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FLAGSHIP STUDIES

Lilla GARAYOVÁ*

The Best Interests of the Child Principle

ABSTRACT: *The best interest of the child principle, a pillar of international family law and children's rights, is enshrined in the UN Convention on the Rights of the Child and serves as a guiding framework for decision-making affecting children. This article explores the evolution, interpretation, and application of the best interest principle, with a particular focus on the role of the Committee on the Rights of the Child. Additionally, the article highlights historical misapplications of the best interest principle, such as forced adoptions and child migrations, and underscores the risks of vague or biased interpretations. Drawing on Eekelaar's conceptualisation of children's basic, developmental and autonomy interests, the article emphasises the need for a child-centred approach.*
KEYWORDS: *best interest of the child, UN Convention on the Rights of the Child, children's rights, Committee on the Rights of the Child, General Comment No. 14, child protection, family law, child welfare*

1.
Introduction

The best interest of the child principle stands as a pillar of international family law and children's rights, serving as a guiding framework for ensuring the welfare and protection of children in a wide range of legal contexts. Recognised across various international treaties, most notably the UN Convention on the Rights of the Child (UNCRC), this principle mandates that in all actions concerning children, their best interests must be a primary consideration. The Committee on the Rights of the Child, tasked with interpreting and overseeing the implementation of the UNCRC, plays a crucial role in shaping the application of this principle. However, its interpretation

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often evolves to address the complexities of contemporary issues affecting children globally.

This article aims to explore how the UNCRC Committee interprets and applies the best interest principle, particularly in the face of emerging challenges such as migration, child protection and the evolving nature of family structures. While the principle is well-established, its application is often challenging and must adapt to the realities of varying national contexts, societal changes and the specific vulnerabilities children face today.

By examining the Committee's General Comments, concluding observations and case law, this article will provide a detailed analysis of the evolving interpretation of the best interest principle. In particular, it will focus on how the Committee balances competing rights and interests, such as parental rights, State interests and the specific needs of children, to ensure that their welfare remains at the forefront of legal and policy considerations. By providing a comprehensive analysis of how the best interest principle is applied in diverse contexts, this article seeks to contribute to the ongoing discourse on international child protection and the evolving role of the UNCRC Committee in shaping its interpretation.

2.
The Best Interest of the Child Principle

The term 'best interest of the child' is widely recognised, yet its precise definition remains somewhat ambiguous. The concept of the best interest of the child, a cornerstone of child protection, is deeply rooted in legal and social frameworks. Its prominence was greatly enhanced with its formal inclusion in the United Nations Convention on the Rights of the Child. However, despite its broad application, there remains considerable ambiguity surrounding what this principle entails across various circumstances. This lack of a clear, operational definition points to the need for a more precise framework that can be effectively applied in both legal and practical settings. Although widely regarded as essential, the principle often suffers from a degree of vagueness, complicating its consistent application, particularly as new societal challenges and technological innovations, such as assisted reproductive technologies, create unprecedented legal and ethical dilemmas.

The Convention on the Rights of the Child (UNCRC) is more than just a list of children's rights. While it certainly outlines these rights in detail, its impact is much broader. The UNCRC has introduced a significant shift in how children are viewed legally and socially. In earlier times, as seen in documents like the Geneva

Declaration of 1924[1] and the Declaration on the Rights of the Child of 1959,[2] children were mainly seen as beings who needed protection and care – they were more like objects of concern than individuals with their own rights.

However, since the UNCRC was adopted in 1989, this perspective has changed dramatically. Children are now recognised as individuals with their own rights. This is not merely a symbolic change. The UNCRC, which has been ratified by almost every country in the world, legally enforces this view by establishing clear principles and rights for children. This broad acceptance underscores the strength and seriousness of the UNCRC's approach, firmly placing children as rights-holders in the international legal landscape. This evolution marks a critical advancement in how children's rights are understood and protected globally.

The new legal status of children as active rights-holders is primarily grounded in two interconnected articles of the Convention on the Rights of the Child – Article 3, which focuses on the best interests of the child, and Article 12, which emphasises the child's right to express opinions on all matters affecting them. Together, these Articles not only uphold the right of children to have a say in decisions impacting their lives but also ensure that their best interests are always considered in such decisions. These Articles serve dual roles within the UNCRC. They are recognised as two of the four foundational principles of the Convention, underscoring their importance to the overall framework. However, they are also distinct rights in their own right:

1. The right for a child's best interests to be assessed in any decision or action that affects them. (Article 3)
2. The right for a child to be heard, ensuring that their opinions are not only expressed but also given due consideration. (Article 12)

This dual recognition emphasises not only the procedural aspect of involving children in decisions affecting them but also the substantive right of having their best interests as a primary consideration. This approach represents a significant shift towards acknowledging and respecting children as individuals with agency and rights, aligning legal practices with the evolving understanding of children's roles within society. These rights, as outlined in Articles 3 and 12 of the Convention on the Rights of the Child, are granted not only to individual children but also collectively to all children defined by their age, as those under 18.

Despite the adoption of the UNCRC by the United Nations 35 years ago, numerous questions persist about the real-world impact of those rights. Specifically, it remains unclear how this recognition of children as rights-holders has influenced national

1 General Assembly of the League of Nations, Declaration of the Rights of the Child, 26 September 1924

2 UN General Assembly, Declaration of the Rights of the Child, A/RES/1386(XIV), UN General Assembly, 20 November 1959

legislation, relevant legal frameworks and various other contexts. There is ongoing debate and inquiry into whether these rights are fully integrated and respected at the national level, and how these legal principles are applied in practical settings affecting children. The effectiveness of the UNCRC in bringing about substantive change in the treatment and rights of children across different countries continues to be a critical area of research and discussion.

A more in-depth analysis of the concept of what is best for children in legal terms, reveals that the phrase 'best interest' is relatively new to our legal systems. Previously, the focus was on 'the well-being of the child', but this has evolved into what is currently known as the 'best interest' principle, which is enshrined in Article 3 of the Convention on the Rights of the Child. This marks it as a thoroughly modern concept within legal discussions – a concept that, despite its importance, has not been fully explored in academic circles yet.

The definition of 'best interest' is still somewhat unclear and can be applied in many different ways, making it a flexible yet complex tool in legal contexts. It is particularly useful when addressing specific legal challenges or when being refined and expanded through court decisions. However, its broad and adaptable nature means that it requires careful interpretation to ensure it effectively protects children's welfare.

2.1. The Evolution of the Principle of the Best Interest of the Child

The concept of the 'best interest of the child' predates the formal recognition of children's specific human rights. Initially, it served as a general standard for guiding decisions concerning children, particularly in contexts where explicit legal rights had not yet been established. Although broad and somewhat ambiguous, this principle provided an essential framework for assessing decisions and actions that affected children.

Historically, the best interest principle has been invoked to justify a wide range of actions, from routine decisions to those that significantly altered the lives of children. A notable example is Dr Barnardo's late 19th-century advocacy in England where he championed the shift from institutional care to foster care, reflecting the application of this principle in transforming child welfare practices.[3] This shift, considered progressive at the time, was driven by the belief that foster care environments would better meet the developmental and emotional needs of children than institutional settings, marking an early application of the best interest principle to

3 Barnardo's UK. (2012). The history of Barnardo's. (Accessed 10.5.2024.) Retrieved from http://www.barnardos.org.uk:80/what_we_do/who_we_are/history.htm

promote child welfare. Such historical examples underscore the enduring reliance on this principle in shaping child welfare policies, even before the formal recognition of children's rights.

However, the application of the best interest principle has not always aligned with what would today be considered acceptable under human rights standards. In the mid-20th century, actions such as forced adoptions and forced migrations were often justified under the pretext of serving children's best interests. These measures, now recognised as severe violations of human rights, reveal the potential dangers of how broadly and ambiguously this principle can be interpreted. The notion of acting in the 'best interest' of the child has, at times, been used to legitimise actions that are now widely condemned. This is particularly evident in historical policies involving the large-scale removal of children from their families – both domestically and across borders – under the rationale of providing them with 'better opportunities'. These practices, once seen as beneficial, are now universally regarded as abuses, reminding us of the complexities and risks inherent in the flexible interpretation of this principle.

A striking example of these misguided practices is the history of forced adoption in Australia, as documented in a 2012 Senate committee report.[4] This report preceded a national apology for these practices issued by the then Prime Minister Julia Gillard in 2013.[5] Between the late 1940s and early 1980s, approximately 150,000 babies born to unmarried mothers were forcibly adopted in Australia. This policy, backed by the Government and supported by churches and charities, was justified under the belief that it was in the children's best interests. The prevailing rationale was that children born to mothers deemed to be of low moral standing or living in poverty would lead better lives if adopted by infertile couples of higher social and economic status. This policy reflected deeply ingrained societal prejudices and assumptions about morality, class and family structure, prioritising the perceived well-being of children over the rights and dignity of their biological mothers. The forced adoptions, now recognised as grave violations of human rights, reveal how the principle of the best interest of the child can be dangerously misinterpreted when shaped by discriminatory social values rather than a genuine commitment to the child's welfare.[6]

The Senate report highlights how the principle of the best interest of the child was exploited to justify these practices, showing how social and moral judgments were

4 Australian Senate, Community Affairs References Committee. (2012). Commonwealth contribution to former forced adoption policies and practices. Commonwealth of Australia: Canberra.

5 Gillard, J. (2013). National Apology for Forced Adoptions. Parliament House, Canberra. Retrieved from http://resources.news.com.au/files/2013/03/21/1226602/365475-aus-file-forced-adoptions-apology.pdf

6 Australian Senate, Community Affairs References Committee. (2012). Commonwealth contribution to former forced adoption policies and practices. Commonwealth of Australia: Canberra.

used to manipulate decisions that had lasting, devastating consequences for both the children and their biological families. Beliefs about social standing and morality were central to these decisions, reinforcing discriminatory attitudes and enabling the forced removal of children under the guise of providing them a better future. An adoptee quoted in the report poignantly encapsulates the tragic misuse of this principle, stating, "*My true mother was told to give me away because it was in the best interests of the child*".[7] This testimony underscores how the best interest principle, when applied without clear safeguards or an understanding of its broader implications, can be twisted to serve harmful and unjust purposes, inflicting deep emotional and psychological harm on those involved.

The concept of acting in the 'best interest' of children has historically been invoked to justify the systematic removal of indigenous children from their families in both Australia and the United States. Framed as an effort to provide these children with education and opportunities for a 'better' life, this practice was deeply embedded in broader governmental policies focused on assimilation in the United States and absorption in Australia. Throughout the nineteenth and twentieth centuries, these policies facilitated the large-scale removal of indigenous children from their communities, effectively severing their cultural ties under the pretext of offering protection and improvement. In reality, these policies were aimed at erasing indigenous identities, contributing to profound and lasting trauma for the children and their families. The use of the best interest principle in these cases reveals the danger of applying the concept without sufficient cultural sensitivity or regard for the rights and heritage of indigenous populations.[8]

In the United States, the post-World War II assimilation agenda transitioned into policies known as *termination* and *relocation*. While the era of Indian boarding schools persisted, child removal increasingly occurred with the intervention of social workers who deemed Native American homes 'unfit' by prevailing social standards. These children were often placed into white foster care systems, where they were separated from their families and stripped of their cultural identities. This practice was rationalised as a necessary step to integrate Native American children into mainstream society, but in reality, it perpetuated a systemic erasure of indigenous culture and family bonds. The justification of these removals as being in the children's best

7 Para 4.7. Australian Senate, Community Affairs References Committee. (2012). Commonwealth contribution to former forced adoption policies and practices. Commonwealth of Australia: Canberra.

8 Haskins, V., Jacobs, M. D. (2002). Stolen Generations and Vanishing Indians: The removal of indigenous children as a weapon of war in the United States and Australia, 1870–1940. New York: New York University Press.

interests masked the deeper goal of cultural assimilation and resulted in profound, long-lasting harm to Native American communities.[9]

In Australia, similar child removal practices targeted Aboriginal children, a tragedy now infamously known as the Stolen Generations. These removals were officially presented as welfare initiatives aimed at transforming Aboriginal children into 'decent and useful members of the community'. Under this policy, organisations like the New South Wales Aborigines Protection Board were granted the power to take custody of Aboriginal children if it was believed to be in the child's best interest, particularly regarding their moral or physical welfare. The language of benevolence, however, concealed the deep cultural dislocation and emotional trauma inflicted on those children and their communities. In both Australia and the United States, these policies, which were ostensibly designed for the children's benefit, have since been widely acknowledged as acts of cultural genocide. The lasting impact of these practices continues to resonate within indigenous communities today, leading to ongoing calls for justice, reconciliation and a critical re-evaluation of what truly constitutes the 'best interest' of a child, particularly in contexts shaped by historical and cultural complexities.

A similar strategy was adopted in Switzerland where the Jenisch traveling communities experienced systematic child removals from their families from the late 1920s until the early 1970s.[10] This practice was rationalised as serving the children's own good. In 1926, the Œuvre des enfants de la grand-route (Action for traveling children), in collaboration with various charitable organisations and backed by the Confederation, initiated the forced removal of approximately 800 Jenisch children. These children were placed with foster families or confined in psychiatric hospitals and even prisons, with the stated objective of assimilating them into a sedentary lifestyle. This policy continued unchecked until 1973 when the affected individuals, through media exposure, successfully brought these practices to an end.

The underlying belief that such drastic measures were in the best interests of the children justified not only the forced removals within Switzerland but also set a precedent that such forced migration could be deemed acceptable. This mindset underscores a broader historical pattern where State and societal interventions, claimed to benefit children, often resulted in severe disruptions to their lives and cultural identities. The case of the Jenisch children in Switzerland is a poignant example of how the notion of best interest can be manipulated to support harmful policies that, in retrospect, are recognised as grave injustices.

9 Marten, J. (2002). Children and War: A historical anthology (pp. 227–229). New York: New York University Press.

10 Cantwell, N. (2014). The Best Interests of the Child in Intercountry Adoption. UNICEF Office of Research, Florence, pp. 7-9.

The United Kingdom has a particularly troubling history of forced child migration, serving as the origin for some of the most severe cases of long-term displacement of children to other countries. According to an in-depth examination by a Parliamentary Committee, it is estimated that around 150,000 children were subjected to this practice during the nineteenth and twentieth centuries.[11] The majority, about two-thirds, were sent to Canada, while the rest were relocated to Australia, New Zealand and other British dominions or colonies. Notably, child migration to Canada ceased after the Second World War, but between 1947 and 1967, between 7,000 and 10,000 children were sent to Australia and 549 to New Zealand.[12]

The Committee's report acknowledges that the best interest principle was sometimes invoked as a justification for child migration policies, though it likely served to obscure more questionable motivations. The report emphasises that the rationale behind these policies was complex and not purely humanitarian. While there was a philanthropic intent to rescue children from poverty and neglect in Britain and protect them from perceived moral dangers – such as having mothers who were prostitutes – economic considerations were also significant. Child migration provided Britain with a means to reduce the financial burden of child welfare, while the receiving countries viewed the children as potential members of a trained workforce. In reality, many of these children were exploited as cheap labour, highlighting the disparity between the stated objectives of the policy and the harsh realities the children faced. This misuse of the best interest principle underscores how economic and political motivations can sometimes distort policies intended to protect vulnerable children.

The report further reveals that charitable and religious organisations were the main driving forces behind sustaining the child migration policy, often motivated by the financial necessity to keep their institutions viable in the colonies. While various justifications were offered for these practices, the report ultimately characterises the forced child migration policy as "a bad and, in human terms, costly mistake". It also draws unsettling parallels between these historical practices and modern-day intercountry adoptions, highlighting the continued need to critically examine the motives and outcomes of child relocation policies. This comparison underscores the importance of ensuring that such policies genuinely prioritise the best interests of the children, rather than repeating past mistakes that served the interests of others.

These historical examples demonstrate the potential dangers of misusing the best interest principle as a blanket justification for drastic interventions in children's lives. They stress the importance of vigilance and of adopting a more nuanced,

11 UK Parliament Select Committee on Health. (1998). Third Report, para. 11. Retrieved from http://www.publications.parliament.uk/pa/cm199798/cmselect/cmhealth/755/75502.htm

12 Ibid.

context-specific approach to ensure that the principle genuinely protects children's welfare, rather than reflecting societal prejudices or advancing the interests of more powerful groups.

Conversely, the 'best interest' principle has also been applied constructively in legal contexts, particularly in family law. Courts in many countries have long used this principle as a critical criterion in deciding custody and access arrangements during parental divorce proceedings. This usage underscores the principle's intended role in safeguarding children's welfare, ensuring that their needs and well-being are prioritised in legal decisions that profoundly affect their lives.

The significant emphasis placed on the best interest principle in the UNCRC is both undeniable and deeply fascinating. It is somewhat challenging to account for how Article 3 of the UNCRC came to be framed in such a comprehensive manner. To understand this, it is essential to look back at the historical texts on children's rights. The 1924 Declaration of the Rights of the Child,[13] also known as the Geneva Declaration, which is often regarded as the foundational international text concerning children's rights, does not mention the best interest of the child at all.

However, the situation began to evolve with the subsequent 1959 Declaration on the Rights of the Child,[14] which is considered to have enshrined the concept, though in reality, it only explicitly mentions best interests in two specific and relatively narrow contexts. Firstly, the best interests of the child are given "the paramount consideration" in elaborating laws designed to enable the child's development across various dimensions – physical, mental, moral, spiritual, and social (Principle 2). Secondly, the declaration advises parents and other caregivers to regard the child's best interests as "the guiding principle" in their upbringing efforts (Principle 7). The introduction of this essential principle marked a significant milestone in international law-making. However, since the UN Declaration was adopted as a General Assembly Resolution, it carried no binding legal force. As a soft law instrument, its implementation relied solely on the willingness of States to adhere to its provisions. Additionally, it is important to note that in this document, the child was still largely viewed as an object in need of protection and assistance, rather than as an autonomous individual. It was only during the drafting of the Convention on the Rights of the Child that a paradigm shift occurred, recognising the child as an independent rights-holder, capable of exercising rights in their own capacity. This transformation laid the foundation for a more enforceable framework for protecting children's rights under international law.

13 General Assembly of the League of Nations, Declaration of the Rights of the Child, 26 September 1924

14 UN General Assembly, Declaration of the Rights of the Child, A/RES/1386(XIV), UN General Assembly, 20 November 1959

This perspective, focusing primarily on lawmakers and primary caretakers, shaped the initial proposal for a convention made by Poland in 1978, which later influenced the development of the UNCRC. This historical context highlights the evolution of the best interest principle from non-existent in early declarations to a cornerstone of contemporary international child rights law, as encapsulated in the UNCRC. The broad, all-encompassing phrasing of Article 3 in the UNCRC marks a significant expansion from these earlier, more limited references, reflecting a growing global consensus on the importance of prioritising children's welfare in all aspects of society.

The initial draft proposed by Poland for the UNCRC was ultimately rejected as a foundation for the treaty, leading to a significant revision the following year. This revised proposal unexpectedly set the stage for a substantial expansion of the best interest principle within the UNCRC.[15] It now proposed that the best interests of the child should govern "all actions concerning children", whether these actions were undertaken by parents, guardians, social or State institutions, especially by courts of law and administrative authorities, and it maintained that these interests should be "the paramount consideration".

During the drafting process, this formulation underwent some changes – most notably, the references to parents and guardians were relocated, legislators were explicitly included among the actors responsible for considering children's best interests, and "the paramount" was moderated to "a primary consideration". However, the discussions around the profound shift in perspective that this expanded scope represented were surprisingly limited. The drafters came closest to addressing these issues in response to a last-ditch, unsuccessful effort by the Venezuelan delegate who sought clearer guidelines for implementing this principle in practice.[16] As a result, the comprehensive scope of Article 3 as it stands today was established with little debate about its broader implications.

The definitive formulation of the principle was consolidated in the 1989 United Nations Convention on the Rights of the Child, specifically within Article 3. This Article lays down a foundational principle that has come to define modern approaches to child welfare and legal standards: the principle of the best interests of the child. According to this principle:

> *"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities,*

15 United Nations Commission on Human Rights (UNCHR), Working Papers of the 34th Session (7 February 1978) E/CN.4/L.1366

16 OHCHR, Legislative History of the Convention on the Rights of the Child (OHCHR/Save the Children, 2007).

> *or legislative bodies, the best interests of the child shall be a primary consideration."*[17]

This wording not only mandates that children's best interests be prioritised in all decisions affecting them, but it also broadens the scope of this consideration to include a variety of entities that might influence a child's life. Whether it is through the actions of courts, the policies of social welfare institutions, or the laws passed by legislative bodies, this principle requires that all such actions uphold the child's best interests as a central concern. By explicitly including both public and private sectors, Article 3 ensures that the protective umbrella it casts over children is comprehensive, leaving no area where the best interests of the child are not to be considered. As reflected in the *travaux préparatoires* of the CRC, the drafting process involved extensive debates surrounding the precise wording of the best interest principle. A key discussion focused on whether the best interests of the child should be defined as *"a"* or *"the"* primary consideration, or, as in the 1959 Declaration, *"the paramount"* consideration. Ultimately, the decision was made to adopt the phrasing *"a"* primary consideration, allowing flexibility to balance conflicting interests in various contexts. This choice underscores that the best interest of the child is not an absolute right and may be overridden by other factors, such as the protection of public order, the interests of another child, or, in rare cases, the interests of the parents. Nevertheless, the principle maintains a particularly high level of importance; it must be given substantial weight, especially when an action directly affects the child involved. This prioritisation signals that, although not absolute, the best interest of the child should be treated as a matter of highest priority in decision-making.

The principle of the best interests of the child is a central theme throughout the United Nations Convention on the Rights of the Child, imposing numerous obligations on States Parties to prioritise this principle in decision-making processes, particularly in the realm of family law. This principle not only guides broad legislative frameworks but also affects specific legal stipulations directly impacting children's lives:

- Article 9 addresses the conditions under which children may be separated from their parents, ensuring that such decisions prioritise the child's best interests.
- Article 18 reinforces the responsibilities of parents towards their children, laying down that parental duties be performed in ways that serve the child's best interests.
- Article 20 concerns children deprived of a family environment, stipulating that alternative care must be provided with the child's best interests as a primary consideration.

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

- Article 21 deals with adoption, specifying that all aspects of the adoption process must safeguard and prioritise the child's best interests.

The principle also plays a critical role in the context of juvenile justice,[18] providing specific protections to ensure that the justice system serves the welfare of children:

- Article 37(c) lays down the separation of juvenile detainees from adults, a provision that acknowledges the vulnerability of young people in detention and aims to protect them from harmful influences and ensure their safety.
- Article 40(2)(b)(iii) requires that parents be present at court hearings involving juvenile penal matters, emphasising the importance of parental support and advocacy in the legal processes affecting their children.

These Articles collectively underscore the UNCRC's comprehensive approach to embedding the best interests of the child in all legal actions and decisions affecting children, whether in the context of family stability, alternative care, adoption, or the juvenile justice system. This pervasive inclusion ensures that children's welfare is consistently considered and protected across various legal and administrative contexts, promoting a holistic approach to child rights that aligns with the core objectives of the Convention.

The principle of the best interest of the child is not only a cornerstone of the United Nations Convention on the Rights of the Child, but it has also been incorporated into other significant international legal frameworks. Notably, this principle is articulated in the UN Convention on the Rights of Persons with Disabilities (Article 23(2)),[19] which underscores the importance of considering children's best interests in contexts involving persons with disabilities. Similarly, The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption (Article 4(b))[20] emphasises that the best interest of the child should be a primary consideration in intercountry adoption processes.

This concept is a fundamental legal principle used to moderate the extent of authority that adults – whether parents, professionals, teachers, medical doctors or judges – have over children. It is predicated on the understanding that adults are tasked with making decisions on behalf of children primarily because children lack

18 Váradi-Csema, E. (2022) 'Children's Rights and the Criminal Protection of Minors' in Váradi-Csema, E. (ed.) Criminal Legal Studies. European Challenges and Central European Responses in the Criminal Science of the 21st Century. Miskolc–Budapest: Central European Academic Publishing. pp. 413–435.

19 UN General Assembly, Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly, A/RES/61/106, 24 January 2007

20 Hague Conference on Private International Law, Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, 33, Hague Conference on Private International Law, 29 May 1993

the experience and judgment needed to make such decisions themselves. This principle serves as a crucial check on adult authority, ensuring that decisions impacting children prioritise their welfare and rights above everything else. By mandating that children's best interests be at the forefront of all relevant decision-making, this principle advocates for a protective and respectful approach to handling matters that affect the most vulnerable population.

3.
The Best Interest Principle and its Interpretation by the Committee on the Rights of the Child

The term *best interest of the child* embodies the overall well-being of a child and is a fluid concept influenced by a range of individual and environmental factors. These factors include the child's age, gender, maturity level, personal experiences and the availability or lack of parental care. Other important considerations are the quality of the child's relationships with their family or caregivers, their physical and psychosocial well-being and the need for protection from risks. Together, these elements help determine what serves the child's best interests in any given situation.

Although the United Nations Convention on the Rights of the Child does not explicitly define the best interest of the child, this principle is fundamental in interpreting and applying the UNCRC and other international legal frameworks. The Committee on the Rights of the Child provides further guidance on this principle, emphasising that it ensures "*both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child*".[21] This interpretation underscores that the best interests of the child must guide all actions and decisions that affect them, ensuring these choices foster their overall development and enable them to fully exercise their rights under the Convention on the Rights of the Child. In practice, this means that the application of the best interest principle must be adaptable to each child's unique situation, ensuring that their specific needs and rights are prioritised in any decision made concerning their welfare.

Following the UNCRC's entry into force in September 1990, the establishment of the Committee on the Rights of the Child was instrumental in ensuring the effective implementation of the Convention. One of the Committee's first tasks was to outline the key areas of focus for States Parties in their initial reports, which detailed the measures taken to implement the Convention's provisions.

21 UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC /C/GC/14, 29 May 2013

In structuring these reports, the Committee emphasised four core principles as essential for the comprehensive application of the UNCRC. These included: (1) non-discrimination, ensuring that all children have equal access to their rights without prejudice; (2) the right to life, survival and development, which highlights the fundamental importance of nurturing a child's capacity to grow and thrive; (3) the right to be heard, affirming that children's views must be considered in all matters affecting them; and (4) the assurance that the best interests of the child will be a primary consideration in all decision-making processes. These guiding principles continue to shape how States and other actors interpret and apply the UNCRC in practice, ensuring a holistic approach to child welfare and rights.

The Committee subsequently designated these four critical areas as the General Principles of the UNCRC. This designation not only emphasised their importance but also established them as the foundation for all future reports from States Parties. This strategic move originated from the deliberations of a 10-person group, focused on developing a standardised questionnaire for States Parties. This group unilaterally decided to elevate the best interests of the child to a status of special importance, highlighting it as a pivotal principle throughout the applications and evaluations of the Convention. This decision has significantly shaped how the UNCRC has been implemented and monitored globally, ensuring that these principles guide the actions and policies affecting children worldwide.

It is notable that no other treaty body has given such prominence to specific provisions within an international instrument as the Committee on the Rights of the Child has with the best interest principle. This principle has been almost universally and unquestioningly accepted as a fundamental aspect of the UNCRC. Without adherence to this principle, effective implementation of the treaty could be significantly hindered or even rendered impossible.

Despite its critical importance, the best interest principle is not without its complications. Historically, its flexibility has occasionally led to misuse, leaving a legacy that continues to challenge its application. This flexibility, while making the principle highly relevant to addressing the unique needs of children within a human rights framework, also adds to its complexity. Surprisingly, it took over 20 years for the Committee to issue a General Comment that specifically interprets and clarifies the application of the best interest principle, highlighting the intricate nature of this concept.

The Committee has made numerous efforts through its General Comment to address the conceptual and practical challenges associated with the best interest principle. Their work underscores the revered status of best interests within the UNCRC as a fundamental value, embodying a right, a principle and a rule of procedure. This delineation ensures that the best interests of the child are consistently

prioritised and implemented across all levels and in all situations, affirming the principle's pivotal role in promoting and protecting children's rights globally.

The Committee on the Rights of the Child articulates the principle of the best interests of the child in UNCRC General Comment No. 14 as encompassing three distinct yet interconnected aspects:

1. A substantive right: This component emphasises that every child possesses the right to have their best interests thoroughly assessed and prioritised as a fundamental consideration in all actions affecting them. This right ensures that the child's welfare is at the forefront of all decisions. This substantive right guarantees that every child has the legal right to have their best interests thoroughly assessed and prioritised in all actions and decisions affecting them. The Committee emphasised that this right is not merely a guiding principle but a self-executing norm, meaning that it can be directly invoked and enforced without requiring domestic transformation, even in legal systems with dualist approaches to international law. This self-executing character makes the principle of the best interests of the child a particularly powerful tool, as it imposes a direct and enforceable obligation on States. In practice, this allows the principle to be invoked before national courts in proceedings involving children, regardless of whether it has been formally integrated into domestic legal frameworks. While the Convention on the Rights of the Child has been ratified by almost every country in the world, this feature adds significant legal weight to the best interest principle by ensuring that it can be applied directly in legal disputes concerning children.
2. A legal principle: As a legal principle, the best interests of the child serve as a fundamental interpretative tool in legal decision-making. When a legal provision can be interpreted in multiple ways, this principle mandates that the interpretation which most effectively safeguards and promotes the child's welfare must be chosen. In this context, the best interests of the child function as a guiding standard, ensuring that laws are applied in a manner that prioritises the child's needs and rights. This principle is particularly important in situations where legal ambiguity exists, requiring courts and decision-makers to adopt an approach that most accurately serves the child's interests. By placing the child's welfare at the forefront of legal interpretation, this principle reinforces the commitment to children's rights as a central concern in judicial and administrative processes.
3. A rule of procedure: As a rule of procedure, the best interests of the child require decision-makers to conduct a comprehensive impact assessment of any action or decision that affects a child, a group of children, or children at large. This procedural obligation ensures that children's interests are thoroughly considered and integrated throughout the decision-making process.

> Authorities are required to justify how the best interests of the child were taken into account, making it a crucial element in validating the decision. The decision must explicitly outline how the child's best interests were identified, which criteria were used to evaluate them, and how those interests were balanced against other considerations. This procedural safeguard demands transparency, ensuring that children's welfare remains a central factor in decisions impacting their lives. By embedding the child's best interests into every stage of the process, this rule ensures that authorities prioritise children's rights and provide clear, reasoned explanations for the outcomes of their decisions.

The best interest principle is universally applicable to all children, irrespective of their nationality, immigration status, including asylum seekers, refugees, or statelessness, and regardless of whether children are accompanied by family members or are unaccompanied or separated. This wide-ranging application underscores the principle's importance not only in personal circumstances but also in broader actions such as the drafting of legislation, policy-making, and resource allocation by States. It mandates that public institutions consider the best interests of the child in all actions that could impact them, thereby embedding children's welfare deeply within the fabric of societal structures and legal frameworks.

The necessity to formalise a method for applying the best interest principle is rooted in Article 3, paragraph 1 of the UNCRC. The Committee on the Rights of the Child clarifies that not all State actions require an exhaustive and formal assessment of a child's best interests. However, for decisions that will significantly affect a child or children, there is a need for enhanced protection and detailed procedural guidelines. The Committee emphasises that the magnitude of the decision's impact on a child's present and future well-being correlates directly with the level of procedural safeguards required during the decision-making process.

To assist States, civil society, the private sector and individuals working directly with and for children, including parents and caregivers, the Committee on the Rights of the Child has drawn up a comprehensive, though non-exhaustive and non-hierarchical, list of factors to be considered when assessing a child's best interests. These factors aim to ensure that all decisions reflect a holistic view of the child's needs and rights. Key elements to be considered include:

- The child's views: Prioritising the child's own opinions and feelings in matters affecting them.
- The identity of the child: This encompasses a wide array of attributes such as gender, sexual orientation, national origin, religion, cultural identity and personality, ensuring that these factors are respected and reflected in decisions.

- The family environment and relationships: The quality of familial relationships and the nature of the child's current home environment play a crucial role in determining what will serve the child's best interests.
- Care, protection and safety of the child: This includes evaluating the child's general welfare, safety and overall development.
- Situations of vulnerability: Identifying risks to the child and assessing the sources of resilience, protection and empowerment available to them.
- The child's rights and needs concerning health and education: Ensuring that the child has access to adequate healthcare and educational opportunities as fundamental components of their development.[22]

By establishing these guidelines, the Committee aims to provide a clear framework for decision-makers to follow, ensuring that all considerations are made systematically and with the child's best interests as the focal point of decisions. This approach is intended to uphold the rights and welfare of children consistently and effectively across various contexts.

4.
Conclusion

In conclusion, the best interest of the child principle, as enshrined in the UN Convention on the Rights of the Child, is a foundational element of international child protection and family law. It offers a flexible yet essential framework to ensure that children's welfare remains central to all decision-making processes that impact their lives. Over time, the principle's interpretation has evolved, particularly through the work of the Committee on the Rights of the Child, reflecting the growing complexities of contemporary legal and societal issues, including migration, family dynamics and child protection.

While the principle has acted as a protective shield globally, historical misapplications—such as forced adoptions and child migrations—underscore the risks of vague or biased interpretations. These examples remind us of the dangers posed when children's rights are compromised by political, social or economic interests. The ongoing challenge is to maintain a nuanced approach that carefully balances competing rights and interests, ensuring the best interest principle genuinely serves children's welfare.

22 UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC /C/GC/14, 29 May 2013

The Committee's efforts, especially through General Comment No. 14, provide valuable guidance on how to apply this principle effectively in practice. By establishing a structured framework for evaluating children's best interests in diverse contexts, the Committee has strengthened the legal and procedural safeguards that protect children's rights. This evolving understanding aligns with Eekelaar's definition of children's basic, developmental, and autonomy interests, which encompasses physical, emotional and intellectual care, preparation for adulthood and the freedom to choose one's own path. His insight reinforces the idea that children are not merely objects of protection but active rights-holders who deserve respect and fulfilment from birth into adulthood. As Eekelaar rightly points out, framing the CRC in terms of children's rights, rather than merely the duties of adults, reflects a progressive view of human development.[23] This perspective emphasises that respecting and fulfilling children's rights not only benefits them but also fosters a society where individuals can contribute positively to others. Thus, as the application of the best interest principle continues to evolve, vigilance, cultural sensitivity and a child-centred focus remain essential in safeguarding the welfare and rights of all children.

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A Systematic Literature Review of Au Pairing: Insights From the Path***

ABSTRACT: *Different definitions of Empirical Legal Studies (ELS) have, at their core, the systematisation of legal data. The systematic literature review (SLR) is a technique that can be used in the scope of ELS, to collect and analyse all relevant studies of a given topic. To this end, SLR employs a staged procedure to increase the transparency of the research being performed and to present it coherently. This technique plays a major role in exploring subjects which are underexplored and undertheorised, as well as when lacking official data. In this paper, we present an SLR focusing on the definition of au pairs in the scientific literature. Au pairing is one of the most frequent forms of care provision in Europe. However, the inclusion of au pairs' mobility under the definition of 'labour migration' for the purpose of care provision is still debated, leaving the phenomenon in a grey area. This can impact both the social and labour rights of au pairs. On this basis, we identify the need to investigate the au pairing phenomenon through a legal approach, grounded in a multi-disciplinary perspective. In this context, we present our protocol for a systematic literature review, composed of five steps on top of the definition of the research design (Step 0): Search protocol (Step 1); Non-relevance criteria and duplicates (Step 2); Relevance criteria (Step 3); Analysis (Step 4); Coding (Step 5). The development of this approach is part of a broader research, representing one of its conceptual foundations.*

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1.
Introduction

The debate concerning the ways in which legal research can investigate its relationship with 'society' is not a new one[1]. Such a relationship is necessarily bilateral: the forces of society shape legal frameworks, institutions, and representations, and are at the same time influenced by them. Different branches of legal scholarship have developed to investigate this perpetual two-way movement, going under the various labels of Socio-Legal Research, Empirical Legal Studies, and Law and Society.

Despite their specificities, these approaches are connected by their focus on studying the legal phenomenon in the real-world, and on developing ways in which to explore this object. Notably, this implies going beyond the doctrinal approach[2], intended as a hermeneutic discipline based on the interpretation of specific documents[3]. To do so, researchers have had to recourse to a variety of methods, using quantitative, qualitative, or mixed-methods approaches. In the context of this article, we shall focus on those developed under the (broad) umbrella of 'Empirical Legal Studies' (ELS).

Epstein and Martin[4] define ELS as "research based on observations of the world or data, which is just a term for facts about the world." Data can be words (e.g. legal decisions), number (e.g. statistical values), or images, without a hierarchy between them as to which one is "more 'empirical'" [5]. Likewise, Cane and Kritzer[6] highlight how empirical legal research deals with "the systematic collection of information ('data') and its analysis according to some generally accepted method." Thus, the systematic collection and treatment of data are at the core of ELS. These systematised processes can be developed in various ways. For instance, the analysis can be through "simple counting, sophisticated statistical manipulation, grouping into like sets, identification of sequences (in some circumstances called 'process tracing'), matching of patterns, or simple labelling of themes"[7].

1 Tomlins, 2007.
2 Banakar and Travers, 2005; Calavita, 2010; McConville and Chui, 2007.
3 Van Hoecke, 2011, p. 4.
4 Epstein and Martin, 2014, p. 14.
5 Epstein and Martin, 2014, p. 14.
6 Cane and Kritzer, 2012, p. 26.
7 Cane and Kritzer, 2012, p. 26.

Thus, ELS is characterised by a commitment to systemising research processes. This refers to the goal of analysing and presenting all the available data under a given scope, with said data being identified and filtered through a pre-defined set of criteria[8]. ELS pursues the general goals of collecting and summarising data, to make descriptive or causal inferences[9]. Collecting the data includes documenting the strategies of collection, supported by the idea of "the more data the better" [10]. In its turn, summarising the data means separating the relevant information from the useless (for the given research), as well as organising it coherently. This can be achieved through the creation of datasets, which can then be shared with the scientific community. On this basis, Epstein and King[11] point to the goal of making descriptive or causal inferences, illustrating that "We do not make them by summarising facts; we make them by using facts we know to learn about facts we do not observe." Its purpose is to go beyond sampling.

The systematic literature review (SLR) can be used to pursue these goals. Through a staged procedure, SLR is relevant for "mapping out areas of uncertainty, and identifying where little or no relevant research has been done, but where new studies are needed. Systematic reviews also flag up areas where spurious certainty abounds" [12]. It is designed to avoid a haphazard and non-reproductible data collection (in our case, the literature review), reviewing what has already been produced on a given subject in a controlled way. According to Petticrew and Roberts, "Systematic reviews are literature reviews that adhere closely to a set of scientific methods that explicitly aim to limit systematic error (bias), mainly by attempting to identify, appraise and synthesise all relevant studies (of whatever design) in order to answer a particular question (or set of questions)."[13]

This technique differs from other forms of literature review for its staged procedure, as well as for its purpose. In lieu of summarising 'all' that has been published of a topic, it intends to answer a question and/or test a hypothesis[14]. For that, the SLR can be explored in various ways, such as using statistical techniques to synthesise the results (meta-analysis) or delving descriptively into the results (narrative review)[15]. Chapman[16] investigated the systematic literature review in the social sciences' scientific literature. She highlighted how it is broadly used in medicine and health sciences, becoming more common in the social sciences. It is important to note that

8 Salehijam, 2018, p. 36.
9 Epstein & King, 2002.
10 Epstein and King, 2002, p. 24.
11 Epstein and King, 2002, p. 29.
12 Petticrew and Roberts 2006, p. 2.
13 Petticrew and Roberts 2006, p. 9.
14 Petticrew and Roberts 2006.
15 Petticrew and Roberts 2006.
16 Chapman, 2021.

her work did not include legal research, which is indicative of the ever-debated place of our discipline among the social sciences.

