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FLAGSHIP STUDIES

Evolution of Equality as a Constitutional Principle in Romania: European Union Membership Impacts and Current Challenges

ABSTRACT: *This study examines the evolution of equality as a constitutional principle in Romania, focusing on the transformative impact of European Union (EU) membership within the broader context of human rights regulations in Europe. It provides an overview of how equality has been understood within Romanian constitutional law, emphasising foundational principles and interpretations made by the Constitutional Court with the incorporation of European catalogues of human rights. From this perspective, the research highlights how the court has addressed complex issues such as gender equality, minority rights, and anti-discrimination protections in sensitive areas. These include political and social rights, education, and even review of the constitutional identity, all while balancing EU mandates with national legal traditions and social contexts. The aim is to evaluate the Constitutional Court's role in incorporating international standards in constitutional review and discuss the ongoing challenges of harmonising human rights protection standards within the EU.*

KEYWORDS: *equality, constitutional review, European Union, Constitutional Court of Romania, human rights*

1. Introduction

In ongoing debates about defining the European Union (EU) and its future, the issue of fundamental rights plays a crucial role in determining harmony or disharmony. This is evident from the various conflicts and tensions that have impacted the EU's evolution. Europe, albeit a relatively small region, is characterised by a multitude of

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fundamental rights “catalogues” and courts tasked with interpreting and adhering to them, often stimulating complex dialogues. Achieving a “single voice” in this context is one of the greatest challenges of coexistence and deeper integration, in the spirit of the founding Treaties. Thus, solutions identified in practice – especially by constitutional courts acting as guarantors of the highest-ranking laws – provide a valuable resource for analysing and shaping political and legislative actions.

Within fundamental rights, perhaps one of the most suggestive for such an analysis is the principle of equality, as it lies at the heart of constitutional and EU values. The Constitutional Court of Romania (CCR) has stated in this regard that equality is ‘a principle that underlies fundamental rights and freedoms’ (Decision No 465/2019, paragraph 32); it ‘characterizes fundamental rights and freedoms, while also serving as a guarantee for each individual’s fundamental rights’ (Decision No 80/2014, paragraph 136). Given this positioning in the structure of the Constitution, the evolution of the enshrinement, interpretation, and application of the principle of equality provides a comprehensive perspective on its development, bearing the EU’s context, illustrating how Romania’s accession to the EU has continuously shaped its constitutional landscape.

In this light, the current study examines the solutions identified by the CCR for harmonising standards that ensure and uphold the principle of equality. After briefly outlining the related complex legal landscape within the EU, the study delves deeper into the relevant jurisprudence of the CCR concerning the interpretation of the principle of equality. Some of the most relevant dimensions of the interpretation and application of the principle of equality are explored, in terms of establishing limits for the revision of the Romanian Constitution (the core of constitutional identity), political rights, and social rights, focusing on both aspects of gender equality and ongoing debates surrounding this issue. In terms of the impacts on the EU and current challenges, the main conclusion of the study highlights that achieving harmony within the EU’s complex framework of human rights is particularly challenging given sensitive issues shaped by legislative fragmentation, differing traditions, and varying social perceptions and experiences among Member States (MS). Consequently, the task of legislators in these delicate matters intricates. They must create regulations that reflect societal progress while considering the different interpretations from constitutional and quasi-constitutional courts across the EU. In the context of Romania, particularly regarding constitutional review, a significant challenge could be identifying and implementing a higher standard of human rights protection within the framework of various overlapping and binding human rights catalogues.

2.

Equality within the EU: a Complex Legal Landscape

2.1. Regulations of the Principle of Equality

2.1.1. Overlapping of a Multitude of Supranational Catalogues of Fundamental Rights

Considering its wide applicability, enduring significance, and impact at the European level, the primary document relevant to ensuring the principle of equality is the Convention for the Protection of Human Rights and Fundamental Freedoms (also known as the European Convention on Human Rights (ECHR)), adopted by the Council of Europe and enforced in 1953.¹ Article 14 explicitly prohibits discrimination in the enjoyment of the rights and freedoms outlined in the Convention. According to jurisprudence of the European Court of Human Rights (ECtHR), the principle of non-discrimination has a “fundamental” character and constitutes the basis of the Convention, together with the rule of law and the values of tolerance and social peace [S.A.S. vs France (MC), 2014, pct. 149; Străin and Others against Romania, 2005, pct. 59]. While the ECHR does not include a standalone equality provision applicable to all legal matters, it does allow for discrimination cases to be addressed alongside other rights violations. Additionally, this protection is supplemented by Article 1 of Protocol No. 12 to the Convention,² which prohibits discrimination in the exercise of any right provided by law in a more general way.

Considering the importance for the legal order of the EU, a highly relevant document is the Charter of Fundamental Rights (CFR), which became legally binding in 2009, being now part of the EU Treaties. Compared with the ECHR, the CFR provides a more contemporary and detailed perspective and guarantees for the principle of equality. Articles 20–26 specifically address equality and non-discrimination, with Article 21 explicitly prohibiting discrimination based on sex, race, colour, ethnic or social origin, and religion, among other factors. Furthermore, the CFR goes beyond merely prohibiting discrimination; it actively promotes equal treatment and opportunities. This is particularly evident in its provisions that focus on gender equality, as well as protections for children, older adults, and individuals with disabilities.

In Europe, numerous other agreements, conventions, or declarations exist with either universal or regional significance that enshrine the principle of equality. The

1 The official, formal legal title of the treaty, while ECHR is its widely used form.

2 Council of Europe, 2000.

most prominent and universally relevant of these, is the Universal Declaration of Human Rights.³ Some of the international or regional instruments have not been ratified by all EU MS. An example in this regard is the Istanbul Convention (Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence), approved by the EU through Decisions (EU) 2023/1075 and (EU) 2023/1076.⁴ As long as not all EU MS have ratified the Istanbul Convention, they are bound only by the EU *acquis communautaire* that implements the convention. Any other aspects regulated by the Convention remain under the competence of MS. This legislative discrepancy creates a diverse landscape for the interpretation and application of the principle of equality within the EU.

2.1.2. National Catalogues of Human Rights: Constitutions of MS

Each Constitution of the EU MS contains a comprehensive list of fundamental rights, shaped by the unique socio-political and economic experiences of each country. In many EU States, constitutional courts serve as guardians of these fundamental laws and rights.

Thus, the Constitution of Romania, adopted in 1991 and revised in 2003,⁵ guarantees that all citizens are equal before the law, without discrimination based on race, nationality, ethnic origin, language, religion, sex, political opinion, property, or social status (Articles 4 and 16). During the revision of the Constitution in 2003, provisions were added to ensure equal opportunities for both women and men to access public, civil, or military positions, in line with relevant international standards. Other articles detail specific applications of the principle of equality. For example, Article 21 ensures free access to justice and the right to a fair trial. Article 44 guarantees equal protection of private property, regardless of ownership. Article 48 establishes equality between spouses in marriage. Additionally, Article 41 affirms the right to equal pay for women and men, along with the right to social protection, including paid maternity leave as stated in Article 47(2).

3 United Nations, 1948.

4 See Article 1 para. 2: 'the Union's accession to the Convention shall be without prejudice to the Member States' competence as regards the ratification of the Convention on matters falling within their national competences'.

5 Constitution of Romania.

2.1.3. Differences in Terms of the Incorporation of Supranational Catalogues

All EU MS are also members of the Council of Europe, meaning that they are subject to the system of key human rights catalogues, including the ECHR and CFR. However, the way these frameworks are received, interpreted, and applied within each country's legal system varies according to that State's constitutional provisions and practices of their national constitutional courts. Therefore, the international catalogues of human rights are assigned varying degrees of binding force in different jurisdictions.

In some countries, such as Luxembourg, these take precedence over national law, including the Constitution. In others, such as Croatia and the Czech Republic, they hold a weight similar to that of constitutional laws. In Belgium and Cyprus, international human rights frameworks have less weight than constitutional laws. Meanwhile, in Ireland and Austria, the significance of individual international treaties varies. In federal countries including Germany, international human rights treaties may have the same weight as federal legislation.⁶ In Romania, Article 20 of the Constitution requires that both the Constitution and domestic laws be interpreted in accordance with the international treaties to which Romania is a signatory. It also states that the most favourable provisions, whether they originate from the Constitution or from international agreements, shall take precedence. Furthermore, Article 148 of the Romanian Constitution establishes that the binding provisions of EU law have priority over any conflicting domestic laws.

Likewise, identifying common standards for applying the principle of equality across the EU is complicated by differences in legislation, culture, and traditions among MS. Variations in national laws and societal norms can influence how equality is understood and implemented, particularly in domains such as gender equality, religious expression, and migrant rights. Referring to the application of the Charter in this complex legal and cultural environment, the President of the European Court of Justice (ECJ) expressed the following opinion:

'In accordance with Article 52(4) of the Charter, "[i]n so far as [the latter] recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions." By referring to the constitutional traditions common to the Member States, the Charter does not seek to define the fundamental rights recognised thereby in accordance with the "smallest common denominator" of the Member States' constitutions, but to interpret the fundamental rights enshrined therein in a way that offers a high level of

6 Conference of European Constitutional Courts, 2021.

*protection; that is adapted to the nature of EU law; and that is in harmony with the national constitutional traditions’.*⁷

In the same context, addressing the question of whether Article 53 of the Charter must be interpreted as a codification of the Solange approach,⁸ the same aforementioned President stated:

*‘One should not read Article 53 of the Charter as a rule of conflict, but as a rule which seeks to strengthen the primacy of EU law by demanding from the ECJ that it states the reasons why it decided to follow (or depart from) the level of fundamental right protection provided for by the MS’ constitutions. Article 53 of the Charter thus mandates the ECJ to engage in a dialogue with the national constitutional courts or, as the case may be, with the national supreme courts. In accordance with such a reading, Article 53 of the Charter would be an expression of constitutional pluralism’.*⁹

The theory of “layers of protection”.¹⁰ advanced for a harmonious coexistence of catalogues of fundamental rights and the principle of subsidiarity¹¹ offers an orientation. However, the operation of these principle guidelines is conditioned by the dialogue and mutual observation of the jurisprudence developed in this complex framework.

