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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

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Declaration of 1924¹ 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

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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.

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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.

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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).

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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

The Best Interests of the Child Principle

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.

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- 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.

23 Eekelaar, J. (1992). The importance of thinking that children have rights. *International Journal of Law and the Family*, 6(2), 230-231.

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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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KEYWORDS: *empirical legal studies, systematic literature review, labour law, European labour law, temporary labour migration, au pairs.*

1. Introduction

The debate concerning the ways in which legal research can investigate its relationship with ‘society’ is not a new one¹. 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 approach², intended as a hermeneutic discipline based on the interpretation of specific documents³. 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 Martin⁴ 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 Kritzer⁶ 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 criteria⁸. ELS pursues the general goals of collecting and summarising data, to make descriptive or causal inferences⁹. 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 King¹¹ 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-reproducible 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 hypothesis¹⁴. 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. Chapman¹⁶ 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 pairs¹⁷. 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 retribution¹⁸. 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 *European 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 regimes²⁰.

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 Lecturinal 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 questions²¹. 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 state²². 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.

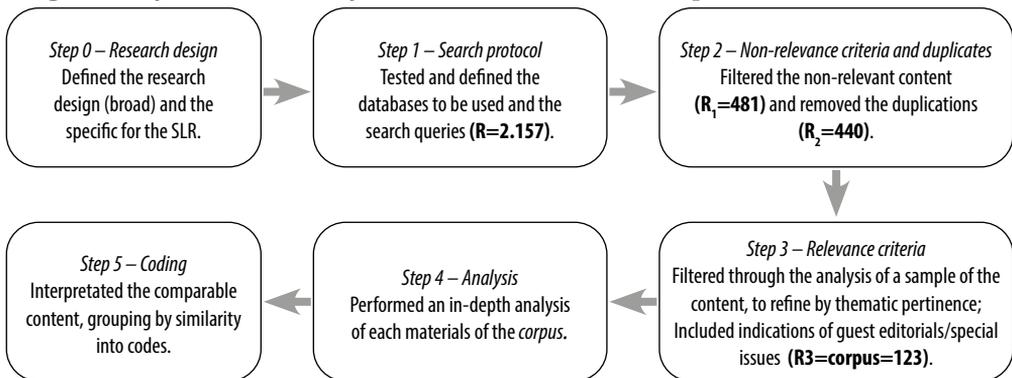
22 Zwysen and Akgüç, 2023, p. 9.

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, McDowell²³ 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.

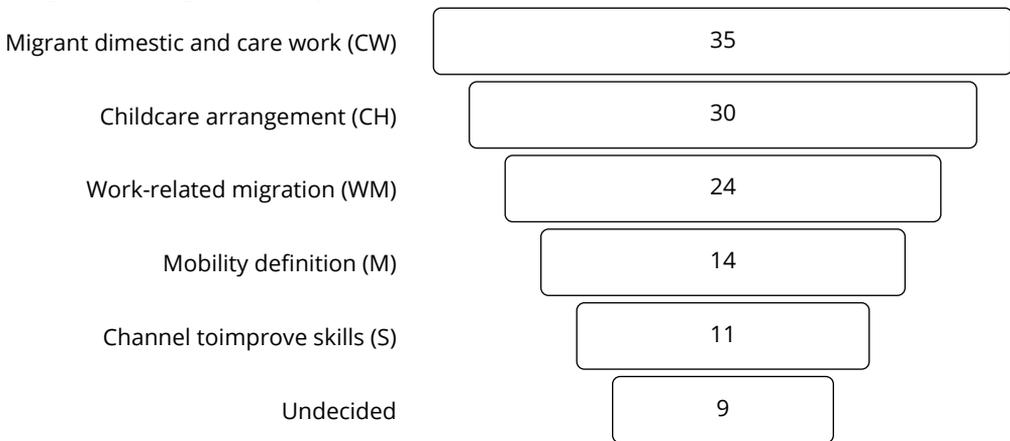
23 McDowell, 2003.

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 techniques²⁵, 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/international 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 regimes³³.

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, Cox³⁷ 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 migration⁴¹. As an illustration, Vosko⁴² 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 phenomenon⁴³.

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 evidence⁴⁴. 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 research⁴⁵. 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 it⁴⁶ 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 inter-disciplinary 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 service¹ 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 Constitution²) – 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 Women¹¹ 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 (UDHR¹⁴) – 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 (ICCPR¹⁶) and the International Covenant on Economic, Social and Cultural Rights (ICESCR¹⁷), 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 (ECHR²¹), 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 (ESC²³) 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 Rights²⁶ 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 2000, 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 1991 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/EU³⁶), 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 Uruguay.

41 Art. 27 of the Constitution of the South Africa Republic.

42 Thielbürger, 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 EPA⁶⁷) 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 provide 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 waste⁶⁹ – 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 Protection⁷¹ 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 WA⁷⁶). The act distinguishes between natural⁷⁷ and built⁷⁸ 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 permit⁸² 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 concession⁸³ 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 SGEIA⁸⁶). 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 Act⁹¹, 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 – problems 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 Child¹ (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 Freedoms⁹ 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 Koshier, 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 2013²⁸ (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.

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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 determination³⁴, 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 Adoption⁴⁹ (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 ECPD 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.

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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; Kilkely, 2016b, p. 195; Kilkely, 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 Vandenhoe 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.

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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 inter-related 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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Anita Marta KLIMAS*

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 Española de Protección de Datos (AEPD) and Mario Costeja González [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).

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- 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 Act²⁵ 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).

The 'right to be forgotten' and the right to freedom of expression

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 automation 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 Żączkiewicz-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](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-ka-sowanie-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 Białycki, 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 Jaszczuński, 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 phase¹ 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 group⁵ 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 Constitution⁷ 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 problem⁸ with unpopular amendments⁹, 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 EU¹¹, that is not the case for the parliaments of EU candidate countries. Research on this issue has been done concerning Montenegro¹², Kosovo¹³ and Serbia¹⁴ 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: Hefftlar et al., 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 representatives²², 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 Constitution²³ and by the Assembly's Rules of Procedure²⁴. Similarly to other national parliaments in Europe²⁵, 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 Republic²⁶ 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 laws³¹ 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 met 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: Hefftlar et al., 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 officials³². 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
Ratifications 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 Commission³⁴ 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.

"Accession Negotiations of North Macedonia"

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

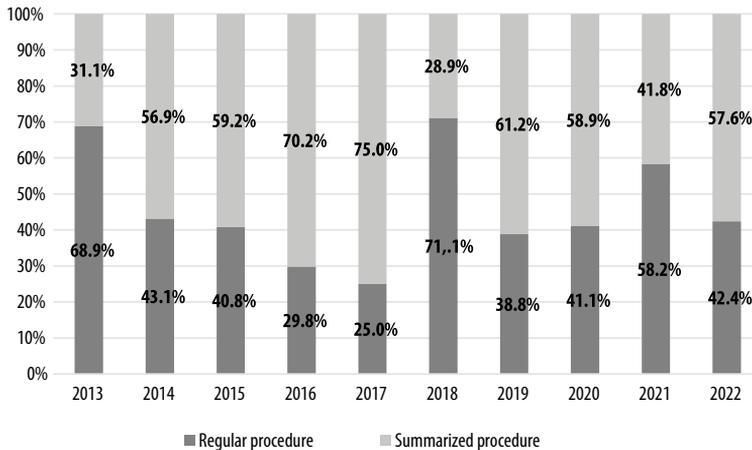
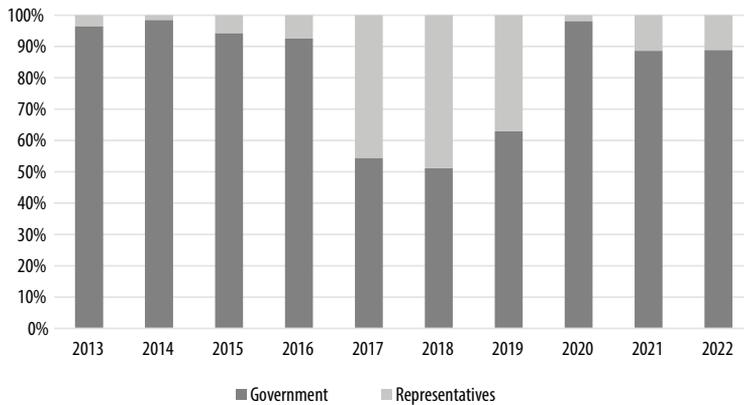


Figure 2 shows another specificity of the national parliamentary system. In an overwhelming number of cases, the bills were introduced by the Government, while the MPs are proposing laws more rarely.³⁶ However, a significant outlier is the period between 2017 and 2019 when over 1/3 of all laws adopted 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 1995⁴² 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 1998⁴⁶ 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 EU⁴⁹, 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 process⁵⁰ 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 countries⁶², 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 Hefftlar 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 2013⁶⁸ 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 specificities⁷⁰ 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

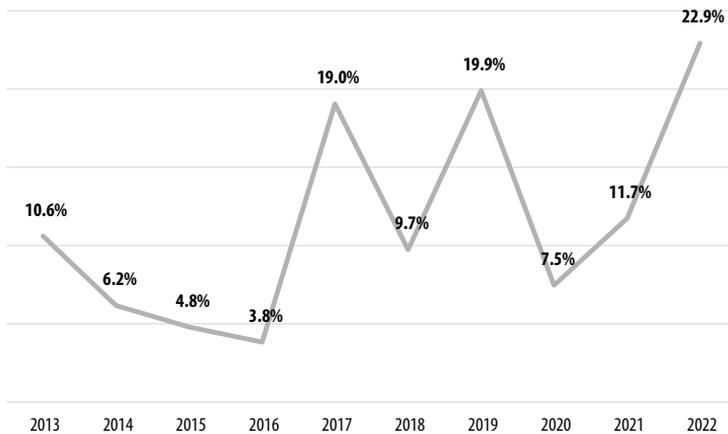
According to the data shown in Table 2, the overall number of laws adopted in the specialised 'EU flag' procedure is low compared with the total number of adopted laws as shown in Table 1.

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 2022⁷⁴ 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 bills⁷⁵ 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 Code⁴ (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 years¹⁰. 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 psycho-education), 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 KK²⁵ 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/Oleżalek 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 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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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 (zhōuhàn huá: gèrén xīn xī 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決定 (quánguó réndàchángwěihùi 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/jrzq/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 bèijīng xiàde gèrénxìnxī fēnlèi bǎohù zhìdù yánjiū [D], běijīng: duìwàijīngjìmàoyìdàxué) [Yuan Qian, 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 (zhǔxíling 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's 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&context-Data=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-034-6988?transitionType=Default&context-Data=(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 PIPL²⁹), 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 PIPL³⁰), 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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Between Casuistry and Vagueness – A Comparative Legal Analysis of Employer Surveillance of Employee Tasks under Polish and Czech Legislation

ABSTRACT: *The new phase of economic development has brought many benefits to the countries of Central and Eastern Europe, yet rapid technological advancements also present inherent risks. While modern technologies have made it significantly easier for employers to fulfil their control entitlements and more efficiently protect their property, they concurrently pose threats towards employee privacy and dignity. The employee cannot be objectified and treated as a tool of the employer, and nor can his or her work be treated as a mere market commodity. The employer must respect the employee's dignity and right to privacy, and should not infringe it by excessive surveillance. The relationship – which can also be classified as a conflict between the interests of the employer and the privacy of the employee – underscores the necessity of striking a certain balance between the two. Legal measures regulating workplace surveillance serve this purpose, albeit with variations across different countries. This article aims to analyse models of employee tasks surveillance in two countries in the Central and Eastern European region: the Czech Republic and Poland. Despite the similar paths followed by the labour law systems of both countries, the regulations concerning employee tasks surveillance exhibit significant divergence. The Polish model of workplace surveillance can be described as detailed yet narrow, while the Czech one can be referred to as open guidance, and sometimes even as a puzzle. Therefore, the focal point of the research is to compare the differences between these models. To achieve this, an exhaustive analysis was conducted of the doctrine, jurisprudence and provisions of legal acts regulating the issue of employee surveillance in both countries.*

KEYWORDS: *privacy in the workplace, surveillance of employee tasks, monitoring of employees, labour law, GDPR, right to privacy*

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1.

Introduction

Recent years have brought increased economic development to the countries of Central and Eastern Europe. Convergence between CEE and Western European countries has improved, and their national labour markets have strengthened¹

This new phase of economic development is associated with rapid technological progress,² driven in part by foreign investment. Multinational companies, while investing in the CEE region, are also introducing new technological solutions, most often affecting the areas of management and employee surveillance.³ These activities also provide inspiration for domestic employers, thus creating new trends in the terms and conditions of employment.

New technologies and their widespread availability enable employers to supervise employees with much greater ease than before. Such forms of employee surveillance as visual monitoring, covert monitoring, monitoring of employees' business email, checking of the visited websites and computer activity during working hours, GPS monitoring, interception of employees' telephone calls and recording of keystrokes allow the employer at relatively low cost to assert its interests. These interests include protecting the employer's property from personal use (or misuse); controlling the correct performance of the tasks entrusted to the employee; preventing crime; ensuring good quality of services and products; preventing the disclosure of company secrets; and securing the employer's reputation.⁴ To a certain extent, these motives for employee surveillance are understandable and justified. However, as a result of the pursuit of profit, among many employers there is a visible tendency to objectify employees by exposing them to excessive surveillance measures.⁵ This, in turn, may cause the infringement of employees' privacy and can lead to increased stress and distrust towards the employer, the consequence of which can be a reluctance to cooperate⁶ and an increased desire to resist.⁷ On the other hand, more detailed surveillance of employees is happening not without reason. The increasing digitalisation

1 Polster, 2021, pp. 74-79.

2 Instytut Analiz Rynku Pracy (Institute for Labour Market Analysis), 2020, p. 3.

3 An example of such an action can be the automated system of worker performance reviews introduced in Amazon's distribution centre in Poznań (POZ1). The system combines the elements of employee evaluation and surveillance, collects vast amounts of personal data throughout the working day and uses algorithms to measure two indicators during process of work: productivity and quality of work. – See more in: Rozmysłowicz and Krzyżaniak, 2023.

4 Dąbrowska, 2019, p. 12.

5 Góral, 2016, p. 56.

6 Chang, Liu, Lin, 2015, p. 96.

7 Ball, 2021, p. 37.

of workplaces has resulted in the fact that the fulfilment of employees' tasks often demands access to computers and the internet. This, in turn, carries the risk that employees will use these technologies in ways that are not work-related, e.g. for online shopping, entertainment, social networking, etc. This phenomenon is known as 'cyberloafing',⁸ and is becoming more prevalent in Central and Eastern Europe, as can be seen in the example of a group of employees described by Štefko as the 'Facebook fired'.^{9 10}

In light of the above, there are increasing calls for the need to establish a balance between the interests of the employer and the rights of the employee in the context of workplace surveillance. The balance can be achieved by appropriate legal measures. However, it is extremely difficult to do so because the law cannot keep up with the swift development of technology. This article intends to contribute to the ongoing discussion between labour law scholars and parties to labour relationships in Central and Eastern Europe. Its aim is to analyse and compare Polish and Czech legislation on surveillance in the workplace, with a special focus on the surveillance of employees' tasks.

The system of labour law in both countries has followed a similar path, consisting of three main periods. The first was the period of law characteristic of the communist bloc and the so-called 'socialist labour relations'.¹¹ The second period was that of systemic transformation and the beginnings of the primacy of neo-liberalism in the economic sphere, which left its mark on the labour law systems of the region at the time.¹² The last period, which continues to this day, commenced in 2004 when Poland and the Czech Republic joined the European Union and began the process of adapting labour law to the standards of the community. However, the harmonisation of the labour law system, the increase in employee protection standards, and the obligation to implement the principles set by GDPR¹³ – in the context of employees' data collection and processing and workplace surveillance – have not eliminated all the problems and inconsistencies that are associated with this topic.

8 Ball, 2021, p. 29.

9 Štefko, 2016, p. 11 – Štefko describes the "Facebook fired" group as a group of employees who lost their jobs because of posts or comments on social media.

10 Štefko, 2017, p. 131.

11 Florek, 2015, p. 31.

12 Orenstein, 2013, pp. 378-379.

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

2. Models of Employee Surveillance in Czech and Polish Legislation

On the subject of broadly understood personal data protection, 25 May 2018 is an important date for all EU member states – including Poland and the Czech Republic. On that day, the fundamental legal act regulating data protection within the European Union became 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” (hereafter: General Data Protection Regulation, or GDPR). The regulation is of a general nature, binding in its entirety and should be directly applicable, although it leaves the member states a certain degree of regulatory discretion in certain areas.¹⁴ An example of such an area is the regulation of personal data protection in employment. Indeed, according to Art. 88 (1) of the GDPR, member states may, by law or by collective agreements, provide for more specific rules to ensure the protection of the rights and freedoms in respect of the processing of employees’ personal data in the employment context.¹⁵ Moreover, in line with Art. 88 (2) of the GDPR, those rules shall include suitable and specific measures to safeguard the data subject’s human dignity, legitimate interests and fundamental rights, with particular regard to the transparency of processing, the transfer of personal data within a group of undertakings, or a group of enterprises engaged in joint economic activity and monitoring systems at the workplace.¹⁶ The legislative discretion in the context of personal data protection in employment is illustrated by the workplace surveillance models regulated in the Polish and Czech labour codes. These models have some similarities, but are notably different. The Polish model for regulating workplace monitoring can be briefly described as detailed yet narrow.¹⁷ Czech legislators have taken the opposite approach, regulating the model more in the form of open guidance, which is described by some as a puzzle.¹⁸

14 Barański, 2022, p. 56.

15 Art. 88 (1) of the GDPR.

16 Art. 88 (2) of the GDPR.

17 Otto, 2023, p. 412.

18 Šmejkal, 2019, pp. 58.

2.1. Employee Surveillance under the Czech Legal Framework

The issue of surveillance in the workplace in the Czech Labour Code is addressed in Chapter VIII, Protection of an Employer's Property Interests and Protection of an Employee's Personal Rights. This chapter consists only of Section 316, which is divided into four paragraphs. However, it is the first three paragraphs that are of relevance to this article, as they touch upon the issue of surveillance measures over the tasks performed by the employees. Paragraph 4 expresses the prohibition against employers collecting employee information that does not directly relate to the performance of work and the basic labour relationship.¹⁹

There is a certain duality between Paragraphs 1-3 of Section 316, as they can be divided into two groups.²⁰ Paragraph 1 introduces a general right of the employer to check compliance with the prohibition against employees using the employer's means of production and other means necessary for the performance of work for personal use.²¹ In this provision, the legislature has not specified the concrete means by which such compliance can be checked. It has only indicated that it should be conducted in an appropriate way. In turn, Paragraphs 2 and 3 regulate the issue of the impermissibility of an employer's encroachment upon an employee's privacy at a workplace without serious cause and establish an information obligation.²² However, in contrast to the first paragraph, Paragraph 2 points out the means of possible workplace surveillance, which under certain conditions²³ will constitute an admissible infringement of the employee's privacy.²⁴ These are open or concealed surveillance (monitoring) of employees, interception (including recording) of their telephone calls, and checking email or postal consignments addressed to a certain employee.

19 Section 316 (4) LABOUR CODE (full translation) No. 262/2006 Coll., as amended „Zákoník práce“.

20 Šmejkal, 2019, p. 58.

21 Section 316 (1) [LABOUR CODE (full translation) No. 262/2006 Coll., as amended „Zákoník práce“] - Without their employer's consent, employees may not use the employer's means of production and other means necessary for performance of work, including computers and telecommunication technology for their personal needs. The employer is authorized to check compliance with the prohibition laid down in the first sentence in an appropriate way.

22 Section 316 (3) [LABOUR CODE (full translation) No. 262/2006 Coll., as amended „Zákoník práce“] - Where there is a serious cause on the employer's side consisting in the nature of his activity which justifies the introduction of surveillance (monitoring) under subsection (2), the employer shall directly inform the employees of the scope and methods of its implementation.

23 According to Section 316 (2) of the Czech Labour Code, this condition is a serious cause consisting of the employer's nature of the activity.

24 Section 316 (2) [LABOUR CODE (full translation) No. 262/2006 Coll., as amended „Zákoník práce“] - Without a serious cause consisting in the employer's nature of activity, the employer may not encroach upon employees' privacy at workplaces and in the employer's common premises by open or concealed surveillance (monitoring) of employees, interception (including recording) of their telephone calls, checking their electronic mail or postal consignments addressed to a certain employee.

Although these paragraphs may, at first glance, appear similar and relate to the same issues, they should not be interpreted as synonymous. This has in fact been confirmed by the Czech Supreme Court. In its judgement of 16 August 2012, as well as in the judgement of 7 August 2014, the Supreme Court indicated that the first paragraph of section 316 of the Czech Labour Code concerns mainly the issue of employer's property, while the second and third paragraphs touch on the protection of employees' privacy.²⁵ An employer's monitoring – according to Paragraph 1 – does not constitute an infringement of the privacy indicated in Paragraph 2. However, it must be conducted in an adequate manner so as to remain within the limits set by the employee's subordination to the employer, according to which the employer is entitled to check that its employees use the entrusted means of production or services exclusively for the performance of the assigned tasks, manage them correctly, ensure their protection against harm or misuse, and refrain from actions against the employer's rightful interest.²⁶ Therefore it can be said that, in practice, Paragraph 1 serves primarily as a basis for the employer's surveillance of employee tasks. After all, a correctly performed task should not involve misuse of the employer's property, which has been entrusted to carry out a specific work. However, an important question arises. How should surveillance under Paragraph 1 be carried out in order to comply with the statutory requirement of adequacy? The answer can be found in the judgement of the Supreme Court of 16 August 2012,²⁷ in a case concerning the possibility of an employer checking the use of a company computer – specifically the extent of internet use by an employee during working time – and the legality of the dismissal resulting from this control. In the case, during his monitoring, the employer detected that - despite the prohibition on employees using company equipment for private purposes - one of the employees spent 102.97 out of 168 working hours (in a single month) visiting non-work-related websites through the company computer. Citing gross negligence within work duties, the employer took the decision to terminate the employment contract immediately. Nevertheless, the legal qualification of the surveillance and the legality of the dismissal became a matter of dispute. According to the employee, the employer's monitoring – which provided him with information on employee misuse of company equipment and improper performance of assigned tasks – was carried out covertly without the employee's knowledge and consent, which constituted a breach of Paragraphs 2 and 3 of Section 316 of the Labour Code (LC). However, the Supreme Court settled the issue by ruling that, in this case, the employer acted in accordance with its right to check granted by Paragraph 1, and there was no impermissible encroachment on the employee's privacy. However,

25 Judgement of the Czech Supreme Court of 16.08.2012 on the case 21 Cdo 1771/2011; Judgement of the Czech Supreme Court of 07.08.2014 on the case 21 Cdo 747/2013.

26 Šmejkal, 2019, p. 60.

27 Judgement of the Czech Supreme Court of 16.08.2012 on the case 21 Cdo 1771/2011.

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using the example of this case we can see that within the Czech model of workplace surveillance, there is a general problem with the subsumption of the employer's act of control over the employees' tasks – namely, when should it fall under Paragraph 1, and when Paragraphs 2 and 3? Indeed, this problem was partly pointed out by the Supreme Court itself. Justifying its judgement, the court drew attention to two key factors indicating the need to qualify the employer's action as an exercise of the right set out in Paragraph 1, rather than surveillance under Paragraphs 2-3. First of all, the court stated that the employer's monitoring cannot be exercised by the employer in a completely arbitrary manner, since the employer is entitled to exercise such control only in a 'reasonable manner' and it must be examined whether the inspection was continuous or subsequent, what was the scope and duration, whether it interfered with the employee's right to privacy, and to what extent. The court also ruled that the object of the inspection can only be the determination of whether the employee has breached the absolute prohibition laid down by law. The second key point highlighted by the court was that the employer did not intercept the employee's phone calls or check his emails and text messages (the measures mainly indicated in Paragraphs 2-3) during his inspection, but limited itself to checking whether the employee browsed websites not related to his work (the employer also focused only on their type and not on their detailed content). The view expressed by the court in its 2012 judgement was later confirmed in another judgement in 2014, in a case concerning unauthorised private calls via a company phone.²⁸

Following the jurisprudence, the doctrine has defined two conditions, which are a kind of guidepost on how the employer should use the right indicated in Section 316 Paragraph 1, in order not to exceed the statutory framework of adequacy.²⁹ These conditions are: 1) the restriction of the scope and extent of control, including the exclusion of the possibility to check the exact content of non-work 'activities' undertaken by employees during work³⁰ (e.g., the precise content of browsed websites – there is no doubt that data which can be collected from them might allow an employer to obtain knowledge about the employee's private life, health, sexual preferences, etc.); 2) refrain from using the employee surveillance measures listed in Section 316 Paragraph 2.³¹

However, there is also a critical approach in the doctrine to this type of interpretation of workplace surveillance in the context of Paragraph 1. Vobořil argues that it is rather difficult to agree that tracking the URLs of websites visited is not an intrusion into privacy, because access to websites is connected with the storing of specific data, which can be used to identify the personal information of users, their preferences,

28 Judgement of the Czech Supreme Court of 07.08.2014 on the case 21 Cdo 747/2013.

29 Šmejkal, 2019, p. 61.

30 See also: Štefko, 2016, p. 15.

31 Šmejkal, 2019, p. 61.

etc. Moreover, it is questionable whether supervising internet activity is a proportional method of checking under Paragraph 1. There are different and more adequate ways to prevent the misuse of the employer's resources, e.g. by blocking websites that are unrelated to work and those that disrupt the performance of assigned tasks. The author also draws attention to another important point with which it is difficult to disagree, namely that – with such broadly defined surveillance criteria under Paragraph 1 – an employer may try to hide, behind the right to protect its property, a real intent to supervise and collect employee data of a private nature.³²

On the other hand, there is an ongoing discussion on the relation of Paragraphs 1 and 2, especially in the context of the second of the mentioned conditions: non-use of surveillance means listed in Paragraph 2 within the monitoring conducted under Paragraph 1. According to Morávek, Paragraph 1 is exclusively applicable if there is a high probability (or *de facto* certainty) that the employee's privacy cannot be encroached upon, regardless of the method of surveillance. Furthermore, even in a situation in which an employee's privacy has been violated, this provision should apply only if a different method of surveillance is chosen than those enumerated in Paragraph 2.³³

Considering the above interpretation, it is possible to come to the false but nonetheless dangerous conclusion that, since the list of surveillance measures listed in Paragraph 2 is exhaustive, an employer using other methods can freely intervene in an employee's privacy. This conclusion is erroneous because its adoption would violate the entire logical construction of Section 316 Labour Code, a key element of which is the assumption that – when acting within the framework set out by Paragraph 1 – there can be no infringement of the employee's privacy.³⁴

However, despite efforts by both the judiciary and the doctrine to clarify the relationship between Paragraphs 1 and 2, it remains unclear. Paragraph 1 only deceptively resembles safe harbour for a Czech employer.³⁵ In reality, it rather looks like an open sea full of hidden dangers. This is illustrated particularly by the Supreme Court, which in its judgement of August 2012 indicated that Paragraph 1 constitutes a norm with an abstract hypothesis, thus leaving it to judicial discretion to determine the very hypothesis of the legal norm in each individual case.³⁶ This, in turn, opens up the possibility of excessive judicial activism, which – with regard to the regulation of employment relations and privacy within the workplace – is particularly undesirable,

32 Vobořil, 2012.

33 Morávek, 2017, p. 6.

34 Šmejkal, 2019, p. 62.

35 Šmejkal, 2019, p. 60.

36 Judgement of the Czech Supreme Court of 16.08.2012 on the case 21 Cdo 1771/2011.

as it results in provisions becoming hard to understand for the ordinary addressee and undermines legal certainty for both employer and employee.³⁷

Paragraph 2 also raises interpretation problems. Under this provision, a serious cause – depending on the nature of the employer's activity – may justify proportional encroachment upon employees' privacy at workplaces and in the employer's common premises. Again, as in Paragraph 1, addressees of this norm are confronted with an abstract hypothesis. What is the serious cause, and who is authorised to use the surveillance measures indicated in this provision? Every employer, or only those engaged in a particularly hazardous activity? On this matter, the doctrine takes different views.

Šimečková indicates that Paragraph 2 cannot be interpreted in a way that only employers involved in specific dangerous activities may exercise the power granted to them by the law. She claims that the grounds for implementing surveillance facilities are compliance with occupational health and safety, protection of the life and health of employees, protection of the property that belongs to the employer or employee, and productivity monitoring. These grounds apply to every employer, and that is why every employer may find justification to use the measures listed in Paragraph 2.³⁸ The opposite approach is taken by the State Labour Inspectorate (SUIP). In one of its publications on the protection of employees' personal rights and the protection of the employer's property interests, the inspectorate pointed out that 'a serious cause' is generally not applicable in the production of ordinary products or the supply of ordinary services.³⁹ Thus, Paragraph 2 does not apply to all employers, regardless of their field of activity. On the other hand, Šmejkal is critical of the SUIP view – stating that such a straightforward answer does not provide good guidance for the doctrine – and of Šimečková -denying that Paragraph 2 can apply to every employer. Following the literature on the subject⁴⁰ and the position of the Office for Personal Data Protection (UOOU), Šmejkal advocates a 'situational analysis', which in his view allows for a more accurate assessment of an increased or extraordinary need for workplace surveillance.⁴¹ Within this approach, he distinguishes the following situations which may justify a proportionate encroachment upon an employee's privacy: a) significant amounts of cash are processed; b) the workplace operates under specific regulations (e.g. when highly sensitive or classified information is handled⁴²); c) there is a heightened risk of accidents, explosions, etc. (e.g. in a nuclear power

37 Morávek, 2017, p. 12.

38 Šimečková, 2017, p. 95.

39 Státní Úřad Inspekce Práce (hereinafter: SUIP), 2019, p. 3.

40 See: Zemanová Šimonová, 2016; Vych, 2015; Jouza, 2022.

41 Šmejkal, 2019, p. 74.

42 Zemanová Šimonová, 2016.

plant)⁴³; d) there exists a significant need to safeguard intellectual and industrial property rights, valuable knowledge, personal data of third parties,⁴⁴ and ensuring equal treatment and non-discrimination.

There is another, different approach, which addresses Paragraphs 1 and 2 holistically. This approach is recommended by Štefko and can be called the 'practical approach'. Štefko identifies three steps that an employer should take before commencing surveillance in the workplace. The first step is a discussion about the scope, duration and manner of the surveillance mechanism with employee representatives – or employees if there are no representatives – before its introduction. The second step is the information obligation towards employees. The last is expressed in obtaining employees' consent.⁴⁵ Štefko also indicates that the requirement for consent is not set by the law, but such a practice may alleviate the legal consequences associated with breaches of employee privacy, as it reduces a reasonable expectation of privacy.⁴⁶ However, when analysing this aspect it should be borne in mind that an inherent feature of the employment relationship is the inequality of the parties – which in the context of the employee's consent as a factor limiting reasonable expectation of privacy in the workplace – is of significant importance, as consent cannot be given under coercion. It is the very nature of the employment relationship that makes it difficult to obtain the employee's entirely voluntary consent to relinquish part of his or her privacy, since the employee, as the party economically dependent on the employer, may always feel a kind of pressure from the side of employer.⁴⁷ This pressure does not necessarily have to be direct but can often involve a limitation of future employment prospects (such as promotion, etc.).⁴⁸ Taking this into account, it is fair to say that the 'practical approach' also does not solve all the problems that arise on the grounds of the Czech model of workplace surveillance.

2.2. Employee Tasks Surveillance under the Polish Legal Framework

The Polish model of workplace surveillance has been shaped in a different manner to the Czech one. In fact, it constitutes a more closed and specified system, defined by three areas of surveillance: video, email, and other forms of monitoring,⁴⁹ with the purposes indicated explicitly that each surveillance measure is intended to serve.

43 Vych, 2015.

44 Jouza, 2022.

45 Štefko, 2016, p. 15; Štefko, 2017, p. 129; Štefko, 2023, p. 153.

46 Štefko, 2023, p. 153, footnote 44.

47 Otto, 2016, p. 86.

48 Morris, 2001, pp. 53-54.

49 Otto, 2023, p. 394.

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This model appears to be more in line with current standards related to privacy in the workplace, and is more understandable to the parties of the employment relationship, as it clearly addresses some issues that in the Czech model are not directly regulated by the provisions of the Labour Code. This is primarily because the Polish regulation is more recent than the Czech one, as it was only implemented in connection with the delegation and the requirements established by GDPR. Previously, the issue of workplace surveillance and the protection of personal data processed in relation to employment was regulated in a fragmentary and implicit way.⁵⁰ Some of the principles were derived from the Constitution,⁵¹ some were interpreted from the Labour Code,⁵² and some had their source in the Act of 29 August 1997 on the protection of personal data.⁵³ It was only on 10 May 2018 with the new personal data protection act that the Labour Code was amended and Articles 22² and 22³ were added,⁵⁴ regulating the conditions and scope of admissible workplace surveillance. The need for change and the regulation of a proper model of workplace surveillance within the framework of the Labour Code has been advocated by the doctrine for a long time.⁵⁵

Article 22² of the Polish Labour Code states that an employer may introduce special supervision over the premises of the establishment, or the area around the establishment, in the form of technical measures that enable video recording (monitoring). However, this form of surveillance can be introduced only if it is necessary to ensure at least one of the prerequisites listed in the form of *numerus clausus*.⁵⁶ These prerequisites are the necessity to ensure the safety of employees or protection of property, or production control or confidentiality of information, the disclosure of which might damage the employer's interests. Given the subject matter of the article, the premise of production control is of particular importance, as it is closely linked to the surveillance of the tasks assigned to the employee. On the basis of this premise, the problem arises whether video monitoring can only be used as a surveillance of the work process – which serves the purpose of its continuity and correctness – or also to measure the productivity and efficiency of work.⁵⁷ In accordance with the position taken above and the opinion of the President of the Personal Data Protection Office,

50 Otto, 2023, p. 393.

51 In this context Art. 47 (Principle of protection of private life), Art. 49 (Principle of freedom of communication), Art. 50 (Principle of "domestic mir") and Art. 51 (Prohibition on the obligation to disclose information) of the Constitution of the Republic of Poland of 2nd April 1997 no. 78 item 483, are relevant.

52 Art. 11¹ of Act of 26 June 1974 Dz.U.2023.1465 Labour Code (hereinafter: LC).

53 For an overview of the employer's obligations to protect the employee's personal data under the Act of 29th August 1997 no. 133 item 883 on the protection of personal data, see – Drzewiecka, 2013.

54 Art. 11¹ of the Act of 10th May 2018 item 1781 on personal data protection.

55 See: Kuba, 2014, pp. 561 and 569.

56 Art. 22² §1 of Act of 26 June 1974 Dz.U.2023.1465 Labour Code.

57 Dąbrowska, 2019, p. 16.

as expressed in the guidelines on the use of video monitoring,⁵⁸ a narrower scope of monitoring and the inadmissibility of using video monitoring to measure work efficiency or productivity should be advocated.

Moreover, the Polish legislature – in §1¹ and §2 of Article 22² of the Polish Labour Code – specifies the sites that should be excluded from the video monitoring. Monitoring shall not cover rooms made available to a company trade union organisation, sanitary rooms, locker rooms, canteens, or smoking rooms.⁵⁹ The law provides an exception to this general restriction: listed areas might be monitored if it is necessary to ensure the safety of employees, protection of property, control of production or confidentiality of information, the disclosure of which might damage the employer's interests. There is also a condition that it should not infringe upon the dignity and other personal rights of the employee, especially by techniques making it impossible to recognise individuals present in those areas. Additionally, the monitoring of sanitary rooms shall require the prior consent of a company trade union organisation, and when the employer does not have a company trade union organisation within its structure, the prior consent of the employees' representatives selected in accordance with the procedure adopted by the employer.⁶⁰

Further, according to the principle of the data storage limitation expressed in the GDPR,⁶¹ Article 22² §3-5 regulates precisely the retention period of the video-recorded data. As a general rule, this period cannot exceed 3 months from the date of the recording.⁶² This means that the employer may set a shorter period. An exception to this rule is when the video recordings constitute evidence in proceedings conducted under law, or the employer has become aware that they may constitute evidence in proceedings. In such a case, the storage period is extended until the proceedings have been terminated.⁶³ After the end of these retention periods, the recordings containing personal data must be destroyed, unless separate regulations provide otherwise.⁶⁴

An integral part of the procedure for implementing video surveillance is defining its objectives, scope and manner of its use. Article 22² §6 states that it shall be established in a collective labour agreement or in the work regulations, and if the employer is not covered by a collective labour agreement or is not obliged to adopt work regulations, in an announcement.⁶⁵ This regulation corresponds to the principle of transparency of data processing and is in line with the opinion 2/2017 of the now

58 Personal Data Protection Office, 2018, p. 20.

59 Art. 22² §1 and §2 of Act of 26 June 1974 Dz.U.2023.1465 Labour Code.

60 Art. 22² §2 of Act of 26 June 1974 Dz.U.2023.1465 Labour Code.

61 Art. 5 (1)(e) of the GDPR.

62 Art. 22² §3 of Act of 26 June 1974 Dz.U.2023.1465 Labour Code.

63 Art. 22² §4 of Act of 26 June 1974 Dz.U.2023.1465 Labour Code.

64 Art. 22² §5 of Act of 26 June 1974 Dz.U.2023.1465 Labour Code.

65 Art. 22² §6 of Act of 26 June 1974 Dz.U.2023.1465 Labour Code.

defunct Article 29 Data Protection Working Party. The Working Party recommended involving a representative group of employees in the creation and evaluation of rules and policies regarding monitoring.⁶⁶ The introduction and amendment of both the collective labour agreement and the work regulations require agreement with the trade union organisation active in the establishment.⁶⁷ Miłosz and Świątek-Rudoman write that in cases where the areas of application of video monitoring vary according to the criterion of the purpose of its use, the said documents should specify which areas are covered by which objectives – and this is particularly important with regard to monitoring used to ensure production control.⁶⁸ In addition, there is an obligation on the employer to inform the employees of the introduction of the monitoring no later than 2 weeks prior to its commencement. The method of the notification should be the one adopted by the employer concerned.⁶⁹ In relation to new employees, contrary to employees already in an employment relationship, the information obligation is of an individual character.⁷⁰ According to the Labour Code, before permitting a new employer to perform his/her work duties, an employer must provide the employee with the information on objectives, scope and manner of the use of monitoring in writing.⁷¹ The information obligation also includes the need to designate monitored areas in a visible and legible manner. This should be done by appropriate signs or sound announcements, but no later than one day before starting the monitoring.⁷² The President of the Personal Data Protection Office, in his guidance on the use of video surveillance at work, indicated that, firstly, persons present in the monitored area must be aware that monitoring activities are taking place in their location. Thus, the signs notifying workers of the installed monitoring should be visible, synthetic, and permanently placed not too far from the monitored areas, and the size of the signs must be proportional to the place where they are located. Additionally, pictograms informing of the coverage of cameras may be used. However, pictograms are not a sufficient means of marking, as the information obligation in Article 13 of the GDPR must be taken into account. Full monitoring information, including all the requirements of Article 13, should be available at the monitored site. However, this does not mean that all this information should be included on one board. In order to comply with this obligation, layered information notes can be used, e.g. in the form of documents available at reception or at the administrator's representative.⁷³

66 Article 29 Data Protection Working Party, 2017, p. 23.

67 Art. 241², 241³, and 104² of Act of 26 June 1974 Dz.U.2023.1465 Labour Code.

68 Miłosz and Świątek-Rudoman, 2019, p. 36.

69 Art. 22² §7 of Act of 26 June 1974 Dz.U.2023.1465 Labour Code.

70 Dąbrowska, 2019, p. 17.

71 Art. 22² §8 of Act of 26 June 1974 Dz.U.2023.1465 Labour Code.

72 Art. 22² §9 of Act of 26 June 1974 Dz.U.2023.1465 Labour Code.

73 Personal Data Protection Office, 2018, pp. 14, 20.

Following the model of regulation adopted in the case of video surveillance, the Polish legislature decided to explicitly regulate the second form of monitoring in the workplace, namely monitoring of employees' business email (Art. 22³ of the Labour Code).⁷⁴ The employer may conduct control of employees' business mail if it is necessary to ensure an organisation of work that enables the full use of the working time and the proper use of the tools made available to the employee. Both of these prerequisites must be met cumulatively.

There is no doubt that employees' business email control translates directly into the supervision of tasks performed by an employee, especially those that involve the use of email or even generally of electronic equipment with access to business email. This is also confirmed by the Personal Data Protection Office, indicating that the employer on this ground can control the activity of his employees while they are at his disposal at the workplace.⁷⁵ However, it is important to consider the adequacy of this surveillance measure in relation to the premises for its admissibility. Kuba points out that the monitoring of business email – introduced to ensure an organisation of work that enables the full use of the working time and the proper use of the work tools made available to the employee – might not comply with the rule of adequacy or data minimisation set by regulation 2016/679 in Article 5 (1)(c).⁷⁶ In Kuba's view, it would be more appropriate to use other forms of monitoring, such as control of the use of company computers or websites visited by an employee during work, without the need to monitor the contents of an employee's business electronic mailbox.⁷⁷ It is difficult to disagree with this position since, in reality, business email is rarely the only tool for providing work. Thus, its control may be insufficient and, in some cases, even too severe to fulfil the premises of this form of surveillance.

Email monitoring constitutes a specific limitation of the freedom and privacy of communication, which is protected at a constitutional level.⁷⁸ This is also expressed by the legislature, indicating that it shall not violate the confidentiality of correspondence and other personal rights of employees.⁷⁹ Therefore, there is a serious need to define the exact boundaries of an employer's email control. It should be stated with certainty that the literal wording of the act makes it clear that only business email boxes, and under no circumstances private ones, may be subject to monitoring.⁸⁰

74 Art. 22³ of Act of 26 June 1974 Dz.U.2023.1465 Labour Code.

75 Personal Data Protection Office, 2018b, p. 34.

76 Kuba, 2019, p. 31.

77 *Ibid*,

78 Art. 49 of the Constitution of the Republic of Poland of 2nd April 1997, Dz. U. No. 78 Item 483.

79 Art. 22³ §2 of Act of 26 June 1974 Dz.U.2023.1465 Labour Code.

80 Kuba, 2019, p. 34.

Moreover, the control of private correspondence is completely prohibited.⁸¹ Hence, if a private message is found in a business email box, it cannot be checked.