In summary, an SLR allows the collection of data through a staged procedure; controlling the biases of the study; recognising the limitations of the researcher; joining discussions and findings on a given topic. It plays a major role in subjects underexplored and undertheorised, as well when lacking official data.

Here we present the concrete application of the SLR to the phenomenon of au pairs[17]. This is part of a broader research on the relationship between labour law, temporary labour migration, and au pairing. In proposing this example we wish to highlight how the SLR can increase traceability and transparency, helping to recognise and present the limitations of a given study, and explore the relevant literature going beyond legal research. Therefore, while engaging with the content of the research in question, our aim is to focus on the functioning of the SLR in practice. In the remainder of this introduction, we will present the main subject. In Section 2 we focus on the various steps composing our protocol for the SLR. We also highlight the way in which we built our corpus and determined the relevance criteria. In Section 3 we present our interpretation of the results of the SLR. Section 4 is devoted to some final remarks concerning the SLR, and what we believe to be the added value it can bring to legal research, as well as pathways for future research emerging from our initial findings.

Au pairing is formally designed as a cultural exchange program, in which the participants – the host family and the au pair – are inserted into a dynamic of offering and retribution[18]. The offering is based on accommodation, feeding, and 'pocket money', whereas the retribution is based on caring for children – which can include teaching languages, cleaning services, washing clothes, and cooking. Within this multilingual environmental, the discourse surrounding au pairs defines them as part of a cultural exchange, since they experience a different culture while (supposedly) having the opportunity to be treated as a 'family member' in the country of arrival.

As for legal regulation, the 1969 *E*uropean Agreement on Au Pair Placement (hereafter 'the Agreement') of the Council of Europe represents an important reference. This Agreement constituted an attempt to standardise the legal status within European countries, by defining the au pair who "belong[s] neither to the student category nor to the worker category but a special category." The *Explanatory Report to the Agreement* provides clarifications and an interpretation of the document. It presents the previous work leading to the Agreement, such as the Motion for a *Recommendation on Au Pair Employment* (1964); the inclusion of the topic on '*Living and Working Conditions of 'Au Pair' Girls' in the* 1966 Intergovernmental Work Programme,

17 This is a French expression meaning 'in pairs'. We do not use quotation marks or italics, since it is widely used in English.

18 Cox, 2015; Lutz, 2002; Kofman, 2014; Ikaksen and Bikova, 2019.

the adoption of a *Recommendation with Draft rules on Au Pair Employment* (1966), the preparation of a draft Convention (1967), and its discussion in the following years. Both the Motion of 1964 and the Recommendation of 1966 included the term 'Employment', which interestingly did not make it to the final versions of the *European Agreement on Au Pair Placement* and its *Explanatory Report*.

Almost fifty years later, EU Directive 2016/801 – commonly known as the Researchers and Students Directive – included au pairs in its scope as an optional category. It defines them as someone from a third country temporarily received by a family based in an EU member state, to improve their linguistic skills and knowledge of the country itself (Art. 3, 8). For that, au pairs must perform 'light housework' and provide childcare. This instrument innovates upon the Agreement of the Council of Europe, since – despite not being included in the definition – recognises that au pairs can be considered in an employment relationship or not. This differentiation has an impact on the rights of au pairs. Those considered to be in an employment relationship will be entitled to the right to equal treatment (Art. 12, Directive 2011/98). For those who are not, the application of this principle will be restricted to the access to/supply of goods and services and, where applicable, to the recognition of diplomas, certificates, and other professional qualifications.

Definitions play a role in delineating the rights to which a category is entitled or not. In practice, au pairs commonly experience lack of rights and protection in several European countries, under the cover of being treated as a 'family member' [19]. This issue is compounded by the potential increase in the recourse to au pairs in EU member states, without reliable data on their quantity. This scenario is connected to rising demands for care work, border dynamics on labour migration schemes, and the differences in childcare provisions between welfare state regimes[20].

2.
The Path into Steps – our Protocol for Systematic Literature Review

In this section we will present the steps of the SLR, performed in the context of the research on au pairs. We organised the SLR in five steps, preceded by the designing of the research itself (*Step 0*), covering the identification of the research question(s), hypothesis(es), and methodology.

In the first step (*Step 1 – Search protocol*) we identified the relevant databases and the search queries – including the options used in the search. Regarding the

19 Cox, 2015; Rohde-Abuba, 2016; Ikaksen and Bikova, 2019; Hess and Puckhaber, 2004.
20 OECD, et al, 2021; Hirata, 2002.

databases, we worked with those available at our institution at the date of submission of the query (30 January 2023). Indeed, noting the date of the query itself is a necessary part of the protocol which allows us to explain potential discrepancies with replications in the future. We selected the relevant databases according to the discipline. As our study was designed to be multi-disciplinary – to investigate a legal phenomenon through the lens of different social sciences – we selected databases for Law, Political Sciences and Europe, and Social Sciences.

Our library provided the list of available databases for each discipline, organised by available content.

Table 1: Available databases – University of Strasbourg (Jan 2023), by discipline

Law	**Political Sciences and Europe**	**Social Sciences**
Dictionaries and encyclopaedias		
	L'International Encyclopedia of Political Science	eHraf WORLD CULTURE
Articles of academic journals and book chapters		
Dalloz.fr Dalloz Revues Ledoctrinal Lamyline Lexis360 Lextenso.fr La base Navis Stradalex Europe	Cairn Open Edition Journals Persée Jstor SpringerLink Sage Journals Wiley Online Library ScienceDirect Stradalex Europe	Cairn Open Edition Journals Persée Isidore Jstor SocINDEX Sociological Abstracts Social Services Abstracts Sage Journals Wiley Online Library ScienceDirect Proquest Sociology Humanities International Complete SpringerLink
E-books		
Cairn La bibliothèque numérique Dalloz La base Navis	DALLOZ Bibliothèque Espace mondial, l'Atlas OpenEdition Books l'Harmathèque EU Bookshop	OpenEdition Books l'Harmathèque ScholarVox by Cyberlibris Dawsonera
PhD Theses and Dissertations		
Theses.fr Thèses-Unistra	Theses.fr Thèses-Unistra	Theses.fr Dumas Thèses-Unistra

Source: Own elaboration.

On this basis, we identified the databases to gather materials in the form of articles of academic journals, book chapters, and e-books. Eleven common databases in the disciplines of Law, Political Sciences and Europe, and Social Sciences were identified (Cairn; Stradalex Europe; Sage Journals; OpenEdition Books; Jstor; l'Harmathèque; OpenEdition Journals; ScienceDirect; Persée; SpringerLink; Wiley Online Library). Due to the number of available databases, we performed several test queries in order to define which one would be used.

Tests were run with different combinations – "Au pair + Work"; "Au pair + Migration"; "Au pair + Europe"; "Au pairing". In the end, we chose to run our tests with the expression "Au pair*", in order to avoid biases related to the field of the research. The asterisk was used to cover the variations of the last word (i.e. au pairs, au pairing, etc.). This test had no temporal delimitation. Results were restricted to the content for which our institution provided access, and the term had to appear in the text of the source. We excluded the databases which did not allow for a sufficient granularity in the filters – for example, when the journals were presented without the articles and when there were no filters to indicate directly if we would have access to the full text.

These tests were fundamental to define the selected databases – Sage Journals, Jstor, ScienceDirect, and SpringerLink – and the search queries to be used. Ultimately, we used the expression "Au pair*" (with quotation marks and asterisk), which had to be in the full text; the results had to be published from June 1953 to June 2023; the content was restricted to what we could access with our institutional login; the results were restricted by language (English, French, Spanish, or Portuguese) and format (articles, reviews, books, book chapters, or research reports). This resulted in our first corpus, comprising 2157 items (R).

In our second step (Step 2 – Non-relevance criteria and duplicates) we defined what was not relevant, what was a duplicate, and which duplicates were included or excluded from the data collection (and the criteria for this inclusion/exclusion). In this sense, we submitted the results (R) to two filters: the first (R1) was to identify the non-relevant content, and the second (R2) to eliminate the duplicates.

Therefore, the results (R) were filtered without an analysis of a sample of the content, being based only on the title and the journal (in the case of articles) or on the title of the book (in the case of book chapters or reviews). The purpose was to identify the field of the study, as well as to reduce the number of items by excluding apparent mismatches. This step was necessary since we identified the use of the expression "Au pair" in publications of Linguistics, Literature, Biology, and Chemistry, for example, with different meanings (e.g. the position of molecules/components in pairs). This was a cursory analysis by design, so we included the items where the reading of the title (and publishing journal, where applicable) was not sufficient to evaluate them. This filtering (R1) resulted in 481 items.

These materials were filtered one more time (R2), to remove duplicates. A 'duplicate' was identified in the following cases: (a) when there was more than one item in the results, with the same title and the same author(s), in the same journal, and published in the same year; (b) when there was more than one book, with the same title, the same author(s), and the same publisher or the same year. Also, when there was more than one chapter from the same book, with the same author(s), we excluded the individual chapters and included the whole book as a single item. This filtering (R2) resulted in a corpus of 440 items, which included publications by the same author(s) and similar subject, but in different outlets and/or years. These are publications presented the same dataset but exploring different research questions[21]. We opted to include these items separately in our corpus, on the basis of the different aspects of the phenomenon which might have been investigating.

In the third step (Step 3 – Relevance criteria) we filtered the results based on the definition of the criteria for inclusion or exclusion of materials. In contrast with R1 (Step 2), we performed a more in-depth analysis of the content to refine it based on thematic pertinence. We analysed it through reading the abstract and, when absent, the introduction, in order to identify the research question(s), goals, and methodology.

In our corpus, we included the introduction and editorials for thematic or special issues of scientific journals. These materials usually explore the main discussions of the published articles. The purpose of including them was to achieve articles with thematic pertinence in relation to the research, which, eventually, had not been captured in our research in the databases. We decided to include them in order to make our final corpus more robust, by capturing (in a systematised way) as many sources caught in our data collection as possible. Ultimately, we had two introductions/editorials of special or thematic issues of scientific journals in our corpus, which led to the inclusion of four journal articles.

A similar procedure was performed with book reviews. These can be used to include entire books or book chapters with thematic pertinence, which had not been captured via the query. Despite this, we ultimately discarded the 21 book reviews on the basis of the previous steps, and, as a consequence, no further books and book chapters were included through this method.

At the end of Step 2, our corpus included 123 items.

21 For example: Geserick 2012, 2016; Dalgas 2016a, 2016b; Búriková 2016, 2019; Eldén and Anving 2016, 2019a, 2019b, 2022.

Table 2: Results and filtering during the SLR

Date of data collection	Database	Results (R)	Results (R1)	Results (R2)	Results (R3)
20 Jul 2023	Sage Journals	33	20	440	123
21 Jul 2023	Jstor	1251	305		
20 Jul 2023	ScienceDirect	506	36		
21 Jul 2023	SpringerLink	367	120		
Total		2157	481		

Source: Own elaboration.

Afterwards, we proceeded with our fourth step (Step 4 – Analysis), in order to perform an in-depth analysis of each item of the corpus. This in-depth analysis comprised the reading and systematising of the comparable content in a table. This table included technical information on each item (database where it was found, the reference, year of the publication, format, and URL), as well as the comparable content. A SLR can be used to identify different comparable contents, which will be determined by the subject and the research design, since the goal and the research questions will guide what the researcher(s) need to look for. In our case, we wanted to explore a) definition and adjacent concepts of au pairing; b) flows (through the identification of au pairs' countries of origin and arrival); c) indications of the quantity of au pairs in the country of arrival; d) the methodology of the study; and e) discussions of regulation, social rights, and migration status of au pairs.

These columns were constructed based on exploratory research that indicated gaps in the literature in relation to data on au pairing. We found that few countries publicise their data regarding visas for au pairs, since some of them do not have a specific scheme. In the scope of the EU, capturing their number faces other obstacles related to the free movement of persons, since EU citizens do not need a visa to move to another EU member state[22]. Difficulties in collecting au pairs' numbers are also connected with informal arrangements, for example the case of a non-EU au pair already present in a given country on the basis of a student visa. In this sense, the SLR enabled us to identify numbers regarding the quantity of au pairs, albeit in a fragmented way.

Another gap was the identification of au pairs' flows. We identified that most of the studies on au pairing were based on a qualitative approach, notably based on interviews. Non-representative samples do not allow us to capture the quantity of people involved in their flows. Despite this, we traced au pairs' flows that were more commonly analysed in the scientific literature.

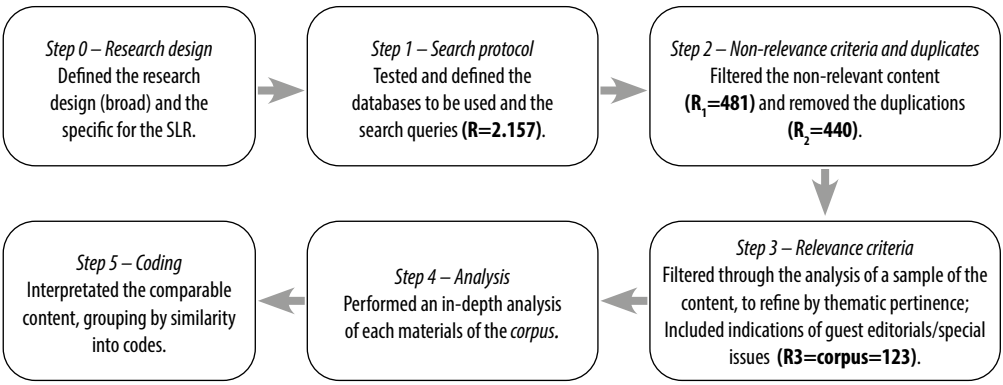
22 Zwysen and Akgüç, 2023, p. 9.

This data was collected based on the information available on the countries of origin and arrival, relying on primary or secondary sources. The more common data was gathered from interviews with au pairs, former au pairs, and their host families/employers. We did not include countries of origin and arrival when au pairing was just mentioned without underlying data (e.g. "It is a common practice in the USA") or when the flow in question was only mentioned by reference to other research (in order to avoid double counting). We identified some items in which the direction of the flow of au pairs was mentioned, but referred to a different historical period. For example, McDowell[23] investigates the flux of Latvian migrant workers in the 1940s and 1950s for the UK, based on her data from 2000 and 2001.

Then, we proceeded with our final step (Step 5 – Coding), devoted to the interpretation of the comparable content, in order to group items into clusters. Since the corpus comprised long materials, the purpose was to reduce its content to units. These units can emerge from the data (in a grounded theory approach) or from a pre-established theoretical framework. They can be used to identify patterns (in a time period, for example) and the relationship between them, to enable the drawing of inferences. We present the codes and the results in the next section.

To close the present section, the following diagram summarises the five steps of our SLR.

Diagram 1: Synthesis of the systematic literature review (protocol)



Source: Own elaboration.

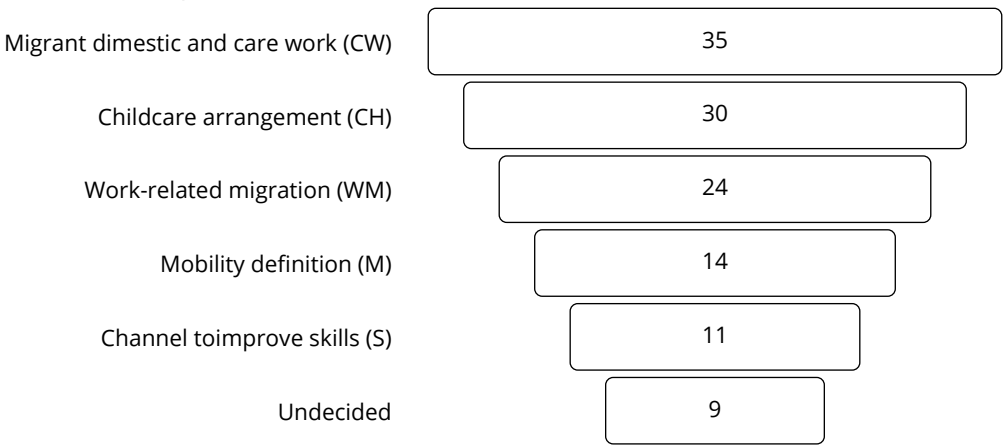
23 McDowell, 2003.

3.
Coding

In our fifth and final step (*Step 5 – Coding*), we applied a set of codes to items included in our corpus. This coding is based on what emerged from the data (in a grounded theory approach).[24] In the present research, the procedure of creating codes was inspired by content analysis techniques[25], focusing on words mentioned by the authors. On this basis, we created six units identifying how au pairs were defined. They are: mobility definition (M); work-related migration (WM); channel to improve skills (S); migrant domestic and care work (CW); childcare arrangement (CH); and undecided. These codes do not have any hierarchical purpose or pretention of exhaustiveness. The purpose was to organise them based on the description of the given arrangement.

After proceeding coding, we obtained the following results:

Graph 1: Coding of our corpus



Source: Own elaboration.

- Migrant domestic and care work definition (CW): The author(s) position(s) au pairing in the scope of transnational/internation migration for domestic and

24 The coding was refined on the basis of the feedback received in two occasions: "II Annual Scientific Conference of the Central European Academy" (Central European Academy – Budapest, September 2023) and "2023 Graduate Student Symposium: Critical Conversations in Work and Labour" (York University – Toronto, October 2023). We wish to thank all the participants to these events for their comments, feedback, and questions.

25 Bardin, 2011.

care work purposes. Thus, we applied this code when the phenomenon was situated in the context of care labour markets, in connection to migration dynamics. E.g.: "The liberalisation of the au pair law can be seen as a political recognition of the rising demand for migrant domestic workers in Austria" [26]. Domestic and care work encompasses services performed in or for a household (cleaning, caring, cooking etc.). In some situations, we identified the mention of remittances.

- Childcare arrangement definition (CH): The author(s) mention(s) au pairing as a possible childcare arrangement (an option between nannies, childminders, etc.), without focusing on migration. We applied this code when the focus of the given item was on the provision/availability of care services, as well as on work-life balance and types and motivations of parents for choosing a modality of childcare service, without mentioning migration. For example, "Although their working conditions differ in some ways, nannies and au pairs both represent groups that are performing paid care work primarily centred on children in the private setting of a family home" [27].
- Mobility definition (M): We applied this code to the items where au pairing was presented as a general strategy of temporary mobility, which was not attached to a labour purpose. It was commonly described as a strategy for cultural exchange, so the publications mainly deal with some au pairs' motivations to have a gap year or being a stepping stone in their transition to adulthood. Therefore, we employed this code when the focus was the mobility *per se*, for example: "As Laura (25, MA, Northern Italy), who decided to become an au pair (in the UK) at the age of 18 due to the uncertainty of choosing the right university course, recalls, her mobility experience had the effect of 'weaning' her from her parents" [28].
- Channel to improve skills definition (S): These items present au pairing as a channel to improve and develop skills and acquire professional experiences in a different country. The skills/experience investigated deal mainly with languages and care activities. As such, these items focus on broadening labour market opportunities (in the country of origin or arrival). This code does not refer to the 'skilled' or 'unskilled' character of the activity performed by au pairs. Instead, it refers to the goal pursued by au pairs. As an illustration: "She used an au pair job only for learning English, then obtained an education as a nurse specialist in Norway, and then used this to obtain an interesting job at an English hospital" [29].

26 Jandl, 2009, p. 121.
27 Eldén and Anving 2016, p. 47.
28 Grüning and Camozzi, 2023, p. 11.
29 Christensen, 2020, p. 28.

- Work-related migration definition (WM): These items present au pairing as a migration strategy, with the specific purpose of work. This link was identified, for example, in sending remittances. However, the items in this group do not focus on the role of au pairing in the context of domestic and care sector. Instead, they deal with borders and barriers to labour migration, and attempts to pursue long-term migration projects through au pairing. As an illustration, "Temporary contracts for au-pairs providing short-term residence permission in their first country of immigration led the nurses to seek further alternatives for staying abroad" [30] and "However, like Gil, many also engage in au pairing as part of longer-term migration processes." [31].
- Undecided: This code was included when we reached different conclusions, without a unified position regarding the given item.

Following the coding, we identified that the majority of the items concentrated in the definitions that recognised the provision of care as a goal. This provides an indication of how au pairing is considered in the literature, notably as part of the transnational/international migration in the domestic and care economy – theorised under "global care chains" [32] and the intersections of regimes [33].

Among the items included under this code, we identified scholars analysing the changes that occurred in au pair programs in the past years. These refer to the fact that it has become "a form of domestic work with quite similar working and living conditions to that of live-in migrant domestic worker"[34]; "(mis-)used by employers for the performance of maidservants' tasks" [35]; and "means of importing cheap labor primarily by dual career families"[36]. Despite this, Cox[37] identifies that they experience similar problems to the ones that motivated the European Agreement in 1969 by the Council of Europe. This suggests that the phenomenon has not changed, but that it continues to develop in the grey area of 'something other than work'[38]. These different approaches to the official design/purpose of these programs warrant further investigation of the law-making process for regulating au pairs in different legal orders.

The analysis of the results also led us to the conclusion that au pairing seems to be investigated by the scientific literature mainly at the intersection of migration and labour. In this sense, we also identified some discussions regarding the (un)

30 Erdal, Korzeniewska and Bertelli, 2023, p. 31-32.
31 Dalgas, 2016b, p. 199.
32 Hochschild, 2000.
33 Lutz, 2008; Williams, 2012.
34 Hess and Puckhaber, 2004, p. 65.
35 Lutz, 2002, p. 70.
36 Kofman, 2014, p. 88-89.
37 Cox, 2015.
38 Cox, 2015.

skilled nature of the work performed. These were not related to the potential skills and experience that can be acquired through au pairing, but mainly to the way in which au pair programs enable "skilled workers occupying unskilled jobs abroad"[39]. In the same vein, some of the items explored the 'de-skilling' process that some au pairs experience, having qualifications that are not formally required for the role nor are reflected in their salaries (or pocket-money)[40].

A further dimension related to the work performed by au pairs emerged from our coding. Some authors identify au pairing as a form of de facto temporary labour migration[41]. As an illustration, Vosko[42] investigated the "back-door entry" to labour migration in Australia and Canada, revealing how programs forged under the cultural exchange discourse foster "precariousness among participants in programs imagined as fulfilling non-work purposes."

Our results emphasise how the phenomenon of au pairing is multifaceted, both in its empirical reality and its scientific representation, being explored through various perceptions on its use (by au pairs and by host family /employers). Finally, a cross-cutting theme emerging from our SLR is the role played by the state in regarding the scheme, in relation both to the legal framework and to the broader policies affecting the phenomenon[43].

4.
Final remarks

In this article we presented our first, tentative and perfectible, application of the SLR to conduct a literature review. The main inspiration for this methodology comes from medical research. It goes without saying that such a transplant requires important changes to the methods developed in other fields. In particular, we draw from systematic reviews, which are a type of study that aims to comprehensively identify and synthesise the available evidence on a particular research question or topic. It is characterised by a rigorous and structured approach to reviewing the literature and by a focus on a precise description of the criteria used to identify, select, and synthesise the relevant evidence[44]. The main objective of a systematic review is to provide a comprehensive summary of the current state of knowledge on a particular topic, which can then be used to inform decision-making, policy development, and

39 Williams and Baláž, 2005, p. 441.
40 Moroşanu and Fox, 2013; Pietka, Clark and Canton, 2013; Gotehus, 2021.
41 Andersen, 2017; Morokvasic, 2004; Vosko, 2023.
42 Vosko, 2023, pp. 93-94.
43 Anderson, 2009; Spanger, Dahl, and Peterson, 2017.
44 Harris et al., 2013.

future research[45]. In borrowing from other scientific disciplines, we are not driven by the aim of anchoring the always contested nature of legal research to other, more widely recognised as 'scientific' fields. Indeed, we do not claim that this methodology makes legal research in any way more 'scientific'.

Instead, a double goal drove us to design and then refine this technique. First, we wanted to reinforce the 'systematic' nature of legal research, which is sometimes described as one the elements characterising it[46] but seems to be scarcely considered in the literature. In reflecting on this characteristic, we were confronted by the problem of how to prove that a given corpus of literature that we identified as relevant to explore a given subject was not simply cherry-picked to lead to a pre-determined conclusion.

Second, we aim to improve the transparency of our process, allowing for debate and critique of our choices, both in terms of the scope of the corpus, the rules adopted to determine relevance, and the coding of the items. At the end of this exercise, we were also convinced that this approach has the potential to help researchers identify their own biases in the selection of relevant literature, reducing reputational and network approaches to the construction of a literature review. Ultimately we believe that, while our specific protocol only represents one possible application, a systematic approach would improve literature reviews underpinning both doctrinal and interdisciplinary legal research.

As for au pairs, our analysis highlights how the multifaceted nature of the phenomenon demands multiple scientific approaches, and methods, to investigate it. At the same time, our coding allowed us to identify common patterns across different disciplines, pointing to the fundamental interaction between migration and domestic and care work – even when such work is not legally defined as 'employment'. In doing so, our literature review strongly points to the need of adopting a socio-legal perspective when investigating the legal regulation of au pairing. Furthermore, policy responses to the challenges highlighted by the literature should simultaneously take into account the role of au pairing as a response to care demands, and as a tool to enact migratory strategies, develop/improve skills, and knowledge of a given culture.

45 Ng and Peh, 2010.
46 Nielsen, 2010.

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The Legal Dilemmas of the Drinking Water Supply in the Republic of Slovenia

ABSTRACT: *Slovenia is one of the few European countries where the right to drinking water is explicitly recognised by the highest legal act. It was included in the Constitution of the Republic of Slovenia in 2016 (Article 70a), but it was constitutionally protected even before that (under the right to life, personal dignity, and the right to a healthy living environment). Although the explicit recognition of this right at the highest level is important, it raised many dilemmas that have not yet been (fully) resolved. Specifically, the constitutional law has excluded the possibility of providing drinking water in the private sector, i.e. through concessions, while the sectoral legislation governing water concessions has not (yet) been amended, which creates an anomaly in the legal order. In this respect, the question of the permissibility of (retroactive) interference with already granted concessions may also arise. Furthermore, the constitutional law has interfered with the (original) competences of municipalities by stipulating that drinking water supply shall be provided by the state, through self-governing local communities, directly and on a non-profit basis. This implies that the provision of drinking water is no longer the original competence of the municipalities, but of the state. However, it is not clear on what legal basis the municipalities shall provide it or how its financing shall be organised. In addition, defining the provision of drinking water as 'non-profit' may raise questions as to the nature of this activity (economic or non-economic public service) and its compliance with EU law. Notwithstanding all the above, the legislator has still not aligned (all) legislation with the new Article 70a, despite the 18-month deadline set by the constitutional law. All this shows that the inclusion of this right in the Constitution has more of a political than a legal nature.*

KEYWORDS: *Drinking Water, Constitutional Rights, Slovenian law, Concessions, Privatisation.*

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1. Introduction

The supply of drinking water is a public service[1] which – because of its importance – is specially protected at both international and national levels. In Slovenian law its protection is guaranteed by the highest legal act – i.e. in the Constitution of the Republic of Slovenia (hereafter the Constitution[2]) – which defines drinking water as a fundamental human right.[3] It was included following a constitutional initiative in 2016 that resulted in the adoption of the Constitutional Law on the Amendment of Chapter III of the Constitution on Social and Economic Relations,[4] incorporating the right to drinking water into Art. 70a. In addition to the Constitution, drinking water is also regulated by many (complementary) sectoral laws, which are supplemented by by-laws of the state and self-governing local communities (municipalities).[5] The legal framework for drinking water supply in Slovenian law is therefore quite complex and opaque.

Even though the explicit inclusion of the right to drinking water in the Constitution has elevated its importance, the constitutional amendment has led to many ambiguities and legal dilemmas. Namely, the legislator has still not harmonised the relevant sectoral laws with the constitutional law, even though the latter set an 18-month deadline for the adoption of implementing legislation.[6] As a result, Slovenia currently has a regime in force that is not in line with the Constitution, and – due to the nature of the right to drinking water – its direct implementation under the Constitution is not (fully) possible.

This paper aims to present these inconsistencies. The first part of the paper presents the *ratio* for the adoption of art. 70a of the Constitution and places the right to drinking water in its theoretical, international, and comparative legal context. The second part of the paper analyses the content of Article 70a and its (in)compatibility

1 Smets, 2006, p. 43.
2 Official Gazette of the Republic of Slovenia, No. 33/91-I as amended.
3 Although the provision on the right to drinking water is included in the chapter on economic and social relations, it has the status of a human right and fundamental freedom. Namely, per the constitutional case law, legal protection under the constitutional complaint (which is designed to protect human rights and fundamental freedoms) is also guaranteed for rights that are not regulated in the chapter on fundamental human rights and freedoms. See the Constitutional Court Decision, No. Up 41/94 of 22 December 1994.
4 Official Gazette of the Republic of Slovenia, No. 75/16.
5 Zobavnik, 2015, pp. 5–6.
6 Between the submission and publication of this paper, a draft law on public utility services for drinking water supply and wastewater management was proposed, addressing some legal issues related to drinking water. However, since it has not yet been adopted, it is not analysed in this paper.

with relevant (sectoral) laws. The final part of the paper presents the key findings and conclusions on the examined topic.

The hypothesis underlying this study is that the explicit inclusion of the right to drinking water in the Constitution was useful, but not strictly necessary.

2.
Drinking Water as a Human Right

2.1. Definition of the Right to Drinking Water

The right to drinking water is recognised in a number of international legal documents, but the most precise definition is provided in General Comment No. 15 on the right to drinking water to the International Covenant on Economic, Social and Cultural Rights (hereafter General Comment No. 15).[7] It states that the right to safe drinking water ensures that everyone has access to sufficient, safe, acceptable, physically, and affordably available water for personal and domestic use.[8] The main elements that define the right to drinking water are therefore the following:[9]

a) *Availability*: Everyone should have regular access to sufficient water for drinking, washing, laundering, cooking, personal hygiene, and household cleaning.
b) *Quality*: Water for personal and domestic use must be safe and acceptable. It must be free from microbes and parasites, chemical or radioactive substances that pose a risk to human health, and must be of an appropriate colour, odour, and taste.
c) *Physical accessibility*: Water must be physically accessible and at least at a safe distance, adapted to the needs of different groups.
d) *Affordability:* Water must be affordable for all. The cost of water to households should not be a disproportionate burden and, in particular, no individual should be denied access to safe drinking water on the grounds of non-payment.[10]

2.2. International Acts on the Right to Drinking Water

The right to drinking water has only in recent decades been established as a separate human right, following the realisation that water resources are limited. The first

7 General Comment No. 15, The Right to Water, E/C.12/2002/11, 20 January 2003.
8 Ibid., para. 2.
9 Ibid., para. 12.
10 WHO, UN Human Rights, 2010, pp. 7–11.

binding international acts that explicitly mentioned the right to safe drinking water are the 1979 Convention on the Elimination of All Forms of Discrimination against Women[11] and the 1989 Convention on the Rights of the Child.[12] However, these acts only refer to specific groups of individuals (women, children).[13] The Universal Declaration of Human Rights (UDHR[14]) – adopted in 1945 and now legally binding as customary international law – also contributed to the development of the right to drinking water, since it has been the basis for a number of international treaties regulating the right to water,[15] such as the International Covenant on Civil and Political Rights (ICCPR[16]) and the International Covenant on Economic, Social and Cultural Rights (ICESCR[17]), adopted in 1966. However, the right to drinking water is defined in both instruments primarily as a socio-economic right.[18]

The most important role in the development of this right at the international level can be attributed to General Comment No. 15, adopted in 2002.[19] The latter is not in itself legally binding but gives an authoritative interpretation. It states that the right to drinking water is not new, but an existing right under the ICESCR, deriving from the right to an adequate standard of living and the right to the enjoyment of the highest attainable standard of health – and is also inextricably linked to the right to life and human dignity enshrined in the ICCPR and the UDHR.[20]

On the other hand, the right to drinking water is not included in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR[21]), nor in the protocols adopted subsequently. However, the European Court of Human Rights (ECtHR) has on several occasions dealt with water-related cases under the existing provisions, especially under the right to privacy and family life (Art. 8 of the

11 Convention on the Elimination of All Forms of Discrimination against Women, UN General Assembly, 18 December 1979, Official Gazette of the Republic of Slovenia - International Treaties, No 9/92.
12 Convention on the Rights of the Child, UN General Assembly, 20 November 1989, Official Gazette of the Republic of Slovenia - International Treaties No 9/92.
13 Thielbörger, 2014, p. 57.
14 Universal Declaration of Human Rights, UN General Assembly, 10 September 1948, 217 A (III).
15 Ahačič et al., 2016, p. 15.
16 International Covenant on Civil and Political Rights, UN General Assembly, 16 December 1966, 2200 A (XXI), Official Gazette of the Republic of Slovenia, No 35/92 - International Treaties, No 9/92.
17 International Covenant on Economic, Social and Cultural Rights, UN General Assembly, 16 December 1966, 2200 A (XXI), Official Gazette of the Republic of Slovenia, No 35/92 - International Treaties, No 9/92.
18 Thielbörger, 2014, p. 117.
19 Smets, 2006, p. 31.
20 Thielbörger, 2014, p. 64–66
21 European Convention of Human Rights, as amended by Protocols 3, 5, and 8 and supplemented by Protocol 2, and its Protocols 1, 4, 6, 7, 9, 10, and 11, Official Gazette of the Republic of Slovenia - International Treaties, No 7/94.

ECHR).[22] The European Social Charter (ESC[23]) also does not explicitly mention the right to drinking water, but the European Committee of Social Rights (ECSR) – in its consideration of the collective complaint European Roma Rights Centre v Italy[24] – recognised the right to drinking water as part of the right to housing under Art. 31 of the ESC.[25]

In EU law, the right to drinking water can be derived from certain provisions of the Charter of Fundamental Rights[26] and is also classified as a service of general economic interest.[27] These are "economic activities for which Member States, for reasons of general interest, impose specific public service obligations."[28] In the national (Slovenian law) context, they are understood as economic public services.[29] However, EU law does not determine the form in which these public services must be organised (the principle of neutrality), leaving this to the member states.[30] It does, on the other hand, lay down so-called public service obligations, which include the obligation to provide a public service (drinking water supply) on a regular (continuous) basis, of the prescribed quality and at an affordable price, for the benefit of all users throughout the territory under equal conditions, with special protection for users and consumers. As drinking water supply is an economic activity, it is subject to EU rules on the internal market, competition, and state aid.[31] Protection of drinking water is also addressed by the Water Framework Directive,[32] the Drinking Water Directive,[33] and the Urban Waste Water Treatment Directive.[34]

22 See, for example *Elci and Others v Turkey*, Application Nos 23145/93 and 25091/94, judgment of 13 November 2003; *Ostrovar v Moldova*, Application No 35207/03, judgment of 13 September 2005; *Zander v Sweden*, Application No 14282/88, judgment of 25 November 1993, *Tătar v Romania*, Application No 67021/01, judgment of 27 January 2009, and *Dzemyuk v Ukraine*, Application No 42488/02, judgment of 4 September 2014.
23 European Social Charter, Official Gazette of the RS - International Treaties, No 7/99.
24 *European Roma Rights Centre v. Italy*, complaint No 27/2004, decision of 7 December 2005.
25 Adamič, 2012, p. 22.
26 In particular, the right to human dignity (Art. 1), the right to life (Art. 2, para. 1), the right to bodily integrity (Art. 3, para. 1), the right to social security (Art. 34) and the right to health (Art. 35), as set out in the EU Charter of Fundamental Rights, OJ C 83/389, 30. March 2010.
27 Pečarič, 2019, p. 423; Pečarič and Bugarič, 2011, p. 166.
28 Art. 14 and 106 of the Treaty on the Functioning of the European Union, OJ C 326/47, 26 October 2012, pp. 47–390, and Protocol No 26 on Services of General Interest.
29 Pečarič, 2019, p. 299.
30 Ahačič et al., 2016, p. 51.
31 Pečarič, 2019, p. 425–426. See also Nikolić, 2015, pp. 22 et seq.
32 Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L 32, 22 December 200, p. 0001–0073.
33 Council Directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption, OJ 330, 5 December 1998, pp. 32–54.
34 Council Directive of 21 May 1991 concerning urban waste-water treatment (91/271/EGS), OJ 135, 30 May 991 pp. 0040–0052.

Following the first European Citizens' Initiative,[35] the water sector was excluded by the European Commission from the application of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (hereafter Directive 2014/23/EU[36]), stating that "Concessions in the water sector are often subject to specific and complex regimes that need to be carefully considered, as water is a public good of fundamental importance for all citizens of the Union. The specific nature of these arrangements justifies excluding the water sector from the scope of this Directive."[37] The 'controversial' proposal for a directive provided that member states which had already partially privatised or were planning to privatise their water supply should, as a general rule, tender for the award of a concession at a European level.[38]

2.3. A Comparative Law Review of the Right to Drinking Water

In most countries the right to drinking water is protected by legislation and is rarely included among human rights and freedoms. Exceptions are Uruguay, South Africa and Slovakia, where the right to drinking water is a constitutional category.[39] At the global level, Uruguay is the first country that has included the right to drinking water in its constitution and established the exclusive jurisdiction of the state over water. The inclusion of this right in the Constitution was achieved through a referendum in 2004, due to the high cost, poor quality of services, and the negative consequences of privatisation.[40] The right to adequate food and water is also explicitly recognised in the Constitution of the Republic of South Africa and specified at the legislative level.[41]

In Europe, the human right to water is explicitly recognised in the legal order in Belgium, Finland, France, Russia, Spain, Sweden, Ukraine, and the United Kingdom. Social tariffs for the less well-off exist in Austria, Bulgaria, Greece, Hungary, Luxembourg, Malta, Portugal, the Netherlands, and the United Kingdom, as well as in Belgium.[42] However, this does not mean that these countries have already fully implemented the right to safe drinking water, nor does it mean that in other countries the right to safe drinking water does not exist in practice. The privatisation of

35 The Slovenian government was among those that supported the proposal, while some countries (Austria, France, Belgium, Czech Republic, Germany, Italy, Poland, Spain, United Kingdom) expressed reservations on the substance.
36 OJ L 94, 28 March 2014, p. 1–64
37 Recital 40 of the Directive 2014/23/EU.
38 Pekolj, 2014, pp. 11–13.
39 Centre of Housing Rights and Eviction, 2008, pp. 58–225
40 Art. 47 of the Constitution of the Republic of Urugvay.
41 Art. 27 of the Constitution of the South Africa Republic.
42 Thielbörger, 2014, p. 17.

drinking water varies widely across the EU, with mixed models prevailing where both public and private providers supply drinking water. In the Netherlands, it is legally established that the private sector is not allowed to participate in the supply of drinking water, while in Belgium, Finland, France, Germany, Greece, Italy, and Spain, the public and private sectors provide drinking water in varying proportions. In England and Wales, on the other hand, there has been full privatisation of the water supply with strong regulation.[43]

However, the only EU member state other than Slovenia that has a constitutional framework for (drinking) water is Slovakia. The right to drinking water was enshrined in the Constitution of the Republic of Slovakia in 2014 and is regulated by Art. 4, which provides in its first paragraph that groundwater and watercourses are also the property of the state, which must protect and care for natural resources on behalf of its citizens and future generations. The second paragraph provides for a prohibition on the export of water out of the country, including through the water supply network. The only exceptions are water intended for personal use, bottled water, and water for humanitarian purposes, further specified in the Water Act (*Vodní zákon*[44]).[45]

Other EU countries do not have such an explicit provision in their constitutions, but this does not mean that this right does not exist, as it can be guaranteed through case law or other legal institutions.[46]

43 Presad, 2007, p. 219.
44 Act No. 254/2001 Coll., the Water Act and Amendments to Certain Acts (Water Act).
45 Zobavnik, 2015, pp. 17–18.
46 Ibid., p. 24.