2.2. Overlapping Jurisdiction Between the ECtHR and ECJ and Relations with National Courts

In addition to the existence of this complex normative framework, problems arise in the coherence of its interpretation, more so due to the overlapping jurisdiction between the ECtHR and ECJ. While the ECtHR has authority over States’ obligations under the ECHR, the ECJ maintains authority over interpreting the CFR within EU law. This dual system introduces complexity and can pose challenges for European citizens, who may find that their rights are interpreted differently depending on which

7 Lenaerts, 2011, pp. 79–106.

8 The judgments of the German Bundesverfassungsgericht of 29 May 1974, known as Solange I (2 BvL 52/71) and of 22 October 1986, known as Solange II (2 BvR 197/83); the judgment of the Italian Corte Costituzionale of 21 April 1989 (No. 232, Fragd, in Foro it., 1990, I, 1855); the declaration of the Spanish Tribunal Constitucional of 13 December 2004 (DTC 1/2004). See also ECtHR, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland*, judgment of 30 June 2005, ECHR 2005-VI.

9 Lenaerts, 2011, pp. 79–106.

10 Polakiewicz, 2016.

11 Vila, 2017, pp. 393–413.

court has final authority in a given case. This dual framework has led to a situation known as “fragmentation” where differing interpretations can complicate enforcement and may undermine uniform standards of equality.¹² Some authors called these Courts ‘Two Senates of Europe’s Constitutional Jurisdiction’.¹³

‘The image of ‘two senates’ expresses the idea that the two courts bear a shared responsibility for the European legal space to which they each contribute in specific ways. The European Court of Justice’s role, as ‘first senate’, is best understood through its contribution to European political unity by fostering and controlling European public authority and ensuring its uniform effect in the European legal space. The European Court of Human Rights, which we consider Europe’s ‘second senate’, aims to entrench a set of basic norms – European human rights – in the European legal space’.

However, the opinion of the President of ECJ was as follows:

*‘from the fact that the Charter is now legally binding it does not follow that the EU has become a “human rights organisation” or that the ECJ has become “a second European Court on Human Rights” (the ECtHR). To this effect, the second paragraph of Article 6(1) TEU stresses that “[t]he provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.” A similar statement is also reproduced in Article 51(2) of the Charter. It requires that, in interpreting and applying the Charter, the ECJ respects the principle of conferral as set out in Article 5(2) TEU’.*¹⁴

The EU’s accession to the ECHR, as required by the Treaty of Lisbon, was intended to create greater coherence between the Convention and Charter, but the EU’s potential accession to the ECHR has yet to be realised. This complicated legal arrangement leads to further challenges in harmonising equality protections for MS.

These challenges were suggestively presented during the discussions within the Congress of Constitutional Courts focusing on catalogues of fundamental rights.¹⁵

12 Gerards, 2020.

13 von Bogdandy, Grabenwarter and Huber, 2023, pp. 383–418.

14 Lenaerts, 2011, pp. 79–106.

15 The XVIII Congress of the Conference of European Constitutional Courts (CECC) was held 24–25 February 2021.

*'Both national and international catalogues of human rights are identical in that they contain a similar list of rights (...). National catalogues have entrusted the protection of fundamental values and fundamental human rights (...) to constitutional courts or equivalent judicial bodies. If these bodies are empowered not only to abstractly review constitutionality but also to provide a posteriori protection of human rights and freedoms, they must also address the question of the source of human rights and freedoms and the normative definition of such a source. Thus, in addition to the application of their national catalogues of human rights (...) they must evaluate, respect and protect the fundamental rights contained in international legal documents. The contemporary approach to the material rule of law is characterized by an effort to eliminate contradictions and gaps in the system of protection of fundamental rights. (...) This brings the European constitutional and equivalent courts to the question of the relationship between national, supranational and international catalogues of human rights. Is there a hierarchy between them? Are they competitive or complementary? What legal system should the Constitutional Court apply first?'*¹⁶

However, as a general rule, European constitutional courts have embraced the interpretation of the principle of equality and non-discrimination developed over time by ECtHR,¹⁷ and, to a significant extent, also incorporate the jurisprudence of the ECJ where applicable, as it proves by the examination of reports of the courts in the same congress. According to some reports, national courts guarantee a comparable standard (e.g. Luxembourg, Slovenia, Slovakia); according to other reports, national courts follow the case law of the ECtHR (Croatia); and according to others, the ECtHR case law is not only followed but often cited in their countries (Romania, Austria, Czech Republic, Lithuania). For instance, the German Federal Constitutional Court has noted that the openness of the Constitution to international law creates a constitutional obligation for the Court to use international treaties, particularly human rights conventions, as interpretive guidelines for the Basic Law, especially concerning fundamental rights. This is particularly relevant for the ECHR, which receives heightened consideration due to its close links with the fundamental rights of the EU and the integration objective outlined in Article 23(1) of the German Basic Law (GG). According to the same report, the interpretation of the principle of equality for the most part corresponds to the approach of the ECJ (when it applies Article 20 of the CFR) and the ECtHR.¹⁸ Various nuances also exist, which differentiate the

16 Conference of European Constitutional Courts, 2021.

17 Hennette-Vauchez, 2023, pp. 199–218.

18 Conference of European Constitutional Courts, 2018.

practice of some constitutional courts, such as the Constitutional Court of Spain, whose case law provides that the prohibition of discrimination includes only the right to be treated equally in a comparable situation, but not the right to be treated differently in a different situation. The Spanish Constitutional Court has defined the right to equality (Article 14 CE) inspired by Article 14 of the ECHR and, now, Protocol No. 12 of 4 November 2000, as interpreted by the doctrine of the Court of Strasbourg. However, it has not accepted its criterion on one point: as summarised in CC Judgment 181/2000 of 29 June (point 11), ‘according to reiterated and constant doctrine of this Court, the right to equality of art. 14 of the Constitution does not enshrine a right to unequal treatment (CC Judgment STC 114/1995, 6 July, point 4), nor does it protect the lack of distinction between different assumptions, so there is ‘no subjective right to unequal normative treatment’ (CC Judgment STC 16/1994, 20 January, point 5), falling the so-called ‘discrimination through indifferentiation’ (CC Judgment STC 308/1994, 21 November, point 5) outside the scope of this constitutional precept. In brief, ‘the principle of equality cannot form the basis of a reproach of discrimination for indifferentiation’ (CC Judgment STC 164/1995, 13 November, point 7)’. Further, for example, the German Federal Constitutional Court has specified:

‘the principle of the Constitution’s openness to international law “does not require that the domestic legal order be schematically aligned in parallel to international law; Rather, the substantive values of international law [as they have been specified by the ECtHR] must be received in domestic law as comprehensively as possible, provided that this is both methodologically tenable and compatible with the requirements of the Basic Law’.

The Romanian Constitutional Court has demonstrated that its interpretation of the protection of fundamental rights, particularly regarding the principle of equality, can sometimes offer a higher standard than that provided by the ECHR. For instance, the CCR has declared the reduction of contributory pensions unconstitutional, highlighting its commitment to the superior protection standards in the Romanian Constitution. The Court notes that the protections afforded by the ECHR are minimal, allowing the Romanian Basic Law and CCR’s jurisprudence to provide ampler safeguards for fundamental rights, as stated in Article 20 (2) of the Constitution and Article 53 of the Convention.

3.

CCR and the Principle of Equality

3.1. Principle of Equality as a Limit of the Amendment of the Constitution

Before we explore examples of how the principle of equality is applied to specific fundamental rights, it is important to emphasise its role in defining the core of “constitutional identity” (see Decision No. 390/2021) in relation with human rights (the limits of constitutional revision). In this sense, Article 152 (2) of the Constitution states that ‘no revision can be made if it results in the suppression of the fundamental rights and freedoms of citizens or their guarantees’.

In its most recent decisions regarding initiatives to amend the Romanian Constitution, in 2019 (Nos. 464 and 465), the CCR highlighted relevant recitals about the application of the principle of equality in the context of constitutional revision. These decisions addressed initiatives with similar content that proposed limiting amnesty and pardon for acts of corruption. Beyond examining them in terms of the boundaries of constitutional revision – which is open to debate – attention is drawn to the distinctions made by the CCR in interpreting the limits of revision set forth in Article 152 (2) of the Constitution mentioned above. According to the CCR, its analysis:

*‘must be carried out in two stages when assessing the suppression of fundamental rights and freedoms or their guarantees within the meaning of art. 152 paragraph (2) of the Constitution, namely (1) the analysis of the revision initiative in relation to the general principles that guide the entire catalogue of fundamental rights and freedoms, principles that constitute their guiding guarantees, and (2) the analysis of the revision initiative in relation to an applicable fundamental right or freedom. The violation of the aforementioned general principles is decisive and can no longer proceed to the second stage of analysis, it being not necessary to identify the suppressed fundamental right or freedom because the violation of the principle of equality affects the individual himself, who is evaluated and placed, based on arbitrary criteria, in a position of inferiority’.*¹⁹

Referring to the principle of equality in the same context, the CCR noted that it has ‘a particular importance’ and ‘the analysis of the suppression of fundamental rights and freedoms must have as a premise the principle of equality, a principle that is at

19 Decision No. 465/2019, para. 34.

the basis of fundamental rights and freedoms'. (para. 32) This being the case, it follows that the way in which the CCR interprets the principle of equality, by incorporating the European and international catalogues of fundamental rights, constitutes a "filter" for the limits of revision of the Constitution, shaping these limits in correlation with the European framework for the protection of fundamental rights. The general interpretation of the same limits of revision should also be noted, in the sense that 'the constitutional protection of the citizen is upward, which implies that constitutional revisions must enhance the protection of fundamental rights and freedoms. According to the meaning of Article 152(2) of the Constitution, the safeguarding of these rights and freedoms can only have an upward/ascending direction'.²⁰

To illustrate how the CCR approached the interpretation of the principle of equality, we have selected several relevant topics for highlighting the interaction between the fundamental rights catalogues in the EU, encompassing political and social rights and education, as well as sensitive and recent developments in domains such as gender identity and artificial intelligence (AI).²¹

3.2. Interpreting the Concept of Equality in Relation to Political Rights Amid Modern Challenges

3.2.1. Artificial Intelligence and Equality of Electoral Competitors

A recent and highly controversial ruling (No. 32/2024) of the CCR, by which it annulled the elections for the President of Romania, foregrounds the principle of equal opportunities for electoral competitors, a crucial aspect of the right to be elected, particularly in relation to the impact of AI interference. Thus, by stating that 'Equality of opportunities must be guaranteed to all candidates and parties and must stimulate the state to adopt an objective and impartial attitude towards them and to apply the same legislation in a fair manner to all' (para. 15), the CCR referred to the main aspects by which this objective is ensured, concerning the conduct of the State and electoral competitors.