When it comes to the establishment of the objectives, the scope, the manner of use and the information obligation regarding email monitoring, the legislature has stated that the provisions of Article 22² §6-10 shall apply accordingly.⁸² Therefore, the considerations and conclusions made above on the grounds of video monitoring will also apply to the control of the employees' business mail.

The last of the provisions that constitute the Polish model of employee surveillance is Article 22³ §4. This regulation extends the catalogue of admissible forms of surveillance within the workplace because it enables, under certain conditions, the use of other forms of monitoring than those specified in the previous articles. However, for other forms of monitoring, the provisions regarding the monitoring of an employee's business email should apply *mutatis mutandis*.⁸³ Therefore, the other forms of monitoring can be introduced only when it is necessary to ensure an organisation of work that enables the full use of the working time and the proper use of the work tools made available to the employee. Such forms of control may include geolocalisation, monitoring of IT systems, monitoring of the use of the internet by employees, the use of systems based on algorithms to record and check the working time,⁸⁴ and many others depending on the target of surveillance and the nature of the activity of the employer.

3.

Similar Paths, Different Outcomes – A Comparison of Both National Models of Employee Tasks Surveillance

A comparison of the two models of employee task surveillance is a challenging task. As can be deduced from the considerations above, Polish and Czech legislatures have taken two different paths when regulating this issue. This is already apparent from the structure of the regulation, which illustrates the approach of the legislatures to the key issues, namely the interest of the employer (i.e. the protection of property) and the interest of the employee (the protection of privacy).

Czech legislation separates issues of the protection of employer's property and the protection of employees' privacy. The protection of the employer's property is addressed in Paragraph 1 of Section 316 of the Czech Labour Code, which introduces a general right of the employer to check compliance with the prohibition on

81 Personal Data Protection Office, 2018, p. 35.

82 Art. 22³ §3 of Act of 26 June 1974 Dz.U.2023.1465 Labour Code.

83 Art. 22³ §4 of Act of 26 June 1974 Dz.U.2023.1465 Labour Code.

84 Otto, 2023, pp. 409-410; Dąbrowska, 2019, p. 19.

employees using the employer's means of production for personal use. According to the jurisprudential line of the Czech Supreme Court, this provision does not touch upon the question of the employees' privacy and cannot be considered as an infringement of the privacy indicated in Section 316 Paragraph 2.⁸⁵ In turn, the notion of the employees' privacy is established in Paragraph 2 by indicating that without a serious cause consisting in the employer's nature of activity, the employer may not encroach upon employees' privacy at workplaces by specific means of surveillance enumerated in this provision. Unlike the Czech one, the Polish legislature did not treat the issues of protection of the employer's property and employees' privacy as separate. While individually regulating video monitoring, business email monitoring and the possibility of using other forms of monitoring, the Polish legislature has restricted them with specific conditions under which such forms of surveillance may be used. The conditions concern in their essence, among other things, the protection of the employer's property. Moreover, the Polish legislature has regulated the issue of the usage of each type of monitoring in detail so as not to allow excessive infringement of employees' privacy. In comparison, the Czech Labour Code does not stipulate any further details on how or when the potential surveillance should be conducted. It only uses vague terms such as that the employer's monitoring should be done in an appropriate way (Paragraph 1 of Section 316), or that the employer may encroach upon the employee's privacy by monitoring or other mentioned forms of surveillance when there is a serious cause consisting in the employer's nature of the activity (Paragraph 2 of Section 316).

Moreover, further differences will emerge when we look at the specific elements of the models applied by legislatures, such as the territorial scope of monitoring, retention period, information obligation, covert surveillance and the question of private usage of employer's equipment.

While commencing with the territorial scope of monitoring, it should be pointed out that not every location within the workplace can be monitored. Premises where the surveillance could lead to the collection of sensitive data, or data not related to the purpose of the monitoring as set out in laws, should not be subjected to monitoring. Such monitoring could constitute a violation of the employee's dignity and the principles set out by the GDPR.⁸⁶ The Polish Labour Code seems to adhere to this principle. It defines the sites that should be excluded from the video monitoring and regulates the possibility of derogating from the general prohibition.⁸⁷ On the other hand, the Czech legislature did not indicate *explicite* in Section 316 of the Labour Code which areas of a workplace should be excluded from monitoring, or where it should be

85 Judgement of the Czech Supreme Court of 16.08.2012 on the case 21 Cdo 1771/2011; Judgement of the Czech Supreme Court of 07.08.2014 on the case 21 Cdo 747/2013.

86 See the principle of data minimisation - Art. 5 (1)(c) of the GDPR.

87 Art. 22² §1¹ and §2 of Act of 26 June 1974 Dz.U.2023.1465 Labour Code.

limited, which creates rather a problematic situation. However, the task of clarifying the 'territorial scope' of video monitoring has been undertaken by doctrine⁸⁸ and jurisprudence. The Czech Supreme Administrative Court, in the judgement of 23 August 2013, noted that the monitoring should be directed at the employer's property, not at the employee's person, and should be carried out in the workplace, not in areas designated for hygiene or resting.⁸⁹

Another difference between Poland and the Czech Republic that arises on the grounds of video monitoring is the issue of the principle of data storage limitation.⁹⁰ To comply with this principle, the Polish legislature has comprehensively regulated the data retention period, indicating how long it may last, in which situation it may be extended, and what should happen to the data after the expiry of the period.⁹¹ The Czech Labour Code does not introduce any similar regulation on the data retention period. In this case, once again, the answer should be sought within the doctrine. Skubal writes that the generally accepted period for the storage of records resulting from video monitoring (CCTV surveillance) shall not exceed 7 days. However, the period can be longer if it is properly justified by the employer. Moreover, he notes that when a data controller has solid arguments for a longer period of retention, the Office for Personal Data Protection (UOOU) often accepts it.⁹² On the surface, it may seem that a time limit of 7 days more appropriately corresponds to the principle of data storage limitation. However, it should be considered that this time limit is not directly set in law and is dependent on the approval of the public authority responsible for personal data protection. This creates a situation of uncertainty for the parties to the employment relationship. Furthermore, the Czech legislation does not specify what should happen to the data after the retention period, whether it should be destroyed or archived.

The situation partially changes with regard to the information obligation. Although the Polish legislature continues to proceed along the path of the extended and detailed regulation⁹³ discussed earlier, the change is evident on the Czech side. The Czech model of workplace surveillance, just like the Polish one, directly addresses an information obligation. However, it is formulated in a much briefer manner than under the Polish Labour Code. Namely, its regulation is limited to a single provision. Section 316 Paragraph 3 of the Czech Labour Code stipulates that in the case of the

88 Šmejkal, 2019, p. 72.

89 Judgement of the Czech Supreme Administrative Court of 23.08.2013 on the case 5 As 158/2012-49 – "Monitoring musí být směřován na majetek zaměstnavatele, nikoliv na osobu zaměstnance (nasměrování kamer) a musí být prováděn na pracovišti, nikoliv na místech určených k hygieně nebo k odpočinku zaměstnance".

90 Art. 5 (1)(e) of the GDPR.

91 Art. 22² §3-5 of Act of 26 June 1974 Dz.U.2023.1465 Labour Code.

92 Skubal, 2023, p. 17.

93 Art. 22² §6-10 of Act of 26 June 1974 Dz.U.2023.1465 Labour Code.

introduction of the surveillance measures referred to in Paragraph 2, the employer is obliged to directly inform the employees of the scope and methods of their implementation.⁹⁴ Therefore, this obligation can be fulfilled in any appropriate form that enables the individual and direct transfer of information to each employee.⁹⁵ Thus, this may be done through an adopted and duly promulgated internal regulation or through a channel with which the employer customarily communicates with the employee – written communication, oral communication, email, etc.⁹⁶ The specific discretion of the form of information on monitoring is also expressed in the Polish Labour Code with the expression that “an employer shall notify employees of the introduction of monitoring, in the manner adopted by the given employer.”⁹⁷ The information should, in particular, allow the employee to familiarise him/herself with the scope of the surveillance, i.e. it should specify the duties entrusted to the employee that are to be monitored; the period during which the surveillance will take place; the premises under monitoring; and the means by which the surveillance is to be carried out.⁹⁸

On the grounds of the information obligation, one more point of divergence arises between the Polish and Czech models of employee surveillance. Namely, it concerns the possibility of covert surveillance. Under Polish law, both doctrine⁹⁹ and jurisprudence¹⁰⁰ unequivocally state that such surveillance cannot be conducted, irrespective of the type (video monitoring, email monitoring and other forms of employee surveillance). The situation is the opposite with regard to the Czech model, as the Czech Labour Code explicitly expresses the possibility of concealed monitoring by an employer.¹⁰¹ This poses the question of how to comply with the requirements imposed by the regulation on information obligation. As a rule, in such a situation the information obligation is limited in a certain way, which does not change the fact that the employer should fulfil it to the maximum extent, but in the *ex-post* manner only after the surveillance was conducted.¹⁰² Moreover, the employer should give advance notice of the possibility of control.¹⁰³ However, this solution seems rather fictitious because as Šmejkal rightly points out, in any future conflict between an employer and

94 Section 316 (3) LABOUR CODE (full translation) No. 262/2006 Coll., as amended „Zákoník práce“.

95 Sehnálek, 2023, p. 259.

96 Morávek, 2017, p. 10.

97 Art. 22² §7 of Act of 26 June 1974 Dz.U.2023.1465 Labour Code.

98 Morávek, 2020, pp. 26-27.

99 Barański, 2018, p. 48; Personal Data Protection Office, 2018, pp. 25-26.

100 Judgement of the Supreme Administrative Court of 13.02.2014 on the case I OSK 2436/12.

101 Section 316 (2) LABOUR CODE (full translation) No. 262/2006 Coll., as amended „Zákoník práce“.

102 Sehnálek, 2023, p. 260.

103 Morávek, 2020, pp. 26.

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an employee, the employee will find out that the employer collected evidence of his/her misconduct as a result of workplace surveillance.¹⁰⁴

Another interesting question that arises is connected to the surveillance of business email inboxes, and touches on issues of the possibility of private usage of employer's equipment by employees and privacy of correspondence. In both countries, such a form of surveillance is permitted and, as indicated earlier, in both countries it is prohibited to check private messages even within a company's email inbox, as it would constitute an infringement of the privacy of correspondence, which is safeguarded by both Polish and Czech constitutional orders.¹⁰⁵ The mere fact that a message is sent or received via a business email does not determine that such a message does not contain private content, nor does the proper designation of the subject and the parties suggest the business character of the conversation.¹⁰⁶ Therefore, employers need to be particularly careful when conducting this form of monitoring, which may prove to be more of a challenge in Poland than in the Czech Republic. This is mainly because of the issue of the use of the company's equipment for private purposes, which obviously has an impact on the process of possible surveillance and its correctness. This issue under Polish labour law is less clear-cut than under Czech law. Czech regulation indicates unequivocally that without the employer's consent, employees may not use the company's equipment for private purposes.¹⁰⁷ However, the situation is reversed in the case of the Polish model of regulation. It follows that in principle, unless such use is prohibited, it is permitted. This state of affairs can cause many problems, infringements and uncertainty on both sides of the employment relationship. Hence, it is reasonably advocated in the doctrine that employers should prohibit the use of business email for private purposes.¹⁰⁸ Such a solution should make it possible to significantly facilitate the control criteria.

Despite the above differences, which are in the overwhelming majority, there is one provision that brings a rather closed and specified Polish model of workplace surveillance closer to the more open and vague Czech one. Namely, Article 22³ §4 of the Polish Labour Code, which under certain conditions widens the closed catalogue of forms of monitoring to other forms. It resembles to a certain extent Section 316 Paragraph 1 of the Czech Labour Code, which by its vague wording that the employer's monitoring should be carried out in an appropriate way, also opens up a catalogue of forms of surveillance. The discussed provision of the Polish Labour Code is rather

104 See more in: Šmejkal, 2019, p. 76.

105 Art. 49 of the Constitution of the Republic of Poland of 2nd April 1997 no. 78 item 483, Art. 13 of the Charter of Fundamental Rights and Freedoms of the Czech Republic of 16 December 1992 (Const. act No. 2/1993 Coll. as amended by constitutional act No. 162/1998 Coll.).

106 Kuba, 2019, p. 34.

107 Section 316 (1) LABOUR CODE (full translation) No. 262/2006 Coll., as amended „Zákoník práce“.

108 Dąbrowska, 2019, p. 18; Kuba, 2019, p. 34.

controversial. On the one hand, it might bring a certain level of risk, especially towards the privacy of employees; but on the other hand, it is a practically useful mechanism to keep up in terms of employee surveillance to rapidly changing and evolving concepts of the workplace.

4.

Conclusion

The issue of surveillance of tasks assigned to the employees is linked to two important aspects. The first is the work itself performed by the employees. Under the Polish and Czech Labour Codes, this work is framed by specific obligations/duties setting out how the work should be performed. Czech employees should work properly in accordance with their strength, knowledge and capabilities, fulfil instructions given by their superiors in compliance with the statutory provisions, and cooperate with other employees.¹⁰⁹ Very similarly, Polish employees shall perform work conscientiously and with due diligence, and shall comply with the work-related instructions of their superiors, unless they are contrary to the provisions of law or the contract of employment.¹¹⁰ However, for the work to be performed in this manner, it firstly needs to be concretised (in the form of specific tasks); secondly, it needs an adequate system to check its process and outcomes. The realisation of these needs is made possible by the second-mentioned aspect – the organisational function of labour law. This function enables the employer to assign specific tasks to a specific employee, and is a source of the employer's control entitlements.¹¹¹

It is only by bringing these two aspects together that a fair model for the surveillance of employees' tasks can be shaped, which recognises both the employee's right to privacy, dignity and respect for their work, and the need of the employer to organise work and the related need for surveillance. Tannenbaum expressed this relationship in the following words: "organisation implies control."¹¹² In our case, the organisation is the workplace.

The Polish and Czech legislatures have both considered these aspects when shaping their national models of employee tasks surveillance. However, they have taken different measures to implement them. The discrepancy between the two models is mostly due to the fact that the Polish regulation is more recent than the Czech one, as it was only implemented in connection with the delegation and the

109 Section 301 (a), LABOUR CODE (full translation) No. 262/2006 Coll., as amended „Zákoník práce“.

110 Art. 101 § 1 of Act of 26 June 1974. Labour Code (Dz. U. z 2023 r. poz. 1465).

111 Kuba, 2022, section 2.2.

112 Tannenbaum, 1962, p. 237.

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requirements established by GDPR. The Czech model already existed in its current shape beforehand.

This has also resulted in the fact that the Polish model appears to be more in line with current standards related to privacy in the workplace, and is more understandable to the parties of the employment relationship. It clearly addresses issues that, in the Czech model, are not directly regulated by the provisions of the Labour Code. However, its detailed and partly casuistic nature may lead to its obsolescence in a situation of rapid technological development. In this context, the openness of the Czech model can be perceived as a positive feature; on the other hand, its over-vagueness results in many interpretation problems, lack of certainty, and may lead to excessive activism of judges, which is rather an undesirable situation, especially in a case of labour law regulations.

Based on conducted research, two general conclusions can be drawn. The first is that, despite a similar path followed by the labour law systems in the countries of Central and Eastern Europe, their individual parts may differ significantly - as can be seen in the Czech Republic and Poland with regard to their models of employee surveillance. The second conclusion is that there is an urgent need to find a balance between the two approaches to workplace surveillance, and to propose a more comprehensive and equitable model which will have to face so far unknown challenges caused by new surveillance techniques.

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The Gender Pay Gap, and Multiple Forms of Discrimination Against Female Migrant Workers: Anti-Discrimination Legislation in Slovakia, and the Current EU Approach

ABSTRACT: *The migration of workers is inextricably linked with today's increasingly globalised environment. Ensuring their equal and non-discriminatory status should be a prerequisite for their participation in the labour market. This particularly concerns their pay equality. The principle of equal pay for men and women has been part of the EU legal framework since the beginning of the integration processes. However, despite decades of efforts, gender pay equality has still not been achieved. A particular challenge in the field of effective implementation and real enforcement of equal pay is the position of female migrant workers. They face multiple forms of discrimination, both as women and as migrants. Legislation at the European and national level should therefore take into account all the discriminatory factors they face. However, the sustainable achievement of pay equality requires joint, mutually coordinated, and targeted solutions.*

KEYWORDS: *gender pay gap, gender discrimination, migrant workers, from Slovakian anti-discrimination legislation to Slovak anti-discrimination legislation.*

1.

Introduction

The EU is based on a set of values and principles: the principle of equal pay for equal work is just one of them. It is an important part of a fairly set and efficiently functioning internal market. The internal market is a key element of the EU, and the primary purpose of economic integration.¹ The free movement of workers is one of the cornerstones of the internal market, enshrined in Article 45 of the Treaty on the Functioning of the European Union (hereafter 'TFEU'). The free movement of

1 Craig and De Burca, 2015, p. 607

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workers includes the abolition of any discrimination against workers in the member states, with respect to employment, remuneration and other working conditions.² The right to equal treatment of workers is formulated quite broadly, and covers not only the right to employment but also other areas closely linked to the residence of workers and their families in another EU member state.³ Equal treatment and related anti-discrimination legislation is the subject of intense interest in the EU. Achieving equality without discrimination of any kind has been one of the EU's objectives for decades. Despite the existing legal framework, the actual implementation and enforcement of equal treatment remains an ongoing challenge.

Violations of the principle of equal treatment can occur for a number of reasons. These often include sex, racial or ethnic origin, language, religion or belief. Female migrant workers have a special position in this context, facing multiple forms of discrimination as both women and migrants at once. Thus, there may be a combination of grounds on which the principle of equal treatment is violated and different axes of discrimination intersect. Most often in a combination of gender and other reasons such as language, race or ethnicity. The principle of equal treatment is of particular importance in terms of equal pay: female migrants are in a particularly vulnerable position in this respect, given the intersectional discrimination.

The principle of equal pay for equal work has been an integral part of primary law since the beginning of integration processes. Equal pay regardless of sex was already provided for in the Treaty Establishing the European Economic Community (hereafter the 'EEC Treaty', or 'EEC'). The main idea behind the EEC Treaty was to achieve economic objectives through the creation of a common market consisting of the free movement of goods, services and factors of production in the form of labour and capital.⁴ Above all, it was about integration and economic growth through the removal of trade and other barriers. Article 119 of the EEC was part of a broader definition of social provisions in which member states set themselves the objective of promoting the improvement of working conditions and the raising of workers' living standards in such a way that these conditions could be reconciled while maintaining the level achieved. The legal basis in the current legal framework in the field of EU primary law is, in particular, Article 157 of the TFEU. It is the duty of each member state to ensure that the principle of equal pay for men and women for equal work or work of equal value is applied. Equality between men and women is thus one of the EU's objectives,⁵

2 Article 45(2) of the Treaty on the Functioning of the European Union.

3 Equinet, 2021, p. 5.

4 Barnard, 2012, p. 4.

5 European Parliament, 2021, p. 1. See also: European Commission, 2020, p. 4.

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and the principle of equal pay for equal work has the status of its fundamental value.⁶ The continuous development of this principle has extended its application to work of equal value. In the field of secondary EU law, anti-discrimination legislation is concentrated in a number of directives. With regard to the principle of equal pay, these are in particular Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. The principle of equal pay has evolved over time: the initially economic dimension of this principle was systematically extended to include anti-discrimination and human rights aspects. The main objective in relation to pay has been for each member state to ensure that the principle of equal pay for equal work is applied and further respected.

2.

Discriminatory Factors in the Pay of Female Migrant Workers

Female migrant workers belong to a special group facing multiple forms of discrimination, with several related factors. This inequality is based on two basic premises:

6 Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, 2021, p. 4.

that they are women, and that they are migrants.⁷ They are discriminated against on the grounds of sex, racial or ethnic origin, religion or belief, but this inequality is particularly pronounced in the area of pay. The EU has been working for decades to strengthen and equalise the position of women in employment relations, with an emphasis on their pay. Nevertheless, despite these efforts, gender pay gaps persist across the EU. Unequal treatment, including pay inequalities, occurs despite the existence of a legal framework aimed at promoting equality – as well as ongoing initiatives to eliminate inequalities between men and women. The principle of equal pay for equal work or work of equal value (hereafter: ‘the principle of equal pay’) is also enshrined in the preamble of the Constitution of the International Labour Organisation (hereafter ‘ILO’). It requires ratifying states to ensure that migrant workers are equal in remuneration with nationals. Nevertheless, the ILO has repeatedly noted the violation of this commitment by a number of states and, consequently, the persistence of inequalities in the remuneration of migrant workers. It should be stressed that the purpose of the principle of equal pay is not only to protect migrant workers, but also to protect the labour market.⁸

The pay gap of migrant workers may also be based on objective factors, including education, experience or language skills. Without knowledge of the local language, the position of migrant workers is significantly hindered.⁹ On the other hand, their status is also affected by the mismatch between their skills and the labour market requirements of the host country. The transfer of work skills and experience, and their adaptation to host country conditions, is also problematic. This is mainly due

7 This paper uses the term ‘migrant worker’ in line with the definition of ‘third-country worker’ in several existing EU laws to refer to a third-country national who has been admitted to, is legally resident in and may work in the territory of an EU Member State under a valid legal relationship under national law. In this context, see, for example, Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State. As Fox-Ruhs and Ruhs point out in this context, in accordance with EU terminology, the term ‘migrant workers’ refers to workers who are not nationals of countries of the European Economic Area, as the principle of free movement of workers applies. They further state that, in line with the EU’s preferred terminology, EU citizens who reside and work in another EU Member State are referred to as mobile workers rather than migrant workers. For more details see: Fox-Ruhs and Ruhs, 2022, p. 11. In this context, see also: European Commission, 2016 or also Fasani and Mazza, 2020. In a broader context (not only within the scope of the definition of EU law), the term ‘migrant’ in this paper refers to a third-country national who, for whatever reasons, has changed his or her country of permanent or habitual residence and has moved from his or her home country to another country. However, for the purposes of ILO references and outputs, the term ‘migrant workers’ also includes workers from other EU Member States. Thus, references to ILO outputs include both migrant workers as well as mobile workers.

8 International Labour Organisation, 2020, p. 3.

9 Reid et al., 2022, p. 3.

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to the lack of adequate systems for the recognition of qualifications and differences in the skills and competences required in different countries. A significant part of the pay gap remains unexplained, even after accounting for objective factors and the characteristics of migrant workers, their education and practical experience. As much as 10% of the overall 12.6% pay gap between migrant workers and nationals remains unexplained by labour market characteristics. This may point to discrimination against migrant workers in terms of their remuneration. As the ILO report notes, if the unexplained part of the pay gap were eliminated, the pay gap between migrant workers and nationals would almost disappear. Moreover, if remuneration were determined on the basis of objective factors such as education and experience, the pay gap between migrant workers would remain very low in many countries – and in some countries there might even be a shift in the ratio in favour of migrant workers. This would particularly affect the status of female migrants.¹⁰

The income status of female migrant workers differs depending on whether they are in high-income countries or middle- and low-income countries. While migrant workers earn on average 12.6% less in a high-income country compared to nationals, in middle- and low-income countries migrant workers earn on average 17.3% more than nationals. The reason for this difference is the high proportion of highly skilled migrant workers in the total number of migrant workers in middle- and low-income countries, which also increases their average remuneration. Assumptions about the rationale for discrimination against female migrant workers are confirmed by data comparing their pay to men who are nationals of the given country. The pay gap between female migrant workers and male nationals is 20.9% in high-income countries. However, the average pay gap between male and female nationals is 16.2%.¹¹ Migrant care workers in high-income countries are a special group: the vast majority are women, and the pay gap for this group is 19.6%. When compared with the average pay gap between migrant workers and nationals at 12.6%, it is again possible to observe a multiple disadvantage for female migrant workers.¹² The above data clearly justifies the urgent interest in eliminating pay inequalities between men and women - and in particular female migrant workers – as these, in addition to discrimination, distort the overall labour market.

10 International Labour Organisation, 2020, pp. 1-2. On the unexplained part of the pay gap between men and women migrant workers, see also: Reid et al., 2022, p. 4.

11 Based on the average hourly wage.

12 International Labour Organisation, 2020. p. 1.

3. Equal Treatment in Slovak Law

3.3. Introduction to Anti-Discrimination Law in Labour Relations in Slovakia

In line with the overall development within the EU, anti-discrimination law in Slovakia is also evolving.¹³ Equal pay without discrimination is an integral part of this area of legislation. The fundamental pillar is the Constitution of the Slovak Republic, guaranteeing equality for all in dignity and rights. In accordance with Article 12(1) of the Constitution of the Slovak Republic, fundamental rights and freedoms are inviolable, inalienable, imprescriptible, and inderogable. In the field of labour law, the legal regulation is mainly concentrated in Act No. 311/2001 Coll., the Labour Code, as amended (hereafter the 'Labour Code'). In accordance with Section 13 of the Labour Code, employers are obliged to apply the principle of equal treatment in labour relations – which applies to both employees and job applicants.¹⁴ Any discrimination against employees is prohibited, including discrimination on the basis of sex, race, language, origin or ethnic group. The Labour Code provides for a number of rights on the part of the employee in this area, in turn matched by the employer's obligations. An employee has the right to lodge a complaint with respect to a breach of the employer's obligation to comply with the principle of equal treatment. Upon receipt of an employee's complaint, the employer shall respond to it in writing without undue delay. It shall also be obliged to remedy the situation, to refrain from the conduct violating the principle of equal treatment, and to eliminate the consequences of such conduct. However, in addition to the right to lodge a complaint with the employer, the employee has the right to apply to the competent court for legal protection. The Labour Code thus provides the employee with more legal tools to protect him or her against violations of the principle of equal treatment by the employer.

In addition to the Labour Code, other legislation contains legal provisions aimed at protecting against discrimination in labour relations. Slovak anti-discrimination legislation is primarily concentrated in Act No. 365/2004 Coll. on equal treatment in certain areas and protection against discrimination and on amendment and supplementation of certain acts (the Anti-Discrimination Act), as amended (hereafter the 'Anti-Discrimination Act'). The Anti-Discrimination Act is the general legal basis for anti-discrimination law in Slovakia. The prohibition of discrimination provided for in the Labour Code is in the position of *lex specialis* in relation to the

13 Barancová, 2019, p. 118.

14 National Labour Inspectorate, 2023, p. 2.

anti-discrimination law.¹⁵ The principle of equal treatment in employment relations is contained in Section 6 of the Anti-Discrimination Act. According to this provision, discrimination against persons on the grounds referred to in Section 2(1) – which includes discrimination on the grounds of sex, race, language, or ethnic origin – is prohibited. The principle of equal treatment under Section 6(1) also applies in the field of remuneration in employment.

3.4. Prohibition Against Discrimination in Labour Relations Under Slovak Law

The general prohibition against discrimination in Slovak labour law stems from Article 1 of the Fundamental Principles of the Labour Code, and the provisions of Section 13 of the Labour Code.¹⁶ Under Article 1 of the Fundamental Principles, natural persons have the right to work; to free choice of employment; to working conditions that are fair, satisfactory, transparent and predictable; and to protection against arbitrary dismissal. These rights are to be in accordance with the principle of equal treatment in labour relations laid down in the Anti-Discrimination Act. Equality in access to employment, pay and promotion, training and working conditions – in accordance with the principle of equal treatment without discrimination on grounds of sex – is laid down in Article 6 of the Fundamental Principles.

Anti-discrimination legislation has been subject to gradual development. The prohibition against discrimination was already part of the original wording of the Labour Code. The wording of Section 13 was based on Article 1 of the Fundamental Principles and Article 12 of the Constitution of the Slovak Republic.¹⁷ The legislation adopted was in line with Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, and Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex.¹⁸ Under Section 13, employees are entitled to rights arising from employment relationships without direct or indirect discrimination. The prohibition of discrimination under the original wording of section 13 included discrimination on grounds of sex, race, language, or ethnic origin. However, an exception was made where the law so provided – or where there was a substantive reason

15 Barancová, 2019, p. 117.

16 *Ibid.*, p. 118.

17 According to Article 12 of the Constitution of the Slovak Republic, fundamental rights and freedoms in the territory of the Slovak Republic are guaranteed to “everyone, regardless of sex, race, colour, language, belief and religion, political or other opinion, national or social origin, membership of a nationality or ethnic group, property, birth or other status”.

18 Explanatory Memorandum - Special Part to the Draft Labour Code, 2001, p. 112.

for the performance of the work, consisting in the prerequisites or requirements, as well as in the nature of the work to be performed by the employee. For the purposes of the principle of equal treatment, indirect discrimination was an outwardly neutral instruction, decision or practice which disadvantaged a substantially larger group of individuals, where such instruction, decision or practice was not appropriate and necessary and could not be justified by objective facts. According to the original wording of the Labour Code, an employee also had the right to file a complaint with the employer in connection with a violation of rights and obligations in the area of prohibition of discrimination, and the employer was obliged to respond to such a complaint without undue delay, to remedy the situation, to refrain from such conduct and to eliminate the consequences of such conduct. At the same time, if the employee felt aggrieved as a result of the failure to comply with the conditions relating to the prohibition of discrimination, they could pursue their rights before the competent court. It was for the employer to prove that there had been no breach of the principle of equal treatment. The exercise of a right arising out of the employment relationship could not be grounds for the employer to penalise or disadvantage the employee.¹⁹

The provision of Section 13 of the Labour Code has been amended several times. A more extensive modification of its wording occurred with the adoption of the Anti-Discrimination Act in 2004. The exception contained in Section 13(1) of the original version of the Labour Code – which consisted in narrowing the scope of restrictions and direct or indirect discrimination in cases where the law so provided, or where there was a substantive reason for the performance of the work, consisting in prerequisites or requirements, as well as in the nature of the work to be performed by the employee - was removed. However, the exception in question remained in Article 1 of the Fundamental Principles of the Labour Code. This amendment to the Labour Code removed the title of Section 13 (Prohibition of discrimination) and introduced a reference to the principle of equal treatment in employment relations in accordance with the Anti-Discrimination Act. The wording of Article 1 of the Fundamental Principles was amended by Act No. 48/2011 Coll., amending Act No. 311/2001 Coll., the Labour Code, as amended, and supplementing certain acts. According to the amended wording of the exemption, differential treatment is justified by the nature of the activities performed in the employment or the circumstances in which these activities are performed. This reason is intended to constitute a genuine and decisive requirement for employment, and the legitimacy of the aim and the reasonableness of the requirement are a condition.

Act No. 376/2018 Coll., amending Act No. 5/2004 Coll. on Employment Services and on Amendments and Supplements to Certain Acts, as amended, and amending and supplementing certain acts, brought a significant change. Under Section 13

19 For more details see the promulgated version of the Labour Code of 2 July 2001.

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of the Labour Code, a new paragraph 5 introduced a prohibition against obligating an employee to maintain confidentiality about the employee's working conditions, including wage terms and conditions of employment. At the same time, the provisions of an employment contract or other agreement between the employer and the employee which would impose an obligation on the employee to maintain confidentiality about his or her working conditions, including wage terms and conditions of employment, are null and void. The above provisions, albeit in a slightly modified form, are part of the currently valid and effective version of the Labour Code. The introduction of these provisions in the Labour Code was highlighted by the UN Committee on the Elimination of Discrimination against Women in its Concluding Observations on the Seventh Periodic Report of Slovakia published in 2023.²⁰

The principle of equal treatment in labour relations is also regulated in Act No. 5/2004 Coll. on Employment Services and on Amendments and Supplements to Certain Acts, as amended, (hereafter the 'Act on Employment Services'). In accordance with the principle of equal treatment laid down in the Anti-Discrimination Act, pursuant to Section 14(2) of the Act on Employment Services, a citizen has the right to access to employment without any restrictions. Any discrimination on grounds of language or origin is also prohibited. In case of violation of rights and obligations in connection with violation of the principle of equal treatment, a citizen has the right to lodge a complaint with the Office of Labour, Social Matters and Family, which is obliged to respond to such a complaint without undue delay, to remedy the situation, to refrain from the conduct in question, and to eliminate the consequences of such conduct. At the same time, in such cases, the citizen has the right to seek legal protection before the competent court. The Act on Employment Services links the principle of equal treatment to the right of access to employment of a citizen of the Slovak Republic. Pursuant to Section 2(2) of the Act on Employment Services, a citizen of an EU member state, a family member of a citizen of an EU member state, and a family member of a citizen of the Slovak Republic who are nationals of a third country and who have legal residence in the territory of the Slovak Republic – as well as nationals of the United Kingdom of Great Britain and Northern Ireland and members of their family who are nationals of a third country, nationals of a third country who have been granted asylum or subsidiary protection and nationals of a third country who have been granted residence in the Slovak Republic as third-country nationals who have been granted EU long-term resident status – have the same status as a citizen of the Slovak Republic in legal relations arising under this act. With regard to the above categories of persons, migrant workers – insofar as they are third-country nationals – may not fall under the above provisions of the Act on Employment Services in any case. On the other hand, mobile workers from other EU member states have the same

20 Committee on the Elimination of Discrimination Against Women, 2023, p. 2.

status as citizens of the Slovak Republic for the purposes of access to employment, and thus without any restrictions in accordance with the principle of equal treatment in labour relations.

The impetus for the adoption of the Anti-Discrimination Act into the Slovak legal system was primarily the obligation to transpose EU directives. The explanatory memorandum to the Anti-Discrimination Act shows that the aim of its adoption was to complete the transposition of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (hereafter 'Directive 2000/43/EC') and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (hereafter 'Directive 2000/78/EC').²¹ These directives do not provide for the concept of multiple discrimination, however they do not exclude situations in which multiple forms of discrimination would occur. In practice, there are often combinations of multiple grounds of discrimination. In the field of labour law, the consequences of multiple discrimination on an employee should be expressed in a different form of moral or pecuniary compensation, since it causes more serious consequences for the injured party.²² In August 2023, preliminary information was published according to which the text of the Anti-Discrimination Act should be amended in the coming period. One of the main objectives of this amendment is to define the concept of multiple discrimination.²³ The proposed text of this amendment is not currently available. However, the very intention of introducing this concept into Slovak law can be evaluated positively, especially in the case of female migrant workers, since in practice multiple discrimination often occurs especially in relation to women.²⁴

4.

Equal Pay Principle Under the Labour Code

The right to remuneration of employees for work performed is enshrined in Article 36 of the Constitution of the Slovak Republic. The principle of equal treatment in the field of remuneration is based on Article 6 of the Fundamental Principles of the Labour Code. According to this, both women and men have the right to equal treatment in relation to employment, remuneration and promotion, training and working

21 Explanatory memorandum to the draft act on equal treatment in certain areas and protection against discrimination and on amendment and supplementation of certain acts (the Anti-discrimination Act), 2004.

22 Barancová, 2019, p. 121.

23 For more details see: Preliminary information PI/2023/255.

24 Barancová, 2019, p. 121.

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conditions. The principle that women and men have the right to equal pay is covered by the provisions of Section 119a of the Labour Code. Remuneration conditions must be agreed without any discrimination based on sex. Remuneration includes any remuneration for work as well as other remuneration paid in connection with employment. Equal work or work of equal value is defined under Section 119a (2) as work of equal or comparable complexity, responsibility and exertion. It is performed under the same or comparable working conditions and with the same or comparable performance and results of work. At the same time, such work is performed in the course of employment with the same employer. The provision of Section 119a was added to the Labour Code by Act No. 348/2007 Coll., amending Act No. 311/2001 Coll., the Labour Code, as amended, and supplementing certain acts. This was a rather extensive amendment to the Labour Code, which primarily harmonised Slovak labour law with EU law.²⁵ The principle of equal pay has been added to the employer's basic obligations by this amendment to the Labour Code. According to the added provision of Section 82(c), managers are obliged to ensure that employees are remunerated in accordance with the relevant legislation, collective agreements and employment contracts, and at the same time to comply with the principle of equal pay under Section 119a. As stated in the explanatory memorandum to Act No. 348/2007 Coll., amending Act No. 311/2001 Coll., the Labour Code, as amended, and amending certain acts in its specific part, the principle of equal pay is one of the basic requirements of the EU. It is part of EU primary law and is also the subject of several directives in the field of EU secondary law.²⁶ This principle is also enshrined in the International Labour Organisation's Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, No. 100 of 1951. As further stated in the explanatory memorandum in this context, according to the relevant EU directives the principle of equal pay implies the elimination of any discrimination on grounds of sex, in relation to all aspects and conditions of pay. As the 2004 assessment of the Committee of Experts on the Application of Conventions and Recommendations of the International Labour Organisation shows, the principle of equal pay has not been sufficiently and unambiguously expressed in the previous wording of the Labour Code. These conclusions were drawn despite the adoption of the Anti-Discrimination Act and the application of the complexity and hardship criteria to ensure equality in

25 Explanatory memorandum - General part to Act No. 348/2007 Coll., amending and supplementing Act No. 311/2001 Coll., the Labour Code, as amended, and amending and supplementing certain acts, 2007, p. 1.

26 In this context, see Article 141 of the Treaty establishing the European Economic Community, Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

relation to women's and men's entitlement to remuneration. One of the objectives of this amendment to the Labour Code was to incorporate the requirement to add the obligation to ensure equal pay conditions for women and men also in the case of comparable work, i.e. work of equal value. The amendment also responded to the conclusions of the CJEU concerning the conceptual definition of remuneration. The principle of equal pay is to apply not only to all types of remuneration for work, but also to all remuneration provided to employees in connection with their employment, even if it is not regarded as wage under the relevant provisions of the Labour Code. The amendment has also introduced a modification reflecting the conclusions of the CJEU, where the scope of the principle of equal treatment also applies to employees of the same sex if they perform the same work or work of equal value. The amendment also modified the system of occupational classification used to determine the level of pay. This system must be based on the same criteria, irrespective of sex and excluding any discrimination.²⁷

5.

Current EU initiatives on equal pay

Despite the existing EU legal framework, there is still a gender pay gap.²⁸ Effective implementation and enforcement of the principle of equal pay in practice remains a challenge. The relevance of the topic is underpinned by the still relatively high and persistent gender pay gap in the EU. It currently stands at around 13%.²⁹ The primary factors are, in particular, the lack of pay transparency and the related lack of evidence of pay differentials, the inconsistency of applicable national case law, the lack of specific criteria in relation to application of the principle of equal pay, as well as sophisticated and hidden forms of discrimination.³⁰ In March 2020, the Commission adopted the Gender Equality Strategy 2020-2025, setting out the basic framework for efforts to advance gender equality in Europe and beyond. As one of the first outputs of the Gender Equality Strategy 2020-2025, the Commission proposed binding measures on pay transparency in 2021. It submitted a proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay between men and women through pay transparency and enforcement mechanisms (hereafter the 'Draft Directive'). It aims to address the persistent lack of

27 Explanatory memorandum - Special Part to Act No. 348/2007 Coll., amending and supplementing Act No. 311/2001 Coll., the Labour Code, as amended, and amending and supplementing certain acts, point 86, 2007, p. 14.

28 See for example: Polachek, 2019, p. 1 or Foubert, 2017, p. 88.

29 Eurostat, 2022, p. 2.

30 Burri, 2019, pp. 38-40.

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enforcement of the fundamental right to equal pay and to ensure its respect across the EU by setting standards in pay transparency and strengthening their effective application.³¹

A particular challenge in the implementation and effective enforcement of equal pay is the position of migrants in the labour markets of individual member states. The migration of workers is inextricably linked to today's increasingly globalised environment. Migration can contribute to stabilising the labour market. However, it is essential to ensure that the rights to which migrants are entitled in the context of legal migration are effectively defined and enforced, both at EU and national level. In line with the European Parliament resolution of 20 May 2021 on new avenues for legal labour migration, Article 79 TFEU provides for the management of legal migration at EU level and commits member states to the development of a common immigration policy, including common rules on the entry and residence of third-country nationals and the definition of the rights to which they are entitled.³² In relation to remuneration, this includes the principle of equal pay.

The Draft Directive has recently been approved by the EU institutions. The process of adopting the final text took two years. The Commission presented the Draft Directive to the Council on 4 March 2021. The European Economic and Social Committee subsequently delivered its opinion on 9 June 2021. On 30 March 2023 the European Parliament adopted its first reading position. Finally, on 24 April 2023 the Council adopted the final text of the Draft Directive. As stated by the General Secretariat of the Council, the outcome of the European Parliament's vote reflects a compromise agreement reached between the relevant EU institutions.³³ However, not all member states voted in favour of the adoption of the Draft Directive. Some member states attached statements justifying their decision to vote against the Draft Directive or to abstain from voting. Bulgaria, Hungary and Sweden were against the Draft Directive. Germany and Latvia abstained. Member states have highlighted some problematic parts from their point of view. It is clear from the statements of some member states that the interpretation of the term 'gender' has been particularly problematic.³⁴ The statements of Germany and Austria show the problematic nature of the use of the term 'racial origin'. In this context, they assumed that the clarification of the use of the term 'racial origin' in the recitals of Directive 2000/43/EC also applies to the

31 European Parliament, 2021, p. 3. See also: Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, 2021, p. 2.

32 European Parliament. 2021b, p. 4.

33 For more details see: General Secretariat of the Council, 2023, pp. 1-2.

34 In this context, see the statements by Bulgaria and Hungary: General Secretariat of the Council, 2023b, pp. 2-3.

Directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023 to strengthen the application of the principle of equal pay between men and women through pay transparency and enforcement mechanisms (hereafter the 'Pay Transparency Directive'). In addition, member states have warned in statements of the burden that the new obligations will impose on employers. The original text of the Draft Directive has therefore been modified. Employers will be obliged to provide information on the gender pay gap, depending on the number of employees, from differently defined periods. In Bulgaria's view, the inclusion of intersectional discrimination in the operative part would create legal uncertainty in view of the legal basis for the adoption of the Pay Transparency Directive, which is Article 157(3) TFEU. This article, as the statement goes on to say, only applies to the protection of equality between men and women on grounds of sex, but not to protection on other grounds or a combination of such grounds.³⁵ In the context of the statement in question, it seems useful to highlight the objective of the Draft Directive, which is to address the persistent lack of enforcement of the fundamental right to equal pay. It can be assumed, however, that the failure to include intersectional discrimination in the operative text of the Pay Transparency Directive may result in the non-coverage of multiple forms of discrimination against female migrant workers, which will contribute to the persistence of the pay gap.