3. Drinking Water Supply from the Perspective of Slovenian Law

3.1. Constitutional Framework

Before the 2016 constitutional reform, the Constitution did not explicitly define the right to drinking water, but the latter (implicitly) derived from certain other rights that cannot be guaranteed without access to water. These include (among others) the right to life,[47] the right to personal dignity and security,[48] and the right to a healthy living environment.[49] In addition, drinking water was protected as a public good by the provision on public goods and natural resources in Art. 70 of the Constitution.

However, it was accepted that the prior constitutional regime on water supply was quite liberal, leaving the legislator and the executive a wide margin of discretion in granting concessions and leaving the provision of drinking water to private operators. In light of the above, demands for more specific constitutional protection of water resources and access to the right to drinking water have begun to emerge.[50] To constitutionally establish water as a universal and fundamental human right, to prevent the privatisation of water resources and the treatment of water as a marketable commodity, and to ensure that the provision of drinking water is a non-profit public service, members of the National Assembly have submitted a proposal to amend the Constitution based on Art. 168. This initiative followed the (successful) European citizens' initiative to exclude the water sector from the scope of the Directive on the award of concession contracts, which originally regulated the possibility of (cross-border) concessions also for drinking water supply. Moreover, by exempting water from the free market and enshrining the right to drinking water in the Constitution, the chances of realising the aim that water remains the property of the people – and that it is the state that distributes this right – is increased.[51]

On 17 November 2016, the National Assembly adopted the constitutional law which added a new Art. 70a to the Constitution, regulating the right to drinking water. It stipulates that everyone has the right to drinking water; water resources are a public good managed by the state; they serve as a priority and sustainable supply of drinking water and domestic water to the population and in this respect are not a

47 Art. 17 of the Constitution.
48 Art. 34 of the Constitution.
49 Art. 72 of the Constitution.
50 National Assembly of the Republic of Slovenia, 2014, p. 2 et seq.
51 National Assembly of the Republic of Slovenia, 2015, pp. 7–8.

marketable commodity; and that the supply of drinking water and domestic water to the population is provided by the state, through self-governing local communities, on a direct and non-profit basis. The second paragraph of the constitutional law provides that the laws regulating the subjects referred to in the new Art. 70a of the Constitution must be harmonised with this constitutional law within eighteen months of its entry into force.

The constitutional provision will be analysed in more detail below.

a) "Everyone has the right to drinking water":
   This provision imposes an obligation on the state to provide, within its means, adequate drinking water in terms of quantity and hygiene for each individual. However, the state is not obliged to provide water in areas where only self-supply is appropriate, nor on properties that do not meet the legal conditions for obtaining a water supply connection. This provision therefore does not impose an obligation to provide a compulsory public service of supplying drinking water from public water supply systems to all inhabitants in the territory of Slovenia.[52] With self-supply, the population assumes the obligation of the municipalities and the state to provide drinking water, which has the effect of relieving the burden of heavy investments in the construction of public water supply networks in certain, more sparsely populated areas. However, even in this case the state and municipalities are obliged to provide assistance to self-supplying water connections in the form of part of the investment funds, by ensuring water quality control, and by training waterworks operators. Where this is not possible, they at least should provide cisterns with drinking water.[53] This also applies to those living in illegal housing without connections to communal infrastructure (e.g. Roma settlements).[54] The concept of 'drinking water' further implies that water must also be medically safe, otherwise, it is not drinkable.[55] However, it is not clear from the constitutional provision what quantities individuals are entitled to based on the right to drinking water, nor what the price of drinking water should be; indirectly, it is only possible to infer that it must be calculated in a cost-based manner.[56] Moreover, it does not regulate the position of those who cannot afford even the most basic quantities of drinking water.

52 Constitutional Commission of the National Assembly of the Republic of Slovenia, 2016, p. 21.
53 See Art. 9-12 of the Decree on Drinking Water Supply, Official Gazette of the Republic of Slovenia, No. 88/12 as amended.
54 *Hudorovič and others v. Slovenia*, Applications Nos 24816/14 and 25140/14, judgment 10 March 2020. Smets, 2006, p. 57, 65.
55 Constitutional Commission of the National Assembly of the Republic of Slovenia, 2016, p. 19.
56 Glavaš, 2019, p. 36.

b) "Water resources are a public good managed by the state"
The term 'water resources' is not defined in Slovenian law, but it is accepted in theory that it includes all sources of water from which drinking water is collected for the supply of the population, i.e. both surface water and groundwater, natural and man-made resources, including water intakes and reservoirs.57 The Constitution therefore confers the status of public good on (all) water resources but does not define it, even though it is also included in the prior article, Art. 70 of the Constitution. In addition, Art. 70a, para. 2, introduces a non-proprietary concept of public good. According to this, the state cannot acquire ownership of water resources (anymore), but can only manage them. Nor can another (public or private) entity acquire ownership of water resources. Such a regulation aims to prevent the (capital) privatisation of water resources.58

c) "Water resources serve as a priority and sustainable supply of drinking water to the population and water for domestic use and are not a tradable commodity in this respect"
The provision does not specify whether the establishment and recognition of a right to drinking water also implies free access to and use of drinking water. However, this cannot reasonably be expected of the state, since the proper maintenance of water supply installations, the costs of the infrastructure system, and the monitoring of water quality itself are not free and represent for the state certain costs.59 In light of this paragraph, the supply of water to the population takes permanent precedence over the economic exploitation of water resources60 and – if a water resource is not sufficiently abundant to meet the needs of a non-profit-making supply – it cannot be exploited for economic purposes. For this reason, the state has to monitor the quantity and quality of water resources and to protect their condition, which is particularly relevant when water resources are used for other purposes. The purpose of this provision is therefore to adequately protect the supply of drinking water to the population while not preventing its economic exploitation. Thus, companies will still be allowed to exploit water resources for economic purposes, but only to an extent that does not jeopardise the supply of the population, which has priority in this case. Only surplus water that is not primarily intended for the supply of the population will therefore be available on the free market.61

57 Kaučič, 2017, p. 61. See also Constitutional Commission of the National Assembly of the Republic of Slovenia, 2016, p. 19.
58 Ibid, p. 20.
59 Kaučič, 2017, p. 61.
60 Smets, 2006, pp. 40–41.
61 Kaučič, 2017, pp. 61–62.

d) "The supply of drinking water to the population and water for domestic use is provided directly and on a non-profit-making basis by the state through the self-governing local communities"
Drinking water supply is defined as the exclusive responsibility of the state, but is provided through self-governing local communities. However, it is not clear on what legal basis self-governing local communities provide this service. Art. 140 of the Constitution allows for the transfer of competences from the state to self-governing local communities if such transfer is provided for by law and the self-governing local community receives financial resources to carry out the tasks of the state, but according to the Explanatory Memorandum to the constitutional law, Art. 70a of the Constitution does not refer to such a transfer of competence from the state to the self-governing local communities, but rather to a sui generis competence.62 It follows that the provisions of Article 140 of the Constitution shall not (fully) apply to the supply of drinking water and - since Art. 70a does not address the financing of self-governing local communities - this aspect will have to be regulated by legislation.

Moreover, this (state) public service has to be provided 'directly', implying the public service provider shall be fully incorporated into the state or local administration system (e.g. a department within a ministry).[63] According to this, the supply of drinking water could be provided only in the form of a state-run overhead plant. However, such an interpretation would be problematic because in Slovenia the supply of drinking water is generally provided in the form of (municipal) public undertakings. In addition, it is clear from the explanatory memorandum of the constitutional law that it aimed to exempt the supply of drinking water to the population from market activities and the market rules of the EU's internal market. This indicates that the provision of public service through a public undertaking is still acceptable,[64] whereas granting a concession for drinking water supply is no longer possible (under the Constitution).

In addition, Slovenian law does not recognise the term non-profit public service, nor is it compatible with the nature of the drinking water supply, which is an economic public service where profit-making is subordinated to the provision of public goods but not prohibited. Art. 70a, para. 4 of the Constitution must therefore be interpreted as requiring that the price of drinking water shall be determined on a cost-oriented basis, and according to an appropriately controlled methodology. Any surplus revenue may only be used for investment in the improvement and development of the activity.[65] A different interpretation – i.e. that by making the service non-profit,

62 Constitutional Commission of the National Assembly of the Republic of Slovenia, 2016, p. 21.
63 Pečarič, 2019, p. 154.
64 Ahačič et al., 2016, pp. 13–14.
65 Rems, 2019.

the legislator intended to exclude it from the scope of EU law - could be problematic from the point of view of the relationship between national constitutional law and EU law, which has primacy.[66] As already explained, under EU law the provision of drinking water has the status of a service of general economic interest. A different regime is therefore inadmissible.

3.2. Legislative Framework

At the legislative level, drinking water supply is regulated by a number of laws, supplemented by state and municipal by-laws (defining for each municipality how the drinking water supply should be implemented within the organisation of the individual municipalities). The Slovenian legal system therefore does not have an umbrella law regulating the water sector, but its provisions are scattered in various regulations which must be applied in parallel. Some of the most important laws, also directly affected by the constitutional change (and therefore subject to future harmonisation), will be presented below.

The Environmental Protection Act (hereafter EPA[67]) defines drinking water supply as a compulsory municipal public service, meaning it has to be provided by the municipality in its territory. Only exceptionally, if the municipality fails to ensure its provision, does the state provides it in the municipality's territory and at the municipality's expense. However, this power has not yet been used in practice, which is mainly due to the lack of state supervision of the public service by municipalities. the constitutional law transferred the responsibility for the provision of drinking water from the municipalities to the state, thereby interfering with its original competences, without compensating it for the loss of revenue from the supply of drinking water. Namely, according to Art. 21 of the Local Self-Government Act,[68] the original tasks of a municipality include the regulation, management, and care of local public services, which are provided by the municipality either directly within the municipal administration, by establishing public institutions and undertakings or by granting concessions.

Moreover, the constitutional law has transferred to the state only the exclusive competence for the supply of drinking water, while other public services in the water sector – such as the discharge and treatment of municipal and precipitation wastewater, and the collection and treatment of certain types of municipal waste[69] – are still within the competence of the municipalities (compulsory municipal economic public services).

66 Art. 3.a of the Constitution.
67 Official Gazette of the Republic of Slovenia, No. 44/22 as amended.
68 Official Gazette of the Republic of Slovenia, No. 94/07 as amended.
69 Art. 233, para. 1 of the EPA.

In addition, water supply infrastructure is (still) owned by municipalities and not by the state.[70] This division of competences does not seem adequate.

On the other hand, the EPA does not specify the subject-matter of this public service but authorises the government to prescribe in more detail the standards for the provision of the public service and the pricing methodology. This is regulated by the Decree on Drinking Water Supply, under which municipalities are required to provide public water supply throughout their territory to operate a public service for the supply of drinking water. Every building must be connected to it unless the building does not have a sewage outlet. The decree also explicitly states that self-supply of drinking water is only allowed in areas and in the case of buildings where the municipality does not provide a public drinking water service. Furthermore, the Decree on the Methodology for Determining Prices of Obligatory Municipal Public Services for Environmental Protection[71] sets out the national guidelines for the pricing of drinking water, while the definition of drinking water and its quality standards are set out in the Rules on Drinking Water.[72] According to this, wholesome drinking water must not contain micro-organisms, parasites, and their developmental forms in such numbers as to constitute a danger to human health; it must not contain substances in concentrations which, alone or in combination with other substances, may constitute a danger to human health; and it must comply with the microbiological and chemical parameters laid down in the rules. The responsibility for its wholesomeness lies with the public drinking water service provider.

The theory argues that such a legal authorisation (as found in the EPA) is not in line with the principle of legality.[73] According to this the exercise of constitutional rights may be determined only by law (so-called reservation of law)[74] and not by lower legal acts (e.g. by-laws), meaning that it is inadmissible that essential aspects of the exercise of the right to drinking water are currently regulated at the sub-legislative level,[75] i.e. in the Decree of Drinking Water Supply, the Decree on the Methodology, and in municipal ordinances.

The concept of public good, which is also contained in the new constitutional provision, is defined in the Water Act (hereafter WA[76]). The act distinguishes between natural[77] and built[78] public goods. The former includes inland waters and water lands,

70 Art. 233, para. 2 of the EPA.
71 Official Gazette of the Republic of Slovenia, No. 87/12 as amended.
72 Official Gazette of the Republic of Slovenia, No. 19/04 as amended.
73 For more on the principle of legality, see Constitutional Court Decision, No. U-I-79/20 of 13 May 2021, point 69.
74 Art. 15, para. 2 of the Constitution.
75 Ahačič et al, 2015, p. 126.
76 Official Gazette of the Republic of Slovenia, No. 67/02 as amended.
77 Art. 5 of the WA.
78 Art. 17 in conjunction with Art. 18 of the WA.

while a built public good is conferred this status by a decision of the competent authority if it can be intended for general use.[79] According to the above, the status of public good cannot therefore apply to groundwater, as it is not generally accessible.[80] Nevertheless, the constitutional law grants the status of public good to all water resources. Since groundwater is the main source of drinking water, *de lege ferenda* public good status will also have to be granted to it. Water goods are subject to a special legal regime. Anyone can use them free of charge and without a special act, provided that this has only a minor impact on the quantity and quality of the water and does not infringe on the equal rights of others (general use).[81] However, any use that exceeds the limits of general use (special use) requires a water right to be obtained for a fee. The latter may be obtained by a water permit[82] granted in an administrative procedure by an administrative decision of the Slovenian Environment Agency (ARSO) for a maximum period of 30 years, or by a concession[83] granted by the government based on a public tender for a maximum period of 50 years. In this respect, special uses of water for the supply of drinking water have priority over uses of water for other purposes.[84] According to the Water Act, the supply of drinking water requires a water right that must be obtained by the municipality and therefore corresponds to a special use of a public good. The WA, contrary to the Constitution, establishes public ownership of water goods but prohibits legal transactions with them.[85]

The provision of economic public (drinking water) services is governed by the Services of General Economic Interest Act (hereafter SGEIA[86]). According to this, public services can be provided in the form of overhead establishments, public economic institutions, public undertakings, or by granting concessions. In the field of drinking water supply, this implies that municipalities obtain a water right based on a water permit and then organise the provision of this public utility in the forms listed above, usually in public undertakings. The legislation therefore allows for both public and private provision of drinking water, which is a fundamental difference from the constitutional law, which *de facto* prohibits the private provision of this public service. This raises the question of the validity of already granted concessions with operators supplying drinking water, and concession agreements and water permits for the commercial exploitation of water resources. A change in the law is admissible under conditions of non-genuine retroactivity, i.e. where there are reasons of public interest

79 Art. 17, para. 1 of the WA.
80 Ude, 1994, p. 121.
81 Art. 105 of the WA.
82 Art. 125 of the WA.
83 Art. 136 of the WA.
84 Art. 108, paras. 1-2 of the WA.
85 Art. 21, para. 8 of the WA.
86 Official Gazette of the Republic of Slovenia, No. 32/93 as amended.

which override the principle of the protection of legitimate expectations. However, the legislator will have to provide for a transitional period and/or fair compensation for the prejudice to the legal position of the concessionaires.[87] Otherwise, the state's liability for damages could be established.

Moreover, the implicit prohibition on the granting of concessions for the supply of drinking water shows a clear misunderstanding of the process of privatisation of the provision of public services. Privatisation of provision implies that certain functions are transferred from the public sector to private sector entities (e.g. companies), in the specific case of supplying drinking water, while control (and responsibility) over the provision of this function remains with the public sector. Moreover, the private entity only manages the water infrastructure, while the municipality remains the owner. It does not therefore lead to a change of ownership (of water resources).[88] The problem is therefore not the privatisation of the provision of drinking water, but the private ownership of water resources (capital privatisation). Despite this, the constitutional law prevents any delegation of any tasks to a private entity. In addition, current legislation already allows for the restriction of specific uses of water and the imposition of specific obligations on the holder of a water right due to threats to drinking water supplies. Therefore, a prohibition on the granting of concessions was not necessary, but rather greater control over the operators of this public service.

Among the more important laws governing drinking water supply are the Act Regulating the Sanitary Suitability of Foodstuff, Products and Materials Coming into Contact with Foodstuffs,[89] which sets out the requirements for drinking water to protect human health; the Fire Protection Act,[90] and the Fire Service Act[91], which set out the requirements for the use of water from the public water supply network for fire safety purposes; and the Act on Protection against Natural and Other Disasters, which prescribes the obligation to draw up a protection and rescue plan for water supply systems following the Regulation on the Content and Drawing-up of Protection and Rescue Plans.

4.
Conclusion

Based on all the above, it is possible to conclude that the explicit inclusion of the right to drinking water in the Constitution was useful, but not strictly necessary, as its

87 Constitutional Court Decision, No. U-I-193/19-14 of 6 May 2021.
88 Božič, 2015. p.
89 Official Gazette of the Republic of Slovenia, No. 52/00 as amended.
90 Official Gazette of the Republic of Slovenia, No. 3/07 as amended.
91 Official Gazette of the Republic of Slovenia, No. 113/05 as amended.

(constitutional) protection was already guaranteed before the constitutional change through other constitutional rights. It therefore has a (merely) declaratory effect. Namely, according to officially published data, more than 94% of Slovenia's population has access to drinking water through public water supply,[92] and monitoring ensures that the water is of adequate quality, meaning that the existing (legislative) regime for the supply of drinking water is functioning.[93] The initial hypothesis can therefore be confirmed.

On the other hand, the constitutional law did not address other – more important – problms regarding drinking water supply, such as insufficient funds for the maintenance of public water supply systems, non-receipt of concession fees, difficulties in accessing drinking water in Roma settlements, and for socially weaker populations. In addition, it introduced some changes that are not in line with the (legally and theoretically) established concept of public services (and at least *prima facie* also not in line with EU law) — such as the non-profit provision of drinking water as a service of general economic interest, and the implicit prohibition against granting concessions for this purpose, although this form of providing a public service is (often) more (economically and professionally) efficient.

Therefore, without relevant changes to legislation – in particular to the laws presented in this paper – it will not be possible to implement the right to drinking water in a (constitutionally) compliant manner. However, given that the deadline for harmonisation has long since passed and that there is no sign of any (new) tendencies to (finally) implement the requirements of the constitutional law, it is evident that the constitutional amendment was more a political gesture without the will to make concrete legal changes.

92 ARSO, 2023.
93 See also Avbelj, 2016, p. 3.

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ARTICLES

Matko GUŠTIN*

The Best Interest of the Child in the Jurisprudence of the European Court of Human Rights in Adoption Cases

ABSTRACT: *In all procedures related to children, including the adoption procedure, the competent national authorities must act in accordance with the principle of the best interest of the child. The challenges of applying the principle of the best interest of the child are particularly reflected in cases related to adoption. This is also connected with the fact of the complexity of adoption, which results in the termination of (legal) relations between the child and the biological parents. The European Court of Human Rights also decided on the best interest of the child in adoption cases, in the context of the right to respect for family life, which contributed to the interpretation of this principle. Therefore, the aim of this paper is to determine the understanding of the best interest of the child in adoption cases in the jurisprudence of the European Court of Human Rights and present the criteria used by competent national authorities to justify adoption. In the first part of the paper, the principle of the best interest of the child is presented, indicating the non-existence of a single definition, guidelines for its interpretation and the relationship between the best interest of the child and adoption. Subsequently, the right to respect for family life is analysed, and besides, the relationship between this right and the principle of the best interest of the child. The views of the European Court of Human Rights on the best interest of the child in adoption cases are analysed in cases of child adoption without parental consent and intercountry adoptions. In this way, an insight into the meaning of the best interest of the child is given through special aspects of adoption.*
KEYWORDS: *the best interest of the child, adoption, the UN Convention on the Rights of the Child, the European Court of Human Rights, the rights to respect for family life*

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1. Introduction

Acting in the best interest of the child is the standard of contemporary society regulated by Art. 3 of the 1989 UN Convention on the Rights of the Child[1] (hereinafter: CRC). Pursuant to that Article, in all actions of public or private social welfare institutions, courts, and administrative or legislative bodies, the best interest of the child shall be a primary consideration. It is a dynamic principle adaptable to different circumstances. In general, referring to the interpretations of legal theory, principles are used to resolve disputed cases and as decision criteria.[2] This especially applies to issues related to children's rights, who enjoy a particular social status and sensibility. Therefore, the formulation of the best interest of the child indicates a multidimensional understanding.

Considering that the best interest of the child is analysed from the adoption perspective, it is necessary to emphasise its fundamental characteristics. Namely, adoption means transferring parental rights from biological parents to other persons, i.e. adoptive parents. In this way, the child becomes a (legally) equal member of the new family and fully integrates into it.[3] In contemporary society, the purpose of adoption is to provide permanent care for the child without adequate parental care. In this way, the right of the adoptive parents to find a family is realised, while the rights of the children still have priority.[4] Art. 21 of the CRC sets international standards for adoption. At the same time, this fundamental international instrument protecting the rights of the child is characterised by a neutral attitude towards adoption, declaring it only as one of the forms of alternative care for the child.[5] International standards applying to all forms of adoption refer to the official approval of the adoption only by a professional person in accordance with the available information and giving consent to the adoption.[6] Considering that it is the most difficult family law measure that leads to the termination of the relationship between the child and the biological parents, adoption is the last applicable measure, only when it is in accordance with the best interests of the child.[7] In that sense, adoption has a double meaning and thus represents the institute of family law, as well as the institute of social protection of a

1 UN General Assembly Resolution 44/25 of 20 November 1989.
2 Vrban, 2003, pp. 405 and 406.
3 Perry, 2020, p. 331.
4 Jakovac-Lozić, 2021, pp. 279 and 287; Sladović Franz, 2015, pp. 21 and 22; Jakovac-Lozić, 2013, p. 73; Jakovac-Lozić, 2000, p. 32.
5 Rešetar, 2022, p. 694.
6 Luhamaa and O'Mahony, 2021, p. 181.
7 Fortin, 2009, p. 608.

child lacking adequate parental care.[8] The theoretical definition of adoption makes it clear that it is a complex family law measure related to several human rights, so the best interest of the child is also interpreted from a different perspective.

The complexity of the best interest of the child in connection with adoption is mainly reflected in the correlation with the right to respect for family life contained in Art. 8 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms[9] of the Council of Europe (hereinafter: ECHR). When deciding on the right to respect for family life, including cases related to adoption, the European Court of Human Rights (hereinafter: ECtHR) applies the test of necessity. In this way, it is determined whether the adoption and other previous measures (of family protection) were justified, given that the competent national authorities have a wide margin of discretion.[10] Since it is a principle from which the guidelines for decision-making derive, one of the most appropriate ways of knowing the meaning of the best interest of the child is the analysis of the jurisprudence. In this sense, the jurisprudence of the ECtHR, which interprets the best interest of the child in adoption cases from the perspective of the right to respect for family life, is particularly noteworthy.

In numerous cases related to adoption, the ECtHR found a violation of the right to respect for family life, whereby a comprehensive analysis of each case provides insight into the understanding of the best interest of the child, as well as the protection of the rights of biological parents. Therefore, the aim of this paper is to determine how the ECtHR interprets the best interest of the child in adoption cases and according to which criteria competent national authorities justify adoption. To achieve this aim, the importance of the principle of the best interest of the child and its effects are analysed, with a particular focus on adoption. In addition, the right to respect for family life and its connexity to the principle of the best interest of the child are also analysed, followed by a (thematic) analysis of selected judgments of the ECtHR related to adoption.

The paper is structured into five chapters. The first chapter provides a general analysis of the principle of the best interest of the child, a contemporary approach to its interpretation and an interpretation of the best interest of the child towards adoption. Then, the second chapter analyses the right to respect for family life, while the third chapter demonstrates the connexity between the best interest of the child and the right to respect for family life. The fourth chapter analyses the interpretation of the best interest of the child in adoption cases in the jurisprudence of the ECtHR, namely the general attitudes and the attitudes taken in adoption cases without parental consent and intercountry adoptions. Finally, the conclusion offers general guidelines for further actions to be taken by the competent national authorities in adoption cases.

8 Čović, 2017, p. 80.
9 Council of Europe Treaty Series (CETS) No. 5, Rome, 4 November 1950.
10 Killkely, 2016, p. 298.

2.
Conceptual Determination of the Best Interest of the Child

In the context of international legal protection of children's rights, the principle of the best interest of the child has been known for a long time. It was also regulated by the 1959 Declaration on the Rights of the Child.[11] However, as the above-mentioned Declaration was a non-binding international instrument, the application of the principle of best interest was dependent on the will of the competent State authorities.[12] Considering that the CRC is a binding international instrument for the States Parties, it is mandatory to act in accordance with the best interest of the child, which is also subject to the supervision of the Committee on the Rights of the Child.[13] As stated in the introduction, the best interest of the child is characterised by a multidimensional understanding that requires a comprehensive analysis. Therefore, below is given: a) a general analysis of the best interest of the child, b) a contemporary approach to its interpretation and c) interpretation of the best interest of the child in relation to adoption.

2.1. Generally about the Best Interest of the Child

By accepting the best interest of the child as a primary consideration, those liable for applying this principle are left with enough space for balancing interests. This is related to the fact that no other international instrument comprehensively protects children's rights. In addition, moral reasons related to the social vulnerability of children, as well as their lesser influence on shaping everyday life, are also taken into account.[14] In this way, children are enabled to become successful adults, or following the so-called Solomon's argument, ones own interests are sacrificed for the sake of the children.[15] The goal of this principle is to achieve a balance between the child's autonomy and protection, who is no longer exclusively a vulnerable individual, but a legal subject vested with certain rights.[16]

The best interest of the child does not have a single definition – it is an indeterminate, but definable principle.[17] The reason for this is the universality of the CRC, where

11 Šeparović, 2014, p. 29.
12 Takács, 2021, p. 98; Hrabar, 1994, p. 31.
13 Hrabar, 2021a, p. 25.
14 Krutzinna, 2022, p. 122; Takács, 2021, p. 98; Sutherland, 2016, pp. 35 and 36.
15 Freeman, 2007, p. 40.
16 Mørk et al., 2022, p. 10.
17 Hrabar, 2021b, p. 208.

different cultures understand childhood and what represents the best interest of the child differently.[18] The uniqueness of each child, as well as the situation in which a decision needs to be made, is a logical consequence of the absence of a definition of the best interest of the child and the necessity for its interpretation on a case-by-case basis.[19] Apart from the particular circumstances applying to each case, the understanding of the principle of the best interest of the child is connected to the other three principles of the CRC. These are the prohibition of discrimination, the child's right to development, and the right to be heard.[20] In other words, the best interest of the child is the basis for the interpretation of all other rights of the child.[21] To decide in accordance with the best interest of the child, it is necessary to take into account the opinion of the child, as well as all others whose opinion may influence the final decision related to the child.[22]

Many scholars have contributed to specifying the meaning of the best interest of the child and have made efforts to define it. The meaning of this principle is best reflected through the following two definitions. Thus, Eekelaar states that the best interest of the child is the primary interest, i.e. taking care of developmental interests, so that the child enters adulthood without defects.[23] Hrabar, on the other hand, points out that acting in accordance with the best interest of the child means to decide as the child himself would decide if he would be capable of that.[24] The best interest of the child must be analysed from a holistic perspective, which emphasises the importance of all the rights of the child without hierarchy. This confirms the dynamism of this principle, which encompasses various aspects related to children's rights that are continuously developing.[25,26] The role of the best interest of the child in realising his rights is multiple. It reinforces or clarifies problems arising in connection with the interpretation of the provisions of the CRC, resolves conflicts and serves as a basis for a

18 Ruggiero, 2022, p. 22; Freeman, 2007, p. 33. Nevertheless, Archard points out that it is precisely the different interpretation of the best interest of the child in each culture that indicates the absence of a general point of view among different cultures as to what is the best interest of the child. Archard, 2003, pp. 46-47.

19 Bubić, 2014, pp. 11 and 12.

20 Ruggiero, 2022, p. 23. See also: Hrabar, 2019, p. 166.

21 Fortin, 2009, pp. 40 and 41.

22 Kosher, Ben-Arieh and Hendelsman, 2016, p. 32. On the importance of the child's opinion in the context of the best interest of the child, as well as the connection of Art. 3 and Art. 12 of the CRC, see also: Doek, 2020, p. 259-263; Kloosterboer, 2017, p. 738 and 739; Sutherland, Barnes Macfarlane, 2016, pp. 14 and 15; Lansdown, 2016, pp. 31-35.

23 Freeman, 2007, p. 27.

24 Hrabar, 2021b, p. 209.

25 Brakman, 2023, p. 370. Such an approach can also be connected with Wellman's understanding of the growth of children's rights, which is "individual, fragmented, overlapping and complex". Tucak, 2009, p. 74.

26 On the best interest as a basis for the enjoyment of other rights and the absence of a hierarchy between the rights of the child, see: Kraljić and Drnovšek, 2021, p. 265.

comparative analysis of children's rights in different countries.[27] Despite the absence of a single definition of the best interest of the child, the connection of this principle with other fundamental principles of the CRC, which correlate with other children's rights, guarantees consistent protection of children's rights and interests.

2.2 Contemporary Approach to the Interpretation of the Best Interest of the Child

General comment No. 14 of the Committee on the Rights of the Child from 2013[28] (hereinafter: General comment No. 14) contributes to the understanding of the principle of the best interest of the child in contemporary society. It confirms the complexity and adaptability of the principle of the best interest of the child and continues to omit its definition.[29] Nevertheless, a kind of attempt to define this principle stems from its determination as a threefold concept: a substantive right, a procedural rule and an interpretive principle.[30] The best interest of the child as a substantive right signifies the fundamental obligation of the State, it is directly applicable and can be invoked before courts. Notably, this approach to interpreting the best interest of the child means that the child's interests will take precedence over the conflict of multiple interests and that the decision made in this way will be implemented (General comment No. 14, para. 6(a)). If the child's interest conflicts with the interests of others, it is necessary to carefully consider the interests of all parties and reach a compromise. In case of impossibility of reaching a compromise, it is necessary to consider the interests of all parties, with the best interest of the child as a priority.[31] In other words, it is necessary to take into account the solution that would result in the least possible damage to other persons, but would not cause simultaneously any damage to the child.[32]

The best interest of the child as a procedural rule imposes an obligation on the bodies that decide on a child's right to consider all the positive and negative effects of that decision on the child's rights. The implementation of this approach to the interpretation of the best interest of the child implies ensuring the procedural rights of the child, whereby a kind of monitoring of their compliance is carried out by imposing the obligation to explain the decision in which it is stated that the best interest of the child has been taken into account (General comment No. 14, para. 6(b)). It is a step in the

27 Jakovac-Lozić and Vetma, 2006, p. 1410; Jakovac-Lozić, 2006, pp. 21 and 22.
28 General comment No. 14 (2013) on the rights of the child to have his or her best interest taken as a primary consideration (art. 3, para 1), Committee on the Rights of the Children, CRC/C/GC/14, 29 May 2013.
29 See: Ruggiero, 2022, p. 25.
30 See also: Rešetar, 2022, p. 17; Ruggiero, 2022, pp. 24 and 25; Takács, 2021, p. 100; Kilkelly, 2016a, pp. 56-62.
31 Rešetar, 2022, p. 16.
32 Rešetar, 2022, p. 17.

decision-making process that does not impose a final solution but obliges the State to establish appropriate mechanisms for procedural implementation of the best interest of the child.[33] Finally, the best interest of the child is also an interpretative principle according to which, of several possible interpretations of a legal provision, the one which is in accordance with the best interest of the child is always applied (General comment No. 14, para. 6(c)). Therefore, it is impossible to uniformly determine what is in the best interest of the child. Still, it is assessed through the rules of procedure and guidelines for its determination[34], on a case-by-case basis.

In addition to determining the best interest of the child as a threefold concept according to General comment No. 14, the legal theory also lists three criteria for determining the best interest of the child. These criteria refer to the needs of the child,[35] the will of the parents and standard behaviour.[36] This also implies obligations for States to ensure the integration and consistent application of the best interest in the actions taken by public and private institutions in charge of children, as well as mechanisms for describing how to apply the best interest of the child, i.e. the weight attributed to it in a particular procedure (General comment No. 14, para. 14). The achievement of the best interest of the child is preceded by two levels: the first, in which it is necessary to assess what is in the best interest of the child, and the second, in which procedural guarantees aimed at determining the best interest of the child are implemented based on the assessment (General comment No. 14, para. 46).

The assessment of the best interest of the child depends on the child's opinion, identity, the need to preserve the family environment, vulnerability, education, health and other parameters. In doing so, different parameters are applied in each situation. On the other hand, at the level of realising the best interest of the child, it is necessary to implement measures of 'child-friendly justice', which include the child's right to express opinions, establishing facts, time perception, the expertise of persons who communicate with the child, explanation of the decision, etc.[37] Although there is no hierarchy between the rights of the child, in the context of determining the best interest of the child, his procedural rights are of particular importance – to determine the best interest of the child, it is necessary to listen to the child. By analysing the guidelines for the interpretation of the best interest of the child, it is still clear that the absence of a single definition does not constitute any obstacle to its application. In the broadest sense, applying the teleological interpretation of the best interest of the child in a specific time and situation, it is necessary to achieve what is good for the child.

33 Zermatten, 2015, p. 32. On the implementation and application of the principle of the best interest of the child in national legislation, see also: Sutherland, 2016, p. 47.
34 Zermatten, 2015, p. 32.
35 Also: Archard, 2003, p. 45.
36 Hrabar, 2021b, p. 209.
37 Zermatten, 2015, p. 38.

2.3. The Best Interest of the Child and Adoption

Guided by the fact that adoption is the last applicable measure that results in the termination of all legal ties between the child and his or her biological family (as a rule)[38], the best interest of the child in this sense has a particular meaning. While the general rule is that the realisation of the best interest of the child is preceded by balancing the interests of several parties as a primary consideration, in the case of adoption, the best interest of the child is a paramount consideration (General comment No. 14, para. 38), which overrides the interests of others (in this case parents).[39] Art. 21 of the CRC, together with international standards for adoption, defines the best interest of the child as the determining factor in adoption procedures.[40] This approach is also related to the rights-based approach to adoption that recognises a wide range of interests of children who deserve to be recognised as rights-holders.[41] Therefore, determining the best interest of the child as a paramount consideration in the adoption procedure means that it determines the course of the procedure and the actions to be taken. On the contrary, a primary consideration of the child's best interest would only mean prioritising his interests,[42] preceded by finding a balance of interests.

In addition, the purpose of interpreting the best interest of the child in the adoption procedure as a paramount consideration stems from the fact that the purpose of this procedure is to find a family for a child, not a child for a family.[43] As regards the application of the best interest of the child as a paramount consideration, it is applied to the entire procedure – from the separation of the child from the family to the final decision on adoption.[44] The best interest of the child is to live with the biological parents, so in the context of adoption, this includes several practical considerations.[45] It is in the best interest of the child to be adopted only when the previous measures aimed at supporting and preserving the biological family did not lead to

38 Namely, most countries regulate only full adoption, which results in the termination of all the child's legal ties with the biological parents (family) and the creation of a parental relationship with the adoptive parents. However, some countries, in addition to full adoption, have retained a form of simple adoption that does not have the feature of terminating all ties with the biological parents (family). See: O'Halloran, 2021, pp. 5 and 6.
39 Davey, 2020, p. 13.
40 Ruggiero, 2022, p. 26; Jakovac-Lozić, 2021, pp. 278 and 279.
41 Tobin, 2023, p. 41.
42 Freeman, 2007, pp. 60 and 61.
43 Fenton-Glynn, 2014, p. 15.
44 Vité and Boéchat, 2008, p. 24.
45 Luhamaa and O'Mahony, 2021, pp. 184 and 185.

positive changes that would justify the child's stay in that family.[46] Therefore, following the principle of proportionality and gradualness, adoption must be preceded by an assessment of the termination of legal ties with the biological family and it must be the last applicable measure which seriously changes the course of the child's life.[47]

The 2008 European Convention on the Adoption of Children (revised)[48] (hereinafter: ECAC 2008) and the 1993 Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption[49] (hereinafter: HC 1993) are international instruments that are directly related to adoption, and are based on the principle of the best interest of the child.[50] The ECAC 2008 is an international instrument of the Council of Europe that regulates in detail the issues related to adoption. In other words, it provides guidelines for the interpretation of the CRC in its section addressing adoption and the legislative regulation of adoption.[51] As regards the ECAC 2008, the best interest of the child is highlighted as a paramount consideration already in the Preamble, thus following Art. 21 of the CRC. The best interest of the child in the ECAC 2008 is particularly important for the adoption decision (Art. 4), an exception to the child's consent to adoption, i.e. expressing an opinion (Art. 6), the age difference between the child and the adoptive parent and exceptions to that rule (Art. 9), possibility of revocation and annulment of adoption (Art. 14) and probationary period (Art. 19). The emphasis put on the best interest of the child in the ECAC 2008 enables its additional explanation and definition.[52]

In relation to intercountry adoption, which is regulated by the HC 1993, the best interest of the child is also emphasised already in the Preamble. Furthermore, it is explicitly stated as a criterion for the selection of adoptive parents (Art. 16), proceedings in the case when it is determined that the choice of adoptive parents is not in the best interest of the child (Art. 21) and when the adoption is refused in the receiving country (Art. 24). However, for intercountry adoption, to be based on the best interest

46 Rešetar, 2022, p. 701. In this sense, Kraljić and Drnovšek point out that in connection with adoption, the double principle of the best interest of the child must be respected - when the child is separated from the family and during the adoption procedure itself. Kraljić and Drnovšek, 2021, p. 271.

47 Sladović Franz, 2019, p. 41.

48 Council of Europe Treaty Series (CETS) No. 202, Strasbourg, 27 November 2008.

49 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, concluded 29 May 1993. Available at: https://assets.hcch.net/docs/77e12f23-d3dc-4851-8f0b-050f71a16947.pdf.

50 At the same time, other international documents that are (indirectly) applied in the adoption procedure, and which also emphasise the best interest of the child, are highlighted, e.g. the European Convention on the Exercise of Children's Rights, Council of Europe Treaty Series (CETS) No. 160, Strasbourg, 25 January 1996.

