute (Art. 91(2) of the Constitution). Nothing else is involved, because ratification is solely a matter of the procedure in accordance with which a state becomes bound by an agreement. As a procedural element, neither does it create nor impact the character of judgments delivered by a court established on the basis of such an agreement.

Therefore, no judgment of international courts is a judgment within the meaning of the national system of law, despite the fact that the name of this act is identical to acts delivered by national courts. Indeed, it has not been delivered in the name of the Republic of Poland, which is directly required from national courts and tribunals by Art. 174 of the Constitution. A judgment of an international court is still a form of obligation arising from the system of international law. Hence, from the perspective of the Constitution, it is embraced by the imperative to abide by international law (Art. 9). It is at the discretion of the national legislator to decide in what way and within what scope this obligation will be fulfilled. The determination of the legal framework of the fulfilment of an obligation takes place at a statutory level[22]. The state's freedom may be limited only by a provision contained in the agreement establishing an international court and obliging a judgment to be executed[23].

18 | Art. 87.
19 | Art. 91.
20 | Apart from Art. 55.
21 | More Muszyński, 2023a, pp. 5–36.
22 | The legal system of the State Party to ECHR should vest in organs of public authority, including organs of the judicial power, the proper powers to assess a judgment of the ECtHR as well as to 'analyse' and 'execute' it under the conditions of a specific case. Cf. Łętowska, 2011a, p. 9.
23 | Art. 39 of the Statute of the International Tribunal for the Law of the Sea.

This shows that the obligation to execute judgments from international courts based on the constitutional imperative of the observance by Poland of international law binding upon itself is not absolute in its character. The fact that it is not absolute is reflected in the dimension of the state's sovereign right to shape its legal system, which will define the manners and limits of executing judgments. This does not exclude the possibility of reviewing them either[24], it only makes one think about the consequences thereof.

4. The execution of the ECtHR judgments from the perspective of Art. 46 of the ECHR

Art. 34 of ECHR states that the ECtHR examines individual applications concerning a violation of individual rights set forth in ECHR. Rulings take the form of a judgment. Under Art. 46(1) of the ECHR, the State Party is obliged to undertake to abide by the final judgement, which in common terms means an international-law imperative to execute a judgment. The fulfilment of this obligation is supervised by the Committee of Ministers of the Council of Europe[25].

The judgment itself is of a declaratory and affirmatory nature[26]. It identifies a specific infringement of the ECHR by a state and has the effect of obliging the state to remedy the violation[27]. The ECHR does not concretise the manner of performance of the obligation. This action remains within the state's discretion. The ECtHR does not prescribe a specific way in which judgments should be enforced, although case law confirms that the measures taken must be adequate[28]. From this perspective, the state's executive autonomy is possibly limited and monitored[29].

It is only in the case of the increasingly common pilot judgments that the ECHR formulates the so-called remedial instructions[30].

In turn, from the perspective of the Constitution, such a judgment remains outside the national legal order[31]. It is not an 'enforcement title' that is subject to compulsory execution in the state's territory. It does not have a direct effect in national legal relations, nor does it bind universally as a source of law[32]. It does not change the applicant's situation in national law. It is an assessment of an individual case examined from the perspective of

24 | Judgment of the CT, K 7/21.
25 | Art. 46(2). In 2001 the Committee of the Council of Ministers stated for the first time that the execution of judgments of the ECtHR constituted a condition for the membership of the European Council. See the so-called interim resolution ResDH (2001)80 of 26.06.2001 concerning the execution of the judgment *Loizidou v Turkey*.
26 | Cf. the judgment of the ECtHR, *Marckx v Belgium*, para. 58.
27 | Cf. Garlicki, 2005, p. 125.
28 | Judgment of the ECtHR, *Burdov v Russia* (no. 2), para. 125.
29 | Judgment of the ECtHR, *Scozzari and Giunta v Italy*, para. 249.
30 | There also appear cases outside the formula of pilot judgments; the first one in the judgment of ECtHR, *Assanidze v Georgia*, paras. 202–203.
31 | Grzegorczyk, 2006, p. 7.
32 | Radziewicz, 2012, p. 2.

the ECHR, an act of application that the state must execute[33] through proper actions, thus eliminating the effects of a violation of the ECHR. This should be viewed through the lens of whether it is possible, because a mere execution of a judgment in an individual case additionally depends on the specificities of the violation.

Accordingly, in the case of a legal action (e.g. there is a judgment of a national court held by the ECtHR to have been delivered in breach of the right to a court), an act constituting the breach as well as its effects should be eliminated from legal relations. In the case of an actual action (e.g. the proceeding of the police vis-à-vis a detainee recognised as torture), what is meant is the simple discontinuation of an action. However, while the latter is easy, for the rectification of damage indicated in the first case to occur, there must exist a formal and defined possibility under national law (procedure) of competent state organs to take a specific action. Moreso as the ECHR itself does not directly impose on states the obligation to introduce specific legal regulations to national legislatures.

In this way, an ECHR-based obligation to execute a specific judgment of the ECtHR is affected by the specificities of the national system of law. The execution of a judgment in Poland may differ from the execution of a similar judgment in another state. Anyway, there are also situations where the elimination of a determined infringement is impossible. This follows from the specificities of the system or of the infringement itself. In the first case, the state might not have proper legal solutions enabling the elimination of the infringement, while in the second one the matter of the case makes it impossible, because how can, for example, an infringement of the right to a court be eliminated which was caused by a past failure to act? In those cases, the ECHR itself envisages a substitute measure. The ECtHR may order the state to pay compensation[34].

Aside from the execution of a judgment in an individual case of the so-called victim of a violation, there also exists a general, i.e. systemic, dimension of its effects. It is a derivative of the judgment and, by way of the obligation stipulated in Art. 1 of the ECHR, it extends the effects of the obligation to execute a judgment.

Art. 1 of the ECHR constitutes a classic, treaty-based imperative for the state to shape its law in accordance with ECHR. The very notion used therein 'shall secure' is not defined by the ECHR. Undoubtedly, it is an obligation of the state. It follows from the case law of the ECtHR that this is a twofold obligation: a negative and a positive one. The negative one means that the state must refrain from violating human rights, whereas the positive one constitutes the imperative to act in favour of those rights. Both obligations may require in certain situations that legislative measures be taken[35].

The effect of Art. 1 of the ECHR is therefore similar to the effect of a national norm of a programme nature, which orders the achievement of a certain objective or commits the public authority to achieving it. It is not a right of an individual. Nor does such a norm indicate how an objective is to be achieved.

Were it not for the imperative contained in Art. 1 of ECHR, then, as a matter of principle, the state could function without the systemic execution of judgments. Possible repetitive cases of infringements would only be the state's problem, and in practice they would reach the ECtHR, which would solve the case during the course of individual

33 | Łętowska, 2011b, p. 35.
34 | Art. 41 of ECHR.
35 | This refers to all judgments of the ECtHR, even those formally directed at other states (e.g., Kamiński, Kownacki and Wierczyńska, 2011, p. 135).

proceedings[36]. However, the situation becomes complicated when a judgment of the ECtHR refers to a case where an infringement of the ECHR does not follow from an individual act of application of law, so there is no mistake concerning the proceedings of an organ, but the infringement has its source in the national system of law. Each subsequent action of such an organ in the same situation will result in the same infringement. Thus, what arises is the issue of a systemic reaction of the state and consideration of necessary legislative changes.

In other words, the execution of a judgment from a systemic perspective consists of analysing case law and translating the results of the analysis into legislative procedures so as to guarantee a level of national law that conforms to the standard of respect for human rights[37]. This reflects the treaty-based obligation formulated precisely in Art. 1 of the ECHR. In this way, the said provision specifies the obligation to execute judgments of the ECtHR contained in Art. 46(1) of the ECHR, thereby strengthening its general dimension. Despite concerns regarding the formal possibility of delivering so-called pilot judgments by the ECtHR, their formula as such expresses at the level of case law this general dimension of the obligation.

5. The execution of the ECtHR judgments in Polish law

A judgment of the ECtHR is an international obligation. On the basis of the constitutional obligation to comply with international law binding upon it, Poland has created certain direct solutions in its domestic legal system in relation to the execution of ECHR judgments. The solutions are not comprehensive. There are solely single provisions that are present in certain procedures for court proceedings. They include the following: Art. 540(3) of the Code of Criminal Procedure[38]; Art. 272(3) of the Act on Procedure before Administrative Courts.

The reopening of proceedings is the institution applied in each of these procedures. The court proceeds on the basis of the premise related to an assessment. It verifies whether, in relation to a judgment delivered by the ECtHR, there is a 'need' to reopen proceedings. What is thus concerned is the impact of a judgment of the ECtHR on the essence of the case. At the same time, a judgment of the ECtHR does not change its declaratory and external effect vis-à-vis national law. Such a premise does not exclude the said reopening, but it does not eliminate the possibility of a refusal to do so either[39].

36 | ECtHR infers that from Art. 46(1) of ECHR. See e.g. the judgment of the ECtHR, *Scozzari and Giunta v Italy*, para. 249; the judgment of the ECtHR, *Christine Goodwin v United Kingdom*, para. 120; the judgment of the ECtHR, *Lukenda v Slovenia*, para. 94. *In the context of systemic or structural infringements, the potential influx of future cases is also an important factor as regards preventing from the accumulation of repeating cases on the docket of the ECtHR. (judgement of ECtHR, Hutten-Czapska v Poland, para. 236 and Kurić and others v Slovenia, para. 414).*

37 | It may also consist in changing the court or administrative practice and in creating guidelines for certain organs, etc.

38 | This provision is also applied in minor offences proceedings (by Art. 113 of the Code of Minor Offences Procedure).

39 | Cf. Łętowska, 2011b, p. 42.

However, the literal construction of the provision, as adopted in the criminal procedure, provides much room for interpretation with regards to both the *ratione materiae* and the *ratione personae*. This translates into diverse disputes, including questions of whether it is possible for a judgment of the ECtHR to affect other national criminal proceedings which have not been the subject of a declaration of a violation of the ECHR, but which are 'almost identical'? There have been attempts to answer this question both in scholarship and in practice. The authors largely seem to accept this possibility[40]. In turn, in the adjudicative dimension, the Supreme Court (SC) was in favour of this conception, by delivering in a panel composed of 7 judges a resolution of 26th June 2014, in which it created the so-called construction of identical infringements[41]. However, the character of a principle of law was not assigned to this resolution[42]. As a result, criminal jurisprudence, despite such a (non-binding) stance of the SC, is not uniform. There are also contrary decisions.[43]

Certainly, such a stance is faulty, both from an international-law perspective as well as from a national (systemic) one, as:

a. firstly, as is highlighted by the adjudicating panel of the SC, the resolution is based on the necessity to give rise to a broad effect envisaged in Art. 1 of ECHR. This is a misunderstanding. Art. 1 of the ECHR is not a right of the individual. This is a task that is realised by way of political and legislative initiatives;
b. secondly, if a national court examines other national judgments and independently comes to the conclusion that there was a potential infringement of the ECHR, then it infringes on the ECHR itself, as it substitutes, in a specific case, the only body that is competent in that regard, i.e. the ECtHR;
c. thirdly, the literal construction of the provision undoubtedly refers to the accused, in favour of whom such a judgment by the ECtHR was delivered, namely, the person who lodged an application for the reopening of proceedings.

In practice, by way of interpretation, the SC attempts to ascribe to this provision the effect identical to that of the provision allowing to reopen proceedings after the delivery of a judgment by the CT. The SC refers to the similar literal wording of both provisions. However, in the case of a judgment of the CT, the normative context is different – a legal defect of the legal provision which has been unequivocally determined. Moreover, the result of a judgment of the CT is of a general and not an individual nature since it is the case with a judgment by the ECtHR. This follows directly from Art. 190(1) of the Constitution. The consequence of this is a broad catalogue of subjects competent to reopening proceedings, which is discussed – with indication of the proper statutory procedures – by Art. 190(4) of the Constitution. By wanting to provide consistency between the effect of a judgment of the ECtHR and of a judgment of the CT, the SC attempts to provide an extending interpretation, acting *contra legem*.

What does not make it easier to understand the scope of such a provision is the divergence between the criminal procedure and the procedure before administrative courts where, by applying the same construction, the legislator links the reopening with

40 | See Zabłocki, 2013, p. 32; Bojańczyk, 2001, p. 131; Wąsek-Wiaderek, 2012, pp. 352–353 and 389.
41 | I KZP 14/14. See the dissenting opinion drafted by Judge Kozielewicz, 2014, p. 15. There have also been two critical commentaries on the resolution: Kmiecik, 2015; Zbrojewska, 2014.
42 | Muszyński, 2023b, pp. 184–185.
43 | See e.g. the order of the SC, III KO 118/12; the order of the SC, I KO 1/21.

a specific case of the applicant by literally mentioning it in the wording of the provision, thereby unequivocally preventing it from providing an extending interpretation.

In turn, there is no solution in the civil procedure enabling the reopening of proceedings after the delivery of a judgment by the ECtHR. Indeed, in 2012 there were legislative attempts for the introduction of such solutions, but they were not realised. It is acknowledged that this is a result of the political need to guarantee legal stability[44].

However, this results in a diversified national adjudicative practice. As early as in the first case resulting from the judgment of the ECtHR[45] a national court (the Civil Chamber) refused to reopen proceedings[46]. In the aftermath, a resolution of the 7th November 2010 was taken by a panel composed of 7 judges of the Civil Chamber[47].

In opposition to the above, there have also been attempts to rely on other procedures, even ones that clearly contravene the essence of judgments of the ECtHR. In this case, the SC in the judgment of 28th November 2008 stated that a judgment of the ECtHR may be considered identical to the premise of unlawfulness of a non-appealable judgment or a final decision. The purpose of it is to make it possible to sue the State Treasury for the redress of a damage under Art. 417^1(2) of the Civil Code.

In the same period, the Labour, Insurance and Public Affairs Chamber of the SC acted in an entirely different way, by reopening the proceedings on the basis of the judgment of the ECtHR in the case *Tobor v Poland* (2007)[48].

Also scholarship is divided in that regard[49]. Given the lack of a national solution, the proponents of strengthening the gravity of ECtHR judgments even go so far as to provide such an interpretation of Art. 46 of the ECHR in accordance with which it constitutes an independent basis for the reopening of proceedings. In this way, they try to attribute to this provision the feature of direct applicability contrary to international-law and constitutional rules.

To finish this issue, it should be stated that, from the perspective of the ECHR, any potential reopening of proceedings is only one of the possible measures of executing a judgment of the ECtHR, which does not mean that it is always an adequate or the most suitable one. Indeed, the case law of the ECtHR supports such an action[50], but those considerations are not binding for the State[51]. This is, in turn, specified by national law.

A systemic execution consists of triggering the legislative procedure. What seems appropriate here is the initiative of the government, as proceeding before international courts belongs to the sphere of international policy, which the Constitution classifies in Art. 146 as a power of the Council of Ministers.

44 | Łętowska, 2011b, p. 41.
45 | Podbielski and PPU Polpure v Poland.
46 | The order of the SC, V CO 16/05.
47 | See the resolution of the SC, III CZP 16/10, item 38.
48 | Order of the SC, item 196.
49 | More: Łętowska, 2011b, pp. 58–59.
50 | See *inter alia* the judgments of the ECtHR, *Paykar Yev Haghtanak Ltd v Armenia*, para. 58; *Lungoci v Romania*, para. 56; *Yanakiev v Bulgaria*, para. 90; *San Leonard Band Club v Malta*, para. 70. Moreover, it may prevent the State Party to ECHR from a repeated infringement of individual rights. (cf. the judgment of the ECtHR, *Verein gegen Tierfabriken Schweiz (VgT) v Switzerland* (no. 2).
51 | Judgment of the CT, SK 57/05.

6. Judgments of the ECtHR as a source of interpretation of national provisions provided by courts

When executing ECtHR judgments, it's important to consider the possibility of interpreting national provisions through the ECHR, supported by Art. 9 of the Constitution and the principle of favouring international law.

The source of international-law content impacting the content of national provisions may be all sources of international law. However, in the case of ECHR, judgments by the ECtHR play an exceptional role. These judgments attribute specific normative content to the provisions of the ECHR. Their role in that regard follows not only from the fact that the ECtHR is the only competent body that can interpret the ECHR, but also from the fact that the ECHR is composed of provisions that constitute general clauses. Hence, the ECtHR adjudicates in an active way, always creating the normative content of a provision[52]. As a result, its judgments contain – apart from a determining element – an abstract element. We can find it in the reasons. While it cannot be used for purposes related to the direct application of the provisions of ECHR, because in this context international law requires the existence of clear and specific wording of a provision[53], it may be used by courts to interpret national law in conformity to the ECHR. This consists of shaping the understanding of a national provision by referral to an ECHR-based provision which corresponds to this national provision and to the context of this provision that has been developed by a judgment of the ECtHR.

It is noteworthy that the interpretation of national provisions in the light of the ECHR shaped by judgments of the ECtHR has its boundaries:

firstly, it cannot lead to results that contradict the literal wording of norms of a national provision;

secondly, it cannot lead to the shaping of the content of a provision so that it becomes inconsistent with the legal standards of the Constitution and prevents the realisation of the guaranteeing functions of the Constitution;

thirdly, it is impossible to shape the content of national law by means of an ECHR-based norm, as revealed by a judgment of the ECtHR, which as a result of constitutional review was held as being unconstitutional.

What is required in the first case is the intervention of the legislator, while in the second and third cases this is a forbidden act due to the fact that ECHR has a lower rank in the hierarchy than the Constitution. Only an action taken by the constitution-maker and a potential amendment to the Constitution can be an alternative.

It is also noteworthy that, by applying the content of the ECHR, as revealed by judgments of the ECtHR, to interpret national law, the object of an interpretative action of a national court is constantly an applied national provision. By way of interpretation only the understanding of such a provision may be altered, but neither the ECHR nor a judgment by the ECtHR may serve as a tool for its derogation or as the legal basis for an action by a national court.

52 | Garlicki, 2023, p. 5.

53 | Advisory Opinion of Permanent Court of International Justice, case: Jurisdiction of the Courts of Danzig, PCIJ Series B–No 15, pp. 17–18.

7. The ECHR as a subject of review of the CT and the role of judgments of the CT in this procedure

The CT also acts in the legal situation described above that defines the framework of action of State organs in the context of executing judgments by the ECtHR. Hence, the question arises whether – and if so, then when, in what way, and within which limits – it may impact the practice of executing judgments by the ECtHR, that is, an international-law and constitutional obligation of the state.

The powers of the CT are regulated by the Constitution. Among those powers, adjudication on the hierarchical conformity of law is the fundamental one. What is relevant from the perspective of this analysis are the provisions concerning the constitutional review of law, in which the Constitution serves as the higher-level norm for review, and a ratified international agreement is the subject of review, in particular Art. 188 p. 1-3.

However, the catalogue of the powers of the CT does not comprise judgments of international courts as the subject of its adjudication. What is closest to this context is the provision referring to the very act of creating an international court, its powers, as well as the scope of its powers, that is, (as a rule) a ratified international agreement.

A constitutional provision literally stipulates that an international agreement is the subject of review. In the practice of the CT, there is no doubt as to the fact that what may be the subject of its adjudication is not only the whole act, but also its part, expressed in editing units, in a formal way as a legal provision, or in a substantive way, i.e. in the form of a legal norm[54].

Regardless of whether it is the whole act, or its editing unit, or a specific norm in its provision that is challenged, the CT, when examining the content of an act, reconstructs the subject of review and extracts therefrom proper normative content. Decoding takes place by way of interpretation and in accordance with the established practice when this practice is uniform and consistent[55]. However, in this latter context, there are cases where constitutionality is examined in a situation where the normative content was ascribed to a provision by way of a one-time action of an organ[56]. What is simply concerned is the following situation: if the CT is able to indicate the existence of a given norm in the legal system, and consequently the possibility of its application, then the review of constitutionality is allowed.

A norm inferred in this way is confronted by the CT with constitutional higher-level norms for review.

In the CT's practice, precise legal norms reconstructed on the basis of a specific legal provision contained in a specific legal enactment – and not provisions or legal enactments – are most often the actual subject of review[57]. While adjudicating on a norm, the

54 | An entire normative act is challenged in a situation where the criterion of review is the power and observance of the mode required by provisions of law to issue an act or to conclude and ratify an agreement, which in the case of an international agreement is decidedly rare.

55 | E.g. the order of the CT, SK 32/04 and jurisprudence referred to therein, and the judgment of the CT, K 6/21.

56 | From the national perspective see e.g. the judgment of the CT, K 10/08 and from the international one see the judgment of the CT, K 6/21.

57 | See the order of the CT, P 15/13.

CT always refers to a specific provision, i.e. an editing unit of the challenged act, which is the textual basis of the examined norm.

If the review refers to an act which is an international agreement, the CT must also consider the specificities of international law. The ECHR is such an international agreement. Therefore, despite political efforts to attribute to it the rank of an international-law foundation of the legal systems of the states of Europe, from the formal-law perspective, it may be the subject of the CT's review as regards its conformity to the Constitution (Art. 188(1)).

While adjudicating on the norms of ECHR, the CT must extract them from a specific provision. For this purpose, it may apply different methods of action. In particular it may refer to the case law of the ECtHR, which – as a subsidiary source of international law[58] – indicates the legal norm (applied by the ECtHR) contained in the editing unit (provision) on the basis of which a judgment was delivered. Considering the specificities of the ECHR, this also follows from the fact that the ECHR's provisions are editing units that are complicated in terms of construction, being blurred and imprecise. They need to be specified, which occurs at the level of case law[59]. In this way, the adjudicating activity acquires a law-creating character[60].

However, if a judgment leads to a normative specification of provisions, and even to a confirmation of the existence of a norm, then a norm revealed in this way may also become the subject of a review. From this perspective, a judgment by the ECtHR should be treated as a 'means of conveying a norm' and consequently as an element of the subject of review as is the case with national provisions or legal enactments, in particular, jointly with the provision from which a norm under examination has been inferred in this way.[61]

The above reasoning is strengthened by the interpretative autonomy of the ECtHR vis-à-vis the ECHR. In accordance with Art. 32, solely the ECtHR is competent with regard to all matters concerning the interpretation and application of the Convention and the protocols thereto which are referred to it as provided in Arts. 33, 34, 46 and 47. Thus, it is this Court that ascribes to it, by means of its judgments, specific normative content[62]. Hence, a legal norm inferred in this way, serving to examine or settle a specific case, may be the subject of a constitutional review. In this case, the CT does not reconstruct the norm on its own, nor does it impact its content, but examines the norm inferred by the ECtHR from an editing unit of the ECHR in the context of its conformity to the Constitution. The CT assesses norms serving as the basis for a judgment of the ECtHR as defined in this judgment.

In this way, the CT becomes a constitutional guardian of the boundaries within which the content of the ECHR's provisions may be altered, because although in the democratic societies of European States there exists a certain common and evolving catalogue of standards protecting the human being, its very existence, just as the existence of a 'democratic society', does not justify the ECtHR's right to reconstruct the normative content of

58 | Cf. Pellet, 2006, p. 677; Hoof, 1983, p. 169.
59 | Cf. the issue concerning the lack of precision of provisions contained in international agreements: Lauterpacht, 1958, pp. 155–226; Lauterpacht indicated that based on numerous examples.
60 | Cf. Shapiro, 1994, p. 155.
61 | The judgment of the CT, K 7/21.
62 | Cf. Karpenstein and Mayer, 2022.

the ECHR's provisions in a way that leads to an arbitrary breaking of individualities, which follow from cultural and national differences or even from the systemic constructions of states[63]. Indeed, these differences often have a constitutional foundation, so they are based on an act that is ranked higher than a ratified international agreement, and the ECHR is still such an agreement, at least from the perspective of the Constitution.

Therefore, the CT guards those boundaries, since ascribing normative content to provisions of the ECHR by way of adjudication may not replace formal amendments to the treaty and circumvent the possible review of constitutionality of those amendments which are envisaged for that procedure[64]. The vision of the ECtHR judges as to the direction in which the world is developing has its boundaries around the constitutional system of the States Parties. In other words, a dynamic action aimed at the creation of norms by means of interpretation instruments and case law may not lead to the creation of a normative effect at the level of ECHR that would require a formal amendment to the ECHR[65]. Interpretation and case law may not turn into an unlimited creation of law which causes an effect that contradicts the assumptions of the state's system at the constitutional level, and it may not be expected that this will be binding on states.

In the Polish system of law, this is all the more justified as the result of the ECHR-based norm shaped in this way is of a hybrid character. By way of a judgment, a specific international-law obligation is created that needs to be fulfilled. But, as normative content, it also has a real impact on national legal relations in connection with Art. 9 and 91(1) and (2) of the Constitution.

Indeed, the provisions of the ECHR cannot be directly applied. Nevertheless, their content, as shaped by a judgment, may serve as a reference for the interpretation of national provisions in the process of the application of law.[66] Hence, it is necessary to conduct the constitutional review with regards to the constitutionality of transferring into national law the normative effects of judgments delivered by the ECtHR, even if this refers only to the interpretative perspective, because the rules of shaping national law are always indicated by the national constitution[67].

This kind of constitutionality review is possible at three levels:

1. by examining the constitutionality of norms of national law that have emerged in the legislative process as a result of the execution of a judgment of the ECtHR by way of the enactment of law by the parliament or another legislative organ;
2. by way of a constitutional review of binding provisions of national law whose content is extracted by organs applying national law, with consideration given to the interpretative impact of a judgment of the ECtHR on such provisions (an *in concreto* review, by way of a question of law or constitutional complaint);
3. by a direct review of the constitutionality of norms contained in an editing unit of the ECHR, revealed by a judgment of the ECtHR.

63 | Cf. Garlicki, 2008, pp. 4–13.
64 | Art. 133(2) of the Constitution.
65 | Cf. the judgment of the ECtHR, Soering v United Kingdom, para. 103.2; the judgment of the ECtHR, *Öcalan v Turkey*, paras. 164–165 and separate opinion to this judgment drafted by judge Garlicki, para. 4.
66 | Cf. Garlicki, 2023, p. 4. Garlicki does not differentiate between fulfilling the standards of a provision (Art. 91(1) of the Constitution) from fulfilling the technical and systemic requirements for possessing the attribute of direct applicability.
67 | Bogdandy and Venzke, 2010, p. 47.

The first two cases are the most common forms in which the Constitutional Tribunal exercises its powers of hierarchical control of norms. Such reviews may be initiated by the bodies referred to in Art. 191(1), Art. 193 and Art. 79(1) of the Constitution, i.e. by means of an application the CT, a question of law or a constitutional complaint.

Neither case is special because both refer to the review of national enactments, legal provisions or norms. Thus, this is a standard procedure, and the only novelty can be related to the fact that the normative content under examination of a national provision stems from the ECHR. Hence this context which is the subject of extensive analyses in scholarship will not be discussed here. This does not give rise to any doubts and does not lead to any direct consequences in the perspective of the execution of judgments of the ECtHR. Namely, their normative effects are examined which are reflected in the content of national provisions. This kind of review is rare. Furthermore, in this case the result would not directly affect the execution of a judgment of the ECtHR, but would rather concern its national effects[68].

The latter formula arouses the strongest political emotions, that is, the direct review of the ECHR's norms, and is often diminished in the public discussion to the notion of 'the review of a judgment of the ECtHR'. This follows from the fact that, in the practice of the CT, there have been two such cases, in which the CT deemed Art. 6 of ECHR inconsistent with the Constitution within the scope of a specific norm inferred in the judgment of the ECtHR. Moreover, the result of such judgments of the CT was a failure to execute the judgments of the ECtHR by the then-government. The reasons for the judgment were based on the assessment that an ECtHR judgment based on an unconstitutional norm arising from an editing unit of the ECHR may not be executed by state organs, as this would lead to the introduction into the system of national law of an unconstitutional legal standard or to the perpetuation of a legal situation that is inconsistent with the Constitution.

8. The review of ECHR in the practice of the CT

On 24th November 2021, the CT delivered a unanimous judgment in the case K 6/21. In this case the subject of constitutional protection was the position of the CT itself. The applicant who lodged an application against Poland with the ECtHR alleged that the CT, by giving a judgment in his case[69], acted in violation of the ECHR-based right to a court, because the panel of the CT was formed in breach of national law, so the CT was not a court established by law within the meaning of the ECHR. The ECtHR in its judgment concurred with the allegation of the applicant and stated that Poland infringed on Art. 6(1) of ECHR[70].

68 | However, while two apps lodged by the Prosecutor General, though referring to a different situation, showed that a decision of this kind may be made at a political level, it is quite hard to imagine such a situation when it is a court that asks a question of law which contests the content of a national provision as shaped by way of a post- ECHR interpretation. It is similar in the case of a potential constitutional complaint.

69 | The order of the CT, SK 8/16.

70 | See the judgment of the ECtHR, *Xeroflor v Poland*.

Upon the application lodged by the Prosecutor General, the CT examined Art. 6(1) of the ECHR within the normative scope determined by the judgment of the ECtHR. In its judgment, the CT concurred with the application of the Prosecutor General and adjudicated in two matters[71]:

1. firstly, it rejected the possibility of treating the CT as a court within the meaning of ECHR (Art. 6(1) first sentence of ECHR (...) insofar as the notion of a court, applied in this provision, embraces the CT, is inconsistent with Art. 173 in conjunction with Art. 10(2), Art. 175(1) and Art. 8(1) of the Constitution);
2. secondly, it negated the possibility of examining by the ECtHR the procedure for the creation of the judges of the CT (Art. 6(1) first sentence of ECHR (...) insofar as it vests with the ECtHR the power to assess the legality of the election of the judges of the CT is inconsistent with Art. 194(1) in conjunction with Art. 8(1) of the Constitution).

In the first context, the CT negated the assessment of the ECtHR from several perspectives:

1. it inferred its stance from the logic of the constitutional system. It highlighted that in the light of the Constitution (Art. 173 and Art. 10(2)), there exist in Poland two kinds of organs of court authority: courts and tribunals. And although they are enumerated jointly, they have different powers and specificities. The monopoly regarding the implementation of the administration of justice, that is, the determination of individual civil, criminal or administrative matters, which are those matters to which Art. 6(1) of ECHR refers, is exercised solely by courts, i.e. the SC, common courts, administrative courts and military courts, which is directly envisaged in Art. 175(1) of the Constitution;
2. it referred to the difference between the quality and results of the jurisprudence of tribunals and courts. It highlighted that in accordance with Art. 190(1) of the Constitution, its judgments are universally binding and final. This refers to decisions delivered in each mode of review conducted by the CT. In turn, decisions of courts implementing the administration of justice have an *inter partes* effect. Judgments of the CT do not have a direct effect in the cancellation of a non-appealable court decision, a final decision or another determination, but – if a normative act on which these decisions were based was held unconstitutional – it only constitutes a premise that enables the CT to reopen proceedings, to quash a decision or another determination based on the principles and mode specified in provisions regulating given proceedings. This applies to all persons who have received determinations based on an unconstitutional provision, and not only to initiators of proceedings before the CT. Moreover, a new decision in an individual case does not have to be at all favourable to such a person. Hence, the assessment of the ECtHR that proceedings before the CT decided about any civil rights of a specific complainant is untrue;
3. it indicated a false understanding of the model of the Polish constitutional complaint. It highlighted that proceedings before the CT were not a continuation of proceedings before the common courts. The CT is not an appellate body, nor is it an organ that can undertake extraordinary reviews of court decisions. The CT's judgments have effects exclusively in the normative sphere, i.e. they do not

71 | Judgment of the CT, K 6/21, item 9.

quash decisions and other determinations delivered on the basis of provisions challenged in proceedings before the CT, but solely repeal provisions which were held unconstitutional by the CT;

4. it suggested that the judgment of the ECtHR had political motives. It alleged that the ECtHR had departed (without explanation) from the hitherto line of the case law referring to an extraordinary means of appeal[72], and had changed its stance in the case of guarantees arising from Art. 6(1) with regards to the access of a court competent to adjudicate on the law[73].
5. In turn, as for the possibility of the ECtHR to conduct an assessment of the legality of the election of the judges of the CT on the basis of Art. 6 of ECHR, the CT held that the norms inferred in the judgment were unconstitutional, as:
6. the interpretation provided by the ECtHR constitutes an unprecedented encroachment on the constitutional powers of organs of authority of the Republic of Poland – the Sejm, which elects a judge, and the President, before whom an elected judge takes an oath. At the same time, this interpretation is unlawful and faulty and infringes on the principle of subsidiarity of ECHR. The ECtHR encroached on a sphere which falls into the category of an exclusive constitutional power of national organs (Sejm and President) and undermined the jurisprudence of the CT in that matter, in particular, the judgment in the case K 1/17. Consequently it transgressed its powers.
7. in the light of the Constitution, there do not exist procedures or mechanisms which would be able to verify the legality of the election of the judges of the CT, thus it is all the more so difficult to create said procedures by way of the interpretation of international agreements that are binding in Poland;
8. the ECtHR misleads as to the effects of certain judgments of the CT. Contrary to the ECtHR's claims, the CT has not only never assessed the election of judges, but has even repeatedly deemed itself incompetent to make such an assessment[74]. In turn, in the judgments indicated by the ECtHR as those referring to the election of the judges of the CT, the CT did not adjudicate on the election of the judges of the CT, but only on certain norms contained in different CT Acts. Those were not even the provisions on the basis of which the judges were elected on 3rd December 2015[75];
9. what is unacceptable is also the rejection by the ECtHR of the findings made by the CT in the judgment in the case K 1/17, where the CT broadly referred to the issue of the validity of the election of the judges of the CT by the Sejm of the 7th and 8th term.

On 10th March 2022, the CT delivered a unanimous judgment in the case K 7/21, in which it again stated that Art. 6(1) of ECHR was unconstitutional. The applicant in the case was again the Prosecutor-General, who alleged that in the judgments of the ECtHR[76]

72 | E.g. cases Bochan v Ukraine and Moreira Ferreira v Portugal.
73 | E.g., cases: Ruiz-Mateos and others v Spain, Gorizdra v Moldova, Wardziak v Poland, Tkaczyk v Poland, Szyskiewicz v Poland, Biziuk and Biziuk v Poland.
74 | Orders of the CT, U 8/15 and U 1/17.
75 | Judgments of the CT: K 34/15, K 35/15, K 47/15, and K 39/16.
76 | Judgments of ECtHR: Broda and Bojara v Poland and Reczkowicz v Poland.

norms infringing on the state's constitutional legal order were inferred from Art. 6(1). The CT adjudicated that[77]:

1. Art. 6(1), first sentence, of the ECHR insofar as the notion 'civil rights and obligations' embraces the right of a judge to hold an administrative function in the structure of common courts in the Polish legal system – is inconsistent with Art. 8(1), Art. 89(1)(2) and Art. 176(2) of the Constitution;
2. the possibility inferred by ECtHR from Art. 6(1) of ECHR to overlook the Constitution, statutes and judgments of the CT by the ECtHR or national courts in the process of interpreting the ECHR while assessing the fulfilment of the requirement of 'a court established by law' as well as the possibility to independently create norms referring to the procedure or appointment of judges of national courts is inconsistent with Art. 89(1)(2), Art. 176(2), Art. 179 in conjunction with Art. 187(1) in conjunction with Art. 187(4), and with Art. 190(1) of the Constitution;
3. such an understanding of Art. 6(1) of the ECHR that authorises the ECtHR or national courts to provide an assessment of the conformity to the Constitution and the ECHR of the Acts concerning the organisational structure of the judicial system, jurisdiction of courts, and the act specifying the organisational structure, the scope of activity, *modus operandi*, and the mode of electing members of the National Council of the Judiciary is inconsistent with Art. 188(1) and (2) as well as Art. 190(1) of the Constitution.

The CT explained that inferring from an ECHR-based phrase 'civil rights and obligations' the judge's subjective right to hold a managerial position within the structure of common courts in the Polish legal system is inconsistent with the indicated higher-level norms for review, because:

1. it constitutes creation at the ECHR level of a right which is not envisaged by the Constitution (provisions on the right to access to public service);
2. the creation of a new right takes place outside the constitutional mode envisaged for the amendment of an international agreement, that is, without the state's consent, and takes place in breach of the constitutional requirement for the regulation of the organisational structure of the judicial system in a statute.
3. With regard to the second excerpt of the operative part, according to the CT, if the ECtHR infers a norm from Art. 6(1), first sentence, of the ECHR that authorises it to assess the process of appointing national judges, overlooking universally binding provisions of the Constitution, acts, as well as final and universally binding judgments of the Polish CT, then such a norm is inconsistent with the indicated higher-level norms for review, because it infringes on the constitutional:
4. obligation of granting consent to the ratification of a specific kind of an international agreement, as it is created by way of the ECtHR's activity that is aimed at the creation of law;
5. powers of the CT as well as the constitutional principle of the finality of judgments delivered by the CT;
6. powers of the President of the Republic of Poland to appoint national judges.

With regards to the third part of the operative part, according to the CT, if the ECtHR inferred from Art. 6(1) of ECHR norms pertaining to powers and the constitutional system, allowing to assess both the constitutionality of the Polish acts concerning the

77 | Judgment of the CT, K 7/21.

judicial system, and its organisational structure, as well as the status of a judge, and to provide a substantive assessment of the correctness and legality of the judgments of the CT, then this norm is inconsistent with the indicated higher-level norms for review, because it infringes on:

1. the systemic (constitutional) position of the CT, in accordance with which it is the only organ in the Polish legal system that is competent to assess the conformity of acts to the Constitution and international agreements ratified upon prior consent granted by statute;
2. the constitutional principle of the finality and the universal character of judgments of the CT.