6. Conclusion

The principle of equal pay is part of both the European and national legal framework. Nevertheless, gender pay inequalities persist. Female migrant workers are at a particular disadvantage in this respect, facing discrimination as both women and migrants at the same time. Legal instruments to ensure equal treatment are contained in a number of acts in Slovak law. From this perspective, the legal environment is based on defined rules in relation to the rights of employees and the obligations of employers. However, multiple discrimination is not clearly defined. The position of female migrant workers is thus insufficiently enshrined in law. At the same time, the factors causing their unequal status are largely linked to their multiple forms of discrimination. A new Slovak legislation that clearly defines multiple discrimination and clearly defines the determining factors for its elimination could bring about change. At EU level, the driving force could be the newly adopted Pay Transparency Directive,

35 On this point see: General Secretariat of the Council, 2023b, pp. 1-3. According to the recitals of Directive 2000/43/EC "The European Union rejects theories which attempt to determine the existence of separate human races. The use of the term 'racial origin' in this Directive does not imply an acceptance of such theories."

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which aims to ensure equal pay for men and women through pay transparency and enforcement mechanisms.

Equal pay has received attention for decades. However, attention to pay equality for migrant workers, particularly women, has lagged far behind the attention paid to the gender pay gap at large. The adopted text of the Pay Transparency Directive confirms these considerations. The obligations on employers in relation to intersectional discrimination were deliberately excluded from the scope of the Pay Transparency Directive in the process of adopting the final text. Discrimination under Article 3(2) formally includes intersectional discrimination in combination with any other ground or grounds of discrimination, but under Article 3(3), there are no additional obligations on employers to collect the data set out in the Pay Transparency Directive relating to protected grounds other than sex discrimination. Those grounds are precisely those on the basis of which female migrant workers face multiple forms of pay discrimination. Member states have an obligation to transpose the Pay Transparency Directive within a three-year period. In this respect, the Commission has stated that this is a compromise that has been reached and that the deviation from the standard two-year period should not act as a precedent for the future.³⁶

In accordance with Article 1 of the Pay Transparency Directive, the Directive sets minimum requirements to reinforce the application of the principle of equal pay. However, this is without prejudice to the adoption of more comprehensive legislation that is sufficiently targeted and specifically addresses also the aspect of multiple forms of pay discrimination of female migrant workers. In this context, a broader conceptual coverage of the area of equal pay and the grounds on which migrant workers – particularly women – face discrimination would be very beneficial. The transposition of the Pay Transparency Directive appears to be a specific instrument for achieving the EU's long-term objective of equal pay without discrimination. Otherwise, there may be insufficient coverage of the factors that cause the unequal position of female migrant workers, and thus a missed opportunity to adopt effective legal instruments aimed at ensuring equal treatment in all areas in the current period.

36 On the Commission's statement see: General Secretariat of the Council, 2023b, p. 5.

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Current Challenges of the Czech Space Sector

ABSTRACT: *On Wednesday May 3, 2023, Czechia signed the Artemis Accords. With this signature, this Central European country joins an ever-growing list of ambitious and prominent state actors in the NewSpace era. This milestone for the Czech space industry is a clear display of intent to actively participate in the new era of space exploration. Czechia has admirable STEM capacities which continue to grow, and is involved in many international space projects. Despite the general practice of legislation following technical progress, based on documents available to the public the state's focus does not seem to extend beyond the scientific and business aspects of space. The National Space Strategy – published in 2019 with plans for the 2020-2025 period – makes no mention of national space legislation. This paper maps out the current state of the Czech Space Sector, and focuses on its associated challenges. It covers Czechia's participation in the international space industry, and its membership and activities in space-relevant international organisations. It also aims to summarise Czech history with space law, and elaborate on possible future challenges and developments in national space law and policy.*

KEYWORDS: *national space law, Czech space law, Czech space sector, Intercosmos, national space governance*

1.

Introduction

In 2023 the Czech Republic – mainly referred to as Czechia in this article¹ celebrated 30 years since its establishment. Even as former Czechoslovakia, the country had a very strong track record in space, whether through science or industry. Now a proud member of the European Union and the European Space Agency, the state commits itself to the European approach to space and international cooperation. The ambitious phrase 'The space can become our sea' has appeared in the media recently,

1 Ministry of Foreign Affairs of the Czech Republic, 2016.

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hinting at how the countries that took part in the sea trade benefited immensely from it². Viewing space as a business opportunity points to a shift in the Czech perception of outer space. Now, in addition to space being observed through science, Czechia recognises its business opportunities and strives to be an active participant in the NewSpace era.

In this paper, the author aims to summarise Czech engagement in space and elaborate on possible challenges. Firstly, the rich history of the Czech space industry is emphasised. Secondly, the national institutional structure for space activities is introduced and its impacts are weighted. And lastly, the core focus of this article is on Czech involvement in space law and policy, accompanied by an outlook into the future. A significant portion of Chapter 4 is based on interviews with employees of the Ministry of Transport, Department of Space Activities and New Technologies, whom the author thanks for their cooperation and the time they took for answering questions.

2.

A History with Outer Space

Providing a historical context is important for better understanding the development of Czechia's space industry. Czechs first distinguished themselves as a nation after the First World War, which resulted in the dissolution of the Austro-Hungarian Empire. Czechoslovakia was established in 1918 and had the tenth-strongest economy in the world by the 1920s. This promised a bright future, and amongst the strongest industries were weaponry and shoemaking³. However, this "brightness" lasted only until 1938. After the Second World War, Czechoslovakia fell within the sphere of influence of the Soviet Union. This development is significant, since involuntary membership of the 'Eastern Bloc' – which lasted for over half a century – set the path for Czechoslovakia and its industry. Thus, until 1989 Czech engagement in the space industry was closely tied to the USSR.

1.1. Intercosmos

The 1960s were for many reasons a memorable decade for space exploration. In the light of Cold War hostility, the two ultimate world powers – the USA and the USSR – engaged in the so-called 'space race'. The Intercosmos programme was a part of the

2 Kozelka, 2022.

3 Šrámek, 2015.

USSR's efforts to foster cooperation within the Soviet bloc in the exploration of outer space. It was inaugurated in 1967, and outlined by the Agreement of Cooperation in the Exploration and Use of Outer Space for Peaceful Purposes of July 13, 1976⁴.

The programme was designed to give nations which were on good and friendly terms with the USSR access to crewed and uncrewed space missions. In addition to Czechoslovakia, other participating countries were Bulgaria, Cuba, Hungary, Mongolia, Eastern Germany, Poland, Romania, and Vietnam. Cooperating countries also included India, Syria, France and Great Britain.

After the dissolution of the USSR, Western nations participated in the programme too, and Intercosmos joined the International Solar Terrestrial Programme with NASA and the European Space Agency⁵.

1.2. MAGION satellites

The MAGION satellites were a prominent milestone in Czech space history. The five small satellites were manufactured in Czechia between the 1970s and 1990s, and were a part of the Czechoslovak space programme focused on research in the physics field. The name stands for both Magnetosphere and Ionosphere⁶, and the satellites' scientific purpose was to study the parameters of, and collect data on, magnetic, ionospheric and plasma presence in Earth's orbit.

MAGION satellites 1, 2 and 3 were launched within the frame of the Intercosmos programme; MAGION-4 and MAGION-5 were designed as part of the INTERBALL project. The five MAGION satellites were also the first entries within the Czech Space Objects Registry (more on this in Chapter 4.3.1). They are no longer operational, with MAGION-1 having burned up in the atmosphere.

1.3. Cosmonauts and astronauts

Different terms can be used when referring to those individuals who fulfil the role of what the Outer Space Treaty (OST) calls "the envoys of mankind"⁷. The most well-known term is 'astronaut', however terms such as 'cosmonaut'⁸ or 'taikonaut' are in use as well. The difference is in the origin of the agency under which such a mission

4 Grant and Barker, 2009.

5 Dasch and O'Meara, 2018.

6 Magion History.

7 Article V of the Outer Space Treaty: "States Parties to the Treaty shall regard astronauts as envoys of mankind in outer space (...)".

8 Greek words *cosmos* (space) and *nautes* (sailor) put together.

is conducted. Cosmonauts are trained and certified by the Russian Space Agency (formerly the USSR Space Agency). Astronauts are trained and certified by NASA, the ESA, CSA, or JAXA⁹, and taikonaut is a term used in the West for people undertaking Chinese space missions¹⁰.

In the history of Czech space exploration, the term cosmonaut is more prevalent and important. On 2 March 1978, Czechoslovakia gained its first cosmonaut with Vladimír Remek, who - accompanied by Aleksei Gubarev of the USSR - flew on board Soyuz 28. Their mission was to spend several days on the Salyut 6 orbital space station. It was the first Intercosmos mission with another national on board, making the significance of the mission not purely scientific but also political¹¹. They returned safely to Earth on 10 March, having spent almost 8 days in space. This made Czechoslovakia the third country in the world – after the US and the USSR – to reach outer space.

Debate exists on why the honour was even given to Czechoslovakia out of all participating Intercosmos countries. Some authors may credit this to participation in the Intercosmos programme, as up until 1978 45% of the experiments conducted on the satellites were of Czechoslovak origin¹².

Other sources, for example the recent multi-part documentary Czechoslovakian Space (Cz: *Československý vesmír*) by Czech Television, dive more into the political reasons. The USA considered plans for a rocket plane which could undertake numerous flights and transport into space not only American citizens but also nationals from European countries. This prompted the USSR to conduct a similar initiative, to also help other nations into space.

In 1976 the three westernmost countries of the Eastern Bloc were offered to present their candidates for spaceflight. Those were East Germany, Poland and Czechoslovakia. East Germany was likely aware that the milestone of a third nationality in space could not be granted to them so soon after the Second World War, so the final choice was between the latter two¹³.

The final choice was between the pairs of Vladimír Remek-Aleksei Gubarev and Oldřich Pelčák¹⁴-Nikolai Rukavishnikov. The sources differ in who had the final pick between the cosmonaut pairs. The Soviet side alleges it was done by a commission voting in Prague, however we can confidently assume it was rather a Soviet decision. Gubarev was a member of the military, and this gave him more leverage to be chosen for the spaceflight. The Czechoslovak half of the two crews did nothing to tip

9 Frost, 2017.

10 Smith, 2005.

11 Human Spaceflights, 2021.

12 Grün, 1978.

13 *Československý vesmír*, 2023.

14 Mr. Pelčák was a fighter pilot, graduated from the Gagarin Air Force Academy and a cosmonaut candidate. He passed away on October 7th 2023.

the scales, even though it was suggested that Remek's parents' origin contributed: his father was a Slovak and his mother a Czech, with his background representing both nations.

Now, after 45 years Czechia has currently two more opportunities to send its second citizen to outer space. One chance is via the public sector, while the other is from the private sector. During the ESA astronaut call finalised in November 2022 – which produced five career astronauts – fighter pilot Aleš Svoboda was selected as one of the members of the ESA astronaut reserve¹⁵. The twelve members of the reserve will not be permanent ESA staff, but could have the opportunity to be selected for specific projects and join the ranks of career astronauts in the future¹⁶.

In June 2023, Czechia received an offer from US-based private company Axiom Space to fly Svoboda to conduct his research in space aboard the International Space Station¹⁷. Axiom provides this opportunity to individuals through the Crew Dragon spacecraft built by SpaceX. Amongst nations who will venture out to space with Axiom are Saudi Arabia¹⁸ or Svoboda's colleagues from the ESA astronaut reserve¹⁹, Sławosz Uznański from Poland²⁰ or Marcus Wandt from Sweden²¹.

Taking up the offer to send a second Czech to space would cost the national budget roughly 41 million euros²². Despite these costs, such investment will be worth it and prove itself returnable in both scientific contribution and prestige, as pointed out by Svoboda himself²³. In addition, he emphasises the positive exposure of local universities and researchers²⁴. The question remains whether Czechia will decide to invest in this opportunity, or if the money will be acquired through private fundraising - if at all.²⁵

The second person to possibly become the second Czech in outer space is an artist and Czech Goodwill Ambassador Yemi Akinyemi Dele, known as Yemi A.D. (Yemi A.D. n.d.) – via a private company project dearMoon – which selected him in December 2022 (ČTK 2022). The project was initiated by Japanese billionaire Yusaku Maezawa, and plans to send a group of 8 international artists towards the Moon and back, with half of the crew descending to the Moon's surface and the rest staying in

15 ESA presents new generation of astronauts, 2022.

16 Astronaut selection 2021-22 FAQs,

17 CT24zive, 2023.

18 Reuters, 2022.

19 Wandt.

20 A Pole among the ESA astronaut reserve, 2022.

21 Lea, 2023.

22 Denko, 2023.

23 Kužel, 2023.

24 Dolejší, 2023.

25 In June 2024, Czechia has announced that the government will fund Mr. Svoboda's flight with Axiom, despite refusing the previous offer back in December 2023.

orbit. Yemi will be a member of the former group. The launch date, as of November 2023, is still undecided²⁶ as it is dependent on the Starship by SpaceX development and test schedule^{27 28}

Sending humans to space is an important part of space exploration. Even historically, such a mission holds prestige and opens many opportunities for the state. For example, the recent European Space Policy Institute brief analyses the undoubted economic benefits of such an endeavour²⁹. Czechia now faces the challenge of how to gain a second national astronaut – whether to wait for the ESA mission, the dearMoon crew launch, or to actively seek funding for the flight with Axiom Space.

3. Institutional Engagement

The beginnings of Czech space exploration were rooted in the Eastern Bloc. Since its newfound sovereignty in 1993, Czechia has become more involved in Western-led projects and sought memberships to many international organisations dealing with space activities. Building up its own space industry required the state to create and arrange a governing structure for management and supervision.

3.1. Governing Structure

At first, national space activities were led mainly by the Ministry of Education, Youth and Sport (MEYS). MEYS also deals with general research and development³⁰, suggesting that in the beginning space was seen more as a scientific research platform than a business opportunity.

The first National Space Plan (NSP) from 2010 provides the first comprehensive description of the governing structure, and discloses cooperation with a private non-governmental entity called the Czech Space Office (on which more in Chapter 3.2.1.) during the Czech ascension to the European Space Agency (ESA). Apart from MEYS, other ministries involved were and, in many ways still are, the Ministry of Transport (MT), the Ministry of Industry and Trade (MIT), the Ministry of Environment (ME) and the Ministry of Foreign Affairs (MFA). This fragmented structure is defended in

26 Announcement by dearMoon project, 2023.

27 Schedule.

28 The dearMoon project was cancelled in June 2024 due to delays in the SpaceX Starship development.

29 European Space Policy Institute, 2023.

30 From the History of the Ministry of Education

the NSP 2010 as necessary, due all the different aspects space utilisation provides, arguing that creating a singular authority would be too complicated. On the other hand, the NSP 2010 admits that this fragmentation may be an obstacle to the healthy and efficient development of the space sector³¹.

The follow up National Space Plan for 2014-2019 puts forth in its review of NSP 2010 precisely this problem. It further establishes that, in April 2011, the Czech Government gave the authority over national space activities to the MT. This ministry handles the national coordination of space activities to this day.

The MT is responsible for national regulations and space activities support (preparation and implementation of the NSP; overall membership of the ESA; EU space policy and the EU space programme).

The MFA joins the MT in the UN Committee on the Peaceful Uses of Outer Space (COPUOS). MEYS still is involved in Czech space activities but on the level of research and development, and it also cooperates with the MT on ESA affairs. The MIT takes responsibility for state industrial and trade policy, and for support of business and Czech companies' visibility through CzechInvest or Czech Trade initiatives.

3.1.1. Coordination Council for Space Activities

In April 2011 the MT also established the Czech Coordination Council for Space Activities (hereafter: 'the council'). It is still active, with seven governmental members – namely the MT, MEYS, the ME, the MFA, the Ministry of Defence (MD), and the Office of Government of the Czech Republic (OGCZ)³².

Other entities which are advised to participate when appropriate are the Ministry of Finance, the Ministry of Regional Development, the Ministry of the Interior, the Ministry of Agriculture, the Czech Telecommunication Office, the Czech Office for Surveying, Mapping and Cadastre, the National Cyber and Information Security Agency, the National Security Authority, the State Office for Nuclear Safety, the Czech Science Foundation, the Technology Agency of the Czech Republic and CzechInvest³³.

The council has three cross-sectional committees to share views with industry and academia, namely Industry and Applications, Science Activities, and Security and International Relations. Creating such a platform was necessary for tackling the fragmented structure, as it gives a platform for the representatives to meet and coordinate efforts. The council also contributes to the fulfilment of the National Space Plan.

31 Ministry of Education, Youth and Sports of the Czech Republic, 2011.

32 Koordinační rada pro kosmické aktivity.

33 Coordination of Czech Space Activities.

3.2. National Space Plan

Czechia has put forth three national space plans so far, each of which were in place for several years. The first National Space Plan (NSP) was published in 2010. The content was based on the National Space Strategy from December 2009. As mentioned previously, the authority over Czech space activities shifted to the MT only in 2011, and thus this first space plan was still facilitated under MEYS.

There were two main impulses for creating the NSP 2010. The first one was Czechia putting forth the candidacy of Prague as the seat of the European GNSS Agency (GSA), which resulted in being tasked by the EU to set up its national space programme. The second reason was the need to define the Czech space strategy for the CZECH/ESA Task Force working group (more on Czech ESA membership in Chapter 3.5.).

NSP 2010 set out medium-term objectives for the following six years, and reflected the needs of the Czech space sector at that time, stating explicitly in its preamble that its contents were addressed mainly to the relevant governmental bodies. Other possible recipients of the NSP contents were academia, industry, and the general public, to serve as a source of information more than any concrete recommendations or plans. However, even the first NSP emphasises the importance of space research and innovation for the competitiveness of Czech industries.

The second Czech NSP was for 2014-2019, this time put together by the MT. The reason for a new space plan so soon after the previous one is that Czechia had fulfilled the goals of NSP 2010 surprisingly quickly. The original deadline was 2016, however most of the medium-term objectives had been fulfilled by 2013. Now, the main goal of NSP 2014 was to increase competitiveness of the Czech space industry and advance its technological progress and innovations. It is also noticeably longer than the previous NSP, and dedicates more pages to relevant financing from the European Funds and its Czech Operational Programmes.

The third Czech NSP is the current one, as it plans for the period 2020-2025. The main objectives are building up Czech space capacities to increase excellence and competitiveness, as well as holding an active position in international relations. This should help increase the visibility of the country³⁴. NSP 2020 includes an evaluation of NSP 2014 and introduces 46 measures for the five-year period. A substantive part of the NSP 2020 focuses on education and awareness spreading at all educational levels. Another portion is dedicated to financing and participating in ESA projects and missions.

34 National Space Plan 2020 – 2025.

3.2.1. National Space Agency

The idea of having a national space agency is not a novelty in Czechia. In 2011 the National Economic Advisory Board to the Government (NERV) put forth an analysis regarding Czech technological advancements³⁵. It strongly recommended setting up a national space agency. According to the report, the lack of such an agency complicates cooperation on a higher international level with other national agencies such as NASA, JAXA in Japan, or the DLR in neighbouring Germany.

Apart from business opportunities for Czech companies, such an authority would be represented internationally, which could result in new jobs, better return on investments into space technologies, and overall improve the image of the Czech space industry. Bavaria is mentioned as an example of good practice when furthering the space field, as it mirrors Czechia in its size, population and schooling system³⁶).

However, there are currently no explicit plans to establish a national space agency. While an intent to do so was mentioned in every single National Space Plan so far – and in NSP 2020 is listed as measure number 1³⁷ – the plan has not yet come to fruition. This is caused by several factors.

As the outline of the Czech national institutional structure suggests, space-related areas are quite fragmented. Uniting those under a sovereign separate agency would require consensus amongst all involved governmental bodies, who would possibly have to hand over their authority.³⁸ Such transfer of competencies will require a thorough, separate plan with a clear outline - while the NSP treats it as a suggestion only and does not elaborate. Another complication is the funding, because in addition to institutional willingness there must be political will to supply the money. It is up for debate whether Czechia, in its current economic and political climate, is ready to take a step in the direction of its own national space agency. The obvious benefit would be to appear unanimous on the international scene.

The Czech Space Office (Cz: *Česká kosmická kancelář*, or CSO) was already introduced in Chapter 3.1. It is a private, non-governmental, non-profit entity established in 2003 to provide the largest and most effective involvement of Czech research, development and industrial institutions in international space projects³⁹. For years it has cooperated with MEYS and provided consulting of space activities. This was a unique arrangement, which has even been pointed out in NSP 2014, as it is unusual for a government to delegate a voice for its national space industry to a private entity.

35 NERV: V ČR by měla vzniknout Národní kosmická agentura, 2011.

36 NERV, 2011.

37 NSP, 2020, p. 54.

38 NSP, 2020, p. 117.

39 Kolář, 2012.

Nowadays it creates confusion on the international scene as to whether Czechia has an official space agency. As of November 2023, the CSO was even listed on a Wikipedia page of national space agencies⁴⁰. Even though the CSO website holds a disclaimer at the bottom of its page that its operation is “Co-financed by the Ministry of Education, Youth and Sports within INTER-EXCELLENCE programme”, it is unclear from the website information whether that is still the case, as the website is rarely updated. Most recent articles were published in 2015 or 2016. This suggests that the funding has been halted and the CSO does not actively engage in representation of the Czech space sector anymore. Nevertheless, the confusion still stands.

This may pose another challenge to Czechia’s self-representation. Either the CSO should be clearer on the website that they are not an official governmental entity, or Czechia should include an explanation of this situation on the official Czech Space Portal run by the MT. The current situation is very confusing, not only for other state representatives but for foreign researchers, businesses and investors as well.

3.3. International involvement

3.3.1. UN COPUOS

The United Nations Committee on the Peaceful Uses of Outer Space (UN COPUOS) was established after the launch of the first artificial satellite in 1958, due to growing concerns during the Cold War over what unregulated outer space may become⁴¹. Czechoslovakia was one of the 18 founding members, and has continued its membership as the Czech Republic since 1993. It regularly participates in both The Scientific and Technical Subcommittee (STSC) and The Legal Subcommittee.

3.3.2. European Union

In 2004 Czechia joined the European Union in its largest expansion to date – counting 10 countries, along with Slovakia, Poland and Hungary. The European GNSS Agency (GSA) was established in 2012 in Prague, and was followed by the European Union Agency for the Space Programme (EUSPA) in 2021. The GSA has been transformed to better cater to European needs in the growing space utilisation⁴².

40 Wikipedia Contributors, 2023.

41 COPUOS History.

42 From GSA to EUSPA: space transforming business and the economy, 2019.

The current plans are to relocate EUSPA into a larger building by 2025, and increase the number of its employees⁴³. The EU has also recently introduced plans to publish an EU Space Law. This will be elaborated on in Chapter 4.3.2.

3.4. Other relevant engagement

Apart from the ESA, the EU and the EUSPA, Czechia is involved in many more international organisations dealing with space. Since 2010 it has been a member of the European Organisation for the Exploitation of Meteorological Satellites (EUMETSAT) – a European operational satellite agency for monitoring weather, climate and the environment from space⁴⁴. Czechia takes part in the mandatory programmes but not the optional ones. Other memberships are of the European Southern Observatory (ESO, since 2006) NATO (since 1999), EUROCONTROL (since 1996), ICAO (since 1944, as Czechoslovakia), ITU (since 1920, as Czechoslovakia) and others.

These organisations are an important gateway for Czech engagement in the space industry. Based on how many Czechia takes part in, the intent of international cooperation and advertisement of local capacities is clear and well-handled.

Considering future plans, an interest has been expressed in becoming a member of Eurisy.⁴⁵ Looking at the nature of institutions that are current Eurisy members (space agencies, educational institutions, ministries), this will probably be done through the Ministry of Transport.

Apart from official memberships, Czechia is indirectly involved in other space-relevant organisations through private bodies. The International Astronomical Union (IAU), the International Aeronautical Federation (IAF; there are currently three Czech members in addition to the EUSPA – the Czech Space Alliance, the Czech Space Office, and most recently the Institute of Experimental and Applied Physics, of the Czech Technical University in Prague), and the Committee on Space Research (COSPAR).

In addition to engagement in international institutions, Czechia has also signed a three bilateral agreements or memoranda of understanding about space-related activities. Namely with Brazil in 2011, France (the UN Committee on the Peaceful Uses of Outer Space 2016) in 2014, and Luxembourg in 2018 (Luxembourg Ministry of the Economy and the Ministry of Transport of the Czech Republic 2018).

43 Hrabětová, 2022.

44 Who we are .

45 NSP 2020, measure 2.

3.5. European Space Agency

The predecessors of the European Space Agency were the European Launcher Development Organisation (ELDO) and the European Space Research Organisation (ESRO). ELDO, with six members (Belgium, France, Germany, Italy, the Netherlands, and the United Kingdom), was established to develop a heavy launcher. Another project, ESRO, followed soon after, with Denmark, Spain, Sweden and Switzerland joining the cause of undertaking scientific satellite programmes.

Both organisations were established by respective conventions, signed in 1962, that entered into force in 1964. Eventually ELDO and ESRO were merged to create the European Space Agency (ESA), which would respond more effectively to the different needs of the ever-evolving space sector⁴⁶. On 30 May 1975 the ESA Convention was opened for signature.

According to Article II of the Convention, the purpose of the ESA is to “elaborate and implement a long-term European space policy, by recommending space objectives to the Member States, by concerting the policies of Member States, and with respect to other national and international organisations and institutions”⁴⁷. Furthermore, Article XIV can be used to meet different needs of international cooperation. The article has three paragraphs, with the first dealing with the general principle of cooperation and the latter two with specific examples of cooperation – participation in ESA programmes or associate member status (European Centre for Space Law 1998). Czech involvement in the ESA shows clear dedication to this mission.

3.5.1. Membership Procedure

For non-member states, the ESA offers cooperation through the Plan for European Cooperating States (PECS) scheme, which provides the possibility to cooperate on some ESA projects. It is a route to becoming an associate member and later possibly a full member⁴⁸. This scheme has been used mostly by Central and Eastern European countries.

Since the ESA plays an important part in the European space industry, Czechia has strived for membership ever since the 1990s⁴⁹. The Agreement between the

46 Tinjod, 2015.

47 Sagath et al., 2018.

48 General overview.

49 Evropská kosmická agentura (ESA).

Government of the Czech Republic and the European Space Agency was signed on 7 November 1996, and entered into force on 5 November 1998⁵⁰.

In June 2000 Czechia started participating in PRODEX (Programme de Développement d'Expériences scientifiques, or PRODEX 2001), which is an optional scientific programme established to fund initiatives proposed by institutes or universities⁵¹.

The European Cooperating State Agreement between the European Space Agency and the Government of the Czech Republic was signed on 24 November 2003 and entered into force on 19 November 2004⁵².

The Programme of the European Cooperating State was also signed on 24 November 2003, and entered into force on 24 November 2004⁵³.

The PECS for Czechia was valid for the next 5 years, during which the space sector soared. In 2008 Czechia gained full membership with the milestone of being the first Central and Eastern European country to do so⁵⁴.

3.5.2. Projects and Funding

According to the ESA 2022 Annual Report, Czechia contributed 46.2 million EUR to its activities and programmes, which equals 0.9% of the ESA budget⁵⁵. Czech companies have been engaged in several significant projects, like the Ariane 6 launch system⁵⁶, the HERA mission and the PLATO mission. The participation of Czech companies seems to be increasing over the years, as well as Czechia's monetary contribution to the ESA. In 2022 it was announced that the budget would be raised to 62 million EUR⁵⁷.

In the same ESA 2022 report, it is stated that the agency currently employs nine Czech citizens (all A-grade positions⁵⁸). Programmes by the ESA such as the Young Trainee Programme have been attended by Czech nationals; however, as opposed

50 Sdělení Ministerstva zahraničních věcí o sjednání Dohody mezi vládou České republiky a Evropskou kosmickou agenturou o spolupráci ve výzkumu a využívání kosmického prostoru pro mírové účely, 1998.

51 Program vývoje vědeckých experimentů (PRODEX).

52 Sdělení Ministerstva zahraničních věcí o sjednání Dohody evropského spolupracujícího státu mezi Českou republikou a Evropskou kosmickou agenturou, 2004.

53 Sdělení Ministerstva zahraničních věcí o sjednání Listiny Programu evropského spolupracujícího státu, 2004.

54 Czech Republic accedes to the ESA Convention, 2008.

55 ESA, 2023.

56 Majer, 2020.

57 ČTK, 2022.

58 Includes scientific or engineering activities within the position, or professional administration relating to law, finance, contracts or administration.

to some other member states Czechia does not have its own separate national programme for students and graduates.

The NSP 2020 does mention within its measures (numbers 13-15) an intent to establish a Czech Trainee Programme or support its citizens through the International Space University with student loans or scholarships. Unfortunately, no known steps have been taken, nor can any specific scheme can be found.

4. Czechia and Space Law

Czechia has the privilege of being the birthplace of several important names, which have made a significant impact in international space law. Professor Vladimír Mandl is often credited as the author of the world's first comprehensive survey of space law⁵⁹ in the book *Space Law: A Problem of Space Travel* (De: *Das Weltraum-Recht: Ein Problem der Raumfahrt*).

Another space law expert, professor Vladimír Kopal, published one of his last works about this revolutionary legal persona⁶⁰. Professor Kopal himself was a well-respected international law expert and served as a chairman of the Legal Subcommittee of COPUOS from 1999 to 2004 and from 2008 to 2010.

4.1. International Law

Czechia is a signatory of four out of five main space law treaties: the Outer Space Treaty,⁶¹ the Rescue Agreement,⁶² the Liability Convention⁶³ and the Registration Convention.⁶⁴ However, it has never signed nor considered signing the fifth known space treaty: the Moon Agreement.

59 Plavec, 2011.

60 Hofmannová, 2014.

61 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies.

62 Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space.

63 Convention on International Liability for Damage Caused by Space Objects.

64 Convention on Registration of Objects Launched into Outer Space.

4.2. Artemis Accords

The Artemis program is a NASA mission to return humans to the Moon⁶⁵. The initiative is accompanied by a bilateral document – the Artemis Accords – which with its 13 sections has managed to spark international discussion.

This is due to its approach to safety zones on the Moon and the ownership of space resources possibly extracted from it⁶⁶. The document was drafted in 2020, and so far thirty-two countries and one territory have signed.⁶⁷

Czechia joined as the 24th country when Minister of Foreign Affairs Jan Lipavský signed the document during his visit to Washington DC on 3 May 2023⁶⁸. This was an important milestone for the Czech space sector, as it opened new cooperation opportunities.

4.3. National Space Legislation

We can observe a rising trend of states drafting their own national space legislation. According to UNOOSA, 43 states have a legislation that is somewhat related to outer space and outer space technologies⁶⁹. This number can vary throughout other sources, as it is subjected to individual assessment of what is deemed to be ‘space’ law.

For example, the German laws related to space deal only with remote sensing (Gesetz zum Schutz vor Gefährdung der Sicherheit der Bundesrepublik Deutschland durch das Verbreiten von hochwertigen Erdfernerkundungsdaten, from 2007) or transfer of responsibilities for space activities (Gesetz zur Übertragung von Verwaltungsaufgaben auf dem Gebiet der Raumfahrt, from 1990). Amongst the most active countries in space laws are the USA and Luxembourg.

It is desirable for countries to pay more attention to their national space activities via legislation. However, attention should not be applied only to the existence of the legislation itself, but also to its contents. In the legal field, a unified language and clear meanings are essential. Different definitions or varying interpretations of international space treaties can cause problems, especially in an effort to conduct outer space activities safely⁷⁰.

The UN General Assembly (UNGA) resolution from 2013 (Resolution 68/74) put forth recommendations for states when regulating their national space activities.

65 Artemis Accords

66 Riordan, Machoň & Csajková, 2023.

67 As of November 9th, 2023.

68 Czechia joins the Artemis Accords, 2023.

69 National Space Law.

70 Frans von der Dunk, 2006.

As a desirable content of such legislation (“should include”), the UNGA puts forth the topics of the launching of objects into – and their return from – outer space; operation of a launch or re-entry sites; and operation and control of space objects in orbit.

Furthermore, topics of design and manufacturing of spacecraft, the application of space science and technology, and exploration activities and research, are advised to be at least considered for inclusion in such laws⁷¹.

4.3.1. Czech Space Objects Registry

To fulfil obligations stemming from Article VIII of the Outer Space Treaty and Article II of the Registration Convention, each state is obliged to establish and maintain its national space object registry. The current Czech National Registry of Space Objects has been administered by the Ministry of Transport since 2014. It currently holds information about eight space objects, one of which (MAGION-1) has already decayed. The registry lists the launching state, registration number, date and territory or location of launch, basic orbit parameters and the general function of the space object.

MAGION-2 was originally registered by the USSR, but after 1990 the registration was transferred to Czechoslovakia. The United Nations registry which is kept by UNOOSA lists seven space objects registered under Czechia and four yet unregistered – VZLUSAT-2 (which can already be found in the Czech registry), BDSAT, PLANETUM1 and BDSAT-2 (the latter three are not noted within the Czech registry to this date).⁷²

The curious fact about the Czech registry is that the ownership and authority over it was moved four times. From 1979 it was administrated by the Czechoslovak Academy of Sciences (as the Czechoslovak National Registry of Objects), the Institute of Atmospheric Physics of the Czech Republic took over in 1996 until the CSO managed the registry from 2009 until 2014. As mentioned in Chapter 3.2.1., it is unusual to entrust a private entity with access to and administration of the national space objects registry.

This was fixed in 2014 when the authority was handed over to the Ministry of Transport via a Government resolution from 5 May 2014, number 326, on the designation of responsibility for the management of the National Register of Space Objects. This resolution is possibly the only document eligible to be considered a Czech space ‘law’, as Czech government resolutions are considered *secundum et intra legem*.⁷³

71 General Assembly resolution 68/74 Recommendations on national legislation relevant to the peaceful exploration and use of outer space, 2013.

72 October, 2023.

73 *Authorities may only act within the law.*

4.3.2. *The Future (of) Czech Space Law*

Outer space is subject to international law, and as such the state bears responsibility for all its activities. The most valid reasons for establishing a national space law are Article VI and Article VII of the OST, which deal with liability for space activities. Here it is up to the state to set further conditions for their companies to engage in space through legislation.

Czechia began working on its space law in 2018. Realising its great importance for furthering the space industry, discussions have been held about what the contents of national space law should be, so that they would cater to both state and private sector interests. These discussions, however, are never made public, and plans for national space legislation are not mentioned in the NSP 2020. No information about Czechia's intentions can be found online from official sources. By comparison, Poland is actively working on furthering a draft that has been mentioned in academic publications⁷⁴, and Slovakia and Hungary have informed COPUOS about their active works on national space legislation.

The only way to get a scope of the possible contents of the potential Czech Space Law is by contacting its Ministry of Transport directly. Thereby it seems the first challenge of Czech national space law is finding out whether plans for it exist or not. Some dated insight can be found in a thesis written by Klára Štenclová from April 2021, titled Article VI of the Outer Space Treaty and its implementation in Czech Republic⁷⁵. Chapter 7 of the work is dedicated to the future of Czech national space legislation, and is based on an interview with Michal Reinöhl, a Czech delegate to the ESA at the Administrative and Finance Committee and International Relations Committee, and an employee from the Ministry of Transport Space Activities and New Technologies Department.

In 2021 Czech national space law was supposed to include authorisation and supervision of space activities of private companies, as well as obligation to inform the relevant state body (which should also be set up by the law), and the requirement of insurance when conducting space activities. Damages exceeding the arranged insurance amount might be covered by the state.

The company was to have its individual activity authorised – as opposed to just gaining a licence to operate – and was to commit to not creating unnecessary space debris. Furthermore, the law was also to regulate the national space registry – meaning how the individual objects should be registered and under what requirements. At the time of the referenced interview, the planned year for implementing the law was 2022. This clearly did not come to fruition, as we are now near the end of

74 Konert & von der Dunk, 2023.

75 Štenclová, 2021.

2024 and no space legislation has been published. The reason for this could have been Czechia's presidency of the Council of the EU, as well as different matters requiring the department's and the lawmakers' attention.

To get a better scope of Czech plans and priorities for its national space law at present, this author has also reached out to Michal Reinöhl with a request for information on the current state of the legislation. The interview took place online on 30 October 2023. Another interview was conducted on 8 November 2023 with Václav Kobera, the Director of Space Activities and New Technologies Department of the Ministry of Transport, Czech delegate to the ESA (ESA Council, AFC Committee) and Czech delegate to the EC space bodies.

It is important to emphasise that the interviews covered merely the scope and overall intent of the department, and are not binding reflections of what may be published by the Czech government in the future. Everything can be subject to change, as the document is put forth for comments from other ministries, interested bodies or parliament. Both interviewees have provided a valuable insight which greatly contributed to this article. The following information about the progress of Czech national space legislation is based on those interviews, and the author is sharing this with the interviewees' permission.

The reason why drafting a national space legislation is not mentioned in any of the NSPs is apparently that it is not seen by the ministry as the proper platform to do so. Though it covers visions and objectives, NSPs are focused on the space economy, industry, and innovation. In the author's judgement, however, this should not exclude establishing a legal framework. Better governance of space activities can further these objectives too, by – for example – embedding space resources' best practices into them⁷⁶.

However, this poses a question as to whether Czech space legislation should aim that far, as only a few countries out of the many with space laws (see Chapter 4.4.2.) have included space resources. According to the ministry, there are no plans for Czechia to cover the issue of property and ownership rights to space resources in its national law, and a change in this approach is highly unlikely. Czechia is however a party to the Artemis Accords (see Chapter 4.3.), which provides an indirect clue as to how government views this issue.

In the works on the national space legislation, the ministry has consulted several sources – the UN General Assembly Resolution 68/74, the Sofia Guidelines for a Model Law on National Space Legislation of the International Law Association, and ESA-organised consultations. In addition to that, some of the fellow ESA member states, which have already passed national space laws, have been informally consulted. Choice of these consultants was made with the size of Czechia and its space industry

76 Gatto and Goessler, 2023.

in mind, as it has different needs for its legislation compared to, for example, France, with a launcher. Due to the similarity in size and historical development of law, cooperation with Austria is the most likely. The Austrian space legislation consists of the Austrian Outer Space Act from 2011, which was later joined by the Outer Space Regulation in 2015.

The intended contents of the space law have not changed much since those covered in the thesis from 2021. What may have changed, however, is the timeframe and the feeling of urgency to adopt a national space law. The author believes the reason behind this seeming reluctance – apart from the limited personnel capacities of the ministry and willingness of politicians – is the matter of mandatory insurance for space companies. Or rather, as it is planned, individual projects and missions. The ministry would prefer to authorise individual projects rather than give generic authorisation to a company. The insurance may be too expensive for many Czech companies, which would hinder progress and work against the desired results.

Based on the interviews, Czechia does realise the international trend of writing a national space law. Not only with the hope to achieve legal certainty by regulating space activities and fulfilling obligations as per international law, but also to protect the interests of the state in the NewSpace age, especially regarding liability. At the same time however, Czechia does not wish to overly restrict the activities of companies in its laws, which could slow industry progress. That seems to the author to be the prominent factor in why the ministry is reluctant to focus on legislation in the current moment.

Another factor that may be delaying the development of the law is a recent initiative from the European Union to create an 'EU Space Law' (EUSL). The form of this, whether it will be a directive or a regulation, is currently unknown. The ministry is likely to contribute to the public consultation. Another official Czech entity, the Civil Aviation Authority, has encouraged the air traffic management community to participate due to the impact of launches and re-entry of space objects on their work⁷⁷. The ministry believes the final EU law may cover some scope of the planned national space legislation, which could deem a national creation redundant.

The EUSL puts forth three pillars – safety, resilience, and sustainability⁷⁸. The safety pillar should cover satellite traffic and space debris; the resilience pillar the protection of satellites against threats such as cyber-attacks; and the sustainability pillar long-term sustainability of space operations for economic growth. Security was not touched upon as a topic possibly included in the Czech space law; prevention of orbital debris is merely 'considered'. The main motivations for drafting it seem to be the registration of space objects, authorisation of Czech space missions, and insurance. These are not very likely to be included in the EUSL.

77 Konzultační průzkum – EU Space Law, 2023.

78 Targeted consultation EU Space Law, 2023.

5. Conclusion

The Czech space sector is currently facing numerous challenges, and its success in tackling them varies. Firstly, we can assess that Czechia is successfully following up on its 20th century space industry through joining the ESA and the EU, which opened new possibilities for local companies and academia, hosting EUSPA headquarters, staying an active participant in COPUOS, and following industry trends through the strategic signing of the Artemis Accords.

Regarding national and international popularisation of the space industry, space gets more exposure on the news due to the efforts of the Ministry of Transport and local space companies. The most excessive exposure for the Czech space industry would be gaining another Czech astronaut.

Even though the governmental coordination of space activities has improved, the fragmented nature of the Czech space sector persists. Crucial steps towards this development were the establishment of the Coordination Council and moving the main responsibilities under the authority of the Ministry of Transport, such as maintaining the space objects registry. The establishment of a national space agency, which could help to alleviate the fragmented nature even more, unfortunately seems unlikely at present.

Legal aspects of space exploration do get some recognition in Czechia, and it remains committed to the four international space treaties it is a party to. Efforts to adopt a national space law are underway but are not treated as a priority. This is supported by the fact that plans for preparation have not been made public, nor have the contents been discussed with academia or stakeholders as of yet. The reluctance seems to stem from the limited capacities of the ministry, the worry of burdening the local private sector, and the announced development of space law by the European Union. Adopting a national space law seems like a challenge that will not be tackled anytime soon.