Thus, approaching the 'electoral behaviour of competitors' and their use of social networks, new technologies, and AI to promote their candidatures, the CCR found that 'the significant exposure of a candidate led to a directly proportional reduction in the online media exposure of the other candidates in the electoral process', thus creating 'a clear inequality between the candidate who manipulated digital technologies and

20 Decision No. 80/2014, para. 65; Decision No. 465/2019, para. 29.

21 Tănăsescu, 1999.

the other candidates participating in the electoral process' (para. 16). In correlation with the exercise of equal conditions of the electoral campaign and considering the impact of AI, the CCR noted that:

'the use of digital technologies and artificial intelligence, both by candidates or electoral competitors, and by political parties, their supporters or sympathizers, must be transparent in order to guarantee the integrity and impartiality of the elections. Otherwise, voters are prevented from forming an opinion about the candidates and the electoral alternatives or may be misled regarding the identity and quality of the candidate or the voting procedures'.

Therefore, the use of such practices in an electoral process by electoral competitors, including political parties, 'entitles the competent public authorities, according to the law, to verify, ascertain and, where appropriate, sanction such conduct'.

From the perspective of reference to international standards, the way in which the CCR incorporated *soft law* in its binding argumentation is interesting, specifically points 18 and 21 of the Explanatory Report to the Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report, adopted by the European Commission for Democracy through Law (Venice Commission), at its 52nd plenary session (Venice, 18–19 October 2002)]. This reference was used to support the argument concerning the possibility of the State to limit the expenses on the electoral advertising to guarantee equal opportunities.

3.2.2. Gender Equality and Electoral Competitors

The exercise of political rights is an important topic that highlights another challenging issue: the evolution in interpreting the principles of equality and non-discrimination, particularly the affirmation of equality between women and men.

In a recent decision (No. 341/2024), the CCR found constitutional provisions of Law No. 115/2015 on the election of local public administration authorities, according to which *'the lists of candidates for the election of local councils and county councils must be structured to ensure the representation of both genders, unless the list contains only one candidate'*; it is notable for its comprehensive approach to understand the evolution of equality between men and women. It provides a detailed examination of the mandatory and *soft law* instruments adopted, particularly within the Council of Europe and EU. According to the CCR:

'In the European context, the principle of equality between women and men has been incorporated into international legal instruments through a lengthy process of social, political, economic, and cultural evolution. This process is rooted in the recognition of various forms of discrimination against women perpetrated by men, which has led to a continuous societal commitment to affirming women's rights. These rights span civil rights – such as achieving full legal capacity at the same age as men regardless of marital status, the right to work and receive equal pay, the right to inheritance, freedom of movement, and the right to self-determination – as well as political rights, including the right to vote and the right to run for office.'

In reference to the relevant international and European documents – such as Article 1, point 3 of the Charter of the United Nations (1945); Article 14 of the ECHR (1950); and the International Covenant on Civil and Political Rights, adopted in 1966 and ratified by Romania in 1974 (Article 3) – as well as Additional Protocol No. 12 to the ECHR on the General Prohibition of Discrimination (Rome, 2000), along with other EU-level documents, the CCR has emphasised the following:

'The principle of gender equality has been strengthened, aiming to achieve genuine equality of opportunities and rights for both women and men, particularly in social and political activities. This goal includes the active involvement of women as decision-makers. Although demographic statistics show an equality or even a numerical predominance of the female population in Europe, women remain underrepresented in institutions and management bodies across all levels and sectors. It is acknowledged internationally that the absence of gender balance in the political sphere does not reflect the values of a true constitutional democracy, where the principle of equal rights is a fundamental value. Consequently, the promotion of equal rights between genders has become a major objective at the declaratory level. However, without mandatory, firm, and effective state measures, this goal remains theoretically declared but not effectively achieved. Several international legal documents have outlined work agendas and proposed specific methods, such as representativeness quotas or the "zipper" system (alternating male and female candidates) for achieving genuine women's representation in elected offices. Additionally, many instruments, including Recommendations and Resolutions adopted by the Council of Europe and the EU, have been developed to further this aim.'

The CCR also invoked the relevant case law of the ECtHR regarding gender quotas and presence of women on the electoral candidate lists, as well as relevant case law of the ECJ.

Based on this extensive analysis, the CCR found that the criticised legal provision reflects, in an internal normative plan, a legal solution through which democratic states, in general, and EU MS, in particular, guarantee the principle of equal opportunities between women and men – an integral part of the universal principle of equality and non-discrimination. In this regard, the CCR emphasised the state's positive obligation to establish concrete legislative measures to achieve a more balanced representation of both sexes in political life and in political governing bodies, choosing, within its margin of appreciation, among the methods recommended or established at the international level: either the rule of gender parity on the lists of candidates for elections, or a certain percentage of women's representativeness in elected political bodies, or the solution of reserving a certain number of eligible seats for women candidates.

In summary, the CCR held that the elimination of gender stereotypes and social barriers that continue to perpetuate the underrepresentation of women in elected political positions depends on the adoption of a system of mandatory representation quotas or the parity system, and the legislative solution provided for in Article 7 (1) the final sentence of Law No. 115/2015 is currently the only guarantee for ensuring a balanced representation of women and men in political life, being in full agreement with the principle of equal rights and equal opportunities, both enshrined in Article 16 (1) and (3) of the Constitution.

3.3. Interpreting the Concept of Equality in Relation to Social Rights: Gender Equality and Retirement Age

A similar evolution, likely to illustrate the elimination of gender stereotypes, is provided by the regulation of the retirement age for women and men in legislation. The jurisprudence of the CCR, before and after accession to the EU, reflects not only societal changes, but also incorporation into the internal order of EU standards and objectives in the field of gender equality.

Thus, in 1995 (before the accession to the EU), the CCR noted (Decision No. 107) that:

'due to the obligations related to children upbringing and education, especially during the early years, to the increased burdens on women around the household, to the lack of widely accessible social and economic means, during the current transition period, that could ease such burdens, as well

as to other aspects that hinder their professional advancement (maternity leaves, postnatal leaves, parental leaves to care for sick children, prohibitions aimed at preventing work under certain conditions, etc.), as well as due to other circumstances, women are in situations that disadvantage them compared to men”, which justified, from the perspective of the principle of equality, the establishment of different retirement ages’.

In 2010 (after the accession to the EU), the CCR found (Decision No. 1237/2010) that:

‘cultural traditions and social realities are still evolving towards ensuring real factual equality between the sexes, so that it cannot be concluded that, at present, the social conditions in Romania can be considered as supporting an absolute equality between men and women. However, important steps have been taken. An example in this regard is the extension of the right to parental leave for men as well, including for militaries, relevant in this regard being Decision No90 of 10 February 2005, published in the Official Gazette of Romania, Part I, No 245 of 24 March 2005. For these reasons, raising women’s retirement age to 65 was intended to take place over a period of 15 years, during which it is expected that, in Romania, the social conditions will change significantly’.

The Court noted, in the same context, ‘the normal changes that occur in society in terms of mentalities, culture, education and traditions’, stating that:

*‘the provision of an equal treatment between the sexes is increasingly necessary in the context of the European trend that requires States to comply with the standards of equal, non-discriminatory treatment between men and women’.*²²

The Romanian court also held the recitals of the ECJ against certain grounds, such as those regarding the role of women in the family, and stated that the imposition of different retirement ages cannot adequately compensate for the disadvantages and difficulties that women encounter in their professional careers due to their social status. Likewise, the concern for raising children should not be related only to women, but also to men, making the situation of the two sexes, in this instance, comparable. Consequently, the Court considered that a change in its perspective is required regarding the issue of equalising the retirement age between men and women and ‘the opposition to this solution would mean, at present, the very opposition of a social

22 To the same effect, see also Decision No. 387/2018.

current that has an international scope, to whose standards Romania is called to live up to'. The Court also mentioned that we should be aware about the discrepancies existing between the current social conditions in Romania and these standards; a reason why the solution adopted by the legislator through the Law on the Unitary Public Pension System for a gradual increase in the retirement age of women over 15 years is 'able to ensure the adequacy of this measure to the social reality and to give a constitutional nature of the legal norm'.

Beyond the issue, in itself, of pensions and the equalisation of the retirement age, we note the recitals that address the traditional social perception closely attached to the biological significance of sex – which seems to overwhelmingly underlie the solution delivered in 1995, respectively the recitals that highlight the social developments in the sense of moving away from gender stereotypes, as an effect of the change/acceptance of the change in the social roles of women and men under the influence of the factors highlighted by the Court in its reasoning.

3.4. Equality and Education in Schools

A significant decision regarding modern challenges and the application of international standards related to the principle of equality concerns the unconstitutionality of the proposal to amend the National Education Law with a legislative solution prohibiting, 'inside all teaching establishments and institutions and inside all facilities intended for vocational education and training, including inside those establishments that provide extracurricular education', any activity aimed at spreading the theory or opinion of gender identity, understood as the theory or opinion that gender is a concept different from biological sex and that the two are not always the same (see Decision No. 907/2020).

Given the numerous criticisms of unconstitutionality, the reasoning of the decision is complex. However, from the perspective of capitalising on the principle of equality, the most relevant are the recitals in which the CCR, with reference to the evolution of Romanian legislation and the European context in the matter, presents in detail the normative framework regarding gender equality. Indeed, also relevant are the recitals on ensuring equality in terms of access to education for Romanian young people in the European context.

Thus, with reference to the normative framework and its evolution, the CCR noted the consistency of Romanian legislation with international regulations in the matter, in which sense it referred both to the Civil Code and the special anti-discrimination

legislation: ‘Law No 202/2002²³ defines the notions of “sex” and “gender”, a distinction reinforced by the definition of “gender” in the Istanbul Convention, ratified in Romania by Law No 30/2016’ (para. 63). In relation to this normative evolution, the Court holds that the notion of “gender” has a broader scope than that of “sex”/sexuality in a strictly biological sense, ‘as it incorporates complex elements of a psychosocial nature’:

‘Thus, if the notion of “sex” is limited to the biological characteristics that mark the differences between men and women, the notion of “gender” refers to a set of psychological and sociocultural traits. The latter notion includes elements of the individual’s social identity, evolving in correlation with the evolution of society and the continuous reevaluation of the interpretation of the principle of equality and non-discrimination on the basis of sex. Gender identity also implies the customary social roles assigned and discrimination based on sex/gender. Awareness of the individual’s sexual affiliation thus appears as a component within gender identification, but biological factors are complemented by social ones, gender identity including the sexual one and adapting it to social demands. The Romanian state has legislatively enshrined this vision/approach, assuming obligations aimed, in essence, at combating gender stereotypes and effectively achieving the principle of equality and non-discrimination’ (para. 64).

The CCR referenced its own case law, which reflects the evolving social roles of women and men and the elimination of gender stereotypes, meaning the decisions regarding the retirement age for both genders, as discussed in the previous sections. It also cited the case law of the ECtHR, highlighting that issues related to gender and gender identity have been the subject of numerous cases. These cases include instances where women are victims of violence, matters related to employment and parental leave, age-related conditions for exercising the right to social benefits, national regulations concerning the choice of first names and the transmission of parents’ surnames to their children, as well as acts of homophobic violence.