The CT highlighted that, as a rule, it avoids conflicts with the international order by applying the principle of a favourable approach of the Constitution towards international law or a number of conflict-of-law solutions. However, in the case under examination this was impossible, as the source of the problem was a manifestly faulty action of the ECtHR in the process of the creation of norms inferred from Art. 6(1) of ECHR. The action of the ECtHR is based on the lack of understanding for Poland's legal system, which results in the creation of normative content enabling the ECtHR to unlawfully interfere with the constitutional system of the Polish State. It also accused the ECtHR of taking action in order to redefine the content of constitutional institutions, both in the substantive scope (the principles of the division of powers, the principle of the rule of law, the powers of state organs), and in the institutional one (the concept of a court, the concept of a legal enactment, the President's prerogative), or of creating content that does not exist in the Constitution or that is inconsistent with that Constitution.

9. The review of constitutionality and the obligation of executing judgments of the ECtHR

The above unequivocally indicates that the review of constitutionality of the ECHR's provisions from the perspective of a judgment of the ECtHR, and according to some, a *de facto* review of such a judgment, is already taking place. Thus, yet another adjudicative boundary has been broken in the powers of the CT itself, based on the interpretation of the constitutional provisions regulating its powers.

This action will undoubtedly impact Poland's obligation contained in Art. 46(1). Although the Constitution is a superior act to the ECHR and therefore its Art. 8 cannot be restricted by inferior acts, the question of the admissibility of such a review in the context of this obligation is worth asking. Especially since it is supported by Art. 9 of the Constitution (imperative to abide by international law).

The existence of a number of doubts undermining the absolute and rigid character of the obligation to execute a judgment is suggested by the very formula of the content of the imperative arising from Art. 46 of ECHR. The literal imperative to 'abide by' the judgment constitutes a formula that is undoubtedly broader in linguistic terms than the

simple and specified imperative to 'execute' a judgment[78]. Such a formula seems to have been introduced on purpose, as in this way it corresponds to the declaratory and affirmatory essence of judgments of the ECtHR. It also has a more abstract character that also provides the state with greater freedom with regards to attaining the objective indicated by the judgment. In turn, the commonly used concept (word) 'execution' is a specified and unequivocal formula of compliance. It constitutes a direct imperative that is also binding as to the content of acting.

This leads to the conclusion that the formulation of the obligation contained in Art. 46 (1) ECHR is largely fluid. On the part of the state fulfilling this obligation, there is considerable discretion in implementing the imperative 'to abide by the final judgment' of the ECtHR, which is also confirmed by the fact that the Committee of Ministers of the European Council was given the power to 'supervise its execution'. We can see the difference between Art. 46(1) and Art. 46(2) of the ECHR. This difference leads to the conclusion that the Committee of Ministers, on the basis of the competence resulting from Art. 46(2), supervises the execution of judgements by the State within the framework of the obligation to abide by final judgment[79].

With regards to the constitutional context of the obligation, it should be noted at the outset that Art. 9 of the Constitution constitutes one of the constitutional principles of the state's functioning. It formulates a general principle of law *pacta sunt servanda* and refers the said principle to the conduct of the state in international relations[80]. It embraces not only legal (normative) enactments but also acts of the application of international law.

The very creation of such an imperative at constitutional level highlights the will of the constitution-maker to adopt an obligation that is parallel to the obligation arising from international law. The provision is thus not only a reflection of the dualism of the systems of national and international law, but also exposes their formal equivalence. As a result, it puts a stress on the independence of both obligations, which have two separate equal sources[81].

However, such a perspective has further consequences. If the imperative contained in Art. 9 of the Constitution is independent, then international law does not create it, but – in accordance with its content – triggers it if a specific obligation arises that is binding on Poland. It is international law that defines the scope of such an obligation, which in this case is materialised by way of reference to specific obligations arising from Art. 46(1) of the ECHR.

However, on the other hand, if this is in its essence a constitutional obligation, then it must operate in the full scope of the system of the Constitution. Indeed, an international

78 | It means 'to accept or obey an agreement, decision, or rule'. See: Cambridge Dictionary (online version).

79 | It is the same wording in both language version: English and French.
Art. 46.1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.
Art. 46. 1. Les Hautes Parties contractantes s'engagent à se conformer aux arrêts définitifs de la Cour dans les litiges auxquels elles sont parties. 2. L'arrêt définitif de la Cour est transmis au Comité des Ministres qui en surveille l'exécution.

80 | Judgment of the CT, P 1/05, item 42.

81 | On the essence of dualism, see: Verdross, 1914, p. 1011.

obligation that is inconsistent with the Constitution cannot reach national legal relations through Art. 9 of the Constitution.

Art. 9 itself does not determine its own mechanism of review or instruments enabling it to impact international-law obligations that are, for instance, similar to the statutory reservation envisaged in Art. 91(1) of the Constitution. Therefore, other provisions of the Constitution form a natural protection from the absolute nature of an international-law obligation. In particular, the possibility to conduct the constitutional review of international agreements by the CT within the scope that is allowed by Art. 188 of the Constitution. Simply, if the entrance of an agreement into national relations takes place on the basis of the Constitution, then it is impossible to demand a resignation from the constitutional review of international law that is envisaged and accepted by the Constitution. Namely, what is impossible is a partial application of the Constitution by state organs and a partial exclusion thereof if the Constitution itself does not provide for this. It is not even possible in the form of an obligation at the level of an international agreement[82]. This is also confirmed by the norm arising from Art. 190 of the Constitution, which does not differentiate between the effects of decisions concerning unconstitutionality, depending on whether a national or an international act is concerned.

In the aforementioned cases K 6/21 and K 7/21, the CT referred to the context of constitutional review in relation to the obligation to execute a judgment of the ECtHR. In the first case, it held that the judgment of the ECtHR was delivered outside the ECHR-based framework (*ultra vires*), and therefore it cannot have the attribute of a judgment with regards to Poland within the meaning of Art. 46(1) of the ECHR. The CT declared it to be the so-called non-existent judgment (*sententia non existens*), which as a result does not have any effects (it is deprived of the attribute of enforceability). At the same time, it stressed that it accepts the application of the construction of non-existent decisions to determinations delivered by the ECtHR in a situation where they are delivered in gross violation of the requirements for the attribution to them of the character and effects of a binding determination. A refusal to execute such a judgment does not constitute an infringement on Art. 9 of the Constitution either.

In turn, in the case K 7/21, the CT stated that the effect of its judgment determining the unconstitutionality of certain norms arising from Art. 6 of the ECHR is the cancellation of the indicated norms from the scope of Poland's obligations (limitation of the normative content of Art. 6 of ECHR). As a result, determinations delivered on their basis[83] do not have the attribute envisaged in Art. 46(1) of the ECHR (the obligation of execution) for the Polish State.

The limitation of the normative content of Art. 6 of ECHR does not constitute an infringement by Poland of the international law binding upon it, as it does not refer to the obligation of being bound by the ECHR as such, which was assumed by Poland upon the ratification of the said act, but indicates a boundary in the dynamics of the ECtHR's

82 | Even Art. 90 of the Constitution does not discuss exclusion, but delegation to an international organisation or international institution the competence of organs of state authority in relation to certain matters. In the light of the jurisprudence of the CT concerning the issue of national identity, one may also have doubts whether this might refer to the powers to conduct constitutional review.

83 | I.e. 4 judgments of the ECtHR: Broda and Bojara v Poland; Reczkowicz v Poland; Dolińska-Ficek and Ozimek v Poland; Advance Pharma sp. z o.o. v Poland.

freedom to create laws, and it should be treated as the states' opposition to the attempt of ascribing new content to an international provision and of enforcing it on Poland *per facta concludentia*, in breach of the procedure for amending treaties.

The CT also stated that state organs responsible for conducting international policy should assess whether or not – in order to avoid misunderstandings regarding the perception of international obligations by Poland – it was justified to take action aimed at informing proper international partners, including the proper ECHR-based bodies, on the constitutional boundaries, as revealed in that judgment, within which Poland is bound by the content of Art. 6(1) of the ECHR.

Finally, according to the CT, if there exist in legal relations acts of the application of law issued on the basis of norms inferred from Art. 6(1), first sentence, of the ECHR which were held as being unconstitutional in the judgment K 7/21, and if there are procedures for appealing against those acts then, in the light of Art. 190(4) of the Constitution, such acts may be challenged.

The above unequivocally indicates that the answer to the question about the admissibility of the constitutional review of ECHR's provisions, also from the perspective of their normative content, as shaped by judgments of the ECtHR, is affirmative. Such a review may be conducted. Only when its secondary result is the refusal to execute a judgment will a problem arise, as from the perspective of international law such an obligation will still be in place. This, in turn, poses the question about the effects on international-law of such a refusal, which takes place at national level.

10. A refusal to execute a judgment of the ECtHR and the state's responsibility under international law

The features of judgments of the CT are specified by Art. 190(1) of the Constitution. Those features are: a 'universally binding' force and 'final' character.

However, the CT is not competent to formally order in its judgment other state organs to act in a specific way. The results of the determination of unconstitutionality arise from the law. They are as follows:

1. firstly, the obligation to take legislative action if a loophole emerges in the law after the delivery of a judgment;
2. secondly, the possibilities of action that are indicated by Art. 190(4) of the Constitution[84].

The effect of a judgment is triggered after the promulgation thereof in a proper journal of laws. To apply each of the indicated possibilities, an action of a subject vested with proper powers (the first case) or rights (the second case) is necessary.

The effect of judgments of the CT defined in this way is focused on the national forum. It is so even in the case of the constitutional review of ECHR-based norms within the scope of their content as specified by a judgment of the ECtHR.

84 | It constitutes the basis for the reopening of proceedings, quashing a decision or another determination in accordance with the principles and in the course specified in provisions proper for given proceedings.

However, providing an assessment of the constitutionality of an international agreement does impact the sphere of foreign policy. Indeed, by adjudicating on the unconstitutionality of a provision of the ECHR, the CT provides (in the name of the state) a unilateral redefinition of the scope of Poland's international obligations within the treaty-based system of the European Council. By promulgating a judgment, other state organs acquire knowledge of the above fact, and the universally binding character of such a judgment changes their vision of the status of Poland's international obligations, as well as to impose on them the obligation to act in accordance with the content of the said judgment. As a result, what arises in the sphere of the state's foreign policy is the third obligation to act. This is an imperative, which is directed at state organs competent to conduct foreign policy, to analyse the possibilities to redefine the framework of the state's functioning in international relations. In particular it is about considering what action needs to be taken after the delivery of such a judgment so as to properly inform international partners about the situation that has emerged and to propose appropriate solutions, which take into account the decision of the CT.

This is an obligation of organs that aim to avoid the triggering of the international responsibility procedure against the state, which follows from the fact that it is possible to raise the allegation of violating an international obligation. Indeed, if the refusal to execute a judgment of the ECtHR from a national (constitutional) perspective does not automatically eliminate an ECHR-based obligation, undertaken to abide by the judgment, then it opens the possibility of Poland facing responsibility for a wrongful act at an international-law level.

In this case, the situation is not mitigated by the fact that the execution of a judgment of the ECtHR is blocked by a judgment of the CT. Therefore, state organs competent in matters of foreign policy should immediately take action to evade such responsibility. They have at their disposal all instruments existing in the state's foreign policy, including the submission of proposals for amending treaties, and even the withdrawal from a treaty. Only an amendment to the Constitution is an alternative here.

In my opinion, this is not a major problem. What may also be helpful in such a complicated legal situation is the unique nature of international responsibility. As opposed to national-law responsibility, it is not absolute. This means that it may be subject to valuation by way of negotiations of the interested parties, both as regards its gravity and scope, as well as even its very existence. What is more, essentially, the state's responsibility is not triggered in international law upon a failure to fulfil an obligation by the state committing a wrongful act, but only after the commission of a wrongful act is established by proper bodies or institutions[85]. Even if a subsequent determination of an infringement of the law had a reverse effect (since the moment of an infringement). This also refers to the case of a failure to execute a judgment of the ECtHR resulting from a judgment of the CT, which constitutes a classic wrongful act that emerged as a result of the refusal to fulfil an obligation arising from Art. 46(1) of the ECHR, that is a classic breach of a treaty. In this case, too, the moment at which such a wrongful act occurs is clear. It is not the actual refusal of the state, nor the event of a persistent lack of execution. The emergence of a wrongful act depends on the declaration of this fact (formula failure 'to fulfil its obligation under para.

85 | If there is not such an organ, the problem of responsibility is solved by satisfaction in the form of undertaken retaliation measures. But what decides then is force, so there lacks a formal and objective perspective to assess culpability and responsibility.

1' – it means a lack of obligation 'to abide by the final judgment') by the competent bodies based on the ECHR, which is stipulated by Art. 46 in para. 2-5 of the ECHR[86]. This means that from the point of view of Art. 46(4) ECHR (construction 'to abide by'), there are many ways to 'execute a judgment', as referred to in Art. 46(2) ECHR. In fact, it is not so much about the judgement itself, which is declarative and affirmative, but about fulfilling the ECHR standard, which is only indicated in judgement[87].

According to these provisions, the Committee of Ministers of the Council of Europe supervises the execution of a judgment. It assesses whether the State's action can be recognised as an adequate abidance by the judgment. In certain cases, it may request the assistance of the ECtHR. If the ECtHR finds that the State 'has failed to fulfil its obligation under para. 1' (it means 'to abide by final judgment'), it refers the case to the Committee of Ministers for consideration of the measures to be taken to ensure such fulfilment.

Among Polish scholars, Art. 46(1) of ECHR is recognised as a provision formulating the legal basis for sanctioning states that do not execute judgments[88]. This is supposed to be confirmed by the fact that the Committee of Ministers is vested with instruments which enable it to exert pressure on states.

But the content of this provision may as well be described as one indicating that the execution of a judgment may be evaded or that its effects may be limited or adjusted to the CT's judgement. Indeed, what also follows from the said provision is that:

1. the execution of a judgment of the ECtHR (in formula 'to abide by') is a legal obligation of a 'blurred' character[89]. It should be 'adequate' only[90]. However, any failure or refusal 'to abide by a final judgment' is of a political, and not legal nature, at least at the first stage. The Committee of Ministers, which is an organ shaped politically, is indeed the main acting subject. The ECtHR merely plays an auxiliary role in that procedure, in which it legitimises the actions of the Committee of Ministers. Yet, even in a critical case, the Committee of Ministers has the freedom to select in which form it will influence the state. This creates a margin of discretion for states, making negotiations possible and in this way protecting the sovereignty of states[91];
2. the role of States Parties with the ECHR is unique. At a certain point states start participating in the proceedings via their representatives in the Committee. Dialogue with states, who do indeed understand the challenges of sovereignty that have been revealed in the constitutional order, may conclude a case quite quickly. States take decisions which are subsequently manifested by the Committee. It suffices that if during voting the level of two thirds of the members of

86 | Especially art. 46(4) ECHR. Compare: Art. 46 (1), Art. 46(2) and Art. 46(4) ECHR.
87 | Apart from the issue of compensation (Art. 41 ECHR).
88 | Cf. Ciżyńska-Pałosz, 2020, p. 14.
89 | Cf. Garlicki, 2007, pp. 126–127.
90 | See the judgment *Burdov v Russia*, para. 125.
91 | The Committee of Ministers, in its decision taken at its 1468th Meeting of 5-7 June 2023 in the framework of the execution of the judgments of the so-called 'Reczkowicz group', expressed the Deputies' grave concern regarding the Polish authorities' persistent reliance on the CT's judgment K 7/21 to justify non-execution of judgments and underlined that such an approach not only contradicted Poland's voluntarily assumed obligation under Art. 46 of ECHR to abide by the Court's final judgments but also its obligation under Art. 1 to secure the rights and freedoms as defined in ECHR.

the Committee of Ministers will not be reached, then responsibility will not be triggered;

3. the whole procedure is open to negotiation when the state refuses to execute a judgment. If the state invokes constitutional issues, then in this dimension, given the good will of the parties, it will be possible to find a solution to the problem. 'Abidance by the judgement' does not have to be the execution of a judgment, and certainly not a complete literal execution thereof.[92] One may be tempted to look for a partial solution or even to formulate the conclusion that the Committee is competent enough to grant consent to a different way of fulfilling the ECTHR standard, or at least not to raise the problem. It is possible to put an end in this way to the problem of responsibility;
4. among Polish scholars, it is even claimed that providing the Committee of Ministers with repressive measures, which may be used against the state, actually aims to prevent categorical demands that a judgment be executed rather than to strengthen pressure exerted by this Committee. It is thus a deterring measure rather than a real one. It serves to prevent situations where a State Party to the ECHR decides to withdraw therefrom[93]. This proves that there is also room for negotiation from that perspective.

What is revealed in this way is the truth that an adjudication by the ECtHR on human rights is, in fact, highly governed by political rules.

11. Conclusion

International courts are part of institutional solutions that are an answer to the necessity to solve different new problems of global society. In principle, they are to aid the effective realisation of common objectives. They also serve the mission of international law to serve justice in a universal forum. Scholars call this the exercise of international public authority[94].

For state, democracy and the rule of law, however, this kind of role for the jurisprudence of international tribunals poses a problem that has two contexts:

1. first, the power exercised by an international court is competitive to national judicial power, as the former is capable of verifying the actions of the latter, although from a limited perspective.
2. second, the authority of an international court is competitive to that of the national legislative power. This is clearly visible in Poland, where ratified agreements may be a directly applied source of universally binding law. Consequently, any attempts at impacting the content of provisions contained in those agreements by means of decisions of the international courts constitute an evident example of the progressive development of law (as to its substance) which bypasses the Sejm.

92 | See the execution by GB of the judgment of the ECtHR in the case *Hirst*. See: Ciżyńska-Pałosz, 2020, pp. 16–21.
93 | Kamiński, Kownacki and Wierczyńska, 2011, p. 94.
94 | Bogdandy and Venzke, 2010, p. 3.

Indeed, the legislative power in the state is the emanation of the nation. As a matter of principle, this is the most legitimised kind of the state's power. In turn, national judicial power acts in a close relationship with legislative power, as the latter creates for the former the legal conditions for its operation and determines the mode of its creation. Judicial power also delivers judgments in the name of the state.

In turn, the creation of international courts is based on the activity of the executive power of the state (government). Hence, adjudication by international courts, and in particular, the creation of law by way of adjudication is separated from democratic legitimisation. It does not even have this legitimisation at such a minimum level as national courts do. Therefore, decisions by international courts are still not directly an element of national legal relations and do not have any direct legal effects for national relations. This is the case despite pressure which has been exerted for many years by leftist scholars seeking justification for the introduction of the direct effectiveness of those decisions in the conceptions of the multicentricism of law[95]. The state notices these shortcomings and all the time filters those decisions by means of the dualist conception determining the relations between international and national law[96].

Therefore, the execution of judgments of international courts takes place by way of an action taken by proper state organs on the basis of their national (constitutional) powers. This guarantees that the state has impact on the manner in which aforementioned judgments are executed, and that it indicates the boundaries within which the state undertakes to abide by such a judgment. Only those bodies may execute the said judgments that are allowed to do so under national law. They may do so only within the scope indicated by the law. It is only the constitution-maker, or alternatively the legislator, that determines who is competent to do so and when.

The possibility of the constitutional review of judgments delivered by international courts plays an important role in the process of their execution. Even indirect execution, as is the case in the instance of Poland, is based on the evolution of the understanding of the constitutional powers of the CT. It indeed deals with answering the question whether broadly understood effects of a judgment can lead to a breach of the Constitution. This is important, as in a democratic rule-of-law state it is impossible to function in violation of the Constitution, even if the instrument of violation is the judgment of an international court.

Constitutional review is particularly advisable when such adjudication develops international provisions, which is undoubtedly the case as regards judgments of the ECtHR. They are indeed a tool by means of which the ECHR constitutes a living instrument. Thus, the probability of violating constitutional boundaries by provisions of the ECHR developed by judgements of the ECtHR is higher than in the case of an ordinary international agreement.

The dynamism of the evolution of the ECHR influenced by judgments of the ECtHR, which more often transgresses the boundaries of rational restraint and political neutrality, requires defensive dynamism in the state's policy as a reaction to this phenomenon. In Poland the result of this phenomenon is the triggering of the supervisory mechanism in the form that is allowed by the existing legal system. This is the constitutional review of

95 | Łętowska, 2011a, p. 18.
96 | Muszyński, 2022, pp. 41.

judgments of the ECtHR, though solely in the formula of reviewing norms on which such a judgment was based.

If the unconstitutionality of an ECHR-based norm is determined on the basis of which a judgment of the ECtHR was delivered, two effects arise: the lack of the possibility to execute such a judgment by the state in the national forum; the danger that the state will have to face international responsibility.

Therefore, appropriate actions taken by constitutional state organs are necessary.

However, it is worth stressing that the ECHR is favourable to such extreme situations.

This is proved by two facts. The first one is the way of executing a judgement in formula 'to abide by'. It is the fulfilment of the ECHR's standard and not a literal execution of judgement. The second is that ascribing responsibility to the state on account of a refusal to execute a judgment is not automatic but conditional on the determination of this fact by the Committee of Ministers. This indicates the gravity of the political component, thus making it easier to reach an agreement to find the proper solution to the conflict between the Constitution and ECHR-based standards. This follows from the fact that international law in its entirity is a flexible system of law, both in the interpretative and the executive context. It is there to facilitate agreement, and not to lead to confrontation.

Bibliography

Bojańczyk, A. (2001) 'Podważenie prawomocnego wyroku sądu karnego przez Europejski Trybunał Praw Człowieka w Strasburgu (ETPCz)', *Próba zarysu zagadnienia, part II, "Palestra" 2001*, 7–8, pp. 124–135.

Ciżyńska-Pałosz, A.D. (2020) 'Wpływ Europejskiego Trybunału Praw Człowieka na porządek prawny państw-stron Europejskiej Konwencji Praw Człowieka, a koncepcja marginesu oceny. Analiza ze szczególnym uwzględnieniem wyroku Europejskiego Trybunału Praw Człowieka w sprawie Hirst przeciwko Zjednoczonemu Królestwu', *Przegląd Prawno-Ekonomiczny*, 50(1), pp. 7–28 [Online]. Available at: https://doi.org/10.31743/ppe.7503 (Accessed: 6 June 2025).

Frowein, J.A. (1991) 'Staatengemeinschaft als Rechtsbegriff im Völkerrecht', *Lichtensteinische Juristen Zeitung*, 4, pp. 141–145.

Garlicki, L. (2005) 'Zakres zobowiązań państwa w świetle orzecznictwa Europejskiego Trybunału Praw Człowieka' in Granat, M. (ed.) *Stosowanie prawa międzynarodowego i wspólnotowego w wewnętrznym porządku prawnym Francji i Polski. Materiały z polsko-francuskiej konferencji naukowej*. Warszawa: Wydawnictwo Sejmowe, pp. 123–132.

Garlicki, L. (2008) 'Wartości lokalne a orzecznictwo ponadnarodowe – „kulturowy margines oceny" w orzecznictwie strasburskim', *Europejski Przegląd Sądowy*, 4, pp. 4–13.

Garlicki, L. (2023) 'Stosowanie Europejskiej Konwencji Praw Człowieka przez sądy krajowe a podporządkowanie sędziego Konstytucji i ustawie', *Europejski Przegląd Sądowy*, 11, pp. 4–12.

Grzegorczyk, P. (2006) 'Skutki wyroków Europejskiego Trybunału Praw Człowieka w krajowym porządku prawnym', *Przegląd Sądowy*, 6, pp. 3–42.

Hofmański, P. (2011) 'Remark 46 in fine to Article 46' in Garlicki, L. (ed.) *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności, vol. II, Komentarz do artykułów 19–59 oraz Protokołów dodatkowych*. Warszawa: C. H. Beck, pp. 211–215.

Kamiński, I.C., Kownacki, R., Wierczyńska, K. (2011) 'Wykonywanie orzeczeń Europejskiego Trybunału Praw Człowieka w polskim systemie prawnym' in Wróbel, A. (ed.) *Zapewnienie efektywności orzeczeń sądów międzynarodowych w polskim porządku prawnym*. Warszawa: Wolters Kluwer, pp. 87–229.

Karpenstein, U., Mayer, F.C. (2022) 'Commentary on Article 32 of ECHR' in Karpenstein, U., Mayer, F.C. (eds.) *Konvention zum Schutz der Menschenrechte und Grundfreiheiten*. München: C.H. Beck, pp. 628–629.

Koskenniemi, M (2008) 'The Ideology of International Adjudication and the 1907 Hague Conference' in Daudet, Y. (ed.) *Topicality of the 1907 Hague Conference, the Second Peace Conference*. Leiden: Yves Daudet, pp. 127–152; https://doi.org/10.1163/ej.9789004174214.3-508.17.

Lauterpacht, H. (1934*) The Development of International Law by the International Court. Being A Revised Edition of "The Development of International Law by the Permanent Court of International Justice"*. London: Praeger.

Łętowska, E. (2011a) 'Czekając na Godota, czyli jak wykonywać wyroki ETPCz (uwagi na tle sprawy Moskal v. Polska)', *Europejski Przegląd Sądowy*, 2, pp. 4–10.

Łętowska, E. (2011b) 'Zapewnienie skuteczności orzeczeniom sądów międzynarodowych' in Wróbel, A. (ed.) *Zapewnienie efektywności orzeczeń sądów międzynarodowych w polskim porządku prawnym*. Warszawa: Wolters Kluwer, pp. 35–61.

Muszyński, M. (2022) 'Konstytucja RP a prawo międzynarodowe – spór o pierwszeństwo w pluralistycznym porządku prawnym', *Consilium Iuridicum*, 1-2, pp. 34–69.

Muszyński, M. (2023a) 'Konstytucyjne granice bezpośredniego stosowania umowy międzynarodowej przez sądy w Polsce', *Prokuratura i Prawo*, 4, pp. 5–36.

Muszyński, M. (2023b) 'Supremacy and Primacy: Hierarchical Relationships Between the Polish and EU Legal Systems and Their Guardians', *Central European Journal of Comparative Law*, 4(2), pp. 177–199 [Online]. Available at: https://doi.org/10.47078/2023.2.177-199 (Accessed: 6 June 2025).

Pellet, A. (2006) 'Commentary on Article 38' in Zimmermann, A., Tomuschat, C., Oellers-Frahm, K., Tams, C.J., Thienel, T. (eds.) *The Statute of the International Court of Justice, A Commentary.* Oxford: Oxford University Press, pp. 577–579.

Radziewicz, P. (2012) 'Rekomendacje dotyczące wykonywania wyroków Europejskiego Trybunału Praw Człowieka przez Sejm' in Radziewicz, P., Mik, C., Balcerzak, M., Ziółkowski, M., Gierach, E. (eds.) *Wykonywanie wyroków Europejskiego Trybunału Praw Człowieka przez Sejm*. Biuro Analiz Sejmowych, pp. 1–4.

Shapiro, M. (1994) 'Judges as Liars', *Harvard Journal of Law and Public Policy*, 17(1), pp. 155–157.

van Hoof, G.J.H. (1983) *Rethinking the Sources of International Law*. Antwerp: Kluwer.

Verdross, A. (1914) 'Zur Konstruktion des Völkerrechts', *Zeitschrift für Völkerrecht*, 8, pp. 329–356.

von Bogdandy, A., Venzke, I. (2010) 'Zur Herrschaft internationaler Gerichte: Eine Untersuchung internationaler öffentlicher Gewalt und ihrer demokratischen Rechtfertigung', *Zeitschrift für auslandisches öffentliches Recht und Völkerrecht*, 70(1), pp. 1–49.

Wąsek-Wiaderek, M. (2012) *Samodzielność jurysdykcyjna sądu karnego wobec kompetencji Trybunału Konstytucyjnego i Trybunałów Europejskich*. Lublin: Wydawnictwo KUL.

Zabłocki, S. (2013) 'Wznowienie postępowania w sprawach karnych po orzeczeniu Europejskiego Trybunału Praw Człowieka', *Krajowa Rada Sądownictwa*, 1, pp. 34–50.

Case Law

Advisory Opinion of Permanent Court of International Justice, 3.03.1928 in case Jurisdiction of the Courts of Danzig, PCIJ Series B–No 15, pp. 15–25.

Decision of the Commision of Human Rights of 16 October 1996, Tkaczyk v Poland, app. no. 28999/95.

Decision of the Commision of Human Rights of 16 October 1996, Wardziak v Poland, app. no. 28617/95.

Decision of ECtHR of 9 December 1999, Szyskiewicz v Poland, app. no. 33576/96.

Decision of ECtHR of 2 July 2002, Gorizdra v Moldova, app. no. 53180/99.

Judgment of the CT of 27 April 2005, ref. no. P 1/05, OTK 2005/A/4.

Judgment of the CT of 20 November 2007, ref. no. SK 57/05, OTK 2007/A/10.

Judgment of the CT of 27 October 2010, ref. no. K 10/08, OTK 2010/A/8.

Judgment of the CT of 3 December 2015, K 34/15, OTK ZU no. 11/A/2015.

Judgment of the CT of 9 December 2015, K 35/15, OTK ZU no. 11/A/2015.

Judgment of the CT of 9 March 2016, K 47/15, OTK ZU A/2018.

Judgment of the CT of 11 August 2016, K 39/16, OTK ZU A/2018.

Judgment of the CT of 24 October 2017, K 1/17, OTK ZU A/2017.

Judgment of the CT of 10 March 2022, ref. no. K 7/21, OTK 2022/A/24.

Judgment of the CT of 24 November 2021 ref. no. K 6/21, OTK 2022/A/9.

Judgment of the ECtHR of 25 April 1978, Tyrer v United Kingdom, app. no. 5856/72.

Judgment of the ECtHR of 13 June 1979, Marckx v Belgium, app. no. 6833/74.

Judgment of the ECtHR of 29 April 1988, Belilos v Switzerland, app. no. 10328/83.

Judgment of the ECtHR of 7 July 1989, Soering v United Kingdom, app. no. 14028/88.

Judgment of ECtHR of 23 June 1993, Ruiz-Mateos and others v Spain, app. no. 14324/88.

Judgment of the ECtHR of 18 December 1996, Loizidou v Turkey, app. 15318/89.

Judgment of the ECtHR of 13 July 2000, Scozzari and Giunta v Italy, app. nos. 39221/98 and 41963/98.

Judgment of the ECtHR of 11 July 2002, Christine Goodwin v United Kingdom, app. 28957/95.

Judgement of the ECtHR of 8 July 2003 Hirst v the United Kingdom, app. no. 74025/01.

Judgment of the ECtHR of 8 April 2004, Assanidze v Georgia, app. no. 71503/01.

Judgment of the ECtHR of 22 June 2004, Broniowski v Poland, app. no. 31443/96.

Judgement of the ECtHR of 29 July 2004, San Leonard Band Club v Malta, app. no. 77562/01.

Judgement of the ECtHR of 22 February 2005, Hutten-Czapska v Poland, app. no. 35014/97.

Judgment of the ECtHR of 12 May 2005, Öcalan v Turkey, app. no. 46221/99.

Judgement of the ECtHR of 26 July 2005, Podbielski and PPU Polpure v Poland, app. no. 39199/98.

Judgment of the ECtHR of 6 October 2005, Lukenda v Slovenia, app. no. 23032/02.

Judgement of the ECtHR of 26 January 2006, Lungoci v Romania, app. no. 62710/00.

Judgement of the ECtHR of 10 August 2006, Yanakiev v Bulgaria, app. no. 40476/98.

Judgments of the ECtHR of 20 December 2007, Paykar Yev Haghtanak Ltd v Armenia, app. no. 21638/03.

Judgment of the ECtHR of 15 January 2009, Burdov v Russia (no. 2), app. no. 33509/04.

Judgment of the ECtHR of 30 June 2009, Verein gegen Tierfabriken Schweiz (VgT) v Switzerland (no. 2), app. no. 32772/02.

Judgment of the ECtHR of 23 November 2010, Greens and M.T. v the United Kingdom, app. no. 60041/08 and no. 60054/08.

Judgement of the ECtHR of 11 January 2011, Kurić and others v Slovenia, app. no. 26828/06.

Judgment of ECtHR of 17 January 2012, Biziuk and Biziuk v Poland, app. no. 12413/03).

Judgment of ECtHR of 5 February 2015, Bochan v Ukraine, app. no. 22251/08.

Judgment of ECtHR of 11 July 2017, Moreira Ferreira v Portugal, app. no. 19867/12.

Judgment of 3 February 2021, Advance Pharma sp. z o.o. v Poland, app. nr 1469/20.

Judgment of the ECtHR of 7 May 2021 Xeroflor v Poland, app. no. 4907/18.

Judgment of ECtHR of 29 June 2021, Broda and Bojara v Poland, apps nos. 26691/18 and 27367/18.

Judgment of ECtHR of 22 July 2021, Reczkowicz v Poland, app. no. 43447/19.

Judgment of ECtHR of 8 November 2021, Dolińska-Ficek and Ozimek v Poland, apps nos. 49868/19 and 57511/19.

Judgment of the ECtHR of 9 April 2024, Verein KlimaSeniorinnen v Schweiz, app. 53600/20.

Order the CT of 21 September 2005, ref. no. SK 32/04, OTK 2005/A/8.

Order of the SC of 19 October 2005, ref. no. V CO 16/05.

Order of the SC of 17 October 2007, ref. no. I PZ 5/07.

| Order of the SC of 16 July 2013, ref. no. III KO 118/12.

| Order of the CT of 19 November 2014, ref. no. P 15/13, OTK 2014/A/10.

| Order of the CT of 7 January 2016, U 8/15, OTK ZU A/2016.

| Order of the CT of 5 July 2017, ref. no. SK 8/16, OTK 2017/A/54.

| Order of the CT of 12 March 2020, U 1/17, OTK ZU A/2020.

| Order of the SC of 27 May 2021, ref. no. I KO 1/21.

| Report of the Commission of Human Rights of 14 December 1976, Tyrer v United Kingdom, app. 5856/72.

| Report of the Commission of Human Right of 8 June 1993 in joint cases Metropolitan Chrysostomos and Georgius Papachrysostomou, app. 15299/89 and 15300/89.

| Resolution of the SC of 30 November 2010 ref.no. III CZP 16/10, OSNC no. 4/2011.

ENSURING SECURITY AND RULE OF LAW THROUGH OUTER SPACE: THE IMPACT OF COPERNICUS ON EUROPEAN UNION EXTERNAL ACTIONS, CITIZEN PROTECTION, AND INTERNATIONAL PEACE

Katarzyna Myszona-Kostrzewa[1] **– László Mezey**[2]

'Those things which I am saying now may be obscure, yet they will be made clearer in their proper place'.

Nicolaus Copernicus[3]

ABSTRACT

How does Outer Space contribute to peace, security, and the rule of law? Outer Space profoundly influences essential domains such as navigation, environmental surveillance, communication, and most importantly, security and defence. Therefore, satellites are crucial for detecting terrestrial and aerial dangers, evaluating conditions on Earth, and enabling crisis interventions.[4]

As a significant player in the global space domain, equipped with the world's most advanced Earth Observation system (Copernicus), the European Union (EU) holds both the opportunity and responsibility to utilise space-based capabilities to safeguard human rights and security, not only across member states but also globally. By taking these actions, the EU can foster a more secure and stable world and reinforce fundamental rights and freedoms.

Therefore, this study explores the connection between security and protection of human rights within the EU framework and examines the international regulations connected to Outer Space, Earth Observation, and security challenges, focusing on the impact of the Copernicus programme on the EU's External and Security Actions, and its role in protecting human rights and maintaining peace inside and outside EU borders from Outer Space.

1 | Full Professor, Department of International Air and Space Law, Faculty of Law, University of Warsaw, Poland; k.myszona@wpia.uw.edu.pl; ORCID: 0000-0001-5059-4992.

2 | PhD student, Ferenc Deák Doctoral School of Faculty of Law, University of Miskolc, Hungary; Intern, Central European Academy, Budapest, Hungary; mezey.laszlo@centraleuropeanacademy.hu; ORCID: 0009-0009-3830-1259.

3 | Copernicus, 1543, p. 2.

4 | European Commission, 2024d, p. 172.

https://doi.org/10.55073/2025.2.145-166

KEYWORDS
space law
rule of law
human rights
European Union's external and security actions
Earth Observation

1. Introduction

In an era marked by persistent geopolitical tensions, particularly in regions surrounding Europe, the foundational principles of the rule of law, human rights, and security remain under threat. While the international community has long prioritised global peace, recent conflicts have revealed that these values are far from being universally safeguarded. Parallel to these challenges, space activities and satellite technologies have emerged as transformative tools, not only for advancing science and innovation but also for supporting strategic objectives, such as security and defence. Recognising this potential, the European Union (EU) has developed a range of legal instruments aimed at harnessing space technologies for the protection and resilience of both the EU and the broader international community.