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Gellért NAGY*

The Protection of National Sovereignty and Constitutional Identity in the Case Law of the Constitutional Court of Romania

ABSTRACT: *One of the most crucial issues in the European Union arises in the relationship between its law and national constitutions. This issue has emerged as one of the breaking points of European integration, which could shape the future development of the EU and the integration process in the years to come. Although the Romanian Constitution recognises the primacy of EU law over national law (in Article 148 paragraph (2)), the case law of the Constitutional Court of Romania reflects that this primacy is far from absolute, since the Constitutional Court interpreted that EU law has no primacy over provisions that form the Romanian constitutional identity. Moreover, during the past few years the Court of Justice of the European Union opened a new area of interpretation of EU law, namely its primacy over the decisions of the national constitutional courts. This issue was first raised in relation to Romania and provoked fierce protest from the Constitutional Court. In the following contribution, I intend to analyse these cases and reflect on the judicial dialogue between the Constitutional Court of Romania and the Court of Justice of the European Union.*

KEYWORDS: *Constitutional Court of Romania, Court of Justice of the European Union, constitutional identity, national sovereignty, primacy of EU law.*

1. Introduction

The aim of this contribution is to provide a synthesis of the Romanian approach to the primacy of EU law – which may be useful not only for lawyers but also for the political community. In the words of the Portuguese jurist and politician Poiares Maduro,

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European integration challenges not just national constitutions, but constitutional law itself.¹

All these challenges can only be understood if we properly analyse the position of each member state and its relationship with EU law. This article undertakes such an in-depth analysis, presenting not only the constitutional regulatory framework, but also the relevant recent cases.

The dialogue between EU institutions and the Romanian public law authorities – in particular the Constitutional Court of Romania – has recently brought to the surface a number of diverging views. Their examination and analysis could play a significant role in shaping the future of the European Union.

Prior to this examination, however, it is necessary to refer to the principles of primacy and direct applicability of EU law. The principle of primacy has been laid down by the Court of Justice of the European Union (CJEU) in its case law, starting with the famous *Costa Enel* case.² Based on this principle, if there is a conflict between an EU law provision and a national standard, the EU law prevails. Nonetheless, this primacy does not lead to the invalidity of the national provision.³ At the same time it is pivotal to separate primacy from supremacy, because “while supremacy is simply a doctrine of hierarchy of powers, of subordination, the principle of primacy expresses the rules of division of competences between the Union and the Member States.”⁴ In contrast, the principle of direct applicability – which also appeared in the case law of the CJEU – presupposes that EU law is applied uniformly and entirely by the member states in a direct manner.⁵

2.

The Primacy of EU Law and the Concept of Sovereignty in the Romanian Constitution

In the years following the revolution of 1989, Romania made European and the North Atlantic integration a declared political priority. The state’s objective was therefore to join both the EU and NATO as soon as possible. At the same time, in the steps taken to achieve these objectives, it soon became clear – in the early 2000s – that the Constitution of Romania was not adequate to resolve the issues arising from

1 Vincze and Chronowski, 2018, p. 17.

2 Judgment of the Court in case C-6/64. ECLI:EU:C:1964:66. Available at: <https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A61964CJ0006> (Accessed: 26 July 2023).

3 Lupu, 2022, p. 112.

4 Gombos, 2019, p. 33.

5 Lupu, 2022, p. 94.

the relationship between domestic law and EU law.⁶ The Romanian legislator soon remedied the shortcomings and enshrined the primacy of EU law in the Romanian Constitution by Law No 429/2003 on the revision of the Constitution of Romania.⁷

The constitutional basis for the primacy of EU law in Romania therefore is provided by Article 148 (2) and (4) of the Constitution.⁸ According to these two paragraphs:

“(2) As a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act. [...]”

(4) The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that the obligations resulting from the accession act and the provisions of paragraph (2) are implemented.”⁹

The provisions of Article 148 (2) and (4) of the Constitution are often referred to – both in the legal literature and the case law of the Constitutional Court of Romania – as the compliance clause (Ro. *clauză de conformitate*)¹⁰ thus justifying its purpose – namely, to ensure the conformity of domestic law with EU law. As can be seen, the provisions on the primacy of EU law “[enjoy] a separate, carefully tailored, locus standi and a peculiar status quo in the Romanian constitutional architecture.”¹¹

Article 148 is fundamentally concerned with the essential elements deriving from the status of a member state, and as such recognises the primacy of EU law as one of these essential elements. Moreover, by virtue of paragraph (4), all three branches of power are responsible for guaranteeing this primacy.¹²

It is important to underline – in the context of the provisions of the Constitution on the primacy of EU law – that in the Romanian constitutional system, primacy is only given to the constituent treaties of the EU and to the other mandatory community regulations. Furthermore, the primacy of EU law does not apply in cases in which national rules are inconsistent with it, but only in relation to those which contain

6 Popescu, 2017.

7 I consider that it is a true reflection of the Romanian people's commitment to European values that the only constitutional amendment since 1991 was adopted in order to join the European Union and the North Atlantic Treaty Organisation (although there have been subsequent attempts to amend the Constitution of Romania, none of them have gone beyond the stage of the referendum).

8 Enache, 2014, p. 142.

9 The Constitution of Romania. Available at: <https://www.presidency.ro/en/the-constitution-of-romania> (Accessed: 02 June 2023).

10 Varga, 2019a, p. 24.

11 Viță, 2016, p. 1631.

12 Fuerea, 2019.

contrary provisions.¹³ On this basis, some scholars held that “Article 148 (2) of the Constitution partially restricts and also partially extends the scope of the primacy of Community law.”¹⁴

Moreover, this article creates the constitutional framework for the transfer of certain national competences to the European Union. However, as it has been expressed in the legal literature:

“[t]he transfer is neither a full transfer of sovereignty, nor can it be, as it would lead to the dissolution of the statehood of those who compose the Union, and the latter would turn into a federal state, which is not the reality, nor an explicit wish of the (majority) of the states.”¹⁵

It is pivotal to underline that all these observations are also in line with the case law of the Constitutional Court, which has already pronounced on Article 148 when examining the constitutionality of the proposed amendments in 2003. In the given decision, the Constitutional Court pointed out that the EU had not acquired its own sovereignty by the transferring of certain competences, and on the other hand stressed that EU provisions are in an intermediate position between the Constitution and other laws.¹⁶ All these findings were upheld by the Constitutional Court in its subsequent case law.¹⁷

The new approach to national sovereignty, resulting from the accession to the EU, is well reflected by the fact that the provisions of Article 148 (1) do not merely refer to the transfer of certain competences, but also to the exercise of some powers in common with the other member states.¹⁸

Therefore, it can be concluded that the provisions of the Constitution of Romania concerning the primacy of EU law must be interpreted in accordance with the constitutional framework on national sovereignty, since with its accession Romania did not completely abdicate its sovereignty, but merely transferred certain state competences and powers to the EU.

The provisions on sovereignty can be found in Article 2 of the Constitution of Romania, which states in (1) that “[t]he national sovereignty shall reside within the

13 Tănăsescu, 2008, p. 1440.

14 Ibid, p. 1441.

15 Varga, 2019b, p. 453.

16 Decision No 148 of 2003 of the Constitutional Court of Romania. Published in Official Gazette No 317/2003.

17 See for example: Decision No 683 of 2012 of the Constitutional Court of Romania. Published in Official Gazette No 479/2012; Decision No 64 of 2015 of the Constitutional Court of Romania. Published in Official Gazette No 286/2015.

18 Vrabie and Balan, 2004, p. 46.

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Romanian people, that shall exercise it by means of their representative bodies, resulting from free, periodical and fair elections, as well as by referendum."¹⁹

It can be observed that – when it comes to defining sovereignty – the Romanian Constitution applies the so-called ‘mystification strategy’²⁰ developed by French constitutional doctrine.²¹ Article 2 (1) of the Constitution traces its foundation of sovereignty back to Rousseau’s concept of popular sovereignty,²² where the sovereignty is the expression of the general will (Fr. *volonté générale*).²³ Similar to the French Constitution, the Romanian Constitution’s model of sovereignty, vested in the people, combines in itself “the national sovereignty based on the principle of representation and the republican popular sovereignty based on the principle of direct democracy.”²⁴ The text of the Constitution explicitly refers to both of the main elements of this mixed model: the possibilities offered by direct democracy (referendums) and by representative, indirect democracy (free, periodical and fair elections). As it was noted in the legal literature, by this model Romania tried “to reconcile fire and water and to combine the two theories in a compromise formula.”²⁵ However, according to some scholars, national sovereignty in the given context should not be seen in its traditional sense, but as equivalent to the sovereignty of the state.²⁶ On the basis of this interpretation, the Romanian Constitution’s definition of sovereignty can no longer be considered deficient, but merely open to criticism from a terminological point of view.²⁷

Undisputedly, this concept of sovereignty is – due to the accession to the EU – subject to a number of challenges. In its current form, the EU is able to harmonise integration with the sovereignty of the nation-states only if both the member states and the union respect the provisions of the founding treaties regarding competences. Although it is possible to go further, to the point of abdicating national sovereignty, at present this is not the case, nor is it in the interest of Romania.²⁸

19 The Constitution of Romania. Available at: <https://www.presidency.ro/en/the-constitution-of-romania> (Accessed: 02 June 2023).

20 For further information on the mystification strategy, see: Jakab, 2016, pp. 98–106.

21 The first sentence of Article 3 of the Constitution of France is almost verbatim the same as the Romanian Constitution’s concept of sovereignty: “[n]ational sovereignty shall vest in the people, who shall exercise it through their representatives and by means of referendum.” Available at: https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constiution_anglais_oct2009.pdf (Accessed: 03 June 2023).

22 For more on Rousseau’s concept, see: Balogh, 1899, pp. 42, 156.

23 Jakab, 2016, p. 99.

24 Ibid, p. 101.

25 Drăganu, 1993, p. 165.

26 Ibid, p. 166.

27 Ibid, p. 166.

28 Severin, 2020.

Furthermore, national constitutional courts have recently developed several control mechanisms to defend their sovereignty in the light of EU integration. One such mechanism – used by the Constitutional Court of Romania as well – is the identity control, under which member states act in defence of their constitutional identity. According to some scholars, constitutional identity “is a narrative, a story that is developed along constitutional principles, values, history and experience.”²⁹

Originally the concept of constitutional identity emerged as a defence against constitutional amendments – and eventually led to the development of the so-called ‘eternity clause’.³⁰ The Constitutional Court of Romania (similar to the case law of the German or French constitutional courts) considers as elements of the Romanian constitutional identity those provisions of the Constitution that are protected by eternity clause and thus cannot be subject to constitutional amendments.³¹ Under Article 152 of the Constitution of Romania, it is protected by eternity clause and, as such, is an element of the Romanian constitutional identity: “the national, independent, unitary and indivisible character of the Romanian state, the republican form of government, territorial integrity, independence of justice, political pluralism and official language” (Article 152 (1) of the Constitution of Romania). In addition, paragraph (2) points out that “no revision shall be made if it results in the suppression of the citizens’ fundamental rights and freedoms, or of the safeguards thereof.”

Nevertheless, as has been noted by some scholars, historically the Romanian constitutional identity has been characterised by an interesting dichotomy. This Janus-facedness can be still observed today: it is simultaneously Eurocentric and ethnocentric.³² It “reflects the strong desire of the Romanians to acquire constitutional modernisation in terms of constitutional Europeanisation and, at the same time, to keep their national ethnic identity.”³³ Ethnocentrism can be justified by historical reasons, such as the union of the Romanian-inhabited territories or the negative effects³⁴ of the system established during more than a century of domination by the Phanariot rule.³⁵ This dichotomy also permeates the spirit of the post-communist Constitution of 1991, since “the Constitution of 1923 was largely considered by the fathers of the post-communist constitution, who, however managed to recover not only some of its liberal elements but also its illiberal ethnocentric ethos.”³⁶

29 Boros, 2023, p. 24.

30 Orbán, 2020, p. 52.

31 Decision No 390 of 2021 of the Constitutional Court of Romania. Published in Official Gazette No 612/2021. Reasoning 81.

32 Guţan, 2022a, pp. 32–39.

33 Guţan, 2022b, p. 124.

34 This period is basically characterised as “*rapid turnover of princes and a high degree of corruption.*” See: Veress, 2022, p. 174.

35 Guţan, 2022b, pp. 109–110.

36 Ibid, p. 122.

In order to achieve the necessary balance between the protection of sovereignty and further integration, the EU institutions and the public law authorities of the member states have a key role to play, as a dialogue between them is essential to overcome the challenges. Therefore, it is worth examining how the Romanian public law authorities – in particular the Constitutional Court of Romania – relates to EU law and its primacy. In the following, I intend to review the relevant, recent case law of the Constitutional Court of Romania, reflecting also on the dialogue between the Constitutional Court and the CJEU.

3.

A Synthesis of the Relevant Case Law of the Constitutional Court of Romania

By the accession to the European Union, the provisions of EU law became “a reference instrument for the review of constitutionality, in the application and with the distinctions laid down in Article 148 of the Constitution.”³⁷

Recently, there have been a number of major cases in which the Constitutional Court of Romania interpreted the primacy of EU law. Moreover, the CJEU also ruled in some cases related to Romania, thus providing an opportunity to present the constitutional dialogue between the two institutions.

3.1. Decisions on the Establishment and Operation of the Section for the Investigation of Offences in the Judiciary

Romania, since its accession to the EU, has committed itself to the EU’s additional expectations through judicial reforms and the fight against corruption. A Cooperation and Verification Mechanism (hereafter: CVM) was established at the time of the accession, by Decision 2006/928/EC, in order to review and monitor these reforms. Later, Romania established an authority to investigate criminal offences committed by judges and prosecutors. This special authority was the so-called Section for the Investigation of Offences in the Judiciary (Ro. *Secția pentru investigarea infracțiunilor din justiție*, hereafter: SIOJ). Nonetheless, in 2018 - some days before the SIOJ came into force - the rules governing its operations were amended by a Government Emergency Ordinance (Government Emergency Ordinance No 90 of 2018 on certain measures for operationalisation of the SIOJ).

37 Stanciu and Safta, 2021.

These amendments have been shown to be relevant in several cases pending before national courts (e.g., proceedings for the annulment by an administrative litigation court of the Ordinance on the organisation and functioning of the SIOJ). In one of these cases an exception of unconstitutionality (*ex post* review) was raised against the provisions of the Government Emergency Ordinance and against Law No 304 of 2004 on the organisation of the judicial power. In several other cases references for preliminary ruling have been made to the CJEU, asking for an assessment of the compatibility of the amendments with EU law provisions.

In its Judgment of 18 May 2021,³⁸ the CJEU – acting jointly on the references for preliminary ruling – held *inter alia* that

*“the principle of the primacy of EU law must be interpreted as precluding legislation of a Member State having constitutional status [...] according to which a lower court is not permitted to disapply of its own motion a national provision [...] which it considers, in the light of a judgment of the Court, to be contrary to that decision.”*³⁹

In essence, the CJEU underlined that – according to the principle of the primacy of EU law - national courts must disregard even constitutional rules if they are contrary to EU law provisions.

To support this conclusion, the CJEU pointed out that

*“[b]y virtue of the principle of the primacy of EU law, a Member State’s reliance on rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of EU law. In accordance with settled case-law, the effects of the principle of the primacy of EU law are binding on all the bodies of a Member State, without, inter alia, provisions of domestic law relating to the attribution of jurisdiction, including constitutional provisions, being able to prevent that.”*⁴⁰

Already in the light of this judgment, the Constitutional Court of Romania examined the exception of unconstitutionality brought before it and, as will be seen below, reached a very different conclusion from that of the CJEU.

38 Judgment of the Court of Justice of the European Union in joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19. ECLI:EU:C:2021:393. Available at: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=241381&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=378468> (Accessed: 07 June 2023).

39 Ibid, Reasoning 252.

40 Ibid, Reasoning 245.

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In its Decision No 390 of 2021⁴¹ the Constitutional Court of Romania examined the exception of unconstitutionality raised by the associations “*Forumul Judecătorilor din România*” (‘Forum of Judges of Romania’) and “*Mișcarea pentru apărarea statutului procurorilor*” (‘Movement to Defend the Status of Prosecutors’) and by a natural person.

In the given decision, the Constitutional Court of Romania stated that the Constitution “is the expression of the will of the people, which means that it cannot lose its binding force only by the existence of a discrepancy between its provisions and those of the European Union.”⁴² The supremacy of the Constitution over the legal order should not be affected by the fact that a state, in our case Romania, is a member of the European Union. In addition, the Constitutional Court, referring to its case law, pointed out that although the member states delegate certain powers to the union in order to achieve community objectives, this transfer of competences must not, however, infringe the national constitutional identity of these member states.⁴³ According to this opinion, the member states do not transfer the powers and competences that are necessary to preserve their national constitutional identity. In this sense, national constitutional identity has a double purpose: it empowers the Constitutional Court to ensure the supremacy of the Constitution, and acts as a barrier to the prohibition of the adoption of rules contrary to EU law.

Moreover, the Constitutional Court also underlined in its decision that, although Article 148 of the Constitution provides that national courts must apply the EU law in the event of a conflict with national law, the terms ‘national law’ and ‘domestic law’ only refer to ‘infra-constitutional legislation.’⁴⁴ In the light of this, as interpreted by the Constitutional Court, Article 148 does not give primacy to EU law over the provisions of the Constitution of Romania.⁴⁵

41 Published in the Official Gazette No 612/2021.

42 Decision No 390 of 2021 of the Constitutional Court of Romania, Reasoning 79. This opinion was already stated by the Constitutional Court of Romania in its Decision No 80 of 2014 of the Constitutional Court of Romania. Published in the Official Gazette No 246/2014.

43 Decision No 390 of 2021 of the Constitutional Court of Romania, Reasoning 79. With regard to the term “*national constitutional identity*” it is worth pointing out that national constitutional courts use the phrase “*constitutional identity*”, while the Court of Justice of the European Union operates with the phrase “*national identity*”, which is also expressed in this way in Article 4 (2) of the Treaty on European Union. Nevertheless, in the case law of the Constitutional Court of Romania, the two terms are combined, somewhat strangely, in the term “*national constitutional identity*”. Since it is not the explicit purpose of my study to examine the substantive content of the two terms in depth (which I would not be able to do, due to the space limitations), I consider it important to simply point out that when the Constitutional Court of Romania refers to “*national constitutional identity*”, it is essentially referring to “*constitutional identity*”, as it is known in the legal literature.

44 Decision No 390 of 2021 of the Constitutional Court of Romania, Reasoning 83.

45 Ibid. This opinion was already stated by the Constitutional Court of Romania in its Decision No 148 of 2003 of the Constitutional Court of Romania. Published in Official Gazette No 317/2003.

In the meantime, the Craiova Court of Appeal also issued a reference for a preliminary ruling on the operation of the SIOJ and its compliance with EU law. This reference was ruled by the CJEU by Judgment of 22 February 2022.⁴⁶ In that Judgment, the CJEU – already aware of the relevant case law of the Constitutional Court of Romania – emphasised that:

“[i]f a constitutional court of a Member State considers that a provision of secondary EU law, as interpreted by the Court, infringes the obligation to respect the national identity of that Member State, that constitutional court must stay the proceedings and make a reference to the Court for preliminary ruling under Article 267 TFEU, in order to assess the validity of that provisions in the light of Article 4(2) TEU, the Court alone having jurisdiction to declare an EU act invalid.”⁴⁷

This ‘exchange of judgments’ between the Constitutional Court of Romania and the CJEU, as described above, accurately reflects the fact that the issues raised go well beyond the changes in the functioning of the SIOJ and their compatibility with EU law. In essence, the two institutions cannot find common ground on the question of the extent of a member state’s constitutional identity, nor on who has the power to declare that an EU norm infringes on that identity.

It is salient to note that, as the case law presented above also reflects, the Constitutional Court interpreted that an EU law provision that is contrary to the Constitution has primacy over domestic law only after the amendment of the Constitution, in accordance with Article 11(3) of the Constitution. Nevertheless, in Romania constitutional amendments must also comply with certain material limits, which are contained in the eternity clause, in Article 152 of the Constitution.⁴⁸ On this basis, the Constitutional Court linked the eternity clause to the core of the Constitution, against which EU law does not prevail.

In accordance with the opinion expressed by some scholars, we can state that “[t]he eternity clause provides a strong constitutional basis for invoking the national constitutional identity in relation to the principle of (possibly) absolute primacy of the European law.”⁴⁹

46 Judgment of the Court of Justice of the European Union in Case C-430/21. ECLI:EU:C:2022:99. Available at: <https://curia.europa.eu/juris/document/document.jsf?text=8&docid=254384&pageIndex=0&doclang=EN&mode=lst&dir=8&occ=first&part=1&cid=21075214> (Accessed: 12 June 2023).

47 Ibid, Reasoning 71.

48 Guțan, 2022a, 31.

49 Varga, 2019a, p. 23.

The possibility that an EU law norm may infringe the constitutional identity of a member state should be examined by the CJEU in close cooperation with the constitutional court of the member state concerned. This solution would also be in line with the principle of sincere cooperation between the European Union and its member states.

Moreover, in this cooperation the CJEU should also take into account the fact that “[c]onstitutional courts are best placed to be familiar with national evolutions when analysing complex issues arising in the relationship between national and EU law.”⁵⁰ On this basis, the role of the national constitutional courts is indisputable in determining whether an EU law provision violates the constitutional identity of the state in question.

3.2. A New Issue: the Question of the Primacy of EU Law Over the Decisions of the National Constitutional Courts. The Euro Box Promotion Judgment.

Over the past few years, the CJEU opened up a new area of interpretation of EU law, namely its primacy over the decisions of the national constitutional courts. This issue was first raised in relation to Romania and initiated a considerable political and legal debate in the country.

Of particular relevance to this issue is the Judgment of the CJEU of 21 December 2021⁵¹ (hereafter the *Euro Box Promotion* judgment). This judgment was delivered in connection with five references for preliminary ruling.

All five references for preliminary ruling were based on the same factual situation: the Constitutional Court of Romania (in the context of *ex post* reviews or solving legal disputes of a constitutional nature between public authorities) had pronounced decisions finding either that criminal procedural rules were unconstitutional or that the rules on the composition of the court chamber were contrary to the Constitution. These decisions of the Constitutional Court had an effect on all the ongoing criminal proceedings, concerning corruption and maladministration, in the framework of which the references for preliminary ruling had been formulated.

The national courts addressed the CJEU, among others: “[m]ust the primacy of EU law be interpreted as permitting a national court to disapply a decision of the

50 Teodoroiu, Enache and Safta, 2019, pp. 45–46.

51 Judgment of the Court of Justice of the European Union in joined cases C-357/19, C-379/19, C-547/19, C-811/19, C-840/19. ECLI:EU:C:2021:1034. Available at: <https://curia.europa.eu/juris/document/document.jsf?jsessionid=3754DC8DE20A524AC21797BCAAE42FFC?text=&docid=251504&pageIndex=0&doclang=HU&mode=lst&dir=&occ=first&part=1&cid=2486417> (Accessed: 09 June 2023).

constitutional court delivered in a case relating to a constitutional dispute, which is binding under national law?”⁵²

With regard to this question, the CJEU, on the one hand, held that it has the exclusive jurisdiction to give interpretation of EU law and to clarify “the scope of the principle of the primacy of EU law.”⁵³ On the other hand, it underlined that:

*“in accordance with the principle of primacy, the national court called upon within the exercise of its jurisdiction to apply provisions of EU law is under a duty, [...] to give full effect to the requirements of EU law in the dispute brought before it by disapplying, as required, on its own authority, any national rule or practice, even if adopted subsequently, that is contrary to a provision of EU law with direct effect.”*⁵⁴

In the light of this, the CJEU ruled – also in the light of its case law – that the primacy of EU law precludes any national rule or practice under which the decisions of constitutional courts are binding on national courts, and judges are obliged to apply them even against EU law in their jurisdiction, under the penalty of disciplinary sanctions.⁵⁵

This judgment has been the subject of much criticism in the legal literature. On the one hand, it could easily lead to the conclusion that the decisions of the Constitutional Court are not to apply at all and that the CJEU, acting as a court of appeal, can overrule these decisions.⁵⁶ It can be presumed that the CJEU did not intend to promote this interpretation, but the possibility of interpreting the judgment in such a manner should have been explicitly excluded by a more precise and transparent reasoning.⁵⁷

On the other hand, the CJEU did not adequately distinguish between the primacy of EU law over national constitutions and over the decisions of the constitutional courts, so it would have been useful to clarify this aspect in the judgment as well.⁵⁸

As a response to this judgment, the Constitutional Court of Romania issued a press release on 23 December 2021. In this press release it sought to nuance the wording of the judgment. First of all, the Constitutional Court underlined that its decisions are binding under the provisions of the Constitution [Article 147 (4)]. On this basis, the *Euro Box Promotion* judgment

52 Ibid, Reasoning 111.

53 Ibid, Reasoning 254.

54 Ibid, Reasoning 252.

55 Ibid, Reasoning 264.

56 Carp, 2022, p. 399.

57 Ibid.

58 Ibid.

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“can only produce effects after the revision of the Constitution in force, which, however, cannot be done by operation of law, but only on the initiative of certain subjects of law, in compliance with the procedure and under the conditions laid down in the Romanian Constitution itself.”⁵⁹

Regarding this reaction, a legitimate question may arise: what is the legal binding force of a press release, and to what extent can it be invoked? In line with the opinion expressed in the legal literature, I consider that this press release is not binding in itself.⁶⁰ At the same time, the arguments advanced in it may be invoked before the Constitutional Court in a future constitutional review. Moreover, in time the arguments set out in the press release may also appear as a matter of principle in the practice of the Constitutional Court. Therefore, this press release can also be interpreted as a general guideline.⁶¹

The need for cooperation between the EU institutions and national authorities – and more specifically between the CJEU and the constitutional courts of the member states – is also emphasised in the present judgment. It is beyond dispute that with this judgment the CJEU sought to limit the binding force of the decisions of national constitutional courts in cases where they contravene the principle of the primacy of EU law. However, in making this conclusion it did not take into account either the specific features of the public law systems of the member states, nor the constitutional role of the national constitutional courts.

3.3. The Question of the Primacy of EU Law Over the Decisions of National Constitutional Courts in Matters Relating to the Limitation Period

In the summer of 2023, the Constitutional Court of Romania and the CJEU had another ‘exchange of judgments’, which once again focused on the primacy of EU law over the decisions of the national constitutional courts.

In 2022 the Constitutional Court of Romania ruled⁶² on several exceptions of unconstitutionality. These exceptions challenged the constitutionality of the provisions of Section 155 (1) of the Criminal Code, according to which “[t]he running of the limitation period of criminal liability shall be interrupted by the performance of any procedural act in the case.” The petitioners stated that, by a decision pronounced in

59 Press release of the Constitutional Court of Romania, 23 December 2021. Available at: <https://www.ccr.ro/en/press-release-23-december-2021/> (Accessed: 12 June 2023).

60 Carp, 2022, p. 399.

61 Ibid.

62 Decision No 358 of 2022 of the Constitutional Court of Romania. Published in the Official Gazette No 565/2022.

2018,⁶³ the Constitutional Court already admitted an exception of unconstitutionality and found that the legislative approach providing for the interruption of the course of the limitation period of criminal liability by performing “any procedural act in the case”, in the provisions of Section 155 (1) of the Criminal Code, is unconstitutional.⁶⁴ Nevertheless, these provisions were still enshrined in the Criminal Code and the legislator failed to amend them.

The Constitution Court of Romania held (already in its decision pronounced in 2018) that the provisions of Section 155 (1) of the Criminal Code lack predictability and, at the same time, are contrary to the principle of the legality, since the phrase “any procedural act” also refers to acts which are not communicated to the suspect, thus preventing them from knowing whether the running of the limitation period has been interrupted.⁶⁵

The Constitutional Court found that the situation created by the passivity of the legislator represents a violation of the provisions of Article 1 (3) and (5) of the Constitution, which enshrines the character of the Romanian State as a state governed by the rule of law, as well as the supremacy of the Constitution.⁶⁶ In order to restore constitutionality, it is necessary for the legislature to clarify and detail the provisions relating to the interruption of the running of the limitation period for criminal liability.⁶⁷

On the basis of the decisions of the Constitutional Court (and of the Decision No 67 of 2022 of the High Court of Cassation and Justice) a number of criminal proceedings have been declared time-barred, by the statute of limitations, and thus terminated. In some of these cases, the Braşov Court of Appeal rendered references for preliminary ruling to the CJEU, asking the court to examine how the situation arising from the decisions of the Constitutional Court relates to EU law.

One of these references for preliminary ruling was decided by the CJEU on 23 July 2023.⁶⁸ In this judgment, it essentially reiterated the principles set out in the *Euro Box Promotion* case but – partly because of the nature of the questions under examination – clarified them.

First of all, in the given judgment the CJEU held that the legal situation resulting from the application of the decisions of the Constitutional Court of Romania and of

63 Decision No 297 of 2018 of the Constitutional Court of Romania. Published in the Official Gazette No 518/2018.

64 Decision No 358 of 2022 of the Constitutional Court of Romania. Reasoning 13.

65 Ibid, Reasoning 42.

66 Ibid, Reasoning 75.

67 Ibid, Reasoning 76.

68 Judgment of the Court of Justice of the European Union in case C-107/23. ECLI:EU:C:2023:606. Available at: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62023CJ0107> (Accessed: 26 July 2023).

the High Court of Cassation and Justice risks that serious frauds against the financial interests of the EU will remain unpunished.⁶⁹

Moreover, on the basis of the principles set out in the *Euro Box Promotion* judgment, the court emphasised that national courts have the obligation to disapply national provisions that prevent the application of sanctions against offences in connection with fraud proceedings affecting the financial interests of the EU.⁷⁰

On this basis, taking into account the relevant provisions of the founding treaties, the CJEU found that national courts are required to disapply the Decisions of the Constitutional Court of Romania (Decisions No 297 of 2018 and No 358 of 2022) as well as the Decision of the High Court of Cassation and Justice "in so far as those judgments have the effect that criminal liability is time-barred in a large number of cases of serious fraud affecting the financial interests of the European Union."⁷¹

However – as it was pointed out in the legal literature after the publication of the judgment – these arguments of the CJEU must be interpreted in the light of the judgment as a whole and as such are nothing more than an expression of the primacy of EU law.⁷² Yet, in addition to these arguments, the CJEU also listed a number of other arguments, such as the fact, that "the Romanian Constitutional Court applied a national standard of protection of fundamental rights which supplements the protection against arbitrariness in criminal matters offered by EU law."⁷³

Moreover, the Decision of the High Court of Cassation and Justice and the relevant decisions of the Constitutional Court of Romania were based on two separate principles. Whilst the later was based on "the principle that offences and penalties must be defined by law, as to its requirements relating to the foreseeability and precision of criminal law", the Decision of the High Court of Cassation and Justice was connected to the "principle of retroactive application of the more lenient criminal law (*lex mitior*)."⁷⁴ It is therefore important to distinguish between the Decision of the High Court of Cassation and Justice and the decisions of the Constitutional Court, and the CJEU took this aspect into consideration.

Considering all the arguments put forward, the CJEU gave a much more nuanced answer to the questions raised by Braşov Court of Appeal. The court considered that the referred EU law provisions (Article 325(1) TFEU and Article 2(1) of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests) must be interpreted in a way that the national courts

69 Ibid, Reasoning 91.

70 Ibid, Reasoning 97.

71 Ibid, Reasoning 98.

72 Blendea and Toader, 2023.

73 Judgment of the Court of Justice of the European Union in case C-107/23. Reasoning 115.

74 Ibid, Reasoning 102.

“are not required to disapply the judgments of the constitutional court of that Member State invalidating the national legislative provision governing the grounds for interrupting the limitation period in criminal matters, as a result of a breach of the principle that offences and penalties must be defined by law, as protected under national law, as to its requirements relating to the foreseeability and precision of criminal law, even if [...] a considerable number of criminal cases, including cases relating to offences of serious fraud affecting the financial interests of the European Union, will be discontinued because of the expiry of the limitation period.”⁷⁵

However, on the other hand, national courts “are required to disapply a national standard of protection relating to the principle of the retroactive application of the more lenient criminal law (*lex mitior*) which makes it possible [...] to call into question the interruption of the limitation period for criminal liability in such cases by procedural acts which took place before such a finding of invalidity.”⁷⁶

The answer to the third question raised by the Braşov Court of Appeal further nuances the situation, as the CJEU stated that the principle of primacy EU law precludes any domestic law under which the national courts of a member state are bound by decisions of the Constitutional Court and the High Court of Cassation and Justice, if that case law is contrary to the provisions of EU law.⁷⁷ This third response is essentially a repetition of the principles stated in the *Euro Box Promotion* judgment.

4.

Closing Remarks and Some Conclusions

It is a fact that, by acceding to the EU, Romania has transferred certain powers and competences and has given primacy to EU law over contrary provisions of national law (as it is reflected in Article 148 of the Romanian Constitution). However, as it can be observed from the cases presented above, there are significant divergences between the EU and national public authorities on the question of how far exactly the primacy of EU law can extend. Through its recent case law, the Constitutional Court of Romania joined the ranks of national constitutional courts that consider that the primacy of EU law should not infringe the constitutional identity of a member state. On the other hand, the CJEU, on the basis of the principles set out in its case

75 Ibid, Reasoning 138.

76 Ibid, Reasoning 138.

77 Ibid, Reasoning 138.

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law, intends to uphold the primacy of EU law even over the decisions of the national constitutional courts.

In order to solve these conflicts, several solutions have been proposed in the legal literature, such as: clarification and specification of EU and member state competences; the more pronounced role and application of the principle of subsidiarity and "strengthening the democratic function of the European Parliament."⁷⁸ At the same time, the most essential first step would be to promote sincere cooperation between EU and national institutions, to achieve a mutually respectful dialogue, in which both sides take into account the arguments and reservations of the other. As it has been stated in the legal literature:

*"each individual state, in particular through its constitutional case law, as well as through the case law of the Court of Justice of the European Union, can contribute separately and together through a sustained constitutional dialogue not only to the solution of specific disputes, but also to the development of the idea of national constitutional identity in relation to European constitutional identity."*⁷⁹

78 Mathieu, 2021, pp. 142–144.

79 Varga, 2019b, p. 466.

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Ana PANEVA*

The Advantages, Risks, and Rules of Installing Video Surveillance in Workplaces

ABSTRACT: *The monitoring of employees is an issue closely related to the right to privacy, protection of personal data, and dignity. The development of modern technology has brought many benefits, but also risks – to which special attention should be paid, especially with the installation of video surveillance systems. The data collected during video surveillance is usually images relating to an identified person, or a person who can be identified – directly or indirectly – to monitor behaviour. As video monitoring spreads, people's freedom of movement and behaviour, and their privacy, are therefore reduced. Video surveillance is used for various purposes, but mostly for security - where guarantees must be taken to avoid any misuse for completely different and individual purposes (e.g. for marketing; to monitor the work of employees, etc.). This paper provides an analysis of the rules and regulations in Macedonian legislation. Special attention is paid to the procedure and circumstances under which it is possible to install permanent video surveillance to control work activity.*

KEYWORDS: *video surveillance, workplace, data protection, procedure.*

1.

Introduction

In our increasingly digitised and interconnected world, the intersection of modern technology and the right to privacy has become a matter of concern. The rapid development of advanced technologies has ushered in a new era of convenience, efficiency, and security – but it has also raised crucial questions regarding the protection of personal data and individual dignity. One significant concern in this scenario is the intricate matter of employee monitoring. This issue revolves around a delicate balance between the necessity of maintaining workplace security and the fundamental rights of individuals regarding privacy, personal data protection, and human dignity.

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One aspect of this challenge involves the use of video surveillance systems. These systems have become pervasive in various environments, offering valuable tools for security and asset protection. However, with this increasing prevalence comes the potential for encroachment upon the individual rights of those being observed. The data captured through video surveillance invariably comprises images of identified individuals – or those who can be indirectly or directly identified – providing a comprehensive record of their actions and behaviour. As these surveillance systems expand their reach, there is a corresponding reduction in the privacy and freedom of movement of those under their surveillance.

Video surveillance is used for a variety of purposes, but mostly for security, where guarantees must be taken to avoid any misuse for completely different and for individual purposes (e.g., for marketing; to monitor the efficiency of employees' performance, etc.). As such, it is imperative to establish clear legal guidelines and regulations to safeguard the rights and freedoms of individuals, while upholding the legitimate objectives of surveillance.

This paper embarks on an in-depth examination of the rules and regulations within North Macedonian legislation. It delves into the specificities of the procedure, and the circumstances under which the installation of permanent video surveillance systems is permissible. This paper aims to clarify the complex legal system that governs the intersection of technology and individual rights, with a specific emphasis on the legal framework in Macedonia.

In the following, the paper will delve into the complexities of video surveillance, examining the challenges of balancing security with personal privacy; it will assess the existing legal safeguards and their effectiveness in achieving a fair equilibrium. Ultimately, this paper aims to contribute to the ongoing discourse on surveillance, privacy, and the protection of personal data – offering insights into how North Macedonian legislation addresses the challenges and complexities posed by video surveillance.

2.

The Legal Framework of the Right to Privacy

One of the most important aspects of moral integrity is a person's privacy, and it is therefore necessary to enjoy legal protection. Hence, the right to privacy is one of the most basic human rights, among a wider group of civil-political rights.

However, modern understandings of privacy were only formed after World War II.¹ In 1947 the United Nations (UN) created the Human Rights Commission

1 Neuwirth, 2007, p. 1.

and prepared the Universal Declaration of Human Rights (UDHR),² which has a fundamental significance in building legal frameworks in the field of human rights and freedoms. This declaration, accepted on December 10, 1948, by the UN General Assembly, became the first universal legal document of worldwide significance that deals exclusively with human rights and freedoms. The right to privacy is enshrined as one of the 30 articles of the declaration, with Article 12 emphasising: “No one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”

The right to privacy in the International Covenant on Civil and Political Rights³ of 1966 is based on the principle of the UDHR and refers to the right of every person to be protected from arbitrary and unlawful interference with his private life, family, home, or correspondence.⁴ In addition, if the person believes that his right to privacy has been violated, he has the right to legal protection and can turn to the competent judicial authorities for the determination of damages and the protection of his rights.

The European Convention for the Protection of Human Rights⁵ is also an important international document in which the right to privacy can find its foundations. The European Convention – one of the most important international agreements for the protection of human rights in Europe – has been accepted by the Council of Europe and aims to protect and ensure the fundamental rights and freedoms of the signatory states.⁶ The protection of privacy is declared in Article 8 of this convention and reads:

“Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary for a democratic society 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.”

2 The Universal Declaration of Human Rights was adopted and published in Resolution 217 A(III), of December 10, 1948, by the United Nations General Assembly.

3 International Covenant on Civil and Political Rights was adopted and open for signature and ratification or accession by resolution of UN General Assembly 2200 A(XXI) of December 16, 1966. Entered into force on the 23rd. March 1976.

4 Article 17 International Covenant on Civil and Political Rights.

5 Convention for the Protection of Human Rights and Fundamental Freedoms. Rome, 4.XI.1950.

6 Under the strong influence of the Universal Declaration of Human Rights Council of Europe in 1950 (on November 4 in Rome) adopted a Convention for the Protection of Human and Fundamental Rights Freedoms. The convention is the first and basic document of The Council of Europe for the Protection of Human Rights and Freedoms.

The primary purpose of Article 8 is to protect against arbitrary interferences with private and family life, home, and correspondence.⁷ However, member states also have positive obligations to ensure that Article 8 rights are respected even between private parties. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals themselves. The right to privacy can only be limited on the basis of a legitimate purpose. Article 8 paragraph 2 of the convention lists such legitimate goals: national security, public security, economic well-being, protection of health and morals, and protection of the rights and freedoms of other citizens.

Later, the Convention for the Protection of Persons with Regard to Automatic Processing of Personal Data⁸ was adopted, in order to extend the protection of the basic rights and freedoms of individuals, and especially the right to privacy. This convention provides specific instructions for the legal processing of personal data (the processing is required to be legal, proportionate, and justified by a legitimate purpose), which allows under certain circumstances and limitations the protection of the right to privacy, in order to respect the rights and freedoms of other persons.

The right to privacy, as defined in international documents, is a universally recognised right that not only binds the international community but also national legislation, creating fertile ground for the formulation and integration of the first mechanisms and norms for the protection of citizens' privacy. Thus the right to privacy, defined as one of the basic human rights in international sources, is not limited only to the international scene. In the constitutions of many countries, including the Constitution of the Republic of North Macedonia,⁹ a guarantee is provided for the right to privacy, which confirms it as an important and universal right at the national level. In the constitution as the highest legal act, in the section dedicated to human rights and freedoms, protection of the right to privacy is ensured. Thus, in Article 25, every citizen is guaranteed respect and protection of the privacy of his personal and family life, dignity, and reputation.

Going deeper into the very content and concept of the right to privacy, it is clearly a complex right with no universally accepted definition. However, in the broadest sense, it represents the right of every individual to live, develop, and realise himself as a person without illegal interference from the state and other natural and legal persons. This right, in specific cases, also requires an active role by the state in creating conditions for its realisation, and providing protection in case of its violation.

7 Guide on article 8 of the European Convention on Human Rights, Rights to respect for private and family life, home and correspondence, 31 August 2022.

8 The law on the ratification of the Convention for the protection of individuals with Regard to Automatic Processing of Personal Data (Official Journal – International Agreements 7/2005).

9 Constitution of the Republic of North Macedonia (The decision to promulgate the constitution, 17.11.1991).

3.

The Right to Privacy in Working Relationships

The right to privacy is a broad concept that includes the protection of individual freedom and the relationship between the individual and society.¹⁰ Hence, in each legal system and country the content of this right may be defined in different ways, but its essence remains unchanged. The right to privacy – like other civil-political rights – aims to protect the private sphere of individuals in relation to the state, but with the development of working life and the fact that people spend considerable time at the workplace, a serious question arises about protection of employees' privacy. Today, labour relations are intertwined with the right to privacy where workers are exposed to various aspects of surveillance, monitoring, and data collection in the workplace. In this context, balancing workers' right to privacy with employers' need to ensure efficient work and job security becomes a challenge.