51 Fenton-Glynn, 2014, p. 18. On issues regulated by the EKPD 2008, see: O'Halloran, 2018, p. 78.

52 Explanatory Report on the European Convention on the Adoption of Children (Revised), para. 14. Available at: https://rm.coe.int/16800d3833. See also: Jakovac-Lozić, 2007, p. 97 and 98.

of the child, the existence of subsidiarity is also necessary. Therefore, intercountry adoption can be established in the best interest of the child only after the child cannot be provided with an appropriate form of alternative care in the country of origin.[53] As for the best interest of the child in intercountry adoption, diversity of the cultural environment that affects the determination of the best interest of the child (by the country of origin of the child) is particularly noteworthy.[54] The implications arising from adoption justify its determination in that context, i.e. the absence of a balancing of interests and an exclusive focus on the child. In addition, the influence of the best interest of the child on other international instruments confirms its universality.

3.
The Right to Respect for Family Life

To fully understand the best interest of the child in adoption cases decided by the ECtHR, it is necessary to explain the right to respect for family life. Therefore, Art. 8 of the ECHR stipulates that everyone has the right to respect for private and family life, home and correspondence, whereby the public authorities shall not interfere in the exercise of this right, except in exceptional, justified cases.[55] Consequently, the right to respect for family life is a qualified right that can be limited only in justified cases.[56] Similarly to the best interest of the child, the right to respect for family life is an indeterminate but definable concept in the ECtHR's jurisprudence, on a case-by-case basis, in different contexts and times.[57] This indicates that the ECHR is also a "living instrument" that adapts to social and legal standards, which is why family life does not refer exclusively to the nuclear family.[58] Therefore, the concept of family life refers to close relatives, relationships between parents and children, relationships between grandparents and children, blood relatives in the collateral line, as well as relationships between foster parents, adoptive parents and potential adopters with a child.[59]

53 Tobin, 2023, p. 49; Brakman, 2023, pp. 366 and 368; Vandenhole et al., 2019, p. 230; Čović, 2017, p. 110; Fenton-Glynn, 2014, pp. 21 and 22; Vité and Boéchat, 2008, pp. 44 and 45.
54 See more: Cantwell, 2017, pp. 67 and 68.
55 As determined by Art. 8, para. 2 of the ECHR: "(...) in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."
56 For more details on qualified and unqualified rights under the ECHR, see: Choudhry and Herring, 2010, p. 5.
57 Also: Korać, 2002, p. 250.
58 Killkely, 2016b, p. 13; Rešetar, 2022, pp. 30, 32; Choudhry and Herring, 2010, p. 6.
59 Rešetar, 2022, p. 31; Davey, 2020, pp. 60 and 61.

If the existence of family life was not established, the person would still enjoy protection based on Art. 8 of the ECHR, but in the context of the right to respect for private life.[60] The task of the ECtHR is not to replace the competent national authorities and decide instead of them, but to review whether the competent authorities acted in accordance with Art. 8 of the ECHR.[61] The fundamental determinant of family life is common life, which enables the normal development of family relations and the enjoyment of family members in each other's company.[62] In addition to living together, important determinants of family life are the efforts of people to establish a "family community" and the reality of these relationships, although the interest in establishing family life can replace its real existence.[63] In general, there are three possible ways of creating a family life through the interpretation of the ECtHR: by showing attachment to the family, by showing attachment to the child through a social relationship, and by showing the motivation to establish such a family relationship.[64]

The right to respect for family life implies positive and negative obligations for the State. Positive obligations have a disjunctive character and indicate an obligation that should result in the realisation of a particular right. On the other hand, negative obligations have a conjunctive character and mean the prohibition of actions that would unjustifiably limit a particular right.[65]Thus, the positive obligations of the State in the context of the right to respect for family life include the protection of family life between parents and children, enabling the reunification of the biological family or enabling contacts between the child and the parents.[66]

Contrary to a positive obligation, a negative obligation in the context of the right to respect for family life would mean actions that prevent the violation of this right. As regards the violation of the right to respect for family life, it can occur due to unjustified State interference in family life or failure to take measures aimed at protecting family life,[67] which in the example of adoption may mean that it is not necessary, that

60 Case of Paradiso and Campanelli v. Italy, application no. 25358/12, judgment of the ECtHR, 24 January 2017, para. 165. According to Korać Graovac, private life is a broader concept than family life. Therefore, family life always represents private life, in contrast to private life, which is a broader term and does not always refer to family life. Korać Graovac, 2013, p. 37.

61 Skivenes and Harald Søvig, 2016, p. 349.

62 Case of Marckx v. Belgium, application. no 6833/74, judgment of the ECtHR, 13 June 1979, para. 31; Olsson v. Sweden (no. 1), application no. 10465/83, judgment of the ECtHR, 24 March 1988, para. 59. Among other things, in the case of Marckx v. Belgium, the ECtHR defined the relationship between parents and children also as part of the right to respect for family life. Kilkelly, 2010, p. 249.

63 Rešetar, 2022, p. 32; Killkely, 2016b, p. 195; Kilkelly, 2010, p. 251.

64 Fenton-Glynn and Sloan, 2023, p. 175. Rešetar states that family life, in the jurisprudence of the ECtHR, is based on origin, legal ties and functionality. See: Rešetar, 2022, p. 31.

65 Wibye, 2022, pp. 488 and 489.

66 See more: Choudhry and Herring, 2010, pp. 9 and 10.

67 Rešetar, 2022, pp. 33 and 34.

is, applied as the last applicable measure. In other words, a violation of this right can occur by not taking preventive measures, which indicates a violation of a positive obligation, or by taking repressive measures in an unjustified manner, which in turn indicates a violation of a negative obligation. As it has been stated, interference in family life is permitted only exceptionally, so according to the test of necessity, it must be a) in accordance with the law, b) legitimate and c) necessary in a democratic society.[68] Therefore, the interpretation of the right to respect for family life is related to discretionary treatment and proportionality. Consequently, the ECtHR respects the diversity, that is, the specificity of each legal system, leaving the States a wide margin of appreciation in choosing the way to protect a certain right. The more important the right, the narrower the margin of appreciation,[69] and the proportionality of the action is also connected to this. On the other hand, proportionality means the obligation to find a fair balance between the interests of the community and the protection of the fundamental rights of the individual.[70]

Although the provision of the ECHR on the right to respect for family life does not explicitly state the rights of children, the interpretation of this right in the jurisprudence of the ECtHR covers a number of areas related to children, *inter alia*, alternative care for children – foster care and adoption, child abduction, guardianship.[71] In the context of adoption, proportionality would mean that the State should intervene in the rights of the child only to the extent that is really necessary to help the child, and at the same time prevent excessive interference in the rights of the individual, which also refers to the right to respect for family life.[72] In this sense, proportionality is interpreted as the deprivation of the right to parental care is provided by family legislation, that it achieves a legitimate goal (e.g. protection of the child's interests, health or life) that cannot be achieved by more lenient measures, and that the deprivation of the right to parental care and finally adoption, are necessary in a democratic society.[73]

However, it is particularly important to emphasise that the right to respect for family life does not guarantee the right to adoption, nor the right to found a family, since its purpose is to provide the child with a family and protect his or her rights and interests.[74] Necessity in a democratic society, when it comes to adoption, includes the State's obligation to respect the right to family life of both the child and the parents, the protection of the child's rights, the discretion of action and the finality or the

68 Choudhry and Herring, 2010, p. 5.
69 Davey, 2020, p. 25; Choudhry and Herring, 2010, p. 11.
70 Killkely, 2016b, p. 9.
71 Kilkelly, 2010, p. 248.
72 Kraljić and Drnovšek, 2021, p. 270.
73 Kraljić and Drnovšek, 2021, p. 271; Davey, 2020, p. 18; Skivenes and Harald Søvig, 2016, p. 348.
74 Bracken, 2023, p. 306; Jakovac-Lozić, 2021, p. 280.

permanence of the decision.[75] As a rule, it is about the fact that the previous preventive measures did not result in the preservation of the biological family, and adoption turned out to be the only solution for the child. In addition to material violations, the ECtHR has also found procedural violations of the right to respect for family life in cases related to adoption, especially in relation to the length of the procedure.[76] Although the ECtHR accepts the best interest of the child in adoption cases as a paramount consideration, the justification of those decisions has also contributed by the necessity of acting as a criterion for the protection of broader interests.

4.
The Relationship between the Best Interest of the Child and the Right to Respect for Family Life

Although the best interest of the child and the right to respect for family life are contained in two different international instruments, they are aimed at the protection of fundamental human rights. At the same time, the best interest of the child is aimed exclusively at children, while the right to respect family life, together with limitations, applies to everyone, including children.[77] When deciding on the right to respect for family life in a specific case, the ECtHR takes into account various international instruments, including the CRC, as well as customary law relevant to the case.[78] However, the ECtHR has no obligation to directly apply the provisions of the CRC or other international instruments that interpret its provisions, but their application contributes to a more comprehensive understanding of children's rights.[79] Since the ECHR does not directly regulate the rights of children, the principle of the best interest of the child provides guidelines for the interpretation of the right to respect for family life (as well as other rights arising from the ECHR).[80] However, the ECtHR is guided by an international consensus that determines the best interest of the child as the most important in all actions concerning children, which at the same time facilitates the achievement of a balance of conflicting rights.[81]

75 Skivenes and Harald Søvig, 2016, p. 352.
76 On the criteria that need to be taken into account when assessing the (un)justification of the duration of the procedure, see: O'Halloran, 2018, p. 90.
77 Breen et al., 2020, p. 6; Grgić, 2016, p. 105.
78 Takács, 2021, p. 102. On the reference to the CRC in ECtHR judgments, see: Helland and Hollekim, 2023, p. 220.
79 Breen et al., 2020, p. 9.
80 Vandenhole and Türkelli, 2020, p. 217.
81 Jensdóttir, 2016, p. 83.

The best interest of the child is an integral part of the right to respect for family life, thus the test of necessity (proportionality),[82] which is argued as follows. Notably, it is the fundamental obligation of every State to ensure the rights arising from the ECHR to everyone within their jurisdiction, which is followed by the obligation to protect fundamental rights not only by interpreting the ECHR but also other international instruments to which States are Parties.[83] The relationship between the best interest of the child and the right to respect for family life is also reflected in the following. Considering that the ECHR does not explicitly regulate children's rights, in the absence of appropriate standards, the best interest of the child provides guidelines for the interpretation of its provisions, as long as the result of such interpretation is in accordance with the goals and purpose of the ECHR.[84]

The ECtHR separately analyses acting in accordance with the best interest of the child and (un)justified interference in family life. In this way, the best interest of the child, in relation to the right to respect for family life, constitutes an important guideline for decision-making, especially when it comes to the implementation of practical measures.[85] Theoretically, because of this, the decision of the ECtHR may establish a violation of Art. 3 of the CRC and Art. 8 of the ECHR, only one of them or none of them,[86] whereby (in cases related to adoption), the ECtHR is invoked in different forms in the best interest of the child.[87] The relationship between the best interest of the child and the right to respect for family life is presented in the following example. It is in the best interest of the child to grow up and develop in a family environment with biological parents, which is why family ties may only be severed as the last applicable measure, such as adoption. In addition, severing family ties must not be based on the fact that the child would be better off in a different environment and that must be strictly justified. In this sense, the ECtHR accepts the best interest of the child as a paramount consideration, so if the maintenance of these relationships would endanger the interests of the child, the best interest of the child may override the rights of the biological parents covered by the right to respect for family life.[88] Therefore, in relation to the respect for family life, the best interest of the child represents an additional protective mechanism to children, at the same time indicating the importance of previous preventive measures aimed at protecting the biological family.

82 Bracken, 2023, p. 308; Collinson, 2020, pp. 171, 172.
83 Takács, 2021, p. 101.
84 Killkely, 2016b, pp. 15, 16.
85 Jensdóttir, 2016, p. 83.
86 Collinson, 2020, pp. 178, 179. Collinson analysed this relationship between the best interest of the child and the right to respect for family life through the so-called immigration cases decided by the ECtHR.
87 See more: Skivenes and Harald Søvig, 2016, pp. 351, 352.
88 See: Breen et al., 2020, p. 7; Grgić, 2016, p. 112.

5.
Interpretation of the Best Interest of the Child in the Jurisprudence of the ECtHR in Adoption Cases

As previously pointed out, the ECHR does not contain provisions directly referring to children, nor does the right to respect for family life guarantee the right to found a family or adoption. The rights enshrined in the CRC are incorporated in the right to respect for family life, so the ECtHR, in every case related to children, including in cases related to adoption, directly or indirectly interprets the best interest of the child.[89] Therefore, the following are analysed: a) general interpretations of the best interest of the child in adoption cases, b) interpretations in cases related to adoption without parental consent, and c) intercountry adoption.

5.1. General Attitudes of the ECtHR on the Best Interest of the Child in Cases related to Adoption

According to Fenton-Glynn,[90] in the cases of *Johansen v. Norway*,[91] *R. and H. v. the United Kingdom*,[92] *Y.C. v. the United Kingdom*[93] and *Strand Lobben and Others v. Norway*,[94] the ECtHR gave a general interpretation of the best interest of the child to adoption. These cases represent an evolution of the interpretation of the best interest of the child in the jurisprudence of the ECtHR as a fundamental international standard in the protection of children's rights, to which the right to respect for family life is also connected.

Apart from the fact that the ECtHR emphasised the best interest of the child for the first time,[95] the case of *Johansen v. Norway* also resulted in the so-called Johansen test which has been applied for almost two decades in adoption cases decided by the ECtHR. Thus, the best interest of the child could override the interests of the parents, depending on the specific case and its seriousness.[96] However, the ECtHR pointed out that it is necessary to achieve a fair balance of interests between the child (to

89 Fortin points out that the terms "welfare and best interest of the child" do not have a single definition in the jurisprudence of the ECtHR's, which confirms the need for their interpretation on a case-by-case basis. Fortin, 2009, pp. 69-72.
90 Fenton-Glynn, 2021, pp. 365-367.
91 Application no. 17383/90, judgment of the ECtHR, 7 August 1996.
92 Application no. 35348/06, judgment of the ECtHR, 31 May 2011.
93 Application no. 4547/10, judgment of the ECtHR, 13 March 2012.
94 Application no. 37283/13, judgment of the ECtHR, 10 September 2019.
95 Breen et al., 2020, p. 13.
96 Fenton-Glynn, 2021, p. 365.

be in appropriate form of alternative care outside the biological family when the circumstances justify it) and the parents (in the context of family reunification).[97] Despite the best interest of the child as a paramount consideration, this should not be the reason for automatic (unjustified) interference in the family life of the parents.[98] The ECtHR considered the placement of the child in a foster family with adoption as the ultimate goal justified, considering that child was placed in that family after birth, which would enable him to live in a safe and emotionally stable family environment (para. 80). However, the previous inadequate care for the second child, the probability of the mother's non-cooperation and the risk of disrupting the care of the daughter were not sufficient reasons for not implementing family reunification. Moreover, the mother showed positive progress that was not taken into account in the assessment of interference in family life (paras. 82-85), whereby adoption was highlighted as the last applicable measure.[99] Although there was no questionable treatment in accordance with the best interest of the child, in this case, the ECtHR found a violation of the right to respect for the mother's family life because of non-implementation of reunification (para. 93). By implementing the test of necessity in a democratic society, the legality and legitimacy of the treatment was determined, but not a necessity.

Unlike the case of *Johansen v. Norway*, which emphasised the importance of balancing the interests of the child and his parents, in the case of *R. and H. v. the United Kingdom*, it is more clearly emphasised that even when balancing interests, the best interest of the child must have absolute priority over the interests of the biological parents.[100] In relation to the procedural aspect of the right to respect for family life, which was invoked by the parents, the interpretation of the best interest of the child is also reflected in this sense. As it was a procedure in which the parents were first deprived of the right to parental care, followed by the adoption procedure itself, the ECtHR took the position that such an approach represents acting in accordance with the best interest of the child. At the same time, it does not call into question the importance of the parents' participation in the adoption procedure, but if the child's interest determines the adoption, and the parents' non-participation in the procedure promotes it, then the child's interests override all other interests (para. 77). In the context of the right to respect for family life, the ECtHR particularly

97 Davey, 2020, p. 19; Skivenes and Harald Søvig, 2016, p. 352.
98 Davey, 2020, p. 16.
99 O'Halloran, 2021, p. 142; Choudhry and Herring, 2010, p. 328.
100 Helland and Hollekim, 2023, p. 228; Mørk et al., 2022, p. 12; Fenton-Glynn, 2021, p. 366. For the factual description of this case, see: Doughty, Meakings and Shelton, 2019, p. 6; Jakovac-Lozić, 2013, p. 88.

emphasises the importance of the reunification of the biological family.[101] However, the aforementioned attitude is 'mitigated' by the fact that the competent national authorities are not obliged to undertake endless attempts to reunify the biological family, but are expected to take reasonable steps that would lead to reunification. In addition, long-term separation of the child from the biological family may override the interest of reunification and thus justify adoption (para. 88).[102] In addition, the importance of timely protection of children is emphasised, which justifies a wide margin of appreciation of the competent national authorities (para. 81).[103] Although the parents participated in the adoption procedure (para. 77), the expert assessment concluded that the child's return to the family would not be in his interest and that there is a justified fear of further harming the child's safety (para. 85).[104] Respecting the child's interest to be adopted, the rights of the parents are also adequately protected, preventing arbitrary treatment by involving them in the adoption procedure.[105] Therefore, in this case, the ECtHR did not find a violation of the right to respect for family life (paras. 89 and 90).

In the case of *Y.C. v. the United Kingdom*, the ECtHR upholds the position previously taken in *R. and H. v. the United Kingdom*, repeating that the best interest of the child must be a paramount consideration in adoption cases.[106] In other words, the rule stipulated by Art. 21 of the CRC is confirmed. Although the ECtHR emphasises the best interest of the child as a paramount consideration in this case as well, it states that this principle is twice as important as adoption. It is primarily in the best interest of the child to maintain his or her ties with the biological family, while secondarily, the inappropriateness of those ties imposes the obligation to ensure the child's development in a safe environment (para. 134), which adoption undoubtedly provides. Acting in accordance with the best interest of the child, as previously stated, requires the analysis of several factors, *inter alia*, the age and maturity of the child, his wishes (para. 135), which also refers to the comprehensiveness of the treatment and the assessment of the family situation (para. 147). Naturally, this also includes the 'balancing' of interests, whereby it is necessary to take into account the best interest of the child (para. 138), which confirms this principle as a substantive right. The possibility of the child's return to the biological family, or more precisely, the assessment of further

101 This confirms the state's duty to take appropriate previous actions to reunify the biological family. According to MacCormick's interpretation, children's rights (to be permanently placed in another family) precede duties (in this case, states and parents, which are reflected in the attempt to reunify the biological family). Tucak, 2009, pp. 76 and 77.

102 Also: Šeparović, 2014, pp. 184-186.

103 See also: Skivenes and Harald Søvig, 2016, p. 350.

104 Jakovac-Lozić, 2013, p. 88.

105 See: Kilkelly, 2003, p. 55.

106 Fenton-Glynn, 2021, p. 367. For the factual description of this case, see: Doughty, Meakings and Shelton, 2019, p. 4.

care for the child, may be overridden by the risk of emotional harm to the child. The fact that positive changes in the child's biological family have not been achieved justifies adoption and the creation of a permanent and stable family environment for the child (paras. 145 and 146). On the other hand, it also confirms that terminating family ties is possible only exceptionally with a prior obligation to attempt reunification.[107] In addition, the mother had the opportunity to participate in the procedure and present her views regarding the adoption of the child (para. 149), thereby justifying the child's return to the biological family. For this reason, even in this case, the ECtHR did not find a violation of the right to respect for family life (paras. 149 and 150).

In the case of *Strand Lobben and Others v. Norway*, the ECtHR 'moves' from the previously adopted attitudes that the best interest of the child is a paramount consideration, pointing to the importance of balancing the interest of the child and the biological parents.[108] In this case, the ECtHR analysed the best interest of the child in the context of adoption through several levels. Thus, the importance of Art. 9 of the CRC was highlighted, according to which a child may not be separated from his parents without their will, and the separation itself must be in accordance with the best interest of the child (para. 207). In this sense, the necessity of constantly review of alternative care measures for children, characterised by temporality and mostly precede adoption, is particularly emphasised. In addition, stricter control of all measures that impose a certain restriction on contact between parents and children is necessary.[109] The ECtHR points out that the long-term placement of a child in a *de facto* family community, such as a foster family, can result in overriding the reunification of the biological family. The key term highlighted by the jurisprudence of the ECtHR for adoption and alternative care measures is time.[110] Namely, the passage of time should not be a guideline for determining the future relationship between the parent and the child. Still, it must be based on relevant considerations (paras. 208, 211 and 212). Therefore, the ECtHR particularly emphasises the importance of networking the interests of the child and the biological parents and consequently the necessity of involving the parents in the procedure, thereby protecting their procedural rights (para. 212).[111] By invoking the passage of time, and taking into account the complexity of adoption on the one hand, and the reunification of the biological family on the other, the ECtHR also points to the need for timely reports, i.e. expert reports (para. 222). Finally, the vulnerability of the child is particularly emphasised, more precisely, the importance of its detailed assessment (para. 224), which can be interpreted in

107 O'Halloran, 2021, p. 143.
108 Helland and Hollekim, 2023, p. 228; Bracken, 2023, p. 308. For the factual description of this case, see: Handbook on European law relating to the rights of the child, 2022, p. 123.
109 Melinder, Albrechsten van der Hagen and Sandberg, 2021, pp. 212 and 213.
110 Kilkelly states the same. See: Kilkelly, 2010, p. 257.
111 Melinder, Albrechsten van der Hagen and Sandberg, 2021, p. 214.

the context of the justification of taking further measures and limiting the right to respect for family life.[112] In this case, the ECtHR found a violation of the child's and the parents' right to respect for family life - the measure was legal and legitimate, but not necessary in a democratic society (paras. 225 and 226). Although the understanding of the best interest of the child in the jurisprudence of the ECtHR in adoption cases has evolved, the fundamental characteristic has remained unchanged, which is its careful assessment throughout each part of the adoption procedure, as well as the procedures that precede the adoption.

5.2. The Best Interest of the Child in Cases of Adoption without Parental Consent

In several cases, the ECtHR decided on adoption without parental consent in the context of the right to respect for family life. Although it is a right which is primarily related to the biological parents, it applies to a broader circle of persons, including the child. As regards consent to adoption, it prevents unjustified adoption, i.e. the termination of the child's ties with the biological family and the security of his or her placement in a new family.[113] It is related to the parents' right to take care of their child and the fact that parents cannot abandon their child.[114] Therefore, it is analysed, through selected cases, how the ECtHR interprets the best interest of the child in cases of adoption without parental consent.

In the case of *X. v. Croatia*,[115] the child was separated from the family due to the mother's mental illness and her addiction to opiates. The mother was completely deprived of legal capacity, and the child's grandmother did not show interest in taking care of him (paras. 42 and 43). Finally, the child was adopted without the mother's knowledge and consent (para. 20). Since there was no prospect that the mother's situation, and thus her ability to take care of the child, would change, it was in the best interest of the child to be placed under State care (para. 43). In addition, the ECtHR accepts the other measures taken as legal and legitimate, which refer to adoption, given that their aim was to protect the best interest of the child, but the necessity was lacking (para. 46). Notably, although the mother was completely deprived of legal capacity, she should have been allowed to express her opinion on the adoption of the child (para. 53), and as she was insufficiently involved in the procedure, it was not possible to assess her real relationship with the child (para. 54), and ultimately

112 On the case of Strand Lobben and others v. Norway, see also: Mørk et al., 2022, pp. 13-16; Vojvodić, 2020, p. 1551.
113 Fenton-Glynn, 2014, p. 51.
114 Hrabar and Korać Graovac, 2019, pp. 119, 120.
115 Application no. 11223/04, judgment of the ECtHR, 17 July 2008.

the justification of adoption.[116] Therefore, the ECtHR found a violation of the right to respect for the mother's family life in this case.

In the case of *Aune v. Norway*,[117] based on a hasty measure, the child was separated from the family due to exposure to violence, the mother's health problems, and the suspicion that she used opiates, and was finally adopted by a foster parent (paras. 5-13). The mother's deprivation of legal capacity and adoption without her consent had a legitimate goal, i.e. to protect the best interest of the child (para. 53). Although the ECtHR did not directly interpret the best interest of the child, by referring to earlier jurisprudence, it emphasised the permissibility of adoption only in exceptional circumstances and if the action was justified by an overriding requirement aimed at protecting the best interest of the child. However, before taking a complex measure such as adoption, the State must take appropriate measures to preserve family relations (para. 66). The proportionality and the legitimacy of the measure aimed at protecting the best interest of the child are also justified by a comprehensive approach, since the adoption was approved based on the appropriate amount of evidence (para. 79).[118] Therefore, in this case, there was no violation of the right to respect for family life (para. 80).

In the case of *A.K. and L. v. Croatia*,[119] the child was separated from the family and placed in foster care because of the mother's mental problems and the inadequate living conditions in which she lived, made it impossible to care for the child properly. Since the mother was deprived of the right to parental care, the child was adopted, and she was not allowed to submit a request to restore the right to parental care (paras. 4-16). The ECtHR concluded that all the measures, including adoption, had a legitimate goal, i.e. the protection of the best interest of the child (para. 61). In relation to the necessity of adoption as the last applicable measure, the following conclusions stand out. Although the competent national authorities have a wide margin of appreciation, cases related to adoption require greater caution, considering that its effect is irreversible, that is, the legal ties between the child and the parents are permanently severed.[120] Also, the importance of involving parents in the procedure, whose interests and attitudes need to be considered, is emphasised. As the ECtHR states, the impossibility of the mother's participation in the adoption procedure made it impossible to consider preserving the family relationship with the child (paras. 62, 63, 75 and 79). Despite the legal and legitimate treatment in accordance with the best

116 See also: Guštin, 2023, pp. 541, 542-544; Guštin, 2022, pp. 406 and 407; Čulo Margaletić, 2021, pp. 159-174; Šeparović, 2014, pp. 187-189.
117 Application no. 52502/07, judgment of the ECtHR, 28 October 2010.
118 See also: Majstorović, 2022, pp. 135-139.
119 Application no. 37956/11, judgment of the ECtHR, 8 January 2013.
120 This results from determining the best interest of the child in the adoption cases as a paramount consideration.

interest of the child, due to the lack of necessity, the ECtHR found a violation of the mother's right to respect for family life (para. 80).[121]

Unlike the so-called 'Croatian cases' in which the ECtHR found a violation of the right to respect for family life, in the case of *S.S. v. Slovenia*,[122] there was no violation of the right to respect for family life. Notably, due to mental health problems and inadequate care of the child, the mother was deprived of the right to parental care (which is why consent to adoption was not required), the child was entrusted to a foster family and finally was adopted (paras. 18, 38, 50 and 51).[123] The measures taken were legal and legitimate, and in this case, necessary. The right to respect for family life implies establishing a balance between the child's interests and the interests of the biological parents, whereby particular importance is attached to the best interest of the child. This interest may override the interests of the parents (para. 83). As pointed out earlier, the competent authorities must take appropriate measures to preserve the family ties between the child and the biological parents. In this case, the competent authorities implemented appropriate measures with a comprehensive approach (paras. 100-102). An expert opinion determined that further contact would harm the child since there was no emotional connection with the parent, and thus, there was no possibility of re-establishing the family relationship (para. 97). By balancing conflicting interests, the child's best interest is focused at a permanent and secure form of care that outweighs other interests (para. 99).[124]

In the case of *Omorefe v. Spain*,[125] due to financial problems and the impossibility of providing adequate care for the child, the mother independently entrusted the child to care. The child was placed in a foster family and finally adopted without the mother's consent (paras. 4, 9 and 10). The ECtHR points out that, to protect the right to respect for family life, it is necessary to balance interests between the child, parents, as well as public order and peace, whereby the best interest of the child always takes precedence. More precisely, the best interest of the child may override the interests of the parents, depending on the circumstances, and it must be a primary consideration (paras. 37 and 46). Therefore, it is the duty of the State to provide appropriate mechanisms to ensure compliance with the positive obligations arising from the right to respect for family life, taking into account the best interest of the child (para. 42). Since it was a mother who was unable to take care of the child due to her vulnerability, it is the duty of the competent social welfare authorities to provide appropriate assistance (para. 59). In accordance with the best interest of the

121 See also: Guštin, 2023, pp. 541, 544 and 545; Guštin, 2022, pp. 407 and 408; Korać Graovac, 2021, pp. 63-84; Šeparović, 2014, pp. 189-192.
122 Application no. 40938/16, judgment of the ECtHR, 30 October 2018.
123 Handbook on European law relating to the rights of the child, 2022, p. 125.
124 See also: Šimović, 2022, pp. 77-101; Guštin, 2022, p. 408.
125 Application no. 69339/16, judgment of the ECtHR, 23 June 2020.

child, any separation of the child from the family should result in its reunification, as a positive obligation in the context of the right to respect for family life (para. 38). Also, as regards the regulation of future relations between parents and children, the passage of time should not be the only criterion for their arrangement, but it must be based on relevant facts (para. 39). Therefore, the procedure in this case, including the adoption, was legal and legitimate, but not necessary, which is why the ECtHR found a violation of the mother's right to respect for family life (para. 44).

In the case of *V.Y.R. and A.V.R. v. Bulgaria*,[126] the child was also adopted without the mother's consent due to her addiction to opiates, since the earlier intervention of the competent State authorities did not result in positive changes and the possibility of the child's return to the family (paras. 1, 4 and 14). In this case, the ECtHR once again emphasises the importance of preserving family ties and the possibility of terminating them as an exception when the biological family proves to be unsuitable for the child. The ineligibility of the family generally results in the child's previous placement in a certain form of alternative care, which must be temporary and enable family reunification. The ECtHR also points to the child's interest in growing up in a healthy family environment, which means that the parent's right to respect for family life cannot result in taking measures that would harm the child's health and development (para. 77). Despite this, the ECtHR emphasises the importance of providing opportunity to the parents to participate in the decision-making process affecting the child (para. 78), which, in addition to adoption, would also refer to the separation of the child from the family and other actions related to the child.[127] Although it was an adoption without the consent of the parent, it represented an action in accordance with the best interest of the child since the adoption was established in child's early age (para. 97). Previously, the competent national authorities tried to implement reunification, but the mother was not interested in it. Instead, she advocated the child's stay in the foster family for an indefinite period (paras. 84, 92, 96 and 98), which is against the best interest of the child.[128] Therefore, in this case, the procedure was legal, legitimate and necessary, so the ECtHR did not find a violation of the right to respect for family life (para. 101).

In cases of adoption without parental consent, the ECtHR particularly emphasises the importance of a comprehensive approach. At the same time, applying the necessity test undoubtedly contributes to a more complete understanding of the best interest of the child and balancing the rights between the child and the biological parents.

126 Application no. 48321/20, judgment of the ECtHR, 13 December 2022.

127 Vité and Boéchat, 2008, p. 24.

128 Several reasons speak to the disadvantages of long-term foster care. Thus, for example, it creates insecurity to children, there are frequent changes of foster families, foster parents are not as dedicated to children as adoptive parents, children potentially have behavioral problems, etc. See: Bainham, 2023, p. 216; Selwyn, 2023, p. 229; O'Halloran, 2018, p. 23; O'Halloran, 2018, p. 229.

5.3. The Best Interest of the Child in Cases of Intercountry Adoption

Intercountry adoptions represent a particularly complex form of adoption, which, along with the termination of all legal ties between the child and the biological family, is also characterised by different citizenships between the adoptee and the adoptive parents.[129] In addition to respecting the principle of the best interest of the child, the existence of subsidiarity is also a prerequisite for the establishment of intercountry adoption.[130] As regards intercountry adoption, it is also related to the recognition of a foreign decision on adoption so that it produces legal effects in another legal system.[131] The ECtHR also decided on several cases related to intercountry adoption, by interpreting the best interest of the child. Therefore, the selected cases are analysed below.

In the case of *Pini and Others v. Romania*,[132] Italian citizens adopted two girls who were Romanian citizens, and were denied the possibility of taking them to Italy due to the girls' opposition (paras. 99 and 157). Intercountry adoption was in accordance with the best interest of the child, considering that the children were abandoned and met the conditions for adoption (para. 144). The adoptive parents who were Italian citizens, were denied the opportunity to take their adopted children to Italy, which is why the ECtHR referred to the best interest of the child in the context of reunification.[133] It is emphasised that the positive obligation of the State is to establish a relationship with the parents, but that this obligation is not absolute, especially when children and parents do not know each other. Any action, in that case, must be based on the best interest of the child (paras. 150 and 151), which, even in this case, may override the interests of adoptive parents' in creating a family relationship, since the purpose of adoption is to provide the child with a family, and not the family with the child (paras. 154, 155 and 156). The best interest of the child must also be interpreted from the procedural aspect. Notably, the children rejected the possibility of going to Italy, and according to their age, it was justified for the children to express their opinion about the environment in which they want to grow and be brought up, therefore, that

129 See about it: Jakovac-Lozić, 2006, pp. 10 and 11.
130 Guštin and Rešetar, 2023, p. 903; see also: note 53.
131 See about it: Guštin and Rešetar, 2023, pp. 809-903; Hoško, 2019, pp. 336-338.
132 Application no. 78028/01 and 78030/01, judgment of the ECtHR, 22 June 2004.
133 Trotter cites this case in the context of the existence of family life that is denied by the actions of the competent state authorities. The ECtHR recognised the existence of family life in this case since the adoptive parents used letters as the only form of communication with the adopted children. Trotter, 2018, pp. 455, 456.

their opinion is respected.[134] The consequence of opposite treatment, i.e. allowing children to go to another country against their will, would hardly lead to integration into the adoptive family (paras. 157 and 158), which would undoubtedly be against the best interest of the child. Therefore, the measures taken were legal, legitimate and necessary, and the ECtHR did not find a violation of the right to respect for family life (paras. 188 and 189).[135]

In the case of *Harroudj v. France*,[136] the competent French authorities refused to recognise the *kafala* established in Algeria as a form of full adoption in France, stating that the *kafala* still provides the parent with the possibility of exercising parental care (paras. 10 and 11). As a rule, in this case, it was about the recognition of an institution similar to adoption created in another legal system. Notably, *kafala* is characteristic for Islamic countries that prohibit adoption. It is a form of long-term care that does not enable the full legal integration of the child into the family.[137] In this case, the ECtHR also states that the ECHR must be interpreted in accordance with international instruments, which also refers to the interpretation of Art. 8 in accordance with the CRC (para. 42). This would also refer to the obligation to apply the best interest of the child. Since adoption was prohibited in Algeria, and the *kafala* enabled the exercise of parental care, the ECtHR did not find a violation of the right to respect for family life (paras. 51 and 52). Moreover, the refusal to recognise *kafala* as a form of full adoption is an example of balancing the public interest and the interest of the bearer of the right to *kafala* (para. 51). This respects cultural pluralism and the integration of a child of foreign origin in another country, and although it is not explicitly stated, this undoubtedly represents acting in accordance with the best interest of the child.[138]

The case of *Wagner and J.M.W.L. v. Luxembourg*[139] *is also related to intercountry adoption and refers to recognising an enforceable decision on adoption. Notably, a Luxembourg citizen who lived as a single person adopted a child in Peru, after which she requested recognition of the adoption as a full adoption in Luxembourg (paras. 6-9). However, the Luxembourg legislation did not foresee the possibility of full adoption for single people (para. 123), which is why the recognition of the adoption was denied.*[140] *It should be noted that in this case, there was a de facto* family relationship, and thus family life (para. 117). In the context of adoption, the ECtHR once again emphasised

134 According to research conducted by Helland, Križ and Skivenes, in certain European legal systems (Austria, England, Estonia, Finland, Germany, Norway and Spain), 85% of children consider that their opinion is not respected in the adoption procedure. Stein Helland, Križ and Skivenes, 2023, p. 216; O'Halloran, 2018, pp. 203, 204.

135 On this case, see also: O'Halloran, 2021, pp. 206 and 207.

136 Application no. 43631/09, judgment of the ECtHR, 4 October 2012.

137 O'Halloran, 2021, p. 6, 159; Vité and Boéchat, 2008, p. 21.

138 On this case, see also: Koumoutzis, 2021, pp. 939-965.

139 Application no. 76240/01, judgment of the ECtHR, 28 June 2007.

140 See also: Župan, 2012, p. 660.

the importance of interpreting the right to respect for family life in accordance with the CRC and that the relationship between the adoptee and adoptive parent is the same nature as the relationship between parents and children (paras. 120 and 121). Despite the reference to the conflict of law rules which referred to the application of Luxembourg legislation, the non-recognition of the adoption as a full adoption faced the adoptive parent with numerous obstacles and prevented the child from fully integrating into the family (para. 132). This departs from the best interest of the child, and it also follows that priority is given to conflict rules instead of social reality (para. 133). Moreover, the circumstances under which the child was adopted require recognition of the adoption as a full adoption, established by the decision of a foreign court (para. 134).[141] Despite the legal and legitimate actions of the competent national authorities, it was not necessary, which is why there was a violation of the right to respect for family life, and in connection with that, discriminatory treatment also (paras. 136 and 160).[142]

Intercountry adoptions show the complexity of interpreting the best interest of the child and its connection with other rights regulated by the CRC. Time is also a decisive factor in these cases, so at each stage of the procedure, it is necessary to be guided anew by considering the best interest of the child.

6.
Conclusion

The best interest of the child is a mechanism that enables the achievement of the most appropriate solution for the child, which is why the absence of a single definition allows its adaptation in different circumstances. In this sense, it is necessary to understand the purpose of the best interest of the child. It is the protection of the child's welfare, which depends on various factors that the competent national authorities must take into account when deciding on the adoption. The best interest of the child in the adoption procedure means that appropriate measures were previously taken to balance the biological parent's rights and the child's best interest, the failure of which ultimately results only in what is best for the child.

Although the right to respect for family life does not explicitly include adoption and the best interest of the child, the ECtHR's interpretations significantly contribute to their understanding. Therefore, it should be pointed out that the ECtHR interprets the best interest of the child in adoption cases comprehensively and dynamically,

141 Since the child was abandoned, Šeparović points out that the recognition of this foreign decision on adoption also protects the child's right to special protection and assistance from the state stipulated by the CRC. Šeparović, 2014, p. 184.

142 See also: Hoško, 2019, pp. 337 and 338.; Shannon et al., 2013, p. 37.

in accordance with the circumstances of each case. The dynamism of the right to respect for family life means that the best interest of the child is an integral part of it. More precisely, the right to respect for family life complements the meaning of the best interest of the child by affirming the child's right to live in a safe family environment.

The ECtHR interprets the best interest of the child as a paramount consideration in adoption procedures. Nevertheless, respecting the positive obligations of the State in the context of the right to respect for family life, the importance of balancing the interests of the child and the biological parents is emphasised, with a significant limitation. Notably, the interests of the parents are respected as long as the child's interests are not jeopardised. The procedure that precedes adoption, i.e. the attempt to reunify the biological family, is mandatory but not an endless procedure. This means that it must be based on proportionality as long as such treatment acts in the direction of protecting the best interest of the child. The same applies to the possibility of biological parents to participate in the adoption procedure, which the best interest of the child may override.