This evolution underscores a vital truth: the European space sector is not merely a symbol of technological progress but a contributor to global stability. The integration of space-based capabilities into everyday life has grown immensely, influencing sectors from environmental monitoring to humanitarian aid. As noted by well-known experts 'space activities are becoming increasingly relevant for the daily life in our times, and it is only natural that they also touch human rights issues'[5] In response, the EU has strategically positioned itself as a leading actor in the global space arena,[6] capitalising on its industrial strengths and commitment to innovation.

Despite notable progress in the development of its space sector, the EU's ambitions remain modest when measured against the scale and pace of space activities conducted by the United States (US). The US continues to set an almost unachievable global development standard through sustained, high-level investment and strategic leadership. As outlined in the Draghi Report, the EU has made substantial achievements in space infrastructure and exploration; however, it still lags in terms of overall capacity and international influence.[7]

Among the EU's accomplishments, the Copernicus programme stands as a flagship initiative. It is not only a technological milestone but also a cornerstone of the EU's contribution to the global public good. Copernicus delivers the most comprehensive Earth Observation (EO) data globally,[8] supporting applications across environmental monitoring, disaster response, climate change assessment, and security operations. Its utility extends far beyond technical innovation – it embodies the EU's commitment to leveraging space systems for broader geopolitical and humanitarian objectives.

5 | Marboe, 2013, pp. 135–149; Potter, 1989, p. 63.
6 | European Commission, 2022.
7 | European Commission, 2024d, p. 172.
8 | Ibid.

Therefore, this study aims to demonstrate that with great (technological) power comes (global) responsibility. In other words, if the EU possesses the most advanced EO technology, it is not only an ethical obligation but also a legal imperative – derived from multiple EU documents, as well as from Article I. of the Outer Space Treaty[9] – that this technology must be used to improve humanity's living conditions. The EU must utilise this system to fulfil its obligations to promote peace and sustainability, aligning its initiatives with the goals outlined in key treaties and legal frameworks. As such, the study examines how integrating space technology into the EU's security and defence frameworks can enhance its global role through a combination of normative, empirical, and interdisciplinary approaches. This study highlights the value of space technology through case studies and offers suggestions for strengthening EU governance in space, ultimately seeking to answer the question: How does Outer Space technology, specifically EO, contribute to peace, security, and the protection of fundamental rights?

1.1. Development of the protection of international peace, human rights, and the rule of law

Following the Second World War, national security, the maintenance of international peace,[10] the enforcement of the rule of law, and the safeguarding of human rights have become key objectives and the primary task of states, and by extension, entire regions and the international community.[11]

The principles of rule of law and human rights are the fundamental principles of contemporary civilisation, reflected back in several international documents,[12] and have become the cornerstone of the EU. Their significance is underscored by the existence of a 'multilevel protection of human rights,'[13] which is established through national constitutions and various international legal instruments and mechanisms. This framework includes Constitutional Courts at the national level, the European Court of Human Rights within the Council of Europe, the Court of Justice of the European Union at the EU level, and the U.N. Human Rights Council or NATO at the international level, all tasked with safeguarding these rights.[14] This complex protection of human rights proves that efforts to ensure the rule of law and freedoms are not always effective, neither at the international-regional nor at the national level, due to constant societal and technological changes.[15] Particularly, considering the recent conflicts and violent circumstances in Europe's close proximity (Ukraine and the Middle East), both of these conflicts have undermined the rule of law and principles of human rights, which were previously regarded as inviolable due to the complex legal framework safeguarding them. Consequently, these actions are undermining the international order, the efficacy of the UN, and the very essence of international law.

This uncertainty inherently results in new forms of security threats to the European region, while the protection of the fundamental principles of the EU and the prevention of

9 | United Nations, 1967.
10 | Novokmet, 2022, p. 71.
11 | Ibid.
12 | United Nations, 1948.
13 | Paczolay, 2022, p. 133.
14 | Paczolay, 2022, p. 133.
15 | Ibid.

further atrocities are more important than ever. The only solution would be the effective implementation of international treaties to fight against injustices and strengthening cooperation between (member) states to ensure security. Security, by definition, is the foundation of the prosperity of European culture, which extends far beyond the absence of violence. It incorporates the 'stability of a government and its political system'[16] and also includes strengthening and protecting the democratic order, ultimately resulting in peaceful coexistence.

The war in Ukraine and the conflict in the Middle East have opened a new scene for the security environment, particularly in Outer Space, which is increasingly becoming a theatre for state supremacy, with the early development of anti-satellite weaponry.[17] Outer Space constitutes a 'double-edged sword' regarding security and peace. It is a domain where unexpected types of potential human rights violations may arise (e.g. Israel has intercepted a ballistic missile beyond Earth's atmosphere, launched by Houthi rebels)[18] and is filled with emerging security threats. For instance, Russia has recently deployed anti-satellite weapons into orbit.[19] The escalation of conflicts into Outer Space is a natural progression, as our daily existence increasingly relies on Outer Space, thereby impacting our security, peace, and safeguarding of human rights.

This interdependence between security, the rule of law, and human rights is critical to global governance, with advancements in one area often benefiting the others. However, challenges arise when security measures infringe on human rights, necessitating a careful legal framework to protect rights while maintaining security.[20] Human rights, when safeguarded, contribute to long-term security and the enforcement of law, thereby reinforcing the importance of maintaining a balance among all three.

1.2. International space law and security

> [The] space sector is currently considered to be one of the pillars of national security and is being developed both by countries with huge military potential, e.g. the US and Russia, as well as countries particularly vulnerable to intervention from outside, e.g. Pakistan and South Korea. It is a common practice to use space technologies first for military purposes and only later make them available for civilian needs.[21]

Military tension has inherently existed in the domain of Outer Space, as its exploration has played an important role in the Cold War's 'Space Race' through developing space capabilities, and the most important international treaties (the Outer Space Treaty, the Rescue Agreement,[22] the Liability Convention,[23] the Registration Convention,[24] and

16 | Novokmet, 2022, p. 74.
17 | United Nations, 2024.
18 | Barber, 2023.
19 | Thomas, 2023.
20 | Dunne and Wheeler, 2004.
21 | Myszona-Kostrzewa, 2018, p. 98.
22 | United Nations, 1968.
23 | United Nations, 1972.
24 | United Nations, 1975.

the Moon Agreement)[25] have effectively prevented any violent conflicts and maintained peace in Outer Space.[26]

However, it must be stressed that due to their vague and general nature, the provisions of Article IV of the Space Treaty have left open the possibility of considering which space activities are detrimental to peaceful objectives and which ones are compatible with them. Many American and Western European politicians equated the peaceful nature of space activities with 'non-aggressive' and allowed for the possibility of military use of space for defence purposes. According to the McGill Manual on international law applicable to military uses of Outer Space,[27]

> Military space activities are space activities of a military character. In the determination of the military character of a space activity, the actors involved in the activity, the aims of the activity, and the effects of the activity are to be taken into account, as appropriate. (Rule 103)

International space law consequently ensures that Outer Space is not an arena for militarisation but is exclusively for peaceful purposes,[28] forbids testing weapons and 'installing nuclear or other weapons of mass destruction',[29] and prohibits the use of force in Outer Space and from space against the Earth. Most importantly, it declares that activities in the exploration and use of outer space must be conducted 'in the interest of maintaining international peace and security and promoting international co-operation and understanding'.[30]

Recently, numerous experts have characterised the aggression against Ukraine as the first (commercial) space war, highlighting and emphasising the strategic importance of the cyberattack on a commercial satellite operated by the US company ViaSat,[31] which attack was primarily aimed at impacting military actors in Ukraine but had a spillover effect as it also disrupted civilian terminals across Europe and stopped thousands of wind turbines in Germany. In response, to replace the strategic value of the attacked commercial satellite, Elon Musk's private companies SpaceX and Starlink satellites have attempted to maintain open information channels for Ukraine.[32]

In light of these developments, the EU must further prioritise the integration of space into its security and defence strategies. This involves not only safeguarding critical infrastructure but also promoting legal clarity and international norms that reinforce the peaceful use of Outer Space.[33] As the EU continues to develop its space capacities, it must do so with a clear legal and strategic vision – anchored in cooperation, resilience, and responsibility – to maintain space as a global common serving both regional and the broader international community's defence needs.

25 | United Nations, 1979.
26 | United Nations, 2024.
27 | Jakhu and Freeland, 2022.
28 | United Nations, 1967, Article IV.
29 | United Nations, 2024.
30 | United Nations, 1967, Article IV.
31 | European Parliament, 2023b.
32 | Ibid.
33 | European Parliament, 2023b.

2. Common foreign and security policy in EU

The economic importance of Europe positions the region among the biggest global actors; however, this also signifies a heightened responsibility to ensure not only its own peace and interests but also to encourage the continued existence and growth of its fundamental principles and prosperity worldwide.[34]

In this rapidly evolving world, security challenges have become increasingly complex, multidimensional, and interconnected, and while all European citizens rightfully expect and deserve to live in a secure and stable environment,[35] no single EU Member State can address security threats completely independently. As the current violent conflicts occur outside of the EU territory, the region's security extends beyond its borders by preventing the escalation of the conflicts.

The Treaty on European Union already established an effective 'Common Foreign and Security Policy' in 1992 as one of two additional areas of cooperation (next to Justice and Home Affairs) supporting the first pillar: the formation of European Communities.[36] The Treaty of Lisbon, which came into effect in 2009, established an institutional framework for the EU's external service by removing the three-pillar system, leading to the Common Foreign and Security Policy to promote the EU's actions and express its viewpoint on the global stage.[37]

The fifth title of the Treaty on European Union[38] contains the 'General provisions on the Union's external action and specific provisions on the common foreign and security policy', and in the first chapter, Article 21 outlines that the EU's actions are 'driven by the rule of law and universal human rights',[39] while it also describes the main goals and aims of these actions[40] (which includes securing and promoting EU values, preserving peace, preventing conflicts, strengthening international security, sustainable economic development, and fostering multilateral cooperation).[41]

The second chapter of the same Treaty establishes particular provisions about the Common Foreign and Security Policy[42] while also defining the Common Security and Defence Policy as an essential element of the previous one, which includes a common defence, military collaboration, and the External Action Service.[43] The Common Security and Defence Policy part of the Common Foreign and Security Policy has rapidly evolved in response to the current geopolitical situation. The enhanced strength and capability of the EU in security and defence is favourably affecting both global and transatlantic security.[44]

34 | European Union, 2023a.
35 | Ibid.
36 | European Union, 1992.
37 | Ministry of Foreign Affairs Spain, n.d.
38 | European Union, 1992.
39 | European Union, 1992, Chapter V, Title I, Article 21.
40 | Ibid.
41 | Federal Foreign Office Germany, 2023.
42 | European Parliament, 2023a.
43 | Ibid.
44 | European Union, 2023a.

The conclusion of the chapter is, first, that we must highlight that the 'common foreign and security policy' is rather a vague and unpredictable term, as it has been significantly influenced by contemporary foreign policy events (see, for example, how the Russian aggression against Ukraine has provided additional momentum towards establishing an EU Defence Union).[45] A significant connection exists between events beyond the EU's borders and security.[46] Second, as a global actor, Europe bears the responsibility of fostering stable conditions for human and economic development, upholding human rights, and supporting democracy and fundamental freedoms. Consequently, the primary objective and interest of the EU is to aid third-world countries in crisis situations to prevent global and trans-regional threats from destabilising effects.[47]

3. Use of space for security and defence within the EU

It is crucial to underscore that the Treaty on European Union does not impose geographical limitations on the EU's external operations. Thus, these rules extend beyond EU boundaries and include Outer Space as an area where the EU must ensure security.[48] In 2022, EU leaders declared space a strategic domain by formulating the EU Space Strategy for Security and Defence.[49] The document, titled 'Council Conclusions on the EU Space Strategy for Security and Defence'[50] highlights the fact that this strategy aligns not only with the EU's broader security and defence policies but also with the evolving international space law framework, affirming the EU's commitment to mitigating space threats through normative regulations.[51] This document encompasses multiple objectives important to our discussion.

First, the EU Space Defence Strategy aims to optimise space usage for security and defence by enhancing space domain awareness (SDA) and EO. This includes two main initiatives: leveraging Member States' capabilities for SDA and establishing new EO services linked to the Copernicus programme.[52] Here, it is worth mentioning that while the Copernicus focuses on broad EO, another separate initiative aimed at the security of the EU is IRIS² (the Union Security Connectivity Programme),[53] whose goal is to secure satellite communications for defence and security, strengthening the EU's resilience and connectivity.

Second, the strategy also promotes cooperation among EU Member States in exploring methods for coordinating the use of national assets for military objectives, including the safeguarding of assets owned by other Member States.[54]

45 | Krentz, 2024.
46 | European Union, 2023a.
47 | European Union Satellite Center, 2023.
48 | European Commission, 2022.
49 | European Space Policy Institute, 2023.
50 | Council of the European Union, 2023.
51 | European Commission, 2024.
52 | Ibid.
53 | European Commission, 2024c.
54 | European Space Policy Institute, 2023.

Finally, the strategy highlights the importance of international collaboration (outside of the EU) by establishing security dialogues with developing space-faring countries and through NATO cooperation[55] (especially given the Ukraine-Russia crisis, which has shown that, despite the importance of the space industry, several EU nations possess relatively weak space capabilities).

3.1. The EU space law

From a security standpoint, the defence strategy underscores the importance of cultivating a shared understanding of security threats.[56] A key objective of this strategy is to foster collective comprehension of space-related risks. Additionally, it aims to establish effective response mechanisms to promote a unified perception of space hazards among Member States. By developing a standardised definition of the space domain, which is currently not explicitly defined in international treaties, the EU will be in a stronger position to conduct classified assessments of the space threat landscape. This would involve utilising intelligence from Member States and clearly defining roles and responsibilities during crises,[57] thereby ensuring accountability in threat detection.[58]

This discussion also raises questions about the EU's legal competence in establishing 'Common European Space Law', particularly within the context of the Treaty on the Functioning of the European Union (TFEU). The news on the establishment of EU Space Law has gained significant attention in both academic and policy circles, and from the perspective of this study, a Common European Space Law could significantly contribute to achieving security both within the EU and globally. The EU's involvement in space law is particularly relevant considering the fundamental principles of resilience, safety, and sustainability, which have been central to debates surrounding the EU's potential regulatory role in space activities.

Article 4(3) of the TFEU establishes that space falls under the category of shared or 'parallel' competences, allowing both the European Union and its Member States to pursue activities in this domain. Specifically, in areas such as research, technological development, and space, the Union may initiate and implement programmes, provided it does not inhibit Member States from exercising their own competences.[59] This model introduces legal flexibility while preserving national sovereignty, particularly as many Member States continue to maintain independent space policies and industrial priorities. Article 189 TFEU further empowers the EU to define a common European Space Policy, implement related programmes, and adopt measures, including the establishment of a European space programme; however, it explicitly excludes any harmonisation of national laws and regulations. This 'no-harmonisation' clause ensures a decentralised legal framework, wherein Member States retain authority over national regulation. Legal scholars agree that while Article 189 provides a solid foundation for EU-led coordination, it does not enable the EU to override national legislation unless Member States explicitly agree to harmonised efforts. Consequently, while the adoption of a common EU space law could enhance cohesion, particularly in areas such as cybersecurity, space traffic

55 | European Commission, 2024.
56 | General Secretariat of the Council, 2023.
57 | European Commission, n.d.a.
58 | European Space Policy Institute, 2023.
59 | Cesari, 2024.

management, and resilience of critical space infrastructure, thus ensuring a consistent, Union-wide approach to safety, security, and sustainability in space activities,[60] its legality is questionable.

4. The Copernicus system

As previously mentioned, the EU Space Strategy emphasizes the significance of a shared EO system, highlighting its role upholding the rule of law and human rights. The EU's Copernicus programme is among the top providers of EO data, although technical limitations currently hinder users from fully benefiting from the data and services it offers.[61] This chapter therefore introduces the international legal rules connected to EO, examining the possible practical use of this technology of ensuring peace and other fundamental values.

4.1. Space law related to Earth Observation

As described in the Outer Space Treaty,[62] 'Freedom of activities' inherently includes the right to use Outer Space for EO. While EO is defined as the 'process of gathering information about the Earth's surface'[63] and refers to the use of remote sensing technologies to monitor land and the atmosphere, the images must be processed and analysed to extract different types of information that can serve a very wide range of applications and industries.[64] However, one aspect of EO, namely 'remote sensing,' has its own non-binding international space law principles,[65] which were declared in Principle is the Resolution Adopted by the General Assembly 41/65. (Principles Relating to Remote Sensing of the Earth from Outer Space).

Principle I(a) of this document describes remote sensing as 'sensing of the Earth's surface from space by making use of the properties of electromagnetic waves emitted, reflected, or diffracted by the sensed objects, to improve natural resources management, land use and the protection of the environment', and while 'all remote sensing is a form of EO, not all EO is remote sensing'.[66]

The use of remote sensing data is somewhat limited by the 'peaceful purposes' principle of the Outer Space Treaty,[67] and by the remote sensing principles only allowing 'the purpose of improving natural resources management, land use and the protection of the environment',[68] while it must also adhere to the principle of full and permanent sovereignty of all states and peoples over their wealth and natural resources,[69] ensuring that it does not infringe upon the legitimate rights and interests of the sensed state, and

60 | European Parliament, 2025.
61 | European Commission, 2016.
62 | von der Dunk, 2013, p. 244.
63 | EUSPA, 2024.
64 | European Commission, 2022.
65 | Cho, 2013, p. 265.
66 | New Space Economy, 2023.
67 | von der Dunk, 2013, p. 254.
68 | United Nations General Assembly, 1986, Principle I(a).
69 | United Nations General Assembly, 1986, Principle IV.

'shall not be conducted in a manner detrimental to the legitimate rights and interests of the sensed State'.[70]

4.2. Application of Earth Observation for security purposes

By leveraging information from sources such as remote sensing, EO data plays a pivotal role in the prevention of both man-made and natural disasters. With the development of space technology, EO, and remote sensing data have been unavoidable instruments in documenting the most significant crimes against humanity (it has been used in trials in front of the ICC about the burning of ethnic Rohingya villages in Burma).[71] Therefore, data derived from EO are a critical instrument for bolstering international, domestic, and regional security. At the international level, the principles of remote sensing underscore these points; specifically, Principles X[72] and XI[73] of the Remote Sensing Resolution document emphasizes that remote sensing should aid in the preservation of Earth's natural environment and prevent harmful activities by providing pertinent information to concerned states. Consequently, satellite data provide a significant contribution to various fields of ensuring the rule of law:

By uncovering the truth about violations and facilitating justice,[74] satellite data provide accountability for alleged criminal activities. (The active arrest warrant for Vladimir Putin issued by the International Criminal Court exemplifies how satellite imagery and data regarding Russian military atrocities may serve as crucial evidence[75] to establish 'reasonable grounds' for demonstrating Putin's individual criminal responsibility.)[76]

By implementing early warning systems, the prevention of crimes would be possible using evacuation strategies and by developing logistics networks that consider regional risks.[77]

In summary, the data derived from remote sensing are important for quick and efficient disaster prevention and response, mitigation, and rehabilitation activities, and are all instrumental in ensuring the rule of law and protection of human rights through space technology.

4.3. Establishment and governance of Copernicus

In 1998, The EU[78] already launched a Global Monitoring for Environment and Security (GMES) initiative to provide 'timely and high-quality data and information' and establish 'operational, independent[79] and autonomous European capability for the global monitoring of environmental and security parameters'.[80]

70 | von der Dunk, 2013, p. 254.
71 | Hurova, 2022, p. 15.
72 | United Nations General Assembly, 1986, Principle X.
73 | United Nations General Assembly, 1986, Principle IX.
74 | Hurova, 2022, p. 18.
75 | Hurova, 2022, p. 15.
76 | International Criminal Court, 2023.
77 | Hurova, 2022, p. 18.
78 | von der Dunk, 2009.
79 | European Space Agency, n.d.
80 | European Union, 2003.

In 2021, the 'EU space program (2021–2027) – European Union Agency for the Space Programme'[81] came into force. It encompasses the establishment of several space flagship initiatives (Galileo, EGNOS, Copernicus).[82]

The Copernicus serves as the EO component of the EU's Space Programme,[83] and it is intended to provide essential information services to persons and organisations both inside and outside the EU.[84]

The governance of the Copernicus programme involves a coordinated effort between the European Commission (EC), the European Union Agency for the Space Programme (EUSPA), and the European Space Agency (ESA).

The EC plays a central role in defining and implementing EU space policies, managing the budget, and ensuring that Copernicus aligns with EU priorities such as sustainability and security.[85] Meanwhile, the Copernicus programme is also financed, supervised, and overseen by the EC in partnership with organisations such as ESA and the European Organisation for the Exploitation of Meteorological Satellites (EUMETSAT).[86]

On the other hand, EUSPA is responsible for the operational management of Copernicus, overseeing its day-to-day activities, coordinating with EU Member States, and ensuring that the programme meets user requirements, particularly in areas such as security and environmental monitoring.[87]

Finally, ESA contributes to Copernicus by developing and deploying the space infrastructure, including the design, procurement, and launch of satellites.[88] While EUSPA manages operations, ESA ensures the technical success and continuity of the programme. Together, these institutions collaborate to ensure that Copernicus provides valuable data and services to meet the EU's strategic goals, balancing policy, technical infrastructure, and operational delivery.[89]

Copernicus provides services that combine satellite EO data with in-situ (non-space) data.[90] The EO component is provided by specialised satellites (the Sentinel families) and contributing missions (currently, commercial and public satellites). This Space component, supervised by ESA, provides customers with satellite data from the Sentinels, thereby supporting missions at the European, national, and international levels.[91] The in-situ component emphasises identifying data access shortcomings, coordinating collaborations with data sources to improve access, and developing innovative solutions with service providers or national authorities.[92]

Overall, the high quality and relevance of the data produced by Copernicus have transformed the EO industry. Its free and open data policy is fundamental to the programme, aiming to make EO-based solutions accessible to all, leveraging these data to

81 | Regulation (EU) 2021/696, 2021.
82 | European Space Legislation, n.d.
83 | European Commission, n.d.a.
84 | European Commission, n.d.b.
85 | Orešković and Grgić, 2021.
86 | European Commission, n.d.a.
87 | Institutional Organization of the European Space Program, 2022.
88 | Citaristi, 2022.
89 | Miglio et al., 2024.
90 | European Commission, n.d.a.
91 | European Commission, n.d.a.
92 | Ibid.

drive positive change and preserve our planet.[93] The majority of the information services, along with the derived data, are freely accessible to the public and utilised by service providers and public authorities, which enhances the quality of life for citizens in Europe and globally.[94]

However, the primary users of Copernicus services are policymakers and public authorities who require this information to develop environmental legislation and policies or to make critical decisions during emergencies, such as natural disasters or humanitarian crises.[95]

4.4. Application areas of Copernicus in SESA actions

In May 2017, the Copernicus in Support of EU External and Security Actions (SESA).[96] became active, functioning as a European geointelligence service to assist the EU and its Member States in actions beyond EU boundaries.[97] This service provides decision-makers with geospatial information on hard to reach areas with substantial security concerns,[98] and it can be activated for operations both within and beyond EU territory, thereby enhancing European capabilities in crisis prevention, preparedness, and response.[99]

As stated earlier, the EU's action on the international scene shall be guided by principles (democracy, the rule of law, the universality and indivisibility of human rights, etc.) that have inspired its own creation, development, and enlargement, and which it seeks to promote globally.[100] The Treaty on European Union, specifically Article 21(2),[101] defines the objectives of 'Common Policies and Actions,' which I intend to use as a structure for connecting the services offered by Copernicus with the overarching aim of security and external activities.

In accordance with Article 21(2a), the Union shall 'safeguard its values, fundamental interests, security, independence, and integrity'. By ensuring the Security of EU Citizens,[102] Copernicus is able to recognise unconventional threats and contribute to situational awareness, practically by developing emergency plans for 'managing sudden, unforeseen situations'.[103]

Based on Article 21(2b), common policies must 'consolidate and support democracy, the rule of law, human rights and the principles of international law'. The EU has consistently supported the promotion of the rule of law,[104] within its geographical borders, however, in accordance with the aforementioned article, the EU must establish an international perspective as well to reflect these core foundational values globally. The Copernicus programme could facilitate this by applying 'geoinformation products'[105] for

93 | European Commission, n.d.b.
94 | Krentz, 2024.
95 | European Commission, n.d.a.
96 | Copernicus, 2024a.
97 | European Commission, n.d.a.
98 | Ibid.
99 | Copernicus, 2024f.
100 | Copernicus, 2024e.
101 | European Union, 1992, Article 21(2).
102 | Copernicus, 2024f.
103 | Ibid.
104 | Copernicus, 2024e.
105 | Copernicus, 2024e.

analysing human activities through the monitoring of possibly illicit acts across many contexts (e.g. mapping piracy camps, detecting potential smuggling routes, etc.)[106] and providing evidence in criminal proceedings. Nonetheless, the establishment of the rule of law may also be achieved through post-crisis rehabilitation, reconstruction, and peacebuilding measures, where geospatial information could be vital.[107]

Regarding crisis and conflict management,[108] Article 21(2c) emphasises the need to 'preserve peace, prevent conflicts and strengthen international security'. This objective is intrinsically linked to the principles of adhering to the rule of law, as it stems from the necessity for the EU to be actively involved in peacebuilding and peacekeeping initiatives. It is imperative to acknowledge that conflicts typically appear locally, often with geopolitical implications, necessitating a thorough comprehension of the fundamental causes of the circumstances.[109]

In terms of humanitarian aid,[110] Article 21(2d) stipulates that our region must 'foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty'. Consequently, the EU also aids partner countries in becoming more resilient to contemporary global challenges by adhering to international humanitarian principles (e.g. 'supporting interventions: food, shelter, healthcare, etc.').[111]

Article 21(2e) highlights the need to 'encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade'. Copernicus analysis and mapping are fundamental in ensuring transport safety and security[112] and international trade and economic diplomacy[113] by preventing accidents. International trade significantly influences political power, through satellite data, enabling the estimation and monitoring of commercial information, which is essential for national leaders.[114]

Article 21(2f) emphasises the importance of 'helping develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development'. The EU uses legislation and policies to foster good governance and human and economic development through stability and resilience for development and climate security,[115] and Copernicus can facilitate efficient mechanisms for planning and monitoring the implementation of development initiatives, supporting informed decision-making and policy execution.[116] While climate change functions as a trigger for threats and instabilities, significantly impacting global peace and security as it could result in climate-induced migration and resource competition, Copernicus could foresee and detect emerging growing natural

106 | Copernicus, 2024e.
107 | Ibid.
108 | Ibid.
109 | Ibid.
110 | Copernicus, 2024d.
111 | Ibid.
112 | Copernicus, 2024h.
113 | Copernicus, 2024i.
114 | Ibid.
115 | Copernicus, 2024g.
116 | Ibid.

resource exploitation through monitoring.[117] It is also important to note that, as mentioned earlier, the EU space law also aims to implement sustainability measures by developing a life cycle assessment tool and standards, applicable to all space assets operating within the EU, to minimise the environmental impact of space activities on Earth; therefore the importance of the Act regarding this topic is also growing.

Based on Article 21(2g), the EU exists to 'assist populations, countries and regions confronting natural or man-made disasters'. Due to our dependence on nature, the environment's cross-border nature, and significant value emphasise fighting against environmental crime as an important effort at the EU level, and the utilisation of EO data could help in environmental compliance[118] and health and security[119] issues (e.g. 'monitoring waste facilities and identifying potentially illicit waste sites' or in connection with man-made disasters such as the COVID-19 pandemic).[120]

In conclusion, the Copernicus programme aligns with the EU's strategic objectives by enhancing security, supporting the rule of law, promoting peace, and facilitating sustainable development and disaster management and the goals of the international community as outlined in UN conventions.

To practically prove that the Copernicus or EO satellites have the potential to influence SESA actions, it is useful to bring up the Ukraine case. The aggression against Ukraine highlights this reality. Despite Ukraine's existing space sector and six operational EO satellites before the war, the aggression exposed the inadequacy of its space sector to safeguard national security independently. The European Space Agency guarantees Ukraine full, free, and open access to data from European Sentinel EO satellites[121]; however, since these efforts are insufficient, the EU Agency for Space Programme launched the EUSpace4Ukraine initiative,[122] allowing the utilisation of freely accessible data from Galileo and Copernicus to bolster humanitarian support for Ukraine.[123]

This situation underscores the necessity of all EU Member States to engage with and rely on Outer Space for their security, while it aligns with the Outer Space Treaty's principle that space activities should benefit all people[124] and reflects the spirit of Principle VIII, which advocates international cooperation. It also demonstrates how Copernicus actively contributes to the security of EU citizens, supports the rule of law, and promotes stability, health, and security. Additionally, this example underscores the necessity of integrating Copernicus into the EU's external and security strategies themselves, emphasising the need for a comprehensive space infrastructure to achieve these goals.

117 | Copernicus, 2024b.
118 | Copernicus, 2024b.
119 | Copernicus, 2024c.
120 | Copernicus, 2024b.
121 | Hurova, 2022, p. 21.
122 | Hurova, 2022, p. 23.
123 | Ibid.
124 | United Nations, 1967, Article I.

5. Conclusion

While this paper provides a brief overview of the issues surrounding EO and the responsibilities of Copernicus, it notably emphasises that this technology can and should be actively utilised. The interdependence in the EU is even stronger, as Member States, despite advancing their national security measures, must foster closer cooperation to uphold peace, security, freedoms, and the rule of law.[125]

Although the EU has demonstrated its capability to develop and deploy advanced EO systems, the extent of national involvement by Member States varies depending on their national legislations and choice of collaboration through the EU, ESA, or more traditional intergovernmental arrangements. This discussion, therefore, remains predominantly theoretical, as the practical implementation of the Copernicus programme within EU institutions and Member States has yet to materialise. However, this landscape is likely to change soon, with the introduction of the Common EU Space Law.

Nevertheless, Outer Space technology is crucial for upholding the rule of law, promoting human rights, and safeguarding national security. Employing such technology is both a legal duty and a shared responsibility. Its application should not be confined to the EU but extended to the entire international community.

To achieve the final objective, greater emphasis should be placed on the practical application of space technologies, particularly by exploring their integration into various national legal fields, such as environmental protection or criminal justice. However, as previously discussed, the diversity of national legal systems presents challenges to unified implementation. In this context too, the EU space law could play a pivotal role by offering a cohesive framework to protect space systems against systemic security threats, particularly amid current geopolitical instability.[126] A harmonised approach under EU law could facilitate the consistent use of the Copernicus system, which represents a remarkable achievement for Member States – yet one that must be safeguarded through clear legal protections and coordinated governance.

If successfully implemented, the EU could set a powerful global example by showing that, despite possessing the world's most advanced EO system, it is committed to making this resource freely available to all nations. Rather than using it solely for regional interests or commercial gain, the EU would demonstrate that such technology serves higher objectives – promoting human rights, strengthening the rule of law, and enhancing global security. This would reinforce the principle that space-based technologies can support the collective advancement of humanity.

125 | Novokmet, 2022.
126 | Desmarais, 2024.

Bibliography

Barber, H. (2023) 'How Israel shot down a ballistic missile in space for the first time', *Telegraph*, 5 November [Online]. Available at: https://www.telegraph.co.uk/world-news/2023/11/04/how-israel-shot-down-ballistic-missile-in-space-houthis/ (Accessed: 1 July 2024).

Cesari, L. (2024) 'Developing an EU Space Law: The process of harmonising national regulations', *McGill Institute of Air & Space Law*, 16 February [Online]. Available at: https://www.mcgill.ca/iasl/article/developing-eu-space-law-process-harmonising-national-regulations (Accessed: 14 February 2025).

Cho, G. (2013) 'Privacy and EO: An Overview of Legal Issues' in von der Dunk, F.G. (ed.) *Studies in Space Law: Evidence from Earth Observation Satellites, Emerging Legal Issues*. 7th edn. Leiden–Boston: Martinus Nijhoff Publishers, pp. 259–292; https://doi.org/10.1163/9789004234031_014.

Citaristi, I. (2022) 'European Space Agency—ESA' in *The Europa Directory of International Organizations 2022*. 24th edn. London: Routledge, pp. 560–562; https://doi.org/10.4324/9781003292548.

Copernicus (2024a) 'Support to EU External and Security Actions: Climate Security', *Copernicus* [Online]. Available at: https://sesa.security.copernicus.eu/services/application-areas/climate-security (Accessed: 1 July 2024).

Copernicus (2024b) 'Support to EU External and Security Actions: Crisis and Conflict', *Copernicus* [Online]. Available at: https://sesa.security.copernicus.eu/services/application-areas/crisis-and-conflict (Accessed: 1 July 2024).

Copernicus (2024c) 'Support to EU External and Security Actions: Health Security', *Copernicus* [Online]. Available at: https://sesa.security.copernicus.eu/services/application-areas/health-security (Accessed: 1 July 2024).

Copernicus (2024d) 'Support to EU External and Security Actions: Humanitarian Aid', *Copernicus* [Online]. Available at: https://sesa.security.copernicus.eu/services/application-areas/humanitarian-aid (Accessed: 1 July 2024).

Copernicus (2024e) 'Support to EU External and Security Actions: Rule of Law', *Copernicus* [Online]. Available at: https://sesa.security.copernicus.eu/services/application-areas/rule-of-law (Accessed: 1 July 2024).

Copernicus (2024f) 'Support to EU External and Security Actions: Security of EU Citizens', *Copernicus* [Online]. Available at: https://sesa.security.copernicus.eu/services/application-areas/security-of-eu-citizens (Accessed: 1 July 2024).

Copernicus (2024g) 'Support to EU External and Security Actions: Stability and Resilience for Development', *Copernicus* [Online]. Available at: https://sesa.security.copernicus.eu/services/application-areas/stability-and-resilience-development (Accessed: 1 July 2024).

Copernicus (2024h) 'Support to EU External and Security Actions: Transport Safety and Security', *Copernicus* [Online]. Available at: https://sesa.security.copernicus.eu/services/application-areas/transport-safety-and-security (Accessed: 1 July 2024).

Copernicus (2024i) 'Support to EU External and Security Actions: Trade and Economic Diplomacy', *Copernicus* [Online]. Available at: https://sesa.security.copernicus.eu/services/application-areas/international-trade-and-economic-diplomacy (Accessed: 1 July 2024).

Copernicus, N. (1543) *Dedication of the Revolutions of the Heavenly Bodies to Pope Paul III*. New York: The Harvard Classics [Online]. Available at: https://hti.osu.edu/sites/hti.osu.edu/files/dedication_of_the_revolutions_of_the_heavenly_bodies_to_pope_paul_iii.pdf (Accessed: 1 July 2024).

Council of the European Union (2023) 'Council Conclusions on the EU Space Strategy for Security and Defence', *Council of the European Union*, 13 November [Online]. Available at: https://data.consilium.europa.eu/doc/document/ST-14512-2023-INIT/en/pdf (Accessed: 1 July 2024).

Desmarais, A. (2024) 'Creating a "true single market" in orbit: What should we expect from Europe's new space law?', *Euronews*, 4 April [Online]. Available at: https://www.euronews.com/next/2024/04/04/creating-a-true-single-market-in-orbit-what-should-we-expect-from-europes-new-space-law (Accessed: 1 July 2024).

Dunne, T., Wheeler, N.J. (2004) '"We the Peoples": Contending Discourses of Security in Human Rights Theory and Practice', *International Relations*, 18(1), pp. 9–23 [Online]. Available at: https://doi.org/10.1177/0047117804041738 (Accessed: 4 August 2025).

EU Satellite Centre (n.d.) 'Support to EU External Action', *EU Satellite Centre* [Online]. Available at: https://www.satcen.europa.eu/Capdev/eu_external_action (Accessed: 20 April 2024).

European Commission (2016) 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, Space Strategy for Europe COM(2016), Brussels, 26 October', *European Commission*, 26 October [Online]. Available at: https://csps.aerospace.org/sites/default/files/2021-08/European%20Commission%20Space%20Strategy%2026Oct16.pdf (Accessed: 2 April 2025).

European Commission (2022) *EU Space Strategy for Security and Defence for a stronger and more resilient European Union* [Online]. Available at: https://defence-industry-space.ec.europa.eu/eu-space/eu-space-strategy-security-and-defence_en#:~:text=In%202022%2C%20EU%20leaders%20identified,Strategy%20for%20Security%20and%20Defence (Accessed: 2 April 2025).

European Commission (2024a) *EU Space Strategy for Security and Defence* [Online]. Available at: https://defence-industry-space.ec.europa.eu/eu-space-strategy-security-and-defence_en (Accessed: 1 July 2024).

European Commission (2024b) *European Union Space Strategy for Security and Defence*, March [Online]. Available at: https://defence-industry-space.ec.europa.eu/document/download/5e3dfcd1-2ff2-4fd1-85f7-74d0d9b62b3a_en?filename=Factsheet%20EU%20Space%20Strategy%20for%20Security%20and%20Defence.pdf (Accessed: 1 July 2024).

European Commission (2024c) 'IRIS²: The new EU Secure Satellite Constellation. Infrastructure for Resilience, Interconnectivity and Security', *European Commission*, 16 December [Online]. Available at: https://defence-industry-space.ec.europa.eu/eu-space/iris2-secure-connectivity_en (Accessed: 2 April 2025).