To ensure that workers' privacy is protected, many states have enacted laws governing the collection and use of workers' personal information, as well as workplace surveillance and monitoring procedures. In the Macedonian legal system, the Law on Personal Data Protection¹¹ takes a central place. This law aims to protect the right to privacy and other human rights of all citizens. This law, adapted from European legislation, was adopted in February 2020, and enables the state to monitor progress in the area of personal data protection. It also introduces the standards and principles of the European Union, specifically the General Data Protection Regulation (GDPR).¹² In addition, in 2022 the methodology for harmonising departmental legislation with the Law on Personal Data Protection was adopted. This methodology ensures consistency and compliance with the law in the various sectors and departments of the state. Although this law does not specifically regulate the right to privacy of employees as such, these provisions are appropriately applied to workers when it comes to protecting the right to privacy and personal data. It is evident that employers automatically or semi-automatically collect various information about their employees in the

10 Jernej, 2005, p. 44.

11 The Law on Personal Data Protection (Official Gazette of the Republic of North Macedonia No. 42/20, 294/21), in the following text LPDP.

12 As technology advanced and the internet was developed, the European Union (EU) recognised the necessity for contemporary data protection measures. Subsequently, Europe's data protection authority announced the need for a comprehensive approach to personal data protection within the EU. This initiative led to the revision of the 1995 directive. The General Data Protection Regulation (GDPR) was implemented in 2016 after receiving approval from the European Parliament, and starting from May 25, 2018, all organisations were mandated to ensure compliance with its provisions.

course of employment, effectively processing personal data.¹³ Consequently, employers are obligated to adhere to legal requirements for data processing according to the LPDP: processing must be lawful (based on written consent or another legitimate and authorised basis); the processing method should be legal; and data should be proportionate and up to date.

The Law on Labour Relations¹⁴ sets the foundations of labour relations, however the legislator did not recognise the need for a more detailed regulation of the issue related to the right to privacy of workers. The need for a more detailed regulation of this issue is often untouched, and the law only briefly mentions it in a few provisions. The first, Article 43, sets an obligation for the employer to protect and respect the personality and dignity of the employee, as goods from the sphere of private life. The second provision, Article 44, establishes the rules for the collection, processing, use, and delivery of workers' personal data. This limits the collection and use of the employee's personal data only if it is determined by law, or if it is necessary for the exercise of rights and obligations from the employment relationship or in connection with the employment relationship. However, these provisions represent principles rather than clear practical guidelines, therefore the issue of protection of the right to privacy of workers remains outside the scope of the Law on Labour Relations. Therefore, the key regulation for analysis when it comes to this issue in the Macedonian legal system is the Law on Personal Data Protection.

Employee privacy rights are rules that limit the extent to which an employer can search an employee's property or person, monitor their activities or conversations, or obtain information about their personal life, especially in the workplace.¹⁵ The nature and extent of protection of these rights have become increasingly important in recent years, especially with the development of the internet and social media.

In this area, three aspects of the employees' right to privacy can be distinguished, from where their protection can be threatened. The first refers to the protection of personal data, which is the most frequently discussed aspect in the legal field, as well as in the theory of labour law.¹⁶ In addition, the privacy of employees can be defined by factors related to their private life, especially in the context of establishing and terminating the employment relationship. Finally, the danger to the privacy of the employees increases in the sphere of the surveillance carried out by the employer during the work process.¹⁷ The greatest danger to the privacy of employees arises

13 Danilović, 2017, p. 170.

14 Law on Labor Relations of the Republic of Macedonia (Official Gazette No. 62/2005; 106/2008; 161/2008; 114/2009; 130/2009; 149/2009; 50/2010; 52/2010; 124/2010; 47/ 2011; 11/2012; 39/2012; 13/2013; 25/2013; 170/2013; 187/2013; 113/2014; 20/2015; 33/2015; 72/2015; 129/2015 and 27/2016).

15 Employee Privacy Rights: Everything You Need to Know.

16 Jašarević, 2016, pp. 263-282.

17 Jovanović and Božičić, 2018, p. 861.

from the unequal relationship between the employee and the employer. One of the basic elements of the working relationship is subordination, that is, the existence of an imbalance of positions in the context of working relationships. Specifically, that would mean the performance of work tasks by the employee under the authority of the employer. More precisely, during the exercise of managerial powers, the most possible danger is the violation of the employee's privacy. With the development of technology, the violation of the right to privacy becomes an essential concern in the workplace, because it provides the employer with various options for managing and monitoring the work process. However, one form of surveillance attracts particular attention, and that is video surveillance.¹⁸ By using video surveillance, employers control the work process and workers in real-time. This can be considered an effective method of monitoring, but it can also be a potential violation of employee privacy, especially if not applied with appropriate restrictions and legal frameworks.

4. Video Surveillance

In today's fast-paced corporate world – where the need for safety, productivity, and workplace compliance is paramount – video surveillance has emerged as a powerful tool for employers. The implementation of video surveillance systems in the workplace is becoming more and more common, promising increased security, optimisation of operational processes, and protection of valuable assets. However, this also raises significant questions about privacy, ethics, and the delicate balance between protecting organisational interests and respecting the rights and dignity of employees.

The establishment of video surveillance in the workplace is mainly justified from the aspect of security – to detect and prevent potential security risks, and to sanction persons who threaten both the public and private aspects of security. This system was initially introduced in the public sector in the 1960s,¹⁹ and was extended to the private sphere in the form of business premises, where it reached its full momentum during the 1990s.²⁰ Bringing this type of surveillance into the workplace raises questions about its expediency and impact on workers.

The introduction of video surveillance creates a complex situation where legitimate employer interests – such as ensuring a safe working environment and protecting property – conflict with the employee's right to privacy. In situations where these

18 Ibid.

19 Žarkovič, 2015, p. 170.

20 Potokar and Androić, 2016, p. 150.

two valid interests collide, and it becomes evident that workplace video surveillance can infringe upon an employee's private life,²¹ restrictions on the employer's supervisory authority become necessary to safeguard employees' privacy rights.

It is crucial to address several significant principles according to European legislation. Firstly, to establish spatial and temporal constraints in the operation of video surveillance. Concerning the workplace, the use of video surveillance has no place within the employer's premises where the work process is not directly conducted. When it comes to time limits, video surveillance should be reserved exclusively for the duration of the employee's working hours. This further implies that continuous video surveillance within the work process is inappropriate. Such limitations are not only in line with safeguarding employees' right to privacy, but also relate to the adverse effects of constant exposure to surveillance on employees' mental well-being.²²

Transparency also represents a fundamental component of permissible video surveillance. This means that employees must receive written notifications prior to its establishment.²³

The issue of secret video surveillance in the work process is particularly sensitive. Its presence inherently suspends the principle of transparency. It is generally prohibited, but exceptions exist in specific, exceptional cases, primarily related to situations where there is reasonable suspicion of criminal activity.²⁴ Before covert recording is carried out, a privacy impact assessment should be carried out to ensure that it is necessary and proportionate to the discovery of criminal activities in the workplace. Where covert video surveillance is installed to monitor criminal activity, then it cannot be used for other purposes (for example, to monitor the work of employees). It is clear that a decision on reasonable suspicion of criminal activity cannot be left to the employer alone. Employees have a right to privacy, which can be limited if justified and proportionate to the intended goal. The jurisprudence of the European Court of Human Rights introduces the concept of 'reasonably expected privacy' to assess the admissibility of employer interference with employees' private lives, considering the interests of both parties.²⁵

When it comes to secret video surveillance in the workplace, it is clear that the decision on its permissibility will depend on the circumstances of each specific case. This is also the conclusion reached by the European Court, which grappled with

21 This position will be taken by the European Court in the case *Köpke v. Germany (dec.)* - 420/07.

22 Jovanović and Božičić, 2018, p. 864.

23 More about the specific conditions for the introduction of video surveillance in the member states of the European Union in: Hendrickx, 2001, pp. 110-111.

24 Jovanović and Božičić, 2018, p. 865.

25 Danilović, 2017, p. 176.

this issue in the case of *Köpke v Germany*.²⁶ In this case, the court highlighted that in a scenario where the legitimate interests of the employer and the rights of the employee are in conflict, the competing interests concerned might well be given a different weight in the future, having regard to the extent to which intrusions into private life are made possible by new, more and more sophisticated technologies.

In practice, the introduction of video surveillance requires a thorough legal analysis to achieve a balance between employer interests and employee rights. Once this analysis demonstrates the appropriate equilibrium, internal policies, procedures, and notifications should be established to inform employees of all aspects related to the processing of personal data through surveillance applications.

Only after completing these steps and ensuring a proper balance between employer interests and employee rights should the employer consider implementing video surveillance.

5. Video Surveillance Installation Under the Macedonian Legal Framework

As previously mentioned, in the Macedonian legal system the issue of video surveillance in the workplace is not specifically regulated by the Law on Labour Relations. Also, there is no separate legal act dedicated exclusively to this topic. However, personal data protection and workplace video surveillance are regulated by the Personal Data Protection Law. This law ensures the rights of persons to whom personal data refers, and sets provisions for the collection, processing, and protection of this data. In the employment relationship, the employer processes the personal data of the employees to fulfil various purposes. In that relationship the employer has the role of a controller with all his powers and obligations, and the employee has the role of a subject of personal data with all their rights. The Law on Personal Data Protection contains provisions that are important for the installation of video surveillance and work at the workplace. The provisions of this law define rules for the processing of personal data, including cases where video surveillance is used for control and security. In the following, aspects regarding the establishment of video surveillance systems at the workplace will be considered in accordance with the legal regulations.

26 *Köpke v. Germany (dec.)* - 420/07. The applicant, a supermarket cashier, was dismissed without notice for theft, following a covert video surveillance operation carried out by her employer with the help of a private detective agency. She unsuccessfully challenged her dismissal before the labor courts.

5.1. Analysis or Periodic Evaluation of the Objective(s)

Before starting the process for establishing a video surveillance system, the controller – i.e. a natural or legal person, a state authority, a legal person established by the state for the exercise of public powers, an agency, or another body, which independently or jointly together with others determines the goals and the method of personal data processing – is obliged to perform an analysis of the goal – i.e. the goals for which the video surveillance is established.²⁷ The analysis contains the reasons for setting up video surveillance with an explanation of the need to fulfil the goal, as well as a description of movable and immovable objects, i.e. the space that will be protected by video surveillance.

The analysis must also contain the opinion of the personal data protection officer.²⁸ Based on the prepared analysis and the opinion received from the personal data protection officer, the responsible person decides upon the establishment of a video surveillance system in a separate document.

The controller is obliged to perform a periodic assessment of the results achieved by the video surveillance system every two years. These especially regard the further need to use a video surveillance system, the purpose or objectives of video surveillance, and possible technical solutions for replacing the video surveillance system. From the performed evaluation, the controller must make a report, which is an integral part of the documentation for the establishment of video surveillance.²⁹

5.2. Defining the Objectives for the Establishment of Video Surveillance

According to the legal provisions, the controller can perform video surveillance on official or business premises if it is necessary to protect the life and health of people; to protect property; protect the life and health of employees due to the nature of the work; or to provide control over entry and exit from official or business premises, for security purposes.³⁰ The controller can perform video surveillance only on the premises that are necessary to achieve specific goals. For example, if the goal is to protect property or control access from official or business premises, video surveillance should be limited to the entrance of the building, and not to internal parts such as kitchens, offices, corridors, meeting rooms, etc. When setting up video surveillance at the entrance or exit from the facility (the company/state institution), the controller

27 Article 92, paragraph 1, LPDP.

28 Rulebook on the content and form of the act on the method of performing video surveillance (RSM Official Journal, no. 122 of 12.5.2020), article 7 paragraph 3.

29 Article 92, paragraph 3, LPDP.

30 Article 90, paragraph 1, LPDP.

should make sure that cameras are directed only to the property of the company/state institution – i.e., that they are not directed onto public areas, neighbouring facilities, etc. When setting up video surveillance, it is essential to protect the right to privacy of all persons, employees, customers, parties, and other subjects of personal data. Precisely for this reason, the controllers should be especially careful when directing the cameras and when choosing the locations for video surveillance, to avoid private rooms such as wardrobes, dressing rooms, sanitary units, and other similar rooms.³¹ Employees should not be under constant video surveillance. The camera should be placed so that it does not cover the workspace where the employees work. Video surveillance must not be set up for the purpose of control – i.e. for the purpose of monitoring the efficiency of employees.

On the one hand, the establishment of video surveillance by the employer has a legitimate purpose, which is manifested in the need to ensure safety in the work process, but also in the protection of property. However, even in such situations video surveillance should be seen as an emergency measure, which should only be considered if there is no alternative method less invasive to the privacy of employees. Concrete measures that could be effective against break-ins and thefts, as well as video surveillance systems, are the installation of security alarm systems, good lighting, use of porters, many security guards, installation of security locks, protective windows, etc.

To protect the personal data that it collects, processes, and stores, the controller must take appropriate technical and organisational measures and regulate the way video surveillance is performed with a special act to prevent possible unauthorised access to the data.³² This means that only the controller has the right to monitor in real-time, and in case of an incident review the material. Stored data must be kept locked, with access available only to the controller.

For performing video surveillance, the controller should prepare a special act (regulations, policy, procedure) which will regulate in detail the way of performing video surveillance. This act should describe the system for performing video surveillance, the purpose (i.e. the purposes of personal data processing), categories of personal sub-flows, technical and organisational measures to ensure the security of personal data processing, authorised persons for personal data processing, deadlines for keeping the recordings, the method of reporting and exercising the rights of the subjects of personal data, technical specification of the equipment, as well as a plan of where the video surveillance system is set up.³³

31 Article 90, paragraph 3, LPDP.

32 Rulebook on the content and form of the act on the method of performing video surveillance (RSM Official Journal, no. 122 of 12.5.2020), Article 9, paragraph 1.

33 The content and form of this act are prescribed by the director of the Agency for the Protection of Personal Data by adopting a separate bylaw.

5.3. Obligation for Transparency and Reporting

The law on the protection of personal data introduces the principle of transparency in the establishment of video surveillance, which means that the subjects of personal data should be informed in detail about when and how their data is processed. This includes detailed information about the locations being filmed and the CCTV reporting – which should be clear, visible, and easily accessible to all stakeholders.³⁴ The notification should contain information about where the video surveillance is performed, the name/title of the controller who performs the video surveillance, the way in which information can be obtained, and about where and for how long the recordings from the video surveillance system are kept.³⁵

The controller is obliged to inform the employees about performing video surveillance on official or business premises.

5.4. Storage Periods and Obligation to Delete

The recordings made during video surveillance are kept until the objectives for which it is carried out are met – not longer than 30 days, unless a longer period is provided by another law. This means that these recordings can be stored for longer than 30 days only if another law provides for a longer period, which includes measures to protect the rights and freedoms of subjects, but no longer than after the fulfilment of the goals.³⁶ Video recordings can be stored for a longer period than 30 days when it is necessary to realise the controller's legitimate interest in conducting appropriate procedures in accordance with the law – for which the controller establishes internal procedures for the method of storing and deleting the recordings.³⁷

Video recordings may not be made available to other people, unless it is necessary in a possible evidentiary procedure. For example, the controller may not make the photos available or sell them to another person.

5.5. The Basic Rights of Employees, or the Subjects of Personal Data

In the act of performing video surveillance, the controller prescribes the method of exercising the rights of the subjects whose data is processed through the video

34 Article 89, paragraph 3, LPDP.

35 Article 89, paragraph 4, LPDP.

36 Article 89, paragraph 8, LPDP.

37 Rulebook on the content and form of the act on the method of performing video surveillance (RSM Official Journal, no. 122 of 12.5.2020), article 11 paragraph 3.

surveillance system, in order to familiarise them with the method of providing transparent information, communication, and the exercise of their rights, information and access to personal data, as well as the exercise of the right to correction and deletion, the right to object, and the automated adoption of individual decisions.³⁸

5.5.1. Right of Access

Employees have the right to confirmation from the controller as to whether their personal data is being processed.³⁹ In the case of real-time monitoring without data storage, the controller may inform them that no personal data is processed after the monitoring is completed. If the data processing is still ongoing during the request – i.e. if the data is stored or continuously processed in any other way – the employee has first access to the recordings and corresponding information. However, there are several limitations to the right of access, such as when identification of the individual is impossible, or the request is unfounded. In such a case, the controller must inform the employee about the same. Also, an indefinite number of individuals may be recorded in the same video surveillance sequence, in which case the controller should take measures to obscure the faces of the individuals who are not the subject of the access request.

5.5.2. Right to Erasure

The employee has the right to ask the controller to delete his personal data, while the controller has the obligation to delete personal data within 30 days from the day of submitting the request for deletion if one of the following conditions is met: personal data is not required for the purposes for which they were collected or processed; whenever consent is withdrawn (and there is no other legal basis for processing); the employee files an objection to the processing; personal data was illegally processed; personal data should be deleted in order to comply with an obligation established by law that applies to the controller; personal data was collected in connection with the offer of information society services, in accordance with the legal provisions.⁴⁰

38 Ibid, article 13, paragraph 1.

39 Article 19, LPDP.

40 Article 21, LPDP.

5.5.3. Right to Object

For video surveillance based on legitimate interest, or for the need to perform a task of public interest, the subject of personal data has the right to object at any time, based on a specific situation. Hence, the controller may not carry out further processing of personal data, unless it proves that there are relevant legitimate interests for processing which prevail over the interests, rights, and freedoms of the subject of personal data, or for the establishment, exercise, or defence of legal claims.⁴¹

6.

Conclusion

Video surveillance and workplace monitoring are on the rise in Macedonia, reflecting the employer's managerial authority and the employment relationship's subordination dynamics. The powers and rights of the employer, as the owner of the capital, determine the employment relationship as a relationship of subordination. In this regard, the right of the employer to organise and control the work of the workers is recognised, thus exercising legitimate managerial authority. While employers possess the legitimate authority to oversee their workforce, it is essential to define the limits of this supervision – especially concerning video surveillance – which can be the most intrusive form of monitoring and a potential threat to employees' privacy. Legal standards, as presented in this paper, establish the parameters within which this balance should be maintained.

In this regard, it is essential to highlight that the legislative framework in Macedonia, concerning the protection of privacy and personal data, aligns with European legal standards. It is in harmony with the principles established in European legislation. It outlines the necessary steps and legal requirements for the installation of video surveillance, with a strong focus on respecting the basic principles. The primary purpose of the provisions on privacy and protection of personal data, in this sense, is to regulate, limit, and condition the supervision to ensure that when surveillance is already carried out – which is *de facto* an invasion of privacy – that invasion is necessary, legal, fair, transparency and proportionate. The employer must respect the principle of proportionality in relation to the purpose for which the video surveillance is installed.

It is important to note that, in Macedonia, there is still no developed case law that sets the framework and interprets the legislation in this area. This creates a challenge and a longer process of development and establishment of standards for video surveillance and control of workplaces.

41 Article 25, paragraph 1, LPDP.

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Marianna RUSSO*

Protecting Cross-Border Workers Within the EU: A Comparative Study Between Italy and the Netherlands

ABSTRACT: *This paper aims to identify the most insidious challenges and the most effective remedies to guarantee the principle of equal treatment and non-discrimination on grounds of nationality. It does so by analysing regulatory frameworks, case law and data on cross-border workers from a comparative perspective, with special focus on Italy and the Netherlands.*

KEYWORDS: *free movement of workers, cross-border workers, equal treatment, non-discrimination based on nationality, comparison.*

1.

Free Movement of Workers Within the European Union

Freedom of movement for workers was one of the founding principles of the European Union (EU).¹ In fact, the first article of the Community Charter of the fundamental social rights of workers² deals precisely with this freedom. The principles therein shaped the European social model in the following decades, and influenced the writing of the Charter of Fundamental Rights of the EU.³

Although free movement was already evident in Art. 3 of the consolidated version of the Treaty on EU (i.e. “the Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons

1 Regulation no. 1612/68 and Council Directive no. 68/360, which have been updated several times.

2 Adopted on 9.12.1989 by a declaration of all Member States.

3 It was laid down in Nice on 18.12.2000 and became legally binding with the ratification of the Treaty of Lisbon on 1 December 2009. In particular, see art. 15 (2), of the EU Charter of fundamental rights, which establishes for every EU citizen “the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State”.

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is ensured⁴), the Treaty on the Functioning of EU (TFEU) identified this right in a clearer and more detailed way. Indeed, it ensured free movement of goods, persons, services, and capital within the internal EU market,⁵ and Art. 45 of the TFEU stated that “freedom of movement for workers shall be secured within the Union.”⁶ There are two important consequences of this declaration. Firstly, among workers of the member states it abolished discrimination based on nationality for employment, remuneration and other work conditions.⁷ Secondly, it allowed workers the right to move freely within the member states for work purposes, limiting it only for justified reasons⁸ such as public policy, public security or public health.⁹

Dir. 2004/38/CE of 29 April 2004¹⁰ and the Regulation EU no. 492/2011 of the European Parliament and of the Council of 5 April 2011 confirm that freedom of movement constitutes a fundamental right of workers and their families, and provides for equal treatment of employment within the EU. Indeed, within the EU labour mobility is one of the most relevant ways to give workers the opportunity to improve their living and working conditions and to promote social advancement.

Free movement entails all aspects of the employment relationship,¹¹ from hiring to termination, with particular attention to the social security system. Regulations exist that provide all workers in the EU with social security benefits, regardless of the place where the activity is carried out,¹² as long as it does not prejudice the autonomy of each member state to determine the types of social benefits and services.¹³ This kind of coordination of social security rules within the EU exemplifies how EU countries harmonise their social services. The EU did not create a single social security system – rather, it established links among the various and distinct social security systems present in each member state.

4 Art. 3 (2) TEU.

5 See art. 26 (2), TFEU.

6 Art. 45 (1) TFEU. Spaventa, 2007; Spaventa, 2015, p. 456; Shuibhne (ed.), 2023.

7 Art. 45 (2), TFEU.

8 Art. 45 (3), TFEU.

9 Just think about restrictions on freedom of movement during the Covid-19 pandemic in the years 2020-2021. According to measures introduced to contain the spread of the contagion, border controls were reintroduced: see Council Recommendation EU 2020/1475 on a coordinated approach to the restriction of free movement in response to the Covid-19 pandemic.

10 It is a tool for harmonising entry and residence requirements (even permanent) of a Union citizen and their family members in a Member State other than that of origin or provenance.

11 As a general rule, applicable legislation is that of the Member State in which the person concerned pursues their activity as an employed or self-employed worker.

12 Paju, 2017.

13 Regulation no. 883/2004 on the coordination of social security systems. See also regulation no. 987/2009, laying down the procedure for implementing Regulation no. 883/2004. Obviously, the worker must be a citizen of an EU Member State.

The phenomenon of labour mobility within the EU is also significant in numerical terms. According to the Annual Report on Intra-EU Labour Mobility 2022,¹⁴ the number of working age EU citizens¹⁵ living in a different EU country – other than the one in which they have citizenship – remained stable in 2020, at 10.2 million, despite the slowdown caused by the COVID-19 pandemic.¹⁶ The share of EU mobile citizens varies greatly between member states, ranging from 0.8% for Germany to 18.6% for Romania.

This data cannot be underestimated. In fact, it requires more attention to avoid the possible negative effects of discriminatory treatments. On 31 July 2019 the European Labour Authority (ELA) was established in order to guarantee that freedom of movement works in practice and brings a fair mobility to individuals and companies. In this perspective, the ELA has four principle aims. The first is to ensure better implementation of EU rules on labour mobility and social security coordination. The second is to provide support services for mobile workers and employers. Next is to sustain cooperation between member states in cross-border enforcement, including joint inspections¹⁷ to tackle undeclared work.¹⁸ Finally, it provides mediation to resolve possible disputes and to promote collaboration.

2.

Who are Cross-Border Workers?

In this framework, it is necessary to pay particular attention to cross-border workers. This term is used to define workers – both employees and self-employed workers – who exercise their right of free movement to work in one EU member state while

14 Published by the EU Commission on 05.04.2023.

15 Between 20 and 64 years.

16 According to the European Trade Union Confederation (ETUC), over 11.3 million people of working age live in another member State, available at: <https://www.etuc.org/en/issue/labour-mobility#:~:text=Over%2011.3%20million%20people%20of,to%20their%20place%20of%20work>

17 Joint inspections are inspections carried out in a Member State with the participation of the national authorities of one or more other Member States, and supported, where appropriate, by the staff of the Authority. They are different from concerted inspections, that are carried out in two or more Member States simultaneously regarding related cases, with each national authority operating in its own territory, and supported, where appropriate, by the staff of the Authority: art. 8 (2) of the EU Regulation 2019/1149, establishing the ELA.

18 See ELA Consolidated Annual Activity Report 2022.

remaining resident in another.¹⁹ The concept of cross-border workers covers different circumstances, and the definition may vary from one field to another,²⁰ thus creating confusion and application uncertainties.

Often 'cross-border workers' and 'frontier workers' are considered synonymous; however, cross-border commuters are distinct from frontier workers to the extent that they do not necessarily work in the frontier zone of the host country. Indeed, frontier workers – as the word itself indicates – are workers who are employed in the frontier zone of an EU member state, but who return each day or at least once a week to the frontier zone of a neighbouring country in which they reside and of which they are citizens.

However, sometimes these terms overlap. The reason is that bilateral tax agreements – which determine the tax arrangements applicable to cross-border workers²¹ – use restrictive definitions and additionally impose a spatial criterion.²²

Furthermore, other expressions are contiguous to the term 'cross-border workers'. One example is the term 'posted workers',²³ employees who are sent by their employer to carry out a service in another EU member state on a temporary basis. This can be found in the context of a contract of services, an intra-group posting or a hiring through a temporary agency.²⁴ Another example is 'seasonal workers'. These include EU and third country nationals travelling to a member state to temporarily live and carry out an activity dependent on the passing of the seasons.²⁵

According to set theory we could say that the expression 'cross-border work' has a larger circumference. It is the species which includes the smaller circumferences, represented by frontier work, posted work and seasonal work (i.e. the genera).²⁶

19 It is essential that they retain their normal place of residence outside the State of employment. If the cross-border employees move to the State of employment, they become migrant workers. The term "normal" place of residence does not exclude the possibility that the cross-border employee, for practical reasons, also has temporary accommodation in the State of employment: Distler and Essers, 2011, p. 65.

20 For instance, tax law, right of residence, welfare entitlements.

21 In order to avoid double taxation.

22 I.e. living and working in a frontier zone: available at https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/cross-border-worker_en

23 *Ex multis*, Fuchs, 2018, p. 3; Rombouts and Houwerzijl, 2018, p. 127; Houwerzijl and Berntsen, 2020, p. 147.

24 The Directive 96/71/CE identifies the definition, the scope, the terms, and the conditions of posted work, but, nevertheless, it is not enough to prevent possible abuse and to distinguish it clearly from other types of labour mobility: Houwerzijl, van Hoek, 2012, p. 419.

25 See the final report written in March 2021 by the European Commission on "Intra-EU mobility of seasonal workers. Trends and challenges", available at <https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=84008>

26 It is worth specifying that, for the purpose of this research, the expression "cross-border workers" is used in its broadest sense, including its various facets.

"Protecting Cross-Border Workers"

It should be stressed that most cross-border workers carry out essential activities in key economic sectors such as agriculture and food production, transport and logistics, construction, social services including care, social work, tourism, food processing and packaging, healthcare and research, IT and pharmaceutical industries, critical infrastructure industries, etc. The health emergency caused by COVID-19 and its mobility restrictions shed light on the strategic role played by cross-border commuters, as the European Parliament pointed out.²⁷

No EU-wide systematic data-gathering or digital tracking system exists to provide adequate data on the total numbers of cross-border workers, but their presence in EU and EFTA²⁸ countries is estimated at approximately 1.7 million. It is a remarkable number and deserves great attention, especially because European labour inspectorates repeatedly report violations of labour rights of cross-border workers.²⁹ For instance, in 2017 more than 700,000 people may have been engaged in some form of undeclared cross-border work. And this figure might increase with raising labour mobility and the growth of new forms of work.³⁰ Furthermore, the consequences of the pandemic crisis may exacerbate existing problems in their treatment,³¹ increasing risks of social dumping and law shopping.³²

Ensuring fairness for companies and workers to operate on a level-playing field across borders is critical to a well-functioning internal market and, therefore, is one of the fundamental issues for the EU.

27 European Parliament resolution of 19.06.2020 on European protection of cross-border and seasonal workers in the context of the Covid-19 crisis.

28 European Free Trade Association, which is an intergovernmental organisation set up for the promotion of free trade and cooperation between the Member States (Iceland, Liechtenstein, Norway, and Switzerland).

29 The last ELA Activity Report shows that, during the 37 concerted and joint inspections organised in 2022, more than 350 infringements were identified. Most irregularities concerned violations related to posted workers, undeclared work, driving and resting times, low wages and possible bogus self-employment: ELA, 2023, p. 11.

30 Stefanov, Mineva, Schönenberg and Vanden Broeck, 2020, p. 2.

31 "Rights for all seasons" was the slogan of the campaign promoted by ELA in the autumn 2021 to inform cross-border workers about their rights and duties, to raise awareness of the employers about the benefits connected to compliance with the rules, and to draw attention to specific safety-measures, available at: <https://www.lavoro.gov.it/priorita/Documents/ELA-national-communication-plan-2021.pdf>

32 For instance, the above-mentioned final EU report 2021 on intra-EU seasonal workers highlights that the most alarming critical issues are represented by lack of access to information about their rights, inadequate social protection, poor accommodation, low pay, and challenging working conditions. These challenges were aggravated during the COVID-19 pandemic, since many seasonal workers could not carry out their work, but, at the same time, they were trapped in countries of work and could not return home.

3.

A Comparative Analysis Between Italy and the Netherlands

Although the right of movement for workers is clearly established within the EU and is based on the principle of non-discrimination because of nationality,³³ it is not so obvious that cross-border workers are actually treated in the same way as nationals. The most significant examples may include access to work, conditions of employment, and social and tax benefits.³⁴ Because there are no standardised national legislations on the matter, the legal system framework is complex. This lack of coordination – even in the application of different definitions of the term ‘frontier worker’ depending on the country and the appropriate double-taxation agreement³⁵ – can lead to different treatments of workers from other member states compared to domestic workers. The European Court of Justice has intervened several times, particularly about taxation of cross-border workers,³⁶ since “the risk of penalties from a fiscal point of view could constitute a brake on these forms of mobility, effectively creating a form of discrimination.”³⁷

Considering the above, it may be interesting to verify how the EU regulatory framework on cross-border commuters works in individual countries and whether it is enough to avoid every kind of discrimination based on nationality. Therefore, preliminary clarifications are necessary to circumscribe the action range of the research to obtain the most reliable results. Firstly, this study aims to focus on three relevant issues: checking the correct transposition and effective compliance with the EU regulatory provisions; evaluating the real impact of cross-border workers (both incoming and outgoing ones); and identifying the most significant challenges. Secondly, this research is based both on an analytical methodology – i.e. examining the regulatory provisions and the data on the matter – and a comparative methodology, bringing into focus suggestive similarities and contrasts among two member states.

The countries selected for this comparative survey – Italy and the Netherlands – are very different not only from a geographical point of view, but also in a

33 According to art. 18 TFEU, “any discrimination on grounds of nationality shall be prohibited”. Moreover, art. 45 (2) TFEU establishes that “such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment”.

34 See Distler and Essers, *cit.* p. 8.

35 As seen in par. 2 of this essay.

36 *Ex multis*, CJEU 14.02.1995, C-279/93 (Finanzamt Köln-Altstadt versus Roland Schumacker); CJEU 11.08.1995, C-80/94 (Wielockx / Inspecteur der directe belastingen); CJEU 12.06.2003, C- 234/01 (Gerritse); CJEU 9.11.2006, C- 520/04 (Turpeinen), in <https://curia.europa.eu>.

37 Nunin, 2016, p. 259.

socioeconomic context. Because most of Italy's national territory extends into the Mediterranean Sea,³⁸ only the northern Italian regions border other European countries.³⁹ This geographical conformation makes the presence of cross-border workers⁴⁰ particularly difficult, because they can only easily reach the limited territories on the border. Conversely, the Netherlands is more than half surrounded by Belgium and Germany and most of the country can be accessed effortlessly.⁴¹ Furthermore, from a socioeconomic perspective, according to the data on the year 2022⁴² the gross domestic product per capita in Italy is slightly below the European average, whereas the Netherlands is in fifth place on the list, with about 16,000 USD more than the European average. Moreover, the Eurostat data on the third quarter of 2022 shows that the unemployment rate in Italy⁴³ is among the highest in the EU,⁴⁴ while the Dutch unemployment rate is one of the lowest.⁴⁵

These differences represent an interesting starting point for comparison while analysing the safeguards of cross-border workers, also considering that "the main purpose of comparative law is a better understanding of one's labour law system."⁴⁶

4. Harmonisation with the EU Legislation on Cross-Border Workers

Even though there are some differences in the formulation of the regulatory provisions, the constitutions⁴⁷ of Italy⁴⁸ and the Netherlands⁴⁹ both recognise protections for all workers, regardless of their nationality. Indeed, work is one of the pillars of the Italian Constitution since the first paragraph of the first article,⁵⁰ and in several

38 Bordering the Ligurian Sea, the Tyrrhenian Sea, the Ionian Sea and the Adriatic Sea.

39 Specifically, France, Switzerland, Austria, and Slovenia.

40 Especially the frontier ones.

41 While the remaining part borders the North Sea.

42 Available at: <https://tradingeconomics.com/>

43 8,3%.

44 About 2,2% more than the European average (6,1%).

45 3,7%.

46 Weiss, 2003, p. 169. See also Blanpain, 2010, p. 3.

47 Both in Italy and the Netherlands the Constitution is the highest law.

48 The Italian Constitution was approved by the Parliament in December 1947 and came into effect on 1st January 1948. The English version adopted in this contribution is published in https://www.prefettura.it/FILES/AllegatiPag/1187/Costituzione_ENG.pdf

49 The Dutch Constitution dates from 1814. The version of the Constitution currently in force dates from 1983. The English translation adopted in this essay is published in <https://www.government.nl/documents/reports/2019/02/28/the-constitution-of-the-kingdom-of-the-netherlands>

50 "Italy is a Democratic Republic, founded on work".

provisions workers⁵¹ are guaranteed with relevant safeguards.⁵² Furthermore, the second paragraph of Art. 35 “promotes and encourages international agreements and organisations which have the aim of establishing and regulating labour rights.”

Although the Dutch Constitution devotes less space to specific provisions on work, leaving it to ordinary law,⁵³ it recognises the legal status and protection of ‘working persons’ without any distinctions. Moreover, the Dutch Constitution opens with a fundamental right, which can easily be defined in its working dimension: “all persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever shall not be permitted.”

In the Italian Constitution there is a similar provision,⁵⁴ but it is aimed only at citizens.⁵⁵ This divergence likely depends on the different periods in which these two constitutional provisions were issued. The Italian has been the same since 1947, while the Dutch one was modified in 1983. Obviously, at that time anti-discrimination sensitivity was more mature and the European legislation in this regard was already extensive.

However, in other articles the constitutional text ensures that “the Italian legal system conforms to the generally recognised rules of international law. The legal status of foreigners is regulated by law in conformity with international provisions and treaties”⁵⁶ and “Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations [and] promotes and encourages international organisations having such ends.”⁵⁷

Moreover, in both countries safeguards against discrimination have been ensured in more detail, at the ordinary level of legislation.

51 Without any kind of distinctions.

52 Regarding the fair pay (art. 36 (1)), the maximum working hours and the weekly and annual paid vacation (art. 36 (2, 3)), protection of women and of minors on the job (art. 37), social insurance for old age, illness, invalidity, industrial diseases, and accidents (art. 38), freedom of association (art. 39) and right to strike (art. 40).

53 See art. 19 (2).

54 See art. 3 of the Italian Constitution.

55 “All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions”.

56 Art. 10 (1, 2).

57 Art. 11 (2, 3). The European Union is one of the international organisations that ensure peace and justice among the Nations.

"Protecting Cross-Border Workers"

In Italy the Workers' Statute⁵⁸ (WS) invalidates any kind of discrimination⁵⁹ for the following reasons: sex, race, language, religion, political or trade union or personal opinion, age, handicap, sexual orientation, and nationality.⁶⁰

The Equal Treatment Act (ETA), enacted on 1 September 1994 in the Netherlands, introduced the general principle of equality in ordinary legislation.⁶¹ It protects all individuals from direct and indirect unequal treatment based on religion or belief, political orientation, race, gender, nationality, sexual orientation, and marital status.⁶²

Indeed, the formulation of the Italian and Dutch regulatory provisions are very similar. Both incorporate inputs coming from the Constitutional Charter – which, as seen, presents strong similarities on this point – and from international and European anti-discrimination legislation.

Nevertheless, there are some interesting differences. Firstly, the Italian WS is expressly and exclusively devoted to workers, whereas the Dutch ETA is aimed at everyone and only in section five does it regulate the prohibition of discrimination in employment.⁶³ Secondly, the ETA does not use the term 'discrimination', but rather 'differentiation'. This is not merely a question of semantics because, under Dutch criminal law, the discrimination requires the intentionality of the conduct to be proven. Conversely, in labour law, even in the absence of an intention to discriminate, differential treatment can be unlawful. Therefore, using the term 'differentiation' avoids any possibility of confusion with criminal law. Thirdly, regarding employment the ETA provides for some specific exceptions to the rule of equal treatment. For instance, in cases where nationality is deemed a deciding factor, such as athletes who wish to play for the national team, or when casting an actor to play a specific

58 Law 20.05.1970, no. 300. It is one of the most relevant Italian regulatory provisions regarding labour and worker protection.

59 The sanction is the nullity of any agreement or action of the employer.

60 Art. 15 Law no. 300/1970. More recently, see the legislative decree 9.07.2003, issued in implementation of the European directive no. 2000/78/CE and updated in light of the directive no. 2014/54/EU. In doctrine, see, *ex multis*, Barbera, 1991; Barbera, 2003, p. 401; Barbera, 2007.

61 Before then, special civil law only protected discrimination on the grounds of sex. See Dierx and Rodrigues, 2003.

62 Ben-Israel and Foubert, 2004.

63 In Italy, general anti-discrimination provisions based on the race and ethnic background for all individuals are included the legislative decree 9.07.2003, no. 215, issued in implementation of the European directive no. 2000/43/CE.

character, corresponding citizenship may be required.⁶⁴ Finally, Art. 15 of the WS sanctions discriminatory acts and pacts with the nullity, while the ETA establishes the invalidity only in case of discriminatory dismissals.⁶⁵ In other situations, compensation is the only available remedy in cases of a breach of the equal treatment law.

Considering the above, free movement of workers and protection against discrimination based on nationality are guaranteed in both countries. This is true despite the inevitable practical difficulties in complying with the legislation,⁶⁶ especially regarding the state of play in implementing the EU regulatory provisions on cross-border workers.

Both member states try to implement the EU directives on the matter. However, occasionally there are critical issues and delays, *a fortiori* because this field is particularly complex and involves many aspects and interests.⁶⁷

Regarding one of the latest directives on the matter, no. 2020/1057,⁶⁸ ruling on the posting of lorry drivers, Italy approved the implementing decree on 23 February 2023 – one year after the deadline expired.⁶⁹ However, on 19 April 2023 the European Commission decided to refer the Netherlands to the Court of Justice for failing to transpose that directive into their national legislation.⁷⁰ Even though this EU directive is essential – not only to ensure social protection for drivers and to improve their working conditions, but also to guarantee fair competition between operators by eradicating illicit employment and business practices – 22 out of 27 EU member states implemented it late or have not done so at all. Despite there being good will among the parties, it appears that the time is not yet ripe for consistent enforcement of non-discriminatory road transport social rules across the EU.

64 While art. 15 of the WS does not provide exceptions, art. 3 (2), of the legislative decrees no. 215/2003 and no. 216/2003 introduces a regime of exceptions to general discrimination rule, according to art. 4 (1), of the European directive no. 2000/78: "Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Art. 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate".

65 Actually, invalidity of discriminatory dismissal is rarely invoked: see Dierx, Rodrigues, *cit.*

66 For instance, Wells, 2015, no. 8: "Known for legalized marijuana and prostitution, acceptance of same-sex relationships, and tolerance of medical processes like euthanasia and abortion, at first glance the country appears to be an idyllic haven for open-mindedness. However, when analyzing the cultural traditions, politics, education, and other aspects of everyday life in the country, a long-lasting history of racism and prejudice is revealed. Those of minority religions or of certain origins different than that of the typical Dutch citizen (often stereotyped as tall, white, and blonde) face a challenging life in the country" (p. 1).

67 See Houwerzijl, 2019, p. 71.

68 This directive modifies the former no. 2006/22/CE.

69 The deadline was 2.02.2022.

70 See <https://ec.europa.eu/commission/presscorner/>.

5. Incoming and Outgoing Labour Flows in Italy and the Netherlands

In 2022, foreigners residing in the 27 countries of the EU accounted for 37.8 million, or 8.5% of the total population. According to the Ministry of Labour and Social Policies' Annual Report of 2023 regarding foreigners in the Italian labour market,⁷¹ over 70% of foreigners resided in four countries: Germany,⁷² Spain,⁷³ France⁷⁴ and Italy. In the latter country there were 5 million resident foreigners, of which 2.3 million were employed.⁷⁵ Although the presence of foreign workers in Italy is varied and exceeds the borders of the European Union, the report shows that eastern countries' citizens - especially those from Romania,⁷⁶ Poland, and Bulgaria - form a significant bloc of them. A large number of cross-border workers come from Slovenia and Croatia, which is reasonable given the geographical proximity to Italy.⁷⁷

Although occupations vary in terms of tasks performed and skills required, the sectors with the highest incidence of foreign workers are agriculture, construction, catering, tourism, road transport, and domestic work.⁷⁸

However, besides the high number of incoming cross-border workers,⁷⁹ there are also outgoing frontier commuters from Italy, especially towards Switzerland.⁸⁰

In contrast, the incoming and outgoing labour flows in the Netherlands are quite different than Italy's flows. According to data from the Dutch Statistics Office,⁸¹ there are more incoming workers - especially from Belgium - than outgoing ones.