The ECtHR does not call into question the best interest of the child but rather the necessity of the measures taken: adoption or other measures that precede it. This means there is no single answer according to which criteria the competent national authorities act to protect the family and determine adoption as a last applicable and necessary measure. Whether the adoption is in the best interest of the child depends on the circumstances of the case in which it is necessary to take a series of interrelated previous actions, each of which must be necessary and in the best interest of the child.

Competent national authorities must take care of the timely undertaking of measures aimed at the reunification of the biological family and the regular questioning of the imposed measures. Only after the passage of time, in which the measures taken to preserve the biological family did not result in positive changes, adoption can be justified, that is, to meet the criterion of necessity. It is also important to point out that questioning the child's opinion in the adoption procedure determines the outcome of that procedure – the child's right to be heard is an integral part of the principle of the best interest of the child. This, in accordance with the best interest of the child, ensures the child's life in a safe and stable family environment.

With the previous interpretation, the ECtHR gave a significant contribution to the understanding of the best interest of the child by confirming that it is a *condicio sine qua non* to all actions in the adoption procedure. Therefore, the ECtHR does not need to refer directly to Art. 3 of the CRC, considering that the context of the case and the teleological interpretation reflect the best interest of the child.

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The 'right to be forgotten' and the right to freedom of expression and information-legal problems on the basis of the judgment of the Supreme Administrative Court of 9 February 2023

ABSTRACT: *According to Art. 17(3) of Regulation (EU) 2016/679 of the European Parliament and of the Council, the 'right to be forgotten' is not absolute and is excluded when data processing is necessary to exercise the right to freedom of expression and information. These freedoms are protected by Art. 11 of the Charter of Fundamental Rights. The content of this provision is consistent with the text of Art. 10 of the European Convention on Human Rights, which is a source of protection of freedom of expression under European law. The freedom to express one's views and to obtain and disseminate one's information is provided for in Art. 54 of the Constitution of the Republic of Poland. In this regard, the Supreme Administrative Court expressed its view in the judgment of 9 February 2023, assuming that the 'right to be forgotten' applies to online archival press materials, and making such publications available is not necessary to exercise the right to freedom of expression. Therefore, it is possible to request the removal of personal data from such materials. The problem that emerged on the basis of the judgment issued boils down to the fact that the court did not fully take into account that the press plays an important role in society and the function of the press is not only to inform about various events, but it also has an archival function. Following the reasoning of the court, the past could be falsified. This verdict changes the rules of the media, is dangerous for the press and can have a 'chilling effect' on publishers. In this context, it is important to analyse the court's interpretation from the point of view of grammatical and teleological interpretation of the provisions, which may also lead to the conclusion that outdated press materials will be removed 'ex officio'.*

KEYWORDS: *the 'right to be forgotten', the right to freedom of expression and information, personal data protection, GDPR, The Supreme Administrative Court, Poland, European Court of Human Rights.*

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1.
The history of the 'right to be forgotten'

The 'right to be forgotten' is the name of the right that was first introduced on 13 May 2014 by a ruling issued by the Court of Justice of the European Union.[1] The Court found that under European data protection law, individuals may request search engines such as 'Google' to remove certain search results associated with their name. The Court of Justice of the European Union agreed to the request submitted by the complainant, interpreting the concept of 'data controller' broadly enough to include Internet search engine operators within its scope, which was intended to be the result of emphasising the importance of Google's activity in processing personal data of citizens of European Union Member States.[2] The Court found that the operator of a search engine is responsible for the processing of personal data placed on websites published by third parties and must comply with the legal provisions that provide natural persons with protection in this respect (Directive 95/46/EC).[3] When deciding to remove content, search engines should consider whether the requested information is inaccurate, inadequate, irrelevant or exaggerated, and whether it is in the public interest to retain it in the search results. This obligation cannot be fulfilled solely because specific information is no longer inconvenient for the person concerned. This obligation constitutes an exercise of the 'right to be forgotten' or the right 'to remove links'.[4]

Initially, the 'right to be forgotten' was not regulated directly in any legal act. It could only be derived from the right to privacy and the right to personal data protection.[5] Under national law, the right to privacy under Art. 47 of the Constitution of the Republic of Poland can be considered a conglomerate of protected values, within which there are characteristic forms of privacy and legal guarantees of their protection, which include the protection of personal data under Art. 51 of the Constitution of the Republic of Poland.[6] Privacy understood as a personal right has not been codified

1 Judgment of the Court of Justice of the European Union of 13 May 2014, ref. no. file: C-131/12 in the case of Google Spain SL and Google Inc. v. Agencia Espaňola de Protecciŏn de Datos (AEPD) and Mario Costeja Gonzàlez [Online]. Available at: http://curia.europa.eu/juris/liste.jsf?language=pl&num=C-131/12 (Accessed: 2 March 2023).

2 Czerniawski, 2023, no page.

3 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (OJ EU L 281, 23/11/1995 pp. 0031- 0050).

4 '*The right to be forgotten' on the Internet* [Online]. Available at: https://eur-lex.europa.eu/PL/legal-content/summary/right-to-be-forgotten-on-the-internet.html (Accessed: 15 March 2022).

5 Gutowski, 2018, no page.

6 Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997, No. 78, item 483).

in the Civil Code, however, taking into account the open catalogue resulting explicitly from Art. 23, both in legal scholarship and in jurisprudence, privacy protection was allowed under this provision.[7] It can already be noted at this point that the 'right to be forgotten' is included in the category of personal rights, under which the data subject has the right to request that the violation of the law be discontinued, resulting in the deletion of information.[8] These two rights have common features because they refer to privacy as a good deserving legal protection.[9]

The right to personal data protection derives from the right to privacy. It is treated as its emanation or element.[10] Both the right to privacy and the right to the protection of personal data are 'third generation' rights, if it can be said that the right to the protection of personal data exists separately from the right to privacy.

The 'right to be forgotten' was also related to the right to delete personal data, derived from Art. 12(b) of Directive 95/46/EC, which provides for the right to request the deletion of one's data. This law is not a completely new institution. It should be treated as an extension and clarification of the current legal order.[11] However, the main normative act in which the 'right to be forgotten' is directly articulated is the General Data Protection Regulation, which has been in force in the European Union since 25 May 2018.[12]

Before the entry into force of the Regulation, the applicable regulation was Directive 95/46/EC, the purpose of which was to introduce a uniform system of personal data protection, because differences in the degree of protection of individual rights and freedoms could have a negative effect on the flow of data between Member States, which could result in failure to implement many projects that the establishment of the internal market will ensure.[13] Contrary to the provisions of the GDPR, member countries had a margin of freedom in their actions. The Directive is important in the light of these considerations because it was on its basis that the Court of Justice of the European Union established the 'right to be forgotten'. However, it should be recalled that Directive 95/46/EC, as a secondary law instrument, was addressed to States, therefore this provision could not be given the attribute of having direct effect in a

7 Act of 23 April 1964 - Civil Code (Journal of Laws 2019, item 1145).
8 Judgment of the Court of Appeal in Warsaw of 3 April 2017, ref. no. file: I ACa 2462/15, Legalis 1720163.
9 Sakowska-Baryła, 2015, p. 23.
10 Jabłoński and Wygoda, 2002, p. 207.
11 Rostkowska, 2017, no page.
12 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (OJ L 119/1).
13 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 4 November 2010, *A comprehensive approach on personal data protection in the European Union,* COM (2010) 609.

horizontal relationship between individuals.[14] There was an obligation to issue an act of national law, which only then would constitute the source of a claim in a private law relationship.[15]

The 'right to be forgotten' was one of the basic elements of the reform of European personal data protection regulations. It has remained a theoretical concept for a long time. The concept itself has been applied to the institution of expungement in criminal proceedings. From a practical point of view, however, it was found that it is not possible to guarantee the full effectiveness of the law, because information transferred to the Internet may be recorded.[16] The purpose of the entry into force of the General Data Protection Regulation was to adapt the regulations on the protection of personal data to the needs of the information society and technological realities.[17] In the light of the development of the 'right to be forgotten', the right to the protection of personal data is a reference point for the direction of its evolution at the level of EU law. The definition adopted in the General Data Protection Regulation, which refers to all information regarding the data subject, is important for considerations regarding the protection of personal data. In a broad sense, this terminology refers both to data published by the data subject and by third parties. It may be difficult to precisely define the phenomenon of linking information to the data subject. The entire concept of the 'right to be forgotten' sets a new standard for personal data protection instruments. The effectiveness of the fundamental and universal right to the protection of personal data has increased and it has enabled natural persons to supervise their data. The reform has improved the dimension of personal data protection linked to the internal market by reducing fragmentation, strengthening coherence and simplifying the regulatory environment, thus eliminating unnecessary costs and reducing administrative burdens. These assumptions strongly determine the inclusion of the 'right to be forgotten', and their full implementation is a response to the need to create a comprehensive personal data protection system in all spheres of operation of their entities.[18]

According to Art. 17 of the GDPR, the data subject may request from the controller the erasure of personal data concerning him or her without undue delay, and the controller is obliged to do so without undue delay in certain circumstances:

14 Judgment of the CJEU of 4 December 1974 in the Van Duyn case, ref. no. file: 41/74, point 15.
15 Different positions are also expressed in the judgments of the Court of Justice of the European Union. They belong to the minority. As an example, one can cite: the judgment of the CJEU of 22 November 2005 in the Mangold case, ref. no. file: C-144/04.
16 Rosen, 2011, p. 345.
17 Special Eurobarometer (EB) No. 359 'Data protection and electronic identity in the EU (2011)'.
18 Opinion of the European Data Protection Supervisor of 7 March 2012 on the data protection reform package (OJ EU C 192/7 of 30 June 2012).

a) personal data are no longer necessary for the purposes for which they were collected or otherwise processed;
b) the data subject has withdrawn consent on which the processing is based in accordance with Art. 6(1)(a) or Art. 9(2)(a), and there is no other legal basis for processing;
c) the data subject objects to the processing pursuant to Art. 21(1) and there are no overriding legitimate grounds for the processing or the data subject objects to the processing pursuant to Art. 21(2) towards processing;
d) personal data have been processed unlawfully;
e) personal data must be deleted in order to comply with a legal obligation provided for by Union law or the law of the Member State to which the controller is subject;
f) personal data were collected in connection with offering information society services referred to in Art. 8(1).

The General Data Protection Regulation places particular emphasis on the protection of humans, by virtue of the very fact that they are humans. The protection of personal data is only secondary. First of all, the individual and his or her privacy are protected. Legal solutions adopted at the European Union level provide an opportunity to improve the situation of a weaker entity in contact with entities that have a global reach. They are a manifestation of the democratisation of law because they give victims more effective access to measures ensuring the protection of their rights as a result of violations through the use of new technologies as an open platform. Certain courses of action imposed by the European Union serve to reduce harm, both in the moral and material spheres.

The application of the 'right to be forgotten' involves many inaccuracies, but its inclusion in the data protection system should be assessed positively, especially in the context of the objectives of the proposed solutions at EU level, which include increasing the control of individuals in the use of information concerning them and ensuring transparent protection mechanisms, including in promoting the protection of personal data on the Internet. Importantly, the concept of the 'right to be forgotten' is currently accused of being in conflict with other fundamental rights and freedoms, of not specifying the procedures and method of deleting controlled data, as well as of not specifying the regulations in the event of informing third parties about the exercise by an individual of the 'right to be forgotten'. Another problem manifests itself in the inadequacy of the practical possibilities of data administrators due to technical limitations and the inability to control every network user who uses any information that has been previously shared. Therefore, it is understandable that, in

addition to practical and theoretical issues, the design of technological improvements is important.[19]

2.
Exclusions to the 'right to be forgotten'

The 'right to be forgotten' is not an absolute right. Considering the content of para. 3 of the above-mentioned provision, the 'right to be forgotten' does not apply to the extent that data processing is necessary:

- to exercise the right to freedom of expression and information;
- to fulfil a legal obligation or task carried out in the public interest or in the exercise of public authority;
- for reasons of public interest in the field of public health;
- for archival, statistical, historical and scientific research purposes;
- in the scope of establishing, pursuing and defending claims.

Although the application of the above exceptions is not fully understood, they are necessary to maintain a balance between the 'right to be forgotten' and other fundamental rights. Literature is interested in the right to freedom of expression, which to some extent contradicts the methods of implementing the 'right to be forgotten'. The relationship between the freedom of speech and the right to data protection requires an interpretation of how the 'right to be forgotten' is implemented in the context of information submitted for disclosure. The juxtaposition of these two laws is called 'media exception'. This applies when interpreting Art. 17 and Art. 80 of the Regulation may raise some doubts. Pursuant to Art. 80, each Member State shall take measures to ensure the coexistence of both rights. The current wording of this provision gives Member States freedom to analyse the provisions of the Regulation, because the EU legislator does not directly specify the scope of restrictions and derogations. In this context, the scope of economic activity must be taken into account. It is becoming more and more popular, alongside the activity of bloggers and internet forum users. This type of activity is increasingly considered to be one whose subject is the public dissemination of information and opinions, regardless of the type of medium used to transmit them. The institution of the 'right to be forgotten' can be reconciled with freedom of speech by developing certain procedures at the level of Member States. From a practical point of view, it is the national authorities that are responsible for controlling the data processing method that will co-create the scope of the 'right to be forgotten' and fulfil the provisions of the Regulation.

19 Ambrose and Ausloos, 2013, pp. 22-23.

3.
Discussion of the first exclusion – the right to freedom of expression and information in the context of the 'right to be forgotten'

The 'right to be forgotten' must be seen in the context of its social function and balanced against other fundamental rights in accordance with the principle of proportionality. A balance is clearly established between the fundamental rights to respect for private life and protection of personal data established in Articles 7 and 8 of the Charter of Fundamental Rights, and the right to freedom of information set out in Article 11 of the same body of rights.[20] A collision can be observed between an individual's rights regarding his or her data and freedom of expression and information, which includes the right to receive and transmit information. When invoking this exception, it is important to consider how these values interact. A guideline may be the Google Spain ruling, where the Court of Justice of the European Union indicated that removing links to certain information may create a conflict with the interests of Internet users attempting to access a category of information, and their interests may be enhanced by the data subject's special role in public life. When refusing to delete data based on this exception, the personal data controller should not only confront opposing interests, but also justify an opinion in detail. As a general rule, the rights of the data subject should take precedence over the interests of Internet users, but in justified cases, this balance may depend on the nature of the information under consideration and how significant it is for the privacy of the data subject and the public interest in using that information, which in turn may depend on the role played by the person in public life.[21] The analysis of de-listing leads to the conclusion that, in evaluating the requests, in the search engine provider's decision to maintain or block search results, it is necessary to consider the potential impact of the decision on Internet users' access to information.[22] The existence of such influence does not necessarily result in the rejection of a request to be removed from the search results list. Interference with the fundamental rights of a data subject should be motivated by the primary interest of the general public in having access to specific information.

The Court also made a distinction between the legitimacy of a website publisher to disseminate information and that of a search engine provider. It stated that the publisher of a website can only conduct its activities for journalistic purposes, where it could benefit from the exemptions that Member States may establish in such cases

20 Charter of Fundamental Rights of the European Union of 7 December 2000 (OJ EU 2016 C 202).
21 Judgment of the CJEU of 24 September 2019, ref. no. file: C-136/17, point 66.
22 Ibid., point 56.

under Art. 9 of the Directive (Art. 85 of the GDPR). The European Court of Human Rights has indicated that balancing the interests at stake may lead to different conclusions, depending on the complex content of the application (against the entity that originally published the information, against a search engine whose main interest is not the publication of primary information about a person, but facilitating the identification all available information about the data subject and creating his profile).[23]

4.
The issue of the Supreme Administrative Court Judgment

The latest, quite recent, judgment of the Supreme Administrative Court of 9 February 2023 relating to the 'right to be forgotten' is detrimental to the freedom of expression.[24] The case started with the refusal of the President of the Office for Personal Data Protection to initiate proceedings. The complainant requested the deletion of personal data from press material dating back several years. The authority claimed that the data had been processed as part of journalistic activities and that the regulations of the EU Regulation, including Art. 17, was not applicable to it. The authority explained that the Polish legislator in Art. 2(1) of the Personal Data Protection Act[25] excluded Art. 5 to 9, Art. 11, Art. 13 to 16, Art. 18 to 22, Art. 27, Art. 28(2) to (10) and Art. 30 of the GDPR in relation to journalistic activities. Since the Authority does not have the authority to assess the legality of data processing in the article posted on the website based on the conditions specified in Art. 6(1) of the GDPR, it is not possible to delete personal data.

The case was referred to the Voivodship Administrative Court in Warsaw, whose opinion was that, although the press law does not set any time limit for the availability of press materials on the publisher's website, the 'right to be forgotten' implies an obligation to delete data when its processing is no longer necessary for the use of the right to freedom of expression, and therefore the Office for Personal Data Protection should assess in each case whether such necessity exists or not. The Provincial Administrative Court in Warsaw quashed the contested decision. The text containing the complainant's personal data constitutes published press material within the meaning of the press law.[26] The legislator does not specify the time limit by which press materials may be published on the Internet. In practice, it is assumed that each

23 Warecka, 2018, no page.
24 Judgment of the Supreme Administrative Court of 9 February 2023, ref. no. file: III OSK 6781/21 [Online]. Available at: https://orzeczenia.nsa.gov.pl/doc/6C317F6401.
25 Act of 10 May 2018 on the protection of personal data (consolidated text: Journal of Laws of 2019, item 1781).
26 Act of 26 January 1984 Press Law (consolidated text: Journal of Laws of 2018, item 1914).

publication can be available indefinitely, therefore it does not matter whether the text in question is archival in nature, even if it were placed in a separate catalogue. In the Court's opinion, the Authority wrongly assumed that the 'right to be forgotten' does not apply to this type of materials within the limits set out in Art. 17 of the GDPR. The national legislator did not exclude the application of this regulation to press activities. As regards the content of Art. 17(3)(a) of the GDPR, it states that if certain personal data are no longer necessary for the purpose for which they were collected or otherwise processed, and are no longer necessary from the perspective of the freedom to exercise the right to freedom of expression and information, it is possible to apply the general rules of the 'right to be forgotten'. Consequently, it is groundless to assume that in order to exercise the right to freedom of expression and information, each article must be published indefinitely.

In response to this ruling, the President filed a cassation appeal with the Supreme Administrative Court. He requested that the contested judgment be set aside in its entirety and that the case be remitted for reconsideration to the Court of First Instance and that the costs of the proceedings be awarded. He criticised the judgment under appeal, among other things – violation of the provisions of substantive law, i.e.:

- Art. 17(1) to (3) of the GDPR in connection with Art. 2(1) of the Personal Data Protection Act by incorrectly interpreting them, by assuming that the legislator's exclusion of the application of Articles 5 to 9 of the GDPR for press activities does not constitute an obstacle to the application of Art. 17 of the GDPR for press activities;
- Art. 17(3)(a) of the GDPR by incorrectly interpreting it and assuming that the President of the Personal Data Protection Office was entitled to assess the necessity of personal data processing in this case, while the possibility of making the above assessment was excluded by Art. 2(1) of the Personal Data Protection Act.

The essence of the case in question, outlined in the cassation appeal, are the following three equally important issues: firstly, whether the President of the Personal Data Protection Office had a legal basis to rule on irregularities in the processing of the complainant's personal data in connection with the publication of the complainant's personal data in a press article on the website posted on a server and in databases related to them, assuming that some time has elapsed since the first publication of the press material, and the press article is currently stored on the publisher's portal in archival resources; secondly, whether making available an archival publication stored on the website constitutes an activity consisting in editing, preparing, creating or publishing press materials within the meaning of the Press Law (press activity), to which the provisions of Articles 5 to 9, Art. 11, Articles 13 to 16, Articles 18 to 22, Art. 27, Art. 28(2) to (10) and Art. 30 of the GDPR do not apply, in accordance with the

provisions of Art. 2(1) of the Personal Data Protection Act; thirdly, whether the 'right to be forgotten' applies to press activities. The GDPR is a comprehensive regulation on the protection of personal data, which does not require implementation by national law in order to be applied in a given country. Pursuant to Art. 85(1) of the GDPR, Member States adopt provisions that reconcile the right to the protection of personal data under the GDPR with the freedom of expression and information, including processing for journalistic purposes and for the purposes of academic, artistic or literary expression. Recital (153) of the GDPR explains that the law of Member States should reconcile the provisions governing freedom of expression and information, including journalistic, academic, artistic or literary expression, with the right to the protection of personal data under the Regulation. The processing of personal data solely for journalistic purposes or for the purposes of academic, artistic or literary expression should be subject to exceptions or derogations from certain provisions of the Regulation where this is necessary to reconcile the right to the protection of personal data with the right to freedom of expression and information, as provided for in Art. 11 of the Charter of Fundamental Rights of the European Union. This should apply in particular to the processing of personal data in the audio-visual field and in press archives and libraries. Member States should therefore adopt legal acts specifying the derogations and exceptions necessary to ensure a balance between those fundamental rights.

Therefore, the GDPR itself notes that there is an inevitable conflict between the right to personal data protection and the freedom of expression and information in journalistic, academic and artistic activities, which is manifested in the fact that the enforcement of personal data protection requirements significantly limits the possibility of free data processing, however, the collection and dissemination of information may violate personal data protection regulations. This entails the need to reconcile these two rights and freedoms to enable their coexistence. Recognising this problem, the EU legislator authorised in Art. 85(1) of the GDPR, Member States to adopt specific provisions in this regard and introduce restrictions on data protection to ensure freedom of expression and information.

The EU legislator decided that a journalist should be exempt from certain data protection requirements when collecting and using personal data, because the need to comply with the requirements could significantly limit the freedom to pursue a profession and carry out a related mission, and thus the freedom of the press. It should only be added that the concept of journalistic needs should refer to the press in the broad sense of the word, i.e. traditional press (magazines), but also radio, television and other electronic media, including online portals, in accordance with the provisions of press law.

Within the meaning of Art. 2(1) of the Data Protection Act (the so-called 'press clause'), exclusions regarding press activities and literary and artistic expression

include the following provisions of the EU Regulation: rules regarding the processing of personal data (Art. 5); grounds for the admissibility of personal data processing (Art. 6); conditions for expressing consent by the data subject (Art. 7); conditions for the child to give consent in the case of information society services (Art. 8); processing of special categories of personal data (Art. 9); processing that does not require identification (Art. 11); information provided in the event of obtaining personal data in a manner other than from the data subject (Art. 14); the right of access of the data subject (Art. 15(1) and (2)); the right to rectify data (Art. 16); the right to limit processing (Art. 18); obligation to notify the data recipient about rectification or deletion of personal data or restriction of processing (Art. 19); the right to transfer data (Art. 20); the right to object (Art. 21); automated decision-making in individual cases, including profiling (Art. 22); representatives of controllers or processors without an establishment in the Union (Art. 27); obligations of the processor (Art. 28(2) to (10)); recording processing activities (Art. 30).

The Polish legislator pointed out that a significant part of the obligations provided for in the GDPR does not apply to journalistic activities consisting in editing, preparing, creating or publishing press materials, within the meaning of the Press Law Act. In the name of constitutional freedoms and social good – general principles of personal data protection, such as the principle of lawfulness, transparency and reliability, the principle of limiting the purpose of data processing, data minimisation, accuracy, limitation of storage, integrity and confidentiality and accountability, have been excluded. However, as the Court of First Instance rightly pointed out, specified in detail in Art. 2(1) of the Personal Data Protection Act, the provisions of the GDPR do not cover Art. 17 of the GDPR, which provides for the right to delete data (the so-called 'right to be forgotten'). The Supreme Administrative Court shares the position of the Court of First Instance that the EU legislator in Art. 17(3)(a) of the GDPR has excluded the application of the general rules of the right to be forgotten only when it is 'necessary' to exercise the right to freedom of expression and information (paragraph (3), introductory sentence), and not generally – in the scope of the right to freedom of expression or information. It is therefore justified to conclude that the 'right to be forgotten' applies, for example, to cases where certain personal data are no longer necessary for the purpose for which they were collected or otherwise processed – pursuant to Art. 17(1)(a) of the GDPR and at the same time they are not necessary from the perspective of the freedom to exercise the right to freedom of expression and information, within the meaning of Art. 17(3)(a) of the above-mentioned act.

Initially, press activities and the related freedom of the press were exercised by publishing press materials in paper form. In such a situation, there were no automated instruments for searching and collecting personal data. Press materials published on paper may therefore be available in an unchanged form, i.e. among others: contain data about people for an indefinite period of time, because without any additional

activity (related to their development and creation of new databases, which, it is worth emphasising, can currently be created almost exclusively using devices such as computers and software, and therefore at least partially in an automated manner) it is not possible to obtain information about individual people from them easily and quickly. The publication of personal data in paper form as part of press activities is therefore unlimited in time, but accessing them many years after their publication is very difficult. The processing of personal data is automated when operations on personal data are performed using devices (most often IT systems, computers, servers and accompanying software) enabling automatic operation (i.e. performing specific activities automatically without the need for any action by a human being). Personal data processing is most often carried out using IT systems that allow for the automatisation of activities, improving the efficiency of processing while increasing the speed and reducing the costs of performing this type of activities. Nowadays, conducting press activities in a traditional way (through the publication of paper texts) along with the publication of press materials on the Internet or conducting press activities only on the Internet, as well as the functioning of technical possibilities allowing for the quick acquisition of personal data from press materials published on the Internet, require limiting the processing time of personal data in press materials available on the Internet. This is because there is a conflict of the right to privacy guaranteed indirectly by Art. 51 of the Constitution of the Republic of Poland with the right to freedom of expression and access to information guaranteed in the provisions of Articles 14 and 54 of the Constitution of the Republic of Poland.

The Supreme Administrative Court agreed in principle with the position expressed by the Regional Administrative Court. The Supreme Administrative Court stated that the legal solutions contained in Articles 14 (freedom of the media), 51 (right to protection of personal data) and 54 (freedom of expression) of the Polish Constitution and Art. 85 of the GDPR (processing vs. freedom of expression and information) dictate that the priority of press freedom over the protection of the right to privacy is possible only until the objectives of press activity are realised, and therefore until the press material serves to realise the citizens' right to reliable information, openness of public life and social control and criticism, until the specific information contained in the press material has the attribute of actuality (rapporteur Judge Rafał Stasikowski).

In addition, the Court shared the view that the publisher's making available of an archive publication stored on a website does not constitute press activity within the meaning of the press law, as this consists in editing, preparing, creating or publishing material. We should agree with the Court of First Instance that a specific information is valid if it describes current phenomena or their specific assessments or is an analysis of past events (journalism), i.e. only for a certain period of time. Information published in the past may, in fact, be interesting even after a significant period of time

– for the assessment of occurring phenomena, changes in positions, reconstruction of old press reports on the course of events, or simply – collecting data about specific people. Making press materials available on the Internet or compiling a personal database, do not belong to the tasks of the press listed directly by law. According to the Supreme Administrative Court, material published on the publisher's website remains actual only for a certain period of time, depending on the circumstances. In the Court's view, archive publications are not necessary for the exercise of freedom of expression and this right has already been exercised at the time of publication. In view of this, the 'right to be forgotten' is applicable.

5.
Why is this judgment so dangerous?

The judgment is dangerous for freedom of expression, which is one of the foundations of democracy. This is because it denies press archives, after a period of 'topicality' not precisely determined by the Court, the possibility of being covered by the press exception from the Data Protection Act. The press exception balances freedom of expression on the one hand and the right to the protection of personal data on the other in press activities. Indeed, the GDPR provides that such a balancing act is carried out by the national legislator.

Data protection rules should not interfere with freedom of expression or threaten the information functions of the press. To this end, the possibility of a press clause has been introduced. The Polish press clause is not yet as restrictive as, for example, in Sweden, where the right to personal data protection cannot limit press freedom in any way.

In the case considered by the Supreme Administrative Court, it was held that online press archives do not fall under this exception, except for up-to-date material. The storage of personal data in these archives is treated like any other data processing activity to which the GDPR applies. Consequently, any individual whose personal data is mentioned in the press material will be able to request the exercise of the 'right to be forgotten', that is, the deletion of the data from the press archive. Publishers will not be able to rely on the press exception and, moreover, the Court has forbidden to point to freedom of expression at all, because in its view, archive publications are not necessary for the exercise of this freedom. This puts the publisher at a disadvantage, as it will have to assess in each specific case whether the narrowly defined exceptions to the 'right to be forgotten' in the GDPR have arisen. Should he decide to deny the right, the burden of proof would be on him. This judgment is also dangerous in a

broader context, as it excludes for web archives all other limitations on the application of the GDPR contained in the press exception.[27]

6.
What are the consequences of the judgment of the Supreme Administrative Court?

The effect of the Court's position will be to apply to archives Article 5 of the EU Regulation introducing principles for the processing of personal data that every data controller must comply with *ex officio*. If the latest view persists, the publisher will have to assess whether the purpose limitation principle has been correctly applied to the archived text without waiting for data subjects' requests.[28] This approach to freedom of expression in press activities is incompatible with the standards established by the European Court of Human Rights.

7.
What do these standards provide for?

A milestone is the *Węgrzynowski* and *Smolczewski v. Poland* judgment of 16 July 2013.[29] The Court left no doubt that an online press archive is covered by the right to freedom of expression, protected by Article 10 of the European Convention on Human Rights and Fundamental Freedoms.[30] Moreover, it recognised that such archives are of great importance to society. They are an important source of historical knowledge and education. A different position could lead to the rewriting of history, that is, the creation of knowledge about a past event, without knowing all the accounts.

The Supreme Administrative Court is moving in precisely this direction. The 'right to be forgotten' in the judgment of the Supreme Administrative Court is 'retroactive'. Press material that becomes outdated will not only be subject to deletion at the request of the person wishing to exercise the 'right to be forgotten', but possibly also

27 *Publishers against the wall after the Supreme Administrative Court's ruling. The 'right to be forgotten' is retroactive* [Online]. Available at: https://www.rp.pl/dane-osobowe/art38050021-wydawcy-pod-sciana-po-wyroku-nsa-prawo-do-bycia-zapomnianym-dziala-wstecz (Accessed: 2 March 2023).

28 Żaczkiewicz-Zborska, 2023, no page.

29 Judgment of the European Court of Human Rights of 16 July 2013, complaint no. 33846/07 [Online]. Available at: https://etpcz.ms.gov.pl/etpccontent/$N/990000000000001_I_ETPC_033846_2007_Wy_2013-07-16_001.

30 Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Rome on 4 November 1950 (Journal of Laws 1993, No. 61, item 284).

at the initiative of the publisher, as Article 5 of the GDPR mandates the deletion after a certain period of data that are no longer necessary for the purposes for which they were processed. Removing personal data from the material means deleting part of the publication, after which the text may become unintelligible and incomplete. The Supreme Administrative Court did not fully consider that the press has an important function in society. It comes down not only to reporting on various events, but also has an archival value. This chronicle of events, happenings, histories, situations and people is not only relevant from a current point of view. It also draws on various information from the past. Removing negative information from newspaper archives would, after some time, lead to falsification of the past.[31]

8.
The significance of the judgment of the European Court of Human Rights (Application No 33846/07)

The judgment of the European Court of Human Rights was issued long before the provisions of the GDPR came into force. In the author's opinion, data protection standards have not changed since then, as the judgment referred to freedom of expression and not directly to data protection legislation. The judgment has a universal character. Its background was a personal rights case before the Polish courts. The judgment concerned the online archive of *Rzeczpospolita* and an article posted there. The text concerned two lawyers who were accused by journalists of using their positions to the disadvantage of public finances. On 8 May 2002, the District Court in Warsaw received a lawsuit for the protection of personal rights, brought by the applicants under Articles 23 and 24 of the Civil Code. The Court found that the journalists in question had not contacted the applicants and their allegations were largely based on rumours and overheard information. The Court stated that journalists have both the right and the obligation to inform the public about issues important to them, using the freedom of expression guaranteed in the Constitution. However, the authors of the article failed to make even the minimum effort to verify the information contained in the article, for example by contacting the complainants and attempting to obtain their comment on the matter. The article does not demonstrate that the allegations were based on reliable factual grounds. The Court accepted the applicants' claim in

31 *Supreme Administrative Court: deletion of personal data is possible for press archives. Adam Bodnar: we would actually be falsifying the past* [Online]. Available at: https://tvn24.pl/polska/nsa-kasowanie-danych-osobowych-mozliwe-dla-archiwow-prasowych-w-internecie-adam-bodnar-de-facto-falszowalibysmy-przeszlosc-6793664 (Accessed: 3 March 2023).

full, ordering the journalists and the newspaper's editor-in-chief to pay a total of PLN 30,000 for a social purpose and to publish an apology in the newspaper.[32]

On 7 July 2004, the applicants again sued the newspaper under the same provisions of the Civil Code. In their lawsuit, they claimed that, according to their latest findings, the article in question was still available on the newspaper's website. The complainants claimed that the article was highly listed in the 'Google' search engine and that anyone looking for information about them could access it very easily. The availability of the article on the newspaper's website, in violation of previous court orders, resulted in an ongoing situation that enabled many people to read the article. The applicants' rights were therefore violated in the same way as when the original article was published. As a result, the protection provided to them pursuant to judgments favourable to them became ineffective and illusory.[33] The applicants sought an injunction ordering the defendants to remove the article from the newspaper's website and publish a written apology for violating the applicants' rights through the article's continued presence on the Internet. They also applied for compensation in the amount of PLN 11,000 for non-pecuniary damage.

The District Court in Warsaw, in its judgment of 28 September 2005, dismissed the applicants' claim. The essence of the legal issue to be resolved by the Court was to answer the question whether the disclosure of a new source of publication, including the Internet, provided an actual basis for filing a new action for the protection of personal rights within the meaning of the Civil Code. According to the Court, the answer to this question should be positive. The Court opined that the disclosure of a new source of publication of the defamatory article, in this case the newspaper's website, gave rise to the applicants bringing a new action. Therefore, the claim was not subject to *res judicata*. The Court emphasised that removing the article from the newspaper's website would be devoid of any practical purpose, constituting a manifestation of censorship and rewriting history. Furthermore, it would be against archiving rules. If, in the current proceedings, they applied to the Court for an order to provide the online publication of the article with a footer or link informing the reader about the content of the judgments or if they applied for an order to require the defendants to publish an apology on the newspaper's website, so that the Court could consider upholding such a claim. The Court further noted that the applicants had already received compensation in the first proceedings. The Court also stated that if they discovered circumstances important for the assessment of the case, but unknown to them during the first proceedings, they should have applied for the reopening of the proceedings and not filed a new lawsuit with the Court. The applicants appealed.

32 *Węgrzynowski and Smolczewski v. Poland,* paras. 6,7,8.
33 Ibid., para. 9.

On 20 July 2006, the Court of Appeal in Warsaw dismissed the applicants' appeal. The Court was of the opinion that the key factor for assessing the case was the fact that the article in question was published on the newspaper's website in December 2000. The Court noted that the applicants claimed that they had learned about the publication of the article on the Internet only one year after the judgment issued in April 2003 became final. However, the fact that in the first proceedings they did not request the application of measures aimed at eliminating the possible effects of a violation of their rights in relation to publications on the Internet prevented the Court from examining in the current case the facts that existed before that judgment. The plaintiffs could not file a new action based on factual circumstances that already existed during the previous proceedings. The Court also noted that at the time in question the online publication of the article was not the so-called undisclosed circumstance.

The applicants filed a cassation appeal, alleging that they had violated the provisions of substantive law by misinterpreting them and the provisions of substantive law by refusing to apply the provisions on the protection of personal rights, invoking their right to effective legal protection of personal rights, including their reputation. They again argued that the continued availability of the article on the newspaper's website violated their personal rights. The cassation appeal was not accepted.

In the complaint to the European Court of Human Rights, the complainants alleged that their right to respect for their private life and reputation had been violated. In general, finally, we could say that in the first proceedings they eventually won a lawsuit for violation of their personal rights in the publication, but this does not justify the removal of the text from the press archive. A reference to the outcome of the civil lawsuit may be included in the article. The European Court of Human Rights therefore opted not to change, remove the article posted from the archives, but to provide a correction if it turned out that the information contained in the article was not true. This is the right approach because the article was published. It has become a reference point for future actions and part of history.

The European Court of Human Rights did not find a violation of Article 8 of the Convention, but noted at the same time that the risk of harm caused by content and messages posted on the Internet to the exercise and enjoyment by individuals of freedom and human rights, especially the right to respect for private life, is certainly higher than the risk emanating from the press.[34] The Court found that online archives serve the public interest and are subject to the guarantees arising from the protection of freedom of expression. One of the important tasks of the press, especially in the era of the development of the Internet, apart from exercising its control function, is documenting reality and making information from the past available to the public.

34 Ibid.

The Court noted that, during the first proceedings, the applicants had not formulated any request regarding the presence of the article in question on the Internet. Therefore, the courts could not rule on this issue. The judgments rendered in the first case did not give the applicants reasonable grounds to expect an order to remove the article from the newspaper's website. The Court shared the view of national courts that it is not the role of the judiciary to engage in rewriting history by ordering the removal from the public sphere of all traces of publications that, pursuant to final court judgments issued in the past, were considered materials constituting baseless attacks on the reputation of individuals. Moreover, an important circumstance for the assessment of the case is that the legitimate interest of society in access to public press archives on the Internet is protected under Art. 10 of the Convention.[35]

9.
Conclusion

The judgment of the Supreme Administrative Court of 9 February 2023, file reference: III OSK 6781/21, is an important step in shaping the balance between the 'right to be forgotten' and the right to freedom of expression and information. In the realities of the dynamically changing digital world, the adjudicating body had to face a dilemma that is increasingly facing courts both in Poland and in other European Union countries. The conflict of these two fundamental rights requires courts to take into account both the interests of the individual and the public good, which often leads to difficult decisions.[36]

The judgment emphasises that the 'right to be forgotten' is not absolute and must always be assessed in the context of other rights and freedoms, in particular freedom of expression and the right to information. The protection of personal data, although fundamental to maintaining privacy, cannot lead to limiting access to information relevant to public debate.[37] This judgment highlights the need to apply a proportionality test, which allows for balancing the interests of the parties, taking into account the specificities of each case.

The Supreme Administrative Court's judgment, which gave primacy to the right to personal data protection over freedom of the press, changed the rules of operation of the media. The press clause was intended to achieve a balance between personal data protection and freedom of expression. However, the Court assumed that the provisions on personal data protection apply to the press archives in their full scope. The

35 Ibid., para. 65.
36 Kulesza, 2018, p. 27.
37 Zanfir, 2020, p. 427.

principle (excluded by the clause) that personal data must be stored no longer than necessary for the purposes of their processing would apply. However, the Court did not specify what a press archive is and when information becomes outdated. These cumulative problems can lead to a chilling effect in the actions of publishers (refraining or discouraging them from performing legal obligations or exercising their rights due to a sense of threat of sanctions or suffering other legal consequences for their actions – this term was used by the ECtHR).[38] Media and other entities publishing information may fear legal consequences related to violating the 'right to be forgotten', which may result in self-censorship and limiting the publication of materials that could be important for public debate. Such a phenomenon may negatively affect the transparency of public life and the public's access to reliable information.[39]

In the context of this judgment, it can be noted that the 'right to be forgotten', although increasingly used by individuals, is still an area full of ambiguities and interpretational challenges.[40] Future case law and the development of legal regulations will be crucial for precisely establishing the boundaries between these rights, as well as for their effective protection in the digital age. Understanding and properly applying this judgment is crucial for legal practitioners who have to navigate the jungle of legal norms regulating these issues, taking into account the interests of both the individual and society.