European Commission (2024d) *The Future of European Competitiveness: Part B – In-depth Analysis and Recommendations*, September [Online]. Available at: https://commission.europa.eu/document/download/ec1409c1-d4b4-4882-8bdd-3519f86bbb92_en?filename=The%20future%20of%20European%20competitiveness_%20In-depth%20analysis%20and%20recommendations_0.pdf (Accessed: 1 July 2024).

European Commission (n.d.a) 'Programme of the European Union: Copernicus – Europe's Eyes on Earth', *European Commission* [Online]. Available at: https://defence-industry-space.ec.europa.eu/document/download/67e3d2d0-53d4-4ef8-893a-c43da0f140a4_en?filename=Copernicus%20General%20EN.pdf (Accessed: 1 July 2024).

European Commission (n.d.b) 'The Copernicus Data Space Ecosystem', *European Commission* [Online]. Available at: https://dataspace.copernicus.eu/ (Accessed: 20 April 2024).

European Parliament (2023a) 'Common Security and Defence Policy', *European Parliament* [Online]. Available at: https://www.europarl.europa.eu/ftu/pdf/en/FTU_5.1.2.pdf (Accessed: 1 July 2024).

European Parliament (2023b) 'EU Space Strategy for Security and Defence', *European Parliament*, November [Online]. Available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/754598/EPRS_BRI(2023)754598_EN.pdf (Accessed: 1 July 2024).

European Parliament (2025) 'EU Space Law' in *A New Plan for Europe's Sustainable Prosperity and Competitiveness*, *European Parliament* [Online]. Available at: https://www.europarl.europa.eu/legislative-train/theme-a-europe-fit-for-the-digital-age/file-eu-space-law (Accessed: 2 April 2025).

European Space Agency (n.d.) 'Introducing Copernicus', *European Space Agency* [Online]. Available at: https://www.esa.int/Applications/Observing_the_Earth/Copernicus/Introducing_Copernicus (Accessed: 20 April 2024).

European Space Legislation (n.d.) *Austria in Space* [Online]. Available at: https://austria-in-space.at/en/space-law/europeanspacelegislation.php (Accessed: 20 April 2024).

European Space Policy Institute (2023) 'High Time for an EU Space Strategy for Security and Defence', *European Space Policy Institute*, 10 March [Online]. Available at: https://www.espi.or.at/briefs/high-time-for-an-eu-space-strategy-for-security-and-defence/ (Accessed: 1 July 2024).

European Union (1992) *Consolidated Version of the Treaty on European Union*, 26 October [Online]. Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF (Accessed: 1 July 2024).

European Union (2003) *Global Monitoring for Environment and Security Final Report for the GMES Initial Period (2001–2003)*, 10 February [Online]. Available at: https://www.copernicus.eu/sites/default/files/2018-10/Initial_Period_Report_final.pdf (Accessed: 20 April 2024).

European Union (2023a) *EU Peace, Security and Defence. Working for a Safe Europe and a Stable World*, 21 March [Online]. Available at: https://www.eeas.europa.eu/eeas/eu-peace-security-and-defence_en#8030 (Accessed: 1 July 2024).

European Union Satellite Center (2023) 'Support to External Action', *European Union Satellite Center* [Online]. Available at: https://www.satcen.europa.eu/Capdev/eu_external_action (Accessed: 1 July 2024).

EUSPA (2024) 'What is Earth Observation', *European Union Agency for the Space Programme*, 17 April [Online]. Available at: https://www.euspa.europa.eu/eu-space-programme/copernicus/what-earth-observation (Accessed: 1 July 2024).

Federal Foreign Office Germany (2023) 'The Common Foreign and Security Policy', *Federal Foreign Office Germany* [Online]. Available at: https://www.auswaertiges-amt.de/en/aussenpolitik/europe/-/228280 (Accessed: 1 July 2024).

General Secretariat of the Council (2023) 'Council Conclusions on the EU Space Strategy for Security and Defence', *General Secretariat of the Council*, 13 November [Online]. Available at: https://data.consilium.europa.eu/doc/document/ST-14512-2023-INIT/en/pdf (Accessed: 1 July 2024).

Hurova, A. (2022) 'Earth Observation for the Protection of Human Rights during the Armed Aggression', *Advanced Space Law*, 9, pp. 15–27 [Online]. Available at: https://doi.org/10.29202/asl/9/2 (Accessed: 1 July 2024).

Institutional Organization of the European Space Program (2022) 'Ensuring the Security of the Union', *Institutional Organization of the European Space Program*, July [Online]. Available at: https://dspace.cuni.cz/bitstream/handle/20.500.11956/178335/120427277.pdf?sequence=1 (Accessed: 2 April 2025).

International Criminal Court (2023) 'Situation in Ukraine: ICC Judges Issue Arrest Warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova', *International Criminal Court*, 17 March [Online]. Available at: https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and (Accessed: 1 July 2024).

Jakhu, R.S., Freeland, S. (eds.) (2022) *McGill Manual on International Law Applicable to Military Uses of Outer Space: Volume I – Rules*. Montreal: Centre for Research in Air and Space Law [Online]. Available at: https://www.mcgill.ca/milamos/files/milamos/mcgill_manual_volume_i_-_rules_final_0.pdf (Accessed: 1 July 2024).

Krentz, O. (2024) 'Common Security and Defence Policy', *Fact Sheets on the European Union*, April [Online]. Available at: https://www.europarl.europa.eu/factsheets/en/sheet/159/common-security-and-defencepolicy (Accessed: 1 July 2024).

Marboe, I. (2013) 'Human Rights Consideration for Space Activities' in Hobe, S., Freeland, S. (eds.) *In Heaven as on Earth? The Interaction of Public International Law on the Legal Regulation of Outer Space*. Cologne: Deutsches Zentrum für Luft-und Raumfahrt, pp. 135–149.

Miglio, A., Grossio, L., Civitella, A., Nota, C., Penna, M. (2024) *Space and Defence: A Hybridisation of EU Space Policy and CSDP*. Torino: Centro Studi sul Federalismo [Online]. Available at: https://iris.unito.it/retrieve/5c6c9e73-fb2d-4aee-a800-2810343d4e23/CSF-RP_EU-Space-Policy_Miglio_Grossio_Civitella_Nota_Penna_Dec2024.pdf (Accessed: 1 July 2024).

Ministry of Foreign Affairs, Spain (n.d.) 'The European Union's Common Foreign and Security Policy', *Ministry of Foreign Affairs, Spain* [Online]. Available at: https://www.exteriores.gob.es/en/PoliticaExterior/Paginas/PoliticaExteriorSeguridadComunUE.aspx (Accessed: 1 July 2024).

Myszona-Kostrzewa, K. (2018) 'Security of the European Satellite Navigation Systems' in Myszona-Kostrzewa, K. (ed.) *Legal and Political Aspects of the Use of European Satellite Navigation Systems Galileo and EGNOS*. Warsaw: Scholar Publishing House, pp. 111–118.

New Space Economy (2023) 'How are Earth Observation and Remote Sensing Different?', [Online]. Available at: https://newspaceeconomy.ca/2023/03/30/how-are-earth-observation-and-remote-sensing-different/ (Accessed: 1 July 2024).

Novokmet, R. (2022) 'International Peace and Security' in Raisz, A. (ed.) *International Law from a Central European Perspective*. Miskolc-Budapest: Central European Academic Publishing, pp. 71–93; https://doi.org/10.54171/2022.ar.ilfcec_4.

Orešković, L., Grgić, S. (2021) 'The New EU Space Regulation: One Small Step or One Giant Leap for the EU?', *Hrvatska pravna revija*, 17, pp. 77–126 [Online]. Available at: https://doi.org/10.3935/cyelp.17.2021.454 (Accessed: 2 April 2025).

Paczolay, P. (2022) 'Protection of Human Rights—The Role of the ECHR' in Raisz, A. (ed.) *International Law from a Central European Perspective*. Miskolc-Budapest: Central European Academic Publishing, pp. 133–155; https://doi.org/10.54171/2022.ar.ilfcec_7.

Potter, M.A. (1989) 'Human Rights in the Space Age: An International and Legal Political Analysis', *The Journal of Law & Technology*, 4, pp. 59–74.

Regulation (EU) 2021/696 of 28 April 2021 establishing the Union Space Programme and the European Union Agency for the Space Programme, *Official Journal of the European Union*.

Thomas, R. (2023) 'US DoD: Russian anti-satellite weapon placed in same orbit as US satellite', *Airforce Technology*, 23 May [Online]. Available at: https://www.airforce-technology.com/news/us-dod-russian-anti-satellite-weapon-placed-in-same-orbit-as-us-satellite/ (Accessed: 1 July 2024).

United Nations (1948) *Universal Declaration of Human Rights*. Paris: UN General Assembly Resolution 217 A (III), 10 December.

United Nations (1966) *International Covenant on Civil and Political Rights*. New York, 19 December. Entered into force: 23 March 1976. 6 ILM 368 (1967) [Online]. Available at: https://treaties.un.org/doc/publication/unts/volume%20610/volume-610-i-8843-english.pdf (Accessed: 8 September 2025).

United Nations (1967) *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 [Online]. Available at: https://treaties.un.org/doc/publication/unts (Accessed: 8 September 2025).

United Nations (1967) *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 [Online]. Available at: https://treaties.un.org/doc/publication/unts/volume%20610/volume-610-i-8843-english.pdf (Accessed: 8 September 2025).

United Nations (1968) *Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space (Rescue Agreement)* [Online]. Available at: https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/rescueagreement.html (Accessed: 8 September 2025).

United Nations (1972) *Convention on International Liability for Damage Caused by Space Objects* [Online]. Available at: https://www.unoosa.org/pdf/gares/ARES_26_2777E.pdf (Accessed: 8 September 2025).

United Nations (1975) *Convention on Registration of Objects Launched into Outer Space* [Online]. Available at: https://www.unoosa.org/oosa/sk/ourwork/spacelaw/treaties/intro-registration-convention.html (Accessed: 8 September 2025).

United Nations (1979) *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies* [Online]. Available at: https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/intromoon-agreement.html (Accessed: 8 September 2025).

United Nations (2023) 'Meetings Coverage General Assembly First Committee, Seventy-Eighth Session, 16th Meeting (AM), GA/DIS/3722', *United Nations*, 19 October [Online]. Available at: https://press.un.org/en/2023/gadis3722.doc.htm (Accessed: 2 April 2025).

United Nations (2024) 'Meetings Coverage and Press Releases: Seventy-Eighth Session, 78th & 79th Meetings (AM & PM), GA/12597', *United Nations*, 6 May [Online]. Available at: https://press.un.org/en/2024/ga12597.doc.htm (Accessed: 1 July 2024).

United Nations General Assembly (1986) *Principles Relating to Remote Sensing of the Earth from Outer Space*. Resolution 41/65.

von der Dunk, F.G. (2009) 'European Satellite Earth Observation: Law, Regulations, Policies, Projects, and Programmes', *Creighton Law Review*, 42, pp. 397–446.

von der Dunk, F.G. (2013) 'Outer Space Law Principles and Privacy' in von der Dunk, F.G. (ed.) *Studies in Space Law: Evidence from Earth Observation Satellites, Emerging Legal Issues*. 7th edn. Leiden–Boston: Martinus Nijhoff Publishers, pp. 241–258; https://doi.org/10.1163/9789004234031_013.

SERBIA AND THE EUROPEAN UNION – EVOLUTION, DISSOLUTION, OR SOMETHING THIRD?

Vladan Petrov[1]

ABSTRACT

In this study, the author tries to define the current state of relations and the perspective between Serbia and the European Union, considering the past experience in a process that has lasted for almost a quarter of century. He asks and answers three questions: 1) Is Serbia late with the EU integration? 2) Is it possible to define the main reason for the slowness and uncertainty of the process? 3) Given the answers to the first two questions, is the European integration of Serbia a process of evolution, dissolution, or something third? Bearing in mind the current geopolitical situation, the state of the European Union and Serbia's policy, which is open to the four corners of the world, the answer seems to be self-evident.

KEYWORDS

European integration
First Brussels Agreement
Brussels-Ohrid Agreement
European Union Enlargement Policy
reform of the European Union

1. Introduction

To begin with, the basic meanings of the terms used in the title of the study should be explained. Evolution, if we leave out Darwin's theory on the evolution of biological species, primarily means gradual development (transition) from one state to another, development or progress. In public law, we are talking about, for example, the evolution of institutions (parliament, head of state, and government), institutional relations (between different subjects and bodies), and so on. In social sciences, dissolution represents disintegration of a society or state. For example, dissolution of parliament is one of the basic mechanisms of the parliamentary system of government.

As we show in this study, the relationship between the Republic of Serbia and the European Union (EU), or vice versa, does not represent an evolutionary process nor has

1 | Full Professor, Faculty of Law, University of Belgrade, Serbia; Judge of the Constitutional Court of Serbia; Member of the Venice Commission in respect of Serbia; vpetrov@ius.bg.ac.rs; ORCID: 0009-0007-2674-5819.

https://doi.org/10.55073/2025.2.167-189

it ever been. The eruptive quasi-democratic enthusiasm of Serbia, or rather a part of its political leadership, after the fall of Slobodan Milošević's regime in the end of 2000 and the full verbal openness of the 'medium-sized' EU during the period resulted in (il) legitimate expectations of both parties that the process would be completed in the next 10 years. However, even in that 'preparatory' phase, which ended when the official accession negotiations started in 2014, one could rather speak about some kind of formal and rather formalistic, *ad hoc* progress of Serbia on the path of European integration, but not about evolution in the sense of substantial fulfilling intra-reform conditions (democracy, rule of law, and human rights). However, the conditions set for Serbia from the very beginning were special, *sui generis*. Even the ruling structures in Serbia have not shown perseverance or the sufficient resourcefulness in the process which has been marked with high political complexity.

However, it would be wrong in today's challenging moment, when the dissolution, that is, abandoning the European path, is more seriously considered. Moreover, it would be wrong to discuss the stagnation on Serbia's European path. Perhaps the right phrase would be 'slow progress', punctuated by extremely frequent challenges to this process, both external and internal.

Therefore, in this study, we pose three questions. First, is Serbia late in joining the EU? We talk more about the reasons for that delay. Second, is the whole process based on the wrong premises, that is, is it true that without formal de *jure* recognition of Kosovo as an independent state, it is not possible to leave the 'grey zone' of European integration? Thirdly, if Serbia's European path is neither evolution nor dissolution, can it be 'something else'? In this context, one most explore which realistic options are available.

However, it is certain that almost a quarter of a century after the establishment of the first official contacts between the EU and Serbia, the 'European fate' of Serbia depends much more than at the beginning of the process on the 'European fate' of the EU, and its redefinition as a more relevant geopolitical factor in the world order.

2. Is Serbia late with the European Union integration?

2.1. On relations between Yugoslavia and the European Community – from the early 1930s to the beginning of the 21st century

Strong supporters of the European integration will say that Serbia is late with the EU integration process, because in the 1990s, instead of accepting becoming a stable democracy, it chose the dictatorship of Slobodan Milošević and participated in war and other conflicts in the territory of the former Yugoslavia. Zečević claims that the Kingdom of Yugoslavia was 'one of the main initiators for the creation of the EU' and that 'Serbia failed to use this historical fact in the right way and fit it into the framework of its foreign policy'.[2] In 1930, through the then Minister of Foreign Affairs, Aristide Briand, France submitted to the League of Nations the Memorandum on the Establishment of the European Federal Union; the document was immediately officially supported by the then Kingdom of

2 | Зечевић [Zečević], 2018, p. 11.

Yugoslavia.[3] Nevertheless, it seems that the assassination of the Yugoslav King Alexander on 9 October 1934 in Marseille 'marked the end of the dreams of a federal Europe', at least before the end of World War II.[4]

The post-war socialist Yugoslavia (SFRY) established diplomatic relations with the European Economic Community (EEC) as early as the 1960s.[5] In 1970, the EEC and SFRY concluded a concise political and economic 'trade agreement', the first of its kind that the EEC concluded with a socialist country.[6] Yugoslavia was then a relevant international factor and a kind of link between the West and the East.[7] Nevertheless, the country, especially since the adoption of the Constitution of SFRY in 1974, entered into serious economic and political crisis. Although just before the SFRY President Josip Broz Tito's death in 1980,[8] another far more extensive agreement on cooperation was concluded, it was also the end of the evolution in relations between the state, which was on the verge of collapse, and the EEC, which was just beginning to expand throughout Europe.[9] According to Vuk Drašković,[10] at the beginning of 1991, there was still an opportunity for Yugoslavia to democratically reform itself, prevent a civil war, and quickly enter the EEC and the North Atlantic Treaty Organization (NATO),[11] but it was missed mainly because of the Croatian and Serbian political leadership. Theories of missed opportunities and claims about the sole responsibility of (small) regional political leaders seem attractive, but they do not provide real, and especially, scientifically based answers. There is a proverb: 'Where there is smoke, there is fire'. 'Smoke', however, is not the cause of 'fire'.

In fact, global geopolitical factors (the fall of the Berlin Wall, the collapse of the Soviet Union, and the end of the Cold War) had a predominant impact on the 'European division of cards' in the Balkans. What the advocates of Serbia's earlier entry into the EEC lightly pass over is that no sign of equality could be placed between Yugoslavia and Serbia. Without going into the specifics of the legal nature of the Yugoslav state and its institutional structure at this point, the fact is that that state had a very significant geopolitical position. With the disintegration of socialist Yugoslavia, the 'little' Yugoslavia (FRY), which consisted of only two member states, Serbia and Montenegro, lost the importance for the West that it had practically had throughout its existence, first as the Kingdom of Yugoslavia (1918–1941), then as socialist Yugoslavia (1945–1991). By contrast, on the ruins of the former Soviet Union, bloc states were created, turned towards themselves and their accelerated 'way to the West'.

3 | Lopandić, 2017, p. 8.
4 | Зечевић [Zečević], 2018, p. 12.
5 | The first contacts were established in 1962, and the SFRY mission in Brussels was opened in 1968 and was one of the first diplomatic missions to the EEC. Lopandić, 2017, p. 34.
6 | Ibid.
7 | Ibid.
8 | Josip Broz Tito (1892–1980), president of the SFRY for life.
9 | Lopandić, 2017, p. 34.
10 | Vuk Drašković was the most popular opposition leader in the first half of the 90s and is a significant Serbian writer.
11 | In an interview given to the news agency TANJUG, Drašković explains that after the opposition demonstrations against Slobodan Milošević's regime in Belgrade on 9 March 1991, the US Secretary of State, James Baker, came to Belgrade and made such an offer on behalf of the United States and the EEC, but that was rejected, each for their own reasons, by the then political representatives of Serbia and Croatia, Slobodan Milošević and Franjo Tuđman. Drašković, 2024.

Possibly, there were better solutions for the political leadership of Serbia in the 1990s, but there were objective circumstances (the civil war in the neighbourhood in which Serbs from those areas as well as those from the motherland participated, and international sanctions, the war in Kosovo and Metohija, the NATO aggression against Yugoslavia, that is Serbia, in 1999), which decisively influenced Serbia at the beginning of the 21st century, and only then did the European integration become a priority its political agenda. Ultimately, Serbia had first to resolve the basic issues of its sovereignty and territorial integrity, in order to create the elementary conditions for initiating the process of European integration. Those conditions were necessary, but not sufficient for the process to actually begin.

In 1991, the Italian singer-songwriter Toto Coutuno won the Eurovision Song Contest in Zagreb with the song 'Insieme: unite unite Europe'. It seemed that two simultaneous yet connected processes were taking place in Europe, the evolution of the idea of a united Europe under the new institutional auspices of the Treaty of Maastricht (1992), and the dissolution of the SFRY in form of a civil war.[12] The EU had nominally tried to mediate in the resolution of war conflicts on the territory of the former Yugoslavia.[13] That mediation did not yield significant results.[14]

2.2. Serbia's preparatory work for the European integration – the first decade of the 21st century

Serbia regained its full sovereignty and constituted itself as an independent state after adopting its (current) constitution in 2006. The Constitution – which was amended only once in 2022, with the aim of preparing the field for reforms in the area of judiciary to speed up Serbia's European integration – rests on one apparent inconsistency. That inconsistency was not the result of a mistake or an oversight by the constitution-maker. It was purposefully incorporated into the foundations of the constitutional system. The Preamble of the Constitution, referring to the 'state tradition of the Serbian people and the equality of all citizens and ethnic communities in Serbia, gives a central place to Kosovo and Metohija 'as an integral part of the territory of Serbia that it has a status of a substantial autonomy within the sovereign state of Serbia'. This results in the 'constitutional obligations of all state bodies to uphold and protect the state interests of Serbia in Kosovo and Metohija in all internal and foreign political relations'.[15] Therefore, the Preamble unequivocally defines some basic elements of the national constitutional identity. Serbia is a civil democracy, because its founding rests on the equality of all citizens and ethnic communities. However, it does not renounce the national source of its constitutionality, the tradition of the Serbian people. Accordingly, the place of Kosovo and Metohija is

12 | 'Centrifugal forces in Europe encouraged centripetal movements on its periphery. Slovenia, and then Croatia, turned their backs on their less developed southern compatriots in the belief that they could achieve their interests better in ties with the new European integration than in the Yugoslav federation'. Lopandić, 2017, p. 40.

13 | An international conference on the former Yugoslavia was organized in The Hague (chaired by Lord Carrington), then an international arbitration (Badinter Commission) under the auspices of the EU. EU declarations on the war in the former Yugoslavia were published, economic and diplomatic sanctions against Serbia were introduced, EU observation missions were sent, peace plans were proposed, and so on. See Lopandić, 2017, p. 41.

14 | Lopandić, 2017, pp. 40–41.

15 | Constitution of the Republic of Serbia, 2006, p. 2.

particularly highlighted, not only in terms of territory and citizenship, but also in terms of constitutional 'being', that is, the state and constitutional 'credo'. This apparent inconsistency is reinforced by Art. 1 of the Constitution, which reads:

> Republic of Serbia is a state of Serbian people and all citizens who live in it, based on the rule of law and social justice, principles of civil democracy, human and minority rights and freedoms, and commitment to European principles and values.[16]

There is nothing in this article that would be against the basic EU principles and values. The preamble emphasizes the national constitutional identity, whereas Art. 1 emphasizes some elements of the European constitutional identity which at least should not contradict each other.[17]

The Constitution of 2006, with its apparent inconsistency, opened the door to the path of European integration of Serbia. Serbia constitutionally indicated the path of its European integration, dressing in the constitutional form of European principles and values its 'most expensive word' – Kosovo.

2.3. Half a decade between signing the Stabilization and Association Agreement and official opening the negotiation process (2008–2013)

In 2008, Serbia and the EU concluded the basic legal document on which the entire process of Serbia's European integration is based. However, the document, Stabilization and Association Agreement (SAA), entered into force only in 2013. Serbia applied for membership in December 2009. The European Council adopted the conclusion on the granting of candidate status to Serbia in March 2012 and made the decision to open accession negotiations only in June 2013.[18] Serbia officially began negotiations on EU accession in January 2014. Thus, Serbia started negotiations a quarter of a century after the fall of the Berlin Wall, almost a decade after the 'Big Bang' in 2004,[19] seven years after the accession of Romania and Bulgaria, and half a year after the accession of Croatia in July 2013.

Among the countries of the Western Balkans, Northern Macedonia received candidate status in 2005 but started negotiations in 2022; Montenegro submitted a request in 2008 and started negotiations in 2012; Albania in 2009 and started negotiations in 2022; Bosnia and Herzegovina submitted its own request in 2016 and started negotiations in 2024. If the events are arranged in this way, it can be said that Serbia was rather late with the beginning of its European integration, but that it is in a more favourable situation than other countries of the Western Balkans (except Montenegro). In fact, it is wrong to talk and guess which of the mentioned countries is closer to membership, considering the time criterion of the duration of these negotiations.

The issues of the institutional reform of the EU, the possibilities and modalities of further its enlargement, the 'common destiny' of the Western Balkan states on the European path and the specific, undoubtedly completely separate issue of resolving the 'Kosovo Gordian Knot' are of such a nature and intensity that they open completely

16 | Ibid.
17 | Varga, 2020, pp. 703–716; Petrov, 2022, pp. 177–200.
18 | Lopandić, 2017, p. 112.
19 | Then the following states joined the EU: Poland, the Czech Republic, Slovakia, Hungary, Estonia, Latvia, Lithuania, Slovenia, Cyprus, and Malta.

different perspectives and extremely uncertain outcomes. The words of Slobodan Samardžić, an excellent expert on the EU and the process of European integration, said in 2015, proved to be true not only for Serbia but also for other countries of the Western Balkans.

> ...The process itself has become so complex and uncertain that nobody could predict its flow or its outcome. After all, in the framework document for accession, it is specifically stated that opening the talks does not guarantee either the achievement of the final goal or durability of the process. Meanwhile, both players – the EU and Serbia, but also their mutual relations – have become substantially different in comparison to the beginning of the century. [20]

Nothing has fundamentally changed in the following 10 years. In Serbia, there is a popular folk saying that reads: 'Whoever goes first to a girl, he gets a girl to him'. However, this is not always the case. Especially, if the 'girl' is still attractive in appearance, but she has become a bit tired and does not know exactly what and whom she wants. At the same time, the 'guy' is not entirely sure whether he prefers a 'marriage' or just a kind of 'relationship'. It is, metaphorically speaking, a concise description of the relations between Serbia and the EU almost a quarter of a century since the beginning of the preparations for the European integration of Serbia.[21]

3. Is the normalisation of relations between Serbia and Kosovo the only true condition for joining the EU?

3.1. EU conditionality policy and its 'peak': The example of Serbia

After the fall of the Berlin Wall, the EU began to develop a policy of conditionality in relations with candidate states, close neighbours, and traditional partners of the African, Caribbean, and Pacific group of states. This conditioning is legal (the ability to assume the obligations arising from membership, i.e. the adoption of the EU acquis), economic (creating a sound economic policy and realizing economic growth), and democratic (political).[22] On this basis, first in 1993, at the meeting of the European Council in Copenhagen, and then in 1995 in Madrid, three criteria (political, economic and legal) were defined in order that candidate countries must fulfil before being admitted to the EU membership. When it comes to political (democratic) conditioning, it initially referred to the stability of institutions that ensure democracy, the rule of law, respect for human and minority rights, and acceptance of the EU's political goals.

After the disintegration of Yugoslavia, new political criteria were defined for countries in the Western Balkans, among which the following are particularly important: respect for peace agreements, full cooperation with the International Criminal Court for the former Yugoslavia, and cooperation with neighbouring countries (regional

20 | Samardzić, 2015, p. 142.
21 | The first joint body of the Consultative Task Force, which had the task of preparing the European integration of Serbia, was founded in 2001.
22 | Гајић [Gajić], 2013, p. 11.

cooperation). Only Serbia got another extra condition: the normalization of relations with Kosovo.[23] This condition, although it became clear very quickly what it could mean, is characterized by nominally great vagueness and ambivalence.[24] It was this condition that made the European integration of Serbia a *sui generis* process. What is even more important, it completely changed the nature of that process by making it predominantly political and turning it into a political juggling for the realization of current and partial political interests. However, the process lost its strategic character.[25]

There is a proverb that roughly says that the meaning of life is not in the achievement of the goal as such, but in the path to the goal. However, this saying is true provided there is a clearly defined goal. If this is not the case, then the road for the road's sake is undoubtedly quite pointless. We can, in doing so, change the means of transport, visit different locations on the way, but without knowing where we are really traveling and why, we will first feel boredom, then fatigue, and finally a kind of frustration due to the awareness that there is no essential progress on the way, and that so much progress has been made that return is also neither a rational option nor, in fact, possible.

Although Serbia, or rather its various political leaders to date, should not be released from responsibility for omissions, delays, and inconsistencies in the European path, it is still impossible not to notice that the policy of conditioning the EU has just reached its 'peak' on the example of Serbia. As Samardžić explains,

> Serbia's steps towards 'normalisation of its relations with Kosovo has become a crucial condition…Each further step on Serbia's path to integration has been conditioned by some concrete step of the recognition of Kosovo as a new state. This means that instead of setting the goal of full membership *ex ante*, the process has been transformed into setting the key *ex post* condition of full recognition of Kosovo's independence.[26]

3.2. The First Brussels agreement and its ambivalent significance for Serbia's further European path

Before the entry into force of the SAA, Belgrade and Pristina, with the mediation of the EU, should have started negotiations on several topics in 2010. Belgrade should have fulfilled all its obligations regarding cooperation with the Court in the Hague, and, instead of the United Nations Mission in Kosovo (UNMIK), as was foreseen by the UN Resolution 1244,[27] the EU-EULEX mission should have been installed. According to Resolution 64/298 of the UN General Assembly, adopted at the initiative of Serbia and the EU, the EU became an intermediary in the dialogue between the two parties whose goals would be 'promoting cooperation, achieving progress on the road to the EU and improving people's lives'.[28]

23 | Гајић [Gajić], 2013, pp. 15–16.
24 | Axyonova and Kartsonaki, 2024, pp. 1–2.
25 | 'The case of Serbia, although it is the extreme one, is not a single one. All countries of the so called Western Balkans which intend to go the way toward the EU cannot escape this grey area of conditionality. This clearly proves our thesis that there is a mutation of the process, which is slowly but surely becoming as association/accession process without a membership perspective.' Samardzić, 2015, p. 149.
26 | Samardzić, 2015, p. 146.
27 | UN Security Council, 1999.
28 | UN General Assembly, 2010.

The peak moment of that phase was the First Brussels Agreement in April 2013,[29] signed between the EU and Serbia.

The ambivalent nature of this agreement was read first in its full and proper name, and not in the one by which it is known to the general public: 'The First Agreement on Principles Governing the Normalization of Relations'. 'Normalization of relations' certainly did not refer to the parties that initiated the conclusion of the agreement, the EU and Serbia, but rather concerned Serbia and Kosovo. From the point of view of the Constitution of Serbia of 2006, this meant that Serbia establishes, that is, 'normalizes' relations with itself, or rather that the state entity treats its component part as a separate and equal entity. Although the title often hides the essence of the text, it was more than clear from the title that the Agreement governs a relationship that the Constitution of Serbia does not recognize.

Another ambivalence of the Brussels Agreement was reflected in its nature. In the simplest terms, the question arose whether it is a (general) legal or political act, or this is some kind of international legal agreement, or a purely political agreement? That dilemma was officially removed by the Constitutional Court of Serbia, when, at the end of 2014, it rejected the proposal for the evaluation of the constitutionality and legality of this agreement, taking the position that this agreement is not a general legal act, and therefore the Constitutional Court is not competent to evaluate the compliance of the Agreements with the Constitution and the law.

> (...) The Constitutional Court assessed that the contested First Agreement does not meet the conditions stipulated by the confirmed international conventions and valid laws of the Republic of Serbia in order to be considered an international treaty, that the contested act in itself does not represent a general legal act of internal law, but only a political basis for the adoption of appropriate general of legal acts by competent authorities and in the prescribed procedure (...) For the Constitutional Court, those expert opinions submitted as part of the public hearing in this constitutional court case, according to which the challenged First Agreement is by its nature the closest to the political *modus vivendi*, are acceptable, interim solution stipulated by the decision on the final status of Kosovo and Metohija, which, in the light of the relevant rules of international law, has no legal force, but creates a political obligation in the spirit of the so-called soft law that allows an asymmetric perception of the obligation either as a political or legal obligation by the parties in the initialed First Agreement and as such, from a legal point of view, does not close the door to any of the two opposing conceptions of the final status of Kosovo and Metohija, etc.[30]

The key points of this agreement were the establishment of the Association of Serbian Municipalities in Kosovo (ASMK), in which Serbs are the majority population in Kosovo; the establishment of the Kosovo Police and the integration of members of the Serbia's Police from the north of Kosovo and Metohija into the Kosovo Police; and the integration of the judiciary and its further functioning within the legal system of Kosovo. It was predicted that the local elections in the northern municipalities, scheduled for 2013, would be held in accordance with Kosovo laws and international standards. In its essence, the First Brussels Agreement served as a political and legal basis for relinquishing Serbia's

29 | First agreement on principles regulating the normalisation of relations, 2013.
30 | Уставни суд Србије [Ustavni sud Srbije], 2018, p. 480.

governing powers in Kosovo, and Kosovo envisaged only one major obligation to enable the formation of the ASMK.

From the perspective of the valid constitutional law of Serbia, that agreement, deviated from the apparent inconsistency we talked about earlier.[31] With that agreement, for the sake of nominal European values, two fundamental principles of international and internal law were deviated from, the rule of law and the inviolability of territorial integrity. From the point of view of Serbia's European path, it was an 'entrance ticket' to the process of European integration.[32]

Therefore, the First Brussels Agreement had the character of a necessary and sufficient condition for Serbia to finally start the negotiations officially. Nevertheless, its ambivalence was also transferred to the further fate of the European integration process of Serbia. The further disintegration of Serbia is a necessary, but not sufficient, condition for its European integration. After all, in the Negotiating Framework for Serbia, which the EU adopted just before the opening of negotiations in early 2014, it is already stated that

> This process shall ensure that both can continue on their respective European paths, while avoiding that either can block the other in these efforts. It should gradually lead to the comprehensive normalisation of relations between Serbia and Kosovo, in the form of a legally binding agreement by the end of Serbia's accession negotiations etc.[33]

How much progress in the dialogue on the normalization of relations is of the greatest importance for the EU can be clearly seen from the fact that Chapter 35 foresees that a delay in this process may affect the EU making a final decision on postponing or stopping the opening of other chapters in the accession negotiations.

However, the negotiation process started very sloppily. Chapter 35 was only opened at the end of 2015, and the dialogue has not progressed substantially in the following years.

The logical question remains to be posed: how could the dialogue progress? Serbia practically fulfilled all its obligations from the First Brussels Agreements, and Kosovo did not even fulfil its only obligation, that is to form the ASMK. Over time, this enabled the almost complete withdrawal of the remnants of the actual powers of Serbia's sovereignty from the territory of Kosovo. By contrast, it enabled various Kosovo governments, especially Albin Kurti's, which came into power after the elections in February 2021, to create an environment of constant pressure on the Serbian minority on Kosovo.[34]

One thing became certain: for the Kosovo government of Kurti, with a lukewarm approach to the EU, the ASMK is just a Brussels 'chimera'. Even bigger is the Euro-Atlantic 'chimera' about the democratic multi-ethnic state of Kosovo in which the rule of law is realized and other European values and principles are respected.[35]

31 | Under the point 2.2.
32 | Moreover, in this document, in point 14, it is mentioned for the first time that no party will block the progress of the other party on its way to the EU.
33 | EU, 2014, p. 6.
34 | Burazer, 2024, p. 12.
35 | Burazer, 2024, p. 13.

3.3. Brussels-Ohrid Agreement of 2023 – a 'dead letter'?

A decade after the signing of the First Brussels Agreement, the EU tried to 'encourage dialogue' with a new agreement, known as Brussels-Ohrid or Ohrid agreement.[36] It was an agreement proposed at the initiative of Germany and France with wording that each party to the Agreement can interpret as they see fit. On one issue, 10 years later, it was no longer necessary to use diplomatic 'vagueness'. The official name of this agreement is 'Agreement on the path to normalization between Kosovo and Serbia'.[37]

On other issues, in the spirit of Anglo-Saxon political and legal methodology and phraseology, which is very well known in these areas, there is plenty of room for broader and ambivalent interpretations. Thus, Art. 2 reads:

> Both parties will be guided by the aims and principles laid down in the United Nations Charter, especially those of the sovereign equality of all States, respect for their independence, autonomy and territorial integrity, the right of self-determination, the protection of human rights, and non-discrimination.

Art. 3 prescribes that 'the parties shall settle any disputes between them in conformity with the United Nations Charter'. Although there is talk of two obviously equal parties, which are obviously states, Serbia could refer to those parts where the phraseology of 'respecting the principles of the UN Charter' is used. However, already in Art. 1 of the Agreement, 'normal, good- neighbourly relations with each other on the basis of equal rights' are mentioned.

It is really difficult to explain how two entities, one of which is a full-fledged, internationally recognized state (Serbia), and the other is not, can have good-neighbourly relations. Para. 2 of Art. 4, which binds Serbia, goes in the same sense: 'Serbia will not object to Kosovo's membership in any international organisation'. The strengthened and expanded Serbia's earlier obligation not to oppose Kosovo's European path, formulated in the First Brussels Agreement, has now been reiterated in Art. 5: 'Neither Party will block, nor encourage others to block, the other Party's progress in their respective EU path based on their own merits etc.' As this could be undisputedly interpreted as Serbia's non-opposition to Kosovo's entry into the UN, and therefore recognition of Kosovo's *de jure* international legal subjectivity, the President of the Republic of Serbia, Aleksandar Vučić, expressly placed a reservation on this provision of the Agreement.[38]

The Brussels-Ohrid agreement is an act of different meaning and significance for each party, and there are at least three of them (the EU has not shown the capacity to be a moderator, but considering the new geopolitical situation after the start of the war in Ukraine, it has become the most subjectively interested party). For the EU, it is the last step on the way of reaching a comprehensive legally binding agreement on the normalization

36 | EU, 2023.

37 | Therefore, there is no longer a dilemma about who the two parties are and there is no longer a dilemma about which is given primacy: first Kosovo, then Serbia.

38 | Burazer, 2024, p. 12.

of relations between Serbia and Kosovo.[39] Without it, Serbia's European perspective is definitely extinguished.