The CCR also acknowledged advancements in gender equality within the EU. It noted that anti-discrimination protections based on sex are fundamental to the EU, with gender equality being both a core value (Article 2 of the Treaty on European Union) and an objective (Article 3 of the Treaty); further, it referenced the vital role of equality in the EU CFR, along with derivative legal instruments such as Directive 2006/54/EC of the European Parliament and Council, which focuses on implementing

23 Law No. 202 of 19 April 2002 on equal opportunities and treatment between women and men, Official Gazette No. 326 of 5 June 2013.

the principle of equal opportunities and treatment for men and women in employment, and Directive 2012/29/EU, which establishes minimum standards for the rights, support, and protection of crime victims, replacing Framework Decision 2001/220/JHA.

In summary, the Court notes that the normative developments at national, Council of Europe, and EU levels, reflected in the jurisprudence of the Constitutional Court, ECHR, and the ECJ, support and highlight the fact that gender identity/equality encompass more than just biological sex or differences. They aim to combat the gender stereotypes associated with the traditional roles of women and men in society. For nearly two decades, the Romanian State has embraced this perspective through specific legal norms, aligning itself with international standards. This commitment is evident in Article 20 of the Constitution, which prioritises the highest standards for the protection of fundamental rights (para. 76).

As concerns the application of the principle of equality of citizens before the law, in conjunction with the constitutional provision of Article 32 regarding ensuring access to education, and with those of Article 49 regarding the protection of children and young people, the recitals of the CCR that address young people in Romania as European citizens and their equal opportunities regarding access to education in the EU are noteworthy. According to the CCR, young people in Romania must know the ‘inherent evolutions of society’, to be able to form an opinion; acceptance/rejection of ‘theories or opinions circulated at a given time’ must be made in an “informed” manner (para. 85). Therefore, ‘education must be continuously connected to these evolutions, and not refuse, *de plano*, knowledge of them’. In the conditions in which ‘the issue of gender identity with its multiple dimensions has been present in the social and legal landscape for a long time’, the prohibition in the organised educational environment of any activity aimed at knowledge of this issue ‘appears almost anachronistic, likely to suppress access to information and, through this, access to education, targeting a psychosocial phenomenon recognized both in legislation and jurisprudence’ (para. 85).

The CCR noted, from this perspective, the generality of the wording in the law regarding a notion ‘which, through the multitude of legal, sociological, psychological meanings, can encompass a variety of fields of study and research that thus become prohibited to the recipients of the educational act only because, in one way or another, they can be interpreted as calling into question aspects of gender identity’ (para. 86). Even if, according to the explanatory memorandum, the intention of the initiators was to prohibit “proselytism”, that is, to prohibit acts of persuading young people to embrace a certain idea/theory, the final form of the law – criticised by the author of the notification – prohibits any activity of expression/knowledge of opinions different from the one imposed by the legislator. The absolute character, formulated in general terms, is considered by the CCR to be incompatible with the organisation

of education in a democratic state and with the protection of children and young people, as regulated by Articles 32 and 49 of the Constitution: ‘concealing/denying/repressing an opinion does not cause it to disappear, nor can it “protect” the individual from allegedly harmful effects that the state would like to prevent with regard to the education of children and young people’ (para. 87).

The CCR also considers the violation of equality by corroborating with the provisions of Article 32 of the Constitution on the right to education and Article 49 on the protection of children and young people. According to the CCR, ‘the place that the principle of equality occupies in the set of constitutional provisions gives it a particular importance’; ‘the principle of equality characterizes the fundamental rights and freedoms, being, at the same time, a guarantee of each fundamental right in particular’; ‘equality is closely correlated with the set of fundamental rights and freedoms, so that the analysis of the suppression of fundamental rights and freedoms must have as a premise the principle of equality, a principle that is at the basis of fundamental rights and freedoms’; ‘since the principle of equality relates to the essence and function of human dignity, it follows that equality is a characteristic and intrinsic element of human dignity’ (Decision No. 464/2019). In light of the principle of equality thus defined, in correlation with the right to education and protection of children and young people, they must be ensured, without any discrimination, the possibility of knowing and studying theories, ideas, and concepts in accordance with the developments of society, without constraints that would censor their freedom of thought and expression. The prohibition of access to education and the imposition of the state’s opinion in the sense shown,

‘do not serve the conscious assumption of a system of values necessary for personal fulfillment and development, constituting, at the same time, a genuine violation of equal opportunities, as long as young people in Romania, citizens of the EU, are prohibited in the country from knowing/expressing opinions/studying a certain sphere of problems and theories’.

The reasoning and conclusion support our opinion, as seen in a comment on the IACL Blog, according to which:

*‘this decision is not about LGBT+ rights or specific individuals, but instead it speaks to everyone about the importance of equality and freedom. It is inconceivable to confine future generations to dogmatic beliefs. Education spaces should always be a place for free thought, research, and expression. The Constitutional Court’s timely judgment reaffirms this’.*²⁴

24 Safta, 2023.

4. Conclusions

The principle of equality serves as a cornerstone of human rights protection in the EU and acts as a unifying element that promotes consistent interpretations of fundamental rights. It acts as a harmonising force both vertically – by integrating interpretations from the ECHR and ECJ – and horizontally through cross-fertilisation, bringing together various legislations, standards, and traditions.

However, its implementation is complicated by overlapping jurisdictions, national differences, and evolving social challenges. Thus, the principle of equality is a dynamic standard that adapts to the diverse needs of the population, aiming to ensure equal rights and protections for all individuals within its jurisdictions. The examples provided illustrate how the harmonisation of standards has progressed over time, integrating various principles in response to social developments.

There are still areas where achieving this harmony is challenging, particularly regarding sensitive issues shaped by legislative fragmentation and differing traditions, social perceptions, and experiences of the MS. These include interpretations of concepts such as family life, gender identity, and same-sex marriage. Consequently, the legislator's task in these delicate matters becomes complex. They must enact regulations that reflect societal evolution while also considering the varying interpretations from constitutional and quasi-constitutional courts across the EU, which can sometimes be in competition with one another.

Returning, from this perspective, to the idea of evolutionary interpretation of the Constitution that invites the reasoning of the CCR regarding the upward orientation of fundamental rights (similar to the “living tree” doctrine),²⁵ we recall the emphasis in the legal literature on ensuring a balance between two seemingly contradictory goals, predictability and flexibility, because “allowing the Constitution to evolve is not a simple task”. In the complex system of the legal order of the EU, this difficulty is multiplied exponentially as far as the evolutionary interpretation of the Constitution must consider the harmonisation of law at the level of the EU, the various powers that belong to the EU and MS and, correspondingly, to their authorities, of the constitutional identity of the States and the EU itself.

This being the case, we consider that the “upward orientation” of the protection of fundamental rights in general and the principle of equality in particular offers a very wide margin of appreciation to the constitutional courts, which comes with the corresponding burden of responsibility, of the fair consideration and balancing of a complex of oft-volatile factors, especially in matters sensitive to public perception.

25 Howes, 2022, pp. 32–51; Huscroft, 2006, pp. 3–23.

Evolution of Equality as a Constitutional Principle

The risk of imbalance manifests itself directly in the legislative action, which can then be judicially censured at the international (through ECHR decisions) or supranational (through CJEU decisions) level or politically at both levels.

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Alternative Approaches to Juvenile Delinquency: Aligning National Legislation with International Standards on Minimum Intervention and Restorative Justice

ABSTRACT: *The subject of this paper is diversion procedures and programmes, and the elements and instruments of restorative justice (such as family group conferences) in juvenile justice proceedings. The author explores their fundamental theoretical foundations and objectives, as well as legal standards based on the principle of minimal intervention and restorative justice. This paper aims to achieve a comprehensive understanding of international standards and identify forms of diversion that are noticeable in comparative law and basic types of diversion in certain national legislations. The central part of the paper focuses on analyzing international legal principles, specifically emphasizing alternative approaches, the balance between informal proceedings and the protection of fundamental rights, and upholding the core elements of the right to a fair procedure. The author addresses alternative and diversion measures applied in proceedings involving juveniles in the Republic of Serbia – diversion orders.*

KEYWORDS: *diversion procedure, diversion programmes, restorative justice, family conferences, right to a fair procedure*

1.

Introductory Considerations on Diversion Options

The diversionary approach in proceedings involving juveniles includes redirecting juvenile offenders away from the formal classic/traditional criminal proceedings through ‘discretionary diversion options’ – ‘diversion process’ and ‘diversion

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programmes'.¹ In theory, it is emphasized that the roots of diversion stem from the late 19th century when juvenile courts were instituted to redirect juvenile delinquents from adult courts, prioritizing 'reform' rather than punishment, even though there was no proven methods available to change juvenile offenders.²

A diversionary approach has been developed under the influence of labelling theory³ as an alternative response to crime, diverting juveniles from the criminal court to other entities (e.g. special youth services) and milder/less severe forms of intervention based on the criminal court's decision. However, it has been observed that such diversion programmes have functioned as additions to the system, as they were applied to juvenile offenders who would otherwise have been released, issued a fine, or given a suspended sentence.⁴ Diversion programs are primarily aimed at reducing stigma and recidivism, providing juveniles with prevention services, connecting them to "community service programs"⁵, and holding youth responsible for their behavior by requiring them to face their victims.⁶

According to the procedural stage at which diversion measures and programmes are applied, or the timing of their implementation, we distinguish diversion measures/programmes implemented before the procedural moment marking the formal initiation of criminal proceedings, diversion measures/programmes applied during the conduct of criminal proceedings, and those applied after the court judgment. Redirecting from formal judicial procedures is commonly applied during the early stages of the proceedings, before the court phase is initiated (*police diversion*, *prosecutorial diversion*). Diversionary forms can be applied before the court, in which cases the court makes certain decisions (e.g. discontinuing proceedings, guilty verdict without punishment, imposing measures of special care instead of a criminal sentence). In some countries, diversion is combined with educational measures. In Serbian juvenile criminal law theory, a distinction is made between *real* forms of diversion and *improper* forms of diversion. A real form of diversion involves the application of the principle of opportunity, whereby the juvenile's public prosecutor refrains from prosecution – either through the use of unconditional or conditional opportunity.⁷

1 For notions 'diversion process' and 'diversion programmes', see Rutherford and McDermott, 1976, pp. 4–5.

2 Albrecht and Ludwig-Mayerhofer, 1995, p. 4

3 It is pointed out in the literature that there are three main policy implications of labelling theory: 1. *ignoring the actions of the delinquent*; 2. *informal response, diverting the child from juvenile justice*; 3. *bringing together the offender, the victim, and the community to "right the wrong" or restore justice*: Regoli, Hewitt and Delisi, 2010, p. 233. About labelling theory: Braithwaite, 1989, pp. 16–21.