As a result of the analysis of the title issue, the following *de lege ferenda* conclusions can be proposed:

1) Introducing clear criteria for assessing proportionality – the judgment of the Supreme Administrative Court of 9 February 2023 highlights the need to clarify the criteria based on which courts should assess the proportionality between the 'right to be forgotten' and the right to freedom of expression and information. In this regard, it would be appropriate to consider introducing legislative or case law guidelines that would enable a more uniform assessment of the conflict between these rights. These guidelines could take into account, among other things, the importance of the information from the point of view of the public interest, the time that has elapsed since the events that are the subject of the information, and the potential impact on the privacy of the data subject.[41]
2) Increasing privacy protection in the digital space – given the growing importance of personal data protection in the digital age, it is worth considering introducing mechanisms that make it easier for individuals to exercise their 'right to be forgotten' while not excessively restricting access to public information.

38 Judgment of the European Court of Human Rights of 26 April 1979, complaint no. 6538/74 [Online]. Available at: www.echr.coe.int.
39 Lubasz, 2024, p. 121.
40 Sibiga, 2024, no page.
41 Białecki, 2021, no page.

This could include, for example, the ability to automatically anonymise or partially remove personal data from archived *on-line* materials, without having to completely remove the content.[42]

3) Developing mediation and dispute resolution mechanisms – in order to mitigate potential conflicts between the 'right to be forgotten' and freedom of expression, it is worth considering introducing mediation institutions that could operate before the case is brought to court. Mediators specialising in personal data protection and media law could help the parties find compromise solutions that would be acceptable to both parties, while avoiding lengthy and expensive court proceedings.[43]
4) Improving the information process for citizens – due to the growing number of requests for data deletion, it may be worth considering introducing an obligation for public and private institutions to provide clear and understandable information on procedures related to the 'right to be forgotten'. Introducing standard forms and guidelines could significantly improve this process, increasing citizens' awareness of their rights and the obligations of data controllers.[44]
5) Amending regulations on archives and information protection – it is also worth considering reviewing and updating the regulations on data archiving and access to public information to better reflect contemporary challenges related to privacy protection. These regulations should precisely define in what situations and on what principles archival information can be deleted or access restricted so that it does not interfere with the right to information, while at the same time respecting the rights of an individual to the protection of their personal data.[45]

In the context of the judgment, there is a risk that the 'right to be forgotten' could be abused by public figures or other entities to hide information that could be of importance to society. The court did not provide mechanisms to prevent such abuse, which raises concerns that the 'right to be forgotten' could be used as a tool to censor inconvenient but true information.

42 Grzelak, 2019, pp. 23-45.
43 Jaszczyński, 2020, pp. 75-94.
44 Kulesza, 2019, pp. 14-32.
45 Żelechowski, 2020, pp. 85-100.

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Goce KOCEVSKI*

The Parliament of North Macedonia in the Advent of Accession Negotiations with the European Union: Bystander or Actor?

ABSTRACT: *This paper analyses the role of the national parliament (Assembly) of North Macedonia in the process of the country's accession to the European Union. In 2022, North Macedonia started the opening phase of the accession negotiations. However, its closure is conditioned. The country must amend its Constitution to include the Bulgarian minority as an ethnic group. This requirement has put the Assembly under the spotlight. The integration of the country into the EU depends on enacting these amendments. Yet, the role of the Assembly does not end here. The paper describes the prerogatives of the Assembly in the context of EU accession, with a focus on the alignment of legislation and political oversight of the executive. It also analyses the specialised parliamentary bodies on EU affairs. The objective of the research is to assess to what extent the Assembly is using its constitutional prerogatives to give legitimacy to the process of EU accession that is overwhelmingly run by the executive. The author analysed data on the performance of the Assembly over the past ten years. The findings showed an overuse of the fast-track procedure for the harmonisation of legislation. The political oversight remains weak, although the special bodies within the parliament are meeting more frequently compared with the previous period. The Parliament is not part of the negotiation structure adopted by the Government, however, the chief negotiator is obliged to report to the Parliament about the progress. The role of the Parliament can be strengthened by a detailed regulation of the procedure for adopting laws for the transposition of EU law and by more frequent hearings in the specialised parliamentary bodies.*
KEYWORDS: *North Macedonia, Parliament, Enlargement, Accession negotiations, Alignment of legislation, Parliamentary oversight.*

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1. Introduction

In July 2022, after being a candidate for 17 years, North Macedonia started the opening phase[1] of the accession negotiations with the European Union (EU).[2] The postponement has largely been determined by politics rather than the policy of EU enlargement.[3] However, the conclusion of the opening phase of the negotiations is conditioned.[4]

The country must amend its Constitution by the inclusion of Bulgarians as a separate ethnic group[5] to proceed with the negotiations.[6] Since the constitution-making powers are vested in the Assembly, and the required constitutional amendments are embedded in the negotiation framework, its role has inevitably received attention. Particularly, since the Government's proposal for amending the Constitution[7] from July 2023 has not passed the phase of first reading due to a lack of qualified majority. For the second time in four years, the Assembly is required to amend the Constitution of the country to settle a bilateral problem[8] with unpopular amendments[9], such as a requirement for continuing on the path to the EU. So, the Assembly undoubtedly plays a central role when it comes to constitutional amendments for issues relevant

1 The first intergovernmental conference at the ministerial level on the accession of North Macedonia took place on 19 July 2022.

2 North Macedonia applied for EU membership in March 2004 and was granted EU candidate status in December 2005. The European Commission first recommended opening accession negotiations with North Macedonia in October 2009. Despite the consistently positive assessment of the EC that the country is ready to start the negotiations the Council of the EU has refrained from making the decision, insisting first on the resolution of the dispute with Greece over the country's name. About the path towards EU membership of North Macedonia see: Mojsovska, 2021, Milchevski, 2013; Gabidzashvili, 2021; Kostoska, 2018.

3 Mojsovska, 2021, p. 572.

4 Conclusions of the Council of the EU, 18 July 2022. Points 4 and 6.

5 This requirement is an element of the French EU Presidency's negotiation framework for North Macedonia's EU accession that aimed at unblocking the start of the accession negotiations that were hindered by the veto from Bulgaria due to bilateral dispute. About the framework see: Vangelov, 2023, pp. 160–172.

6 The name of the Parliament of North Macedonia is Assembly (Собрание).

7 Government of Republic of North Macedonia. Proposal for acceding to an amendment of the Constitution of Republic of North Macedonia. 18.07.2023.

8 In 2019 the Assembly amended the Constitution and changed the name of the country from Republic of Macedonia to Republic of North Macedonia, as required with the "Prespa Agreement" that the country signed with Greece. About the Prespa Agreement and the subsequent constitutional amendments see: Maatsch and Kurpiel, 2021, pp. 53-75; Chryssogelos and Stavrevska, 2019 pp. 427–446.

9 Velinovska, 2023, p. 11.

to integrating into the EU, even when they are not related specifically to the *acquis* or transferring sovereignty.

However, aside from this, what are the other functions of the Assembly in the EU accession process? To what extent does the Assembly have an active role in the process of aligning national legislation with EU law, or does it confirm the bills coming from the executive? Does the Assembly use its constitutional prerogatives for political oversight over governmental actions related to the EU accession of the country, and does it hold the Government accountable for stalling the process? This paper attempts to provide an answer to these questions. It describes and analyses the past and current role of the Assembly in the EU accession process. It focuses on two key functions: the alignment of legislation with EU law and the political oversight of EU-related affairs. The paper aims to assess the impact that the Assembly has reached so far in the EU accession process and its prospective role in the recently started EU negotiation process. The paper strives to assess whether the Parliament in the current constitutional and legal settings and the current political and social context is ready to take over the demanding tasks of a Parliament of an EU Member State. This is particularly important, as the involvement of national parliaments in EU affairs has developed significantly since the Lisbon Treaty, and EU matters are increasing in complexity, demanding more attention and specialised knowledge of EU policies.[10]

Although significant literature exists on the relationship between national parliaments (of Member States) and the EU[11], that is not the case for the parliaments of EU candidate countries. Research on this issue has been done concerning Montenegro[12], Kosovo[13] and Serbia[14] but it is either focused on specific functions (e.g. harmonisation of legislation) or it is focused on the EU accession process *per se*. With regard to North Macedonia, the work of Ristova–Asterud is a valuable contribution to the role of the Assembly in the EU accession process.[15] In setting up the theoretical framework, the author took into consideration the well-studied difference between the structural potential for parliamentary participation in EC/EU policy-making or in the perspective of an EU candidate country, the accession negotiations (the 'legal constitution') and the use of the constitutional rules and other relevant legal acts in reality (the 'living constitution').[16] Whether the gap between these two will be narrow or wide, depends on the specific patterns of interaction between the executive, the majority

10 Auel and Christiansen, 2015, p. 289.
11 See: Hefftler et all., 2015; Aue and Christiansen, 2016; Winzen, 2022; Sprungk, 2015.
12 Marović and Sošić, 2011.
13 Shala, 2019.
14 Orlovic, 2011.
15 Ristova-Asterud, 2011.
16 Maurer and Wessels, 2001, p. 17.

parties and the opposition parties.[17] The new functions of national parliaments, once the candidate countries become EU member countries, are significant because of the political sensitivity and technical complexity of the EU's decision-making procedures.[18] The literature shows that the role of the legislative branch relative to the executive in the process of joining an intergovernmental international organisation or *sui generis* political union of sovereign States is in an inferior position. The European Union, in particular, seems to have the effect of weakening both parliaments and interest groups in favour of the executive within its Member States.[19] The consolidation process has automatically brought about the strengthening of the executive.[20] A recent review concluded that in the last decade, there has been growing policy specialisation in the institutional position of national parliaments at the European and national levels, while the causes and consequences remained largely unstudied.[21]

The author has reviewed primary data on law-making processes as well as the work of the working committees of the Assembly. He has reviewed the relevant constitutional provisions and laws, and has consulted secondary sources of information and literature. The methodology also reflects the structure of the article, which is divided into three parts. The first part focuses on a description of the constitutional prerogatives of the Assembly and its position in the political system. The second part focuses on the past role of the Assembly in the EU accession process. The third part focuses on two key functions of the Assembly in the context of EU accession: the harmonisation of legislation and political oversight.

2.
The Assembly of North Macedonia: Legal v. Living Constitution

2.1. The Assembly in Law

The Assembly (*Собрание*) of North Macedonia is a unicameral representative body that has exclusive competence for the enactment of laws. The Assembly is composed

17 Auel and Benz, 2005, pp. 372–393.
18 Zajc, 2008, p. 5.
19 Mauer and Wessels, 2001, pp. 19–22.
20 Olson and Ilonszki, 2011, p. 247.
21 Winzen, 2022.

of 120 representatives[22], elected by a proportional representation (using the *D'Hondt method*) from six electoral districts and a 5% electoral threshold. The representatives are elected for a four-year term, and they enjoy a free mandate that cannot be revoked. The organisation and functioning of the Assembly are regulated by the Constitution[23] and by the Assembly's Rules of Procedure[24]. Similarly to other national parliaments in Europe[25], the Assembly has the power to adopt laws, budget, amend the Constitution, ratify international treaties, exercise political oversight over the executive, elect public officials and has other constitutional prerogatives. The Assembly elects the Government and possesses the power to a motion of no confidence as well as the power to initiate a procedure for determination of liability of the President of the Republic[26] for violation of the Constitution and the laws in exercising his/her rights and duties (impeachment procedure).[27]

The constitutional setting of the Assembly has certain specificities that differentiate it from other national parliaments in Europe. The Assembly cannot be dissolved by holders of the executive power (as is the case in the parliamentary systems in Europe). It can be dissolved only if the majority of the total number of MPs vote for dissolution.[28] It elects the Government both as a collective body and as individual members. The Prime Minister cannot decide upon the resignation of any Government member and cannot change the composition of the Government without the approval of the Assembly. According to some authors, the effect of these specificities is the increase of the power of the Assembly beyond that of the Government.[29] Lastly, there are the elements of consociational democracy introduced with the Ohrid Framework Agreement.[30]. A double majority is required for specific laws[31] as well as for the elec-

22 The Constitution defines the minimum (120) and the maximum number of representatives (140). See Article 62 paragraph 1 from the Constitution of North Macedonia. The Electoral Code limits the number to 123 from whom 120 are elected from the six electoral districts while the remained three are elected from three electoral districts for citizens living abroad. However, in the early parliamentary elections in 2016 and in 2020 the necessary electoral threshold has not been meet and these three seats remained vacant.

23 Constitution of Republic of North Macedonia. Articles 61–78.

24 Assembly of the Republic of North Macedonia. Rules of Procedure. OJ No. 91/08, 119/10 and 23/13.

25 With the exception of Cyprus and to a lesser extent France, Portugal and Ireland, legislatures in the member states of EU are characterised by a relatively similar level of institutional prerogatives. See: Hefftler et all. ,2015, p. 5.

26 The President of the Republic is the head of state, elected on a direct election for a term of five years with limited executive prerogatives.

27 Shkarikj, 2014, pp. 315–319.

28 Constitution of Republic of North Macedonia. Article 63 paragraph 6.

29 Shkarikj, 2006, p. 449.

30 Treneska – Deskoska et al., 2023, pp. 132–138.

31 The laws that directly affect culture, use of languages, education, personal documents, and use of symbols, the Law on Local Self-Government and specific amendments to the Constitution.

tion of public officials[32]. These decisions are adopted by a majority vote of the MPs attending, within which there must be a majority of the votes of the MPs attending who belong to minority communities of the country.

2.2. The Assembly in Practice

Next, the author will look at how the Assembly works in practice. The author will focus on several key elements. The legislative dynamics, the use of the shortened procedure in the adoption of laws, the most common proposer of bills, the public trust and the level of political dialogue. Based on Table 1, a significant discrepancy can be observed in the number of laws adopted each year. From the peak in 2015 (606 laws adopted or two laws per day), in just two years, the legislative activity has fallen to 42. This shows the vulnerability of the Assembly to the political context and the impact of elections.

Table 1. Adopted laws in the period 2013–2022.[33]

Number of adopted laws	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**	**2020**	**2021**	**2022**
Total number of adopted laws	**349**	**357**	**606**	**366**	**42**	**267**	**196**	**67**	**213**	**109**
In regular procedure	215	147	234	101	8	175	66	23	113	42
In shortened procedure	97	194	339	238	24	71	104	33	81	57
In urgent procedure	3	0	1	1	1	0	0	0	0	0
Ratificatios of international treaties	34	16	32	26	9	21	26	11	19	10

Another relevant indicator, particularly for the culture of debate and building consensus, is the number of laws adopted in shortened procedures. This procedure limits the time for deliberation and discussion in both standing committee sessions and in plenary sessions. The data shows that in the ten years studied, in over seven of them, the majority of laws were adopted in shortened procedures. This practice, on more than one occasion, has been characterised by the European Commission[34] as undemocratic and limiting inclusiveness and transparency.

32 Ombudsman, three members of the Judicial Council and three judges of the Constitutional Court.
33 Source: Annual Reports of the Assembly of Republic of North Macedonia.
34 EU Progress Reports, 2014, 2016, 2018, 2020 and 2022.

Figure 1: Comparison of laws adopted in regular procedure with laws adopted in summarised procedure.[35]

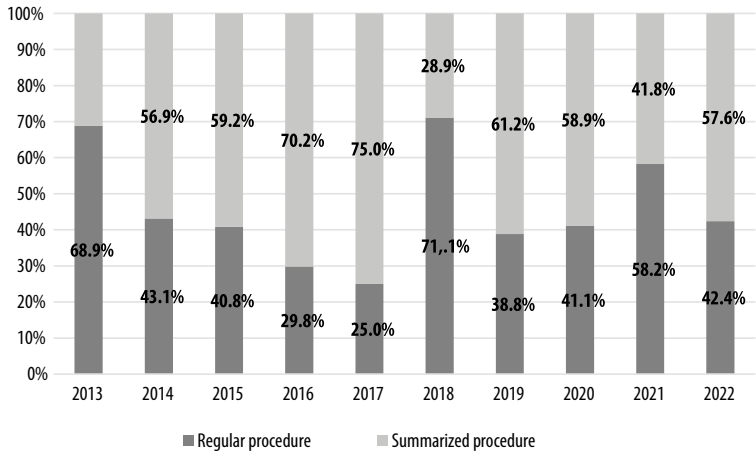
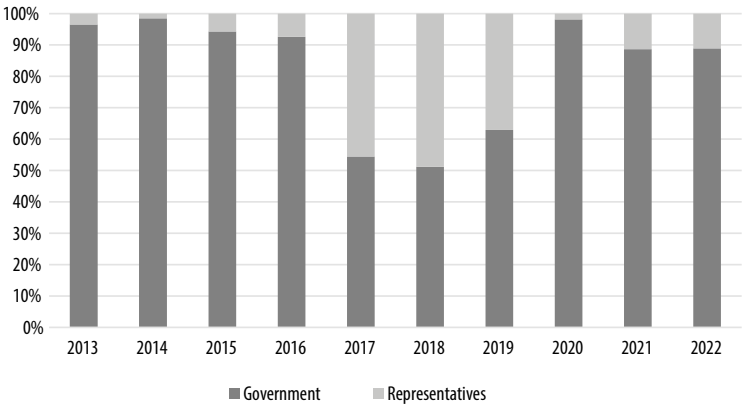


Figure 2 shows another specificity of the national parliamentary system. In an overwhelming number of cases, the bills were introduced by the Government, while the MPs are proposing laws more rarely.[36] However, a significant outlier is the period between 2017 and 2019 when over 1/3 of all laws adopted were proposed by the representatives. These years were characterised by the overall democratisation of the society following the previous 'captured State' period.[37]

35 Source: Annual Reports of the Assembly of Republic of North Macedonia.
36 According to the Constitution, 10.000 citizens can also propose legislation but the number of such proposals is negligible.
37 Auerbach and Kartner, 2023, p. 545–547.

Figure 2: Comparison of bills introduced depending of their proposers.[38]



The public trust in the Assembly is low and is in decline.[39] The country has an extensive history of boycotts in the Assembly which has negatively influenced the political system and the stability of the country. In the past, a significant number of laws were amended or adopted without the presence of the opposition. This contributed to dividing the population into left-wing and right-wing political supporters and has negatively affected the public perception of political parties. The party system of North Macedonia also mirrors the internal divisions of its bifurcated society. Ethnic parties dominate the political spectrum.[40] Ongoing political crises and boycotts in the country have led to the development of a new unique culture of moving the political negotiations outside the Assembly and to greater involvement of the international community in resolving crises. Boycotts derive from the lack of political dialogue, insufficient nurturing of the multi-ethnic culture and the lack of courage to implement the country's strategic goal, Euro-Atlantic integration.[41]

38 Source: Annual Reports of the Assembly of Republic of North Macedonia.
39 According to a recent survey, the score for the trust in the Assembly (on a scale from 1 to 10) in 2022 was 3.4 which is lower by 0.6 points compared with 2021. See: Reçica, 2023, p. 92
40 Egeresi, 2020, p. 118.
41 'Parliamentary Boycotts in the Western Balkans: Case Study Macedonia', 2019, p. 107.

3.
The Assembly and the EU Accession Process

3.1. Engagement of the Assembly in the Key Milestones of the EU Accession Process

The first step towards EU integration happened in December 1995[42] when the two parties established diplomatic relations, though some level of political dialogue between the Assembly and the European Parliament had already begun.[43] The Assembly ratified the first agreement between the parties in 1997.[44] To declare political support for EU membership, in 1998 the Assembly issued a declaration in which, for the first time, it listed EU membership as a strategic objective of the country and it pledged for, among other things, an approximation of the legislation, transparency of the process and engagement of both, the legislative and the executive branches of the Government in the EU accession process.[45] In the same year, the Assembly established the first specialised body, the Committee for European and Euro-Atlantic Integrations.

In 2000, the Assembly reiterated the pledge from 1998[46] and endorsed the Government's efforts to sign a Stabilisation and Association Agreement (SAA) that was signed in April 2001 and ratified the same year. In 2003, the Assembly adopted another declaration specifying its role in the parliamentary dimension of the SAA process.[47] The SAA process was important for the Assembly for two main reasons: it required the start of the process of harmonisation of national legislation, and it enhanced the interparliamentary cooperation with the European Parliament. For

42 Although the Euro-Atlantic Integration has been determined as a strategic objective of foreign policy since the independence of the country in 1991, the process was delayed due to the objections raised by Greece with regards to the country's name which impeded the process of international recognition of the country.

43 On November 17, 1994, the European Parliament established a Delegation for Relations with Southeast Europe (SEE), which was responsible for inter-parliamentary relations with five countries from the region: Albania, Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia and the Republic of Macedonia.

44 Cooperation Agreement between the Republic of Macedonia and the European Communities and the Transport Agreement.

45 Declaration for Development of the Relations of Republic of Macedonia with the European Union. Official Journal No. 7/1998.

46 Declaration for Elevating the Level of Relations of Republic of Macedonia with the European Union. Official Journal No. 99/2000.

47 Declaration on the Role of the Assembly of Republic of Macedonia in the Parliamentary Dimension of the Stabilization and Association Process. Official Journal No. 39/2003.

that purpose, the Committee for European Affairs as a specialised working body of the Assembly was established in 2004.

A significant milestone of the process occurred in March 2004, when the country applied for membership in the EU. The Assembly also unanimously recommended to the Government to apply for membership.[48] In December 2005, the country was granted EU candidate country status, based on the decision of the Council of EU[49], endorsed by the European Council but without a date for starting the negotiation process. After acquiring the candidate country status, the Assembly took the formal status of the national parliament in COSAC. In 2007 and 2008, the Assembly demonstrated a proactive attitude. It issued resolutions for the priorities in the accession process[50] and established a National Council for European Integration. In October 2009, the EC concluded the country's Progress Report with the recommendation that negotiations for EU membership be started. However, the European Council (December 2009) did not decide to launch the accession negotiations. The Assembly amended its Rules of Procedure and introduced a specialised, fast-track procedure for harmonisation of legislation.[51]

In the years that followed, the Commission continuously recommended opening accession negotiations, while the Council consistently postponed the decision. Between 2011 and 2017, the process of EU accession stalled due to the threat of a veto by Greece and the internal deterioration of democracy and the rule of law.[52] During this period, in the context of other Western Balkans countries, the country regressed from the position of frontrunner in 2004/2005 to that of laggard in 2014.[53]

In 2017, the process was relaunched, with the Assembly issuing a declaration to speed up the reform and integrative processes. In June 2018, following the signature of the Prespa Agreement with Greece, the Council of the EU (General Affairs) adopted the conclusion that the Member States set out the path towards accession negotiations with North Macedonia (and Albania) in June 2019.[54] The Assembly adopted the constitutional amendments stemming from the Prespa Agreement, although the Referendum held (which was not mandatory) was not successful since the census

48 Declaration for Submitting Application for Membership of Republic of Macedonia in the European Union. Official Journal No. 7/2004.
49 Conclusions of the Council of the EU, 15–16 Dec 2005.
50 Resolution on the Priorities in the Accession Process of Republic of North Macedonia in the European Union and opening negotiations for membership in the European Union. Official Journal 145/07. Resolution for priorities in 2009 for accessing of the Republic of Macedonia in the European Union. Official Journal 155/08.
51 Assembly of the Republic of North Macedonia. Rules of Procedure. Official Journal No. 119/10 and 23/13.
52 Dabrowski and Myachenkova, 2018, pp. 20–21.
53 Kacarska, 2014, p. 69.
54 Conclusions of the Council of the EU, 26 Jun 2018

was not met. However, in 2019, despite the previous year's pledge, the Council of the EU did not decide to start negotiations for EU membership in North Macedonia.

In September 2022, the Government of North Macedonia adopted a decision to set up a structure for negotiations for accession to the European Union.[55] The structure for negotiations is composed of chief negotiators, deputy negotiators, different working bodies, the Mission of RNM in Brussels and the Secretariat for Negotiations. According to the structure, the burden of the negotiations will be born solely by the executive. The negotiation positions will be adopted by the Government and not by the Assembly. The only reference of the Assembly concerns the obligation of the chief negotiator to report to the Assembly quarterly about the negotiations and the determined negotiation positions. The National Council for European Integration may provide opinions and directions for the negotiation positions, but they are not mandatory in the current institutional setting. Yet, by using the regular mechanisms for parliamentary oversight described below, the Assembly can fight its way to a more proactive role in the process.

3.2. Parliamentary Structures on European Affairs

3.2.1. Committee on European Affairs

The Committee was established in 2004 as a working body of the Assembly. It has a president, fourteen members and their deputies. It is a relevant working body for all laws for alignment of legislation with EU law. The Committee monitors the implementation of the National Strategy for the Integration in the EU. It also monitors the fulfilment of the obligations arising from the agreements with the EU and the realisation of the programs and other acts of financial assistance. It has an active role in the process of harmonisation of the legislation. With regard to political oversight, it follows the activities of the Government and State administration bodies in connection with the admission of the country in the EU. It may also carry out activities aimed at informing the public about the processes of European integration. The data shows limited engagement in organising public debates and hearings. The work of the body is reduced to passing bills from the Government and having discussions on EU reports on the progress of the country without a proactive stance.

55 Decision for Establishing a Structure for Negotiations for Accession of Republic of North Macedonia to the European Union. Official Journal No. 200/2002.

Table 2: Overview of the work of the Committee on European Affairs.[56]

Committee on European Affairs	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Sessions	17	12	15	6	7	17	28	7	17	21
Topics on the agenda	26	18	18	6	9	25	56	11	38	47
Reviewed legislative proposals	22	11	9	1	3	20	32	15	22	30
Public debates	0	1	5	3	1	1	1	0	0	1
Supervisory hearings	1	0	0	0	0	0	0	0	0	0

3.2.2. National Council for European Integration

In 2007, the Assembly established a National Council for EU Integration, completing the process of internal reorganisation to set up the institutional framework for the EU accession process.[57] It was envisioned as a broad platform, under the auspices of the Assembly, that would enable the inclusion of all social factors in the creation, debate and follow-up of the European integration of the country. The Council's task is to develop common positions and coordinate action in the process of obtaining membership in the EU. The Council monitors and evaluates the course of activities for obtaining membership and gives opinions and directions regarding the preparations for starting the accession negotiations as well as regarding the negotiating positions. In addition, it reviews information about the negotiation process and evaluates the activities of individual members involved in the negotiation teams. If necessary, it gives opinions on the harmonisation of national legislation with EU law. The manner of work of the Council is regulated by its Rules of Procedure.[58]

The composition of the National Council for European Integration reflects the different political, ethnic, religious and interest groups in Macedonian society that are united towards a common aim. The Council has a president, a vice president and 15 members. Nine members (and nine deputy members) are elected from the MPs in the Assembly, and six members are from specific institutions.

The Assembly is represented by three members from the ruling parties, three from the opposition and three ex-officio members (the president of the Committee for European Affairs, the president of the Committee for Foreign Affairs and the co-president of the Joint Parliamentary Committee between the Assembly and the

56 Source: Annual reports of the Assembly of North Macedonia.
57 Ristova-Asterud, 2011, p. 17.
58 Rules of Procedure of the National Council on EU Integrations. 2011.

European Parliament. The other six members are the deputy of the Prime minister in charge of European integration, representatives from the Cabinet of the President of the Republic, the Prime Minister from the Macedonian Academy of Sciences and Arts, the Community of Local Self-Government Units and the Association of Journalists of Macedonia. These members participate in the work of the Council without voting rights. The President of the Council is appointed from the representatives of the opposition.[59]

The National Council for EU Integration bears the responsibility for securing a broad consensus on the EU agenda. On average, it has three sessions per year. However, the work of the Council has been affected by party-political differences.[60] Because of this, the NCEI strives to meet its *raison d'être*, i.e. ensuring broader societal support and consensus for key reforms necessary for further EU integration in the country. A peek into the reports of the NCEI in the past ten years makes it clear that it was unable to build a joint and unanimous consensus on key issues, such as ensuring an independent and impartial judiciary, an effective fight against corruption, reforms towards a functional public administration and other important issues. The sessions of the NCEI had the same pattern through the years. They were either related to reviewing EC reports, the status of the realisation of the program for alignment of legislation, or discussion upon the priorities of the different Member States that chaired the Council of the EU. Although these topics are important, what is lacking is the more assertive role of the NCEI in conducting political oversight and seeking accountability for the failures encountered by the executive in the EC accession policy.

4.
The Assembly's Key Functions in the Context of EU Accession:

4.1. Alignment of National Legislation with EU law

4.1.1. Planning of the Alignment

The alignment of legislation is a process of drafting and adopting legal measures aimed at gradually achieving consistency between the legislation of a third country and the EU *acquis*. North Macedonia took a formal obligation to align its legislation

59 Decision for Establishment of a National Council on Euro-integration No. 140/07 and Art. 3.
60 European Commission. Country Progress Report for the Former Yugoslav Republic of Macedonia. 2013.

in certain specific areas with the Stabilisation and Association Agreement.[61] Since 2001, though, as the country progressed on its EU accession path, the areas have been broadened to include all 35 chapters of the *acquis*. Similarly, as in the other countries[62], the preparatory activities for harmonisation, the process of drafting the proposals is within the competence of the executive, in the national context within the competence of the Government and the competent Ministries. The planning of the harmonisation is done by regular updates of a National Program for Adoption of the Law on European Union. The Program was prepared by the Secretariat for European Affairs and adopted by the government. The Program establishes a detailed plan and schedule for harmonising the national legislation with the European legislation, and the competent institutions and bodies for its preparation and implementation are also defined. The Rules of Procedure of the Government also impose an obligation to the competent Ministries that the legislative proposals must contain statements of compatibility and tables of concordance.[63] The materials also must have an EU flag (here EU flag procedure).[64]

4.1.2. The Procedure for Adoption of Laws for Harmonisation with EU Law

The Assembly bears the responsibility for the alignment of national legislation in accordance with the *acquis*. The procedure for adopting laws is regulated by the *Rules of Procedure of the Assembly*.[65] The Rules introduced for the first time specific references related to the role of the Assembly in the harmonisation process. They require that any legislative proposal tabled for the purpose of harmonisation of the legislation must contain a set of mandatory elements (reference to the EU act with full title and statement for compliance signed by the competent Minister).[66] The Rules do not contain more specific requirements for validation of the statement, i.e. to assess whether the proposal is actually related to harmonisation or not.

The Rules set out three different procedures: regular, summarised and urgent procedures. They define the criteria for determining which procedure will be used for a specific legislative proposal. The type of procedure is indicated by the proposer of the law, but the President of the Assembly has the authority to reject the proposal

61 Stabilisation and Association Agreement between the European Communities and their Member States, and the former Yugoslav Republic of Macedonia.
62 Hefftler et al., 2015.
63 Rules of Procedure of the Government. Art. 66 par. 2.
64 Ibid. Art. 73.
65 Rules of Procedure. Official Journal No. 91/08, 119/10 and 23/13.
66 Ibid. Art. 135 par. 4.

if the criteria are not met.[67] The regular procedure is intended as a common avenue for the adoption of laws. It encompasses three readings. The urgent procedure may be used for legislative proposals when they are necessary for preventing and removing major disturbances in the economy or when the interests of the security and defence of the Republic require it or in cases of major natural disasters, epidemics or other extraordinary and urgent needs. The shortened procedure may be used in three cases: (1) when the proposal is not a complex and extensive law, (2) for repealing a law or specific provisions of a law and (3) where the amendments are not related to complex or extensive harmonisation with the law of the European Union.

Though colloquially known as 'EU flag Procedure' the Rules do not set up a special procedure for the adoption of a law for harmonisation of the legislation with the EU law. Instead, the amendments to the Rules from 2013[68] introduced a specific provision regarding the legislative procedure before the working bodies for, among others, the laws for harmonisation of the legislation with the EU *acquis*.[69] The three key specificities[70] are:

In the first reading, the duration of general deliberation is limited to three working days, and the total time for discussion of MPs is limited to a maximum of 20 minutes for each MP, 30 minutes for coordination of the MP's group and 15 minutes for the proposer.

The second reading is limited to three working days. In this phase, MPs can only speak once and for no longer than 10 minutes, while the coordinator of a group can do so for 15 minutes. The deliberation for laws that are tabled in summarised or urgent procedures can last a maximum of two working days.

For the legislative proposals that are processed in a summarised and urgent procedure, the deliberation can last two working days. An MP can only discuss the proposed amendments, only once for 10 minutes, while the coordinator of the MP's group only once for 15 minutes.

Though the Rules are not sufficiently specific, the bills for the alignment of legislation are reviewed solely by the Committee on European Affairs and the Committee on Legislation. They are not reviewed by any other thematic working body.

67 Rules of Procedure of the Assembly. Art. 136.
68 Rules amending the Rules of procedure of the Assembly of Republic of North Macedonia. OJ No. 23/13.
69 These exemptions also apply to legislative proposal related to laws in competences of the standing committees on finances and budget and on the economy.
70 Rules of Procedure of the Assembly. Art. 171-a–171-d.

4.1.3. The Alignment in Numbers

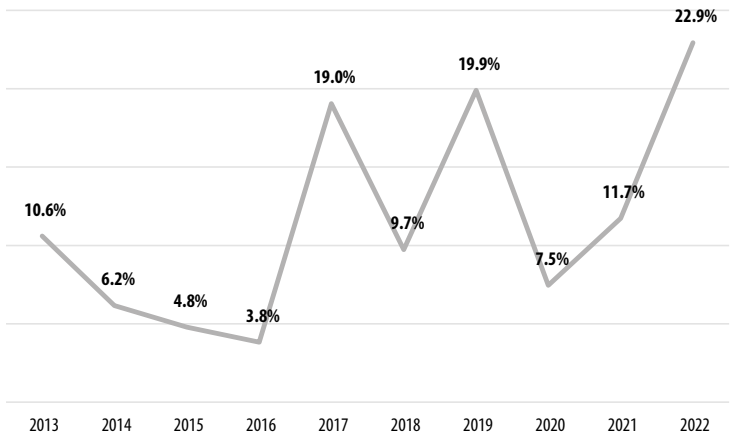
According to the data shown in Table 2, the overall number of laws adopted in the specialised 'EU flag' procedure is low compared with the total number of adopted laws as shown in Table 1.

Table 3: Number of laws for harmonisation with EU law.[71]

	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Total number of laws	37	22	29	14	8	26	39	5	25	25
Regular procedure	20	18	17	5	1	15	32	4	17	13
Shortened procedure	9	0	3	1	5	5	4	0	6	11
Urgent procedure	8	4	9	8	2	6	3	1	2	1

However, when looking at the percentage from the total number of adopted laws, their number shows an increasing trend.

Figure 3: Laws adopted for harmonisation with EU law, expressed as a percentage of the total number of adopted laws.



71 Source: Annual Reports of the Assembly of Republic of North Macedonia.

4.1.4. The 'EU Flag' Procedure – An Avenue for Efficient Alignment or Surpassing Debate

Some authors have claimed that the rules of parliament have been shaped to enable Government parties not only to favour Government bills but also to discourage opposition bills and discussion, thus increasing the success of governments in gaining parliamentary approval of their legislative proposals.[72] One of the 'side effects' of introducing a streamlined and shortened procedure is the potential risk for misuse, particularly since it significantly limits the time and space for debate and dissent. Whenever the Government needs to adopt specific legislation for which either there is a lack of public support, or there is a risk of filibustering by the opposition, the option of attaching the EU flag to the bill can be attractive. Calls about the misuse of this procedure have been raised on multiple occasions by scholars, opposition, NGOs and the media. However, in 2021 for the first time, the European Commission explicitly reiterated that "The use of 'EU flag' needs to be coherent and linked to laws, a large part of which aim at being aligned with the EU acquis".[73] The same message was reiterated in 2022[74] while in 2023, it was pointed out as an "excessive and inappropriate use of the EU flag procedure" and on one occasion even as the "abuse of EU flag procedure continued". Since 2021, over 10 bills[75] have been proposed; a larger proportion of them were adopted, though they contained deficiencies and did not meet the criteria for an 'EU flag procedure'. The deficiencies included a lack of indication of the specific EU legal act with which the law was harmonised, lack of table of concordance or inadequate filling of the table, and the bill was not planned in the national program for harmonisation of legislation. Very commonly, as a means to legitimise a proposal, some sections of the bill were related to harmonisation, but at the same time, other novelties were introduced that required a more thorough scrutiny and debate. The 'EU flag' procedure was used, among other things, to amend the Criminal Code by introducing lower penalties for crimes of corruption and to amend laws on labour relations, expropriation, urban planning, construction, and highways to be built (notably road corridors VIII and X-d), even though the amendments did not generally concern the alignment of existing legislation with the EU *acquis*.

72 Olson and Ilonszki, 2011, p. 237.
73 European Commission. Report on North Macedonia, 2021. p. 14.
74 European Commission. Report on North Macedonia, 2022. p. 13.
75 Laws for Amending the Law on Games of Chance and Entertainment Games, February 2023, Academy of Judges and Public Prosecutors in the shortened procedure, March 2023; Controlled and Psychotropic Substances, August 2021; Accounting, December 2021; Civil Procedure, August 2021; Financial companies, January 2023, Court expertise, November 2023. Agency for Intelligence, December 2020; Labor Relations, Expropriation, Urban Planning, Civil Engineering, Coridors 8 and 10-d, May 2023. Criminal Code, August 2023.

4.2. Political Oversight over EU Accession Affairs

The political oversight function on the activities of the Government in issues related to EU accession is carried out with the constitutional mechanisms of individual or collective responsibility of the Government (i.e. vote of no confidence), interpellation, parliamentary questions and setting up special inquiry commissions. Aside from this, the Assembly also has the power to organise supervisory hearings. Besides these general tools, the Assembly introduced new, specific mechanisms for political oversight related to EU affairs, including quarterly Government reports on the situation of European integration, annual plenary sessions on the situation of European integration, quarterly reports on the realisation of the program for alignment of legislation; opinions and recommendations from the Committee on European Affairs to the Government.[76] Since 2005, there has been only one case for (unsuccessful) interpellation of a Government minister for failure in the accession process and failure to provide information to the Assembly on the process. No Government official was held accountable for failure to submit a legislative proposal without adequate supporting documents.

As for the current parliamentary composition, a total number of 12 questions have been asked, either regarding the accession process or the relations with the EU in general. Questions have been raised about the reason for not starting the negotiations, the impact of the problem with Bulgaria, alignment with EU foreign policy, etc. All questions have been answered. Compared with the total number of parliamentary questions, those related to the EU are insignificant.

Table 4: Overview of the number of parliamentary questions related to the European Union.[77]

Parliamentary composition	2008- 2011	2011-2014	2014-2016	2016-2020	2020-2024
Number of parliamentary questions related to the EU	8	5	0	7	12
Total number of parliamentary questions	648	671	587	713	969
Initiated interpellations for EU-related issues	1	0	0	0	1
Total number of initiated interpellations	8	3	2	8	8

Interpellation for issues related to EU accession has been initiated twice, again by former Vice Prime Ministers for European affairs (in 2010 and 2020), both for alleged stalling of the EU integration process. The debates were in a highly politicised setting.