The EU wants to put pressure on both sides to reach the desired result, which is a *de facto* recognition of Kosovo, but it is neither allowed nor able to press harder.

> ...The big question is whether the European Union has the political strength to pressure both sides to implement existing agreements and achieve full normalization, as is the question of whether the integration of the Western Balkans has become as important to the European Union as its officials claim.[40]

However, 'it is completely clear that there is no political will in either Belgrade or Pristina to normalize relations and that the only incentives come from the European Union itself'.[41] At the centre of that process is the *de facto* and *de iure* recognition of Kosovo by Serbia, that is 'the idea of an independent multi-ethnic Kosovo, which is independent from Serbia, but which ensures adequate participation of Serbian and other minority communities and enables continuation of Belgrade's formal ties with Kosovo Serbs'.[42] As for the Kosovan authorities, with or without Albin Kurti, things are simple. They

> ...do not want the creation of a multi-ethnic state in which the power of the Albanian majority would be limited by mechanisms such as the right of veto of the Serbian community, mandatory bilingualism, formal connections of Kosovo Serbs with Belgrade and other power-sharing mechanisms that are formally guaranteed by the existing Kosovo constitution and laws, and which would additionally strengthen the establishment of a community of municipalities with a Serbian majority.

As far as Serbia is concerned, things are far more complex. There are many factors that influence the fact that Serbia, not just its current government, accepts to take the next and final step, which is the *de facto* and *de iure* recognition of Kosovo's independence. The

39 | 'In light of the previously signed agreements between Belgrade and Pristina, political or technical, the implementation process of previous agreements, formulations of the APN and the AI, and statements by the negotiating parties about their will to implement the provisions of these two newest texts as well, it can be concluded, from the international legal point of view, that the APN is an international treaty between two equal sides that partially regulates specific issues of mutual interest. As such, it represents a step towards the future development of relations based on international law, UN Charter principles on good-neighborly relations, equal rights and peaceful settlements of disputes, mutual desire to accede to the EU, and the will to regulate the issue of formal recognition in the mutually acceptable manner. The critical international legal obligation of the Republic of Serbia under the APN is to abstain from preventing Kosovo from freely conducting its international relations. On the other hand, the critical international legal obligation of Kosovo is to find a solution that would enable an undefined measure of self-management for the Association of Serbian majority municipalities on its territory, based on previously accepted agreements of 2013 and 2015, which can lead either to the Kosovo's Constitution amendments or the finding of a new and creative solutions based on the decision of the Constitutional Court of Kosovo, acceptable at the same time for the Serbian party'. Vučić, Đukanović, 2024, p. 29.

40 | Burazer, 2024, p. 12.

41 | Ibid.

42 | Ibid., p. 13.

first factor is constitutional. The Constitution of Serbia of 2006 does not recognize Kosovo as an independent state, but includes Kosovo and Metohija as an autonomous province in the state structure of Serbia. This province is guaranteed substantial autonomy, regulated a law to be adopted in accordance with the procedure for the revision of the constitution. If the idea of the substantial autonomy of Kosovo and Metohija were revived at one point, that law would have to be confirmed in a referendum with an absolute majority. However, the same procedure would be necessary if Serbia were to remove the Republic of Kosovo from its constitutional preamble, and from the normative part of the constitution. That issue for the vast majority of Serbian citizens is not a question of territory but an issue of identity.

The second factor, which is partly based on the previous one, is the issue of internal politics, which would lose all legitimacy if it even tried to explain that Serbia cannot continue on the path of European integration without abandoning Kosovo.[43] That argument was used by certain law experts belonging to the opposition, even those who are nominally completely pro-European, attacking President Vučić for violating the constitution because of the (verbal) acceptance of the Brussels-Ohrid Agreement.[44]

The third factor that also concerns internal politics is the inability of the authorities in Belgrade to agree to any next step in the direction of rounding off the sovereignty of Kosovo, because 'it would lose all mechanisms of influence and protection of the rights of Kosovo Serbs'.[45] This argument is sometimes emphasized by President Vučić himself, which was also the case after the incident in Banjska in September 2023,[46] who is trying to convince political actors in the West that it is no longer able to control the dissatisfaction, anger, and fear of the Serbian population. Serbs are increasingly organizing themselves or even acting spontaneously to protect its basic rights to life and property.

The fourth factor is related to the principles and values of the international order based on the UN Charter. Serbia constantly repeats that it is committed to respecting those principles and values.[47] At the end of the 20th century, the question of Kosovo was internationalized. After NATO aggression against FR Yugoslavia in 1999, the UN Security Council passed the Resolution 1244. Formally and legally, the resolution confirmed the sovereignty and territorial integrity of the then FR Yugoslavia. Essentially, the issue of the status of Kosovo could no longer be resolved unilaterally, solely by the sovereign will of the State of Serbia.

The fifth factor, which builds on the previous one, concerns the emergence of new geopolitical relations characterized by a network of different highly influential power centres on all four sides of the world. If it wants to survive and establish itself as one of the centres of global influence, the EU will have to reform its identity, that is in-depth, and

43 | According to some surveys, in 2022, the majority of Serbian citizens were against Serbia's entry into the EU due to the pressure exerted by the EU regarding the issue of recognizing Kosovo and the issue of imposing sanctions on Russia. Lopandić, 2023a, p. 13.

44 | Law professor says Vucic could be seen to have violated constitution, 2023. For the opposite argumentation: Petrov, 2023a.

45 | Burazer, 2024, p. 13.

46 | The conflict between a group of Serbs and Kosovo Police in the village of Banjska near Zvecan. Three Serbs lost their lives: Igor Milenkovic, Bojan Mijailovic, and Stefan Nedeljkovic, and a Kosovo police officer Afrim Bunjaku. The events in Banjska in the morning of 24 September have been the subject of separate investigations in Belgrade and Pristina.

47 | National Security Council of the Republic of Serbia, 2022.

not just institutionally, that is, superficially. Over time, Kosovo will lose the importance it had during the unipolar order at the turn of two centuries. Its role has already been spent. That is why Kosovo is in a hurry, but it seems to be 'hitting a wall' when it comes to the further process of international recognition.[48]

> ...If the proposals on the phased accession of the candidate states or the creation of several concentric circles of European integration are fully operationalized – which is part of last fall's Franco-German proposal on EU reform – there is a possibility that both Serbia and Kosovo will achieve a certain degree of integration into the structures of the European Union without full normalization. relationship. This possibility can affect the calculations of all actors.[49]

That is why the political leadership of Serbia is not in a hurry. The European path is still a priority of Serbia's foreign policy, but membership is not the ultimate goal. Serbia has adapted to the nature of the process. The goal is far more complex than Serbia's membership in the EU. In the complex aspects of that goal, further strengthening of the rule of law and human rights, strengthening of economic ties with the EU, and participation in the development of modern technologies are high on the Serbian political agenda.[50]

From all of the above emerges a fairly clear answer to the question from the subtitle. Even at the time when the phrase 'normalization of relations' was coined, it was not in itself a real and exclusive condition for Serbia's membership in the EU. Nevertheless, for more than a decade, it had the force of a necessary but not sufficient condition, at least from the point of view of the EU, but that was the EU before the big and consecutive internal crises (economic crisis, migration crisis, especially in 2015, Brexit in 2016, and the crisis caused by the COVID-19 pandemic) and external crises, especially since the beginning of the war in Ukraine.

However, legally, from the perspective of constitutional law and international law, it is a textbook example of an impossible condition, that is, an impossible obligation. That was perhaps inconvenient to say it in 2013 when the Brussels Agreement was signed, but the Brussels-Ohrid Agreement from 2023 showed all the senselessness of the idea of normalizing relations that would lead to the *de facto* and *de iure* recognition of Kosovo by Serbia. Moreover, a compromise is still possible, but it must be the right one. According to President Vučić, it is a compromise that would imply that it cannot happen that one side gets everything (Kosovo) and the other side (Serbia) gets nothing. It would be a solution that would imply that everyone must get something but also lose something in return.[51]

48 | There were announcements that Kosovo would become a member of the Council of Europe in May 2024, but the decision was postponed.

49 | Burazer, 2024, p. 13.

50 | In this sense, the considerable contribution could be given by a Memorandum of Understanding, launching a Strategic Partnership on sustainable raw materials, battery value chains, and electric vehicles, which was signed by the EU and Serbia on 19 July 2024. This partnership is in line with EU's New Growth plan for the Western Balkans. 'It represents a building bloc in advancing Serbia's integration within the EU's single market, and further boosting its economic, social and environmental convergence with the EU'. European Commission, 2024, p. 1.

51 | Vučić, 2018.

4. Other conditions on Serbia's European path

In addition to technical conditions, one of the main and priority conditions for progress on Serbia's European path is full alignment with the EU's foreign and security policy. This has become a *de facto* condition since the beginning of the war in Ukraine, because formally full harmonization is necessary immediately before admission to membership. However, geopolitical conditions are such that all countries in Europe, except Serbia and Belarus, have imposed sanctions on Russia. All countries of the Western Balkans, with the exception of Bosnia and Herzegovina and Serbia, have fully harmonized with the EU's foreign and security policy.[52]

As a reason for avoiding full alignment with the EU's foreign and security policy, Serbian political leadership led by President Vučić cites the positions of Russia and China and other countries regarding the status of Kosovo, but a significant role is also played by the fact that a survey from the end of 2021 showed that voters of the ruling parties are more favourable to Russia and China in comparison with their inclination to Serbia's membership in the EU.[53] This greater affection for Russia and China has another side of the coin, and it is reflected in more or less hidden resistance to the EU accession process. Certainly, Serbia's refusal to impose sanctions on Russia produces numerous negative effects on Serbia's progress on the European path (non-participation in the EU Growth Plan for the Western Balkans, receiving other financial privileges and incentives, treating Serbia in some circles in the West as 'Little Russia').[54] In summary, there is no progress in the important chapter 31 ('Foreign policy and security'). Those who condemn the fact that Serbia recognizes Russia's aggression against Ukraine but does not impose sanctions on Russia, while providing Ukraine with humanitarian and technical aid qualify it as Vučić's balancing policy, which is still somewhat acceptable to the United States (US) and some of the EU member-states. However, the essence of such foreign policy is consistent respect for the principles of sovereignty and territorial integrity from the United Nations Charter. This is clearly stated in the concluding remarks of the paper, in which the Government of Serbia expressed its position on the situation on the territory of Ukraine, relying precisely on the principle of inviolability of the territorial integrity of the state from Art. 8 of the Constitution:

> (...) 2. The Republic of Serbia is committed to respecting the principles of territorial integrity and political independence of states, as one of the basic principles of international law contained in the Charter of the United Nations and the Final Act of Helsinki (1975), which guarantees the right of states to the inviolability of borders. (...) 5. 5. In accordance with its previous policy of advocating for consistent and principled respect for the principles of international law and the

52 | Full alignment with the EU's foreign and security policy also applies to packages of measures towards some other countries (for example, China and Belarus). Out of a total of 65 declarations that the EU offered candidates, potential candidates and partner states for harmonization in 2023, Serbia agreed with 34. Cvijić, 2024, p. 5.

53 | Ibid.

54 | Cvijić, 2024, p. 5.

> inviolability of borders, the Republic of Serbia provides full and principled support for respect for the principles of territorial integrity of Ukraine, etc.[55]

Serbia's further European path also implies significant acceleration of the process of harmonizing legislation with the acquis of the EU. The Government of Serbia adopted the National Program for the Adoption of Legal Acquis (NPAA), but the implementation of the program has declined over the years. According to the report of the Ministry of European Integration, the degree of fulfilment of the NPAA, when it comes to laws and by-laws, for the second half of 2022 was 7%, and in the first quarter of 2023 it was 12%.[56]

When it comes to progress in the area of the rule of law (chapters 23 – Judiciary and fundamental rights and 24 – Justice, freedom and security), the functioning of democratic institutions, public administration reforms, economic reforms and other chapters grouped from 2020 according to the new expansion methodology in Cluster 1 – Fundamentals, the progress is visible in the sphere of economic reforms.[57] In the area of the rule of law, significant progress was made with the constitutional amendments on the judiciary in 2021 and the accompanying judicial laws a year later.[58] Nevertheless, this was the main reason for the opening of Cluster 4 – Green agenda and sustainable connectivity, which was the last cluster that Serbia has opened so far. In the mentioned areas, it is necessary to work on the implementation of judicial laws in order to achieve greater independence of the judiciary and the autonomy of the public prosecution, strengthening freedom of expression (especially when it comes to the protection of journalists and media pluralism), progress in the operational autonomy of the police, better management of migration and asylum procedures, and the suppression of human trafficking, organized crime, and various forms of corruption.[59]

5. Changed or 'new' EU enlargement policy and potential substantial EU reform

In addition to the mentioned conditions that Serbia needs to fulfil on its path to European integration, there is one, the new EU enlargement policy, which is equally important. It depends on one, but realistically, smaller part on the candidate countries. The essential part is that it depends on the challenges and finding adequate answers to those challenges by the EU.

Since 2008, the EU has been gripped by the biggest crisis since its foundation. This crisis, because it originates from several sources and is very complex, and none of them has been fundamentally overcome, is often called poly-crisis.[60] In principle, the sources of that crisis would be: 1) 'enlargement fatigue' – is there a sufficiently clear political will

55 | Vlada Srbije, 2022.
56 | Lopandić, 2023a, p. 11.
57 | Mihajlović, 2024, p. 3.
58 | Petrov, 2023b, pp. 233–257.
59 | Mihajlović, 2024, p. 5.
60 | Ćeranić Perišić, 2021, p. 402.

at the level of the EU, but also of some of its members, for enlargement in a foreseeable time (for example, until 2030)?; 2) economic crisis; 3) migrant crisis – the wave of migrants and refugees from the Middle East towards Europe in 2015/2016 is considered the world's biggest refugee crisis;[61] 4) Brexit – after the June 2016 referendum, when citizens of the United Kingdom (UK) voted to leave the EU, the UK officially left the EU on January 31, 2020; 5) the COVID-19 pandemic (2020-2022); and 6) war in Ukraine.

Russian-Ukrainian war represents a 'watershed' in the geopolitical picture of Europe.

> ...The European Union found itself faced with the new challenge of reconstructing the disturbed European institutional (especially defense) architecture, and first of all with the challenge of its own adaptation to completely new international conditions marked by geopolitics and the return of bare power in international (European) relations. In this framework, the issue of the conception and strategy of EU enlargement is reopened... With the geopolitical necessity of faster integration of Ukraine and other countries of the Eastern Partnership (Moldova, Georgia) into European integration, the debate about 'unfinished business' – the inclusion of the Western Balkans in the EU - has been reopened which extended to more than two decades. Within this framework, a series of new proposals based on supplementing the new EU enlargement methodology were submitted, which consider the possibilities of phased or sectoral integration of the candidate countries into certain EU policies, as well as their partial inclusion as observers in some of the organs, i.e. working bodies of the Union.[62]

In accordance with these events or, rather, discussions, the perspective of EU enlargement is reopened and the year 2030 is being bid. Two countries that seem to be closest to membership, no matter how objectively and subjectively they are far from it, are once again in the spotlight, Montenegro, which has formally advanced the most in the negotiations, and Serbia, which is the economically and politically central country of the Western Balkans.

With the declarative goal of overcoming the deadlock in the process of European integration of the countries of the Western Balkans, the new EU enlargement methodology was adopted at the beginning of 2020. The new methodology provided for four criteria: credibility (mutual trust of both parties in the process), stronger political guidance (both parties must show more leadership and adhere to their obligations), dynamics (regrouping of previous chapters into so-called clusters), and predictability (positive and negative conditioning). Various instruments have been determined to achieve these criteria. These are focus on basic political reforms (especially focus on fundamental rights and the rule of law), intergovernmental conferences (their regular holding with the possibility for representatives of the Western Balkan countries to participate as observers in important

61 | Ibid.
62 | Lopandić, 2023b, pp. 466–467.

European meetings on topics that are most important to them), grouping of negotiating chapters into clusters, and measures of positive and negative incentives.[63]

Already at the very beginning, two points of view were taken on this methodology. According to the first, the new methodology will 'revive' the process of European integration. According to the second, the new methodology does not introduce new instruments, but rather old instruments in a 'new guise'.[64] The new EU enlargement methodology envisages the possibility of closer integration even without full membership in the EU, which is not essentially a new instrument, as it is recognized by Art. 20 of the EU Treaty.[65] However, the possibility of a country based on merit in the process being more closely integrated and included in certain EU policies, markets, and programs is not the best developed through appropriate mechanisms, which raises the question of whether first, is it feasible or more declarative? Second, even if it were possible, the question of introducing different categories of membership in the EU arises, that is, the question of whether closer integration is a means or an end in itself, which would be permanent and not temporary in nature. In other words, it is debatable whether such a country would ever become a full member, bearing in mind the essential reform challenges facing the EU for decades.[66]

In addition to the aforementioned factors that could be not always favourable for the further process of integration, one must not lose sight of the fundamental problems that the EU has been facing practically since its beginnings, but which in later times, especially in the 21st century and today, have reached the point of escalation.

Those problems are the EU's geopolitical attachment to its democratic deficit and, in connection with that, the EU's identity crisis, which became evident with the collapse of the project of the European Constitution in 2005. This identity crisis somehow remained in the background for the past two decades compared to the multiple crises of the EU, which apparently came from the outside.

However, this crisis is fundamental and latent. It concerns the foundations of the EU and perhaps gives the right to those authors who are consistent opponents of the current form of the EU and who even 10 years ago pleaded for a 'reverse perspective' – '... the question cannot be only when the countries of the Western Balkans will enter the EU, but also what exactly will they be able to enter, i.e. what exactly will they be able to become members of'.[67] It is possible to try to give some answers to that and similar questions related to the context of potential and real substantive EU reforms only in a separate study.

63 | The grouping of the negotiating chapters in six thematic clusters (Fundamental rights; Internal market; Competitiveness and inclusive growth; Green Agenda and sustainable connectivity; Resources, agriculture, and cohesion and External relations) should bring dynamism to the accession process. Negotiations on each cluster are opened as a whole, after meeting the conditions for opening, and not on the basis of individual chapters.

64 | Ćeranić Perišić, 2020, pp. 439–440.

65 | EU, 2020.

66 | Ćeranić Perišić, 2021, p. 410.

67 | Jovanović, 2015, p. 49.

6. Conclusion: 'Something third...'

The economic and political, but above all the identity crisis of the EU strengthened the rhetoric of institutional reforms. In fact, those reforms do not exist. This, among other things, produces indecision about the enlargement policy and the modalities of its implementation. The EU must first 'look at itself in the mirror' and try to answer what it sees and what it wants to see – not in a year, but in half a century. Ad hoc pragmatic and cosmetic solutions, such as changes in the Western Balkans accession methodology, only cause greater mutual apathy and deepen uncertainty. Serious, if not tectonic, geopolitical changes in the world are also possible. They are followed by wars in Ukraine and the Middle East. At this moment, it would be pretentious to say that the unipolar world led by one superpower, the United States, is 'dead', but it is undeniable that relations at the global level are far more complex. The world is searching for a new balance. In that complex network, the EU must try to build a more autonomous position than has been the case since its creation until today. Otherwise, it may also be threatened by 'Balkanization'.

The Balkans is a melange of ethnic, religious, cultural and other ingredients that is constantly 'boiling'. That is its natural state. This situation should be monitored by a 'benevolent guardian' for the sake of world peace. However, there are always those forces in the world who are not interested in peace, and therefore, not in a peaceful Balkans. A strong Serbia is no match for those forces, because whenever Serbia was weak in the 20th century, there was war in the Balkans.

Serbia is on the European path as much as the EU allows and wants. In the meantime, it is strengthening its ties to 'all four corners of the world'. It seems that Serbia has learned to 'take blows' and not return them immediately. Its policy of patience, persistence, consistency, and argumentation explains why in May 2024 another attempt of Kosovo to enter the Council of Europe failed and the Resolution on the Genocide in Srebrenica voted by a stretched majority. In between May and October, 2024, Chinese President Xi Jinping, German Chancellor Scholz, and French President Macron visited Serbia to sign a number of important bilateral agreements in the field of economy, security, and so on; then the President of Israel, Isaac Herzog, was in on official visit to Serbia; and finally the President of the United Arab Emirates, Sheikh Mohammed Bin Zayed Al Nahyan, came to Belgrade.[68] Friendship between Hungarian Prime Minister Orban and President Vučić is unique among statesmen today.

Is Serbia on the European path or is it going in some other direction? That path was unequivocally never evolutive and most likely never will be. The nature of this process is quite different and is not easy to define. Can we expect a dissolution, or rather a definitive departure from that path? This is neither a realistic nor a wise option for Serbia, and it is not for the EU either. Perhaps the answer is known to those who are able to understand the connection between the arrival of the President of the United Arab Emirates, Sheikh Mohammed Bin Zayed Al Nahyan, and the signing of the UAE-Serbia Comprehensive Economic Partnership Agreement on 5 October, 2024, on the one hand, and the inclusion of Serbia, two days later, in the global alliance for batteries and mineral raw materials at

68 | At the time of finishing this text, the President of Turkey, Erdoğan, is coming to Serbia for an official visit (October 2024).

the initiative of Germany, on the other. Nevertheless, it seems that a direct answer to the question in the title has become redundant.

Bibliography

Axyonova, V., Kartsonaki, A. (2024) 'The European Union's Normalisation Policies for Kosovo: Contributing to a Durable Peace?', *Ethnopolitics*, pp. 1–18 [Online]. Available at: https://doi.org/10.1080/17449057.2024.2358647 (Accessed: 4 August 2025).

Burazer, N. (2024) 'Normalizacija odnosa s Kosovom: centralno pitanje evropskih integracija Srbije?' in Cvijić, S., Golubović, K., Burazer, N., Krstić, A. Burazer, N. (eds.) *Future of Serbia*. Friedrich Ebert Stiftung: Belgrade, pp. 9–14 [Online]. Available at: https://library.fes.de/pdf-files/bueros/belgrad/21345.pdf (Accessed: 20 February 2025).

Ćeranić Perišić, J. (2020) 'Nova metodologija proširenja Evropske unije – instrument za prevazilaženje umora od proširenja EU' in Perović Vujačić, J. (ed.) *Unifikacija prava i pravna sigurnost*. Belgrade: Kopaonička škola prirodnog prava – Slobodan Perović, pp. 437–452.

Ćeranić Perišić, J. (2021) 'Izazovi evropskih integracija zemalja zapadnog Balkana dve decenije nakon početka procesa' in Perović Vujačić, J. (ed.) *Primena prava i pravna sigurnost*. Belgrade: Kopaonička škola prirodnog prava – Slobodan Perović, pp. 399–412.

Conclusion of the National Security Council Number 1-10/2022 from 25 February 2022 (2022) *National Security Council of the Republic of Serbia*, 25 February [Online]. Available at: https://www.predsednik.rs/en/press-center/press-releases/conclusion-of-the-national-security-council-of-the-republic-of-serbia-number-1-102022-from-25-february-2022#:~:text=2.,4 (Accessed: 20 February 2025).

Constitution of the Republic of Serbia ('Official Herald of the Republic of Serbia', No. 98/2006 and 115/2021) [Online]. Available at: https://www.paragraf.rs/propisi/constitution-of-the-republic-of-serbia.html (Accessed: 31 August 2024).

Cvijić, S. (2024) 'Načertanije: Program spoljne i nacionalne politike Srbije za XXI vek' in Cvijić, S., Golubović, K., Burazer, N., Krstić, A. Burazer, N. (eds.) *Future of Serbia*. Friedrich Ebert Stiftung: Belgrade, pp. 3–8 [Online]. Available at:https://library.fes.de/pdf-files/bueros/belgrad/21345.pdf (Accessed: 20 February 2025).

EU (2009) 'The Treaty of Lisbon', *European Union*, 1 December [Online]. Available at: https://www.europarl.europa.eu/factsheets/en/sheet/5/the-treaty-of-lisbon (Accessed: 30 August 2024).

EU (2014) 'Intergovernmental conference on the accession of Serbia to the European Union', *European Union* [Online]. Available at: https://www.media.srbija.gov.rs/medeng/documents/eu_opening_statement_for_accession_negotiations_general_eu_position.pdf (Accessed: 26 September 2024).

EU (2023) 'Belgrade-Pristina Dialogue: Agreement on the path to normalisation between Kosovo and Serbia', *European Union External Action*, 27 February [Online]. Available at: https://www.eeas.europa.eu/eeas/belgrade-pristina-dialogue-agreement-path-normalisation-between-kosovo-and-serbia_en (Accessed: 31 August 2024).

EU and Serbia sign strategic partnership on sustainable raw materials, battery value chains and electric vehicles (2024) *European Commission,* 19 July [Online]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3922 (Accessed: 27 September 2024).

Jovanović, M. (2015) 'Zapadni Balkan ii EU: obrnuti perspektivu', *Međunarodna politika*, 66(1158-1159), pp. 37–51.

Law professor says Vucic could be seen to have violated constitution (2023) *N1,* 7 March [Online]. Available at: https://n1info.rs/english/news/law-professor-says-vucic-could-be-seen-to-have-violated-constitution/ (Accessed: 26 September 2024).

Lopandić, D. (2017) *Evropska unija i Srbija: novo vreme i novo okruženje.* Belgrade: Evropski pokret u Srbiji [Online]. Available at: https://www.emins.org/wp-content/uploads/2018/03/Evropska-unija-i-Srbija_Novo-vreme_Novo-okruzenje.pdf (Accessed: 26 September 2024).

Lopandić, D. (2023a) 'Relations of Serbia and the European Union: between accession and unfinished integration', *Serbian Review of European Studies,* 2(2), pp. 3–28 [Online]. Available at: https://doi.org/10.18485/sres.2023.2.2.1 (Accessed: 4 August 2025).

Lopandić, D. (2023b) 'Transformacija politike proširenja Evropske unije pod uticajem rata u Ukrajini – od politike uslovljavanja do geopolitičkog proširenja EU' in Perović Vujačić, J. (ed.) *Međunarodni pravni odnosi i pravda.* Belgrade: Kopaonička škola prirodnog prava – Slobodan Perović, pp. 455–469.

Mihajlović, M. (2024) 'Serbia' s Challenging Journey to the EU: Reforms Required for Membership', *European Policy Centre Blog*, 3 April [Online]. Available at: https://cep.org.rs/en/blog/serbias-challenging-journey-to-the-eu-reforms-required-for-membership/ (Accessed: 29 September 2024).

National Assembly of the Republic of Serbia (2006) 'Constitution of the Republic of Serbia', *National Assembly of the Republic of Serbia*, 30 September [Online]. Available at: https://www.rik.parlament.gov.rs/tekst/en/59/constitution-of-the-republic-of-serbia.php (Accessed: 25 August 2024).

Petrov, V. (2022) 'European Versus National Constitutional Identity in the Republic of Serbia: A Concurrence or Unity' in Pastuszko, G. (ed.) *Constitutional Identity and European Union axiology – perspective of Central European States*. Warszawa: CBPE, pp. 177–200 [Online]. Available at: https://eprints.uklo.edu.mk/id/eprint/8140/1/1.Constitutional_identity_www.pdf (Accessed: 25 August 2024).

Petrov, V. (2023a) 'Profesor Vladan Petrov: Povreda Ustava ili opsesija Vučićevom krivicom kao dokaz naše neodgovornosti', *Новости* [*Novosti*], 6 March [Online]. Available at: https://www.novosti.rs/vesti/politika/1212213/profesor-vladan-petrov-povreda-ustava-ili-opsesija-vucicevom-krivicom-kao-dokaz-nase-neodgovornosti (Accessed: 26 September 2024).

Petrov, V. (2023b) 'Judicial Reform in Serbia in Light of "the Venetian Concept" of the Rule of Law', *Central European Journal of Comparative Law*, 4(2), pp. 233–257 [Online]. Available at: https://doi.org/10.47078/2023.2.233-257 (Accessed: 4 August 2025).

Samardzić, S. (2015) 'Evolution of the Relations between Serbia and the European Union', *Stosunki Międzynarodowe – International Relations,* 1(51), pp. 141–152 [Online]. Available at: https://doi.org/10.7366/020909611201509 (Accessed: 4 August 2025).

The Government of Republic of Serbia (no date) 'Brussels Agreement (First agreement on principles regulating the normalisation of relations)' *The Government of Republic of Serbia* [Online]. Available at: https://www.srbija.gov.rs/specijal/en/120394 (Accessed: 31 August 2024).

UN General Assembly (2010) 'Resolution 64/298', *UN General Assembly*, 13 October [Online]. Available at: https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/ROL%20A%20RES64%20298.pdf (Accessed: 11 September 2024).

UN Security Council (1999) 'United Nations Resolution 1244', *UN Security Council*, 10 June [Online]. Available at: https://unmik.unmissions.org/united-nations-resolution-1244 (Accessed: 11 September 2024).

Varga, Zs.A. (2020) 'Rule of Law and Constitutional Identities' in Granata-Menghini, S., Tanyar, Z.C. (eds.) *Venice Commission Thirty Years of Quest for Democracy through Law 1990 – 2020*. Lund: Juristförlaget i Lund, pp. 703–716 [Online]. Available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2020)013-bil (Accessed: 11 September 2024).

Vlada Srbije (2022) 'Zaključak Vlade Srbije o situaciji u Ukrajini (05 broj 06-1741/2022)', *Vlada Srbije*, 1 March [Online]. Available at: https://www.propisi.net/zakljucak-vlade-05-broj-06-1741-2022/ (Accessed: 25 September 2024).

Vučić, A. (2018) 'Speech of President of the Republic of Serbia in Kosovska Mitrovica 09.09.2018.', *The President of the Republic of Serbia*, 11 September [Online]. Available at: https://www.predsednik.rs/en/press-center/news/speech-president-republic-serbia-kosovska-mitrovica-09092018 (Accessed: 28 September 2024).

Vučić, M., Đukanović, D. (2024) 'The Challenges of normalizating relations between Belgrade and Priština: implications of the "Agreement on the Path to Normalization", *Journal of Liberty and International Affairs*, 10(1), pp. 20–36 [Online]. Available at: https://doi.org/10.47305/JLIA24101022v (Accessed: 4 August 2025).

Vuk Drašković: 9. marta 1991 propuštena je istorijska prilika (2024) *Tanjug*, 9 March [Online]. Available at: https://www.tanjug.rs/srbija/politika/78101/vuk-draskovic-9-marta-1991-propustena-je-istorijska-prilika/vest (Accessed: 7 September 2024).

Гајић, С. [Gajić, S.] (2013) 'Европска унија, демократско условљавање и Србија' [Evropska unija, demokratsko uslovljavanje i Srbija], *Европско законодавство* [Evropsko zakonodavstvo], 2013/45-46, pp. 9–21.

Зечевић, S. [Zečević, S.] (2018) 'Европска одредница српске спољне политике [Evropska odrednica spoljne politike]', *Европско законодавство* [Evropsko zakonodavstvo], 2018/63, pp. 9–21.

Уставни суд Србије [Ustavni sud Srbije] (2018) *Билтен Уставног суда 2012-2016 књига* [*Bilten Ustavnog suda 2012-2016 knjiga II*]. Belgrade: Constitutional Court [Online]. Available at: https://www.ustavni.sud.rs/Storage/Global/Documents/Sudska_Praksa/%D0%91%D0%B8%D0%BB%D1%82%D0%B5%D0%BD%201-2012-2016.pdf (Accessed: 7 September 2024).

EU AND WESTERN BALKAN COUNTRIES

Bojan Tubić[1]

ABSTRACT

The integration of the Western Balkan countries into the European Union is a key element of the EU's enlargement policy and a strategic priority for regional stability, economic development and democratic consolidation. Despite varying degrees of progress, Albania, Bosnia and Herzegovina, Montenegro, North Macedonia and Serbia continue to pursue EU membership as a path to institutional reform and socio-economic progress. While reaffirming its commitment to enlargement, the EU has linked eligibility for membership to comprehensive reforms in governance, the rule of law, the independence of the judiciary and the fight against corruption. However, the accession process has been slow and complex, influenced both by internal political dynamics within the candidate countries and by growing enlargement fatigue among EU member states. This paper examines the current state of EU-Western Balkans relations, the challenges and opportunities facing the accession process, and the geopolitical implications of further EU enlargement to the region. A successful enlargement would not only integrate the Western Balkans into the EU's political and economic framework but also strengthen the Union's strategic presence in Southeastern Europe in the face of increasing global competition.

KEYWORDS

EU
Serbia
Albania
BiH
Montenegro
North Macedonia

1. Introduction

The EU has maintained a long-term commitment to the integration of the Western Balkans, seeing the region's stability and development as essential to the future of Europe. The countries of the region - Albania, Bosnia and Herzegovina, Montenegro,

1 | Full Professor, Faculty of Law, University of Novi Sad, Serbia; tubic@pf.uns.ac.rs; ORCID: 0000-0001-7333-2741.

https://doi.org/10.55073/2025.2.191-213

North Macedonia and Serbia - have varying degrees of alignment with EU standards and progress in the negotiations, which are presented first in this paper. While they all share the goal of EU membership, political, institutional and historical challenges have made the process uneven.

This paper explores the EU's relationship with each of these countries, examining their individual paths towards membership, and the broader dynamics shaping EU enlargement in the Western Balkans.

We will start with Serbia, a country that is a key player in the region, having formally opened accession talks in 2014. However, its path remains uncertain due to concerns about democratic governance and its unresolved relationship with Kosovo. This paper will also focus on Bosnia and Herzegovina, which has been granted candidate status in 2022 and is struggling with internal political divisions and slow reform implementation. Albania has made notable progress, particularly in judicial and anti-corruption reforms, and has started formal negotiations. North Macedonia has been praised for significant reforms and regional cooperation, but bilateral disputes, particularly with Bulgaria, have delayed its accession. Finally, this paper also highlights Montenegro, considered the regional leader, which began negotiations in 2012 and has opened most chapters, although recent political instability has slowed progress. As Croatia is the only Western Balkan country that is part of the EU, this paper will also briefly discuss its position.

2. European Union integration of the Western Balkans

The Western Balkans is a geopolitical term referring to the region of the following countries: Serbia, Bosnia and Herzegovina, Croatia, North Macedonia, Montenegro, Albania and Croatia. The countries of the Western Balkans have been candidates for European Union (hereinafter: the EU) membership for many years. There are many reasons why the EU is interested in this region. The first is that these countries have always been seen as a historical and geographical part of Europe.[2] Secondly, the political situation and conflicts in some of the countries, as well as mass emigration, caused the EU to start an initiative towards its stronger involvement in this region. For these reasons, the EU has included the Western Balkans in its enlargement plans.[3]

It is widely believed within the EU that European integration will not be complete without the full accession of the Western Balkan countries. However, the conditions of

2 | Many of those countries were formerly part of Yugoslavia. Yugoslavia was a country in South East Europe that was formed after the First World War, initially as the Kingdom of Serbs, Croats and Slovenes. After World War II, it became a socialist federation comprising six republics: Bosnia and Herzegovina, Croatia, North Macedonia, Montenegro, Serbia and Slovenia. Despite ethnic and religious differences, Yugoslavia maintained unity under the leadership of Josip Broz Tito.
However, after Tito's death in 1980, the federation was weakened by economic problems, rising nationalism and political instability. In the early 1990s, several republics declared independence, leading to violent conflicts and wars, particularly in Bosnia and Croatia. The dissolution of Yugoslavia resulted in the formation of several independent states, making it one of the most tragic and complex events in recent European history.

3 | Domachowska, 2021, p. 67.

the Stabilisation and Association Agreements (hereinafter: SAA), developed specifically for the Western Balkans, are stricter than those required for the countries of Central and Eastern Europe. In addition to meeting the Copenhagen criteria, SAA signatories are required to cooperate with their regional neighbours. However, SAAs are not a guarantee of accession, although they can be an important step on the road to European integration.[4]

Moreover, the strategic importance of this region cannot be ignored by the EU and its members. If we look at this region geographically, the Balkan countries represent a bridge and the shortest transit route between the south-eastern and central sections of the EU. The importance of this route was confirmed during the refugee crisis in 2015. Moreover, the economies of these countries already enjoy a close relationship with the EU. The EU is their biggest trading partner, their largest foreign investment source and the main destination for migration.[5] In addition, good economic and trade relations between the EU and the Western Balkans can contribute to improving the business environment, attracting foreign investment, and speeding up the membership process.[6]

The Stabilisation and Association Process (hereinafter: SAP) is seen as an instrument for negotiations between the EU and its future member states in the Balkans. It includes three objectives, such as the stabilisation of the region, regional cooperation and promotion, and accession to the EU. The SAP also includes SAAs, EU financial assistance and trade measures. The process requires political effort as well as financial and human resources.[7]

However, the main part of the SAP is when a state concludes an SAA with the EU. It sets out the rights and obligations for both parties contained in the SAA. The SAA is also of huge political importance, and leads to the creation of a free trade area, which is of crucial importance for the state party. It requires the state to harmonise its standards with those of the EU. When a country signs the SAA, it means that it has decided to become a member of the EU. The preamble to these agreements refers to the 'European perspective' - and explicitly to the potential for the country in question to obtain the status of candidate country for EU membership in the case of the successful implementation of the agreement.[8] However, before signing the SAA, there is a preparation period during which the state must meet EU standards and carry out reforms. These reforms are conducted in accordance with EU models and allow the EU to monitor the country's progress towards joining the EU's single market. The SAA, as an agreement, represents not only the bilateral relationship between the EU and the future member state, but also the development of cooperation and the promotion of good neighbourly relations.[9]

For each country wishing to join the EU, its negotiations with the EU are divided into 35 chapters. The candidate state must adapt its institutional, administrative and judicial capacities to EU standards. By closing these chapters, the candidate country acquires the conditions for full membership in terms of compliance with the requirements of the *acquis communautaire* and is considered to have completed the systemic reforms necessary for

4 | Babuna, 2014, p. 10.
5 | Dabrowski and Myachenkova, 2018, p. 1.
6 | Baranenko and Milivojević, 2011, p. 91.
7 | Schenker, 2008, p. 2.
8 | Gabrisch, 2023, p. 9.
9 | Nezirović et. al., 2022, pp. 37–38.

its successful function within the EU. The reforms required for full membership in the EU are among the highest in the world, especially in the areas of building an independent judiciary, environmental protection, strengthening the rule of law, human rights, building stable institutions, developing the civil sector, functioning of the market economy, protection of personal data, and so on. It is undeniable that all the reforms required by EU membership are necessary to build a modern, democratic, market-oriented state based on the rule of law.[10]

Although there are many benefits to being a part of the EU, there has been no enlargement since Croatia's accession in 2013. It does not currently appear that there will be any changes in that situation. In 2018, the then President of the European Commission, Jean-Claude Juncker, stressed that 2025 could possibly be the year for new members, but not only for those who were the most advanced in the accession process at that time.[11] So far, however, no Western Balkan countries have joined the EU. On the other hand, each of these states has some kind of relationship with the EU, which will be presented in the following chapters.