71 See <https://www.lavoro.gov.it/temi-e-priorita-immigrazione/focus/xiii-rapporto-mdl-stranieri-2023>.

72 10,9 million.

73 5.4 million.

74 5.3 million.

75 Which is 10% of the total number of employees in Italy.

76 With an increase of 0.7% compared to the previous year.

77 See par. 3 of this essay. For an analysis of the situation in the border region of Friuli-Venezia Giulia, see NUNIN, *cit.*, p. 259.

78 See also European Commission, *2017 Annual Report on Intra-EU Labour Mobility*, available at: https://ec.europa.eu/futurium/en/system/files/ged/2017_report_on_intra-eu_labour_mobility.pdf.

79 In the absence of a structured system for tracking cross-border workers, the estimated number, based on detection of passages at the Transalpina station and foreign mobile telephone users, varies between 15,000 and 18,000 cross-border workers per day: see Regione Friuli Venezia Giulia, 2020. See also the most recent data available at: <https://www.rainews.it/tgr/fvg/video/2022/10/gorizia-transalpina-confronto-lavoro-transfrontaliero-dede4f1c-e1be-47a1-ba05-baa918a6f397.html>

80 Data available at: <https://www.bfs.admin.ch/news/it/2023-0507>

81 <https://www.cbs.nl/en-gb>

In fact, frontier workers make up a significant part of workforce in the Netherlands – ranging from 15% to about 40% – especially for companies located near the border. In 2019 cross-border workers accounted for at least 1% in many regions, with significant peaks in Zuid-Limburg,⁸² Zeeuws-Vlaanderen,⁸³ Noord-Limburg,⁸⁴ Midden-Limburg,⁸⁵ and Zuidoost-Noord-Brabant.⁸⁶ For certain sectors, border locations are often the best places to settle in Dutch regions. For multinational companies, that type of location is advantageous for recruiting international and multilingual staff, with the best skills.

In almost all sectors in the Dutch labour market qualified personnel are needed because of the insufficiency of the native Dutch workforce. Indeed, in the Netherlands there are 133 vacancies for every 100 unemployed people.⁸⁷ This factor is consequential to the low unemployment rate recorded there.⁸⁸

6. Challenges in Equal Treatment Between Cross-Border and National Workers

Despite the differences in geographical and socio-economic factors, the challenges for cross-border workers in Italy and the Netherlands are similar. For example, social dumping – where foreign workers receive lower pay or worse working conditions compared to domestic employees – is a risk in both countries.

Although this is a recurring term in debates related to workers' mobility and security, social dumping does not have a generally accepted definition. It is often considered a 'vague concept', and "legal experts, economists, social scientists all have their own conception."⁸⁹ Even though there are different perspectives on the term, there is a common agreement that it has a 'negative connotation'. The phenomenon signifies, at the same time, exploitation of workers and unfair competition between companies. It is a set of practices carried out on an international, national, or inter-corporate level. It is aimed at gaining an advantage over competitors due to application of different wages and social protection rules to different categories of workers.⁹⁰

82 5.5%.

83 4.1%.

84 4.6%.

85 3.7%.

86 2.2%.

87 <https://nltimes.nl/2022/05/17/dutch-labor-market-super-tight>

88 As reported in par. 3 of this essay.

89 Jorens, 2022, p. 375.

90 Bernaciak (ed.), 2015; Buelens and Rigaux (ed.), 2016; Kiss, 2017.

In some cases it might consist of different treatments or discrimination based on the nationality. As such it contributes to the vulnerability of workers.⁹¹

For cross-border workers, social dumping may be the result of the following critical issues: higher taxation, greater difficulties in accessing social benefits and working arrangements, and the risk of undeclared work.

Due to the lack of a regulatory framework, cross-border workers risk double taxation. In fact, their income from work could be taxed both in the country of residence and in the country where the work is carried out. Not only is it an economic burden on workers, but it also is an obstacle to free movement within the EU.

The only way to avoid double taxation and its consequences is signing bilateral taxation agreements. Italy has just revised the agreement with Switzerland,⁹² which contains the definitions⁹³ of 'frontier area'⁹⁴ and 'frontier workers',⁹⁵ establishes the prohibition against double taxation,⁹⁶ and reaffirms the principle of non-discrimination.⁹⁷

Even the Netherlands has just updated its double tax treaty with Belgium.⁹⁸ However, it still needs to be approved by both parliaments to become effective.⁹⁹ The revision of the existing treaty concerns a simplification of applicable rules and aims at combating abuse. In essence, the treaty prevents workers from paying tax in both countries. According to the new treaty, income from work must be taxed in the country where work was carried out.¹⁰⁰

All agreements on the matter have similar purposes, i.e. avoiding double taxation and preventing exploitation. However, the sheer number of existing treaties and different modalities of their discipline may create great confusion and uncertainty. Therefore, a multiplicity of bilateral agreements can be a temporary solution.

91 A clear example may concern companies who engage cheaper and more vulnerable agency workers or relocate production to lower wage and less regulated locations. Social dumping may take different forms in different sectors.

92 Bilateral taxation agreement between Italy and Switzerland was ratified in Italy with law 13.06.2023, no. 83 and has been in force since the first July 2023. There is also a bilateral agreement with Slovenia, in force since 2002.

93 Art. 2 of the agreement.

94 Regarding Italy, frontier areas are considered the Regions of Lombardy, Piedmont, Valle d'Aosta and the Autonomous Province of Bolzano.

95 Frontier workers must be tax resident in a municipality whose territory is located, totally or partially, in the area 20 km from border with the other contracting State and should come back daily to its own principal domicile in the State of residence.

96 Art. 3.

97 Art. 4.

98 On 21.06.2023 the relevant ministers of the two Countries signed the new tax treaty. The previous treaty, still in force, was signed in 2001 and modified in 2009.

99 This is not expected to be until 2025.

100 Nevertheless, there are some exceptions in specific situation: for instance, working for government, working in education, working on board a ship or aircraft, etc...

However, the most effective remedy would be a homogeneous regulation on this relevant topic, valid throughout the EU member states.

Under no circumstances should access to social benefits be more difficult for cross-border workers than for domestic ones. If so, it would be an obstacle to equal treatment and a failure of the principle of free movement within the EU. Even though rules have been established, sometimes they do not work in practice, as attested by the interesting and lively case law in both countries.

A recent episode of the problem in accessing social benefits can be seen in foreign lecturers working in Italian universities. Although Italian law provides an acceptable framework for the so-called reconstruction of careers of foreign lecturers,¹⁰¹ in practice most universities do not adequately respect the EU rules on free movement and non-discrimination based on nationality. They do not provide for a correct reconstruction of foreign lecturers' careers. This includes the adjustment of their salary, seniority and corresponding social security benefits to those of a researcher under a part-time contract. Therefore, most foreign lecturers have not received the money and benefits to which they are entitled. Consequently, the European Commission decided to refer Italy to the Court of Justice of the European Union,¹⁰² claiming that Italy had violated the principle of non-discrimination due to nationality in another EU member state in regards to employment access and conditions of work.¹⁰³

This is not an isolated case. In one of the Italian regions with the greatest presence of cross-border workers – i.e. Friuli Venezia Giulia – a regional law breached the principle of equal treatment.¹⁰⁴ It reserved sickness benefit to residents in Italy for at least ten years, of which five specifically in the region. Restricting access to social benefits favours those who are native and most deeply rooted in the region. This constitutes indirect discrimination based on nationality.¹⁰⁵

Similarly, on this issue, the EU Court of Justice declared against the Netherlands for requiring foreign workers and dependent family members to comply with residence conditions. In particular, this pertains to the 'three out of six years' rule, which conflicts with obligations under Art. 45 TFEU and Art. 7(2) of Regulation no. 1612/68 on freedom of movement for workers within the EU.¹⁰⁶

Because of the lack of a single social security system valid throughout the EU, case law plays a fundamental role in protecting cross-border rights and ensuring

101 As recognised by the Court of Justice of the European Union in case C-119/04, settled on 18.07.2006, available at: <https://curia.europa.eu>

102 Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3480

103 Art. 45 TFEU and art. 7 of Regulation EU no. 492/2011.

104 According to art. 117 of the Italian Constitution, regional normative provisions must respect not only the Constitution itself, but also the constraints of the EU regulatory system.

105 See Court of Udine 29.06.2010, in *D&L*, 2010, p. 874, which disapplied regional law 7.11.2006.

106 See CJEU 14.06.2012, C-542/09, *European Commission v. Kingdom of the Netherlands*, available at: <https://eur-lex.europa.eu/>

the principle of equal treatment in accessing social benefits, both at national and supranational level.¹⁰⁷ As noted, implementation of these rights "became a matter of jurisdiction rather than legislation."¹⁰⁸

The number and variety of controversies on the matter are the clearest sign that freedom of movement and its effects,¹⁰⁹ although generally transposed into national legislation, are not yet sufficiently internalised.

Digital transformation of the labour market, especially due to the COVID-19 pandemic and its impact on the increase in remote working, may also affect working conditions of cross-border workers. Accessing remote work may be a bone of contention between cross-border and domestic workers. While national employees can easily take advantage of remote work,¹¹⁰ frontier workers would be cut off from this possibility in order to comply with the strict provisions of bilateral agreements on the matter.

Furthermore, Art. 13 of Regulation no. 883/2004, which is applicable legislation for cross-border workers, establishes that an employee who normally pursues an activity in two or more member states shall be subject to the legislation of the member state of residence if they pursue a substantial part of work¹¹¹ in that member state.¹¹² During the COVID-19 pandemic, a Guidance Note¹¹³ was issued to clarify that telework in a member state other than the usual country of employment, due to health emergency, should not change the applicable legislation, even when working from home exceeds 25% of activity.

Considering the changed post-pandemic social context – where telework has become a structural way of working for many employees – the greater difficulty in using remote work for cross-border employees would have represented an obstacle to free movement and equal treatment in employment. Therefore, a framework agreement for habitual cross-border telework has recently been promoted by the Administrative Commission for the coordination of social security systems.¹¹⁴ It has been signed by 18 member states so far. This agreement¹¹⁵ – which implements

107 It is appropriate to point out a recent CJEU ruling on the matter: 15.06.2023, C-411/2022, *Thermalhotel Fontana Hotelbetriebsgesellschaft m.b.H. v. Bezirkshauptmannschaft Südoststeiermark*, available at: <https://eur-lex.europa.eu/>

108 Grimm, 2015, p. 467.

109 I.e. equal treatment and non-discrimination on grounds of nationality.

110 This modality of carrying out working performance may allow reduction in commuting time, better work-life balance, more flexibility in working time organisation, and higher productivity.

111 According to art. 14 (8) of the Implementation Regulation no. 987/2009, substantial part is more than 25% of the activity.

112 So-called *lex loci domicilii*.

113 For the period between 1.02.2020 and 30.06.2022: see the revised version as of 25/11/2021 - AC 074/20REV3 available at: <https://ec.europa.eu/social/main.jsp?catId=868&langId=en>

114 For a comment on the agreement see Aceto, 25.09.2023.

115 Entered into force on 01.07.2023.

Art. 16 (1) of Regulation no. 883/2004¹¹⁶ – only disciplines cross-border telework and constitutes an exception to Art. 13.

Although the purpose of the framework agreement is to identify applicable legislation and simplify procedures, some critical issues are recognisable. Firstly, both the member state of residence and employment must have signed it.¹¹⁷ While the Netherlands has already approved it, in Italy it is still in discussion.

Secondly, according to Art. 3 of the agreement, cross-border telework should be carried out in the state of residence less than 50% of the total working time. Therefore, unlike for national workers, cross-border employees' flexibility is strongly constrained.

Although "considered a reasonable compromise",¹¹⁸ this agreement is yet another demonstration of the urgency for true harmonisation between national regulations.¹¹⁹

Remote work presents opportunities as well as challenges for all employees, especially in the areas of occupational health and safety. This includes psychosocial issues related to hyper-connection, overworking, blurring boundaries between personal and professional life, etc. Challenges related to cybersecurity and data protection must also be addressed. In the case of cross-border workers these issues may be amplified, due to the possible differences in various national regulatory provisions.

Because the movement of cross-border workers is frequently not monitored, their risk of undeclared work is even more likely than for national ones.

Despite being a topic of great media interest, it is not easy to define irregular work according to traditional legal categories. It is an ancient and complex phenomenon. Not only is it widespread but it is varied because 'irregular work' as genus presents numerous species. It can be difficult to distinguish what constitutes undocumented work,¹²⁰ illegal work,¹²¹ and informal employment.¹²² Undeclared work is the definition adopted by the European Union for the first time in 1998.¹²³ It means "any paid

116 Art. 16 (1) establishes the possibility that two or more Member States, or the competent authorities of these Member States or the bodies designated by these authorities may, by common agreement, provide for exceptions to conditions in art.s 11-15 of Regulation no. 883/2004, in the interest of certain persons or categories of persons.

117 Art. 2 of Framework Agreement.

118 Aceto, *cit*.

119 From a tax perspective, circular no. 25/E of 18.08.2023 issued by the Italian Tax Agency provided clarifications on use of remote working and consequent tax regulation for cross-border workers, also to counter abuse of fictitious residences abroad.

120 Calafà, 2017.

121 This expression generally refers to irregular work carried out by individuals illegally present on the national territory (European Commission, 2014, p. 8) or to illegal activity in itself.

122 Vermeylen, 2008.

123 European Commission, 1998.

activities that are lawful as regards their nature, but not declared to public authorities, taking into account differences in the regulatory systems of the Member States."¹²⁴

Not all EU member states have an express regulatory reference to undeclared work¹²⁵ or even use the same term. Depending on regulatory provisions, Italy uses the term 'irregular work'¹²⁶ – to mean the employment relationship for which the obligations in civil, administrative, fiscal, social security and insurance matters have not been fulfilled, in whole or in part – or 'black work'¹²⁷ when the violation is total. Conversely, the Netherlands prefers the term 'illegal employment' for every kind of exploitation of workers (i.e. dangerous and unhealthy working conditions, being underpaid, working without registration for income tax and social security, etc.).¹²⁸

This phenomenon is a challenge that negatively affects workers, companies and governments across Europe in different ways.¹²⁹ It may have far-reaching consequences, including breaching of workers' rights, unfair competition, and reduced tax revenues.¹³⁰ At EU level the most effective measure was the creation of the European Platform. It made a permanent working group of the European Labour Authority to tackle undeclared work since 26 May 2021. At the national level the fight against undeclared work relies mostly on the actions of labour inspectorates. However, besides deterrent measures, preventive policies – such as tax incentives, amnesties, awareness raising – may be useful to decrease the incidences of undeclared work and facilitate compliance with existing rules.

Undeclared work is a serious issue both in Italy and in the Netherlands. Evidence of the problem can be seen in the annual reports on supervisory activity in labour and social security written by the Italian Labour Inspectorate¹³¹ and the Dutch documents on the matter.¹³² The data shows that cross-border workers are in one of the most vulnerable categories. Italy's latest reports highlight alarming incidences of illicit transnational posting in the northern Italian regions, especially in transport, construction, and health services.¹³³ Domestic work is another sector that is char-

124 See opinion of the European Economic and Social Committee no. 2014/C - 177/02 on "A strategy to combat the black economy and undeclared work", available at: eur-lex.europa.eu

125 Robert, 2014.

126 Art. 1 of law 18.10.2001, no. 383.

127 Art. 36-bis of decree-law 4.07.2006, no. 223, converted by law 4.08.2006, no. 248.

128 See <https://www.nllabourauthority.nl/topics/illegal-employment>. See also factsheet on undeclared work in the Netherlands in www.europa.eu.

129 See characteristics of undeclared work across all 27 EU Countries, and the institutions and policy responses available at: <https://ec.europa.eu/social/main.jsp?catId=1322&langId=en>

130 On the topic, Russo, 2018, p. 876.

131 <https://www.ispettorato.gov.it/attivita-studi-e-statistiche/monitoraggio-e-report/rapporti-annuali-sullattivita-di-vigilanza-in-materia-di-lavoro-e-previdenziale/>

132 See <https://www.cbs.nl/en-gb> and <https://www.nllabourauthority.nl/>.

133 Ispettorato Nazionale del Lavoro, 2022, p. 40.

acterised by a high rate of irregularities.¹³⁴ Since this area lacks good data, it is often overlooked by supervisory reports.

In the Netherlands, the Dutch Labour Inspectorate carefully monitors compliance with the Posted Workers in the European Union Act (*Wet arbeidsvoorwaarden gedetacheerde werknemers in de Europese Unie*). It provides better protection for these workers and combats unfair competition based on employment conditions,¹³⁵ especially in sectors of construction, maritime/shipbuilding and transport industries.¹³⁶

In order to avoid dangerous consequences of undeclared work on cross-border employees, the only available remedies may be implementing labour inspections both at national and EU level, and promoting a culture of integration and legality for safer and more decent work, regardless of border and nationality.

7.

Brief Conclusions and Prospects for Strengthening Free Movement of Workers

It is clear that cross-border workers' protection is guaranteed – in theory – by general rules on the right to freedom of movement within the EU. This is constitutionalised in the treaties and progressively interpreted by the EU Court of Justice. Nevertheless, in practice many challenges need to be overcome.

The reasons for the gaps between theory and practice are numerous. Firstly, from a political viewpoint the last two decades have seen increased labour mobility become more heterogeneous.¹³⁷ Much of this is due to Eastern enlargements¹³⁸ that have led to migration flows from East to West.¹³⁹ Secondly, from a sociological perspective, an obstacle to full integration may be because of the public perception of cross-border workers. Studies on the issue show that less-educated persons consider free movement of workers as a threat to their jobs.¹⁴⁰ Moreover, from a legal viewpoint the complexity of harmonising national legislations cannot be underestimated, above all in the field of social security, which has remained a national competence. Thus,

134 Nunin, *cit.*, p. 263.

135 <https://www.government.nl/topics/foreign-citizens-working-in-the-netherlands/employment-conditions-for-posted-workers-in-the-eu>

136 Houwerzijl, 2018, p. 22.

137 For instance, regarding wage levels and working conditions.

138 Poland, Hungary, Slovenia, the Czech Republic, Slovakia, Latvia, Estonia, Lithuania, Cyprus, and Malta joined the EU in 2004. In 2007 Bulgaria and Romania were added. The last entry was Croatia in 2013.

139 Roos, 2019, p. 631.

140 Toshkov, Kortenska, 2015, p. 910; Vasilopoulou, Talving, 2019, p. 805.

coordination of national welfare systems may be essential to promote and facilitate free movement of workers within the EU.

Because of this contentious framework, it is no wonder that there were a significant number of infringement procedures initiated by the EU Commission against both the countries examined in this study.¹⁴¹ Without going into details, they concern both the late communication to the EU Commission about the measures chosen to implement the directives, and the failure or the incorrect application of the EU regulatory provisions. Such procedures could involve the Court of Justice and lead to an economic penalty. Over time it could become a great cost to the state.

In conclusion, since free movement of workers cannot be taken for granted, what could be the most effective measures to strengthen it and protect cross-border workers?

At the EU level, the first point to address should just be creating a clear definition of cross-border workers. Indeed, these workers lack a uniform classification. Additionally, there is the issue of different disciplines, which depends on the criteria used for different groups of workers (i.e., frontier workers, seasonal workers, posted workers, etc.). These differing terms could increase confusion and thereby weaken worker safeguards even though these employees may have the same characteristics and vulnerabilities, i.e., they live in one member state and work in another.¹⁴²

In regard to the principle of equal treatment, cross-border workers are pioneers of European integration and effective compliance. Therefore, the harmonisation of national regulatory frameworks should be a priority. This is especially true for the issues of granting social benefits and avoiding higher taxation. Furthermore, greater cooperation of European and national authorities to supply proper information and verify rule compliance should be included in the agenda.

Only with these essential tools will it be possible to reinforce free movement of workers, which is the cornerstone of European citizenship.

141 In the first half of 2020, 22 infringement procedures against Italy and 5 against the Netherlands were promoted. See *www.openpolis.it*.

142 Unlike EU migrant workers, who leave their country of origin completely, with or without their family, to live and work in another Member State.

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Workplace Surveillance of Employees from the Czech Perspective

ABSTRACT: *This contribution focuses on workplace surveillance from the Czech perspective. Its basis is to present the essence of surveillance by employers in the Czech Republic – a much-discussed topic influenced by a number of facts such as the development of modern technologies, also included in this paper. These issues are presented from several perspectives – specifically: employees under video surveillance; monitoring of employees' computers; and consumption of alcohol or other addictive substances under surveillance. In the case of video monitoring, the aspect of GDPR legislation and the Labour Code are discussed in detail. The national attitude towards hidden monitoring and dummy camera systems is also emphasised. For example, it is important that – according to some opinions – the employer is obliged to directly inform the employees about the scope and methods of the employee surveillance in advance. This would completely eliminate employee surveillance carried out with hidden cameras. However, this approach would basically be much harder on employers than the European Court of Human Rights' case-law. This paper, therefore, represents a different way of interpreting the relevant Czech Labour Code. The role of the Czech Personal Data Protection Office is also highlighted. The development of the opinion of this Office on employee email surveillance is also included. In relation to the topic of employee surveillance through a work computer, the paper also summarises the basic limits that the employer must take into account. Finally, monitoring work premises for the presence of alcohol is a highly important topic as well, with employees forbidden from working under the influence of alcohol. However, the employee surveillance faces some major restrictions in this respect, not only from Czech Labour Code legislation but also by the case-law of the Supreme Court of the Czech Republic.*

KEYWORDS: *labour law; employee surveillance; employer; workplace; Czech Republic*

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1.

Introductory notes

Surveillance of employees is certainly a much-discussed topic. Many employers are now thinking about how to approach the surveillance of their employees, or are introducing it to their workplaces as a new measure. This can be induced by many causes, the most common of which will likely be the effort to control efficiency and performance, while also including health and safety monitoring, natural monitoring of the working environment, or any other relevant cause. At the same time, employee surveillance is not only related to moments when the employee is performing distance work, such as on home office. Currently, these surveillance methods can be frequently encountered even during routine work in the employer's workplace and on its premises.

It is also necessary to emphasise that there are many new information technologies appearing – often directly associated with much easier and more intensive surveillance. And the more thorough these new surveillance possibilities are, the more essential it is to pay attention to the protection of employees, who can be excessively affected by such surveillance.

This is, at the same time, a very broad topic that can be viewed from different angles. This paper, therefore, includes employee surveillance from several different points of view. In this respect, employees under video surveillance and computer monitoring – and monitored for consumption of alcohol or other addictive substances – are discussed.

2.

Employees Under Video Surveillance

2.1. The GDPR legislation

Video surveillance is probably the most frequent method of employee surveillance in the Czech Republic, and the associated employee protection has two levels. By all means, recording of employees may be considered as processing of their personal data under the General Data Protection Regulation (hereafter GDPR).¹ This is especially the

1 Cf. 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.

case if the recording from the cameras can be kept for a longer period – in which case the employer will fulfil the requirements of Article 4 Points 2, 7 and 8 of the GDPR,² and will act as the controller and processor of the personal data of its employees.

In addition, the internal Act No. 110/2019 Coll., on the processing of personal data, as amended (hereafter the Act on Personal Data Processing), which closely follows this GDPR Regulation, was adopted in the Czech Republic. Therefore, the relevant legislation is included in both of these legal sources. On an application level, these jointly represent the general legislation in relation to camera systems and employee surveillance, which is to stipulate the basic³ obligations placed on the employer – for example, the obligation to specify the purpose of processing personal data, records of processing activities, balance test, instruction of the data subject on the scope of their processing, on the proportionality test, or on the securing of protection of the personal data processed. The relevant supervisory body is then the Czech Personal Data Protection Office (as well as the European legal framework for personal data protection).

Although there are not many court decisions at this general level, a judgment by the Supreme Administrative Court of the Czech Republic can be referred to at this point. Specifically, it stipulates that the aim of the national legislation contained in the Act on Personal Data Processing (as well as in the previous legislation) is to fulfil the right of everyone, including the employees, to be protected against unauthorised interference with their privacy - and to get the rights and obligations regarding personal data processing in compliance with the European legislation.⁴

2 Article 4 Point 2 of the GDPR Regulation stipulates that processing means any operation or set of operations, *'such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.'*

3 Cf. Štefko, 2019, pp. 1246–1254.

4 Cf. Supreme Administrative Court, 2006, 3 As 21/2005-105.

2.2. The Role of the Czech Personal Data Protection Office and the Methodology

2.2.1. Division of Camera Systems into 4 Classes

In response to the European Data Protection Board Guidelines 3/2019,⁵ the Personal Data Protection Office has prepared its national methodology.⁶ This methodology is not a binding legal act, but a draft document to help with the GDPR application on video surveillance. In principle, it can be said that the office attempts to make the processing much easier for those processing personal data in a lower quality and smaller extent. Therefore, the office divides camera systems into 4 classes. The criteria of this division are - among other things - the quality of the recording, its sensitivity, or the degree of interference with the rights of the data subject (i.e. the employee).

The methodology also defines four types of threats to which the employer must react if using the camera systems for employee surveillance:

- a) Unauthorised access to camera systems
- b) Access by unauthorised persons to camera recordings
- c) Unauthorised reading (even online), copying, transmission, modification, and erasing of camera recordings
- d) Potential weather damage to surveillance cameras

For each of these 4 classes and types of threats, technical and organisational measures used for a specific camera system are subsequently determined by the methodology. These measures must be adopted by the employer to prevent the abuse of camera systems. The lower the recording quality of a specific camera included in the relevant class is, the fewer measures the employer is obliged to implement. In this case these measures are usually less demanding for the employer.

2.2.2. Camera Systems in Online Mode

In its methodology the office newly stipulates that – in order to save camera recordings – the processing of personal data can be carried out in ‘online mode’ – i.e. with a

5 Cf. European Data Protection Board (2020): Guidelines 3/2019 on processing of personal data through video devices [Online]. Available at: https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-32019-processing-personal-data-through-video_en (Accessed: 27 October 2023).

6 Cf. Czech Personal Data Protection Office (2023): Methodology for the design and operation of the camera systems in terms of the processing and protection of personal data [Online]. Available at: <https://uouu.gov.cz/media/novinky/dokumenty/metodika-kamery0-983.pdf> (Accessed: 27 October 2023).

camera system that does not store the recording. However, these videos can be monitored by the employer or by any other person online. The principle here is that any shot of an identifiable person represents personal data, and therefore enabling access to an unlimited circle of recipients also represents the processing of personal data.

Thus, the office extends the scope of GDPR legislation to all cameras, camera systems, photo traps and all similar devices capturing or transmitting shots of natural persons – whether they make a long-term recording or not.

2.2.3. Sample Documentation

The methodology also contains three sample documents. One is a sample document for fulfilling the information obligation; one is a sample record of the operation of the processing by the camera system; and one is a sample balance test within the processing of personal data on the basis of legitimate interests.⁷ This is a step helping – in particular – smaller controllers to comply with the obligations of the GDPR in the using of camera systems.

2.3. Czech Labour Code

In addition to the GDPR legislation, some basic requirements are also stipulated in the Czech Act No. 262/2006 Coll., the Labour Code, as amended (hereafter the Labour Code). The legislation contained in the Labour Code is especially in relation to the general GDPR rules. The relevant supervisory bodies are then the Regional Labour Inspectorates and the State Labour Inspection Office.

In accordance with Section 316 of the Labour Code, without a serious reason the employer must not interfere with the employee's privacy in the workplace and in the joint premises of the employer. This means that the employer is forbidden from monitoring the employee openly or covertly, to intercept or record telephone calls, or to check email or other mail shipments addressed to employees. More importantly, if a reason is provided to justify such control mechanisms, the employer is obliged to directly inform the employees about the scope of the surveillance and the methods of its implementation.

7 *Ibid.*

2.3.1. *Hidden Camera Systems*

According to some opinions,⁸ the provision of the above information should always precede the surveillance itself – and therefore secret employee surveillance was generally prohibited with regard to Section 316 of the Labour Code. However, this would also mean that the legislation of the Czech Labour Code would be much stricter on employers than foreign judicial decisions, such as those of the European Court of Human Rights (ECtHR). Out of these reasons, I cannot in principle identify with the opinion that provision of the information should always precede the surveillance itself.

An example of such ECtHR case-law is the judgment in *Lopez Ribalda et al. versus Spain*. This judgment dealt with a case in which a supermarket employer installed camera systems to prevent continuing theft at the workplace. Employees were informed about the installation of visible cameras, which were directed towards the entrances and exits of the supermarket. However, there were also several hidden cameras in the supermarket, of which the employees were not informed.

The court noted that Spanish law – as well as international standards – requires fulfilment of the employer's informational obligation previous to surveillance, but this is only one of the criteria taken into account in assessing the adequacy of employee surveillance. If the information has not been disclosed, other guarantees will be more important. It is essential to balance the employees' right to privacy with the protection of the employer's assets. The court observed that the interference with the employees' privacy was proportionate in the end, judging that there existed a reasonable suspicion of serious misconduct by the employees, and that the extent of the losses did constitute appropriate justification.

Therefore I strongly support the second interpretation, according to which it is sufficient to either inform the employees about the monitoring afterwards, or get the employees acquainted with the sole possibility of video monitoring without any other relevant details preceding the surveillance,⁹ provided there is a significantly relevant reason for it (such as a risk of a severe property harm caused to the employer). Generally speaking, the possibility to use hidden cameras is still an open issue in the Czech Republic.

8 Cf. Jelínek, 2022, 1013.

9 Cf. Morávek, 2022, pp. 950–965.

2.4. Dummy Models of Cameras

The above-mentioned implies that legislation in the Czech Republic is partly duplicated and overlapping. The powers of the competent supervisory bodies are also doubled. This was relatively well reflected in a recent case dealt with by the Personal Data Protection Office,¹⁰ dealing with the location of dummy cameras in the common premises of the workplace. The surveillance did not meet the definition of hidden monitoring, with the employees fully informed about the presence of these cameras. However, they were not informed that they were only dummy models – unable to make or store any record at all.

As part of its investigation, the office concluded that no breach of general GDPR legislation was caused. As a dummy camera is not capable of collecting any personal data at all, it cannot cause a GDPR breach. However, it pointed strongly to the fact that -in addition to the GDPR obligations - the employer is also obliged by the Labour Code to create favourable working conditions for the employees and ensure their health and safety.¹¹

The dummy cameras were located in the common areas of the employer's workplace – specifically at the toilets. The office referred the whole matter to the relevant Regional Labour Inspectorate, which considered the location of the dummy cameras as a breach of the employer's obligation. Camera surveillance done in this form was assessed to be creating undue pressure on the affected employees, which while it represented no breach of the GDPR still violated the Czech Labour Code.

2.5. Partial Summary

In conclusion, it should be highlighted that there is duplicate legislation on camera surveillance in the Czech Republic – with not only the GDPR, but also the Labour Code. There is also an overlap between the competence of the Personal Data Protection Office and the Labour Inspectorates. In accordance with the Section 316 of the Czech Labour Code the employer must not interfere with the employee's privacy in the workplace or in the joint premises of the employer without a serious reason. However, it is not determined what this serious reason may be.

The employer is obliged to directly inform the employees about the scope of the employee surveillance and the methods of its implementation – however I am convinced that this does not prohibit employers from using hidden camera systems.

10 Cf. Czech Personal Data Protection Office (2022) Camera atrapa does not violate GDPR, but its installation can be sanctioned [Online]. Available at: https://uoou.gov.cz/vismo/dokumenty2.asp?id_org=200144&id=55810 (Accessed: 2 October 2023).

11 Cf. Section 302, para. c) of the Czech Labour Code.

This approach is entirely consistent with ECtHR case-law. However, for such monitoring the employers must have very serious reasons.

The general criterion is to proceed adequately towards the employees and always choose the more suitable and less invasive approach of surveillance carried out by the camera systems (this may be surveillance by a superior employee). At the same time, it is unacceptable to continuously monitor common relaxation spaces, especially toilets. On the other hand, the ruggedness of this legislation in some cases – such as the installation of dummy cameras – allows us to sanction a much wider range of inappropriate behaviour by employers than the GDPR would alone.

3.

Monitoring of Employees' Computers

3.1. Basic Definition

3.1.1. Several Comments on the Legislation

This section presents several notes on monitoring work computers. This can include not only installation of programs to allow the employer to remotely monitor activity, but also monitoring of emails and the employees' working environment. In principle, it is not decisive who the owner of these computers is, whether the employer or even a third party. The only important thing is how the employer performs surveillance in relation to a particular computer. In line with the development of modern technologies, there are a number of ways that employees can be monitored. Their range is extensive, and it is certainly not possible to deal with all of them. Some examples include monitoring of keystrokes, screens, mouse movements, observation of the environment around the computer, surveillance by webcam, and email monitoring. In addition there is the installation of data leak prevention systems and new generation firewalls. It should be said that with the current rapid development of technologies, this type of surveillance is becoming increasingly frequent.

Regarding computer surveillance, the above-mentioned legislation applies as well, especially when it comes to camera or video monitoring (in particular random activation of a webcam or microphone, and taking pictures of the environment around the computer). If the employee's personal data is processed through the selected means of surveillance, the GDPR legislation will apply again. In addition, the same Section 316 of the Czech Labour Code can always be related to the matter. Thus, for the employer to carry out surveillance their interest must outweigh the

interests (especially privacy) on the employee's side. And again, there is some overlap between the competence of the Personal Data Protection Office and the Labour Inspectorates.

Based on ECtHR case-law, the employees' privacy in the workplace is always to be protected by the employer. However, this does not grant employees permission to take paid leave and use the employers' devices to arrange their private affairs. According to the relevant interpretation, this is not contrary to the case-law of the ECtHR and the Court of Justice of the EU.¹² It is clear enough that no employer must be obliged to accept the use of professional equipment for employees' private purposes. Compliance with these rules is to be monitored by the employer.

The Czech Labour Code presents the very same opinion. In accordance with Section 316 the employee is prohibited from using work devices for their personal needs, and can do so only with previous consent from their employer. This can be implicit as well. If the employees violate this rule, they carry all the costs and it represents a breach of their duties, which can also lead to the termination of the employment relationship.¹³

However, it should be emphasised that for surveillance carried out by the employers, Section 316 stipulates conditions that must be observed by the employers in addition to the general conditions according to the GDPR.¹⁴ The employer is entitled to monitor compliance solely in a proportionate manner. The Supreme Court of the Czech Republic extends this conclusion, as it stipulates that the surveillance "cannot be performed by the employer completely arbitrarily (in terms of scope, length, thoroughness, etc.), since the employer is entitled to perform this surveillance only in a proportionate manner."¹⁵ The Labour Code leaves the court to define the circle of circumstances at its discretion. In particular, it should be relevant whether "it was a continuous or subsequent surveillance, its length, the scope of whether and to what extent it restricted employees in their activities, whether and to what extent it also interfered with the right to the employees' privacy, etc."¹⁶ It is still necessary to say that the employer's right to monitor its property is not limited to working hours. However, in terms of determining the degree of proportionality of employee surveillance, employees in general are given a greater amount of privacy outside working hours.¹⁷

12 Cf. Morávek, 2017, pp. 573–577.

13 Cf. Supreme Court, 2014, 21 Cdo 747/2013.

14 Cf. Štefko, 2019, pp. 1246–1254.

15 Cf. Supreme Court, 2012, 21 Cdo 1771/2011.

16 *Ibid.*

17 Cf. Morávek, 2022, pp. 950–965.

3.1.2. *Illustrative Examples of Appropriate Execution of the Employees' Surveillance*

The method of proportional employee surveillance is essential. For example, if a physical inspection carried out by a superior is sufficient, it may always be more proportionate than surveillance through any kind of tracking software.

At the same time, technical tools preventing computer abuse (e.g. whitelists or blacklists) will always prevail over the subsequent surveillance – i.e. prevention always prevails over surveillance. Even in the case of subsequent monitoring, the employer should restrict the monitoring itself to the quantity and size of the mail correspondence or to the list of domains visited by the employee. It is generally decisive for the proportionality of employee surveillance whether it is a continuous or subsequent surveillance, its length, and whether and to what extent it restricted employees in their activities or interfered with their privacy.¹⁸

A completely different approach must be applied if the employer knows and accepts that employees use professional devices to arrange their private affairs. If the employer's approach represents a tolerated practice, it is not possible to penalise the employees in any way as they have not committed any breach of their obligations at all. This applies to all employees, including incoming employees, otherwise it would represent a discriminatory approach. Any possible change in the conditions would then have to be made in relation to all employees.

3.2. The Personal Data Protection Office – Surveillance of the Employees' Email Correspondence

3.2.1. The Previous Unsatisfactory Development

Although the rules presented so far may seem natural enough, the preceding development was rather confusing in the Czech Republic. The approach of the Personal Data Protection Office towards email surveillance was significant. The office had previously presented its Standpoint No. 2/2009,¹⁹ focused exclusively on workplace surveillance with a special consideration to monitoring employees' email correspondence.

The office used to strictly divide employees' mail into private and work-related according to the email addresses used. For instance, in case the email was sent to the address *distribution@employers-domain.cz* it was always considered a work-related

18 Cf. Morávek, 2017, pp. 573–577.

19 Cf. Czech Personal Data Protection Office (2009): Stanovisko č. 2/2009, Ochrana soukromí zaměstnanců se zvláštním zřetelem k monitoringu pracoviště [Online]. Available at: https://uouu.gov.cz/files/stanovisko_2009_2.pdf (Accessed: 2 October 2023).

mail, and the employee was never granted any protection of privacy. Therefore, the employer could monitor the messages delivered to the employee using this address without any restrictions. This rule had to be followed even if this address was only used by one particular employee.

Conversely, the office claimed that in case of the email address starting with the name of the employee (e.g. *Svoboda@employers-domain.cz*), it is more reasonable to assume that the email may contain a message of a private nature, and is therefore subject to privacy protections. Emails sent to an address containing the name and surname of the employee were to be considered private, with no access allowed by the employer. Therefore, the employer was only allowed to monitor the number of received and sent emails, or (if the employer had a real suspicion of misuse of the work facilities for employees' private needs) to whom the employees write these emails, and from whom they receive them.²⁰ However, this division of email addresses was evidently very strict and in certain cases also outdated and inaccurate.

3.2.2. Remedy of the Harmful State of Things

The office finally realised that this approach had its limits, and the system was partially abandoned. The approach towards email addresses has since been modified, and now the employer shall determine themselves whether the email correspondence is private or work-related according to the topic, the sender, the recipient, or the salutations used, etc. "The employer may carry out the surveillance and check the contents of the employees' e-mail messages (open them and read them) only for a serious reason."²¹ Emails qualified as private or containing any private information cannot then be read by the employer. If the employer realises that the email contains any private information only while reading it, they are strongly prohibited from reading on and must pass the email on to the appropriate employee.²² If possible, the employee shall be informed in advance about the monitoring of their correspondence. Unfortunately, the previous Standpoint No. 2/2009 of the Personal Data Protection Office is still quite widely spread among the employers and the employees, which sometimes results in malpractice in email surveillance.

At the same time, the basic principle of minimising intervention into the protected values of the employees is still applied – proportionality is still the principle on which employee surveillance stands. For example, if an employee is not at the workplace (due to illness or holiday etc.) and does not respond to email correspondence, this

20 Cf. Morávek, 2010, pp. 3–7.

21 Cf. Morávek, 2017, pp. 573–577.

22 Cf. Štefko, 2019, pp. 1246–1254.

would seem to give the employer the right to view the emails instead of the employee – especially if the employer is threatened by serious property damage as a result of any kind of a delay. However, if we really follow the relevant proportionality principle, it is more appropriate to set an automatic response within the employees' e-mail address. This automatic response will then inform the sender that the employee is not present, and to what substitute address the message should be forwarded. In this way, the employer avoids any possible danger in delay and the sender receives all necessary information. However, it should also be emphasised that any automatic response that returns to the sender must not contain any other personal data of the employee in question. It is sufficient to report that the employee is absent until a certain date, but not the reason for their absence at work, etc.²³

This approach is significantly more appropriate than going through all employees' emails immediately and without prior warning. Nevertheless, there will undoubtedly always be a certain number of cases where an automatic response would not be enough in order to prevent employer's property damage. In such a situation, the employer is justified to carry out surveillance and go through the employees' correspondence themselves.

4.

Consumption of Alcohol or Other Addictive Substances Under Surveillance

4.1. Initial Considerations

The final part of this article focuses on the monitoring of alcohol in the workplace, though everything listed in the following part can also be used regarding other addictive substances. Under Section 106 para. 4 of the Czech Labour Code, the employee is strictly prohibited from consuming alcohol at the employer's workplace;²⁴ consuming alcohol during working hours both inside and outside the employer's workplace; and entering the workplace under the influence of alcohol. Section 106 of the Labour Code, among other things, generally stipulates that each employee "is obliged to pay attention to his or her own safety, his or her health and the safety and health of natural persons who are directly affected by his or her actions or omissions at work." It is consequently obvious that 'alcohol surveillance' is part of the Health and Safety

23 Cf. Morávek, 2017, pp. 573–577.

24 This prohibits the employees from consuming alcohol in the workplace both during and after the end of their working hours.

requirements in the Czech Republic. Thus, although the main purpose of the previous types of employee surveillance was monitoring of the fulfilment of the employees' work tasks, protection of the employer's property, and prevention of data loss, in the case of alcohol surveillance it is less a case of protection of the employer's property than to prevention of injuries in the workplace and protection of employees' health.