76 Ristova-Asterud, K. (2011) *Position and Functions of National Parliaments in the European Union – Recommendations for the EU Integration of the Assembly of the Republic of Macedonia.* Skopje: Progress Institute. 2011. p. 17.

77 Source: www.sobranie.mk.

Both initiatives were rejected. Only one supervisory hearing was organised in 2013 for the use of the fund for the Instrument for Pre-accession Assistance.

5.
Conclusions

Statistical and other data demonstrate that the Assembly has yet to fully utilise all of its available resources to participate in the process of EU accession negotiations. The EU accession negotiations of the Republic of North Macedonia in the current legal and political setting are overwhelmingly in the grip of the executive. Although it may be explained by the quite technical nature of the negotiation process, the Assembly still needs to have a more proactive role in legitimising the process and building consensus between the different divisions of the parties in the country, including on ideological lines as well as on interethnic lines. The Assembly demonstrated a lack of capacity to prevent the overuse of documents and, in some cases, the misuse of the fast-track procedure, which, instead of harmonisation of the legislation, has been used for enacting laws that are either controversial, lack popular support or require a much more thorough debate and the inclusion of all stakeholders. The Assembly possesses the power not to deliberate upon a bill that did not meet the necessary criteria; however, that has not been utilised accordingly. This shortcoming has been identified by the European Commission and may have a negative impact on the negotiation positions of the country.

The lack of effective political oversight is transferred to EU affairs as well. A highly divisive political culture prevents the Parliament from effectively using its institutional structures for greater engagement of the public and scrutinising the work of the executive on the EU accession process.

The Assembly needs to accelerate its internal modernisation. This is necessary to ensure that it is prepared to participate in the European Union's decision-making process. It is also clear that the Assembly, with limited expert knowledge on specific technical areas, has concentrated mostly on acquiring information with the possibility of engaging the government in debate, although in the end, it has usually confirmed all positions or has only slightly amended them. North Macedonia, in the final stages of the negotiations, will need to amend its national Constitution before becoming a member of the European Union to transfer aspects of its sovereignty to the EU. This will return the spotlight on the Parliament that, according to the Constitution, is the sole Constitution-maker. Parliament needs to substantially improve its performance as a forum for constructive political dialogue and representation. The focus needs to be on the active participation of all parliamentary parties, proper consultation and impact assessment prior to the enactment of legislation.

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Klaudia LUNIEWSKA*

Analysis of sentencing policies in Poland's criminal justice system

ABSTRACT: *This paper focuses on criminal policy in Poland, and its impact on the justice system. It includes a comprehensive analysis of the types of penalties, penal measures, and general directives concerning punishment in the Polish legal system, particularly from the perspective of the latest amendment to the criminal law. The aim is to illustrate the development of criminal policy in Poland and understand its influence on criminal justice. The paper will analyse various types of penalties, ranging from fines to custodial sentences, as well as penal measures, which constitute a key element of the legal system. Directives determining how penalties are imposed - and the goals that should be achieved through the criminal system in Poland - will also be scrutinised. Through the analysis of statistical data, this paper will provide an overview of the actual sentencing by courts and the execution of sentences in Poland, including data on the average length of imprisonment in relation to custodial sentences. Trends in sentencing over the years will be examined, and the latest changes (introduced as part of recent reforms to improve the effectiveness and fairness of the criminal system) will be analysed. In examining the formation of criminal policy in Poland, the paper will also consider potential controversies, challenges, and future perspectives influencing the development of the criminal system. This analysis will help understand how the approach to criminal matters in Poland is changing, and the consequences of these changes for the administration of justice and society.*

KEYWORDS: *criminal policy, penalties, penal measures, general directives, justice*

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1.
Introduction

Punishment has been used as a means of dispensing justice within human communities since time immemorial. This remains true today, where its use persists in various state systems and diverse legal frameworks. Punishment - as a tool directed at behaviour and the protection of societal interests - operates in various religions and cultures worldwide. It plays a fundamental role in building social order, shaping ethics, and establishing legal norms.[1]

In the context of the Polish legal system, punishment is a significant tool for achieving justice – including from the perspective of criminal law regulations. In this sense, it focuses on punishing criminals and preventing further criminal activity through the implementation of a preventive function, which will be discussed in the subsequent part of this paper. It is worth taking a closer look at the concept of punishment in the Polish legal system to understand the goals it sets for the administration of justice and the mechanisms used in the process of dispensing punishment. Considerations on the issue of criminal policy in Poland will begin with an analysis of the concept of legal punishment itself, understood depending on the branch of law in which it occurs. The paper will present punishment as defined by legal provisions, as a detriment imposed by the law on a legal subject, serving as a sanction for non-compliance with legal norms. In the Polish legal system, the concept of punishment operates in various branches of law – including administrative, civil law, offenses, and criminal law. Depending on the branch of law, the concept of punishment can be defined differently. In administrative law, for example, Article 189b of the Act of 14 June 1960, on the Administrative Proceedings Code (Pl: *Kodeks Postępowania Administracyjnego*, hereafter: KPA)[2] introduced an administrative monetary penalty into the Polish legal system.

According to the legal definition, it is understood as a specific pecuniary sanction imposed by the public administration authority through a decision – following a violation of the law consisting of non-fulfilment of an obligation or breach of a prohibition – imposed on a natural person, legal person, or non-legal personality organisational unit. Meanwhile, under civil law there exists a contractual penalty, which is understood as the payment of a specified sum as a form of redress for damage resulting from non-performance or improper performance of a non-pecuniary obligation.[3]

1 Warylewski, 2006, pp. 91-109; Zabłocki, 1995, pp. 231-244; Nowicka and Nowicki, 2009, pp. 149-162; Sójka-Zielińska, 1995

2 *Art. 189b of the Act of June 14, 1960, Administrative Proceedings Code (consolidated text: Official Journal of Laws of 2023, item 775).*

3 Art. 483 of the Act of April 23, 1964 (consolidated text: Official Journal of Laws of 2023, item 1610).

On the other hand, criminal punishment - which will be the subject of further considerations in this study – derives from criminal law regulations, specifically the Act of June 6 1997 – the Penal Code[4] (Pl: *Kodeks Karny*, hereafter: KK). Defining it in the context of criminal law, it can be indicated that it is a legal and criminal response by the state to a crime, constituting a personal detriment for its perpetrator.[5]

According to the conditions of criminal liability indicated in Article 1 Paragraph 1 of the KK, criminal responsibility applies only to those who commit a prohibited act under the threat of penalty by the law in force at the time of its commission. This corresponds to the Latin maxim *nullum poena sine lege*, which means that there is no punishment without law. Based on Article 1 Paragraph 2, we can state that an act whose social harmfulness is minimal cannot constitute a crime. Furthermore, according to §3, the perpetrator of a prohibited act has not committed a crime if it cannot be attributed to him at the time of the act (*nullum poena sine culpa* – no punishment without guilt).[6] On the other hand, Article 3 of the KK expresses the principle according to which penalties and other measures provided in this code are applied, taking into account the principles of humanitarianism, especially with respect for human dignity.[7]

2.
Penalty in Polish Criminal Law

Penalties, alongside penal and preventive measures, constitute one of the fundamental responses to the commission of a crime. Polish criminal law includes a catalogue explicitly listing the penalties that can be applied by the court. This catalogue is expressed in Article 32, Points 1-3 and 5 of the KK, according to which the penalty can be a fine, restriction of liberty, imprisonment, or even life imprisonment. In Polish law, there was previously Article 32 Point 4, which prescribed a penalty of 25 years of imprisonment. However, this was repealed by Article 1, Point 2 of the Act of 7 July 2022, amending the KK and certain other statutes.[8] The mentioned catalogue of penalties in Article 32 of the KK lists punishments ranging from those inflicting the least harm on the offender to the most severe. It is important to note that this perspective reflects the legislator's view because, for individual offenders, a fine may prove more burdensome than a term of restricted liberty. Consequently, this catalogue serves as

4 Act of June 6, 1997 – Penal Code (consolidated text: Official Journal of Laws of 2022, item 1138).
5 Burdziak, Kowalewska-Łukuć and Nawrocki, 2021.
6 Art. 1 of the Act of 6 June 1997 - Penal Code (consolidated text: Journal of Laws of 2022, item 1138).
7 Art. 3 Ibid.
8 The Act of 7 July 2022, amending the Penal Code and certain other statutes (Journal of Laws of 2022, item 2600).

a suggestion regarding the legislator's preferences in the realm of imposing custodial sentences. Therefore, in Polish criminal law the catalogue of penalties encompasses both non-isolating penalties (fines, restrictions of liberty) and isolating penalties (imprisonment, life imprisonment). In Article 33 of the KK, the legislator established a system for determining fines. According to this system, fines can be determined either in a specific amount or in so-called daily rates. In the case of fines specified in daily rates, the court defines the number of rates and the amount of one rate. The law specifies that, unless the KK provides otherwise, the minimum number of rates is 10, and the maximum is 540.[9] Meanwhile, based on §1a, it is considered that if the law does not state otherwise and the offense is punishable by both a fine and imprisonment, the fine is determined at a minimum of 50 daily rates for an offense carrying a penalty of imprisonment not exceeding one year, 100 daily rates for a maximum 2-year imprisonment offense, and 150 daily rates for anything exceeding 2 years[10]. A fine is imposed as a penalty for offenses of lower social harm. It can be either an independent penalty or imposed alongside other types of penalties, if provided by the law as a form of legal liability for a specific type of prohibited act. Cumulative fines, on the other hand, can be imposed alongside imprisonment based on Article 33 §2 of the KK in a situation where the offender has committed a prohibited act to gain financial benefit, or has achieved financial gain. Cumulative fines serve as a complementary measure to the punitive repression resulting from imprisonment by introducing elements that are burdensome for the offender from an economic perspective.[11] When determining the daily rate, the court takes into account the income of the offender, their personal and family circumstances, financial relationships, and earning capabilities. However, the daily rate cannot be lower than 10 Polish złoty or exceed 2000 Polish złoty, as stipulated in Article 33 §3 of the KK. In literature it is pointed out that a disadvantage of a fine is the lack of certainty regarding the source of the money used to pay it.[12] After the changes introduced by the law of 20 February 2015, it is no longer possible to conditionally suspend the execution of a fine.[13] The limits on restriction of liberty are specified in Article 34 of the KK, where in §1 it is indicated that, unless the law provides otherwise, this penalty lasts a minimum of one month and a maximum of two years. It is imposed in months and years.[14] The penalty of restriction of liberty involves the obligation to perform unpaid, supervised work for social purposes or

9 Art. 33(1) of the Act of 6 June 1997 - Penal Code (consolidated text: Journal of Laws of 2022, item 1138).
10 Art. 33(1a) Ibid.
11 Melezini, 2016, p. 139.
12 Burdziak, Kowalewska-Łukuć and Nawrocki, 2021, p. 188.
13 Mozgawa Marek (ed.), Penal Code. Commentary, 2015.
14 Art. 34(1) of the Act of 6 June 1997 - Penal Code (consolidated text: Journal of Laws of 2022, item 1138).

the deduction of 10% to 25% of the monthly earnings for social purposes specified by the court, as defined in §1a.[15] The duties and deductions can be imposed either collectively or separately.[16] As of 1 October 2023, §1aa came into effect, according to which – unless the law provides otherwise – if an offense is punishable by both a penalty of restriction of liberty and imprisonment, the restriction of liberty is determined at a minimum of 2 months for an offense carrying a penalty of imprisonment not exceeding one year, 3 months for a maximum 2-year imprisonment offense, and 4 months for an offense with a penalty of imprisonment of over 2 years.[17] It is crucial that during the serving of the penalty, the convicted person cannot change their permanent residence without the court's consent. Additionally, they are obligated to provide explanations regarding the course of serving the penalty.[18] When imposing the restriction of liberty, the court can order a monetary contribution mentioned in Article 39 Point 7 or obligations as specified in Article 72 Paragraph 1 Points 2-7a. These may include apologising to the victim, fulfilling the duty to financially support another person, engaging in gainful employment, pursuing education or vocational training, abstaining from alcohol abuse or the use of other intoxicants, undergoing addiction therapy, participating in therapy (especially psychotherapy or psychoeducation), engaging in corrective and educational interventions, refraining from being in certain environments or places, avoiding contact with the victim or other individuals in a specific manner, or keeping a distance from the victim or others.[19] Article 35 defines community service – which is unpaid, supervised, and performed for a duration ranging from 20 to 40 hours per month.[20] Paragraph 2 specifies that a deduction from the earnings for work can be ordered for an employed person, and during the period for which the deduction is ordered, the convicted person cannot terminate the employment relationship without the court's consent.[21] A just response to the commission of a crime does not always require the court to resort to an isolating penalty. Therefore, in the Polish legal system there are provisions allowing for the imposition of a non-isolating penalty. The amendment from 2022 also modified the wording of Article 37, which defines the limits of imprisonment. Currently, this provision states that the term of imprisonment is at least one month and, at most, 30 years, imposed in months and years. Previously, Article 37 stipulated that the maximum term of imprisonment would be 15 years. An example of this is Article 37a Paragraph 1 of KK, which allows for the imposition of a restriction of liberty of not

15 Art. 34(1a) Ibid.
16 Art. 34(1b) Ibid.
17 Art. 34(1aa) Ibid.
18 Art. 34(2) Ibid.
19 Art. 34(3) Ibid.
20 Art. 35(1) Ibid.
21 Art. 35(2) Ibid.

less than 4 months or a fine of not less than 150 daily rates, especially if concurrently imposing a penal measure, compensatory measure, or forfeiture. This is applicable if the offense is punishable by imprisonment not exceeding 8 years, and the imposed term of imprisonment would not be longer than one year.[22]

However, in accordance with Article 37a Paragraph 2 of the Penal Code, the above provision does not apply to offenders specified in Article 64 Paragraph 1, or to offenders acting within an organised group or association aimed at committing a crime or a fiscal offense, offenders of terrorist offenses, or offenders of a crime specified in Article 178a Paragraph 4. Article 37b indicates that in the case of an offense punishable by imprisonment – regardless of the lower limit of the statutory penalty provided for in the law for a given act – the court may simultaneously impose a term of imprisonment not exceeding 3 months. If the upper limit of the statutory penalty is at least 10 years, a term of imprisonment can be imposed for 6 months, with restriction of liberty for up to 2 years. Articles 69-75 do not apply. In this case the term of imprisonment is executed first, unless the law provides otherwise. An important principle expressed in Article 38 Paragraph 1 is that if the law provides for a reduction or extraordinary tightening of the upper limit of the statutory penalty, and the statutory penalty includes more than one of the penalties listed in Article 32 points 1-3, the reduction or tightening applies to each of these penalties. Article 38 Paragraph 2 now provides that an extraordinarily tightened penalty cannot exceed 810 daily rates of a fine, 2 years of restriction of liberty, or 30 years of imprisonment. Before the changes introduced by the amendment in 2022, Paragraph 2 stipulated that an extraordinarily tightened penalty could not exceed 810 daily rates of a fine, 2 years of restriction of liberty, or 20 years of imprisonment, and it was imposed in months and years. The current Article 38 Paragraph 3 indicates that if a reduction in the upper limit of the statutory penalty is provided for, the penalty imposed for a crime punishable by life imprisonment cannot exceed 30 years of imprisonment. Whereas, before the changes introduced by the amendment in 2022, it stated that if the law provides for a reduction in the upper limit of the statutory penalty, the penalty imposed for a crime punishable by life imprisonment cannot exceed 25 years of imprisonment, and for a crime punishable by 25 years of imprisonment, it cannot exceed 20 years of imprisonment.

22 Giezek and Kardas, 2022, pp. 103-140.

3.
Penal Measure

Penal measures, applied alongside the penalty, constitute a hardship imposed on the perpetrator of a crime and enhance the consequences resulting from the conviction. In such a situation, the penal measure serves the ancillary purposes of the criminal process that cannot be adequately addressed through the imposition of the penalty alone. While rare, it is not impossible for penal measures to be pronounced instead of a penalty. This typically occurs when even the lowest sentence would be disproportionately severe for the offender.[23] The catalogue of penal measures in Polish criminal law is specified in Article 39 of the Penal Code. According to this provision, penal measures include: deprivation of public rights; prohibition from holding a specific position or practicing a specific profession, or conducting a specific business activity; prohibition from engaging in activities related to the upbringing, treatment, education, or care of minors; prohibition from holding a position or practicing a profession or job in state and local government institutions, as well as in commercial law companies where the State Treasury or a local government unit directly or indirectly owns at least 10% of shares or stocks through other entities; prohibition from staying in specific environments or places, contacting certain individuals, approaching specific persons, or leaving a designated place of residence without court permission; prohibition from entering mass events and gambling establishments, and participation in gambling; an order to periodically leave premises occupied jointly with the victim; prohibition from driving vehicles; a monetary fine; disclosure of the judgment to the public; and degradation.[24]

4.
Preventive Measures

Article 93a specifies a catalogue of preventive measures, including electronic location monitoring, therapy, addiction therapy, and residence in a psychiatric facility. The imposition as a preventive measure of an order or prohibition as specified in Article 39 points 2-3 of the KK[25] is possible in a situation explicitly provided for by law. Preventive measures may be decided by the court when necessary to prevent the perpetrator from committing the prohibited act again, and other penal measures

23 Burdziak, Kowalewska-Łukuć and Nawrocki, 2021, pp. 206-233.
24 Art. 39 of the Act of 6 June 1997 - Penal Code (consolidated text: Journal of Laws of 2022, item 1138).
25 Art. 93a(2) Ibid.

defined in this code or imposed based on other laws are not sufficient. The preventive measure referred to in Article 93a Paragraph 1 Point 4 can be imposed only to prevent the perpetrator from committing a prohibited act of significant social harm again.[26] Lifting of a preventive measure occurs when its further application is no longer necessary.[27] A preventive measure and its manner of execution should be appropriate to the degree of social harm, as well as the likelihood of its commission, and should take into account the needs and progress in therapy or addiction treatment. The court may modify the imposed preventive measure against the perpetrator or its manner of execution if the previously imposed measure has become inappropriate or its execution is not feasible.[28] In the case of the same offender, more than one preventive measure can be imposed.[29] The court orders placement in a psychiatric facility only when the law so provides.[30] In Article 93c of the KK, the legislator has defined a group of offenders for whom preventive measures can be applied. In point 1 it is specified that such a measure may be imposed on an offender for whom proceedings have been discontinued due to committing an act prohibited while in a state of insanity as defined in Article 31, Paragraph 1 of the KK. In this case, the law refers to the provision specifying the regulation concerning the insanity of the offender. This provision applies exclusively to individuals for whom experts have ruled on insanity, i.e., individuals not subject to criminal responsibility.[31] The duration of applying a preventive measure is not predetermined.[32] Lifting the preventive measure in the form of residence in a psychiatric facility, the court may impose one or more of the following preventive measures: electronic monitoring of the place of residence, therapy, or addiction therapy.[33] The court determines the necessity and feasibility of implementing the imposed preventive measure no earlier than 6 months before the anticipated conditional release or the serving of a prison sentence.[34] If a custodial sentence is being served against the offender, preventive measures such as electronic monitoring of the place of residence, therapy, or addiction therapy may also be imposed until the completion of the sentence. However, this can only be decided no earlier than 6 months before the anticipated conditional release or completion of the custodial sentence.[35] If the offender has been sentenced to an imprisonment term without the

26 Art. 93a(1) Ibid.
27 Art. 93b(2) Ibid.
28 Art. 93b(3) Ibid.
29 Art. 93b(4) Ibid.
30 Art. 93b(5) Ibid.
31 Art. 93c ed. Stefański 2023, edn. 6/Wilkowska-Płóciennik.
32 Art. 93d(1) of the Act of 6 June 1997 - Penal Code (consolidated text: Journal of Laws of 2022, item 1138).
33 Art. 93d(2) Ibid.
34 Art. 93d(3) Ibid.
35 Art. 93d(4) Ibid.

suspension of its execution or a life sentence, the imposed preventive measure is applied after serving the sentence or conditional release, unless the law provides otherwise.[36] If the offender's behaviour after the revocation of the preventive measure indicates the need for preventive measures, the court – no later than within 3 years from the revocation of the measure – may again impose the same preventive measure or another measure as specified in Article 93a, Paragraph 1, Points 1-3, namely electronic monitoring of the place of residence, therapy, or addiction therapy.[37] Electronic monitoring of the place of residence, as defined in Article 93e, entails that the offender subject to such a measure is obligated to undergo continuous monitoring of their place of residence through technical devices, including a worn transmitter.[38] The obligation to undergo addiction therapy in a facility, as specified in Article 93f, means that the offender subject to therapy is required to attend the facility designated by the court at times determined by a psychiatrist, sexologist, or therapist. The offender must also undergo pharmacological therapy aimed at reducing sexual drive, psychotherapy, or psychoeducation to improve their functioning in society.[39] The offender for whom addiction therapy has been ordered is obligated to attend the addiction treatment facility designated by the court at times determined by the doctor. They are also required to undergo treatment for alcohol, narcotics, or any other similarly acting substance addiction.[40] On the other hand, Article 93g pertains to the principles of ordering residence in a psychiatric facility. According to Paragraph 1, the court orders residence in an appropriate psychiatric facility for an offender specified in Article 93c, Point 1, meaning an offender for whom proceedings were discontinued for an offense committed in a state of insanity. This occurs if there is a high probability that the offender will commit another offense of significant social harm due to mental illness or intellectual impairment.[41] However, when sentencing an offender specified in Article 93c, Point 2 – meaning an offender convicted of a crime committed in a state of diminished responsibility – to a custodial sentence without the suspension of its execution or a life sentence, the court orders residence in an appropriate psychiatric facility if there is a high probability that the offender will commit an offense of significant social harm due to mental illness or intellectual impairment.[42] When sentencing an offender specified in Article 93c, Point 3 to a custodial sentence without the suspension of its execution or a life sentence, the court orders residence in an appropriate psychiatric facility if there is a high probability that the convicted person

36 Art. 93d(5) Ibid.
37 Art. 93d(6) Ibid.
38 Art. 93e Ibid.
39 Art. 93f(1) Ibid.
40 Art. 93f(2) Ibid.
41 Art. 93g(1) Ibid.
42 Art. 93g(2) Ibid.

will commit a crime against life, health, or sexual freedom due to a disorder of sexual preferences.[43] In the case of Article 93g, we are dealing with a mandatory preventive measure due to the use of the legislative expression "the court orders". This provision establishes the conditions for placing individuals in an appropriate psychiatric facility for three categories of offenders: those who are not criminally responsible, those with significantly limited criminal responsibility, and those who committed a crime in connection with a disorder of sexual preferences.[44] If the perpetrator has committed an offense in a state of insanity, there is the possibility for the court to impose, as a preventive measure, an order or prohibitions listed in Article 39, Points 2-3. These may include a prohibition on occupying a specific position, practicing a specific profession, or engaging in a specific business activity; a prohibition on engaging in activities related to the upbringing, treatment, education, or care of minors; a prohibition on holding a position or practicing a profession or job in state and local government bodies, as well as in commercial law companies where the State Treasury or a local government unit directly or indirectly holds at least 10% of shares or stakes; a prohibition on staying in specific environments or places; restrictions on contact with specific individuals; restrictions on approaching certain persons or leaving a designated place of residence without the court's consent; a prohibition on entering mass events; a prohibition on entering gaming facilities and participating in gambling; an order to periodically leave the premises occupied jointly with the victim; or a prohibition on driving vehicles.[45] The imposition of this preventive measure is discretionary, due to the use of the legislative expression "may impose". It is worth noting the purpose of establishing this provision, which is to protect society from the potential uncontrolled behaviour of the offender that may pose a threat due to their social or professional role. The purpose of the prohibitions is to secure society, including its individual members, from the risk associated with the offender holding a position, performing a function, or engaging in business activities.[46]

5.
Principles of Sentencing and Penal Measures

Analysing the principles of issuing judgments, it is essential to first point out how imprisonment is defined in our legislation, and what the purpose of incarceration is. According to Polish law, the purpose of imprisonment is to achieve several key objectives stemming from the concept of punishment in the Polish legal system.

43 Art. 93g(3) Ibid.
44 Art. 93g ed. Stefański 2023, edn. 6/Wilkowska-Płóciennik.
45 Art. 99(1) Ibid.
46 Art. 99 ed. Stefański 2023, edn. 6/Wilkowska-Płóciennik.

One of the primary goals of imprisonment is to restrict the personal freedom of the convicted person. This is done by depriving them of the ability to move and act freely in society through the application of isolation as a penalty. The punishment aims at both individual prevention and general prevention, meaning it seeks to deter both the offender and other potential criminals from committing crimes. It also aims to protect society from any harmful actions by the convicted person.

Chapter IV of the KK specifies the principles of sentencing and penal measures. Article 53, opening this chapter, outlines general guidelines for sentencing. According to Paragraph 1, the court imposes a sentence at its discretion within the limits provided by law, taking into account the degree of social harm of the act, aggravating and mitigating circumstances, the goals of punishment in terms of social impact, as well as preventive goals to be achieved regarding the convicted person.[47] Before the entry into force of the 2022 amendment, this provision stated that the court imposes a sentence at its discretion within the limits provided by the law, ensuring that the severity of the penalty does not exceed the degree of guilt. It takes into account the degree of social harm caused by the act and considers preventive and educational goals to be achieved regarding the convicted person, as well as the needs for shaping legal awareness in society.[48] According to the justification of the project, this change pertains to a different definition of the general prevention directive and emphasises its equal status with the individual (specific) prevention directive. Before the entry into force of the 2022 amendment, the directive expressed in this provision was meant to ensure general prevention, as reflected in the language concerning the consideration of needs in shaping legal awareness in society.[49] It is crucial to have a guilt degree directive, indicating that the severity of the penalty should not exceed the degree of guilt.[50] When imposing a sentence, the court takes into account, in particular, the motivation and behaviour of the offender, especially in the case of committing a crime against a vulnerable person due to age or health, committing a crime jointly with a minor, the nature and degree of violation of the offender's obligations, the type and extent of the negative consequences of the crime, the personal characteristics and conditions of the offender, their lifestyle before and after the commission of the crime, especially efforts to remedy the harm or provide restitution in another form to satisfy societal sense of justice. This is specified in Paragraph 2.[51]

47 Art. 53 of the Act of 6 June 1997 - Penal Code (consolidated text: Journal of Laws of 2022, item 1138).
48 Ibid.
49 Art. 53 Commentary on the amendment from 7 July 2022 Bogacki/Olężałek 2023.
50 Art. 53 ed. Stefański 2023, edn. 6/Konarska-Wrzosek.
51 Art. 53(2) of the Act of 6 June 1997 - Penal Code (consolidated text: Journal of Laws of 2022, item 1138).

An essential change introduced by the latest amendment to the criminal law in Poland regarding the principles of sentencing was the establishment of extensive yet open catalogues of aggravating and mitigating circumstances. It is noteworthy that this novelty did not exist in previous Polish criminal codes.[52]

An aggravating circumstance includes, in particular, prior convictions for intentional or similar unintentional crimes; taking advantage of the helplessness, disability, illness, or advanced age of the victim; actions leading to humiliation or torment of the victim; committing the crime with premeditation; committing the crime due to motivation deserving special condemnation; committing the crime driven by hatred based on the victim's national, ethnic, racial, political, or religious affiliation, or because of their lack of religious beliefs; acting with particular cruelty; committing the crime under the influence of alcohol or a narcotic substance, if this state was a factor leading to the commission of the crime or significantly increasing its consequences; or committing the crime in collaboration with a minor or exploiting their participation.[53] On the other hand, a mitigating circumstance includes, in particular, committing the crime due to motivation deserving consideration; committing the crime under the influence of anger, fear, or excitement justified by the circumstances of the event; committing the crime in response to a sudden situation where a proper assessment was significantly hindered due to the offender's personal circumstances, scope of knowledge, or life experience; taking actions to prevent harm or injury resulting from the crime or to limit its extent; reconciliation with the victim; repairing the damage caused by the crime or providing compensation for the harm resulting from the crime; committing the crime with significant contribution from the victim; voluntary disclosure of the committed crime to the law enforcement authority.[54] A circumstance that is a characteristic feature of the crime committed by the offender does not constitute an aggravating or mitigating circumstance, unless it occurred with particularly high intensity.[55] A circumstance that is not a characteristic feature of the crime does not constitute an aggravating circumstance if it serves as the basis for increasing criminal liability applied to the offender.[56] A circumstance that is not a characteristic feature of the crime does not constitute a mitigating circumstance if it serves as the basis for reducing criminal liability applied to the offender.[57] Based on Article 56 of the KK, this applies accordingly to the imposition of other measures

52 See: Art. 53 ed. Stefański 2023, edn. 6/Konarska-Wrzosek.
53 Art. 53(2a) of the Act of 6 June 1997 - Penal Code (consolidated text: Journal of Laws of 2022, item 1138).
54 Art. 53(2b) of the Act of 6 June 1997 - Penal Code (consolidated text: Journal of Laws of 2022, item 1138).
55 Art. 53(2c) Ibid.
56 Art. 53(2d) Ibid.
57 Art. 53(2e) Ibid.

provided for in the criminal law, with the exception of the obligation to repair the damage caused by the crime or provide compensation for the harm suffered. If mediation was conducted between the victim and the offender or a settlement was reached in proceedings before the court or prosecutor, the court, when imposing a sentence, also takes into account their positive outcomes.[58] Special rules apply to the sentencing of minors and juveniles. Article 54 provides a directive stating that when imposing a sentence on a minor or juvenile, the court is primarily guided by the goal of educating the offender. This does not necessarily imply a directive for lenient treatment of such offenders, i.e., imposing a mild penalty. Instead, it imposes an obligation on the court to understand the personal characteristics and conditions of the juvenile offender and to impose a penalty necessary for their upbringing.[59] It should be noted that life imprisonment cannot be imposed on an offender who was under 18 years of age at the time of committing the crime.[60] This means that life imprisonment cannot be imposed on juveniles and minors brought to criminal responsibility who committed a crime between the ages of 17 and 18.[61] It is worth noting the existence of Article 10, Paragraphs 3 and 4 in the KK, which establish a general limit on the punishment for juveniles to 2/3 of the upper limit of the statutory penalty prescribed for the offense committed by the perpetrator, provided that the offense is not punishable by life imprisonment. The 2022 amendment also introduced changes regarding the principles of sentencing for juveniles. In the case of an offender who committed an offense after reaching the age of 17 but before turning 18, the court, instead of imposing a penalty, applies educational, therapeutic, or corrective measures provided for juveniles if the circumstances of the case, the degree of the offender's development, and their personal characteristics support this.[62]

The circumstances affecting the punishment are taken into account only with respect to the person they concern, as stipulated by Article 55 of the KK. It should be noted that the possibility of considering various aspects of the act and the characteristics and behaviour of the perpetrator in determining the punishment also allows for the implementation of the principles of humanitarianism and proportionality. At the same time, sentencing directives and principles prevent judicial arbitrariness, ensuring the preservation of the principles of equality and justice.[63] At the core of this is human dignity and the principle of equality.[64] We should refer to the judgment of the Supreme Court dated 27 July 2004, where it was indicated that "the punishment

58 Art. 53(3) Ibid.
59 Art. 54 ed. Gadecki 2023, edn. 1/Gadecki.
60 Art. 54(2) Ibid.
61 Art. 54 ed. Stefański 2023, edn. 6/Konarska-Wrzosek.
62 Art. 54 ed. Stefański 2023, edn. 6/Konarska-Wrzosek.
63 Art. 54 Ibid.
64 Art. 55 ed. Zawłocki 2021, edn. 5/Królikowski/Żółtek.

should not be an act of a 'collective' nature; consequently, the court should assess each participant in collective action and their individual characteristics separately in terms of an appropriate penalty". This means that the characteristics and personal conditions of each perpetrator, as well as subjective circumstances (primarily the degree of guilt), and objective factors influencing the act of determining the penalty, should be taken into account separately for each perpetrator and convincingly justified, without resorting to generalisations. These criteria are naturally intensified in the case of judgments involving the imposition of the most severe penalties.[65] The need to appropriately punish the perpetrator must be fulfilled, even if the act was committed in collaboration. Individual circumstances regarding the perpetrator should be taken into account to ensure the principle of internal justice of the judgment, requiring consideration of the significance of the committed act and the assessment of how personal circumstances significantly differentiate the situation – making them a justified basis for a different sentence compared to co-perpetrators, as indicated, for example, by the judgment of the Supreme Court dated 20 September 2002.[66] In accordance with Article 56 of the KK, this applies correspondingly to the imposition of other measures provided for in criminal law, with the exception of the obligation to compensate for the damage caused by the offense or make amends for the harm suffered. Article 57 establishes principles regarding the concurrence of grounds for mitigation and enhancement. According to Paragraph 1, if several independent grounds for extraordinary mitigation or enhancement of the penalty exist, the court may only once exceptionally mitigate or enhance the penalty, considering all concurrent grounds for mitigation or enhancement when determining the penalty.[67] However, if there is a convergence of grounds for extraordinary mitigation and enhancement, the court applies extraordinary mitigation or enhancement or imposes a penalty within the statutory limits, as indicated in Paragraph 2.[68] In both cases mentioned above, if there is a convergence of grounds for extraordinary mitigation or mandatory and discretionary penalty enhancement, the court applies the mandatory grounds.[69] The provisions, insofar as they relate to the grounds for extraordinary mitigation, apply *mutatis mutandis* to the grounds for refraining from

65 See II Criminal Chamber of the Supreme Court, case No. 332/03, in the Criminal and Military Supreme Court Judgments of 2004, No. 9, item 87, with commentary by S.M. Przyjemski, in "Criminal Law and Procedure" of 2005, No. 4, p. 136 and following.

66 See the judgment of the Supreme Court dated September 20, 2002, case No. WA 50/02, in the Criminal and Military Supreme Court Judgments of 2003, No. 1-2, item 9, with commentary by M. Kiziński, in "Prosecution and Law" of 2005, No. 6, p. 113 and following.

67 Art. 57(1) of the Act of 6 June 1997 - Penal Code (consolidated text: Journal of Laws of 2022, item 1138).

68 Art. 57(2) Ibid.

69 Art. 57(3) Ibid.

imposing a penalty.[70] Conversely, if there are grounds for extraordinary aggravation of a mandatory nature and grounds for extraordinary mitigation as specified in Article 60 Paragraph 3, the court applies extraordinary mitigation of the penalty.[71] However, if there are grounds for extraordinary aggravation of a mandatory nature and grounds for extraordinary mitigation as specified in Article 60 Paragraph 4, the court may apply extraordinary mitigation of the penalty.[72] However, if there are grounds for extraordinary mitigation and for refraining from imposing a mandatory penalty, or if there are grounds for extraordinary mitigation of an optional nature and for refraining from imposing a mandatory penalty, the court refrains from imposing a penalty. On the other hand, if there are grounds for extraordinary mitigation of a mandatory nature and for refraining from imposing a penalty of an optional nature, the court applies extraordinary mitigation or refrains from imposing a penalty. However, if there are grounds for extraordinary mitigation of the penalty and for refraining from imposing a penalty of an optional nature, the court applies extraordinary mitigation or refrains from imposing a penalty - or imposes a penalty within the limits of the statutory penalty.[73] On the other hand, based on Article 57a, when sentencing for an offense related to hooliganism, the court imposes a penalty upon the perpetrator at a level not lower than the lower limit of the statutory penalty increased by half. The court orders restitution for the victim unless it orders the obligation to repair the damage, the obligation to compensate for the harm suffered, or restitution based on Article 46. If the victim has not been identified, the court may order restitution to the Fund for the Aid of Victims and Post-penitentiary Assistance.[74] The punishment for a continuous act is specified in Article 57b of the KK. Based on this provision, in the case of a continuous act the court imposes a penalty upon the perpetrator above the lower limit of the statutory penalty. In the case of a fine or a penalty of restricted liberty, the punishment is not lower than double the lower limit of the statutory penalty, and up to double the upper limit of the statutory penalty.[75] If the law allows for the choice of the type of penalty, and the offense is punishable by imprisonment not exceeding 5 years, the court imposes a term of imprisonment only when no other penalty or penal measure can achieve the objectives of the penalty. Penalties of restricted liberty in the form of an obligation to perform unpaid work or supervised work for social purposes are not imposed if the health condition of the accused or their characteristics and personal conditions justify the belief that the

70 Art. 57(4) Ibid.
71 Art. 57(5) Ibid.
72 Art. 57(6) Ibid.
73 Art. 57(7) Ibid.
74 Art. 57a Ibid.
75 Art. 57b(1) Ibid.

accused will not fulfil this obligation.[76] Article 58 of the KK expresses the principle of the primacy of imprisonment penalties. According to this provision, if the law allows for a choice of penalty types and the offense is punishable by imprisonment not exceeding 5 years, the court imposes a term of imprisonment only when no other penalty or penal measure can achieve the objectives of the penalty.[77] If the offense is punishable by imprisonment not exceeding 3 years or a milder type of penalty, and the social harm of the act is not significant, the court may refrain from imposing a penalty if it simultaneously imposes a penal measure, forfeiture, or compensatory measure, and the objectives of the penalty are thereby achieved.[78] Article 60 pertains to extraordinary mitigation of the penalty. The court may apply extraordinary mitigation of the penalty in cases provided for by law and in relation to a minor if reasons specified in Article 54 Paragraph 1 speak in favour of it.[79] The court may also apply extraordinary mitigation of the penalty in particularly justified cases, especially when even the lowest penalty provided for the crime would be disproportionately severe, particularly: if the victim has reconciled with the perpetrator, the harm has been repaired, or the victim and the perpetrator have agreed on a way to repair the damage; due to the perpetrator's attitude, especially when the perpetrator made efforts to repair the damage or prevent it; if the perpetrator of an unintentional crime or their closest suffered serious harm in connection with the committed offense.[80] Upon the prosecutor's motion, the court applies an extraordinary mitigation of the penalty, and it may even conditionally suspend its execution in relation to the perpetrator who collaborates with other individuals in committing a crime, provided that the perpetrator discloses to the law enforcement authorities information regarding persons involved in the commission of the crime and significant circumstances of its commission.[81] Upon the prosecutor's motion, the court may apply an extraordinary mitigation of the penalty and may even conditionally suspend its execution in relation to the perpetrator of a crime who, regardless of the explanations provided in their case, disclosed to law enforcement and presented significant circumstances previously unknown to that authority, for crimes punishable by imprisonment exceeding 5 years.[82] It is worth noting that in cases specified in Paragraphs 3 and 4, when imposing a term of imprisonment of up to 5 years, the court may conditionally suspend its execution for a probationary period of up to 10 years if it deems that, despite not serving the sentence, the offender will not commit another crime again;

76 Art. 57b(2) Ibid.
77 Burdziak, Kowalewska-Łukuć, Nawrocki, p. 197.
78 Art. 59 Ibid.
79 Art. 60(1) Ibid.
80 Art. 60(2) Ibid.
81 Art. 60(3) Ibid.
82 Art. 60(4) Ibid.

the provisions of Article 69 Paragraph 1 do not apply, and the provisions of Article 71-76 apply accordingly.[83] Extraordinary mitigation of the penalty consists of imposing a penalty below the lower limit of the statutory penalty, a milder type of penalty, or refraining from imposing a penalty and adjudicating a penal measure, compensatory measure, or forfeiture according to the following principles: if the act constitutes a crime, the court imposes a term of imprisonment not less than one-third of the lower limit of the statutory penalty; if the act constitutes an offense, with the lower limit of the statutory penalty being imprisonment for not less than one year, the court imposes a fine, a penalty of restriction of liberty, or imprisonment; if the act constitutes an offense, with the lower limit of the statutory penalty being imprisonment for less than one year and the upper limit being imprisonment for not less than three years, the court imposes a fine or a penalty of restriction of liberty; if the act constitutes an offense, with the upper limit of the statutory penalty being imprisonment not exceeding 2 years, the court refrains from imposing a penalty and adjudicates a penal measure referred to in Article 39 Points 2-3, 7 or 8, compensatory measure, or forfeiture; the provisions of Article 61 Paragraph 2 do not apply.[84] If the act is punishable by both imprisonment and restriction of liberty or a fine, the provisions of Paragraph 6 shall apply accordingly.[85] If the act is not punishable by imprisonment, the provisions of Article 6, Point 5 shall apply accordingly.[86] The court may refrain from imposing a sentence in cases provided for by law and in cases specified in Article 60 Paragraph 3, especially when the role of the perpetrator in committing the crime was subordinate, and the information provided contributed to preventing the commission of another offense.[87] Departing from imposing a sentence, the court may also refrain from imposing a penal measure, a fine payable to the State Treasury, and forfeiture, even if their imposition was mandatory.[88] When imposing a custodial sentence, the court has the authority to specify the type of correctional facility in which the convicted person is to serve the sentence. The court can also determine the therapeutic system for its execution.[89] According to Article 63, Paragraph 1 of the KK, which outlines further rules related to the judicial imposition of a sentence, it should be noted that the period of actual deprivation of liberty in a case is counted towards the imposed sentence, rounding up to the nearest full day. One day of actual deprivation of liberty is considered equal to one day of imprisonment, two days of restricted

83 Art. 60(5) Ibid.
84 Art. 60(6) ibid.
85 Art. 60(7) Ibid.
86 Art. 60(7a) Ibid.
87 Art. 61(1) Ibid.
88 Art. 61(2) Ibid.
89 Art. 62 Ibid.

liberty, or two daily fines.[90] In this regard, when counting the period of actual deprivation of liberty towards the imposed fine specified in terms of amount, it is assumed that one day of deprivation of liberty corresponds to an amount equal to twice the daily rate established in accordance with Article 33, Paragraph 3. Additionally, towards the imposed penal measures mentioned in Article 39, Points 2-3, the period of actual application of the corresponding preventive measures of the same type is counted.[91] However, towards the imposed penal measures mentioned in Article 39, Points 2-3, the period of actual application of the corresponding preventive measures of the same type is counted.[92] The period of withholding a driving license or another relevant document is also counted towards the imposed penal measure referred to in Article 39, Point 3.[93] According to Article 63, Paragraph 5 of the KK, it should be assumed that for the purposes of Paragraphs 1 and 2, a day is considered a period of 24 hours counted from the moment of actual deprivation of liberty.[94] Mention should also be made of Article 90, which expresses the rule on the combination of penal and preventive measures. According to Paragraph 1, penal measures, forfeiture, compensatory measures, preventive measures and supervision shall be applied, even if they have been imposed on only one of the concurring offenses.[95] On the other hand, Paragraph 2 obliges the court to apply the provisions concerning a cumulative sentence in the case of sentencing for concurrent offenses involving the deprivation of public rights, prohibitions, or obligations of the same kind.[96]

6.
Statistics on Imposition of Imprisonment Sentences

Statistics regarding sentences of imprisonment in Poland are published on the Statistical Informant of the Ministry of Justice website, as well as on the website of the Prison Service. Information about the number of persons detained in prisons and remand centres, victims of rape and domestic violence, as well as crimes against life and health can also be found on the website of the Central Statistical Office in the thematic area concerning justice.[97]When it comes to data regarding the execution of judgments in Poland, it is essential to point out the statistical data provided by the

90 Art. 63(1) Ibid.
91 Art. 63(2) Ibid.
92 Art. 63(3) Ibid.
93 Art. 63(4) Ibid.
94 Art. 63(5) Ibid.
95 Art. 90(1) Ibid.
96 Art. 90(2) Ibid.
97 Statistics Poland 'Justice' [Online]. Available at: https://stat.gov.pl/en/topics/justice/ (Accessed: November 1, 2023).