Joining the European Union is a complex process involving several EU institutions, each of which plays a specific and important role. In this respect, the European Commission plays a central role in the accession process. It evaluates the membership applications from candidate countries and prepares an opinion on whether they meet the Copenhagen criteria. Once negotiations begin, the Commission monitors progress and produces annual reports evaluating reforms and alignments with EU standards. The Commission also proposes negotiation frameworks and chapters that will structure the accession talks.

The European Council, which is made up of the heads of state or governments of the member states, is responsible for providing the overall political direction of the enlargement process. The European Council must unanimously agree to grant candidate status to a country, as well as to open or close negotiation chapters. The European Council's conclusions establish the EU's key strategic priorities for enlargement policy.[12]

The Council of the EU plays a crucial role in managing and deciding on the course of accession negotiations. It adopts negotiating positions for each chapter and ensures that conditions are met before chapters can be provisionally closed. The Council also discusses progress reports and can suspend negotiations if necessary.[13]

The European Parliament is consulted throughout the accession process. It debates and adopts resolutions on the progress of candidate countries, and its consent is required by a majority vote before a country can officially join the EU. The Parliament plays a key role in maintaining democratic accountability and supporting the EU's values throughout the enlargement process.

10 | Stanković, 2014, p. 179.
11 | Gotev, 2018.
12 | Brennan, 2006, pp. 55–58.
13 | Costa, 2022, p. 46.

3. Serbia and the EU

The negotiations on the SAA between the EU and Serbia were launched on 10th October 2005, when Serbia and Montenegro were still a single state. The Republic of Serbia signed the SAA with the EU on 29th April 2008, which entered into force on 1st September 2013.[14] Serbia submitted its official application for membership in the European Union on 22nd December 2009 and obtained the status of a candidate country on 1st March 2012.

On 10th October 2012, the European Commission published two documents: 'Report of the European Commission on Serbia's progress'[15] and 'Strategy and main challenges of enlargement in 2012-2013'.[16] The main, and continuing recommendations of the report are appropriate reforms in the judiciary, the fight against corruption, the issue of privatisation of companies, the protection of the rights of vulnerable groups, as well as further constructive engagement in regional cooperation and the strengthening of relations with neighbouring countries. Out of a total of 33 chapters analysed and assessed by the European Commission in the report, the activities and results achieved were assessed positively in 26 chapters. The European Council's decision of 28th June 2013 to start to negotiate with Serbia marks the start of the most challenging phase of European integration, the negotiations on membership, where the country must fully align itself with the EU's institutions, values and legislation.[17]

Considering the chapters, Serbia has taken many steps in its system, only some of which will be listed here:

1. In accordance with the obligation arising from membership in the United Nations (hereinafter: the UN) and the signing of the Dayton and Paris Peace Agreements, Serbia arrested and handed over to The Hague Tribunal all 46 individuals accused of war crimes;
2. Serbia is a member of the most important universal international conventions (adopted within the UN system) in the field of human and minority rights protection, and a legal framework for the protection of rights has been established in Serbia in accordance with the standards of the Council of Europe, of which it has been a member since April 2003;
3. Serbia confirmed its commitment to regional cooperation by actively participating in the work of numerous regional initiatives and organisations. The conclusion of the CEFTA agreement in 2006, the Agreement establishing the Energy Community of South East Europe in 2005 and the Agreement on Common Aviation Area of Europe in 2006 contributed to cooperation between the signatories, but also to the advancement of the interests of each of them. Serbia has also improved bilateral relations in the region. Relations with Bosnia and Herzegovina have improved. In March 2010, the Serbian Parliament adopted

14 | Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Serbia, of the other part, 18 October 2013, Official Journal L 278.
15 | European Commission, 2012b.
16 | European Commission, 2012a.
17 | European Council, 2013, p. 12.

a declaration condemning the crimes in Srebrenica and calling for a decision by the International Criminal Court regarding Srebrenica;

4. Serbia has committed itself to the problem of corruption and has adopted a package of anti-corruption laws, such as the Law on Prevention on Corruption,[18] the Law on Financing Political Activities,[19] the Law on Seizure and Confiscation of the Proceeds from Crime,[20] and the Law on the Liability of Legal Entities for Criminal Offences.[21] The Anti-Corruption Agency was established and began operating on 1st January 2010;
5. Serbia is also engaged in the reform of the judiciary and the independence of judges in the performance of their duties. In February 2022, the National Assembly of the Republic of Serbia promulgated the Act on Amendments to the Constitution.[22] The amendments adopted were aimed at strengthening the independence of the judiciary, which is one of the key requirements of the EU in the accession process. These amendments abolished the three-year probationary period for judges and provided for the election of judges and court presidents by the High Judicial Council. In this way, the direct influence of the National Assembly on judicial functions and judicial decision-making during the probationary period was reduced. In addition, the guarantee of the independence of the judiciary has been strengthened by the permanent nature of the judiciary, the way in which judges are elected and their unremovability;
6. A lot of new independent and regulatory bodies have been formed above all to the supervision of the behaviour of the executive power, such as Commissioner for the Protection of Equality, Anti-Corruption Agency, Ombudsman, Commissioner for Information of Public Importance and Personal Data Protection, Commission for Protection of Competition, etc. many are in new, better equipped premises, able to hire more professional staff.

Although Serbia is ready to accept as many recommendations as it should, one of the most serious obstacles to Serbia's accession on the EU side is the problem of Kosovo.[23] The EU has continued to put pressure on Serbia, insisting that it should work to establish 'good neighbourly relations with Kosovo' and that it should adjust its policy towards Kosovo and Metohija to recognise Kosovo's independence. Direct talks between Serbia and Kosovo began at the end of 2010, mediated by the EU. The Agreement on Integrated Border Management, which defines the borders between Serbia and its southern territories - Kosovo and Metohija - was adopted soon after the change in the Serbian government in the 2012 presidential elections, characterised by the election of Tomislav Nikolić as the President of Serbia. Shortly afterwards, in April 2013, Belgrade and Pristina adopted the first

18 | Law on Prevention on Corruption, Official Gazette of the Republic of Serbia, No. 35/2019, 88/2019, 11/2021 – authentic interpretation, 94/2021 and 14/2022.
19 | Law on Financing Political Activities, Official Gazette of the Republic of Serbia, No. 14/2022.
20 | Law on Seizure and Confiscation of the Proceeds from Crime, Official Gazette of the Republic of Serbia, No. 32/2013, 94/2016 and 35/2019.
21 | Law on the Liability of Legal Entities for Criminal Offences, Official Gazette of the Republic of Serbia, No. 97/2008.
22 | Act on Amendments to the Constitution, Official Gazette of the Republic of Serbia, No. 16/2022.
23 | Economides and Ker-Lindsay, 2015, p. 1028.

agreement on principles for normalising relations.[24] It can be said that this agreement has no practical significance because Kosovo has not respected it.

In October 2024, the European Commission published the report on Serbia's position in the accession process.[25] It is said that reforms regarding the rule of law and relations between Serbia and Kosovo are still the most important part of the negotiations. There is an expectation from the EU for Serbian cooperation regarding the attack in the north of Kosovo in 2023, in that Serbia is expected to find the perpetrators of the attack. Despite this, Serbia and Kosovo are expected to continue to find solutions to all difficulties and to normalise their relations.

Serbia had provisionally closed 2 chapters. The Commission considers that Serbia should continue the process of implementing the SAA. Serbian legislation is still not in full compliance with the SAA in a number of areas, and it also needs to align its legislation, in accordance with Commission's recommendations. In addition, Serbia has introduced a number of temporary trade restrictions without providing sufficient justification or following the procedures laid down in the SAA. For example, when it comes to public procurement, the agreements concluded with third countries and the way these are implemented have failed to comply with the EU principles of equal treatment, transparency, non-discrimination and competition for the largest share of the value of public contracts. Consequently, this prevents EU companies from participating in the country's major infrastructure projects.

However, instead of democratisation as a primary goal, the process of normalisation of relations between Belgrade and Pristina has taken the centre stage in the accession process.[26] This fact had a negative impact on the dynamics of the accession process even before 2022, and the invasion of Ukraine has unfortunately further 'securitised' this area. Instead of being prioritised and valued in political discourse and also in practice, achievements in the field of rule of law and fundamental rights are not as prominent and valued as activities in the framework of high-level political challenges.[27]

The priority of harmonisation with the EU's initiatives against Russia is reflected in Serbia's accession process in two ways: both through the normalisation of relations with Pristina and through monitoring the state of relations with Moscow. This is an unfavourable position, but it is a fact that must be considered if the intention is to eventually become a member of the EU. The treatment of Russia has also created a sense of urgency and made enlargement policy one of the most important instruments for improving European security. These exceptional geostrategic circumstances have influenced the sudden advancement of less advanced candidates, such as Bosnia and Herzegovina, whose democratisation process has not shown any positive trends for years. Moreover, several candidates, whose democratic performance is also not at an enviable level, have received a roadmap for the opening of accession negotiations under the accelerated procedure. As regards Serbia's progress in the accession negotiations, while two thirds of the negotiation chapters are open, the situation in most of the accession negotiations is broadly at the same level as in previous years.

24 | Bazić, 2019, p. 313.
25 | European Commission, 2024c.
26 | Petrovic, 2019, p. 38.
27 | Petrovic et. al., 2023, p. 351.

4. Bosnia and Herzegovina and the EU

The relationship between Bosnia and Herzegovina (hereinafter: BiH) and the EU can be observed in the post-Dayton period. The Dayton Peace Agreement also established the Constitution of BiH.[28] This constitution established a constitutional, political and territorial structure with two entities and institutions of BiH: The Parliament, the Presidency, the Council of Ministers, the Constitutional Court and the Central Bank.[29] This constitution also established democracy, the rule of law and the protection of human rights.[30]

As far as the process of institutional cooperation and in particular the accession process is concerned, the Thessaloniki European Council in 2003 is certainly important. Negotiations for the signature of the SAA started in 2005. The EU required the establishment of certain central police authorities, which had been largely separate in the two entities since Dayton. Following the adoption of the police reform in April 2008,[31] the SAA with BiH was signed two months later in Luxembourg.[32] Its application was soon stopped because BiH's did not fulfil a number of obligations, in particular those relating to human rights and the rule of law. The failure to implement the European Court of Human Rights' judgment in the significant Sejdić Finci case[33] was one of the examples of failure.[34]

In its 2004 report on the situation in Bosnia and Herzegovina, the European Commission noted that some progress had been made in certain areas, but that the conflict between the central state and the two entities, and the lack of sustainable policies regarding the investor climate and the legal framework were proving to be problematic.[35] That is why BiH needs to solve the problem regarding its two dysfunction entities.[36]

For BiH, the EU integration process is primarily of geopolitical significance. By becoming a member of the EU, BiH will achieve internal integration and stability in its economic development. In addition, BiH would build the essential features of a rule-of-law state that protects universal human rights and its state integrity and sovereignty. In this context, the historic project of BiH's integration into the EU represents a strategic advantage for the citizens of BiH, because it enables the establishment of a stable and lasting peace.[37]

Moreover, the EU's relationship with BiH and its future as a member of the EU have been confirmed by the EU institutions, which have invested more than 3.5 billion euros into the reconstruction and development of BiH from 1996 to 2018. This financial support from the EU has made it possible to rebuild post-war infrastructure, reform public

28 | Osland, 2004, p. 548.
29 | Pejanovic, 2023, p. 24.
30 | Szewczyk, 2010, p. 24.
31 | Kim, 2008, p. 4.
32 | Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part, 30 June 2015, Official Journal L 164.
33 | *Sejdic and Finci v. Bosnia and Herzegovina,* European Court of Human Rights, App. Nos. 27996/06 and 34836/06, Judgment of 22 December 2009.
34 | Halilovic, 2024, p. 150.
35 | European Commission, 2004, p. 375.
36 | Toal and Maksic, 2011, p. 290.
37 | Pejanovic, 2021, p. 198.

administration and establish the rule of law. There is hardly a region in BiH where the EU has not financed the reconstruction of municipal infrastructure, the reconstruction of educational institutions, the reconstruction of health care facilities and the development of small and medium-sized enterprises.[38]

In practice, several years passed before the last EU member ratified the signed SAA with BiH. In 2010, BiH citizens gained the right to travel to the Schengen area. At the end of June 2012, the EU organised the first meeting with BiH to prepare an official application for membership. Following the entry into force of the SAA in June 2015, BiH submitted a formal application for membership in early 2016. Subsequently, in December 2016, the EU presented BiH with the so-called Membership Questionnaire, a series of measures to be taken in various areas of governance and social organisation. At the end of February 2018, BiH submitted its answers to the questionnaire. In mid-2018, the EU submitted an additional 655 questions from the questionnaire, and the BiH submitted the answers to these questions on 5 March 2019. The European Commission published a positive opinion on the answers to the additional questions in May 2019.[39] However, it was not until 2024 that the EU opened negotiations with Bosnia on its accession to the EU.[40]

Given that the EU did not open negotiations with BiH until 2024, BiH has now committed itself to adopting legislation in line with the EU's recommendations. Thus, on 30 January 2025, BiH adopted as a matter of urgency the draft Law on Border Control, which is one of the two laws that the European Commission insists on being passed, in order to convene an Intergovernmental Conference to adopt the negotiating framework necessary to formally open the negotiation process with BiH. BiH has also adopted the Law on Personal Data Protection, which is in line with the EU General Data Protection Regulation. This law regulates the protection of natural persons regarding the processing of personal data for the purpose of investigation, detection and prosecution of criminal offences, in line with the decisions of the European Parliament and the European Council, while the Law on Border Control regulates all issues related to border surveillance. The European Commission has insisted on the adoption of these laws, considering them a prerequisite for the next step in the process of approaching EU membership. BiH has also adopted various mechanisms to create a coordination system for EU integration, such as working groups on European integration.[41]

On the other hand, the Law on Courts, one of the priorities for the opening of negotiations with the EU, was not adopted because there was no consensus for its adoption in February 2025. This law is one of BiH's priorities for opening negotiations with the EU and was drafted in accordance with the opinion of the Venice Commission. In its opinion on BiH's application for EU membership, the European Commission called for the adoption of a new Law on Courts, in order to achieve greater legal certainty and improve the functioning of the judiciary. In addition, on 21st November 2024, the Minister of Justice of BiH asked the Venice Commission for a follow-up opinion on the draft Law in the High Judicial and Prosecutorial Council.[42]

38 | Ibid., p. 205.
39 | Petrovic, 2021, p. 46.
40 | European Commission, n.d.d.
41 | Preljevic, 2024, pp. 112–113.
42 | European Commission for democracy through law, 2025.

However, BiH is still trying to find its place in the EU, whose political path is directed towards full EU membership, and this whole process and path seems to have no alternative, given the political crises the EU has faced in recent years. However, BiH has not achieved much on its way to the EU, both because of the politicisation of the integration process and because of systemic corruption and a lack of internal consensus on some issues. Furthermore, it also seems that the EU does not have a sincere political motivation to accept BiH as a full member. This raises the question of whether it is worthwhile for a country in the Western Balkans to pursue EU membership at all costs. At this point, we can conclude that the crisis of the EU's political concept is negatively affecting BiH's integration into the EU.

5. Albania and the EU

Diplomatic relations between the EU and Albania were initiated in 1991 and strengthened the following year with the conclusion of a trade and cooperation agreement and a joint declaration on political dialogue. For the rest of the 1990s, the relationship was generally limited to donor-recipient status, as the EU became the country's largest supplier of external assistance. At that time, substantial trade preferences were also granted by the EU to Albania, which allowed for the facilitation of bilateral trade and the establishment of closer trade relations.[43]

As far as EU-Albania relations are concerned, Tirana started negotiations with the EU on the SAA in 2003. It represented the new generation of agreements that the EU envisaged for the five Western Balkan countries and was the first step on the road to EU membership. Albania signed its SAA in June 2006[44] and submitted its formal application for membership three years later, when it became a full member of NATO.[45] The EU also linked SAA negotiations to readmission negotiations in the case of Albania.[46]

It has continued reforms and stepped up its efforts in many areas, such as the freedom of the media, the speeding up of trials, the restitution and compensation for confiscated property, the protection of minorities and the strengthening public administration.[47] The Ministry of European Integration plays a central role in the coordination of 'European' affairs and is responsible for the planning and monitoring of all activities related to European integration, the harmonisation of the Albanian legal system with that of the EU, the coordination of EU pre-accession funds. Furthermore, it is the central point of communication with the European Commission. Albanian state institutions still depend on European financial and technical assistance, and all their activities related to the EU accession process are carried out within the framework of the National Plan for European Integration (2014-2020) adopted by the Council of Ministers.[48]

43 | Zahariadis, 2007, p. 13.
44 | Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part - Protocols – Declarations, 28 April 2009, Official Journal L 107.
45 | Abazi, 2008, p. 246.
46 | Dedja, 2012, p. 100.
47 | Hoffmann, 2005, pp. 67–68.
48 | European Commission, 2020.

The reforms that have followed most recently are largely the result of fulfilling the obligations of the SAA. In this phase, the EU has largely displaced other international actors and become the major and most important initiator of administrative reforms in Albania, as well as an evaluator of what has been achieved, implementing a policy of linking progress in negotiations to the achievement of reform objectives.[49] The most important recent strategic document is the Intersectoral Strategy of Public Administration Reform, adopted by the Council of Ministers in 2008, but also in 2020.[50] The strategies focused on the reform of civil service legislation.

Albania formally applied for EU membership on 24th April 2009. At the end of the same year, the European Council approved Albania's application and invited the European Commission to submit its opinion. The conclusion was that Albania still needed to achieve a necessary level of compliance with the criteria for EU membership before negotiations could be formally opened.[51]

In a short period of time, the Law on Civil Servants (2013), the Law on the Functioning and Organisation of the State Administration (2012), the Law on the Organisation and Functioning of Administrative Courts (2012), the Law on Public Procurement (2012), and the Law on Concessions and Public-Private Partnerships (2013) were all adopted.

In 2012, the European Commission instructed the European Council to approve candidate status for Albania, which was officially granted in 2014. It proposed to open negotiations with Albania in November 2016. On 26th June 2018, the General Affairs Council adopted conclusions on the EU-Western Balkans Stabilisation and Association Process, which includes Albania. The European Council endorsed these conclusions on 28th June 2018.[52]

In May 2019, the European Commission' report on Albania's progress[53] towards the EU was positive, as was the corresponding report on North Macedonia. Progress in judicial reform was praised, and one of the most important parts of the report referred to the Commission's view that Albania was ready for accession negotiations. However, it seems that some countries, such as France and the Netherlands, had not yet given a green light for negotiations to start.

The European Commission has stated that Albania's political objective is European integration, which is reflected in a number of factors. Albania has maintained its record of full alignment with the EU's Common Foreign and Security Policy. Regarding Russia's war against Ukraine, Albania fully aligned itself with the EU's position, including sanctions against Russia. In this example, Albania has shown, in the EU's view, that it is a reliable partner of the EU.[54] Moreover, Albania has started reforms on digital, human rights and rule of law, human capital, as well as energy and green transformations. Albania is seen as an 'instructive' country that has undergone far-reaching judicial reforms under the auspices of the EU. It is also fully aligned in terms of regional relations.[55]

49 | Dhamo and Dhamo, 2024, p. 199.
50 | Departmenti Administrates Publike, 2020.
51 | Yazgan, 2023, p. 294.
52 | European Commission, n.d.a.
53 | European Commission, 2019,
54 | European Commission, 2024a.
55 | Beshku and Mullisi, 2018, p. 49.

Some argue that Albania is more in line with EU policies than other Western Balkan countries. Moreover, Albania does not have many foreign policy problems with other countries, such as North Macedonia. However Albania does have internal problems, such as corruption.[56] The success of its journey will depend on continued reform efforts on the Albanian side and the political dynamics within the EU.

6. North Macedonia and the EU

North Macedonia was the first of the Western Balkan countries to begin negotiations on the SAA and the first to conclude and sign this agreement in April 2001.[57] The SAA entered into force in April 2004, following ratification by all EU states. In March 2004, North Macedonia submitted an application for EU membership, following the example of Croatia, which did not wait for the entry into force of the SAA. After completing and submitting the EU questionnaire in February 2005, North Macedonia was given the status of candidate country at the European Council in December 2005.[58]

The main objectives of the SAA are to:

1. support North Macedonia's efforts in strengthening democracy and the rule of law;
2. contribute to the political, economic and institutional stability of North Macedonia and the stabilisation of the region;
3. provide a suitable framework for political dialogue that enables the development of close political relations between the EU and North Macedonia;
4. support North Macedonia's efforts in the development of its economic and international cooperation, among other things, by bringing its legislation closer to the EU legislation;
5. support North Macedonia's efforts to complete the transition to a functioning market economy;
6. promote harmonious economic relations and gradually develop the area of free trade between the EU and North Macedonia;
7. develop regional cooperation in all areas covered by the agreement in question.[59]

The SAA for North Macedonia is similar to those of other Western Balkan countries. It has ten key chapters that refer to everything that North Macedonia must respect, promote, work on, cooperate with, and fight against on its European path. North Macedonia's accession process began thirteen years after it declared its independence in 2004, although this process has made little progress in recent years. In December 2005, Macedonia was officially granted candidate status.

56 | Grieger, 2018, p. 4.
57 | Shabani, 2024, p. 309.
58 | European Commission, n.d.c.
59 | Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part, 20 March 2004, Official Journal EU 084, Article 1.

Every year since 2009, the European Commission has proposed the opening of negotiations with Macedonia, but this has so far been unsuccessful because Greece has vetoed the decision every year.[60] In 2012, Bulgaria also vetoed the proposal. Macedonia has unresolved bilateral issues with Greece and Bulgaria, which make it impossible for Macedonia to follow its European path.[61] The similarity in the above example between Serbia and Kosovo can be found in the internal problems between North Macedonia and Greece.

In June 2018, the Prespa Agreement on the name change to North Macedonia was signed,[62] ending the decades-long name conflict with Greece. Macedonia's European integration has perhaps been most affected by the severe economic crisis in Greece. The expectation that the name change under the Prespa Agreement, despite its unpopularity, could be a turning point was largely fuelled by the international community, as some of the more prominent leaders of the EU had visited before the Agreement was signed. Macedonia has met the most important benchmarks set by the EU for the start of negotiations, and it was expected that the EU would decide on the start of the accession process. However, the enthusiasm caused by the solution of the long-term dispute was not justified by the fact that the start of negotiations on Macedonia's accession to the EU were delayed.[63]

In the European Commission's report from May 2019 on North Macedonia's progress towards the EU, North Macedonia was recommended as a country that was ready to start accession negotiations with the EU. They had resolved their name conflicts with Greece, fulfilled the necessary conditions, and received the best marks with Albania when compared to the previous report. It was expected that the EU would decide to start negotiations, based on the powerful commitments made by the EU leaders. Instead, French President Macron blocked the decision, stating that the EU should first review its enlargement policy while noting that Albania did not meet the criteria to start negotiations. Before the October 2019 summit, the EU's enlargement policy clearly stated that each candidate country would be judged on their merits. Responding to Macron's views the European Commission developed a new approach, which it called 'Enhancing the Accession Process – A credible EU Perspective for the Western Balkans', representing a new membership methodology. A new methodology was adopted on 25th March 2020 from the European Council. Finally, having adopted this methodology, a decision was taken to start negotiations between the EU and North Macedonia in March 2020. The decision specified that the negotiations would be launched at the first intergovernmental conference between the parties but did not specify a date for this. This conference was supposed to take place during 2020. Unfortunately, Bulgaria blocked this from being realised.[64]

Commenting on the importance of the new methodology, in March 2020, Olivér Várhelyi, Commissioner for Neighbourhood and Enlargement, stated:

The European Union enlargement to the Western Balkans is a top priority for the Commission. We are working on three tracks: Firstly, today we propose concrete steps on how to enhance the accession process. While we are strengthening and improving the process, the goal remains accession and full EU membership. Secondly, and in parallel,

60 | Minovska, 2023, p. 617.
61 | Agon, 2020, p. 11.
62 | Kolakovic-Bojovic and Simonovski, 2023, p. 104.
63 | Minovska, 2023, p. 617.
64 | Mojsovska, 2021, pp. 565–566.

the Commission stands firmly by its recommendations to open accession negotiations with North Macedonia and Albania and will soon provide an update on the progress made by these two countries. Thirdly, in preparation of the EU-Western Balkans Summit in Zagreb in May, the Commission will come forward with an economic and investment development plan for the region.

The first intergovernmental conference on accession negotiations was held on July 19th 2022, after which North Macedonia kept on implementing the SAA and the joint bodies under the SAA met. According to the European Commission's report, North Macedonia has consistently demonstrated its strong political commitment to the strategic goal of integrating with the EU and its willingness to make progress in the membership negotiations. The Commission considers that key EU-related reforms should be undertaken. North Macedonia should continue to maintain good relations with other Western Balkan countries and engage itself in regional activities. All bilateral agreements with neighbours should be implemented in good faith, including the Prespa Agreement. With regards to the Common Foreign and Security Policy, North Macedonia has fully aligned its policies, including on Russia's aggression against Ukraine, sending a powerful signal of its strategic decision to join the EU and demonstrating once again that it is a reliable partner.[65]

7. Montenegro and the EU

Montenegro's independence was approved in a referendum on May 21st 2006, and bilateral recognition by EU member states soon followed. The European Commission has published European reports on Montenegro's progress since 2007, the year in which the SAA was signed.[66] On December 15th 2008, the country applied for EU membership. Its SAA entered into force on 1st May 2010.[67]

In order to obtain the status of a candidate country, Montenegro, like other candidate countries, had to receive a recommendation from the Commission on its readiness for the next stage of integration. Thus, based on the quality of the submitted answers and other relevant sources, the European Commission prepared an opinion on the readiness of the country for candidate status. In 2009, citizens of Montenegro were able to travel without visas to all 25 member states of the Schengen area, and in the same year the country received a questionnaire from the European Commission containing questions from all areas of the EU acquis.[68]

In the final opinion, Montenegro was given seven political criteria to fulfil, with the ultimate goal being the opening of negotiations for membership of the Union. These seven criteria are the:

65 | European Commission, 2024d, p. 3.
66 | Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Montenegro, of the other part, 29 April 2010, Official Journal L 108.
67 | European Commission, n.d.b.
68 | European Commission, 2010, p. 4.

1. Improvement of the electoral legislation and the strengthening of the legislative and oversight role of the Assembly;
2. Essential steps in the reform of the state administration, with a focus on improving the professionalism and depoliticisation of the state administration, and strengthening the transparent and merit-based approach to appointments and promotions.
3. Strengthening the rule of law through key segments of judicial reform; improving the anti-corruption legal framework, while strengthening institutions and establishing a clear and stable mechanism for monitoring the results of investigations, prosecutions and final court judgments at all levels;
4. Strengthening the fight against organised crime, based on threat assessment, proactive investigations, enhanced cooperation with regional and EU partners, efficient processing of criminal intelligence data, and increasing law enforcement and coordination capacity. The development of a clear and stable mechanism for monitoring results in this area;
5. Improvement of media freedoms, in particular by harmonising its processes with the practice of the European Court of Human Rights on defamation, and strengthening cooperation with civil society organizations;
6. Implementation of anti-discrimination legislation and policies in line with European and international standards, ensuring the legal status of displaced persons and respecting their rights.[69]

In December 2010 Montenegro became a candidate country for membership of the European Union, and the accession negotiations began on June 29th 2012 with the first session of the International Conference. At the same conference, the so-called negotiating platforms, i.e. the general negotiating positions of the EU and Montenegro, were exchanged.[70]

The EU common negotiating framework consisted of the following 'essential elements': the policy of conditionality and border disputes, the policy of conditionality in relation to the SAA and the position of the European Commission, the euro (Montenegro already uses the euro as legal tender), the suspension clause (in the event of serious violations of the values on which the Union is based, the European Commission has the right to suspend negotiations on its own initiative or at the request of one of the Member States and to propose other conditions for the possible continuation of the negotiations), the balance clause (the Commission has the right, on its own initiative or at the request of a third Member State, to propose to 'freeze' the recommendation to open or close certain negotiation chapters and to take certain measures until the balance is restored).[71]

So far, Montenegro has opened 33 out of a total of 33 negotiating chapters with the EU. Due to intensive work, three chapters have been temporarily closed.[72]

While Croatia has, for example, been negotiating for five years and nine months, in the case of Montenegro it is still uncertain how long it will take to complete the negotiations and become a full member of the EU, but it is certain that the Union's doors are already open to it.

69 | Djurovic, 2017, p. 77.
70 | Schiop, 2021, p. 73.
71 | Djurovic, 2016, pp. 86–87.
72 | Nič et. al., 2024, p. 1.

In the report of the European Commission on Montenegro's progress towards the EU from May 2019, Montenegro received a warning and poor results in the area of media freedoms, as well as in the fight against corruption and organised crime. The question of further improvement of the rule of law and many other issues that still separate the population from the EU quality of life have rightly been raised.[73]

According to the European Commission's report from 2024, Montenegro's implementation of the SAA is still at a high level and meetings under the SAA have been regular. Montenegro's overall compliance with the interim benchmarks for chapters 23 and 24 was confirmed at the 16th Accession Conference with Montenegro on June 26th 2002, and the benchmarks for the closure of these chapters were adopted. This fact opened a new stage in membership negotiations, with the potential for further chapters to be provisionally closed. In doing so, it will be necessary for Montenegro to build a track record of implementing and delivering results on the ground. European integration, as a political goal of Montenegro and its politicians, is seen as the main priority for Montenegro and maintaining the EU's strategic orientation remains of crucial importance. Since it came to power in October 2023, the Government has operated in a generally stable political environment, which has become less polarised compared to recent years. However, the country and its institutions are weak and vulnerable to political crises. The Parliament elected in June 2023 held its first session at the end of October 2023 and has generally met regularly, largely reaching consensus on key EU-related reforms.[74]

8. Croatia

Croatia became a member of the European Union on July 1st 2013, ahead of other Western Balkan countries, due to a combination of political, institutional, and strategic factors. Following the end of the war in the 1990s, Croatia achieved faster political and economic stabilisation compared to its neighbours, enabling it to initiate comprehensive reforms early on. The country demonstrated a strong commitment to aligning with EU standards by building effective administrative structures and adopting the EU acquis across various sectors. Importantly, Croatia met a critical EU condition by fully cooperating with the International Criminal Tribunal for the former Yugoslavia, including the extradition of indicted war criminals, which helped overcome political resistance within the EU. Furthermore, EU integration has enjoyed widespread public and political support in Croatia, ensuring consistent progress despite changes in government. Relative political and ethnic stability also created a more favourable environment for reforms. Lastly, Croatia's accession was seen by the EU as a strategic move to promote stability and regional cooperation in the Western Balkans, positioning Croatia as a role model for neighbouring countries still on the path to membership.[75]

73 | European Commission, 2019b.
74 | European Commission, 2024b.
75 | Maldini and Paukovic, 2015, pp. 178–180.

9. Conclusion

The EU's enlargement policy towards the Western Balkans faces both political and practical challenges, yet the prospect of EU membership remains a powerful catalyst for reforms in the region. For these countries, EU accession is not only a matter of economic and political transformation but also a pathway towards long-term peace, stability, and prosperity. While the timeline for full integration remains uncertain, the process is gradually moving forward, with each country continuing to take important steps toward meeting EU criteria.

As the region navigates these complexities, continued EU support, alongside political will from the Western Balkans, will be essential to securing a unified and stable European continent. The Western Balkans' future in the EU will largely depend on the resolution of internal and regional conflicts, sustained reform efforts, and the capacity of both EU institutions and the individual nations to overcome the obstacles that have historically hindered progress.

Looking beyond just the technical and political dimensions, the future of the Western Balkans within the EU is also about fostering a sense of shared identity and purpose. The EU's commitment to regional integration offers the potential for deeper cultural and societal cooperation, which can help bridge longstanding ethnic and political divides. For the people of the Western Balkans, joining the EU holds the promise of greater economic opportunities, enhanced security, and stronger democratic institutions.

However, the process will not be without its setbacks. The EU itself is undergoing significant transformation, and internal challenges such as enlargement fatigue and rising nationalism could potentially complicate the integration process. Still, the EU remains a key anchor for the region's stability, especially given the geopolitical context in which Russia, China, and Turkey have shown growing influence in the Western Balkans.

Therefore, the future of the Western Balkans in the EU depends on a dual commitment - both from the region to continue pursuing reforms, and from the EU to maintain its openness to further enlargement. The road to full membership is long and fraught with challenges, but it offers the promise of a more stable, integrated Europe that reflects the diversity and complexity of the continent as a whole. Ultimately, successful integration of the Western Balkans would not only benefit the region itself but also contribute to the overall strength and cohesion of the EU, making it a truly inclusive and united entity.

Bibliography

Abazi, E. (2008) 'Albania in Europe: Perspectives and Challenges', *International Relations and Strategic Studies*, 14(1), pp. 229–252.

Agon, D. (2020) 'The Path of North Macedonia towards the European Union', *International Journal of Legal Sciences,* 8(13-14), pp. 9–16.

Babuna, A. (2014) 'European Integration, Bosnia and Herzegovina and Stability in the Western Balkans: A New Strategy', *Perceptions: Journal of International Affairs,* 19(2), pp. 1–32 [Online]. Available at: https://dergipark.org.tr/en/pub/perception/issue/48969/624763 (Accessed: 6 June 2025).

Baranenko, E., Milivojević, S. (2011) 'The Western Balkans Countries Relations with the EU: Development and Perspectives' in Salej, S., Eric, D., Redzepagic, D., Stosic, I. (eds.) *Contemporary Issues in the Integration Processes of Western Balkan Countries in the European Union*. Ljubljana: Institute of Economic Sciences, pp. 88–104 [Online]. Available at: http://ebooks.ien.bg.ac.rs/232/ (Accessed: 6 June 2025).

Bazić, J. (2019) 'Relations of Serbia and European Union: Socio-Historical Determinants and the Contemporary Political Issues', *Politeja*, 16(3), pp. 303–322 [Online]. Available at: https://doi.org/10.12797/Politeja.16.2019.60.20 (Accessed: 6 June 2025).

Beshku, K., Mullisi, O. (2018) 'The European Union as a reforming power in the Western Balkans: the case of Albania', *Journal of Liberty and International Affairs*, 4(2), pp. 40–53.

Brennan, J. (2006) *The Eastern Enlargement of the European Union*. New York: Routledge; https://doi.org/10.4324/9780203008706.

Costa, B.F. (2022) *Challenges and Barriers to the European Union Expansion to the Balkan Region*. Herchey PA: Igi GLOBAL; https://doi.org/10.4018/978-1-7998-9055-3.

Dabrowski, M., Myachenkova, Y. (2018) 'The Western Balkans on the road to the European Union', *Policy, Contribution*, 2018/4, pp. 1–23 [Online]. Available at: https://www.econstor.eu/handle/10419/208011 (Accessed: 6 June 2025).

Dedja, S. (2012) 'Human Rights in the EU Returning Policy: The Case of the EU-Albania Relations', *European Journal of Migration and Law,* 14(1), pp. 95–114 [Online]. Available at: https://doi.org/10.1163/157181612X628291 (Accessed: 6 June 2025).

Departmenti Administrates Publike (2020) 'Cross-Cutting Public Administration Reform Strategy, Annual Monitoring Report 2019', *Departmenti Administrates Publike*, April [Online]. Available at: https://www.dap.gov.al/images/raportetvjetore/Annual_Monitoring_Report_April_2020.pdf (Accessed: 18 April 2025).