However, the prohibition against alcohol does not apply to employees for which these beverages are part of the performance of their work tasks, or are usually associated with the performance of these tasks.²⁵ This is especially the case of tasters in the production or trade of alcohol. It can also be the case for employees working in unfavourable microclimatic conditions, who are allowed to drink beer with reduced alcohol content for these causes. Such employees will be, for example, staff of the metallurgical industry.²⁶

The employees are also obliged to undergo monitoring as to whether they are under the influence of alcohol. This surveillance can be performed directly by the employer, or the employee can be sent to a suitable medical facility. The employee is only obliged to undergo surveillance based on the instruction of the authorised superior employee.²⁷ Such a superior must be determined in writing by the employer in advance. If the employee refuses to undergo surveillance, this may mean a breach of professional obligations.²⁸ An employer who does not ensure the prohibition of alcohol consumption in the workplace - in accordance with the Labour Code - may be fined up to a maximum of CZK 300,000.²⁹

4.2. The Surprising Attitude of the Supreme Court of the Czech Republic

Following all of this, it would seem as if the legislation itself is unambiguous. Nevertheless, the Czech Supreme Court recently made the topic much more confusing. In principle, being under the influence of alcohol is not always enough for the employee to seriously breach their contractual obligations. Typically, being under the influence does not always grant the employer any permission to terminate the employment relationship.

In the assessed case,³⁰ the employee performed dangerous work within the operation of a steel plant. Before the shift started, the employee had a measured blood level of 0.32 ‰ of alcohol during the first breath test. In the second breath test

25 Cf. Section 106 para. 4 of the Czech Labour Code.

26 Cf. Pichrt and Stádník, 2019, pp. 590–599.

27 Cf. Section 106 para. 4 of the Czech Labour Code.

28 Cf. Pichrt and Stádník, 2019, pp. 590–599.

29 Cf. Section 30 para. 1 of the Act No. 251/2005 Coll., on the labour inspection, as amended.

30 Cf. Supreme Court, 2016, 21 Cdo 4733/2015.

(half an hour later) he had a blood alcohol level of 0.23 ‰. The court stressed that even if the employee had entered the employer's workplace under the influence of alcohol, "a state when he or she severely violates his or her duties, may not be given by mere ingestion of alcoholic beverages, but his or her ingestion must happen to such an extent that it affects the reduction of mental functions and overall employee's unreadiness." The assessment of intensity of the relevant breach always depends on specific circumstances. The court also noted that the blood level of 0.2 ‰ of alcohol is considered inconclusive with regard to the so-called physiological level, i.e. the natural level of alcohol.³¹ In this case, the court took into account the personality of the employee and fulfilment of his existing tasks as well. The Supreme Court (after assessing all these facts) concluded that there was no fundamental breach of obligations.

The influence of alcohol is apparently only decisive if it directly leads to a certain decrease in the employees' mental or physical abilities. An explanation can be that the employees' abilities must be influenced to such an extent that cannot be ignored (for example the inability to speak, walk, etc.). This conclusion of the quoted judgment means that employers, as a rule, must tolerate a blood alcohol level of up to 0.20 ‰ of alcohol. However, the employers should be able to detect whether an employee who has exceeded this limit has or has not been sufficiently influenced. Nevertheless, there is no concrete guidance set for the employers as it may differ from employee to employee,³² and Supreme Court case-law is extremely rare in this respect. Another negative aspect of this case-law lies in the fact that it forces any employer who wants to fight against alcohol abuse not only to carry out the appropriate alcohol surveillance, but also to seek witnesses or any other acceptable proof of the decrease in the employees' abilities.

This decision is groundbreaking in a manner. In principle it may now be possible to consume alcoholic beverages during working hours and enter the workplace under the influence of alcohol, unless the alcohol level exceeds a certain limit. However, it is still true that the circumstances of each individual case must always be thoroughly assessed.³³

For the sake of completeness it should be noted that the Constitutional Court of the Czech Republic also rejects zero tolerance of alcohol in the case of the employees' alcohol surveillance.³⁴ The Constitutional Court relies its argumentation on the fact that, among other things, even the public law legislation does not provide for the zero

31 Therefore, it also evaluated, among other things, the fact that before the beginning of the shift the result of the finding was only 0.23 ‰ of alcohol, which is close to the given physiological level.

32 Cf. Supreme Court, 2016, 21 Cdo 4733/2015.

33 Cf. Jelínek and Odrobinová, 2022, pp. 418–423.

34 Cf. Constitutional Court, 2017, III. ÚS 912/17.

tolerance of alcohol, including in driving. “In practice, even the Road Traffic Act mentioned by the employer does not consider zero alcohol levels in the body but works with a so-called physiological level of 0.20 ‰, from which the eventually measured values exceeding it are deducted.”³⁵

5. Conclusions

I strongly believe that, regardless of the aforementioned legislation and case-law, employee surveillance should be especially well balanced to prevent employees from feeling stressed or over-monitored. These employees habitually tend to work less hard, which results in precisely the opposite effect we want to achieve.

This contribution focused on the issue of employee surveillance from the Czech point of view. It discussed the basic legal framework of surveillance that employers in the Czech Republic carry out upon their employees. In particular, the aspect of relevant GDPR legal regulations and the Labour Code, were discussed in detail. Obviously, other topics such as the development of modern technologies were also mentioned, as they have an impact on monitoring as well.

The intention was to cover employee surveillance in the Czech Republic relatively widely and from different aspects, including video surveillance, monitoring of the employees' computers, and consumption of alcohol or other addictive substances under surveillance. There are many conclusions. For example, the employer is obliged to directly inform the employees of the scope of surveillance and the methods of its implementation in advance. According to some opinions, this condition stated in Section 316 of the Czech Labour Code completely excludes the possibility of carrying out covert employee surveillance. However, my opinion is that it is necessary to conclude the exact opposite. Only this conclusion can be consistent with the case-law of the European Court of Human Rights.

Naturally, the article also brought an overview of the basic limits that the employer must take into account when monitoring employee computers and monitoring alcohol in the workplace. In this respect, the surveillance faces some major restrictions, with which each employer should become acquainted. At the same time, the role of the Czech Personal Data Protection Office was emphasised in many places. The methodology, which contains the office's view on employee surveillance carried out through camera systems, was obviously mentioned and disassembled in detail. Its positive could probably be a degree of facilitating the position of certain personal data processors (i.e. employers) dealing with personal data obtained from the camera

35 *Ibid.*

systems. In direct contradiction then is the former unclear and confused opinion of the Personal Data Protection Office on surveillance and monitoring of the employees' emails. This original state was clearly unsatisfactory and was therefore subject to much criticism. Nevertheless, the new approach adopted by the office seems to be significantly more appropriate.

In summary, employee surveillance is certainly a highly relevant topic. Most employers have either tested it in the workplace in some form, or have already included it in their ordinary operations at their workplaces. As it often happens that some of these employers tend to modify and interpret the relevant legislation incorrectly – most often in a manner more favourable for them – it is necessary to pay particular attention to compliance with legal rules. The right to employees' privacy and the interest of the employer in protecting their assets often collide, and it is precisely for these reasons that flawless knowledge of legal regulations is so important.

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Surrogacy and Legal Parenthood in Greece – One Size Fits (Almost) All¹

ABSTRACT: *The Greek legal framework governing the application of surrogacy is strictly defined and derives from four specific laws: Nos. 3289/2002, 3305/2005, 4272/2014 and 4958/2022. In order to safeguard the assisted parent(s) as well as the surrogate and establish legal family bonds between the child and the social mother, the legislation sets out specific prerequisites, such as the inability of the social mother to carry a child, the existence of a prior judicial authorisation, a written agreement between the parties and the prohibition of using the surrogate's eggs. However, the (excellent for the creation of legal family bonds) existing legal framework in Greece silently denies surrogacy to single men and gay or lesbian couples, reserving it only for straight couples and single women. This is a real-life issue largely ignored in everyday practice, which results in the birth of children without any legal family bond with their parent(s). The analysis of the legislation has identified three key issues on single men's and gay or lesbian couples' access to assisted reproduction: (1) Greek legislation remains silent on the issue; (2) Greek case-law is scant in the cases of single men and non-existent in the cases of gay or lesbian couples; (3) Greek legislation needs to be amended so that single men and gay or lesbian couples have unambiguous access to surrogacy, medical specialists can provide unhindered services to them and, most importantly, children born that way share a legal bond with their parent(s). The consensus for an overall reform of the legal framework governing single men and gay or lesbian couples to medically assisted reproduction in Greece, granting equal access to it for everybody – regardless of their sex or their sexual orientation – is absolutely imperative*

KEYWORDS: *medically assisted reproduction, right to procreation, Greek law, single men, gay and lesbian couples, surrogacy*

1 For the needs of this paper, there is no distinction between trans or cis-gender men and women; the terms 'man' and 'woman' refer equally to trans and cis-gender men and women.

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1.

Introduction: The Greek Legislation on Methods of Assisted Reproduction (MAR)

Despite the fact that the majority of European countries had enacted legislation regarding MAR in a relatively short period from the implementation of these methods,² it took Greece 24 years from the birth of Louise Brown to establish, in 2002 and 2005, two laws related to the implementation of MAR. Specifically, these are Law No. 3289/2002 entitled Medical Assistance in Human Reproduction³ and Law No. 3305/2005 regarding the Implementation of Medically Assisted Reproduction.⁴ The first law focused on civil law issues, creating and incorporating into the Greek Civil Code an entirely new chapter dealing with the conditions for the permissibility of MAR for married couples as well as for partners living in a civil union and for single women. It also legislatively recognised posthumous assisted reproduction methods and surrogacy, ensured the anonymity of sperm and egg donors, and established the principle of social and emotional kinship in MAR. The second law pertained to criminal law and made the violation of the terms of MAR application punishable, aiming for their as safe as possible implementation. Additionally, it provided a detailed description of MAR methods and techniques, specifying potential risks associated with their application.

The aforementioned laws remained unchanged until 2014 when Law No. 4272/2014 was subjected to vote, focusing on the Adaptation to national law of Commission Implementing Directive 2012/25/EU of October 9, 2012 laying down information procedures for the exchange, between Member States, of human organs intended for transplantation - Regulations on Mental Health and Medically Assisted Reproduction and other provisions.⁵ This law has brought changes to Article 8 of Law No. 3089/2002 (regarding the residence of the intended mother or the surrogate in the surrogacy process), Articles 7 to 9 (about the duration of cryopreservation, disposal and restriction of the disposal of reproductive material), Articles 16 and 17 (concerning the operation of MAR clinics and MAR units), and Articles 25 and 26 (regarding the operation of the National Authority for Assisted Reproduction and the imposition of criminal sanctions on the trade of reproductive material, respectively) of Law No. 3305/2005. The most recent changes have taken place under Law No. 4958/2022 on Reforms in Medically Assisted

2 The Human Fertilization and Embryology Act, which came into effect in the United Kingdom (UK) in 1990, the Embryo Protection Act (Embryonenschutzgesetz) of Germany, also enacted in 1990, and the Insemination Act of Sweden, which was implemented in 1984, are indicative examples.

3 Government Gazette A' 327/23.12.2002.

4 Government Gazette A' 17/27.01.2005.

5 Government Gazette A' 145/11.07.2014.

Reproduction and other urgent regulations. This law has introduced significant changes, such as the modification of the upper time limits for cryopreservation and the age of the assisted woman, the relaxation of the principle of donor anonymity with the introduction of a complex system of selection between two categories of donors (anonymous or not), the provision for the donation of reproductive material among relatives and for the creation and cryopreservation/storage of sperm and eggs independently of the existence of recipients, and social freezing, even without the consent of the spouse or partner. Subsequently, a substantial increase in the compensation amounts for donors was envisaged, to the extent that the compensatory nature of the said remuneration for donors was called into question.

*1 When Rachel saw that she was not bearing Jacob any children, she became jealous of her sister. So she said to Jacob, "Give me children, or I'll die!" 2 Jacob became angry with her and said, "Am I in the place of God, who has kept you from having children?" 3 Then she said, "Here is Bilhah, my servant. Sleep with her so that she can bear children for me and I too can build a family through her." 4 So she gave him her servant Bilhah as a wife. Jacob slept with her, 5 and she became pregnant and bore him a son.**

*Transferring fertilised eggs into the body of a woman (the eggs not belonging to her) and carrying the child is permitted only after judicial permission is granted before the transfer, as long as there is a written and free agreement between the persons seeking to have a child and the woman who will carry the child, including her spouse, if she is married. The said judicial permission is granted upon the application of the woman who wishes to have a child, as long as it is proven that she is medically unable to carry a child and that the surrogate woman is able to carry a child, in view of her health state.***

2. The History behind Surrogacy

For centuries, the saying *mater semper certa est* (the mother is always known) was taken for granted. Even today, in numerous pieces of legislation, the legal mother

* Genesis 30:1-5

** Article 1458 of the Greek Civil Code (GCC).

of a child is considered the woman who gave birth to them.⁶ However, the fact that the female body has been used throughout the ages as a means of procreating other human beings and that surrogacy (or otherwise, the ‘split of biological motherhood’⁷) is not something unheard of in human history. The biblical reference to Jacob and Rachel is well-known – Rachel could not bear children and for this reason she gave her handmaid Bilhah to Jacob as a ‘wife’ to bear them a child. This story is the inspiration behind Margaret Atwood’s dystopian novel entitled “The Handmaid’s Tale”, in which women of childbearing age are used as surrogate mothers giving birth to the children of the elite in the fictional Republic of Gilead. The law attempted to regulate these practices in as early as 1780 BC, when the Code of Hammurabi stipulated that if a woman could not provide children to her husband, he retained the right to acquire them through a slave, whom he could not subsequently sell.⁸ In ancient Egypt, it was a common practice for Pharaohs to have children with their concubines to avoid intermarriage with their wives, who were usually close relatives. In ancient Rome, the practice of uterine borrowing was also common for patrician families, allowing them to have a child through another woman to avoid the risks and hardships of pregnancy and childbirth.⁹ Cases of artificial insemination with the husband’s sperm, as well as that of a third-party donor, were recorded already in the late 18th century and throughout the 19th century.¹⁰

Nowadays, surrogacy raises concerns about the potential degradation and commodification of pregnancy, the exploitation of the female body and the commercialisation of the child to be born, as well as about the risk of creating unresolved legal issues and the fear of a burgeoning surrogacy market. As a result, this specific method is viewed sceptically by most European legislators. In France and Italy, the practice is explicitly prohibited. In Ireland and Sweden, while not explicitly prohibited, there is no regulatory framework for its implementation, leading to its practical non-application. Finally, in Greece and the United Kingdom, surrogacy is explicitly allowed and practiced.¹¹

6 For example, Section 33.1 of the UK Human Fertilization & Embryology Act defines the mother of the child exclusively as ‘the woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman’ and the Article 1571 of the German Civil Code states that ‘the mother of a child is the woman who gave birth to them’.

7 Petousi-Douli, 2013, pp. 303 et seq.

8 Rodakis, 1982, p. 55.

9 Papachristou, 2003, p. 20.

10 Milapidou, 2011, pp. 10-11.

11 For a complete analysis, vide Gerber & O’ Byrne, 2015.

3. Liberation or Slavery of Women?

The fundamental philosophical issue regarding the permissibility of surrogacy – and what essentially has prevented many legal systems from adopting it – is the possibility of commodification of the female body,¹² either in the form of exploiting poor and marginalised women who will bear children due to economic hardship,¹³ or by exploiting individuals who wish to have children through women who bear children as a “profession” and demand continuous payment to carry out the pregnancy.¹⁴

It is at least naive and hypocritical to pretend that women who have been granted legal permission to bear children as surrogate mothers are such good friends with the couple that desires to have a child, so that they agree to carry it for them without any compensation when, for the most part, they are foreigners, often from economically disadvantaged Eastern countries.¹⁵ Furthermore, it has also been expressed that it is a per se unethical transaction that treats a child as an object of exchange.¹⁶

Essentially, the deeper issue raised here is to what extent our legal culture can accept the gestation and childbirth of a child on behalf of third parties as an expression of the autonomy of the surrogate woman. In other words, the issue at hand is nothing other than the “nature and extent of women’s freedom: their freedom to control their bodies, their lives, their reproductive power, and to control the social use of their reproductive abilities”.¹⁷ From one perspective, this is impossible due to the broader exploitation that women undergo due to patriarchy,¹⁸ and also due to the fact that surrogacy is such a heavy exploitation of women that none of them would choose it freely, in the same way that no one would choose freely to become a slave.¹⁹ On the contrary, not allowing this choice to women “implies that women, due to their gender,

12 Kotzampassi, 2003, pp.48 et seq.

13 Kounougeri-Manoledaki, 2012, p. 48.

14 Grammatikaki-Alexiou, 2011, pp.56 et.seq and Kounougeri-Manoledaki, 2012, p.48.

15 Ravidas’s research by Raptas P. (2012) on judicial decisions regarding surrogacy issued by the courts of Athens during the years 2010-2016 showed that in 217 out of 256 cases studied, foreign surrogate mothers (158) are almost twice as many as Greek ones (90), with the percentage being 61.2% and 35%, respectively. The countries of origin of the foreigners were mainly Bulgaria, Georgia, Poland, Albania, Romania, and Russia. The findings of a jurisprudential research conducted at the Thessaloniki Court of First Instance for the first quarter of 2017 are also categorical: in the twelve examined decisions (none of which were dismissive), only three pregnant women were of Greek origin, and of the rest, three were Albanian, two Russian, one Georgian, while there is no mention of the origin of the remaining two. For more, vide Vlachou-Vlachopoulou, 2017, pp. 1861-1870, but also Papadopoulou-Klamari, 2015, pp. 117-124.

16 Counter-argumentation in Kounougeri-Manoledaki, 2012, p. 48.

17 Shalev, 1989, p. 11.

18 Dodds & Jones, 1989, p. 13.

19 Hasan, 1999, pp. 101-121 and Overall, 1987.

are incapable of functioning as rational and ethical beings with regard to their own reproductive ability” – instead, women alone should decide²⁰ on issues concerning their reproductive capacity.²¹

4.

Full and Partial Surrogacy

Surrogacy is distinguished based on whether the surrogate’s own egg is used, fertilised by the spouse/partner of the surrogate, the spouse/partner of the intended mother, or a third-party donor (full substitution), or whether the egg of the intended mother or of a third unknown donor is used, fertilised by the spouse/partner of the intended mother or by a third unknown donor (partial substitution).²²

Full substitution has been criticised as a commodification of the child to be born and as an ‘internal violation of the woman’s personality’,²³ undermining her right to self-determination. Additionally, concerns have been raised in the fear that it would be much more difficult for the surrogate to part with the child if they are biologically hers.²⁴ To avoid this possibility, Article 9 of the Greek Code of Ethics for Assisted Reproduction specifies that the surrogate mother must already have at least one child of her own, in accordance with the international data of the European Society of Human Reproduction and Embryology (ESHRE) and the American Society for Reproductive Medicine (ASRM).²⁵ Psychological support should also be provided to her during pregnancy and for a sufficient period after the child’s birth.²⁶

20 This decision is sealed by their consent, which takes place before the surrogacy. (Katz, 1986).

21 Shanley, 1995, pp. 164-179.

22 Kounougeri-Manoledaki, 2012, p. 47.

23 Kotzampassi, 2003, pp. 55-57.

24 It is worth mentioning, however, that there is no evidence to indicate such behaviors, even in countries that allow this practice, such as the United Kingdom. Research has shown that no couple refused to take the child from the surrogate (Van Den Akker, 1999, p. 264), and only 1% of surrogates ultimately changed their minds and decided to keep the child (Andrews, 1995, pp. 2343-2375).

25 <http://eaiya.gov.gr/deltio-typou-19-04-2017/> (in Greek)

26 Papaligoura, 2011, p. 563.

5. Greek Legal Requirements

Based on the above, the Greek legislator established partial substitution only, in a particularly liberal and innovative manner,²⁷ albeit under very strict conditions.²⁸ Specifically, in addition to the general conditions of Articles 1455 and 1456 of the Civil Code, it is required that:

5.1. The Woman Wishing to Have a Child must be Unable to Carry a Pregnancy and this must be Confirmed by Medical Opinions²⁹

This should also include the case where the woman can conceive, but gestation poses the risk of transmitting a serious disease to the child.³⁰ Therefore, surrogacy is not considered for aesthetic and/or professional reasons (e.g. a woman working as a model or athlete).³¹

5.1.1. The Attempts of Jurisprudence to Circumvent the Upper Age Limit

Despite the requirement in Article 1455 of the GCC that a woman wishing to have a child must be of reproductive age (meaning she must not have exceeded 54 years of age at the time of the hearing of her case, as currently defined by law³²), courts seem to be attempting to bypass the age limit using legal sophistry to grant permission for child acquisition through surrogacy. While exceeding the limit by only one and a half months may not seem to pose a significant problem,³³ considering that it could be due to the lack of hearings in a specific Court and it is unfair to punish the citizen for deficiencies in the Greek judicial system, the decision by the Court of Patras to

27 Skorini-Paparigopoulou, 2007, p. 141.

28 Grammatikaki-Alexiou, 2011, p. 62

29 The medical inability can be the result of either physical or psychological reasons – vide Papazissi, 2013, p. 78.

30 Panagos, 2023, p. 47. Counter-argumentation in Koutsouradis, 2006, p. 347, who considers this view to broaden the scope of surrogacy.

31 Kounougeri-Manoledaki, 2012, pp. 50-51, Skorini-Paparigopoulou, 2007, p. 144 Papaligoura, 2011, p. 561.

32 Thessaloniki Single-Member Court of First Instance 29288/2010 (NOMOS database).

33 Serres Multi-Member Court of First Instance 4/2018 (NOMOS database).

grant permission for child acquisition through surrogacy to a 54-year-old woman in its ruling No. 398/2018 is highly problematic.³⁴

This decision is also extremely problematic because, in order to circumvent the provision of Article 4.1b of Law No. 3305/2005, which explicitly stated then that “*in the case that the assisted person is a woman, the age of natural reproductive ability is considered to be the fiftieth year*”, it relies on the explanatory memorandum of Law No. 3305/2005, which states that the age of natural reproductive ability is defined as the fifty-fifth year. However, it is inconceivable for a Court to rely on an explanatory memorandum and not a legal provision to issue a decision.³⁵ It is also inconceivable for a law to be violated by invoking the Constitution, as the said judicial decision accepts that the constitutionally protected right to the free development of the personality of the applicant can only be satisfied if the upper age limit of 50 years provided by the absolutely clear Article 4.1b of Law No. 3305/2005 is raised to 54 years “*by teleological contraction of the aforementioned provision*”.³⁶ Such decisions essentially mock the law and its conditions and should be strongly condemned by legal theory to prevent their repetition.

5.2. The Surrogate Mother must be in Good Health, Fit for Pregnancy, and this must be Confirmed by Medical Opinions³⁷

This broad condition is specified in Article 13(2) and (3) of Law No. 3305/2005 and Article 9 of the Code of Ethics for Assisted Reproduction. The first one stipulates that the surrogate mother must undergo tests for HIV 1 and 2, hepatitis B and C and syphilis, as well as a thorough psychological evaluation.³⁸ The second one establishes that she must be between 25 and 45 years old, have already given birth to at least one child, and not have undergone more than two cesarean sections, presumably

34 (NOMOS database). Keep in mind that in 2018, the age limit of the intended mother was 50 years old.

35 A contrario the Heraclion Multi-Member Court of First Instance 14/2019 (NOMOS database), which rejected the application of a 58-year-old woman, ruling that Article 4.1b of Law 3305/2005 explicitly establishes an indisputable criterion regarding the maximum age limit for a woman's reproductive capability. Consequently, there is no legal vacuum justifying, through a teleological narrowing of the provision in paragraph b, the application of paragraph a of the same article, which would grant the right to resort to assisted reproductive methods, regardless of age.

36 Article 4.1 of Law 3305/2005

37 Vide the Thessaloniki single-Member Court of First Instance 838/2010 (NOMOS database), which postponed the issuance of a decision and ordered the resumption of the discussion to conduct the necessary medical examinations and obtain the relevant medical opinions so that the Court could form a ‘definite legal conviction.’

38 For the need to monitor the surrogate mother by a psychologist, vide Papaligoura, 2011, pp. 562 et seq.

to ensure her maturity for making such a decision and her physical endurance for pregnancy and childbirth.

There is no specific age limit; instead, it is examined *in concreto* within the framework of the suitability of the surrogate for pregnancy.³⁹ This grants the Court the freedom to assess the age of the surrogate within the context of its capacity to judge her suitability for pregnancy within the legal framework. It should be noted that if the surrogate is a public servant, she is entitled to maternity leave, childbirth leave, and postpartum leave under Article 52.1 of the Code of Status of Public Civil Servants and Employees of Public Law Entities.⁴⁰

5.3. The Applicant's or the Surrogate's residence/Temporary Stay in Greece

Law No. 3089/2002 initially required residence in Greece for both the intended mother and the surrogate. This was entirely justified, as it prevented Greece from becoming a destination for reproductive tourism⁴¹ and reduced the likelihood of surrogates becoming victims of trafficking.⁴² However, according to the amendment introduced by Article 17 of Law No. 4272/2014 to Article 8 of Law No. 3089/2002, temporary stay in Greece is currently sufficient, in order to avoid hindering “*the [freedom of movement of health services provided for by EU law⁴³]*”.

It would not be unreasonable to assume that this legislative choice – given its fragmentary nature – does not fit into a broader plan of exploiting medical tourism but simply eliminates an obstacle preventing the process and the consequent gain from the MAR Units.⁴⁴ This is also suggested by the publication of Law No. 4272/2014 on 11 July 2014, just a few days⁴⁵ after the publication of the *Mennesson*⁴⁶ and *Labas-*

39 Skorini-Paparigopoulou, 2007, p. 144.

40 ‘Female employees who are pregnant are granted maternity leave with full pay two (2) months before and three (3) months after childbirth. In the case of having more than one child beyond the third, maternity leave after childbirth is extended by two (2) months each time. Maternity leave due to pregnancy is granted upon certification from the attending physician regarding the anticipated childbirth date. In the case of a multiple pregnancy, maternity leave is increased by one (1) month for each child beyond the first one.’

41 Panagos, 2023, pp. 49 et seq. and Skorini-Paparigopoulou, 2007, p. 146.

42 Papazissi, 2013 pp. 81-82.

43 Koutsouradis, 2006, pp. 342 et seq.

44 Milapidou, 2014, 978 επ.

45 Kovacs, 2014.

46 <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145179>.

*sée*⁴⁷ v. France ECHR decisions on 26 June 2014.⁴⁸ Briefly, both decisions concern two French couples who resorted to the ECHR after lengthy legal battles for the registration in French registries of the birth certificates of their children, born to surrogates in the United States.⁴⁹ The ECHR ruled that the refusal to recognise the parent-child relationship between the intending parents and the children born to a surrogate abroad constitutes a violation of Article 8 of the ECHR, thus protecting the children's privacy.⁵⁰ By all means, the different legal provisions of each European country on surrogacy has led to efforts for regulating cross-border surrogacy cases, such as Petra De Sutter's Motion for a Resolution to the EU Parliamentary Assembly on Children's rights related to surrogacy,⁵¹ the Comparative Study on the Regime of Surrogacy in EU Member States of the European Parliament Policy Department C: Citizens' Rights and Constitutional Affairs⁵² or even the Aristotle University of Thessaloniki project entitled "Assisted Reproduction and Protection of the Embryo *in vitro*" as part of the ARISTEIA II project, co-financed by the Greek Secretariat of Research and Technology and the EU,⁵³ suggesting a proposal for a European legislation on assisted reproduction in general, including surrogacy of course.

47 <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145180>.

48 On July 21, 2016, the ECHR issued the judgments Foulon and Bouvet vs France (<http://hudoc.echr.coe.int/eng?i=001-164968>), with factual circumstances similar to those of *Mennesson and Labassée*. The court ruled that there was a violation of the right to respect for the private life of the children involved. For other ECHR judgements stating that the refusal to recognise legal bonds between the intended parent(s) and the child(ren) born via surrogacy violates the Article 8 of the ECHR, vide indicatively *D.B. and Others vs Switzerland* (<https://hudoc.echr.coe.int/fre?i=002-13896>), *A.L. vs France* (<https://hudoc.echr.coe.int/fre-press?i=003-7305366-9961797>), *K.K. vs Denmark* (<https://hudoc.echr.coe.int/eng-press?i=003-7514285-10313040>). For contra judgements, vide *Paradiso & Campanelli vs. Italy* case (<https://hudoc.echr.coe.int/?i=001-170359>) and the dissenting opinions, *D. and Others vs Belgium* (<https://hudoc.echr.coe.int/eng-press?i=003-4865500-5943678>) and *C& E vs France* (<https://hudoc.echr.coe.int/eng?i=003-6589814-8731890>), to name but a few.

49 In both cases, the appeals had been rejected by the French Court of Cassation in 2011, with the reasoning that a different judgment would legitimise a surrogacy agreement that is illegal under French law.

50 Commentary by Trokanas, 2015, pp. 207-216.

51 <https://pace.coe.int/en/files/23015>.

52 http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474403/IPOLJURI_ET%282013%29474403_EN.pdf

53 <http://repro.law.auth.gr/en>.

In any case, if a European couple from a country where surrogacy is prohibited (such as France⁵⁴) can now hope for the citizenship of their children born through surrogacy in a country where the practice is allowed, why not come to Greece to do so, where they can find high-quality medical services at a very low cost? The abolition of the residence requirement in Greece and its replacement with a temporary residence requirement seems very convenient in this direction. Decisions have already been issued *allowing foreigners temporarily residing in Greece* to have a child through surrogacy.⁵⁵

Nevertheless, this choice indicates the tolerance – if not the intention – of the legislator to create a ‘market’ for surrogacy, where the incentive of solidarity is doubtful. “Because, if the legislator abolished the balance of Law No. 3089/2002 (which correctly introduced the term ‘residence’, strictly defining a very limited geographical scope for the application of the method precisely because it implied the motive of solidarity), it leaves the rest of the regulation of surrogacy entirely open to the development of a real ‘market’ at all levels.”⁵⁶

5.4. The Fertilised Eggs must Come Either from the Woman Desiring to Have a child or from an Egg Donor⁵⁷

As a consequence of the issues raised in the Chapter on full and partial surrogacy, Article 1458 of the GCC explicitly states that the surrogate woman can never be the biological mother of the child to be born. This legal choice stems from the fact that the law cannot accept the case where a woman is deprived of a child who was conceived with her own eggs, as well as carried and laboured by herself, just for the sake of another woman. Such a scenario would be very constraining for her and would be

54 These ECHR judgements led to the French Court of Cassation requesting for an advisory opinion of the ECHR on the recognition in domestic law of a legal parent-child relationship between a child born abroad by a surrogate, using donor’s eggs, and the intended mother, according to the provisions of the ECHR Protocol No 16 (also known as the “Protocole du dialogue”). The ECHR found (<https://hudoc.echr.coe.int/eng-press?i=003-6380685-8364782>) that the establishment of legal motherhood is imperative in such a case, in order to ensure the child’s right to private life, as stated in Article 8 of the European Convention of Human Rights – however, such recognition is not obligatory to take place according to the surrogacy details legally established abroad and another means may be used if necessary, such as adoption.

55 Vide the Athens Multi-Member Court of First Instance 693/2018 (NOMOS Database), the Athens Multi-Member Court of First Instance 465/2018 (NOMOS Database) και την Athens Multi-Member Court of First Instance (ISOCRATES Database), which granted permission for child acquisition through the method of surrogacy to a 47-year-old French woman, a 40-year-old English woman, and a 45-year-old Dutch woman, respectively.

56 Vidalis, 2015, p. 183.

57 Counter-argumentation in Koutsouradis, 2006, pp. 349 et seq., who argues that the eggs must belong to the surrogate mother.

socially unacceptable, according to Article 179 of the GCC.⁵⁸ In addition, that would be an adoption and not a surrogacy case.

5.5. Applicants must be Married Couples, Civil Union Partners or Single Women

This requirement, which excludes same-sex couples or single men, will be discussed at length in the following sub-chapter.

5.5.1. The Myth of Motherhood

The conviction that the desire for a child concerns exclusively women, an idea based on the ‘maternal instinct’ construct⁵⁹ seems to be deeply rooted in the collective subconscious. The ‘maternal instinct’ is defined as “*an inherent emotional and tender tendency of all women without any exceptions towards children, stemming from their reproductive capacity*” and is supposed to create the desire in all women to carry a child and become mothers, be they trans or cis-gender.⁶⁰ On the contrary, the paternal instinct is not considered as strong as the maternal one – actually, even its very existence is often questioned.⁶¹ This view stems from the undeniable fact that the perpetuation of the human species takes place through pregnancy, childbirth, nursing (and breastfeeding, if one selects it), experiences of an exclusive female (in the biological sense of the word) nature⁶² and has led to the formation of social perceptions and policies on the role of the two sexes. Maternity is considered as the basic mission, the ‘profession’ and the integral element of the female nature, to the point where the term ‘woman’ is equated with the term ‘mother’.⁶³

This social model has been endlessly perpetuated, unchanged from generation to generation, defining the role of cis-gender women as mothers and teaching at the same time young children what the roles of adults in childbearing should be.⁶⁴ Thus, a biological feature has acquired a central character and has become the basis of the

58 ‘Actions contrary to good morals include especially those legal practices where a person’s freedom is excessively constrained, or where someone exploits another’s need, deafness, or inexperience to secure for themselves or a third party material benefits that are manifestly disproportionate to the service provided.’

59 Borgeaud, 2004, Badinter, 1982.

60 Wade, 2002.

61 Shields, 1984.

62 West, 1988; Firestone, 1979.

63 Constantinou, Varela & Buckby, 2021.

64 de Marneffe, 2019.

identity of the female gender.^{65,66} In that way, societies have established the norms of education and work for the two sexes, justified all kinds of discrimination between sexes and patriarchy. Therefore, they have fixed both sexes in traditionally defined roles in a perfect harmony with their 'natural calling'. In this scenario, women are meant to become mothers and men are meant to become workers, each of them acting in the private and public sphere of action⁶⁷ respectively.⁶⁸ In other words, "women's self-identity, social role and 'human needs' have all been defined historically by their procreative capacities. Rather than having physiological and other 'needs', women are seen principally as physical 'beings' and are socially confined to reproductive and domestic roles".⁶⁹ Obviously, gender ideology has impacted not only the cultural notions of reproduction, parenthood and family, with all women (single or not) being treated as would-be mothers, but also the medical provision and legal access to assisted reproduction.⁷⁰ As a result, single women must always have legal access to MAR, since they will inevitably want to have a child, even without a spouse or partner. On the contrary, men will never want to have a child on their own; the opposite is viewed as something paradoxical or as the exception to the rule, at best.

5.5.2. Surrogacy (and other MAR) for Gay and Lesbian Couples

In Greece, same-sex couples achieved legal recognition only in 2015 under Law No. 4356/2015, which extended the civil union status (but did not allow civil marriage) to them. This development sparked a storm of reactions from conservative circles in society.⁷¹ This expansion was expected, especially after Greece's condemnation by the ECHR in the *Vallianatos and Others v. Greece*⁷² case in which the ECHR ruled that the exclusion of same-sex couples from Law No. 3719/2008 regulating civil unions constituted a violation of the right to private and family life, as well as of the provisions prohibiting discrimination. However, this law does not regulate the possibility of obtaining a child through MAR, as natural reproduction is *de facto* not possible.

65 Rubin, 1975.

66 Irigaray, 1974.

67 Baraitser, 2014.

68 Kravaritou, 1996; Arendt, 1958; Pateman, 1988.

69 Prialux, 2008, p. 182; Friedan, 1963, pp. 273–274.

70 Almeling, 2007, pp. 319–340, Remennick, 2000, pp. 821–841 and Waggoner, 2017.

71 The public consultation on extending the civil union to same-sex couples received 3,324 comments, with the majority being homophobic and vulgar. Some indicative comments, with preserved spelling, include: "ALL THIS IS UNACCEPTABLE!!! WE ARE RETURNING TO THE TIMES OF SODOM AND GOMORRAH!!!", "No to the civil union for homosexuals!!! We won't level everything! It's time to learn to distinguish between the abnormal and the normal!", "Disgrace! The bill of abnormality should be abolished."

72 <https://hudoc.echr.coe.int/?i=001-128294> – commentary by Pervou, 2014.

Additionally, the law excludes same-sex couples from MAR, as Article 9 clearly intends to permit child acquisition only to opposite-sex couples entering into a cohabitation agreement: “the child born during the civil union or within three hundred (300) days from the dissolution or annulment of the agreement is deemed to have the man with whom the mother drafted the agreement as their father”.⁷³

This situation changed in Greece in 2024, when Greece regulated civil marriage between same-sex individuals with Law No. 5089/2024 on Equality in Civil Marriage, Amendment of the Civil Code and Other Provisions again amid a storm of reactions from conservative circles in society.⁷⁴ This was mainly because this law addressed, at least partially, the significant problem faced by same-sex couples who had children through assisted reproduction abroad⁷⁵ – the child would share a legal bond with one parent, but the other parent would legally be considered a third party to the child, with all the problems that could entail.

According to the provisions of Law No. 5089/2024, marriage is concluded between “persons of different or of same sex” (Article 3). If no declaration is made, the child’s surname will not be that of the father but a combination of both parents’ surnames, with the first surname being the one that comes first alphabetically (Article 4). Social security benefits and parental or maternity leave entitlements are extended to same-sex couples (Articles 6 to 8). Pre-existing same-sex marriages concluded

73 The bold and underline fonts belong to the writer.

74 According to the writer’s opinion, the establishment of civil wedding for same-sex couples is just a matter of time for all Western societies. Moreover, for every judgement like the Greek Supreme Court (Areios Pagos) 1428/2017 (NOMOS Database), which deemed the civil marriage of two men invalid and “reflects the ethical and social values and traditions of the Greek people, who do not accept the establishment of marriage for same-sex couples” there will be a judgement like the Supreme Court of the United States *Obergefell vs. Hodges* (https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf), stating that the prohibition of marriage for same-sex couples violates human rights, with the notable conclusion of Justice Kennedy: ‘no union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization’s oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.’

75 For example, the decision 623/2021 of the Athens Court of Appeals (NOMOS database) rejected the application of a male couple, who had entered into a civil union abroad, to recognise in Greece a voluntary jurisdiction decision from a foreign court (specifically of South Africa) that had granted them permission to jointly have a child using a surrogate woman. The rejection was based on the grounds that men are excluded from surrogacy in Greece, and any adoption of the child by one part of the couple would be ‘contrary to dominant social and moral principles and beliefs, and the legal consequences arising from this could cause a profound disruption to the Greek legal order.’

abroad are considered valid (Article 10), and parent-child relationships registered in public documents or court decisions from third countries are recognised in Greece, whether established through adoption or ART (Article 11). However, it is noted that there is no provision allowing married same-sex couples to jointly pursue surrogacy to have a child, which constitutes a discriminatory treatment against them. In other words, couples who have children via this method outside of Greece will be able to establish a legal bond with their children in Greece, while those who might have children within Greece will not!

Although the Greek law is notably innovative, allowing even controversial and prohibited in other European) from reproductive technologies.⁷⁶ This decision is based on the delineation of the free development of personality through reproduction from the ‘rights of others’.⁷⁷ Another argument is the fear of the potential impact on the emotional development of the children born to same-sex couples, something which may be against the welfare of the child to be born.⁷⁸ Finally, if one accepts that MAR are used by couples unable to conceive naturally, they cannot be used in cases where natural reproduction is de facto impossible.

However, these arguments are unfounded. Firstly, it is absurd to consider that the welfare of the child – which is the basis of this prohibition – dictates not bringing the child into existence.⁷⁹ Moreover, homosexual individuals in our country have, as a rule, been born and raised by heterosexual parents. If one accepts that the sexual orientation of parents affects that of their children, no child from a heterosexual family would ever become homosexual,⁸⁰ which is, of course, not true.⁸¹ Research has also clearly demonstrated that the sexual orientation of parents does not affect the sexual orientation, sexual behaviour, and overall sexual identity of their children.⁸² Even fears of potential inadequate psychosocial development of these children have been debunked by research,⁸³ with the American Academy of Child and Adolescent Psychiatry emphatically stating in 2013 that “current research shows that children with gay and lesbian parents do not differ from children with heterosexual parents in their emotional development or in their relationships with peers and adults. It is important for parents to understand that it is the the quality of the parent/child

76 Rethymiotaki, 2014, p. 171.

77 Papachristou, 2013, p. 278.

78 Papachristou, 2013, p. 279.

79 Papachristou, 2013, p. 279.

80 In passing, this argument is not only fallacious but also not just weak, but homophobic, as it implies that potential homosexuality is something bad and harmful to a person.

81 Papazissi, 2007, p. 765.

82 Green, 1978, pp. 692-697, Miller, 1979, pp. 544-552, Bailey et al., 1995, pp. 124-129, and Farr et al., 2010, pp. 164-178.

83 Golombok, Spencer & Rutter, 1983, pp. 551-572, Patterson 2009, pp. 727-736, Sasnett 2015, 2015, pp. 196-222 and Telingator & Patterson, 2008, pp. 1364-1368.

relationship and not the parent's sexual orientation that has an effect on a child's development. Research has shown that in contrast to common beliefs, children of lesbian, gay, or transgender parents: Are not more likely to be gay than children with heterosexual parent/ Are not more likely to be sexually abused./Do not show differences in whether they think of themselves as male or female (gender identity)./ Do not show differences in their male and female behaviours (gender role behaviour)".⁸⁴

Finally, the argument regarding the impracticality of applying MAR when reproduction is practically impossible is utterly flawed, as to be consistent with this argument, the application of MAR should be prohibited to single women as well – something that nobody contemplates doing. Therefore, it is self-evident that the prohibition of same-sex couples' access to MAR constitutes discriminatory and adverse treatment based on their sexual orientation, violating the principle of the free development of their personality.

In any case, the wording of the law does not allow same-sex couples to resort to MAR methods, whether they are women or men.⁸⁵ However, practically, same-sex couples circumvent the legal prohibition in the following ways: in lesbian couples, one partner applies for MAR as a supposedly 'single woman' according to the letter of the law,⁸⁶ and in gay couples, one partner appears with a surrogate as a supposed couple in civil union and acquires a child with her, or attempts to do so as a 'single man' with a surrogate, as will be discussed in the next part of this paper. In these cases, the problem lies in the fact that only one partner has a legal bond with the child in lesbian couples, and that in gay couples a surrogate has a legal bond with a child she may never have even seen, while the other partner – who raises the child – has no legal relationship with them, with all the implications that such a situation may entail.