4 Jilly, Cullen and Ball, 2007, p. 137.

5 Harris et al., 2011, p. 6.

6 Bayer, 2003, p. 4.

7 Škulić, 2022, pp. 157–159.

By contrast, an improper form of diversion refers to cases where criminal proceedings have already been initiated but subsequently discontinued for reasons of purposefulness (unconditional or conditional discontinuing of proceedings).⁸ The principle of opportunity was applied to 660 juveniles in 2023 and 572 juveniles in 2022.⁹ Also, proceedings against 412 juveniles were discontinued by the court due to the application of opportunity.¹⁰

2. Restorative Justice

Restorative justice has its origin in Anglo-Saxon systems where the position of the victim in the criminal procedure is very weak.¹¹ The essence of the restorative justice model is to create conditions within the framework of criminal proceedings for the maximal satisfaction of the interests of the injured party/victim of the criminal offence.¹² The term used for this concept is “victim-centred justice”.

The theory of reintegrative shaming forms the basis of the restorative justice model.¹³ It is constructed on the assumption that wrongdoing can be disapproved of while maintaining a respectful relationship, disapproving the “evil of deed” without labelling the person as evil, ensuring that deviance does not become “a master status trait”.¹⁴ Restorative justice is closely linked to the theory of procedural justice, which suggests, among other things, that there is a connection between obeying the law without the threat of sanctions, and perceiving that the criminal justice system and its authorities are acting justly and the “legal system based more heavily upon voluntary cooperation”.¹⁵ Some researchers have shown that restorative justice programmes are perceived to be more legitimate, compared with traditional criminal justice processes.¹⁶

The juvenile criminal law doctrine states that the restorative justice model aims to achieve social reintegration of the offender through the application of measures

8 Ibid.

9 Vrhovno javno tužilaštvo, 2024, p. 96.

10 Ibid., p. 100.

11 In an adversarial criminal procedure, the injured party generally cannot have the status of an authorised prosecutor; as a rule, they lack the ability to initiate evidence or realise a restitution claim. Furthermore, the examination of the injured party/victim as a witness (especially during cross-examination) often takes on a notably “aggressive” character. Škulić, 2020, p. 19.

12 Škulić and Miljuš, 2024, p. 16.

13 About theory of reintegrative shaming see: Braithwaite, 1989, p. 55.

14 Braithwaite, 1995, p. 146

15 See: Tyler, 2006, pp. 309–313.

16 Office of Juvenile Justice and Delinquency Prevention, 2021, p. 1.

that ensure adequate participation of the victim, the offender, and the broader social community in the procedure.¹⁷ The model of restorative justice is considered as a “community-based alternative to state justice system”, and “the way of doing criminal justice” is characterized by “voluntariness”.¹⁸ Restorative justice programmes focus on *repairing the harm* (compensating for the damage) caused by a criminal offence, *holding the juvenile accountable* for his/her actions, and *a dialogue* between the juvenile and the victim. Restorative justice programmes and elements of the restorative justice system in proceedings involving juveniles aim to ensure that juveniles understand the significance of the harmful consequences of their actions, acknowledge their responsibility, and agree to compensate for the damage or rectify the detrimental consequences caused by the commission of the criminal offence.

Diversion procedures enable juveniles to engage in a restorative process, involving both the victim and the community. Restorative justice elements are applied through diversionary mechanisms, such as, “diversion orders”¹⁹ in Serbia's juvenile criminal law. The juvenile public prosecutor can impose diversion orders on a juvenile during the pre-trial procedure, and may condition non-prosecution on the fulfilment of one or more diversion orders. In court procedure, diversion orders can be imposed by the juvenile judge or juvenile court bench. The juvenile judge shall issue a decision on discontinuing proceedings if a juvenile complies with the ordered diversion orders (conditional discontinuing of proceeding).

2.1. Youth Conferences – The Example of Northern Ireland

Youth Conferences are a form of diversion procedure and an instrument of restorative justice, characteristic of New Zealand (family conferences) and Nordic countries. They contain elements of mediation. The co-ordinator is impartial, respects the dignity of the parties, and has a disciplinary approach. The co-ordinator is a trained professional. He/she explains the procedure to the participants and leads the procedure.

¹⁷ Škulić, 2022, p. 110.

¹⁸ Zernova, 2016, pp. 59–102.

¹⁹ “Diversion orders” in juvenile criminal law in Serbia are: 1. *settlement with the injured party* (by compensating the damages, rendering an apology, work, or otherwise), so that the detrimental consequences would be alleviated either in full or partly; 2. *regular attendance of classes or work*; 3. *engagement, without remuneration, in the work of humanitarian organisations/community work* (welfare, local or environmental); 4. *undergoing relevant check-ups and drug and alcohol treatment programmes*; 5. *participation in individual/group therapy* at a suitable health institution or counselling centre. See more: Škulić, 2015, pp. 811–813. During 2023, the public prosecutor issued diversion orders for 288 individuals, while the court issued diversion orders for 82 individuals. See: Vrhovno javno tužilaštvo, 2024, p. 96.

Northern Ireland is considered a pioneer in Europe for restorative responses to youth delinquency. In Northern Ireland “diversionary referrals” accounted for the largest proportion of all referrals in 2022/23 (47.6%; 648), followed by court ordered (27.0%; 367) and earlier stage diversions (16.9%; 230).²⁰

Northern Ireland’s youth conference system is based on law, and the procedure for conducting conferences is partially prescribed by law. A high percentage of victims participate in such conferences and experience satisfaction. These conferences are based on the voluntary acceptance of their participation. The victim has the option to attend a conference and either accept or decline participation. The victim may be physically present at the conference, participate via audio-video link, through another close person representing their interests, or provide written statements regarding the consequences of the criminal offence. A juvenile offender must confess his/her offence (admit the offence) and accept that his/her case will be resolved in this manner.

There are two forms of youth conference and methods for initiating the youth conference procedure: 1. youth conference referral by the Public Prosecutor Service, available when the youth offender consents to the process and admits to have committed the offence (“*diversionary conferencing*”, “*pre-court mechanism*”); 2. “*court-ordered youth conferencing*” – requires the admission of guilt or establishment of guilt and consent of the young person involved.²¹ The public prosecutor may refer the case to some specific form of diversion, including a youth conference (“*diversionary youth conference*”). If court proceedings have been initiated and the juvenile admits the offence, the court may issue a decision ordering the youth conference to be held. In Northern Ireland, the system is characterized by “mandatory court-ordered referrals to youth conferencing” with some exceptions.²²

Youth conference can be defined as a formal meeting attended by the juvenile, a police officer, members of the juvenile’s family, and the victim or their representatives, led by a conference coordinator, where a discussion about the criminal offense committed is conducted for the purpose of formulating an “action plan”. The procedure concludes with the adoption of an “action plan”, which is confirmed by the Public Prosecutor’s Office or the court. Both the offender and the victim agree to the “conference plan”, which is the outcome of the conference. The “action plan” is the result of prior sharing of stories and expressing emotions by the parties, as well as the dialogue between them.²³ A “Conference plan” could include an apology, compensation, undertaking reparation/community service, adhering to restrictions

20 Brown, 2023, p. 1.

21 O` Mahony and Campbell, 2006, pp. 101–102.

22 Ibid., p. 102.

23 Nulund, Evrasti and Adrian, 2018, p. 151.

on conduct/whereabouts (through the use of curfews or electronic monitoring), or involvement in programmes or treatments.²⁴

2.2. Konfliktråd – The Example of Norway

In Norway, administrative bodies conduct proceedings for minors under the age of 15; jurisdiction is concurrent – either an administrative body or a court may proceed for minors aged between 15 and 18 years.²⁵ In cases involving minors aged 15 to 18, the prosecutor may initiate proceedings before a social welfare board.²⁶ Elements of restorative justice are evident in the mediation process. The mediation procedure in Norway is an integral part of the criminal justice system, which includes the juvenile justice system. The formally structured mediation procedure has its roots in Nils Christie's lecture and his article "Conflicts as Property", wherein he has advocated for establishing an alternative to the professional punishment system, allowing parties in conflict to take an active role in the process of finding solutions to their problems.²⁷ The basic principles of mediation include, among others, "simple and rapid case resolution"; "the parties themselves participate in problem-solving"; "finding individual solutions"; "contributing to a real resolution of the conflict", and "paying attention to the victim, including the possibility of rapid compensation".²⁸

The Law of Conflict Processing (Conflict Thread Act) was enacted on 15 March 1991. Mediation proceedings are conducted between the minor and the injured party before the Konfliktråd (Norwegian National Mediation Service), organized under the Ministry of Justice. At the municipal level, special committees handle both criminal and civil cases based on voluntary conflict resolution. The fundamental principle is "participation in a collective process" to determine how the consequences of violations of rights will be resolved (The Mediation Service Act – Section 1).²⁹

Practically, the decision to prosecute can be conditioned on the successful completion of the mediation process (a form of conditional opportunity) if the case is suitable for mediation. The decision to refer a case to mediation can be made by the prosecuting authority integrated within the local police. The basis for mediation can also be a court decision (mediation as a special condition within a suspended sentence, or as part of a

24 Seumour Mairéad, 2013, p. 62, Youth justice, no date, p. 1. See more details on the obligations/measures covered by the "Youth conference plan": The Criminal Justice (Children) (Northern Ireland) Order 1998, Section 3C.

25 Škulić, 2022, p. 175.

26 Ibid., p. 176.

27 Kemény, 2005, p. 101.

28 Ibid., p. 111.

29 The Mediation Service Act (Lov om konfliktrådsbehandling (konfliktrådsloven)), LOV-2014-06-20-49, Last consolidated LOV-2021-06-18-127 from 01.07.2021.

community sanction). Mediation proceedings in criminal cases are urgent and must begin as soon as possible after the case is received. One of the basic principles is that an attorney (proxy) cannot represent the parties in the mediation process. Before conducting the mediation process in a formal sense, the mediator/mediators hold meetings and conduct discussions with the parties to prepare for the mediation process. Mediators are professional, trained laypersons, volunteers, who meet certain legal criteria. They are appointed for each municipality. In most cases, mediation concludes with an agreement, which is not recorded in the criminal register. The agreement between the parties must be approved in writing by the mediator. When the agreement is fulfilled, the prosecuting authority is notified (Section 20). The public prosecutor may initiate criminal proceedings if the minor did not participate in the mediation process or if the minor significantly violated the agreed terms.

3.