Dhamo, I., Dhamo, A. (2024) 'Albania and the European Integration', *Interdisciplinary Journal of Research and Development*, 11(1), pp. 198–200 [Online]. Available at: https://doi.org/10.56345/ijrdv11n1s130 (Accessed: 6 June 2025).

Djurovic, G. (2016) *Evropska unija i Crna Gora*. Podgorica: EU Info centar.

Djurovic, G. (2017) *Evropska unija i Crna Gora: proces pristupanja*. Podgorica: EU Info centar.

Domachowska, A. (2021) 'The Status of the European Integration Process of the Western Balkan Countries', *Studies in European Affairs,* 24(4), pp. 67–82 [Online]. Available at: https://doi.org/10.33067/SE.4.2021.4 (Accessed: 6 June 2025).

Economides, S., Ker-Lindsay, J. (2015) 'Pre-accession Europeanization: the case of Serbia and Kosovo', *Journal of Common Market Studies*, 53(5), pp. 1027–1044 [Online]. Available at: https://doi.org/10.1111/jcms.12238 (Accessed: 6 June 2025).

European Commission (2004) 'Bosnia and Herzegovina: Stabilization and Association Report 2004', Commission Staff Working Paper, *SEC*.

European Commission (2010) 'Commission Opinion on Montenegro's application for membership of the European Union', European Commission, 9 November [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52010DC0670 (Accessed: 6 June 2025).

European Commission (2012a) 'Strategy and main challenges of enlargement in 2012-2013', *European Commission*, 10 October [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52012DC0600 (Accessed: 16 April 2025).

European Commission (2012b) 'Report of the European Commission on Serbia's progress', *European Commission*, 10 October [Online]. Available at: https://enlargement.ec.europa.eu/serbia-progress-report-2012_en (Accessed: 16 April 2025).

European Commission (2019a) 'Albania 2019 Report', *European Commission*, 29 May [Online]. Available at: https://enlargement.ec.europa.eu/system/files/2019-07/20190529-albania-report.pdf (Accessed: 18 April 2025).

European Commission (2019b) 'Montenegro 2019 Report', *European Commission*, 29 May [Online]. Available at: https://enlargement.ec.europa.eu/document/download/e5f886d9-191e-46fc-aac8-3fd7912735f8_en?filename=20190529-montenegro-report.pdf (Accessed: 18 April 2025).

European Commission (2020) 'Instrument for Pre-Accession Assistance 2014-2020, Albania', *European Commission* [Online]. Available at: https://enlargement.ec.europa.eu/document/download/257656a5-c112-4885-aa03-cbcbefa9f768_en (Accessed: 18 April 2025).

European Commission (2024a) 'Albania 2024 Report', *European Commission*, 30 October [Online]. Available at: https://enlargement.ec.europa.eu/document/download/a8eec3f9-b2ec-4cb1-8748-9058854dbc68_en?filename=Albania%20Report%202024.pdf (Accessed: 18 April 2024).

European Commission (2024b) 'Montenegro 2024 Report', *European Commission*, 30 October [Online]. Available at: https://www.eeas.europa.eu/sites/default/files/documents/2024/Montenegro%20Report%202024.pdf (Accessed: 18 April 2025).

European Commission (2024c) 'Serbia 2024 Report', *European Commission*, 30 October [Online]. Available at: https://enlargement.ec.europa.eu/document/download/3c8c2d7f-bff7-44eb-b868-414730cc5902_en?filename=Serbia%20Report%202024.pdf (Accessed: 17 April 2025).

European Commission (2024d) 'North Macedonia 2024 Report', *European Commission*, 30 October [Online]. Available at: https://enlargement.ec.europa.eu/document/download/5f0c9185-ce46-46fc-bf44-82318ab47e88_en?filename=North%20Macedonia%20Report%202024.pdf (Accessed: 18 April 2025).

European Commission (n.d.a) 'Albania – candidate country', *European Commission* [Online]. Available at: https://enlargement.ec.europa.eu/enlargement-policy/albania_en (Accessed: 18 April 2025).

European Commission (n.d.b) 'Montenegro – candidate country', *European Commission* [Online]. Available at: https://enlargement.ec.europa.eu/enlargement-policy/montenegro_en (Accessed: 18 April 2025).

European Commission (n.d.c) 'North Macedonia – candidate country', *European Commission* [Online]. Available at: https://enlargement.ec.europa.eu/enlargement-policy/north-macedonia_en (Accessed: 19 April 2025).

European Commission (n.d.d) 'Bosnia and Herzegovina – candidate country', *European Commission* [Online]. Available at: https://enlargement.ec.europa.eu/enlargement-policy/bosnia-and-herzegovina_en#:~:text=In%20December%202022%2C%20the%20European,the%20membership%20criteria%20is%20achieved (Accessed: 18 April 2025).

European Commission for democracy through law (2025) 'Bosnia and Herzegovina, Follow-up opinion to previous opinions on the draft Law on the High Judicial and Prosecutorial Council', *Council of Europe*, 18 March [Online]. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2025)004-e (Accessed: 18 April 2025).

European Council (2013) 'Conclusions', *European Council*, 28 June [Online]. Available at: https://www.europa.rs/upload/Jun%202013.pdf (Accessed: 16 April 2025).

Gabrisch, H. (2023) 'How to Get Things Moving in EU-Western Balkans Relations', *The Vienna Institute for International Economic Studies, Policy Notes and Reports*, 73, pp. 9–16 [Online]. Available at: https://www.econstor.eu/handle/10419/283272 (Accessed: 6 June 2025).

Gotev, G. (2018) 'Juncker tells Balkan states 2025 entry possible for all', *Euractiv*, 26 February [Online]. Available at: https://www.euractiv.com/section/global-europe/news/juncker-tells-balkan-states-2025-entry-possible-for-all/ (Accessed: 16 April 2025).

Grieger, G. (2018) 'China, the 16+1 format and the EU', *European Parliament Briefing*, September [Online]. Available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625173/EPRS_BRI(2018)625173_EN.pdf (Accessed: 6 June 2025).

Halilovic, H. (2024) 'How not to do European Integrations: Bosnia and Herzegovina and legal challenges in accession process to European Union', *Access to Justice in Eastern Europe*, 7(4), pp. 143–174 [Online]. Available at: https://doi.org/10.33327/AJEE-18-7.4-a000111 (Accessed: 6 June 2025).

Hoffmann, J. (2005) 'Integrating Albania: The Role of the European Union in the Democratization Process', *Albanian Journal of Politics*, 1(1), pp. 55–74.

Kim, J. (2008) 'Bosnia: Overview of Current Issues', *CRS Reports for Congress*, pp. 1–6 [Online]. Available at: https://sgp.fas.org/crs/row/RS22324.pdf (Accessed: 6 June 2025).

Kolakovic-Bojovic, M., Simonovski, I. (2023) 'The Accession Negotiations of North Macedonia to the EU: Between new Methodology and Old Challenges', *Institute of Criminological and Sociological Research,* pp. 103–115 [Online]. Available at: http://institutecsr.iksi.ac.rs/824/1/kolakovic-bojovic%2C%20simonovski.pdf (Accessed: 6 June 2025).

Maldini, P., Paukovic, D. (2015) *Croatia and the European Union*. New York: Routledge; https://doi.org/10.4324/9781315575124.

Minovska, M. (2023) 'The evolution of EU accession requirements for North Macedonia', *RUDN Journal of Economics*, 31(3), pp. 614–628 [Online]. Available at: https://doi.org/10.22363/2313-2329-2023-31-3-614-628 (Accessed: 6 June 2025).

Mojsovska, S. (2021) 'North Macedonia: Politics versus Policy of EU Integration', *Comparative Southeast European Studies*, 69(4), pp. 561–574 [Online]. Available at: https://doi.org/10.1515/soeu-2021-0072 (Accessed: 6 June 2025).

Nezirović, S., Živko, A., Durmišević, B., Hodžić, A. (2022) 'Stabilisation and association agreement between the Western Balkan countries and the European Union', *Journal of Geography Politics and Society*, 12(2), pp. 36–50 [Online]. Available at: https://doi.org/10.26881/jpgs.2022.2.05 (Accessed: 6 June 2025).

Nič, M. (2024) 'Montenegro's EU Push: Imminent Opportunities and Challenges', *German Council of Foreign Relations*, 2024/3, pp. 1–3 [Online]. Available at: https://www.ssoar.info/ssoar/handle/document/93803 (Accessed: 6 June 2025).

Osland, K. (2004) 'The EU Police Mission in Bosnia and Herzegovina', *International Peacekeeping*, 11(3), pp. 544–560 [Online]. Available at: https://doi.org/10.1080/1353331042000249091 (Accessed: 6 June 2025).

Pejanovic, M. (2021) *Državnost Bosne i Hercegovine u XX i XXI stoljeću*. Sarajevo: University Press.

Pejanovic, M. (2023) 'Geopoliticke promene u Evropi i svijetu i mogucnost ubrzanja integracije Bosne i Hercegovine u Evropsku uniju', *Pravna misao*, 7-8, pp. 22–39 [Online]. Available at: https://www.researchgate.net/profile/Lejla-Mesihovic/publication/374031000_Zasebni_domeni_u_vanjskim_politikama_kandidata_u_procesu_pregovaranja_za_punopravno_clanstvo_u_Evropskoj_uniji_CASOPIS_ZA_PRAVNU_TEORIJU_I_PRAKSU_7_-8_srpanj_-kolovoz_juli_-august_Sarajevo_2023_PRAVNA/links/650abdf2d5293c106cc94ba9/Zasebni-domeni-u-vanjskim-politikama-kandidata-u-procesu-pregovaranja-za-punopravno-clanstvo-u-Evropskoj-uniji-CASOPIS-ZA-PRAVNU-TEORIJU-I-PRAKSU-7-8-srpanj-kolovoz-juli-august-Sarajevo-2023-PRAV.pdf (Accessed: 6 June 2025).

Petrovic, D. (2021) 'Odnos NATO-a i Evropske unije prema Republici Srpskoj i Bosni i Hercegovini', *Institut za medjunarodnu politiku i privredu,* 6(2), pp. 43–56 [Online]. Available at: http://repozitorijum.diplomacy.bg.ac.rs/845/ (Accessed: 6 June 2025).

Petrovic, M. (2019) 'EU Intergration Process of Serbia: A vicious circle of High Politics?', *The Review of International Affairs*, 70(1175), pp. 23–48.

Petrovic, M., Kovacevic, M., Radic Milosavljevic, I. (2023) *Srbija i Evropska unija, dve decenije nakon solunskog samita*. Beograd: Institut za međunarodnu politiku i privredu.

Preljevic, H. (2024) 'Defining Documents in the EU Integration of Bosnia and Herzegovina: Where is the "European choice" Heading?', *Review of European and Comparative Law*, 59(4), pp. 97–132 [Online]. Available at: https://doi.org/10.31743/recl.17626 (Accessed: 6 June 2025).

Schenker, H. (2008) 'The Stabilization and Association Process: An Engine of European Integration in Need of Tuning', *JEMIE*, 7(1), pp. 1–19.

Schiop, E. (2021) 'The Accession Negotiations Chapters between Montenegro and the European Union', *University of Oradea, International Relations and European Studies Department*, 2021/13, pp. 69–80 [Online]. Available at: https://doi.org/10.58603/GVLL5799 (Accessed: 6 June 2025).

Shabani, F. (2024) 'The Path of the Republic of North Macedonia Towards a Functional Market Economy and the Ability to Cope with Competitive Pressure and Market Forces Within the European Union', *Studies in European Affairs*, 28(3), pp. 295–313 [Online]. Available at: https://doi.org/10.33067/SE.3.2024.17 (Accessed: 6 June 2025).

Stanković, N. (2014) 'Srbija u odnosu na EU', *Institut za medjunarodnu politiku i privredu*, pp. 174–189.

Szewczyk, B. (2010) 'The EU in Bosnia and Herzegovina: powers, decisions, legitimacy', *European Union Institute for Security Studies,* Occasional Paper(83), pp. 1–60 [Online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1881717 (Accessed: 6 June 2025).

Toal, G., Maksic, A. (2011) 'Is Bosnia and Herzegovina Unsustainable?, Implications for the Balkans and European Union', *Eurasian Geography and Economics*, 52(2), pp. 279–293 [Online]. Available at: https://doi.org/10.2747/1539-7216.52.2.279 (Accessed: 6 June 2025).

Yazgan, H. (2023) 'Coming to Terms with the Past: Case of Albania in the European Union Process', *Journal of Balkan Research Institute*, 12(1), pp. 275–313 [Online]. Available at: https://doi.org/10.30903/Balkan.1323595 (Accessed: 6 June 2025).

Zahariadis, Y. (2007) 'The Effects of the Albania-EU Stabilization and Association Agreement: Economic Impact and Social Implications', *The Economics and Statistics Analysis Unit,* ESAU Working Paper 17, pp. 1–92 [Online]. Available at: https://www.files.ethz.ch/isn/32677/esau_wp17.pdf (Accessed: 6 June 2025).

REDEFINING THE PRINCIPLE OF LEGALISM (ARTICLE 7 OF THE CONSTITUTION) TOWARDS 'THE BOGUS RULE OF LAW' IN POLAND AFTER 13 DECEMBER 2023

Konrad Wytrykowski[1]

ABSTRACT

The principle of legalism is the base of every democratic state system. There is no modern state without this vital rule. 'Breaking the law by public authorities undermines a whole idea of the law as a system of binding standards of conduct', as the Constitutional Tribunal said. That is why the principle of legalism is relevant for a society that claims to create a state of law.

The principle of legalism predicates that 'the organs of public authority shall function on the basis of, and within the limits of, the law', as the Polish Constitution predicts.

How does this principle look like in practice? Are the Polish authorities indeed complying with it?

The shift of political power should be a typical phenomenon in a democratic state of law but in Poland, after the 2023 elections, it seems like an undermining of the constitutional order with a hurried 'takeover' of individual institutions and revanchism. Illegal acquisitions of public media and the National Prosecutor's Office, undermining of the National Council of Judiciary, the Constitutional Tribunal, the Supreme Court and the judges appointed since 2018, the dismissal of court authorities in violation of laws, harassment of judges with criminal proceedings, problems with correct law making and wide-ranging plans to dismiss judges could mean are observing an illegal attempt to change the political system of the state.

Although it takes place under the banner of the fight for restoring the rule of law, it is in fact a break with classically understood legalism. As such, this study explains the ideological foundations of such actions and whether they have been planned.

KEYWORDS

rule of law
legal order
irremovability of judges
fighting democracy
repressive tolerance
bogus rule of law

1 | PhD, Retired Judge of Polish Supreme Court, Poland; konrad.k.wytrykowski@gmail.com; ORCID: 0009-0003-5472-5795.

https://doi.org/10.55073/2025.2.215-237

1. What is the rule of law?

Eunomia was the goddess of good order and lawful conduct in ancient Greece. She was associated with the internal stability of the state, including the enactment of good laws and the maintenance of civil order. Eunomia was also an important political slogan in ancient Greece during the archaic and classical periods, as well as one of the major Greek political thought schools. This term consists of two parts: 'eu', which means 'good', and 'nomos', which means 'law'; in short, it acknowledge good law, a fair social order, law-abidingness or simply rule of law.[2]

In every modern democracy a state's system is based on the principle of legalism. The importance of this principle is emphasised by the fact that it should be a vital rule of every legal system. As it was ascertained by the Constitutional Tribunal, 'breaking the law by public authorities undermines a whole idea of the law as a system of binding standards of conduct',[3] that is, why it is relevant for a society which claims to create a state of law to obey to the principle of legalism.

The principle of legalism predicates that all public authorities should function on the basis of and within the limits of the law. The law not only should provide competences to take action but also be a source of order and limit the range of legal functioning. Jurisdiction to take action must not be surmised to be constructed by regulations of different nature such as material, procedural and systemic.[4]

The idea of a lawful state is that the public authorities should only take action when the Constitution or the acts which are materially and formally consistent with the Constitution allow them to do so. The goal of their actions is to protect human dignity, fairness and legal certainty.[5]

It can be assumed that the principle of legalism has a formal status and that the material requirements, according to the law, underlie its origins from the rule of a democratic state of law[6]. In the Polish Constitution (Article 2) it is stated: 'The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice', which means enriching the classical rule of the state of law by values such as justice, especially social justice[7], and democratism which makes universal election the main path to create law-making bodies and other overarching state authorities, as well as guaranteeing a political pluralism.[8]

2 | Eunomia [Online]. Available at: www.theoi.com/Ouranios/HoraEunomia.html (Accessed: 25 November 2024). PWN Encyklopedia: Eunomia [Online]. Available at: www.encyklopedia.pwn.pl/haslo/;3899090 (Accessed: 25 November 2024). Eunomia corresponds to the Latin 'legalitas'.

3 | Judgment of the Constitutional Tribunal of 16 March 2011, file no. K 35/08, OTK ZU no. 2/A/2011, item 11.

4 | M. Florczak-Wątor in Tuleja (ed.), 2023, Article 7.

5 | Morawska, 2003, p. 60.

6 | M. Florczak-Wątor in Tuleja (ed.), 2023, Article 7.

7 | The Constitution of Poland borrowed the concept of the principle of social justice from the period of the Polish People's Republic, where Article 5 of the Constitution of the People's Republic of Poland (in the version in force since 14 February 1976, consolidated text – Journal of Laws 1976.7.36, i.e. of 1976.02.21), declared that the People's Republic of Poland 'implements the principles of social justice, eliminates the exploitation of man by man and counteracts the violation of the principles of social coexistence'.

8 | Banaszak, 2004, p. 217.

The jurisprudence says that the requirement to act on the basis of and within the limits of the law does not mean that the legal foundation for public authorities must be consonantly formed. Depending on the field of the issue connected with the actions taken by public authorities, law acts can formulate additional requirements concerning the legal foundation of their action. For example actions limiting rights and freedom of an individual, especially criminal and tax law norms may be only carried out based on the statute. However, substatutory law acts require a specific enablement stated in the statute.[9]

The principle of legalism cannot function in a democratic state within its formal meaning without a material component. Otherwise it would serve to legalise illegal actions taken by public authorities, leading to the conclusion that the authority acting on a behalf of an unconstitutional law and within the limits of this law is lawful. This material meaning of the principle of legalism comes from Article 2 of the Constitution, which is the essential complement of Article 7. Respecting the principle of legalism by public authorities also helps accomplishment other rules originating from Article 2 of the Constitution, particularly the rule of protecting the trust of citizens in the state and the law established by the state, as well as the principle of law certainty and protection.[10]

In Poland, the principle of legalism is also a valid rule resulting from Article 7 of the Constitution. According to this provision, public authorities act on the basis of, and within the limit of, the law:

> The purpose of the principle of legalism is to counteract the discretion and arbitrariness of the actions of state authorities and to control this action based on the criterion of compliance with applicable law. Actions of authorities without a legal basis and outside the limit of the law or in violation of these limit are always illegal and may give rise to constitutional and criminal liability of the people undertaking these actions, as well as the state's liability for damages.[11]

Each action taken by a public authority should be based on a statutory authorisation: to take action on a given matter, to deal with the case in a given form and to give the decision a specific legal form.[12]

According to the principle of legalism understood as an interpretative directive, the presumption of competence as well as surmising competences of public authorities are forbidden. In foregoing judicial decisions of the Constitutional Tribunal, the principle of legalism was mostly bound with the ban of the presumption of competence by a public authority[13]. This ban excludes public authorities' actions without a proper permission given by the law:

9 | Article 92 of the Constitution. They can be given by authorities mentioned in the Constitution on the basis of a specific enablement stated in the statute and in the purpose of executing it.
10 | M. Florczak-Wątor in Tuleja (ed.), 2023, Article 7.
11 | Ibidem.
12 | Zubik, and Sokolewicz in Garlicki (ed.), 2016, Article 7.
13 | Judgment of the Constitutional Tribunal of 27 May 2002, file no. K 20/01, OTK-A 2002 no. 3 pos. 34.

> Pursuing the competences, legal authority must include the content of the authorising standard and cannot look for an analogy in different law regulations concerning different or even similar regulations within competences given by the lawmaker.[14]

The recipients of the principle of legalism are all public authorities on a central and local levels. These bodies must obey every law act, no matter of its weight, unlike judges who, within the exercise of their office, are independent and subjected only to the Constitution and statutes.[15] They can skip, while adjudging, sub-laws such as regulations which they value as unconstitutional. The judges cannot avoid the statute on their own, even if they consider it unconstitutional.

In such a case, the judge, acting as a court, has the privilege to advance a question of statute to the Constitutional Tribunal for a review of its constitutionality.[16] Differently, the principle of legalism concerns the judges of the Constitutional Tribunal, who in the exercise of their office are subject only to the Constitution.[17]

For authorities applying the law, Article 7 of the Constitution produces the duty of acting when the premises indicated in the legal basis are updated. An omission of actions is also a violation of these duties equivalent to transgressing the principle of legalism.[18]

This leads to the issuance of a decision in the form prescribed by law, based on a proper legal basis and in compliance with the provisions of substantive law binding on a specific authority[19]. 'Acting on the basis of law' means the requirement of legal standing (basis of competence) for all activities consisting of the exercise of public authority. This competence cannot be presumed, it must be defined clearly and precisely by the law. The term 'within the limits of the law' means the constitutional obligation of public authorities to strictly obey in their activities not only the norms determining their tasks and competences (not to exceed their competences), but also not violate any other applicable norms.[20]

Transgressing the rule of law, such as in the case of illegal actions taken by public authorities, has different aftereffects in the fields of civil, criminal pr constitutional law. Compensatory responsibility of the state towards its citizens has its source in Article 77

14 | M. Florczak-Wątor in Tuleja (ed.), 2023, Article 7.

15 | Article 178, p. 1 of the Constitution: 'Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes.'

16 | Article 193 of the Constitution: 'Any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statute, if the answer to such question of law will determine an issue currently before such court.'
It remains debatable whether, in the process of adjudication, the court is entitled to independently disregard a statute that it considers to be unconstitutional. It seems that this can only happen exceptionally, for example, in the case of secondary unconstitutionality of a provision or gross unconstitutionality, visible prima facie to every honest person.

17 | Article 195 of the Constitution: 'Judges of the Constitutional Tribunal, in the exercise of their office, shall be independent and subject only to the Constitution.'

18 | M. Florczak-Wątor in Tuleja (ed.), 2023, Article 7.

19 | Judgment of the Constitutional Tribunal of 16 March 2011, file no. K 35/08, OTK ZU no. 2/A/2011, item 11.

20 | Judgment of the Constitutional Tribunal of 27 May 2002, file no. K 20/01, OTK-A 2002/3/34; judgment of the Constitutional Tribunal of 23 March 2006, file no. K 4/06, OTK-A 2006/3/32.

section 1 of the Constitution.[21] However, a repressive nature may lead to the constitutional responsibility of some persons fulfilling public functions which they face in front of the State Tribunal, as well as criminal responsibility for their actions that have the features of criminal offences.

The measures of reacting to law violations by the authorities that enact the law is the review of the constitutionality of the law entrusted to the Constitutional Tribunal. This can lead to the abolition of unconstitutional regulations and legal acts.

The problem of legalism may lead to questions about the proper form of the broader understood principles guaranteeing legalism such as the tripartite separation of powers or independence of judiciary, as well as a general question about who should take care of accomplishing the rule of law and who should be equipped with measures to stop illegal actions carried out by public authorities, and if they happen, punish them.[22] In other words, who will guard the guards themselves, as the ancient Romans asked.[23]

2. Rule of law in action

2.1. Introduction

In 2023, the parliamentary elections in Poland were won by foregoing opposition, which formulated a government making a past coalition in power become the opposition. The shift of political power is a typical phenomenon in a democratic state of law. This change should not lead to the undermining of the constitutional order of a country. Unfortunately, in Poland the change of government did not look like a shift of the guardians of state power but as a hurried 'takeover' of institutions and revanchism.

On 13 December 2023, new Council of Ministers – with Donald Tusk as a Prime Minister – have been appointed. Then, the new Polish government operating on the behalf of resolutions given by the Sejm started to take illegal actions, which struck foundations of a democratic state of law, which are to pose as 'temporary time' order. The term 'temporary time' was used in a resolution brought in by the Sejm on the day of 19 December 2023 'in order to bring back a legal order, impartiality and reliability of public medias and the Polish Press Agency', where these actions were declared as 'in harmony with standards of the state of law in the temporary time, it means until enacting and implementing appropriate legislative solutions'.[24] Minister of Justice Adam Bodnar also referred to the doctrine of

21 | Article 77 of the Constitution:
1. Everyone shall have the right to compensation for any harm done to him by any action of an organ of public authority contrary to law.
2. Statutes shall not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights.

22 | M. Florczak-Wątor in Tuleja (ed.), 2023, Article 7.

23 | 'Quis custodiet ipsos custodes?' is a Latin phrase found in the Satires (Satire VI, lines 347–348), a work of the 1st–2nd century Roman poet Juvenal.

24 | Uchwała Sejmu Rzeczypospolitej Polskiej z dnia 19 grudnia 2023 r. w sprawie przywrócenia ładu prawnego oraz bezstronności i rzetelności mediów publicznych oraz Polskiej Agencji Prasowej [Online]. Available at: https://web.archive.org/web/20240528232223/www.isap.sejm.gov.pl/isap.nsf/download.xsp/WMP20230001477/O/M20231477.pdf (Accessed: 28 May 2024).

transitional justice in his public statements.[25] In the practice of the current government, it relies on departing from normal rules of functioning of a democratic state of law, as well as taking actions with no legal foundation, based on using violence (e.g. one MP was beaten up during her intervention in defence of public media;[26] on 3 July 2024, the police and the prosecutor's office forcibly entered the premises of the NCJ and locks have been broken and judges' cabinets to take files on the cases conducted by disciplinary judges[27]) as well as diversionary actions (e.g. switching of a signal of a TV station TVP Info).[28] The very issuance these resolutions by the Sejm (i.e. acts of internal law) is a flagrant and unprecedented violation of the constitutional principle of a closed system of sources of universally applicable law. Thereby, this is a 'direct violation against the constitutional regulation for a public authority to act only on the basis of, and within the limit of, law.'[29]

Despite the described above principle of legalism, everyday practice provides the impression that the law is being treated by governing instrumentally. Below, I provide some examples of this practice.

2.2. Public media

By virtue of the resolution by the Sejm of 19 December 2023, the government made an unlawful takeover of the public media. On this day, the Minister of Culture and National Heritage, Bartłomiej Sienkiewicz, as a body executing owner's privileges of the State Treasury called the current presidents of the Polish Television JSC, Polish Radio JSC and the Polish Press Agency JSC off as well as supervisory boards of those companies. The minister replaced them with new supervisory boards which appointed new company management. On 27 December 2023, the minister adopted a resolution of liquidation of these public companies.

Those actions were not valid by law, because the competencies to appoint and recall personnel of public radio broadcasting, television broadcasting and Polish Press Agency are reserved to the National Media Council. Moreover, liquidation of public media is unacceptable in the Polish legal system.[30] Those actions led to a stop in the broadcasting of public television, as well as lack of admission for the workers of this institution to their workplaces.

In a verdict from 18 January 2024, the Constitutional Tribunal confirmed that such actions were illegal,[31] but this has not reversed the effects of the unlawful actions.

2.3. The National Council of Judiciary (NCJ)

Rulers continue their efforts to undermine the status of the NCJ. Hitherto, these actions have been reflected in the resolution of the Sejm on 20 December 2023[32]and the adoption of a bill shortening the term of office of the judicial part of the NCJ and returning

25 | Bodnar, 2022.
26 | Chaos wTVP. Pobita poseł PiS trafiła do szpitala, 2023.
27 | Skandaliczny atak na KRS: dziennikarze usunięci, szafy pancerne rozprute, 2024.
28 | Rule of Law Observer, no date.
29 | Uchwała Sejmu RP w sprawie usunięcia skutków kryzysu konstytucyjnego, no date.
30 | Act of 22 June 2016 on the National Media Council, Journal of Laws 2021.692 (see Article 2(1)).
31 | Judgment of the Constitutional Tribunal of 18 January 2024, file no. K 29/23, Dz. U. 2024/96.
32 | ISAP: Internetowy System Aktów Prawnych [Online]. Available at: www.isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WMP20230001457 (Accessed: 18 June 2024).

to the previous methods of election.[33] Moreover, current members of the NCJ are threatened with criminal and disciplinary liability, including expulsion from office.[34]

The resolution of the Sejm, which has no legal power, states that the election of judges – as members of the NCJ – was adopted in manifest breach of the Constitution. The Sejm also called on the elected members of the NCJ to immediately cease their activities 'in this body'.

Any doubts as to the constitutionality of the current method of electing judges as members of the NCJ have been already removed in the proper procedure. In the judgment of 25 March 2019,[35] the Constitutional Tribunal adjudicated that the method of electing them by the Sejm is consistent with the Constitution.[36] As a result, judges as members of the NCJ are now considered legally elected and this assessment cannot be changed by any unlawful expectations and postulates.

2.4. Prosecutors

Since taking power in Poland, the current government has tried to take over the office of the National Prosecutor and thus gain control over Polish prosecutors.

On 12 January 2024, General Prosecutor Adam Bodnar informed National Prosecutor Dariusz Barski that he was removing him from his duties due to the ineffectiveness of restoring him to active service from retirement in 2022; therefore, in Adam Bodnar's opinion, he could not perform the functions of National Prosecutor. At the same time, at the request of General Prosecutor Adam Bodnar, by decision of Prime Minister Donald Tusk, prosecutor Jacek Bilewicz was appointed as the (acting) first deputy of the General Prosecutor and National Prosecutor.

Adam Bodnar, when asked for a legal basis of his actions, pointed at 'external legal opinions of respected experts and law authority figures [...] concerning results of effectiveness of restoring a prosecutor, Mister Adam Barski to the active duty'.[37]

New authorities started a personnel revolution in the prosecutor's office, replacing prosecutors managing the organisational units of the prosecutor's office and appointing new prosecutors to the National Prosecutor's Office.

In this way, prosecutor Dariusz Korneluk was appointed and, on 14 March 2024, the Prime Minister appointed prosecutor Dariusz Korneluk to the position of National Prosecutor despite the lack of the President's opinion required by law.

By an interim measure resolution from 15 January 2024 in a case Ts 9/24 the Constitutional Tribunal ordered all public authorities to stop taking action to prevent Dariusz Barski from exercising his privileges, tasks and competences as the prosecutor of the

33 | Ustawa z dnia 12 kwietnia 2024 r. o zmianie ustawy o Krajowej Radzie Sądownictwa [Online]. Available at: https://web.archive.org/web/20240618194803/www.orka.sejm.gov.pl/proc10.nsf/ustawy/219_u.htm (Accessed: 18 June 2024).

34 | Sędzia Cezariusz Baćkowski powołany przez Ministra Sprawiedliwości Adama Bodnara do pełnienia funkcji Rzecznika Dyscyplinarnego, 2024; Rojek-Socha, 2024.

35 | Judgment of the Constitutional Tribunal of 25 March 2019, file no. K 12/18, OTK-A 2019/17 [Online]. Available at: www.trybunal.gov.pl/sprawy-w-trybunale/art/10382-wybor-czlonkow-krs-przez-sejm-sposrod-sedziow-odwolanie-od-uchwaly-krs-dotyczacej-powola (Accessed: 4 August 2025).

36 | Article 190(1) of the Constitution: 'Judgments of the Constitutional Tribunal shall be of universally binding application and shall be final.'

37 | Mrowicki, 2024.

National Prosecutor's Office in active duty, as well as performing the function of the National Prosecutor; it also stopped a resolution brought in by the Prime Minister on 12 January 2024, which presumed the appointment of Jacek Bilewicz to perform the function of the National Prosecutor and forbade the execution of privileges, tasks and competences of the National Prosecutor by a person appointed to be a National Prosecutor with no legal foundation.[38]

Questioning the appointments of the most important prosecutors of the Republic of Poland and making a number of appointments that raised doubts as to their effectiveness caused chaos in the justice system, undermining the validity of prosecutors' decisions the influence the right to a fair trial.

To illustrate these consequences, it is enough to mention the competences of specific prosecutors to act as public prosecutors are already being questioned in court proceedings.

Moreover, on 27 September 2024, the Supreme Court adopted a resolution stating that Dariusz Barski is still the National Prosecutor.[39]

2.5. Court presidents

The functions of presidents and vice-presidents of courts are for a tenure.[40] However, there are provisions allowing the Minister of Justice to dismiss court presidents and vice-presidents before the end of their statutory term of office, which the current minister has used so far nearly 90 times.[41]

According to these provisions, the Minister of Justice may dismiss the president and vice-president of a court during their term of office in cases generally specified in the Act - Law on the System of Common Courts.[42] The exercise of this right is conditional on the

38 | Auzbiter, 2024.

39 | Sąd Najwyższy, 2024a.

40 | The presidents and vice-presidents of district courts are appointed for a four-years tenure, while the presidents and vice-presidents of courts of appeal and regional courts are appointed for a six-years tenure (Article 26 § 1-4 of the Act of 27 July 2001 Law on the System of Common Courts, Journal of Laws 2024.334, i.e. of 2024.03.08).

41 | By 13 June 2024, the Minister of Justice had initiated 79 procedures for the dismissal of presidents and vice-presidents of common courts but further appeals also followed that date. See Ministerstwo Sprawiedliwości, 2024.

42 | Article 27 of the Act of 27 July 2001. Law on the System of Common Courts, Journal of Laws 2024.334, i.e. of 2024.03.08, Journal of Laws 2024.334, i.e. Of 2024.03.08):
§ 1.The president and vice-president of a court may be dismissed by the Minister of Justice during their term of office in the following cases:
1) gross or persistent failure to perform official duties;
2) when the continuation of the function cannot be reconciled with the interests of the administration of justice for other reasons;
3) finding particularly low effectiveness of activities in the field of administrative supervision or organisation of work in a court or lower courts;
4) resignation from the function.

Minister obtaining a positive opinion from the college of the competent court or a positive opinion of the NCJ.[43]

This procedure, as well as the introduction of a high qualified majority of the required votes, were noticed by the NCJ, which, in its resolution of 16 February 2024, requested the Constitutional Tribunal to declare these regulations inconsistent with the provisions of the Constitution of the Republic of Poland. The NCJ argues that the statutory regulation strengthens the role of the executive (i.e. the Minister of Justice) and means that he will be able to influence the third power. The possibility of dismissing a president or vice-president of a court without the opinion of the NCJ contradicts the idea of control of supervisory decisions over the administration of justice by the NCJ in the procedure for dismissing the president and vice-president of the court and violates the balance of powers in favour of the executive and legislative powers.[44]

Moreover, there is likely the secondary unconstitutionality of the challenged provisions resulting from the judgment of the Constitutional Tribunal issued in 2004.[45]

By virtue of its decision on 24 April 2024, the Constitutional Tribunal prohibited the Minister of Justice from dismissing the presidents and vice-presidents of courts; however, the minister does not comply with this provision.[46]

In the verdict from 16 October 2024, the Constitutional Tribunal confirmed that it was illegal for the Minister to take such actions.[47] A declaration of unconstitutionality of the challenged provisions means the illegality of the previous actions of the Minister of Justice, who dismissed presidents and vice-presidents of courts en masse.

43 | If the opinion of the college of the competent court on the dismissal of its president or vice-president is negative, the Minister of Justice may present the intention for dismissal, together with a written justification, to the NCJ. A negative decision is binding on the Minister of Justice if the resolution on this matter was adopted by a two-thirds majority. (Article 27 § 1 - 5a of the Act of 27 July 2001. Law on the System of Common Courts, Journal of Laws 2024.334, i.e. of 2024.03.08).

44 | Resolution of the NCJ on submitting to the Constitutional Tribunal a request to examine the conformity to the Constitution of the Republic of Poland of Article 27(5) and Article 27(5a), second sentence, of the Act of 27 July 2001 – Law on the Organisation of the Courts p (www.krs.pl).
The NCJ argues that the statutory regulation strengthens the role of the executive (i.e. the Minister of Justice) and means that he will be able to influence the decision of the NCJ to a greater extent than by applying the general voting rules. The possibility of dismissing the president or vice-president of a court without the opinion of the NCJ contradicts the idea of control of supervisory decisions over the administration of justice by the NCJ in the procedure for dismissing the president and vice-president of the court and violates the balance of powers in favour of the executive and legislative powers.

45 | The Constitutional Tribunal stated the unconstitutionality of the provisions authorising the Minister of Justice to dismiss the president of a court during his term of office, despite the negative opinion of the NCJ, when the continuation of his functions for reasons other than failure to perform his official duties cannot be reconciled with the interests of the administration of justice (judgment of the Constitutional Tribunal of 18 February 2004, file ref. no. K 12/03).

46 | Prezesi sądów od Ziobry jednak bez parasola. Bodnar nie uzna zabezpieczenia TK, 2024.

47 | Documentation of the proceedings before the Constitutional Tribunal, Ref. No. K 2/24, trybunal.gov.pl; [Online]. Available at: www.niezalezna.pl/media/tv-republika/wszystko-bedzie-zgodnie-z-prawem-tak-jak-my-je-rozumiemy-zapowiadal-tusk-w-sprawie-mediow-publicznych/507546#:~:text=„Wszystko%20będzie%20zgodnie%20z%20prawem,%20tak%20jak%20my%20je%20rozumiemy” (Accessed: 4 August 2025).