Theoretically, each partner could form a legal bond with the child by adopting them. However, it is unknown whether the social services, which will be called upon to judge whether the specific adoption is in the best interest of the adopted child,⁸⁷ will reach such a decision. Moreover, even if a court approves the adoption of the child by the partner of the mother or of the father, any legal bond between the minor and

84 https://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFFGuide/Children%20with%20Lesbian,%20Gay-Bisexual-and-Transgender-Parents-92.aspx

85 Papazissi, 2007, p. 766 και Fountedaki, 2007, p. 178.

86 Kantsa & Chalkidou, 2014, pp. 180-205 and Rethymiotaki, 2014, pp. 173-174.

87 1557 GCC: 'Before the adoption takes place, a social service or another recognized organization specializing in adoptions conducts a social investigation. A relevant report is then submitted to the court within the specified deadline, based on the criteria defined in the law. This report assesses whether, according to the gathered information, the particular adoption is in the best interest of the adoptee.'

the biological mother must be severed,⁸⁸ making it impossible for both parents of the child (either through adoption or through assisted reproduction) to exist simultaneously.⁸⁹ It is obvious that legislative changes are thus imperative, not for rewarding the circumnavigation of laws, but for safekeeping the welfare of the child to be born.

However, it is only a matter of time before a Greek same-sex couple resort to the ECtHR in order to seek the conviction of Greece for this discrimination. The ECtHR has already relevant case law seeking the protection of same-sex couples and the prohibition of discrimination against them, based on their sexual orientation. More specifically, the case *X v. Austria* was issued in 2013, with the Grand Chamber of the ECtHR ruling that the prohibition for a woman to adopt the biological child of her partner constitutes a discriminatory treatment against them compared to a heterosexual couple and that it violates Article 14 of the ECHR on the prohibition of discrimination and Article 8 of the ECHR on the right to respect for private and family life.⁹⁰

5.5.3. Surrogacy (and Other MAR) for Single Men

One could argue that allowing surrogacy only to single women and (straight) couples is due to the fact that these categories are able to conceive a child naturally. The ECtHR's established case law, however, has now included the right to assisted reproduction within the individual rights enshrined in the European Convention on Human Rights, specifically in the right to private and family life (Article 8⁹¹), as well as in Article 7 of the Charter of Fundamental Rights of the European Union.⁹² This stance of the ECtHR, also adopted by the Supreme Courts of individual European countries,

88 1561 GCC: 'Through adoption, every bond of the minor with their natural family is severed, with the exception of the provisions regarding marriage impediments of Articles 1356 and 1357. The minor is fully integrated into the family of their adoptive parent. In relation to the adoptive parent and their relatives, the minor has all the rights and obligations of a child born in wedlock. The same applies to the descendants of the adoptive child. In the case of simultaneous or successive adoptions of more than one child, a relationship is created among them similar to that between siblings.'

89 The article 1562 GCC (In the case where one spouse adopts the child of the other, the ties of the adopted child with their natural parent and relatives are not severed. In all other respects, adoption produces all the effects of adoption that occurs by both spouses), cannot be applied to same-sex couples, as article 1561 GCC explicitly refers to a 'spouse' and not a 'partner.'

90 Kostopoulou, 2013, pp. 720-729.

91 Full analysis of the article can be found in van Dijk & van Hoof, 1998, pp. 504-514 and Schabas, 2015, pp. 358-411.

92 Respect for private and family life - Everyone has the right to respect for his or her private and family life, home and communications.

such as Germany⁹³ and Italy,⁹⁴ essentially reverses the question to be answered: the question is not when assisted reproduction should be allowed, but when and why somebody may be prohibited from resorting to assisted reproduction if they want to procreate. In other words, any restrictions must be justified and, as the ECtHR states, absolutely necessary in a democratic society.

There is no doubt that reproduction, which can be achieved naturally (through a sexual encounter resulting in pregnancy) or by artificial means (by resorting to methods of assisted reproduction), is an aspect of private and family life. The mere fact that single men are obliged to resort to surrogacy to procreate is not such a justified and absolutely necessary restriction, as invoking biological and moral reasons that could impose the exclusion of single men from surrogacy would primarily lead to the prohibition of the very forms of single parenting for me (e.g. adoption and sole custody after a divorce or widowhood), and not just the prohibition of access to surrogacy – denying surrogacy to single men is inconsistent with the fact that single parent families are legally established and single women are allowed to have a child via a surrogate, using not only donor's sperm but also donor's eggs (so that the child has no biological link to them).⁹⁵

After all, individuals should be allowed to make decisions with respect to their life plans, according to their own values, beliefs and wishes, as long as others are not harmed by the exercise of this right.⁹⁶ Peoples' reproductive decisions are personal and encapsulate the meaning of being human – disregarding them deprives both men and women from their right to control their most intimate spheres of their life.⁹⁷

This issue has engaged Greek jurisprudence with the ground-breaking decisions of the Athens Single-Member Court of First Instance (decision No. 2827/2008)⁹⁸ and the Thessaloniki Single-Member Court of First Instance (decision No. 13707/2009),⁹⁹ which used the same reasoning and analogically applied the provisions of Law No. 3089/2002, granting permission to a single man to have a child through egg donation and surrogacy. Specifically, the Court ruled that Article 1458 of the GCC violates the right to free development of personality under Article 5.1 of the Constitution, given the ethical preference it gives to the single-parent family created by a single woman. Furthermore, it constitutes 'an overt discriminatory treatment' against men, as their

93 BGH 10.12.2014- Az. XII ZB 463/13, OpenJur 2014, 27194.

94 Corte Suprema di Cassazione 162/9.4.2014, Gazzetta Ufficiale 1^a Serie Speciale, n.26/18.6.2014.

95 Kounougeri-Manoledaki 2003, pp.145-154.

96 O' Donovan, 2018, p. 490–491.

97 Robertson, 2004, pp. 7-40.

98 NOMOS Database.

99 NOMOS Database.

exclusion from recourse to surrogacy deprives them of the opportunity to form a family and infringes¹⁰⁰ Articles 4.2 and 4.3 of the Constitution.¹⁰¹

However, these exceptional decisions were not repeated, as the jurisprudence took a conservative turn on this issue: the Public Prosecutor of the Courts of First Instance in Athens appealed against decision No. 2827/2008 taken by the Athens Single-Member Court of First Instance, which was accepted by decision No. 3357/2010 of the Athens Court of Appeals.¹⁰² The latter decision annulled decision No. 2827/2008 of the Athens Single-Member Court of First Instance and rejected the application.¹⁰³ Moreover, a recent decision of the Thessaloniki Multi-Member Court of First Instance (decision No. 8641/2017)¹⁰⁴ accepted that MAR are not allowed to single men, only for couples and single women.

These decisions concluded that the issue of unconstitutionality does not arise, as the legislative differentiation between the two genders is created by their different nature.¹⁰⁵ According to the judicial opinion, only a woman can conceive and give birth, and therefore, only she may have a relevant medical inability, allowing her to resort to surrogacy. In contrast, a man, whether fertile or not, needs a surrogate to have a child, thus compensating for a medical inability that is not his own. However, this argument is fundamentally flawed: *when a fertile woman without a medical inability has a child with donated sperm, she also compensates for a medical inability that is not hers*. Whether a woman simultaneously needs to have a medical inability related to her gender does not mean that a man cannot have a medical inability related to his gender, such as oligoasthenozoospermia. This is when it becomes even clearer that the need for a man to use donated sperm must be evaluated by the law in exactly the same way as for women.¹⁰⁶ Just as a woman needs sperm donation, a man needs egg

100 Papachristou, 2009, p. 818.

101 More precisely, it states that ‘...the provision of the right to MAR to single women while simultaneously denying it to single men constitutes a blatant discriminatory treatment of those interested in the solution of MAR, which is not justified according to Article 4, paragraphs 3 and 4, of the Civil Code. The gap that arises concerning the right to artificial reproduction for single men is addressed by an overall analogy of the article 1455, emphasizing, particularly in relation to paragraph 1, point a, that, just as for the assistance of the single woman beyond the limits of her gender (using sperm donation), the same applies to the assistance of the single man beyond the limits of his gender (using egg donation and surrogacy). It is also required that there be a medical need for assistance for the aspiring single parent, preventing natural reproduction either in the context of a couple with a person of the opposite sex. This limitation is imposed in both cases, for the woman and the man, according to good morals (Article 1456 and 1458 of the Civil Code).’

102 NOMOS Database.

103 Note that this decision was preceded by the birth of this child from the unmarried father, which was ultimately prohibited.

104 NOMOS Database,

105 Papachristou, 2003, pp. 55 et seq., and Vidalis, 2003, pp. 839-840.

106 Kounougeri-Manoledaki, 2010.

donation and a uterus. In both cases (single men or women), monoparental families are created.

In fact, decision No. 8641/2017 of the Thessaloniki Multi-Member Court of First Instance takes another logical leap, demonstrating the Court's intention to avoid taking responsibility for granting permission. The Court argues that, aside from the fact that the legal order is not yet ready for such decisions,¹⁰⁷ the lack of a legal mother violates the personality of the child. This perceived violation justifies a legitimate restriction on the free development of the man's personality through the acquisition of an offspring.¹⁰⁸ Disregarding the fact that no personality violation arises in the case of a being that may not even exist yet as a fertilised egg, with the same logic, the fact that a child born to a single woman does not have a legal father should equally violate their personality. Therefore, the acquisition of an offspring using donor sperm should not be allowed for single women either. However, no one would contemplate prohibiting such a thing, nor was that the intention of the law.

For a more in-depth analysis of the welfare of the child, it should be noted that the main argument for prohibiting single persons form access to MAR is the idea that a child should grow up in a two-parent environment. While it is certainly beneficial for the responsibilities of raising a child to be shared between two parents, this does not mean that it is forbidden, impossible, or problematic for a child to be raised by a single parent. The number of families established by single women has been increasing – as a matter of fact, these families enjoy special protection under the law and studies indicate that children from these families continue to function satisfactorily as they enter adulthood.¹⁰⁹

Specifically, in the case of single men, the reservations are based on the fact that single women and couples can 'naturally' procreate, while a single man is obliged to resort to surrogacy. Apart from the gender equality issue, there does not seem to be any sufficient and necessary condition to limit single men's access to assisted reproduction, as there is no well-founded study stating that single men cannot be

107 Certainly, one might reasonably wonder how the legal system will be ready for such cases when the justice system itself refuses to integrate them into society.

108 "...the provision of legal protection for the right to the free development of personality, based on Article 5 of the Constitution, undoubtedly has as its limit the right to the free development of the personality of other members of society. In this case, beyond the aforementioned, the reasonable question arises whether the recognition of the right to medically assisted reproduction using a surrogate uterus for a single man infringes on basic expressions of the personality of the child to be born through this process. This is because it would involve a child with a legally nonexistent mother, given that, based on our current legal order, no bond of kinship is created between the woman who carries the pregnancy and the child. Therefore, adopting the view that this specific case could be regulated by analogy with the law is considered, at least, risky for the personal identity and characteristics of the future child. Moreover, our legal system is not prepared to handle such cases, even at the administrative level..."

109 Vide indicatively Golombok 2020 and the bibliography therein.

good parents. The only acceptable distinction should be based not on gender but on a general prohibition of surrogacy; however, such a prohibition could not be applied in Greece where surrogacy is a legally regulated everyday practice. If surrogacy was against the welfare of the child, it should be completely banned and not restricted to certain categories of persons; anything else would constitute an obvious sophistry.

In conclusion, it is entirely unjust – especially considering that the law on MAR is based on social and emotional kinship – for a woman to be legally allowed to have a child through a surrogate using not only donor sperm but also donor eggs, while a man cannot do the same. Such perspectives are contrary to any declaration of gender equality, insulting both the female gender by suggesting that motherhood is a biological destiny and not a choice, and the male gender by implying that fatherhood is an auxiliary task and coercion, not a choice.¹¹⁰ When it comes to the welfare of the child, one should not forget that surrogacy is a choice with significant financial and emotional costs. Therefore, the choice made by these single men is a conscious one, contrary to many pregnancies which just ‘occur.’

6. Conclusion

The absence of an explicit provision of gay and lesbian couples’ and single men’s unhampered access to MAR methods in Greece does not only lead to unacceptable discrimination against them, as this could be as much construed as an infringement to their autonomy.¹¹¹ After all, individuals should be able to make decisions with respect to their life plans, according to their own beliefs and wishes, as long as others are not harmed by the exercise of their right to decide for themselves.¹¹² According to Robertson and Jackson, decisions related to reproduction are personal ones and encompasses the sense of being human and disregarding them essentially removes from persons the right to control one of the most intimate spheres of their lives. If the law prohibits surrogacy for gay and lesbian couples and single men, this should have severe and explicitly stated reasons. However, in the current legal framework, such reasons are inexistent.

The ideal legal solution is amending the existing legal framework, so that the Greek law unconditionally recognises the right of gay and lesbian couples’ and single men to reproduction, allowing them unhindered access to MAR methods – this will

110 Krajewska & Cahill-O’Callaghan, 2020, pp. 85-106.

111 Quigley, 2010, pp. 408-409.

112 O’ Donovan, 2018, pp. 490-491.

also safeguard the best interests of any children born, the core of the legislation governing access to MAR.

Furthermore, if it has to be accepted and respected that straight couples and single women may not wish to become parents and neither pregnancy nor childbirth is imposed on them, it has to be equally accepted and respected that gay and lesbian couples and single men may wish to become parents and thus provide them with equal access to MAR and surrogacy.

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Agata WRÓBEL*

The intersection of national and European law - Assessing the conflict of laws, rules and the primacy of EU law in Poland

ABSTRACT *The article explores the principle of the primacy of European Union law in the context of Polish law, analyzing its evolution, legal foundations, and its impact on the sovereignty of member states. It discusses the origins of the primacy principle, emphasizing the role of the case law of the Court of Justice of the European Union and the significance of the Treaty of Lisbon. The conflicts between EU law and the Polish Constitution are examined, with particular focus on rulings of the Polish Constitutional Tribunal, such as K 3/21 and P 7/20. The article highlights the challenges of implementing EU law within the Polish legal framework and the mechanisms for resolving disputes between the legal systems. In conclusion, it underscores that despite controversies over sovereignty limitations, the principle of EU law primacy is crucial for ensuring coherence, protecting citizens' rights, and maintaining the effective functioning of the EU.*

KEYWORDS: *EU law primacy, CJEU, Sovereignty of member states, Lisbon Treaty, Conflict of Polish and EU law.*

1.

Background of the Principle

The primacy of EU law, sometimes called the principle of supremacy¹, derives from the case law of the Court of Justice of the European Union (CJEU). The CJEU is of great importance in shaping and changing the dynamics of EU law – but the acceptance of such a high degree of authority of the court has often been problematic for member states, with many doubts raised about the impact on state sovereignty and

1 Biernat, 2011, p. 47.

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decision-making.² Indeed, when considering the primacy of EU over national law, we are talking about both primary sources of law – i.e. the treaties establishing the legal framework of the EU legal order – and secondary sources of law – comprising legal instruments adopted on the basis of these treaties (regulations, directives, decisions, agreements, as well as general principles of EU law, CJEU case law and international law). For the development of the principle, the key document is the Treaty of Lisbon, regulating and detailing the scope of EU competence. The Lisbon Treaty, unlike the Constitutional Treaty, does not contain a formal article granting the primacy of EU law over national legislation.

However, the Lisbon Treaty was accompanied by Declaration No. 17, which refers to the opinion of the Council's Legal Service – and again refers to the consistent case law of the CJEU on this issue.³ In that annex, “the Conference recalls that, in accordance with the consistent case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties take precedence over the law of the Member States under the conditions established by the said case law.” The adoption of the primacy of the European legal system entails several important consequences. Firstly, it ensures uniformity in the application of law throughout the EU – which is relevant to the functioning of the common market and ensuring its efficiency. Second, it ensures the protection of the rights of citizens and businesses throughout the EU, guaranteeing a unified level of legal protection. Third, it gives the CJEU the ability to interpret EU law and apply it throughout the union, which is crucial to maintaining a unified position on legal issues. In principle, therefore, EU law takes precedence over national law. This does not mean, however, that national law no longer has any relevance.

As we explore the implications of the primacy principle, it becomes evident that the CJEU's role extends beyond a mere legal arbiter. The court's ability to interpret and enforce EU law fosters a cohesive legal framework, reinforcing the integration of member states. This integration, however, is not without challenges, as the principle's influence on member states' sovereignty continues to be a subject of ongoing debate and negotiation within the EU framework. Moreover, the dynamic nature of EU law – shaped by ongoing developments and legal interpretations – underscores the need for a comprehensive understanding of the primacy principle. The continuous evolution of the EU legal landscape prompts scholars, policymakers and legal practitioners to stay abreast of CJEU decisions and legislative developments that impact the

2 For more on the process of forming the principle see in: Kozłowski, 2018, pp. 29-33; Cesarz, 2014, pp. 179-182.

3 Consolidated version of the Treaty on the Functioning of the European Union - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon signed on December 13, 2007 - A. Declarations relating to the provisions of the Treaties - 17. Declaration relating to primacy (Official Journal 115 , 09/05/2008 P. 0344 - 0344).

delicate balance between union and national law. The primacy of EU law represents a cornerstone in a unified European legal framework. Its origins in CJEU case law – reaffirmed by the Treaty of Lisbon and accompanying declarations – highlight its enduring importance. As the EU navigates the complexities of legal harmonisation, the primacy principle remains a linchpin – ensuring coherence, uniformity, and the effective functioning of the European Union.

2.

Allegations of unconstitutionality and judgments

In the case *Van Gend en Loos v. Nederlandse Administratie der Belastingen*,⁴ the CJEU ruled that community law adopted by the institutions of the European Union can be a source of powers enforced by natural and legal persons before the courts of individual member states. This means that EU law can be applied directly. In *Costa v. ENEL*⁵ the court relied on the principle of direct application, and held that recognising the subordination of community law to the laws of individual member states would jeopardise the objectives of the treaties. Because the member states had delegated certain powers to the EU, they had thereby limited their sovereignty. Consequently, in order for community law to operate effectively, the principle of its primacy over all national laws – including the constitutions of individual member states - must apply.⁶

In Poland this hierarchy of sources of law has been met with a number of allegations, amounting to a conflict between the founding treaties and the Polish

4 Court ruling of February 5, 1963. *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Nederlandse administratie der belastingen*. Reference for a preliminary ruling *Tariefcommissie - Netherlands*. Case 26/62.

5 Judgment of the Court of July 15, 1964. *Flaminio Costa v. E.N.E.L.* Reference for a preliminary ruling *Giudice conciliatore di Milano - Italy*. Case 6/64.

6 See also other examples of cases in which the Court has emphasised the principle of the primacy of European Union law include: *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (Judgment of the Court of December 17, 1970. *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*. Reference for a preliminary ruling *Verwaltungsgericht Frankfurt am Main - Germany*. Case 11/70); *Marleasing SA v. La Comercial Internacional de Alimentacion SA* (Judgment of the Court (Sixth Chamber) of November 13, 1990. *Marleasing SA v. La Comercial Internacional de Alimentacion SA*. Reference for a preliminary ruling: *Juzgado de Primera Instancia e Instruccion no 1 de Oviedo - Spain*. Directive 68/151/EEC - Article 11. Case C-106/89); *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* (Judgment of the Court of March 9, 1978. *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*. Reference for a preliminary ruling: *Pretura di Susa - Italy*. Case 106/77).

Constitution.⁷ On November 27 2009 a group of MPs submitted a motion to examine the compatibility of a number of provisions of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community. The motion concerned the extent that these provisions allow the Council of the European Union to legislate by a qualified majority – either alone or jointly with the European Parliament - contrary to the sovereign interests of Poland. The application also sought to examine the compatibility of Declaration No. 17 with Article 8 in conjunction with Article 91(2) and (3) and Article 195(1) of the Constitution of the Republic of Poland. In addition, the applicant alternatively requested an examination of the compatibility with Articles 2, 4, 8, 10, and Article 95(1) of the Constitution of Article 1 of the Act of April 1 2008 on the ratification of the Treaty of Lisbon – to the extent that the legislature’s consent to the binding of the Republic of Poland to the indicated treaty provisions is not accompanied by a statutory norm providing for the participation of the Sejm and the Senate in the process of shaping the position of the Republic of Poland in any matter of possible adoption by the European Council or the Council of the European Union of a legal act on the basis of any of these provisions. The applicant’s fundamental constitutional doubts concerned the mechanism for creating EU law and making other relevant decisions. The case was resolved by the Constitutional Court in its decision of November 10 2010 (ref. K 32/09).⁸

The allegations concerned the incompatibility of Poland being bound by the provisions of the Founding Treaties and acts adopted by the institutions of the communities and the European Central Bank – and therefore by the rulings of the CJEU – leaving doubt as to the compatibility of this regulation with Article 8 of the Constitution, which guarantees the supremacy of the Constitution and its direct application. Recognition of the supremacy of the external legal system over the Constitution was met with the charge of limiting the sovereignty of the nation from Article 4 of the Constitution. In addition, the principle of permissibility to interpret the primacy of community law over the Constitution was accused of limiting the sovereignty of the republic itself, due to the fact that the scope of the state’s competencies

7 Constitution of the Republic of Poland of April 2, 1997 (Journal of Laws 1997 No. 78, item 483). Text adopted on April 2, 1997 by the National Assembly.

8 In this particular case, the Court decided to discontinue the proceedings with regard to the examination of the application of a group of deputies due to the absence of the applicant at the hearing. The presence of the representative of the group of deputies was limited to participation in the first phase of the hearing, because at the beginning of the second phase, after responding to the Constitutional Court’s decision not to grant the request for adjournment of the hearing and to the positions of the participants in the proceedings on this issue, the deputy left the courtroom. The representative of the group of deputies asked the Court to allow him to resign from further participation in the hearing. The Court did not issue any decision in this regard. In this state of affairs, the Constitutional Court, in the absence of the representative of the group of deputies, did not have the opportunity to continue the proceedings on the motion of the group of deputies.

ceded to the European Union exceeded the permissible scope of the vague concept of 'certain matters'⁹ in which the republic may – on the basis of an international agreement – delegate to an international organisation or international body the powers of state authorities, in accordance with Article 90(1) of the Constitution. Beyond this, the allegations also included the risk of danger associated with "opening before the Community adjudicating institutions the issue of the legal status of real estate in the northern and western lands of the Republic" (which refers to the transfer to certain legal entities of the Catholic Church free of charge ownership of land located in the resources of the State Land Fund or in the Agricultural Property Stock of the State Treasury). It was also alleged that Article 55(1) of the Constitution (which prohibits, in principle, the extradition of a Polish citizen) was incompatible with the possibility of extraditing a citizen under EU law.

In light of the legal analysis of the Constitutional Court's ruling K 18/04,¹⁰ it can be concluded that the accession of the Republic of Poland to the European Union and the adoption of its laws as a result of the Accession Treaty does not violate the sovereignty of the Polish state. The Constitutional Court pointed out that the EU and the European Communities are not considered supranational organisations that stand above sovereign states. They are considered international organisations to which sovereign member states are parties. Joining the EU means joining an international organisation, which is in accordance with the Constitution. The legal acts adopted clearly define the scope of the competencies that have been transferred to the EU. The Republic of Poland retains its sovereignty and the ability to withdraw from international agreements, including the EU, remains preserved. Therefore, accession to the EU does not violate state sovereignty – and in accordance with international law and constitutional provisions, the Nation has authorised state organs to conclude international agreements and join international organisations, such as the European Union.

9 The article reads: "The Republic of Poland may, on the basis of an international agreement, delegate to an international organization or international body the competencies of the organs of state power in certain matters". Although the Constitution of the Republic of Poland lacks a direct reference to the EU, the general feeling, as well as in the doctrine, is that the quoted provision was included with Poland's membership in the EU in mind and can be considered the equivalent of the European clause. It should be emphasised that the Constitution of the Republic of Poland allows for the delegation of powers to an international organisation, but does not specify the limits of such delegation.

10 Judgment of the Constitutional Tribunal of May 11, 2005, ref. K 18/04, para. 11.2, OJ. 2005.86.744, 17.05.2005.

3. Crucial Judgments for Poland

The rulings K 3/21 and P 7/20 of the Constitutional Court in Poland are milestones in the debate on the primacy of EU law over national law. In its judgment K 3/21 of 7 October 2021, the Constitutional Court ruled that certain provisions of the Treaty on the European Union (TEU) are incompatible with the Polish Constitution.¹¹ In particular, the court held that Articles 1 and 19 of the TEU – which provide the basis for the primacy of EU law and the principle of effective legal protection – cannot be applied in the Polish legal order to the extent that they empower EU bodies to act beyond the scope of their powers and interfere with Polish sovereignty. Similarly, in its judgment P 7/20 of 14 July 2021, the Constitutional Court questioned the competence of the CJEU to issue interim measures that affect the organisation of the judiciary in Poland. The court found that the provisions of the TEU, to the extent that they allow for such measures, are contrary to the Polish Constitution.

Both judgments are an expression of the position of the Polish Constitutional Tribunal, according to which the Constitution of the Republic of Poland takes precedence over EU law in situations where this law violates fundamental principles of the Polish system – such as the sovereignty of the state or the rule of law.¹² They are also a reflection of the broader political context in Poland, where the ruling political majority seeks to limit the interference of EU institutions in domestic affairs.¹³

The rulings K 3/21 and P 7/20 have a significant impact on the primacy of EU law in Poland, challenging its absoluteness in the Polish legal order. These decisions undermine the fundamental principle of the community legal system that EU law takes precedence over national law, including the constitutions of the member states.¹⁴ The K 3/21 judgment is particularly problematic as it relates directly to the principle of effective judicial protection, which is a key element of the *acquis communautaire* and the EU rule of law system. In practice, this means that Polish courts may be obliged to ignore CJEU rulings that are not in line with Constitutional Court rulings,¹⁵ leading

11 See: Jaraczewski, J. (2021).

12 See more: Pastuszko, G. (2023).

13 After all, there remain different interpretations of the primacy of EU law by the Polish Constitutional Court. See: Zoll F., Południak-Gierz K., Bańczyk W. (2022).

14 Biernat S., Łętowska, E. (2021).

15 This in practice, by all means, raises a number of interpretative problems in in concreto situations. See Wojcik, 2023: The EC argues that the Polish Constitutional Court violates EU law by challenging its primacy over national law. This Court has issued rulings that question the supremacy of EU law, which, in the EC's view, threatens the fundamental principles of the European Union.

to a potential fragmentation of the application of EU law in Poland and undermining the principle of uniform application of law throughout the Union.¹⁶

4. Competences Ceded to the EU

The basis for Poland's membership in the EU is Article 90 of the Constitution, which we call the pillar of European integration. It does not expressly mention the EU, but rather "an international organization or international body",¹⁷ reflecting concerns about the union infringing on the republic's independence. The article contains a basis for transferring to such entities the competencies of state authorities in certain matters, such as when the Sejm abandons the issuance of regulations in a matter already regulated by international law. However, the transfer of competencies does not mean that state sovereignty is divested. The transfer of competencies is carried out on the basis of a treaty, and the treaty must be ratified with the prior consent of either the people in a referendum or the Sejm in a law – and the choice of the path of consent to ratification is made by the Sejm with an absolute majority of votes.

The opening of the Polish domestic order to international law also has a basis in Article 9 of the Constitution, obliging Poland to comply with international law binding on it. The two legal orders are reconciled by conflict of laws rules. Primary law is part of a member state's domestic legal order and should be applied directly, unless application requires the issuance of a law. If this law is adopted through the so-called 'major ratification'¹⁸ procedure it takes precedence over the law in the event of a contradiction. Secondary law is applied directly, taking precedence in case of conflict with laws. Regulations are applied directly, while directives require implementation and are implemented through an implementing law. In general, EU law has the force of a law and takes precedence over a law in case of conflict. EU law enables

16 See more: Kwiecień, R. (2019).

17 Jerzy Ciapała distinguishes two potential interpretations of the term in this regard. The first implies referring the term exclusively to state bodies with authority, i.e., those with imperium, to the exclusion of local and professional self-government bodies. The second interpretation suggests treating the term in a functional sense, referring to anybody with public authority, regardless of its position in the public power structure. Given the unique nature of Article 90(1), the need for a restrictive interpretation of the term, and the relevance of Articles 15, 16 and 163 of the Constitution, the first interpretation is preferred, although this does not imply a concomitant approval of the form of expression of the term in Article 90(1). See: Ciapała, 2014, pp. 77-90.

18 Also referred to as "superratification", see: Jaskiernia, 2009, pp. 461-470. The legislative regime for enacting an ordinary law expressing approval for the ratification of an international agreement applies exclusively to agreements whose effects do not result in the transfer of competences as defined in Article 90 of the Constitution of the Republic of Poland.

the realisation of its common goals and values, such as freedom, security and justice. It constitutes the legal foundation of the union's operation. EU law and the national laws of the member states have common roots, as noted by Article 2 of the TEU, saying that these legal orders are based on common values.

As already mentioned in the introduction, the Lisbon Treaty distinguishes three main types of competence, which is important for the principle of primacy of EU law. Thus, we distinguish firstly between 'exclusive competences',¹⁹ which empower the EU to exclusively enact its laws (leaving member states with the duty to implement them); second, 'shared competencies',²⁰ which allow member states to adopt legal acts of a binding nature when the EU has not addressed a particular area; and third, complementary competencies,²¹ which allow the EU to adopt measures to support or complement the policies of member states. The transfer of powers from the union to the member states is only possible through the Treaty amendment procedure. The division of powers is linked to the issue of exceeding powers. Any action outside the granted scope of authority is referred to as *ultra vires*. The consequence of such an action is that it is null and void by operation of law, and thus lacks the attribute of validity. As an example of *ultra vires* action one can point to rulings of the CJEU, concerning areas reserved for member states such as the organisation of the judiciary. The exercise of EU competence is subject to two basic principles set forth in Article 5 of the TEU. The first of these is the principle of proportionality, which imposes limits on the content and scope of EU activities so that they do not go beyond what is necessary to achieve the objectives set forth in the Treaties. The second principle is that of subsidiarity, which specifies that in areas that do not fall under its exclusive competence, the EU shall take action only if the objectives of the intended action cannot be sufficiently achieved by the member states and can be better achieved at EU level.

There should also be a dive into the historical context of Poland's accession to the EU. The journey towards EU membership began in the early 1990s, following the collapse of the Soviet bloc and the establishment of a democratic government in Poland. The desire to integrate into Western political, economic and security structures became a central tenet of Poland's foreign policy. The Association Agreement signed in 1994 paved the way for closer ties, setting out the framework for cooperation and establishing the path towards EU accession. The actual accession process was marked by rigorous negotiations and a comprehensive alignment of Polish legislation with EU norms and standards. This process required significant domestic reforms to meet the accession criteria outlined in the Copenhagen criteria, which focused on democracy, rule of law and market economy principles. The completion of this

19 Article 3 of the Treaty on the Functioning of the European Union (TFEU).

20 Article 4 TFEU.

21 Article 6 TFEU.

process culminated in Poland officially becoming a member of the European Union on May 1 2004, along with nine other countries. Poland's membership in the EU brought about a multifaceted transformation. On the economic front, access to the EU's single market opened up new opportunities for Polish businesses. Structural funds and cohesion policy provided crucial financial support for the modernisation of infrastructure and the convergence of living standards.²² However this period also posed challenges, particularly in sectors where Polish industries had to adapt to increased competition within the common market.

From a political perspective, EU membership solidified Poland's commitment to democratic values and the rule of law. It became an active participant in EU decision-making processes, contributing to the shaping of policies that spanned various domains, from agriculture to foreign affairs. Additionally, the free movement of people facilitated cultural exchanges and increased societal interactions, fostering a sense of European identity among Poles. However, Poland's relationship with the EU has not been without its complexities. Tensions have arisen on several fronts, including issues related to the rule of law, judicial independence, and migration policies. These challenges underscore the delicate balance between national sovereignty and the obligations that come with EU membership.

The ongoing discourse surrounding the rule of law has been a prominent feature of Poland's relationship with the EU. The European Commission, invoking Article 7 of the TEU, initiated proceedings against Poland – expressing concerns about the independence of the judiciary and the rule of law. This development triggered debates about the limits of EU intervention in the internal affairs of member states, and raised questions about the effectiveness of the mechanisms in place to safeguard fundamental values. Another area of contention has been migration policies, with Poland taking a firm stance against mandatory quotas for the relocation of refugees. This stance reflects broader debates within the EU about solidarity, burden-sharing, and the preservation of national identity in the face of complex migration challenges. As the dynamics of the EU continue to evolve, Poland finds itself at a crossroads, navigating the tensions between national sovereignty and integration. The emergence of new geopolitical challenges, such as the conflict in Ukraine and the redefinition of the EU's relationship with Russia, adds additional layers of complexity to Poland's role within the union.

22 After Poland's accession to the European Union, aid programs became much more influential for the economy, mainly due to an increase in the amount of structural funds. With EU accession, there have been significant changes in the directions of support, with a particularly noticeable increase in the role of programs focused on improving human capital. See statistics from the collective work edited by Filip Tereszkievicz in: Glusman, 2013, pp. 154-191.

5. Resolving Conflicts of National and EU Law

The implementation of EU law in the Polish Sejm mainly consists of the creation of laws that incorporate EU provisions into the national legal order. This process is not regulated in detail by law, and is mainly carried out under the standard legislative procedure. However, there are some exceptions that regulate a number of procedural issues aimed at aligning the legislative process with implementation requirements. These include provisions contained in the Rules of Procedure of the Sejm²³ and the cooperative law.²⁴ Unlike the process of EU lawmaking, implementation activity in the Sejm is carried out by various parliamentary committees associated with specific areas of law. These committees undertake ordinary legislative activities as part of the legislative procedure, adapting Polish legislation to the norms and requirements of EU law. Their activities vary, as each committee has a specific subject area.

It is worth emphasising that the process of implementing EU law in the Polish legal order does not involve passing laws that are contrary to European norms. The Sejm strives to create regulations that are compatible with European law, which is one of the key principles of the Polish parliament in the context of European integration.²⁵ The implementation procedure requires cooperation between various state bodies, as well as dialogue with EU institutions. The parliamentary committees, acting in their specialised areas, strive to adapt Polish legislation to European standards effectively and in accordance with the law. In this context, consultations with the public and experts in the field also play an important role.

However, even within the framework of the implementation procedure there is a certain freedom of action for the Sejm. This allows national specifications and needs to be taken into account, while maintaining compliance with the principles of EU law. The implementation process is thus a balance between meeting European requirements and preserving the state's autonomy in shaping its laws. It is worth noting that Poland, like other EU member states, actively participates in shaping European policy through its participation in EU institutions. The European Parliament, the Council of

23 Resolution of the Sejm of the Republic of Poland dated July 30, 1992 Rules of Procedure of the Sejm of the Republic of Poland.

24 Law of October 8, 2010 on cooperation of the Council of Ministers with the President of the Republic of Poland and the Sejm and Senate in matters related to the membership of the Republic of Poland in the European Union.

25 That is why, among other things, one of the mandatory elements of the justification of a bill, as stipulated in Article 32(2) of the Rules of Procedure of the Sejm, is the prophylactic obligation to require a statement on the compatibility of the bill with EU law or a statement that the subject of the proposed regulation is not covered by EU law. See more on this topic: Kuczma, 2015, pp. 136-138.

the European Union and the European Commission are places where Polish representatives co-determine the direction and content of EU policy.

It should be emphasised that the European Union is not a state, but a special legal entity. It does not have the right to *kompetenz-kompetenz* (the right of an entity or state to assign itself the competencies of another entity or state),²⁶ which only EU member states have. In addition, the transfer of competencies to union bodies is subject to the jurisprudential control of the Constitutional Court and the constitutional courts of other states. The fact that EU law does not always have primacy over national law is evidenced by the Constitutional Court's interpretation in its judgment K 18/04, according to which Poland could withdraw from the EU if an irremovable contradiction between the Constitution and EU law were to arise.²⁷ The decision is made by Poland – not the European Union. On the basis of Article 90 of the Constitution, an entire legal construction has been created covering accession and the possibility of withdrawal from the EU. Three steps are taken in the following order: mandatory renegotiation of the European Treaty, amendment of the Polish Constitution, and, as a last resort, withdrawal from the EU. The position of the Constitutional Court is that neither Article 90(1) nor Article 91(3) can provide a basis for delegating to an international organisation the authority to enact legal acts or make decisions that would be contrary to the Constitution of the Republic of Poland. In particular, the norms indicated here cannot be used to delegate authority to the extent that would make the Republic of Poland unable to function as a sovereign and democratic state.²⁸

Moreover, the CJEU in its rulings K 18/05 and K 32/09 distinguished the primacy of application from the primacy of validity. He stated that the principle of supremacy of the nation in Article 4 allows for the primacy of application of EU law over national law, including the Constitution, but this does not imply the supremacy of EU law over the Constitution of the Republic of Poland, because the Constitution still retains primacy of validity. He further formulated the concept of constitutional identity as a set of inalienable values and principles of law that are fundamental to the country, and these provisions can never be transferred to international bodies.

26 An interesting approach defining the *Kompetenz-Kompetenz* doctrine as a "necessary evil that aids in the administration of justice" see: Bawah, 2019, pp. 168-179.

27 A similar approach to the primacy of EU law and national sovereignty can be seen in the jurisprudence of the Hungarian Constitutional Court, e.g. in the already mentioned decision 32/2021 (XII. 20.) AB, where it was emphasised that the protection of constitutional identity is a key element of Hungarian sovereignty. The Court stated that Hungary may refuse to apply EU law if it considers that it violates its constitutional order. See more about that: Varga Zs., András és Berkes, Lilla (2023).

28 I am encouraged to read a similar case in the Decision 32/2021. (XII. 20.) AB judgment. This judgment concerned the question of whether Hungarian state authorities are obliged to implement the provisions of European Union law in such a way as to lead to a violation of the Hungarian Constitution, in particular with regard to national sovereignty and the integrity of constitutional identity.

The principle of primacy, or priority, signifies the precedence of the applicability of EU law over the national legal systems of its member states. From the perspective of the EU, this principle holds sway over all national legal norms within the member states, irrespective of their position within the hierarchy of legal sources, including constitutional provisions. Nevertheless this perspective – which inherently entails the absolute supremacy of EU law over national law – has not found unanimous validation in the rulings of the majority of constitutional courts within the member states. Consequently the CJEU – while acknowledging the necessity for a ‘constructive dialogue’ with the national courts of the member states – has introduced certain techniques designed to facilitate the coexistence of EU and national legal frameworks.

Specifically, in its recent jurisprudence²⁹ the court has recognised the safeguarding of the national identities of the member states as a justification for limiting the scope of the primacy principle.³⁰ In this manner, the court has permitted the potential invocation of constitutional values by member states under certain circumstances, thereby enabling them to deviate from the absolute supremacy of EU law in the interest of protecting their national identities. In the legal context, it should be emphasised that the EU has neither a state nor a federal character. Nevertheless, the degree of cooperation and economic interdependence achieved – as well as the gradual implementation of elements typical of sovereign states, such as citizenship, the establishment of a common euro currency in some member states and the abolition of internal border controls within the Schengen area – contribute to a growing sense of European identity.³¹

6.

Conclusions

In conclusion, the primacy of EU law – rooted in the case law of the CJEU and bolstered by the Treaty of Lisbon – plays a crucial role in the legal dynamics of the European Union. Despite concerns raised by member states about the potential impact on sovereignty, the principle serves to maintain uniformity in the application of law, protect the rights of citizens and businesses, and empower the European Court of Justice in

29 See for example: Judgment of the Court of Justice of October 14, 2004. C-36/02.

30 Całka, 2016, pp. 47-58.

31 The significance of positive self-images in shaping European identity goes beyond internal discussions, as the EU actively projects its vision of European identity beyond its own borders. This is particularly evident in the European neighborhood, encompassing both the Southern and Eastern dimensions. The focus lies on the external democratisation efforts of the EU, involving the promotion of democracy in third countries through support for human rights, the establishment of good governance standards, and participation in modernisation projects. See more: Kaina and Karolewski, 2013), pp. 35-40; Martinelli, 2017, pp. 7-12.

interpreting and applying EU law across the Union. Allegations of unconstitutionality and conflicts between EU law and national constitutions, exemplified by the case in Poland, underscore the ongoing tension between supranational legal systems and national sovereignty. The Constitutional Court's decision in the K 32/09 case emphasised that the accession to the EU does not violate state sovereignty, provided the transfer of powers is clearly defined, and the state retains the ability to withdraw from international agreements, including the EU.

Examining the competences ceded to the EU, Article 90 of the Polish Constitution serves as the foundation for European integration, allowing the transfer of specific competencies while preserving state sovereignty. The Lisbon Treaty's delineation of exclusive, shared, and complementary competencies further shapes the principle of primacy, emphasising the importance of proportionality and subsidiarity in EU actions. Resolving conflicts between national and EU law involves the implementation of EU law in the Polish Sejm, where laws are created to align with European norms. While there is a degree of freedom for the national legislature, efforts are made to ensure compatibility with EU law, reflecting the delicate balance between meeting European requirements and preserving state autonomy.

The classical concept of sovereignty, as defined in Article 4 of the Constitution of the Republic of Poland, is inadequate today to reflect with full clarity the essence of Poland's functioning in EU structures. The concept has evolved in such a way that the Constitution always retains the supreme power and priority of validity but allows, in certain cases, the priority of applying international law directly. Thus, the culmination of the argument will be the recognition that EU law does not have absolute precedence over national law, due to the strongest position of the fundamental legal act of the state. Thus, the purpose of the primacy of community law is to ensure that all residents enjoy equal protection under EU law throughout its territory. However, it should be borne in mind that the primacy of community law applies only in areas in which individual member states have transferred their sovereign powers to the EU – such as the single market, environmental protection, transportation, and others. However, it does not apply to areas such as education, culture, or tourism. This nuanced approach aims to facilitate the coexistence of EU and national legal frameworks, while respecting the diversity and values of member states.

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