Certain International and European Standards as Alternative Approaches to Juvenile Delinquency

The United Nations Convention on the Rights of the Child (UNCRC) of 20 November 1989³⁰ is a leading international human rights document. In Serbian legal theory, it is described as “the most comprehensive source of international law” in the field of children’s rights, which imposes obligations on States Parties to harmonise their normative and institutional systems with the provisions of the Convention.³¹ It includes guarantees for the realization of human rights and the legal protection of children and encompasses the rights of “children” who are charged with a procedurally relevant degree of suspicion of having committed a criminal offense (suspects, accused), and the position and rights of children in criminal proceedings.

The UNCRC establishes the principle of *prioritizing alternative approaches over judicial processes*, which involves applying alternative measures instead of conducting criminal proceedings and using alternatives to “institutional care” after adjudication. Its implementation involves the prescription by states of alternative procedures that respect human rights and ensure the legal protection of the child.³²

30 Convention on the Rights of the Child, 20 November 1989, General Assembly Resolution 44/25

31 Novaković, 2023, p. 621.

32 According to European legal standards, the principle of priority is practically defined as the promotion of alternative approaches (such as mediation and forms of diversion that involve judicial redirection mechanisms) whenever they best serve the “child’s best interests”. It is also emphasised that the “preliminary use of alternatives” must not be used in a way that hinders the child’s access to justice. See: Committee of Ministers of the Council of Europe – Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, 17 November 2010, Rule 24.

Practically, the UNCRC obliges States Parties to maintain a balance “between the informality of proceedings and the protection of the fundamental rights of the child”.³³ Following the ratification of the Convention by the States Parties, formal progress has been achieved in two directions: 1. the establishment of specialized juvenile courts in countries where they did not previously exist; 2. the expansion of diversion measures in some states.³⁴

Earlier, on 29 November 1985, the General Assembly adopted the “*Beijing Rules*” (*Standard Minimum Rules for the Administration of Juvenile Justice*)³⁵, which prescribed diversion and considering the possibility of resolving cases involving juvenile offenders without resorting to formal trial by the competent authority “whenever appropriate” (Rule 11.1). Commentators have noted state practices of applying diversion in the form of diverting away from criminal proceedings (formal criminal justice system) and redirecting juveniles to alternatives – community services (community-based diversion) or other services – to avoid stigmatization (“the stigma of conviction and sentence”) and a criminal record. It is observed that, in some cases, diversion in the form of deciding not to intervene at the outset is the best solution, such as when the juvenile offense is minor, and when informal social control institutions (such as family and school) have already reacted/are likely to react responsibly and constructively.

Police/prosecutor’s offices are authorized to *act at their discretion*, without formal hearings, according to criteria prescribed in their national legal systems, and the principles of the Rules. Also, courts/tribunals could use diversion. States are faced with an important requirement that the application of a diversion measure must be conditioned upon the *free and voluntary consent* of the juvenile, parents, or guardians. It is also advocated that they ensure an “objective assessment of the appropriateness” of the decision to apply diversion, upon request.³⁶ “Juveniles should not feel pressured (e.g. to avoid court appearance) or be pressured into consenting to diversion programmes”.³⁷

General Comment No.24 (2019) on children’s rights in the child justice system,³⁸ issued by the UN Committee on the Rights of the Child, interprets that diversion usually involves “*programmes or activities*” (para. 15). It suggests that states *continuously expand* “the range of offences for which diversion is possible, including serious

33 Van Bueren, 2006, p. 25.

34 Ibid., p. 1.

35 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”), General Assembly A/RES/40/33

36 “The Beijing Rules” – Commentary of Rule 11.3

37 Ibid.

38 General Comment No. 24 (2019) on children’s rights in the child justice system, CRC/C/GC/24, 18 September 2019.

offences where appropriate” (para. 16).³⁹ Diversion programmes include community service, supervision, and guidance by designated officials, family conferencing, and other restorative justice options, including reparation to victims. Diversion measures and programmes are a part of the child justice system and their application requires the fulfilment of the following procedural conditions: 1. *compelling evidence* exists that the “child” committed the alleged offence; 2. the “child” *freely and voluntarily admits responsibility*; 3. *free and voluntary consent from the child to participate in the diversion process* and to diversionary measures is obtained.

In the application of diversionary measures or programmes, it is essential to uphold elements of the right to a fair procedure, ensuring adequate procedural safeguards.⁴⁰ These include: 1. *Right to Information* – information provided must be adequate and specific, detailing the nature, content, and duration of the diversionary measure, as well as the consequences of failure to cooperate or complete the programme; 2. *Access to a Lawyer* – the “child” must have the opportunity to seek legal/other appropriate assistance concerning the proposed diversionary measure; 3. *Preservation of the Presumption of Innocence* – records of diversion should not be treated as criminal convictions or included in criminal records; 4. *Prohibition of Repetitive Prosecution* – fulfilment of the diversionary measure or completion of the diversionary programmes should result in the “definite and final closure of the case”, with no further prosecution allowed.

The United Nations “Tokyo Rules”⁴¹ distinguish measures alternative to institutional treatment that are applied, in accordance with the principle of minimal intervention, before trial and after adjudication. The criteria for selecting measures should relate to the offense (nature, severity/gravity), the offender (character/personality, background), the purpose of punishment, and the rights of the victim (Rule 3.2). At the pre-trial stage, the police or the public prosecution service should be empowered (police and prosecution diversions) to decide not to prosecute the offender or to terminate the early stage of the proceedings, provided it is assessed that criminal prosecution/further criminal prosecution is not necessary to achieve the purpose of punishment (such as “the protection of society, crime prevention, or the promotion

39 This tendency was evident in the Draft Law on Amendments to the Law on Juvenile Criminal Offenders and Criminal Protection of Juveniles of the Republic of Serbia, which proposed expanding the possibility of applying diversion orders to the category of criminal offenses punishable by five to eight years of imprisonment. See: Škulić, 2022, p. 388.

40 See also Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, Rule 25, which emphasised the child’s right to detailed and adequate information (both legal and otherwise), the child’s right to be consulted, and in this regard, the right to legal advice and other assistance in choosing between court proceedings and alternatives.

41 United Nations Standard Minimum Rules for Non-custodial Measures (“The Tokyo Rules”), General Assembly resolution 45/110 of 14 December 1990.

of respect for the law”)⁴², while considering the rights of the victims. In this regard, the prosecution may also decide to impose measures that do not involve deprivation of liberty when the situation entails minor offences.

Regarding the formulation of European standards for alternative proceedings, the practical significance lies in the recommendations of the Council of Europe – Committee of Ministers. The following basic principles are prominent as the foundation for alternatives to formal prosecution: 1. alternatives should be *part of the regular procedure*; 2. the *principle of proportionality* should be respected; 3. the application of alternatives should reflect “*the best interest of the child*”; and 4. in principle, alternatives to criminal prosecution should be applied in cases where *juveniles freely accept responsibility*.⁴³ It is recommended that states expand the range of suitable alternatives to formal prosecution. It is suggested that community sanctions and measures be developed even in cases involving serious offenses, with elements of violence, and when dealing with repeat juvenile offenders. Likewise, unless it is deemed counterproductive, the application of these sanctions/measures should also involve the juvenile’s parents/other legal guardians to contend deal with the offending behavior, the needs of the offender, and to ensure that they “become aware of and accept their responsibilities regarding the offending behavior of young children”.⁴⁴ When determining the potential alternatives to criminal prosecution, the rights and needs of victims should be considered. The development of diversion and mediation procedures at the public prosecutor or police level is encouraged, along with the involvement of Child Protection Boards and relevant services in these procedures.⁴⁵

*European Rules for juvenile offenders subject to sanctions or measures*⁴⁶ define the principles of minimum intervention and a restorative approach and the notion of “community sanctions or measures”. “Community sanctions” refer to “any sanction imposed by a judicial/administrative authority”, while a “community measure” refers to “any measure taken before” or as an alternative “to a decision on a sanction”.⁴⁷ These also include special methods of enforcing a sentence of imprisonment outside a prison facility. Diverse measures are *not criminal sanction*, in the formal – legal sense/

42 United Nations Standard Minimum Rules for Non-custodial Measures (“The Tokyo Rules”) – Pre-trial stage, Rule 5.1.

43 Council of Europe, Recommendation Rec(2003)20 of the Committee of Ministers to member states concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, 24 September 2003.

44 Recommendation Rec (2003) 20, Rule 8, 10.

45 Council of Europe, Recommendation CM No. R (87) 20 of the Committee of Ministers to member states on social reactions to juvenile delinquency, 17 September 1987.

46 Recommendation CM/Rec(2008)11 of the Committee of Ministers to member states on the European Rules for juvenile offenders subject to sanctions or measures, 5 November 2008, Appendix to Recommendation CM/Rec(2008)11 – European Rules for juvenile offenders subject to sanctions or measures

47 European Rules for juvenile offenders subject to sanctions or measures, Rule 21.4.

sense of criminal law. The principle of minimal intervention implies that sanctions or measures should be applied to the extent and for the duration strictly necessary. This principle, on the one hand, ensures better protection of human rights and preserves social bonds, while on the other hand, it does not increase the risk to society.⁴⁸ The principle of a restorative approach in proceedings against juveniles emphasizes prioritizing restorative measures, such as mediation and others, at all stages of the procedure. This approach is favored owing to its greater preventive benefits for the offender, the victim, and the community.⁴⁹

Regarding the intentions for the development of restorative justice, it is also necessary to highlight certain standards from the Council of Europe's Recommendation on restorative justice in criminal matters⁵⁰: 1. *"General availability"* – access to all types of offences and at all stages of the criminal procedure. 2. *Application of restorative principles to certain interventions* that transcend the offender-victim dialogue. 3. *Individualization in practice*, which involves considering the status and needs of children and adapting the application of restorative justice to the child.⁵¹

4.

Basic Types of Diversion in National Legislations

According to their substance, three types of diversion are distinguished in national legislation. They are: 1. *Diversion involving non-intervention*, which involves the legal decriminalization of an offense for which there is minimal culpability and non-action/non-intervention by prosecuting authorities (the application of unconditional opportunity). 2. *Diversion with intervention* – complex diversion that involves the application of diversion measures, such as diversion orders in Serbia (the application of conditional dismissal of criminal prosecution) and the application of instruments in the implementation of diversion programmes. 3. *Diversion, in combination with referring the case to a) social services, and b) special administrative body.*

According to the formulated European standards in the "Yerevan Declaration"⁵², regarding "procedural decriminalization", prosecutors, as prosecuting authorities, are required to seek advice from social services or specialized child protection services before deciding to prosecute a juvenile (para. 23). When it comes to alternatives

48 Council of Europe, 2009, p. 38.

49 Ibid., p. 39.

50 Council of Europe, Committee of Ministers, The Recommendation CM/Rec (2018)8 concerning restorative justice in criminal matters, 3 October 2018.