2.6. Criminal proceedings

Criminal proceedings against judges have been launched, being often groundless and political in nature. They are intended to depress and freeze judges and perhaps even eliminate them from their profession. In addition, such proceedings publicly discredit judges because they are suspected of committing crimes. Such an accusation is discrediting for any judge.

On 11 June 2024, the prosecutor's office initiated proceedings concerning the abuse of powers and acting to the detriment of the public interest to achieve personal benefits for the judge members of the NCJ in the period from 2017 onwards. The investigation concerns 20 judges whose only fault was the application of the law in force in Poland.[48]

Moreover, the prosecutor's office began a series of unfounded motions to waive immunity to judges it considered its enemies, mainly because they fulfilled their official duties. The basis of individual applications is the thesis that judges acted 'in an organised criminal group'. The participants of the group were to conduct 'actions against judges, including, primarily, those gathered in the Association of Polish Judges Iustitia'. 'The criminal activity consisted primarily of the unauthorised processing of personal data of judges and the disclosure of information obtained about these judges' between each other. A further goal was to be public criticism of the aggrieved judges.[49]

Surprisingly, the prosecutor was the one that has tried to block the proceedings by filing further fragmental motions (which must be considered together), as well as by threatening to bring charges against one of the defence counsels,[50] while another defence counsel had his judge salary unlawfully reduced on the eve of the court session.[51]

There are other motions for the permission to prosecute disciplinary judges for allegedly 'concealing' the files of disciplinary cases they legally kept, which constituted a failure to comply with official duties.[52]

2.7. Law making

The Sejm has deliberated in an improper composition, violating the principle of legalism. The adopted acts have been affected by a legal defect, which implies the necessity of stating that such acts are inconsistent with Article 7 of the Constitution.

The Constitutional Tribunal found that the act adopted by the Sejm in which, due to the unlawful actions of the speaker of the Sejm, two MPs were refused participation, is inconsistent with the provisions of the Constitution of the Republic of Poland, in particular with the principle of legalism.[53] The Constitutional Tribunal stated the unlawful differentiation of the legal status of individual MPs. Upon taking office, each of the 460 MPs – elected by the nation in universal elections – gains the possibility of exercising parliamentary rights, in particular the possibility of participating in voting, and has the same status in relation to other MPs and analogous rights and obligations. Meanwhile, the unlawful

48 | Sędzia Cezariusz Baćkowski powołany przez Ministra Sprawiedliwości Adama Bodnara do pełnienia funkcji Rzecznika Dyscyplinarnego, 2024; Rojek-Socha, 2025.
49 | Prokuratura Krajowa, 2024b.
50 | Broński, 2024.
51 | Broński and Romaszewski, 2024.
52 | Prokuratura Krajowa, 2024b.
53 | The judgment of the Constitutional Court from 19 June 2024, K 7/24; [Online]. Available at: www.trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/12818-tryb-uchwalenia-ustawy (Accessed: 4 August 2025).

actions of the speaker of the Sejm led to the permanent exclusion of specific individuals from the work of the Sejm, thus de facto creating an unknown category (in relation to the Constitution) of deputies who do not perform their mandates. Therefore, the Sejm proceeded in a composition formed as a result of unlawful actions of the speaker of the Sejm, preventing specific MPs from participating in legislative work. For this reason, this body cannot be classified as the Sejm in the constitutional sense. Consequently, the adoption of a law by an improperly formed body leads to its unconstitutionality.

2.8. Attempted illegal removal of judges

On 6 September 2024, politicians and judges from organisations such as Iustiitia and Themis (cooperating with the government) decided to announce their plan on how to remove judges in bulk, stating that they are no longer judges.[54] After the meeting (there were no invitations to the jurisprudents critical to government's actions, including those consociated in the Association Lawyers for Poland, the Association of Judges of Republic of Poland or the Independent Association of Prosecutors Ad Vocem), its participants came up with an idea of how to change a judiciary system. They euphemistically named it as 'restoration of the constitutional order' and regulating the status of 'neojudges'.[55]

As a result of this meeting, it was said that the appointments of judges since 2018 were made illegally with an involvement of the 'unconstitutional NCJ' and that they have no legal force and their appointments are not identical with the appointments referred to in the Constitution. This means that 'neojudges' are to 'come back to their previous position'.[56]

As a result, a segregation scheme for judges was invented, distinguishing among them a group of judges appointed after 2017. They were also defined as 'neojudges', that is, judges appointed incorrectly.[57]

The group of these judges was split into three subgroups.

54 | Kancelaria Prezesa Rady Ministrów, 2024b.

55 | The term 'neojudge' cannot be found in any Polish dictionary affirmed by the Council for the Polish Language, which operates at the Presidium of the Polish Academy of Science by the article 12 of Act of 7 October 1999 about Polish language (Journal of Laws of the Republic of Poland 2021.672 (12 April 2021). Each time I used the term 'neojudge' my text editor would underline this term informing me that such word does not exist in Polish language. The Constitution and other legal acts constantly use the term 'judge'. The term 'neojudge' is nowhere to be found. Moreover, the Polish language does not allow this word. It was made up as a way to describe judges appointed after 2018. As such, it has a disdainful scope and is used to humiliate them. Unfortunately, due to cunning propaganda action, this term became a constant work used by certain media sources, politicians and resolutions and other documents of judges associations. Further, since 6 September 2024, this term has been included in the dictionary of the Polish Government. On this date, it was officially used in a statement on the website of the Ministry of Justice and the Chancellery of the Prime Minister.

56 | Rojek-Socha, 2024.

57 | Before 2018, judge appointments were made by the motion of the NCJ that the Constitutional Tribunal reached at least five times the verdict that procedures, rules of functioning and the way in which new members were elected were unconstitutional (Ref. No. SK 43/06, K 40/07, SK 57/06, K 62/07, K 5/17). However, since 2018, judges' appointments are motioned by the NCJ which procedures of electing new members has been affirmed as consistent with the Constitution by the verdict of the Constitutional Tribunal (K 12/18).

The first one consists of young judges who became judges after graduating from the National School of Judiciary and Public Prosecution. It was said that 'the statute will treat their appointment as constitutional'. This means that, although their nominations are considered faulty, they will be 'healed' by virtue of the Act.

The second group is composed of people who 'are connected by so-called common design', which is said to be 'taking part in building undemocratic order in Poland'. It was not explained in detail what is understood by these populist slogans. Unofficially, there is talk about a group of 500 people who are to be simply removed from the judge profession.

The third group consists of people who 'got their promotions due to their overwhelming desire to do so'.

These two last groups will be able to 'return to their previous offices' only if they make a declaration that getting promoted was 'their mistake in life' that is referred to as 'active regret'. People who were practising other law related jobs such as attorneys or legal counsels before becoming judges were told that there is no going back to their previous jobs. They were 'generously' offered positions of judge assistants.

The presented solutions sharply interfere with the constitutional order of the Republic of Poland. Specifically, they ignore the regulations of the Constitution in particular the principle of irremovability of judges.[58]

These announcements about governmental repressions against judges are a brutal attack on the independence of the judge, and their realisation will mean the destruction of the judiciary. Those repressions may affect more than 3,000 judges, who successfully and rightfully underwent law determined procedures. Foreshadowed actions may only be compared to the repressions that affected judges during the martial law launched by the communist regime.

2.9. The Constitutional Tribunal

During its first days of ruling, the new government already demonstrated its attitude towards the Constitutional Tribunal, undermining the status of its judges by leaving an annotation to Tribunals' verdicts in the Journal of Laws of the Republic of Poland (published by the Prime Minister) that says that the Constitutional Tribunal is deprived of characteristics of the legally appointed tribunal due to the presence of an unauthorised member. The published verdict was released in a form appointed with a violation of a basic

58 | Article 179 of the Constitution: 'Judges shall be appointed for an indefinite period by the President of the Republic on the motion of the National Council of the Judiciary.'
Article 180 of the Constitution:
1. Judges shall not be removable.
2. Recall of a judge from office, suspension from office, transfer to another bench or position against his will, may only occur by virtue of a court judgment and only in those instances prescribed in statute.

rule having use in electing judges to the Constitutional Tribunal and as a consequence violating the core of the right to a tribunal established by law.[59]

This annotation on the verdicts given by the Constitutional Tribunal has no legal foundation. In official journals, legal acts are to be published in the form given by the author – without any annotations.

As of 6 March 2024, the government has ceased publishing any rulings of the Constitutional Tribunal. The Sejm also proceeded with a bill that will allegedly restore the functioning of the Constitutional Tribunal. There are plenty unconstitutional ideas in it, but there are provisions that blatantly violate the legal order. It is planned, for example, that any rulings issued in the adjudicating panel which consisted of 'a person unauthorised to adjudicate' are worthless and does not sway the results mentioned in the Constitution.[60] In this way, the legislature gives itself eligibility to determine who is an unauthorised person, ergo who is a judge of the Constitutional Tribunal or undermining the legal force of currently valid verdicts given by the Constitutional Tribunal. This is entirely a constitutional matter and entering this area of regulations by the Sejm is an obvious abuse of the law determining the border of competences of the legislature. It is also a violation of the Constitution and an obvious interference in the judiciary.

3. Reversal of meanings

The above examples of breaking the law do not deplete all the 'achievements' of the current governments. We can also point out the following: lacking the legal basis for the withdrawal of the person assigned by the Prime Minister under the resolution of the President for scheduling a judge to be a chairman of the assembly of judges of the Civil Chamber of the Supreme Court[61]; attempts to intimidate the First President of the Supreme Court by initiating criminal proceedings for compliance with the law[62]; trying to prevent the election of Presidents managing the work of the chambers of the Supreme

59 | 'According to the verdict of the European Court of Human Rights in case: Xero Flor in Poland LLC v. Poland from the day of 7.05.2021, complaint number 4907/18; Wałęsa v. Poland from the day of 23.11.2023, complaint number 50849/21; M.L v. Poland from the day of 14.12.2023, complaint number 40119/21, the Constitutional Tribunal bereft of characteristics of the legally appointed tribunal due to the presence of an unauthorised member. According to this opinion, published verdict was released in a form which had been appointed with a violation of a basic rule having use in electing judges to the Constitutional Tribunal and as a consequence violating the core of the law to a court appointed on a basis of the resolution.' Rule of Law Observer, no date.

60 | The bill provides: a bench of judges of the Tribunal in which a person elected to the position of judge of the Tribunal sat in violation of the provisions of the Act of 25 June 2015 on the Constitutional Tribunal (Journal of Laws of 2016, item 293 and of 2018, item 1077) and the judgments of the Tribunal of 3 December 2015, file no. K 34/15 (Journal of Laws, item 2129) and of 9 December 2015, file no. K 35/15 (Journal of Laws, item 2147), as well as the person elected in his place, hereinafter referred to as 'persons not entitled to adjudicate'. (Article 10 Law of 13 September 2024 – Provisions introducing the Act on the Constitutional Tribunal) [Online]. Available at: www.orka.sejm.gov.pl (Accessed: 4 August 2025), Akt prawny.

61 | Sąd Najwyższy, 2024c.

62 | Prokuratura wszczęła trzecie śledztwo ws. pierwszej prezes Sądu Najwyższego, 2024.

Court[63]; pressurising courts by announcing depletion of budget of judiciary institutions, which oppose government's authoritarian actions[64]; ignoring verdicts and undermining the Supreme Court.[65]

With such a range of actions marked by bad will it is the government must be aware of the illegality of their actions. For the time of being in the opposition the current governing were alarming the public opinion that the rule of law was violated, basic human rights were invaded, as were are the rules of functioning of publicly-funded institutions. The independence of judges as well as autonomy of courts were said to be in danger. While assuming authority, the current government promised the restoration of the rule of law and 'constitutional order'.

Nowadays, the constitutional principle of legalism is thus being treated as a dummy tool to hide an intention to take over every publicly-funded institution. Instead of operating on the basis of, and within the limit of, the currently valid law, which is required by the principle of legalism, everyday practice gives us impression that the law is being treated instrumentally. In the official interview the Prime Minister Donald Tusk defined this way of acting: 'everything will be agreeably with the law as we understand it'.[66] It can be seen that the government first act and then look for the legal justification of their actions. According to the Minister of Justice Adam Bodnar: 'We have a situation in which we are restoring the constitutionality and try to find a legal foundation to do so'.[67]

The shift in political power is a typical phenomenon in a democratic state of the law. However, such a change should not lead to the undermining of the constitutional order of the country. Unfortunately, in Poland, the change of authority did not look like a shift of state power but as a hurried 'takeover' of individual institutions and often unlawful personnel changes and revanchism. Representative is a speech of the Prime Minister Donald Tusk at the conference 'Ways of leaving a constitutional crisis', organised in the building of the Senate 10 September 2024, where he was accompanied by the Speaker of the Sejm, Szymon Hołownia, and the Speaker of the Senate, Małgorzata Kidawa-Błońska, and a string of Polish constitutionalists. Donald Tusk then announced a de facto break with the rule of law and the principle of legalism in public actions, stating:

> Today we have a need to act in categories of a fighting democracy. Probably not once will we make mistakes or take actions which according to some legal authority figures will not be consistent with the law or not fully consistent with the law but nothing exempts us from acting every day.[68]

The Prime Minister gave legitimacy to these actions by saying that 'a kind of 'contamination' affected public authorities, legal acts, regulations as well as the Constitution of the Republic of Poland:

63 | Sąd Najwyższy, 2024b.
64 | Mikowski, 2024.
65 | Prokuratura Krajowa, 2024a.
66 | „Wszystko będzie zgodnie z prawem, tak jak my je rozumiemy" - zapowiadał Tusk w sprawie mediów publicznych, 2023.
67 | Minister Bodnar dał popis! "Przywracamy tę konstytucyjność i szukamy jakiejś podstawy prawnej". Bezlitosne Komentarze, 2023.
68 | Kancelaria Prezesa Rady Ministrów, 2024a.

> The real problem is the matter of interpreting the acts of law and their usage by the government [...]. If we want to restore a constitutional order, foundations of the liberal democracy, everyday we encounter the situations in which we have tools on command which does not give us chance to repair our reality.[69]

The theoretical bases for the 'fighting democracy' methods were delivered by the participants to the project 'Transition 2.0.' since 2023.[70] Adam Bodnar, nowadays the Minister of Justice, lamented about Polish legal system:

> [...] they have to be taken into account as a scenario in which political and legal actions are achievable, and which of them are merely theoretical and illusory. They are like traps installed in the system that may prevent a natural return to the rule of law system.[71]

Moreover, he has been stubbornly looking for a way to get past the constitutional rule of irremovability of judges. As he wrote,

> [...] one of the most important obstacles could be the implementation of any vetting procedure for judges. The President of Poland Andrzej Duda declared on different occasions that any judicial nominations made by him cannot be challenged, as they were made within his constitutional prerogative. [...] This is a controversial view.[72]

With regard to the matter of the NCJ, Adam Bodnar noticed:

> [...] it is a fundamental task to resolve the problem of the NCJ. The only solution is the appointment of judges to the NCJ in accordance with constitutional and legislative practices that existed before 2018. 15 judicial members should be appointed by other judges, in order to guarantee judicial independence standards. For this purpose, a relevant legislative act should be implemented.

Simultaneously, the future Minister wondered how to reduce the constitutional tenure of the judges in the NCJ: 'The question is whether the existing terms of current members could be shortened'.[73] Because of this he came forward with the journalistic statement that 'original nominations for the period 2018–2022 (first term) and 2022–2026 (second period) were made in grave violation of the Constitution'. While lacking legal arguments he invoked the argument of public discourse [74] and judgments made by international tribunals without any normative value, he came to the conclusion that 'Their nominations have been challenged in the public discourse and in the jurisprudence of the CJEU and the EctHR'. After such reasoning, Adam Bodnar gave a statement that 'These

69 | Ibidem.
70 | Bobek et al., 2023.
71 | Bodnar in Bobek et al., 2023, p. 301.
72 | Ibidem, p. 301.
73 | Ibidem, p. 304.
74 | A. Bodnar forgot that 'the crowd does not desire the truth and despises reality, but idolises deceptive illusions'. Le Bon, 2018, p. 39.

developments potentially provide an argument that the existing terms of some members could be shortened'.[75]

Mirosław Wyrzykowski, a retired judge of the Constitutional Tribunal, professor at the University of Warsaw, as well as a determined critic of the previous government (he wrote about 'the process of destroying the Polish constitutional order' and about 'the political villainy that the destruction of the state's constitutional order by unconstitutional and anti-constitutional accomplished facts has become'[76]), announced in 2023 that 'a real dilemma will arise: whether it is possible, in order to restore constitutionality, to use methods that will be questionable from the perspective of their constitutionality'.[77] He also raised the question of 'how to restore the state of affairs in accordance with the Constitution without violating the constitutional guarantee of the irremovability of judges?'[78] As a solution, he offered 'to create a mechanism that would lead to the rectification of defects in the appointment of a judge'[79] and 'to differentiate the situation of three groups of judges appointed after 2018'. He then assumed that 'the two categories of judges who would be subject to this mechanism of re-evaluation and appointment'[80]. By the way, it is significant that he treats the holders of the judicial power as an 'object' of politics.

An even more restrictive mechanism had been prepared by Mirosław Wyrzykowski for the judges of the Constitutional Tribunal, assuming that 'zeroing out the tribunal is an attractive concept, as it removes the most serious obstacle to restoring constitutionality'.[81] He justified an obvious conflict of these ideas with the constitutional principle of irremovability of judges by saying that 'ordinary legal instruments will not be effective in achieving the intended goal' and 'an extraordinary situation requires extraordinary measures'.[82] It is clear that Mirosław Wyrzykowski, while writing those words, was fully aware of the illegality of the suggested measures. He wrote about 'extraordinary measures, including when their legality may be in dispute'. He excused by the need of the moment that, in his opinion, we are 'dealing with an extraordinary unconstitutional state and an extraordinary state requires extraordinary measures'.[83]

It can be clearly seen how the rule of law is treated in today's Poland ruled by decrees and opinions with no normative value. Applying various tricks from juggling the appearance of the law to open violations of the law under the banner of fighting for the restoration of the rule of law is a premeditated act. If someone was under the illusion that these actions were taken on impulse, he or she should sober up. A proper name for this group of notions and actions presented by the government of today's Poland is 'the bogus rule of law'. 'Bogus' means one that is false, feigned, pretended or – as it is used in everyday, colloquial speech – fake.

I think the core of this phenomenon had been shown by its keen proponent, Marek Safjan, who is the retired judge of the Court of Justice of the European Union and ex-President of the Constitutional Tribunal. By formulating that 'We need to break out from

75 | Bodnar in Bobek et al., 2023, p. 304.
76 | Wyrzykowski in Bobek et al., 2023, p. 228.
77 | Ibidem.
78 | Ibidem, p. 241.
79 | Ibidem, p. 242.
80 | Ibidem.
81 | Ibidem, p. 247.
82 | Ibidem, p. 248.
83 | Ibidem.

the trap of legal formalism' in the article named 'Rule of law immediately'[84], he got to the heart of the matter.

This concept combines the declared 'fighting democracy'[85] by Prime Minister Donald Tusk with ideas such as transitional justice[86] or repressive tolerance.

The concept of 'fighting democracy' (in German: streibare demokratie) originated in 1937 and was popularised by the political scientist named Karl Loewenstein. Compendiously, this concept assumes that the democracies should defend themselves from undemocratic actions with the help of tools and measures set in the constitution, with simultaneous creation of repressions set against certain groups in the country.[87] However, the idea of repressive tolerance assumes that one that does not tolerate it should be repressed.[88] The term was created by Herbert Marcuse, a leading neo-Marxist of the second half of the 20th century, in an essay named 'Repressive Tolerance' published as a chapter of a book called 'A Critique of Pure Tolerance' from 1965. According to this idea 'real and deep tolerance must rely on intolerance of certain fake ideas and movements' and 'the real tolerance can not protect false ideas and undeserved actions'.[89]

Echoes of all these ideas can be seen nowadays in Poland as a demonstrational violation of the principle of legalism by a whole gamut of actions: from replacing laws with decrees and lawyers' opinions through a legal mask to open law violations. All these are made under the banner of 'restoring the rule of law'. The issues is that the details show the opposite, as these intellectual concepts are only excuses for violence and deprivation of civil rights of those whose political views are not consistent with those imposed by liberal and revolutionary elites. A common characteristic of briefly presented ideas is showiness and superficiality in the execution of goals opposite than those declared. They consist of a bogus rule of law that in the name of establishing the rule of law assumes breaking the law and raping the constitution.

By adding to traditional and classical ideas of democracy, equity or tolerance adjectives such as 'fighting', 'transitional' or 'repressive', their true meaning is skewed, creating not only products of the Newspeak but also institutions that distort beautiful and good ideas.[90] They only serve to strengthen a certain political system, which will neither give citizens a free choice of their representatives nor freedom of expression of opinions, information and ideas without the interference of public authorities. The bogus rule of law being introduced in Poland is a signal to the entire society that acting under the flag of the rule of law could mean a lack of certainty of tomorrow for everyone. It is obvious that every human being can be subject to arbitrary treatment by the authorities, to a

84 | Safjan, 2023.
85 | This is the English term used by the Chancellery of the Prime Minister in an official announcement (The Chancellery of the Prime Minister, 2024). However, it is correct to speak of 'militant democracy', which is the translation of the German 'streibare demokratie'. For more details on this topic, see Ossowska-Salamonowicz and Giżyńska, 2022, p. 33.
86 | García-Sayán in Bobek et al., 2023, p. 92.
87 | Wiśniewski, 2020, p. 16.
88 | Dorosiński, 2024, p. 67.
89 | Kołakowski, 1988, p. 1117.
90 | According to the Constitution of 1952, in force until 14 February 1976, the People's Republic of Poland was a state of people's democracy (Article 1(1)). What kind of democracy it was is best evidenced by a joke comparing the relationship between democracy and people's democracy to the relationship between a chair and an electric chair.

derogatory search, be charged with imaginary charges or deprived of property and even taken away the right to express her/his own opinions. I leave unanswered the question of whether Poland is already an anocracy or is only heading in this direction.[91]

Nowadays, if we remain passive to this attack on the world as we know and if we do not shout about it at the top of our voice, we can soon forget that 'freedom is the freedom to say that two plus two make four. If that is granted, all else follows'.[92]

91 | Anocracy is a hybrid form of a state 'suspended' between democracy and authoritarianism, a political-legal regime that is internally incoherent, possessing the constitutive features of democracy and autocracy at the same time (see Prokop, 2015, pp. 31–46).

92 | Orwell, 1949, p. 68.

Bibliography

Auzbiter, M. (2024) 'Trybunał Konstytucyjny wstrzymał działania Adama Bodnara ws. Barskiego i PK', *Rzeczpospolita*, 15 January [Online]. Available at: https://www.rp.pl/sady-i-trybunaly/art39698111-trybunal-konstytucyjny-wstrzymal-dzialania-adama-bodnara-ws-barskiego-i-pk#:~:text=Prawnicy.%20PK%20nie%20zgadza%20si%C4%99%20z%20odwo%C5%82aniem%20Barskiego (Accessed: 5 August 2025).

Banaszak, B. (2004) *Prawo konstytucyjne*. Warszawa: C. H. Beck.

Bobek, M., Bodnar, A., von Bogdandy, A., Sonnevend, P. (2023) *Transition 2.0. Re-establishing Constitutional Democracy in EU Member States*. Baden-Baden: Nomos; https://doi.org/10.5771/9783748914938.

Bodnar, A. (2022) 'Słabsi czy mniej zamożni często nie mogą sobie pozwolić na luksus wymiaru sprawiedliwości', *Wyborcza*, 14 October [Online]. Available at: http://www.wyborcza.pl/magazyn/7,124059,29016180,slabsi-czy-mniej-zamozni-czesto-nie-moga-sobie-pozwolic-na.html#:~:text=Niestety%20ci%20słabsi,%20mniej%20zamożni%20czy%20gorzej%20ustosunkowani (Accessed: 5 August 2025).

Broński, G. (2024) 'Prokuratura torpeduje własne śledztwo i nie chce starcia w sądzie? Sędzia Iwaniec: 'To było pisane na kolanie'', *Niezalezna*, 23 September [Online]. Available at: http://www.niezalezna.pl/polska/prokuratura-torpeduje-wlasne-sledztwo-najpierw-odkryli-grupe-przestepcza-teraz-unikaja-starcia-w-sadzie/527357 (Accessed: 5 August 2025).

Broński, G., Romaszewski, M. (2024) 'Dzisiaj posiedzenie SN, a kolejny obrońca s. Iwańca ofiarą represji. Prezes nagle obniżył mu wynagrodzenie', *Niezalezna,* 24 September [Online]. Available at: https://niezalezna.pl/polityka/dzisiaj-posiedzenie-sn-a-kolejny-obronca-iwanca-ofiara-represji/527418 (Accessed: 5 August 2025).

Chaos wTVP. Pobita poseł PiS trafiła do szpitala (2023) *Dorzeczy*, 20 December [Online]. Available at: http://www.dorzeczy.pl/kraj/528156/joanna-borowiak-pobita-w-siedzibie-tvp-posel-pis-trafila-do-szpitala.html#:~:text=Poseł%20PiS%20Joanna%20Borowiak,%20która%20została%20poturbowana%20przez (Accessed: 5 August 2025).

Dorosiński, R. (2024) *'Mowa nienawiści' – KOŃ TROJAŃSKI rewolucji kulturowej*. Warszawa: Ordo Iuris.

Garlicki, L. (ed.) (2016) *The Constitution of the Republic of Poland. Comment. Volume I*. 2nd edn. Warsaw: LEX.

Judgment of the Constitutional Court of 19 June 2024, fole no. K 7/24, OTK-A 2024/60.

Judgment of the Constitutional Tribunal of 16 March 2011, file no. K 35/08, OTK ZU 2/A/2011, item 11.

Judgment of the Constitutional Tribunal of 18 January 2024, file no. K 29/23, Journal of Laws 2024/96.

Judgment of the Constitutional Tribunal of 25 March 2019, file no. K 12/18, OTK-A 2019/17.

Judgment of the Constitutional Tribunal of 27 May 2002, file no. K 20/01, OTK-A 2002/3/34.

Kancelaria Prezesa Rady Ministrów (2024a) 'Działamy w imię demokracji walczącej' *Kancelaria Prezesa Rady Ministrów*, 10 September [Online] Available at: https://www.gov.pl/web/premier/dzialamy-w-imie-demokracji-walczacej (Accessed: 5 August 2025).

Kancelaria Prezesa Rady Ministrów (2024b) 'Rządy prawa to nasz wspólny priorytet' *Kancelaria Prezesa Rady Ministrów*, 6 September [Online] Available at: http://www.gov.pl/web/premier/rzady-prawa-to-nasz-wspolny-priorytet (Accessed: 5 August 2025).

Kołakowski, L. (1988) *Główne nurty marksizmu*. Warszawa: Wydawnictwo Krag.

Le Bon, G. (2018) *Psychologia tłum*. Warszawa: Vis-a-vis.

Mikowski, M. (2024) 'Pozbawią 'neosędziów' pensji w KRS? Szykuje się wojna w Krajowej Radzie Sądownictwa', *Rzeczpospolita,* 13 August [Online]. Available at: http://www.rp.pl/prawnicy/art40955501-pozbawia-neosedziow-pensji-w-krs-szykuje-sie-wojna-w-krajowej-radzie-sadownictwa#:~:text=Zapowiedź%20rządowych%20działań%20w%20sprawie%20budżetu%20KRS%20z (Accessed: 5 August 2025).

Minister Bodnar dał popis! „Przywracamy tę konstytucyjność i szukamy jakiejś podstawy prawnej". Bezlitosne Komentarze (2023) *wPolityce.pl*, 30 December [Online]. Available at: http://www.wpolityce.pl/polityka/676441-min-bodnar-dal-popis-szukamy-jakiejs-podstawy-prawnej#:~:text=Uważam,%20że%20podstawa%20prawna%20wynikająca%20z%20Kodeksu%20spółek (Accessed: 4 August 2025).

Ministerstwo Sprawiedliwości (2024) 'Powołania i odwołania Prezesów oraz Wiceprezesów sądów powszechnych', *Ministerstwo Sprawiedliwości*, 13 June [Online]. Available at: http://www.gov.pl/web/sprawiedliwosc/powolania-i-odwolania-prezesow-oraz-wiceprezesow-sadow-powszechnych2#:~:text=Minister%20Sprawiedliwości%20Adam%20Bodnar%20podczas%20dotychczasowego%20pełnienia%20swojej,79%20procedur%20odwołania%20prezesów%20i%20wiceprezesów%20sądów%20powszechnych (Accessed: 4 August 2025).

Morawska, E. (2003) *Klauzula państwa prawnego w Konstytucji RP na tle orzecznictwa Trybunału Konstytucyjnego*. Torun: Wolters Kluwer.

Mrowicki, R. (2024) 'Nagły ruch Bodnara ws. Barskiego. Teraz pokazuje opinię promotora Dudy', *Wiadomości*, 13 January [Online]. Available at: https://wiadomosci.wp.pl/bodnar-opinie-prawne-dot-przywrocenia-prokuratora-barskiego-6984097941731840a (Accessed: 5 August 2025).

Orwell, G. (1949) *1984*. London: Secker and Warburg.

Ossowska-Salamonowicz, D., Giżyńska, M. (2022) 'Standardy delegalizacji partii politycznych w świetle orzecznictwa Europejskiego Trybunału Praw Człowieka – zagadnienia wybrane', *Acta Universitatis Wratislaviensis. Studia nad Autorytaryzmem i Totalitaryzmem*, 44(3), pp. 31–44 [Online]. Available at: https://doi.org/10.19195/2300-7249.44.3.3 (Accessed: 5 August 2025).

Prezesi sądów od Ziobry jednak bez parasola. Bodnar nie uzna zabezpieczenia TK (2024) *Rzeczpospolita*, 1 May [Online]. Available at: http://www.rp.pl/sady-i-trybunaly/art40288581-prezesi-sadow-od-ziobry-jednak-bez-parasola-bodnar-nie-uzna-zabezpieczenia-tk#:~:text=Minister%20sprawiedliwości%20nie%20uzna%20najnowszego%20zabezpieczenia (Accessed: 5 August 2025).

Prokop, M. (2015) 'Demokratyczno-autorytarna hybryda: redefinicja kategorii teoretycznej', *Historia i Polityka*, 13(20), pp. 31–46 [Online]. Available at: https://doi.org/10.12775/HiP.2015.002 (Accessed: 5 August 2025).

Prokuratura Krajowa (2024a) 'Oświadczenie Prokuratury Krajowej w sprawie dzisiejszego stanowiska wyrażonego w Sądzie Najwyższym', *Prokuratura Krajowa*, 27 September [Online] Available at: http://www.gov.pl/web/prokuratura-krajowa/oswiadczenie-prokuratury-krajowej-w-sprawie-dzisiejszego-stanowiska-wyrazonego-w-sadzie-najwyzszym (Accessed: 5 August 2025).

Prokuratura Krajowa (2024b) 'Wnioski o uchylenie immunitetu w sprawie ukrywania akt dyscyplinarnych', *Prokuratura Krajowa*, 7 July [Online]. Available at: http://www.gov.pl/web/prokuratura-krajowa/wnioski-o-uchylenie-immunitetu-w-sprawie-ukrywania-akt-dyscyplinarnych (Accessed: 5 August 2025).

Prokuratura Krajowa (2024c) 'Wnioski o uchylenie immunitetów sędziowskich w tzw. aferze hejterskiej"', *Prokuratura Krajowa* [Online]. Available at: http://www.gov.pl/web/prokuratura-krajowa/wnioski-o-uchylenie-immunitetow-sedziowskich-w-tzw-aferze-hejterskiej (Accessed: 5 August 2025).

Prokuratura wszczęła trzecie śledztwo ws. pierwszej prezes Sądu Najwyższego (2024) *Rzeczpospolita*, 23 August [Online]. Available at: http://www.rp.pl/sady-i-trybunaly/art41014981-prokuratura-wszczela-trzecie-sledztwo-ws-pierwszej-prezes-sadu-najwyzszego#:~:text=Prokuratura%20Krajowa%20wszczęła%20śledztwo%20w%20sprawie (Accessed: 5 August 2025).

Rojek-Socha, P. (2024) 'Czyściec dla zwykłych neo-sędziów, dyscyplinarka dla funkcyjnych - projekt na finiszu', *prawo.pl*, 11 September [Online]. Available at: http://www.prawo.pl/prawnicy-sady/neo-sedziowie-propozycje-ministerstwa-sprawiedliwosci-i-komisji-kodyfikacyjnej,528962.html (Accessed: 5 August 2025).

Rule of Law Observer (no date) [Online]. Available at: http://www.obserwator-praworzadnosci.pl/ (Accessed: 4 August 2025).

Safjan, M. (2023) 'Państwo prawa bez zwłoki. Trzeba wyrwać się z pułapki prawniczego formalizmu', *wyborcza.pl*, 28 November [Online]. Available at: http://www.wyborcza.pl/7,75968,30449535,panstwo-prawa-bez-zwloki-trzeba-wyrwac-sie-z-pulapki-prawniczego.html#:~:text=Trzeba%20wyrwać%20się%20z%20pułapki%20prawniczego%20formalizmu.%20Opinie (Accessed: 5 August 2025).

Sąd Najwyższy (2024a) 'Komunikaty o sprawach', *Sąd Najwyższy*, 27 September [Online]. Available at: http://www.sn.pl/aktualnosci/SitePages/Komunikaty_o_sprawach.aspx?ItemSID=671-b6b3e804-2752-4c7d-bcb4-7586782a1315&ListName=Komunikaty_o_sprawach (Accessed: 5 August 2025).

Sąd Najwyższy (2024b) 'Wydarzenia', *Sąd Najwyższy*, 3 September [Online]. Available at: http://www.sn.pl/aktualnosci/SitePages/Wydarzenia.aspx?ItemSID=1017-0dc69815-3ade-42fa-bbb8-549c3c6969c5&ListName=Wydarzenia (Accessed: 5 August 2025).

Sąd Najwyższy (2024c) 'Wydarzenia', *Sąd Najwyższy*, 10 September [Online]. Available at: https://www.sn.pl/aktualnosci/SitePages/Wydarzenia.aspx?ItemSID=1022-0dc69815-3ade-42fa-bbb8-549c3c6969c5&ListName=Wydarzenia (Accessed: 5 August 2025).

Sędzia Cezariusz Baćkowski powołany przez Ministra Sprawiedliwości Adama Bodnara do pełnienia funkcji Rzecznika Dyscyplinarnego (2024) *gov.pl – Serwis Rzeczypospolitej Polskiej* [Online]. Available at: http://www.gov.pl/web/sprawiedliwosc/sedzia-cezariusz-backowski-powolany-przez-ministra-sprawiedliwosci-adama-bodnara-do-pelnienia-funkcji-rzecznika-dyscyplinarnego#:~:text=Po%20powołaniu%20na%20stanowisko%20Sędziego%20Sądu%20Apelacyjnego (Accessed: 5 August 2025).

Skandaliczny atak na KRS: dziennikarze usunięci, szafy pancerne rozprute (2024) *fronda.pl*, 3 July [Online]. Available at: http://www.fronda.pl/a/Skandaliczny-atak-na-KRS-dziennikarze-usunieci-szafy-pancerne-rozprute-Wideo,232035.html (Accessed: 5 August 2025).

The Chancellery of the Prime Minister (2024) 'We stand for the Fighting Democracy', *The Chancellery of the Prime Minister*, 10 September [Online] Available at: http://www.gov.pl/web/primeminister/we-stand-for-the-fighting-democracy#:~:text=We%20stand%20for%20the%20Fighting%20Democracy.%2010.09.2024.%20The (Accessed: 5 August 2025).

Tuleja, P. (ed.) (2023) *The Constitution of the Republic of Poland. Commentary.* 2nd edn. Warsaw: LEX.

Uchwała Sejmu RP w sprawie usunięcia skutków kryzysu konstytucyjnego (no date) *Trybunał Konstytucyjny* [Online]. Available at: http://www.trybunal.gov.pl/postepowanie-i-orzeczenia/komunikaty-prasowe/komunikaty-po/art/12777-uchwala-sejmu-rp-w-sprawie-usuniecia-skutkow-kryzysu-konstytucyjnego (Accessed: 4 August 2025).

Wiśniewski, A. (2020) 'Europejski Trybunał Praw Człowieka i demokracja', *Acta Universitatis Wratislaviensis. Studia nad Autorytaryzmem i Totalitaryzmem*, 42(4), pp. 7–29 [Online]. Available at: https://doi.org/10.19195/2300-7249.42.4.1 (Accessed: 5 August 2025).

„Wszystko będzie zgodnie z prawem, tak jak my je rozumiemy" - zapowiadał Tusk w sprawie mediów publicznych (2023) *Rzeczpospolita*, 26 December [Online]. Available at: http://www.niezalezna.pl/media/tv-republika/wszystko-bedzie-zgodnie-z-prawem-tak-jak-my-je-rozumiemy-zapowiadal-tusk-w-sprawie-mediow-publicznych/507546#:~:text= (Accessed: 5 August 2025).

Design by
IDEA PLUS
Elemér Könczey
Kolozsvár / Cluj-Napoca (Romania)

Prepress
PÁTRIA PRINTING HOUSE CO.
Chief executive officer: Katalin Orgován

Printed and bound