Central Administration of the Prison Service, which also provides information on the average length of sentences and the median concerning currently executed judgments. As of 31 December 2022 it should be noted that the average length of a sentence of imprisonment (excluding life imprisonment) was 47.49 months in 2021 and 47.24 months in 2022. The median was the same in both years, at 24 months. Meanwhile, the average length of a sentence of imprisonment (excluding life imprisonment and a sentence of 25 years of imprisonment) was 39.16 months in 2021 and 39.03 months in 2022, with a median of 24 months in both years. Generally, based on the data from 2021 and 2022, it can be observed that they represent a minimal difference.[98] As of 31 December 2020, the average length of a sentence of imprisonment (excluding life imprisonment and a sentence of 25 years of imprisonment) was 50.13 months in 2020, compared to 47.62 months in 2019. The median in 2020 was 30 months, while in 2019 it was 28 months. Meanwhile, the average length of a sentence of imprisonment (excluding life imprisonment and a sentence of 25 years of imprisonment) was 41.31 months in 2020 and 39.56 months in 2019, with a median of 28 months in 2020 and 26 months in 2019.[99] Analysing the statistics regarding the length of sentences in the case of final judgments executed on 31 December 2022, for adults it should be noted that life imprisonment was imposed 502 times, including 487 times for men and 15 times for women. On the other hand, a sentence of 25 years of imprisonment was imposed in 1670 cases, with 1603 times for men and 67 times for women. A sentence between 15 and 20 years was imposed on 186 men and 1 woman. A sentence between 10 and 15 years was imposed 2531 times, with 2364 times for men and 167 times for women. A sentence between 3 and 5 years was imposed in 7969 cases, with 7708 times for men and 261 times for women. Imprisonment between 2 and 3 years was imposed 6944 times, with 6685 times for men and 259 times for women; between 1 year and 6 months and 2 years was imposed in 5125 cases, with 4904 times for men and 221 times for women; between 1 year and 1 year and 6 months was imposed in 5949 cases, with 5733 times for men and 216 times for women; between 3 and 6 months was imposed in 4804 cases, with 4584 times for men and 220 times for women; and up to 3 months in 717 cases, with 662 times for men and 55 times for women.[100]

Analysing the statistics prepared by the Department of Strategy and European Funds of the Ministry of Justice regarding the operation of life imprisonment and 25 years of imprisonment imposed in first-instance courts and finalised between

98 Ministry of Justice Central Administration of Prison Service (2022) 'Annual Statistical Report for the year 2022' [Online]. Available at: https://www.sw.gov.pl/strona/statystyka-roczna, p. 12.
99 Ministry of Justice Central Administration of Prison Service (2020) 'Annual Statistical Report for the year 2020' [Online]. Available at: https://www.sw.gov.pl/strona/statystyka-roczna, p. 12.
100 Ministry of Justice Central Administration of Prison Service (2022) 'Annual Statistical Report for the year 2022' [Online]. Available at: https://www.sw.gov.pl/strona/statystyka-roczna, p. 13.

1946 and 2021,[101] it should be noted that the highest number of cases of final life imprisonment sentences in the first instance occurred in the years 1946-1949. It is worth noting that from 1970 to 1995, life imprisonment was not imposed due to its absence in the catalogue of penalties at that time. During that time, the basis for legal responsibility was the so-called 'small penal code', namely, the decree of 13 June 1946, on particularly dangerous crimes during the reconstruction of the state,[102] which was in force from 12 July 1946 to 31 December 1969. This legal act was issued during the period of the Polish People's Republic, and during its validity, it suspended some provisions of the Makarewicz Code. On 1 January 1970, the Act of 19 April 1969 - the Penal Code,[103] also known as the Andrejew Code - came into force, repealing the previously applicable Makrewicz Code, the Military Penal Code of the Polish Army, and the small penal code. This code prescribed fines and penalties, ranging from 3 months to 2 years of restricted liberty, imprisonment from 3 months to 15 years, 25 years of imprisonment, life imprisonment (introduced from 20 November 1995), and the death penalty for the most serious crimes, executed against civilians by hanging and against soldiers by firing squad. The death penalty could be alternatively imposed by the court alongside a 25-year prison sentence or life imprisonment. Since 1996, life imprisonment has been reinstated in the catalogue of penalties. In 1996, it was pronounced finally in the first instance only once, but in 2000 it occurred 12 times, 20 times in 2001, and 34 times in 2005. In 2015 this penalty was imposed 6 times, and in 2016, 20 times. In 2019, it was 19 times. The penalty of 25 years of imprisonment was introduced into the Polish legal system by the Penal Code of 1969. In the first instance courts, it was pronounced finally in 30 cases in 1970, with a noticeable upward trend in the following years. The maximum number of times was pronounced in 1976, followed by a slight decrease in its imposition frequency until 1986 when this value reached 72 cases. There was a noticeable decline in the imposition of this penalty in the subsequent years until 2001 when it was imposed 113 times. Since 2013, there has been a slight decrease in the frequency of its imposition. In 2017 it was imposed 50 times, 41 times in 2018, and 74 times in 2019.

101 Department of Strategy and European Funds of the Ministry of Justice 'Life imprisonment and 25-year imprisonment sentences imposed in first-instance courts and finally in the years 1946–2022' [Online]. Available at: https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/download,2853,4.html.

102 Decree of 13 June 1946, on Particularly Dangerous Crimes during the Reconstruction Period of the State (Journal of Laws of 1946, No. 30, item 192).

103 Act of 19 April 1969 - Penal Code (Journal of Laws of 1969, No. 13, item 94, as amended).

7.
Summary

The analysis of sentencing policies in Poland highlights several key trends and impacts on the criminal justice system. The recent legal amendments, especially those introduced in 2022, have touched on the principles of punishment and sentencing guidelines. These changes, particularly the expansion of aggravating and mitigating circumstances and adjustments to the catalogue of penalties, reflect an effort to balance fairness with the need for more stringent punishment for severe offenses. The statistical data reviewed in this paper provides insight into the actual sentencing practices in Polish courts, emphasising trends in imprisonment lengths. For example, the average length of imprisonment (excluding life sentences) has remained relatively stable over the years, with minimal fluctuations between n 2021 and 2022. The average sentence length hovered around 47 months, while the median remained consistent at 24 months, indicating a preference for mid-range sentencing in many cases. Furthermore, the data also shows a continued reliance on isolation penalties such as imprisonment, especially in severe cases, with life imprisonment and 25-year sentences being applied predominantly to male offenders. The data suggests that while there is a structured system of fines and non-isolation penalties, imprisonment remains the primary tool for dealing with serious criminal offenses in Poland. In terms of future perspectives, the reforms in sentencing policies and penal measures aim to enhance both the fairness and effectiveness of the criminal justice system. However, challenges remain in ensuring that the system continues to evolve in line with social expectations and the demands of justice.

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Chen MENGXUAN*

The Right to Privacy of Workers under Workplace Surveillance in China

ABSTRACT: *Article 1032 of the Civil Code of the People's Republic of China, which came into force on 1 January 2021, establishes the right of personality as a separate chapter, and defines privacy for the first time: "Privacy is the undisturbed private life of a natural person and his private space, private activities, and private information that he/she does not want to be known to others."[1] The Personal Information Protection Law of the People's Republic of China (Hereinafter: PIPL), effective since 1 November 2021, requires personal information processors in China to take technical measures and necessary steps to secure personal information (Article 42), comply with laws/regulations and agreements (Article 43), and publish rules for personal information protection (Article 44). At present, China does not have any systematic law for the installation of regulatory surveillance systems. Article 26 of the PIPL only relates to the collection of personal information in public places, which mandates the installation of personal identification equipment in public places for public safety purposes, while requiring prominent logo reminders, and collected personal data may only be used for public security purposes, unless with individual consent.[2] The Chinese Labour Code and the Labour Contract Law only deal with the protection of the property of workers in China, and there are no clear provisions for the protection of workers' privacy. In labour law cases, the most common view of the courts is that the purpose of installing cameras in the workplace is to ensure the safety of a particular workplace, which is a normal exercise of the employer's right to supervise.*

1 PRC Civil Code, Order of the President of the People's Republic of China No. 45, National People's Congress, 28 May 2020, p. 186; available at: https://english.www.gov.cn/archive/lawsregulations/202012/31/content_WS5fedad98c6d0f72576943005.html (Accessed: 25 October 2023).

2 The Personal Information Protection Law of the People's Republic of China, 20 August 2021, Standing Committee of the National People's Congress; available at: http://www.npc.gov.cn/npc/c30834/202108/a8c4e3672c74491a80b53a172bb753fe.shtml (Accessed: 25 October 2023).

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Recently there have been no legal provisions defining workers' right to privacy in the workplace. This article aims 1. to analyse the views on privacy in China from the historical perspective, and 2. to analyse workers' right to privacy under workplace surveillance in China through the legislation and a case study on Chinese jurisprudence.
KEYWORDS: *Right to Privacy, Privacy of Workers, PIPL, Workplace Surveillance, Civil Code of the People's Republic of China.*

1.
Introduction

Since the implementation of the Personal Information Protection Law in China on 1 November 2021, the protection of personal information and the right to privacy have attracted growing attention, especially as China is a country with a large number of surveillance cameras, the impact of workplace surveillance systems on the workers' right to privacy has become increasingly important, and the lack of legislation on the surveillance of workplaces has made it even more important to protect the workers' right to privacy under the Personal Information Protection Law.

The aim of this article is 1. to analyse the views of privacy in China from the historical perspective, and 2. to analyse workers' right to privacy under workplace surveillance in China through the legislation and a case study on Chinese jurisprudence. Following the introduction, the article will elaborate on three aspects: the history of privacy in China, the protection of workers' right to privacy under workplace surveillance in China and a case study.

2.
The History of the Right to Privacy in China

Chinese notions of privacy have undoubtedly existed long before the modern era. At the very latest, during the late imperial era, a profound understanding of privacy had already emerged, accompanied by a recognition of its numerous advantages.[3] However, the concept of privacy at this time ('Yin Si') was very different from the

3 McDougall, Bonnie, Hansson, 2002.

modern concept of privacy. The interpretation of 'Yin Si'[4] in the 1983 edition of the Modern Chinese Dictionary was 'a shameful secret', This concept has been going on for over 2,000 years since ancient China.[5] For an extended period, there was a fusion of the terms 'Yin Si' and privacy, Until the People's Daily gradually stopped using the concept of 'Yin Si' from the late 1980s onwards.[6]

China's legislation on the right to privacy is relatively late: in 1986, the General Principles of Civil Law did not provide for the right to privacy; in 1988, the Supreme People's Court of the People's Republic of China ruled 'on the implementation of the application of the General Principles of Civil Law on a number of issues of the opinion', clear infringement of privacy in accordance with the infringement of the right to reputation, but with the definition of the current point of view, privacy and reputation are two completely different rights, the right to reputation of the core of the fabrication of false facts, defamation and an insult to reputation, while the right to privacy is the other party's breaking of true material and true information, which does not constitute defamation and is an infringement of privacy.[7]

Since 2013, the Chinese Government has focused on personal information protection. On 28 December 2012, the Standing Committee of the National People's Congress passed the 'Decision on Strengthening the Protection of Internet Information'.[8] The 'Decision' consists of four parts and a total of twelve Articles. Article 1 emphasises the protection of electronic information, while Article 2 stipulates the principles of lawful, proper, and necessary collection and use of information. Article 3 specifies the principle that collected personal information must not be disclosed, tampered with, damaged, or sold, while Article 4 outlines the principle of security protection for personal information. Article 11 outlines the responsibilities for violations of the 'Decision'. The revised 'Consumer Rights Protection Law' of 2014 and the

4 The term 'privacy' used here does not signify the modern understanding, but rather 'Yin Si' (阴私) [yīnsī], which shares a similar pronunciation in Chinese but is represented by different characters. For an extended period, there was a fusion of the terms Yin Si and privacy. However, it was not until 1999 that Chinese scholars discerned between the concepts of privacy and Yin Si. Privacy was defined as 'matters that one does not wish to be known,' while Yin Si was understood as 'matters that should not be known,' the former denoting the private aspects of individuals' lives neutrally and the latter carrying certain pejorative connotations.

5 周汉华:个人信息保护观念演变的四个阶段_权利 (zhōuhànhuá: gèrénxìnxī bǎohù guānniàn yǎnbiàn de sìgè jiēduàn_quánlì) [Zhou Hanhua: Four Stages of the Evolution of the Concept of Personal Information Protection Rights], no date; available at: https://www.sohu.com/a/281451267_455313 (Accessed: 25 October 2023).

6 Zhenhao, 2022.

7 Sourced from Sanlian Life Week's interview with Prof. Shi Jiayou from Renmin University of China Law School.

8 全国人大常委会关于加强网络信息保护的决定 (quánguó réndàchángwěihuì guānyú jiāqiáng wǎngluò xìnxī bǎohù dejuédìng) [Decision of the Standing Committee of the National People's Congress on Strengthening the Protection of Network Information], no date; available at: https://www.gov.cn/jrzg/2012-12/28/content_2301231.htm (Accessed: 25 October 2023].

'Cybersecurity Law' of 2017 established comprehensive measures for safeguarding consumer information, stressing the principles of lawful collection and user consent. These were followed by amendments to the Criminal Code (from the seventh to the ninth amendments), which introduced penalties for crimes related to the illegal acquisition and provision of personal information. Additionally, the 'Information Security Technology-Personal Information Security Specification' of 2017 provided detailed guidelines for safeguarding personal data, while the 'E-Commerce Law' of 2019 reinforced users' rights to access, correct, and delete their information, positioning them as proactive participants in data protection.[9]

The Civil Code of the People's Republic of China defined the right to privacy for the first time on 1 January 2021, with Article 1032 stating "*Privacy is the undisturbed private life of a natural person and his private space, private activities, and private information that he/she does not want to be known to others.*"[10] Meanwhile, the PIPL, effective from 1 November 2021, mandates personal information processors in China to secure data (Article 42) and follow laws and agreements (Article 43). They must also publish protection rules (Article 44). While there is no comprehensive surveillance law, Article 26 regulates data collection in public areas, requiring personal identification systems with clear notices. Collected data may only be used for public security unless consent is given.[11] China does not have a tradition of case law and therefore relies heavily on statutory law, and the meaning of the right to privacy will need to be continually researched and interpreted in the future.

3.
Workers' Right to Privacy under Workplace Surveillance

For employees, the protection of personal information is primarily enshrined in Article 8 of the Labour Contract Law (2007)[12] and in Articles 20 and 36 of the Law on

9 袁泉, 大数据背景下的个人信息分类保护制度研究[D] ,北京:对外经济贸易大学 (yuánquán , dàshùjù bèijǐng xiàde gèrénxìnxī fēnlèi bǎohù zhìdù yánjiū [D],běijīng: duìwàijīngjìmàoyìdàxué) [Yuan Quan, Research on Personal Information Classification and Protection System under the Background of Big Data [D], Beijing, University of International Business and Economics], 2019.

10 PRC Civil Code, Order of the President of the People's Republic of China No. 45, National People's Congress, 2020; p. 186.

11 The Personal Information Protection Law of the People's Republic of China, Standing Committee of the National People's Congress, 2021.

12 中华人民共和国劳动合同法(主席令第六十五号) (zhōnghuárénmíngònghéguó láodòng hétongfǎ (zhǔxílìng dì liùshí wǔhào)) [PRC Labour Contract Law (Presidential Decree No. 65)], no date; available at: https://www.gov.cn/flfg/2007-06/29/content_669394.htm (Accessed: 25 October 2023).

the Prevention and Control of Occupational Diseases (2001).[13] Article 8 of the Labour Contract Law states that:

> "*When an employer recruits a worker, it shall truthfully inform the worker of the content of the work, the working conditions, the place of work, the occupational hazards, the safety conditions of production, the remuneration for labour, and any other information that the worker may request; the employer shall have the right to learn about the worker's basic information that is directly related to the labour contract, and the worker shall truthfully explain it.*"

This provision emphasises the power of employers to obtain work-related information about workers. In an ancillary manner, it prohibits employers from soliciting irrelevant personal information and lays down the foundation for protecting workers' privacy.

Article 20 of the Law on the Prevention and Control of Occupational Diseases states that: "*Employers must use effective occupational disease protection facilities and provide workers with occupational disease protection equipment for personal use.*" and Article 36 states that:

> "*Workers have the following rights to occupational health protection: a) To have access to occupational health education and training; b) To obtain occupational health examinations, diagnosis and treatment of occupational diseases, rehabilitation and other services for the prevention and control of occupational diseases; c) To be informed of the hazards of occupational diseases arising or likely to arise in the workplace, the consequences of such hazards, and the measures that should be taken to protect against occupational diseases; d) To require employers to provide occupational disease protection facilities that meet the requirements for the prevention and treatment of occupational diseases and occupational disease protection articles for personal use, and to improve working conditions; e) To make criticisms, denunciations and complaints about violations of laws and regulations on the prevention and control of occupational diseases and acts that endanger life and health; f) To reject unauthorised direction and forcing to carry out operations without occupational disease protection measures; g) To participate in the democratic management of*

13 中华人民共和国职业病防治法 (zhōnghuárénmíngònghéguó zhíyèbìng fángzhìfǎ) [PRC Law on Prevention and Control of Occupational Diseases], no date; available at: https://www.gov.cn/banshi/2005-08/01/content_19003.htm (Accessed: 25 October 2023).

> *the occupational health work of the employer, and putting forward opinions and suggestions on the prevention and treatment of occupational diseases. The employer shall guarantee that workers exercise the rights listed in the preceding paragraph. Any act that reduces the wages, benefits or other entitlements of a worker, or terminates or suspends an employment contract with a worker, as a result of the worker exercising his or her legitimate rights in accordance with the law, shall be null and void.*"

It is obvious that these two Articles concentrate on safeguarding the health data of employees, mandating employers to establish and maintain comprehensive occupational health records. Nonetheless, there is a legal vacuum specifically concerning the protection of sensitive personal information for skilled workers.

Regarding the issue of surveillance systems, at the legal level, there are currently no detailed regulations in China that specifically address the installation and use of surveillance facilities and equipment. In other words, the employer's installation and use of surveillance cameras and microphones in office spaces does not violate any legal provisions, and thus the employer's behaviour in itself is not illegal.[14]

When it comes to the protection of workers' right to privacy under surveillance, the Labour Contract Law on privacy and personal information only deals with the workers' right to know the content and intensity of their work, and the employers' right to know specific information about workers. Although the workers' privacy can be protected on the basis of 'information not related to the work', the Labour Contract Law has considerable limitations due to the complexity of the working environment and the collection of information, and therefore we mainly rely on the Civil Code and the PIPL for the protection of workers' privacy under workplace surveillance.

3.1. Protection of Privacy in Civil Code

Article 1032 of the Civil Code states "*Privacy is the undisturbed private life of a natural person and his private space, private activities, and private information that he/she does not want to be known to others.*"[15] Even though the Civil Code provided a definition for Privacy, it is not as clear that "*That he/she does not want to be known to others*" which shows that definitions are highly subjective.

Article 1034 of the Civil Code stipulates that "*The personal information of natural persons is protected by law.*" The subjects of this protection are natural persons, and

14 Wang, 2022.

15 PRC Civil Code, Order of the President of the People's Republic of China No. 45, National People's Congress, 2020.

the objects of protection are personal information. This provision applies to the definition and regulations concerning personal information as mentioned above in the PIPL. According to Article 1035 of the Civil Code:

> "*Those handling personal information shall follow the principles of legality, legitimacy, and necessity, avoid excessive processing, and meet the following conditions: (1) Obtain the consent of the natural person or their guardian, except as otherwise provided by laws and administrative regulations; (2) Abide by the rules for the public processing of information; (3) Clearly indicate the purpose, method, and scope of processing information; (4) Not violate the provisions of laws, administrative regulations, or the agreement of both parties.*"[16]

The principle of legality serves as a prerequisite, the principle of legitimacy as the foundation, and the principle of necessity as the standard, with the fundamental objective being to avoid excessive use. The four conditions listed in the provision are the overarching prerequisites: it is only legal if the natural person or guardian agrees; it is legitimate to process information according to the rules; it is necessary to clearly indicate the purpose, method and scope of processing information; and it is only not excessive processing if it does not violate the provisions of laws, administrative regulations, or the agreement of both parties. The provision also explicitly outlines the methods of handling personal information, including collection, storage, use, processing, transmission, provision and public disclosure.[17]

3.2. The Concept of the 'Personal Information' in the PIPL

'Personal information' is defined by the PIPL in Article 4 as "*all kinds of information related to identified or identifiable natural persons that are electronically or otherwise recorded, excluding information that has been anonymised.*"[18] There are two important parts of this definition that are key to identifying personal information: 'related to' and 'identified or identifiable natural person'. Since this Article is focused on the right to privacy, employees are clearly identifiable by their employers in the workplace, the term 'related to' is very important in defining personal information. However, there is no further description of 'related to' in the PIPL.

16 PRC Civil Code, Order of the President of the People's Republic of China No. 45, National People's Congress, 2020; p.186.
17 Kai, 2022.
18 The Personal Information Protection Law of the People's Republic of China, Standing Committee of the National People's Congress, 2021.

The relationship between information and data is viewed as the interplay between content and form. Personal data is seen as a specialised manifestation of personal information, and once the informational essence is lost, the legal relevance and discourse surrounding data become unnecessary. Consequently, the legal discussion of personal data in the era of big data is considered tantamount to the discussion of personal information, emphasising their conceptual equivalence and treating them as different expressions of consent.[19,20] Therefore, Chinese scholars accordingly compare and analyse China's personal information protection (mainly in PIPL) with the EU's personal data protection (mainly in the GDPR).[21]

The General Data Protection Regulation (GDPR) defines 'personal data' in Article 4 as:

> "*any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person*".[22]

In addition, Recital 26 specifies that the GDPR does not apply to anonymised information.[23] Like the definition of personal information in PIPL "*excluding information that has been anonymised*" This Article concurs with prior examinations concerning the legal convergence between personal information and personal data, and takes the GDPR's definition of personal data only in terms of defining personal information as a reference.

In the GDPR, the term 'related to' within the definition signifies the direct connection between information and individuals. This link may be clear in various scenarios, such as personnel files in a human resources office or medical records of a patient. However, establishing this connection is not always straightforward, particularly when data concerns objects or involves indirect relationships. To ascertain the relevance of specific data to an individual, the presence of a 'content', 'purpose', or 'result' element is crucial. The 'content' element refers to specific information about an individual, while the 'purpose' element involves using data to influence an individual. The

19 Xiao, 2018.
20 Xiaying, 2019.
21 Xiaoping, Junjie, 2022.
22 Personal Data - General Data Protection Regulation (GDPR), 2021; available at: https://gdpr-info.eu/issues/personal-data/ (Accessed: 25 October 2023).
23 Recital 26 - Not applicable to anonymous data - General Data Protection Regulation (GDPR); available at: https://gdpr-info.eu/recitals/no-26/ (Accessed: 25 October 2023).

'result' element comes into play when data usage affects an individual's rights, even if not explicitly related. This understanding is vital in applying provisions such as the right of access to data. For instance, data collected during workplace monitoring is generally considered personal information under the GDPR due to its direct impact on employees, encompassing both the 'purpose' and 'result' elements.[24]

Article 28 of the PIPL specifies certain categories of personal information that require additional safeguards, classified as 'sensitive personal information'. According to the law, sensitive personal information refers to personal data that is likely to cause harm to an individual's personal dignity, physical well-being or property. This category encompasses various data types, including but not limited to biometric identification, religious beliefs, special identities, medical health information, financial accounts, tracking of physical locations, whereabouts, and personal details of individuals below the age of 14.[25] Therefore, the facial recognition or biometric information of the employees is considered sensitive information in personal information.

3.3. Protection of Personal Information in the PIPL

Article 2 of the PIPL states that "*The personal information of natural persons shall be protected by law. No organisation or individual may infringe upon natural person' rights and interests relating to personal information*." Article 13 states that "*A personal information processor may not process personal information unless the individual's consent has been obtained"* but there are some situations involving the processing of personal information without an individual's consent:

1. the processing is necessary for the conclusion or performance of a contract to which the individual is a contracting party or for conducting human resources management under the labour rules and regulations developed in accordance with the law and a collective contract signed in accordance with the law;
2. the processing is necessary to fulfil statutory functions or statutory obligations;
3. the processing is necessary to respond to public health emergencies or to protect the life, health or property safety of natural persons under emergency circumstances;
4. personal information is processed within a reasonable scope to conduct news reporting, public opinion-based supervision, or other activities in the public interest;

24 Article 29 Working Party: Opinion 4/2007 on the concept of personal data, no date; available at: https://uk.practicallaw.thomsonreuters.com/w-034-6988?transitionType=Default&contextData=(sc.Default)&firstPage=true (Accessed: 25 October 2023).

25 Crowell & Moring LLP, no date.

5. the personal information that has been disclosed by the individuals themselves or other personal information that has been legally disclosed is processed within a reasonable scope in accordance with this Law; or
6. under any other circumstance as provided by any law or administrative regulation.[26]

For workers, the first of the situations listed above is particularly important. Necessary information processed for the purposes of human resources management is not subject to the consent of the individual. This can lead to employers relying too heavily on 'human resources management', but not all workplace surveillance is done for human resources management purposes, for example, if an employer installs surveillance cameras to ensure safety in the workplace, or monitors employees' use of the Internet and documents to maintain network security or protect trade secrets, these situations are hard to be recognised as a necessary measure for human resources management.[27]

As regards the working environment, when it refers to the consent problem, according to Article 14, valid consent must incorporate the following essential components: employees must be comprehensively informed about the intricacies of data processing; consent must be given without any form of coercion or influence; and the consent granted must be clear and unmistakable.[28]

Moreover, in specific scenarios, what is referred to as 'separate consent' must be obtained, including but not limited to the following cases:

1. Transferring Personal Information (PI) to a third party (Article 23 of the PIPL[29]), for instance, providing an employee's ID number to an insurance company to facilitate the purchase of commercial insurance.
2. Public disclosure of PI (Article 25 of the PIPL[30]), such as displaying an employee's PI on the company's website.

26 The Personal Information Protection Law of the People's Republic of China, Standing Committee of the National People's Congress, 2021.

27 Sun, 2022.

28 The Personal Information Protection Law of the People's Republic of China, Standing Committee of the National People's Congress, 2021.

29 A personal information processor that provides any other personal information processor with the personal information it or he processes shall notify individuals of the recipient's name, contact information, purposes and methods of processing, and categories of personal information, and obtain the individuals' separate consent. The recipient shall process personal information within the scope of the aforementioned purposes and methods of processing, and categories of personal information, among others. Where the recipient changes the original purposes or methods of processing, it or he shall obtain individuals' consent anew in accordance with this Law.

30 Personal information processors shall not disclose the personal information processed, except with the separate consent of the individuals.

3. Collection of images or personal identity through devices installed in public places for uses other than public security (Article 26 of the PIPL), for example, the employer using facial recognition for attendance management at the building's reception area.
4. Processing of Sensitive PI (Article 29 of the PIPL), including the collection of an employee's prescriptions, lab reports and other detailed medical information.
5. Transferring an individual's PI to a party located outside the territory of China (Article 39 of the PIPL), for instance, the employer sharing employees' contact information with other offices situated outside mainland China.

As the term 'separate consent' lacks a specific definition within the PIPL, the precise manner of its implementation by organisations remains to be determined. However, as a fundamental guideline, (I) 'separate consent' should correspond to the crucial elements of valid consent as outlined in Article 14, and (II) it is probable that the requirement for 'separate consent' cannot be fulfilled through a method of 'bundled consent' (wherein an employer acquires a single consent for the processing of personal information for multiple purposes).[31]

However, in real court practice, inherent modes of adjudication and lack of clarity in legal definitions also result in workers' right to privacy often being ignored.

3.4. Workers' Information Collected through Workplace Surveillance

Both the PIPL and the Civil Code are focused on personal information protection in order to determine if information collected during workplace surveillance qualifies as personal information, it is crucial to initially comprehend the types of data that employers usually collect and handle through workplace surveillance. In general, worker information captured through workplace surveillance includes the following.

1. Biometric Data: Initially, there is biological data, with workplace cameras and equipment directly accessing workers' facial information and movements. Additionally, certain companies have adopted fingerprint or facial recognition clock-in and clock-out systems, capturing both fingerprint data and specific facial details.[32]
2. Communication Data: In the workplace, employer monitoring extends to email and internet usage, serving the purpose of ensuring legal compliance and reinforcing security measures. Company-owned emails and phone

31 Gong, 2021.
32 Sun, 2022.

numbers are subject to monitoring, with the aid of specialised software for content filtering and computer activity tracking.[33] The data collected through communication monitoring is typically categorised into two segments: 'traffic information', which includes specifics such as session duration, dial-in/out numbers, visited websites, IP addresses and data volume, and 'content information', encompassing the actual message or information conveyed during these communications.[34]

3. Other Data: At certain workplaces, employee health information is collected to verify the physical and mental fitness of employees for job-related duties. Moreover, real-time location data may be collected to monitor regular attendance and ensure adherence to work schedules.

Based on the definition of 'personal information' explained above, according to the three elements of 'related to', it is clear that the information of workers collected through surveillance in the workplace belongs to personal information, and the PIPL and the Civil Code can serve as a legal framework for workers' right to privacy under workplace surveillance.

4. Introduction to Chinese Jurisprudence on Workers' Right to Privacy under Workplace Surveillance

The author searched the 'China Judgments Online' website with the keywords 'workers, surveillance, privacy, and the search result was 189 judgments; excluding the unrelated judgments on workplace video surveillance, and combining the judgments of the first trial, second trial and re-trial, obtained 28 valid judgments and 7 valid judgments after the enactment of the PIPL.

None of the workers' claims that workplace video surveillance infringed on their right to privacy were upheld by the courts. Since in some of the judgements the right to privacy was not the plaintiff's main claim, some courts did not mention this aspect in their decisions,[35] while others pointed out that workers, as employees of their organisations, need to be supervised and managed by their organisations. In one case, a worker made a recording of another worker in the workplace, but the court's judgement still rejected the claim of invasion of privacy, the court held that carrying out the recording acts involved in the case belonged to the worker's lawful

33 Abdurrahimli, 2020.
34 Sun, 2022
35 10 out of 28 judgements did not mention the right to privacy in their judgements.

safeguards and own rights and interests, and it was confirmed that no rules and regulations existed to prohibit the recording behaviour, therefore, the court firmly believed that the company claimed with the plaintiff secretly recorded private conversations with other people and serious violation of other people's privacy cannot be sustained.[36] In another case,[37] the company's shareholder sued the employee for violating his portrait rights was also not supported by the court which held that the case was a dispute over portrait rights. Portrait right refers to a natural person's enjoyment of his or her own portrait embodied in the interests of personality as the content of a personality right. Portrait right is a fundamental right of citizens, which means that without their consent, no one shall use or insult their portraits. In this case, the defendant acknowledges the authenticity of the evidence provided by the plaintiff but explains that the video was recorded solely for evidence collection and used for labour arbitration. During the hearing, the plaintiff did not provide proof that the defendant had unlawfully shared the video on public platforms to defame, damage, or use it for profit, resulting in a violation of the plaintiff's right to their likeness, the court determined the defendant's actions did not violate the plaintiff's right to likeness and dismissed all of the plaintiff's claims for lack of legal basis.

The prevailing stance of the courts favouring employer surveillance practices, primarily for safeguarding property and upholding management order, has created a disparity in the consideration of the competing interests of employers and employees. This imbalance stems from the courts' failure to adequately assess the extent of both the employer's surveillance needs and the workers' right to privacy. Notably, judicial practice often downplays the significance of protecting employees' privacy under surveillance, rendering it a minor or overlooked aspect in many litigation cases. Consequently, court judgments frequently fail to acknowledge this crucial aspect, indicating a systemic disregard for workers' privacy rights.

36 Case Number: Yue 0104 Min Chu No.7358.The plaintiff submitted a CD of recorded conversations with the defendant's personnel specialist and legal representative and transcription of some of the recordings, proving that on August 18, 2020, the plaintiff and these two people were negotiating and bargaining over the defendant's unilateral dismissal as proof that the defendant's dismissal was a violation of the law.

37 Case Number: Yue 2071 Min Chu No. 3029: The plaintiff (a shareholder of the company) claimed to have come to the office of the defendant (an employee) and quarrelled with the defendant over a labour dispute. During the altercation, the defendant recorded the plaintiff's portrait on his mobile phone without the plaintiff's consent. The plaintiff repeatedly asked the defendant to delete the video, but the defendant refused to do so. The plaintiff claimed that the defendant's behaviour had seriously violated the plaintiff's right to privacy. The defendant claimed that the dispute with the plaintiff's portrait right is based on the company and the defendant is still in the period of labour relations, the company does not provide the defendant with labour conditions of labour contract dispute, and the plaintiff is the company's shareholder, the defendant is the company's worker, the plaintiff is not in a disadvantageous position of the individual, the defendant's recording video is not a stealing secretly recorded.

Compounding this issue is the apparent indifference of workers themselves towards safeguarding their privacy in the context of workplace surveillance. Of the 28 judgments, only two addressed the right to privacy. This lack of concern further contributes to the marginalisation of privacy protection in legal deliberations.

Moreover, the absence of comprehensive laws and regulations concerning workplace surveillance in China exacerbates the problem, leaving ample room for ambiguity and inconsistent legal treatment in similar cases. Although China lacks specific case law on this matter, the recurrent pattern of judgments in workers' privacy cases suggests a significant reliance on past precedents, leading to uniform rulings that may not adequately address the nuanced privacy concerns in contemporary workplace surveillance.

5. Conclusion

In conclusion, the evolution of privacy rights in China has been a gradual process, with the concept of privacy itself transforming over time. Despite the relatively recent formal recognition of the right to privacy in the country's legal framework, the comprehensive integration of privacy protection has lagged behind its international counterparts. The enactment of the Civil Code in 2021 and the subsequent implementation of the Personal Information Protection Law (PIPL) in 2021 marked significant steps towards the establishment of robust privacy regulations, particularly concerning the protection of workers' privacy in the context of workplace surveillance.

However, gaps and ambiguities in the current legal framework persist, particularly in instances where employers may exploit the ambiguity in defining 'human resource management' to circumvent the necessity of individual consent. Additionally, the issue of 'separate consent' in specific scenarios demands further clarification to ensure more stringent safeguarding of workers' privacy rights. It is imperative for future legal developments to address these loopholes comprehensively to establish a more equitable balance between the legitimate interests of employers and the fundamental right to privacy of workers.

The PIPL may not offer holistic safeguarding for employees' personal data due to its oversight of the unique requirements for preserving such information. This gap arises from the subordinate position of employees in relation to the authority of employers and the growing disparity in labour dynamics, rendering employees' personal information more susceptible to misuse by employers.[38] At the same time, Courts consistently prioritise employer surveillance needs over workers' privacy

38 Wang, 2022.

rights, neglecting the significance of safeguarding personal information. Workers' indifference and the absence of comprehensive legal frameworks exacerbate this issue, resulting in inconsistent and inadequate protection for employee privacy in the workplace.

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