51 See Marder and Forde, 2023, p. 203.

52 Consultative Council of European Prosecutors (CCPE) – Opinion No. 5 "Public prosecution and juvenile justice" – Yerevan Declaration, 19–21 October 2010.

to prosecution, alternatives to prosecution should represent an appropriate judicial response to the offense, assessed by considering the interests of victims, the public, and adherence to the goals of juvenile justice (para. 26).

More importantly, in general, and with respect to juveniles, the application of conditional opportunity represents a “consensual method of concluding proceedings”, a form of negotiation aimed at avoiding the initiation of criminal procedure or adjudication, and one of the forms of simplified procedures.⁵³ When alternative measures to prosecution are applied, it is necessary to emphasize that the procedures in which decisions are made must meet the requirements of a fair trial, which primarily involves respecting the presumption of innocence. Alternative measures cannot be imposed by the prosecuting authority’s decision on an individual who is innocent, or in cases where there are obstacles to their criminal prosecution. Furthermore, an individual to whom the public prosecutor offers alternatives to prosecution must be informed about the procedural consequences of rejecting or failing to adequately comply with the measures/obligations imposed on him/her – the initiation of criminal prosecution against him/her.⁵⁴

4.1. Germany

In proceedings involving juveniles in Germany, the principle of specialization of the procedural actors applies. Juvenile prosecutors (“youth public prosecutors”) and juvenile judges should have the necessary educational qualifications in relevant fields (such as criminology, pedagogy, social education, youth psychology) and experience in working with young people (§ 37 Jugendgerichtsgesetz⁵⁵). In German youth justice, two types of the principle of opportunity are distinguished: 1. *The classical/real form* of opportunity, when the juvenile public prosecutor decides to waive prosecution, for which no court approval is required. 2. *The improper form of opportunity*, which grants the juvenile judge the authority to discontinue the proceedings with the consent of the public prosecutor.

The first form, unconditional opportunity and diversion involving non-intervention, is applied in the case of “waiver of prosecution in cases of minor offense”

53 See Nenadić and Miljuš, 2023, p. 157.

54 Consultative Council of European Prosecutors (CCPE) – Opinion No. 2 (2008) of the Consultative Council of European Prosecutors to the Committee of Ministers of the Council of Europe on “Alternatives to prosecution”, Conclusions, paras. m., o.

55 Jugendgerichtsgesetz (JGG), in der Fassung der Bekanntmachung vom 11. Dezember 1974 (BGBl. I S. 3427), das zuletzt durch Artikel 21 des Gesetzes vom 25. Juni 2021 (BGBl. I S. 2099) geändert worden ist.

under the conditions of the Code of Criminal Procedure (§153 StPO⁵⁶). The public prosecutor is authorized to decide not to prosecute a young person under the following conditions: 1. The offense in question is a *petty offense* – misdemeanour (“*Vergehen*”). 2. Previously, it was assessed that the *guilt of the “offender” is considered minor*. 3. Earlier, it was assessed that there is *no public interest* in prosecuting such an offense. Practically, in cases of applying the principle of opportunity, a reliable assessment of guilt is not possible because no trial has taken place. Therefore, only a “preliminary assessment” can be conducted, considering all the circumstances of the specific case.⁵⁷ More precisely, the evidence must indicate a relevant degree of suspicion that the guilt is minor. The literature shows that circumstances related to the personality of the “offender” and the offense are assessed, implying circumstances that are typically considered during sentencing.⁵⁸ The second condition is the absence of public interest in initiating proceedings, where the requirements of both special and general prevention should be considered.⁵⁹ Public interest entails a “balance between the general interest of the community and the protection of individual freedoms and rights”, and circumstances necessary for its assessment are the circumstances of the commission of the criminal offence, including the guilt of the suspect, harm caused, and the impact of the offence on the community.⁶⁰ The public prosecutor practically “weighs” all the circumstances to assess whether public interest necessarily requires the initiation of criminal proceedings and punishment.

In German youth justice, diversion can be applied with measures undertaken by parents, schools, or other institutions or combined with mediation, which represents “the second level of diversion” – “*diversion with educational measures*”.⁶¹

The public prosecutor shall refrain from prosecution if an educational measure has already been carried out/initiated.⁶² The condition is that the public prosecutor assesses that it is not necessary for the court to be involved in the application of prosecutorial discretion, such as issuing a warning, instructions, or conditions, or filing charges for the offence. It is stipulated that “the juvenile’s efforts to reach a settlement with the injured party are considered equivalent to an educational measure” (§ 44 (2) JGG). This protects the victim, the victim’s interest, and achieves a preventive effect.

Diversion with intervention (*complex diversion*) is the type of conditional opportunity that can be applied only if the young person *admits to committing the offence*. The

56 Strafprozeßordnung (StPO), Strafprozeßordnung in der Fassung der Bekanntmachung vom 7. April 1987 (BGBl. I S. 1074, 1319), die zuletzt durch Artikel 2 des Gesetzes vom 25. März 2022 (BGBl. I S. 571) geändert worden ist.

57 Karlsruher Kommentar, 2023, 153a, Rn 11.

58 Đokić and Čvorović, 2021, p. 38.

59 Ibid.

60 Bejatović, Kiurski and Ilić, 2022, p. 13.

61 Dünkel, 2016, p. 5.

62 § 44 JGG.

second material condition for the application of complex diversion is that the public prosecutor must assess that it is necessary to impose an appropriate measure on the young person and that it is not appropriate to conduct criminal proceedings against them before a juvenile court. The procedural condition is a proposal by the public prosecutor to the juvenile court judge to issue a warning to the young person or impose a specific measure, which may be an instruction or a condition. Instructions may include providing work services, offender-victim settlement, or attending a traffic safety training course. Conditions are obligations that may be imposed on a juvenile by the juvenile court judge. These include: 1. restitution for damages, 2. apologizing to the injured party, 3. providing work, and 4. payment of a sum of money to a charitable organization. When a juvenile fulfils the instructions or obligations, the public prosecutor refrains from the prosecution, and the judge may discontinue the proceedings.

Additionally, diversion without intervention or with intervention, in one of the mentioned forms, can also be applied if an indictment has been filed (§ 47 JGG). As regards the application of diversion with intervention, once the conditions, instructions, or educational measures are fulfilled, the juvenile judge discontinues the proceedings.

4.2. Ireland – Diversion Programmes

Ireland is an example of the use of law-based diversion programmes for youth who commit a criminal offence or realize some form of anti-social behavior. As the criminal prosecution authority, the police can decide, based on the principle of discretion, whether to apply diversion or to prosecute a young person. The Garda Youth Diversion Programme, established as a tool to address the issue of juvenile delinquency, is led by the police. It is defined as a “formalized system of intervention between young people and police”.⁶³ Diversion Programmes are applied if the juvenile accepts responsibility for the offence and agrees to participate in the programme. It includes a *warning* to young people, which can be informal and conducted in a home setting, or formal and carried out at the police station in the presence of a parent/guardian. The implementation of a formal warning may be followed by restorative elements if the victim participates in the procedure, such as inviting the young person to apologize to the victim or to provide compensation to the victim. A formal warning may be followed by placing the young person under supervision, which is carried out by the Juvenile Liaison Officer (JLO).

Within the Garda Youth Diversion Programme, for a juvenile under supervision, a (family) conference can be held, organized by the JLO, with the participation of the

63 KilKelly, 2011, p. 2.

child, parent/guardian, JLO, and the victim, if deemed appropriate for the victim to attend. The aim of the conference is to discuss the child's behavior, the reasons for such conduct, and how the family can help the child and prevent the child from repeating the offence.⁶⁴ If the victim participates, mediation is conducted. As a result of the conference, an action plan for the juvenile may be formulated with the goal of achieving special preventive effects. It can include, apart from compensation, some educational and sports activities. The new "Youth Justice Strategy" supports the increased use of restorative processes that involve the participation of children, victims, and/or families, as well as broader practitioner training in restorative practices.⁶⁵ Additionally, the latest report indicates the intention to increase restorative cautions.⁶⁶

4.3. Sweden

Referring cases to social services is a deeply rooted tradition in Sweden. The primary responsibility lies with social services, which predominantly implement measures in the form of non-institutional care.⁶⁷ Voluntary measures are commonly applied. Co-operation between social services and the juvenile criminal justice system is essential during the entire legal process, from preliminary investigation to the final court decision.⁶⁸

We can identify the following forms of diversion throughout the phases of the procedure: 1. *police discretion*; 2. *police directing juveniles to repair the damage they caused*; 3. *the prosecutor's decision to dismiss the case and the decision to issue a penalty warning*; 4. *prosecutorial decision not to pursue prosecution*; and 5. *the imposition of special care measures by a court*. A police officer may choose not to report a criminal offence to the prosecutor if it is deemed "less serious" or likely to result in a fine. Police caution is a form of minimal intervention. A police officer is authorized to direct a juvenile aged 15 to 17 to repair the damage if he/she confesses or if "the perpetration is obvious".⁶⁹ A public prosecutor may dismiss the case and issue a penalty warning if the juvenile is under care (which includes measures taken by social services) or subject to other measures that provide help and support. A penalty warning may be revoked if the juvenile does not comply with the care plan. After an investigation, the prosecutor may decide not to pursue prosecution for a less serious crime if the

64 Ibid., p. 8.

65 Marder and Forde, 2023, p. 202.

66 Marder and Forde, 2023, pp. 208–209.

67 See Pettersson, 2017, p. 8.

68 Hollander and Tarnfälv, 2017, p. 1.

69 Act (1964:167) making special provisions for young offenders (Lag (1964:167) med särskilda bestämmelser om unga lagöverträdare – LUL), § 13.

juvenile has confessed. Also, the court may impose special care measures instead of a criminal sanction for any offence committed by a young person aged 15 or older. The decision is made based on the evaluation of the report from the competent social welfare authority regarding potential measures appropriate to address the child's needs. In that case, based on a court decision, social services are responsible for the care or treatment of the offender. The sanction of youth care, determined by a court decision, may be imposed if there is a "special need for care".

5.

Instead of a Conclusion

Diversion procedures and programmes are alternative and informal responses to juvenile offences, grounded in law. They are implemented when the competent authority (police or prosecution)/authorities (court and prosecution) deem it appropriate not to initiate/not to continue criminal proceedings, or when the court decides that instead of criminal sanctions, upon the conclusion of criminal proceedings, appropriate social care and treatment measures should be applied by relevant social services. These procedures also incorporate elements of restorative justice. The primary goal of instruments of restorative justice is to establish a dialogue between the victim and the juvenile offender, find solutions to their issues, make the youth accountable for their actions by confronting their victims, achieve the social reintegration of the juvenile, ensure rapid compensation for the victim, and achieve satisfaction for the victims. This is accomplished through the voluntary cooperation of the juvenile with the relevant authorities and the condemnation of the offender's behaviour without the stigmatization associated with formal condemnation.

In proceedings involving juveniles in the Republic of Serbia, alternative measures are various diversion orders that allow for juveniles to avoid criminal prosecution and for proceedings against them to be discontinued. In prosecutorial and judicial practice, there is generally a low level of application of diversion orders, sporadic application, or non-application, as well as numerous difficulties in their implementation. The challenges in application primarily stem from the lack of or insufficiently developed institutional frameworks for their implementation, including the absence of detailed regulations governing the procedure for applying diversion orders. However, the application of the principle of opportunity has shown an increase, according to reports from the Supreme Public Prosecutor's Office in 2024, both in terms of its use by the prosecution and by the courts. Starting from 2021, a growing trend in the application of conditional opportunity has been observed.

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ARTICLES

Between Rehabilitation and Responsibility: Approach of Serbian Misdemeanour Law towards Juvenile Offenders

ABSTRACT: *This study analyses the Serbian law provisions that regulate the liability of juveniles, that is, persons under 18 years of age. The work is divided into three sections that address the most important aspects of the juvenile justice system. The first section examines substantive legal provisions. The Law on Misdemeanours differentiates between two major categories of offenders under 18 years: children – individuals below 14 years of age, who are completely exempt from misdemeanour responsibility, and juveniles between 14 and 18 years, who are legally liable for their actions. One unique characteristic of the Serbian misdemeanour law system is the principle of parental responsibility regarding offenses committed by juveniles below 18 years of age. When a child commits a misdemeanour, the parent is held liable on the principle of vicarious liability; this means they are treated as having committed the offense themselves. If the misdemeanour is committed by a juvenile aged 14–18 years, parents can be held liable alongside the juvenile, if the law stipulates so. The second section addresses sanctions against juvenile offenders. The main sanctions designated and tailored especially for juveniles are educational measures, which aim to positively influence the behaviour and development of a juvenile. Their focus is to achieve the effect of special prevention. For juveniles in the older age group (16–18 years), the law provides for the possibility of applying penalties if circumstances require so. The final section presents a detailed analysis of procedural provisions related to juvenile offenders, highlighting specific features that distinguish juvenile proceedings from adult cases. By providing a comprehensive overview of Serbia's legislative approach to juvenile misdemeanour responsibility, this study aims to contribute to the ongoing discourse on optimal juvenile justice practices.*

KEYWORDS: juveniles, misdemeanour, crime, responsibility, vicarious liability, sanctions

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1.

Introduction

This study focuses on a particular field of penal law – misdemeanour law – specifically examining provisions governing the status of persons under 18 years of age when they appear as perpetrators of misdemeanours. However, before delving into this analysis, it is useful to provide a brief overview of the Serbian penal law system in general and the position of misdemeanours within that system, to facilitate a more comprehensive understanding of the topic.

Serbian penal law recognises three categories of punishable offenses: criminal offenses, misdemeanours, and economic infractions. The distinction between criminal offenses and misdemeanours is primarily based on the severity of the act, with criminal offenses being considered significantly more serious violations, as evidenced by both their formal descriptions and prescribed penalties (e.g. in Serbian law, the most severe punishment that can be imposed is life imprisonment). Misdemeanours are generally regarded as minor offenses that sanction so-called petty delinquency or minor infractions (e.g. traffic violations), and consequently carry lighter penalties (e.g. the maximum imprisonment term in Serbian misdemeanour law is 60 days).¹ Economic infractions are a unique feature of the penal law systems of former Yugoslav states, designed as a response to corporate misconduct. They emerged during a period when corporate criminal liability was not widely accepted across most of continental Europe. Thus, juvenile misdemeanours are generally considered a lighter category of punishable offenses compared with juvenile criminal offenses.

Juvenile criminal law, both substantive and procedural, is systematised in a unified act called the Law on Juvenile Criminal Offenders and Criminal Protection of Juveniles (hereon: Law on Juvenile Criminal Offenders).² Juvenile misdemeanour law is not separated into a distinct act but rather forms part of the unified general misdemeanour legislation, the Law on Misdemeanours,³ which encompasses both substantive and procedural law.

While the term juvenile criminal law is now well-established in legal scholarship,⁴ the same cannot be said for the subject of our work – juvenile misdemeanour law. Just as misdemeanour law in general (particularly in the last decade following the adoption of the current Law on Misdemeanours and the conceptual alignment between criminal and misdemeanour law) remains in the shadow of criminal law doctrine,

1 For a more detailed discussion see Vuković, 2024a, pp. 33–36.

2 Official Gazette, No. 85/2005.

3 Official Gazette, Nos. 65/2013, 13/2016, 98/2016, 91/2019, 91/2019 and 112/2022.

4 Škulić, 2015, pp. 39–40.

juvenile misdemeanour law can be said to operate somewhat behind the scenes. This observation primarily relates to the theoretical treatment of this issue – the number of scientific papers dedicated to misdemeanour law in general, and consequently to juvenile misdemeanour law, is significantly lower than those devoted to criminal law, or juvenile criminal law. Nevertheless, similar observations are made by those who deal with this issue in practice.⁵ A noticeable, though still insufficient, shift occurred during the revision of the organisational and procedural framework for misdemeanour law, resulting in the establishment of misdemeanour courts and the alignment of juvenile misdemeanour provisions with those in the Law on Juvenile Criminal Offenders.⁶ Therefore, scholars rightly argue that this issue merits much greater attention, especially considering that, unfortunately, juvenile misdemeanour offenses often serve as an introduction to more serious offenses, leading to the commission of criminal acts.⁷

The term ‘juvenile misdemeanour law’, akin to its counterpart, juvenile criminal law, can, in its broadest sense, be understood as a branch of misdemeanour (or more broadly, penal) law that includes provisions applicable when the offender is a juvenile, meaning an individual under 18 years of age.⁸

As previously mentioned, juvenile misdemeanour law is contained within the Law on Misdemeanours, which regulates both substantive and procedural aspects of juvenile offenders’ liability for misdemeanours.

2.

Substantive Legal Provisions on Juvenile Liability

The substantive legal conditions for juvenile liability are regulated in a separate chapter of the Law on Misdemeanours – Chapter VI entitled ‘Provisions on Juveniles’.

The law initially establishes a distinction similar to that found in Serbian criminal law regulations, differentiating between those who are absolutely non-labile for

5 Obradović, 2010, p. 54.

6 Jovanović and Pašalić, 2016, pp. 217–218.

7 Mrvić Petrović, 2015, p. 170. In this sense, misdemeanour court judges, based on their direct observations during judicial work, report that not only is recidivism among juvenile offenders common, but the most frequent offenses they commit are those involving elements of violence, where the line distinguishing these from criminal acts is very thin. Consequently, these offenders could easily find themselves before a criminal court. The reason this does not happen lies primarily in the prosecutor’s decision to conclude the incident with a misdemeanour outcome. Besides the judges’ experiences, some studies also confirm such occurrences; see Jovanović and Pašalić, 2016, pp. 218–219.

8 Škulić, 2013a, p. 45.

misdemeanours – children, and those under the age of 18 who are liable for misdemeanours, collectively referred to as juveniles.

Children, as in criminal law, are defined as individuals who, at the time of the offense, were under 14 years of age. According to art. 71, para. 1 of the Law on Misdemeanours, they are exempt from misdemeanour liability, with an irrefutable presumption of misdemeanour incapacity. Scholars rightly note a technical inconsistency in this provision: although art. 71 is titled 'Juvenile Liability for Misdemeanours', the provision, *expressis verbis*, addresses the impossibility of initiating misdemeanour proceedings against children, rather than juvenile liability per se, as implied by its heading.⁹ In this regard, legal theory suggests that the legislator effectively defines the minimum age for misdemeanour liability as a procedural prerequisite.¹⁰

For the application of this provision, the crucial moment is the time of the offense, rather than any later stage, such as the trial. Accordingly, if a request is made to initiate misdemeanour proceedings against a child, the court will dismiss it; and if, during proceedings, it is determined that the juvenile was under 14 years at the time of the offense, the court will terminate the misdemeanour proceedings. The court will notify the child's parents, adoptive parents, or guardians, as well as the guardianship authority, and, if necessary, the child's school or institution where they are placed (art. 299 of the Law on Misdemeanours).

Although children cannot be held liable for misdemeanours, the Law on Misdemeanours introduces a solution specific to misdemeanour law that significantly deviates from the general model of liability accepted in penal law. This relates to vicarious liability. Specifically, art. 72, para. 1 stipulates that when a child commits a misdemeanour due to the failure of proper supervision by parents, adoptive parents, guardians, or foster parents, and these persons were in a position to exercise such supervision, they shall be punished for the misdemeanour as if they had committed it themselves.

For the parents or other specified persons to be held liable in this case, the following conditions must be cumulatively met:

1. The misdemeanour must be committed by a child, that is, a person who has not reached the age of 14 years at the time of commission. This raises the question of whether it is terminologically correct to speak of a child committing a misdemeanour. According to theoretical teachings, immaturity in *criminal law* is understood as a basis for excluding the perpetrator's culpability.¹¹ In this context, it is not terminologically precise to say that a *child has committed a criminal offense*, as a criminal offense exists only when all its constituent elements, including culpability, are present. When

⁹ Ristivojević and Milić, 2023, p. 180.

¹⁰ Škulić, 2013a, p. 46.

¹¹ Vuković, 2024b, pp. 232–233.

culpability is excluded, the Criminal Code¹² refers to an unlawful act prescribed as a criminal offense. However, the situation in misdemeanour law is different. Unlike criminal law, *misdemeanour law* distinguishes between the concept of a misdemeanour and that of misdemeanour liability. The concept of misdemeanour includes the act, its statutory definition, and unlawfulness, which principally corresponds to what is known as *actus reus* in Anglo-Saxon legal concepts. Misdemeanour liability for natural persons is essentially reduced to the concept of culpability, corresponding, in principle, to the concept of *mens rea*. In other words, the Law on Misdemeanours clearly separates the concept of misdemeanour (which is reduced to the existence of an act, its statutory definition, and unlawfulness) from the concept of misdemeanour liability, which, in the case of natural persons, is possible only when there exists an appropriate subjective relationship, namely culpability. Therefore, we conclude that this terminological designation is legally and doctrinally acceptable, as it does not inherently imply the culpability of these individuals.¹³

2. The commission of a misdemeanour must be a result of parents' failure to exercise due supervision. Parents, according to the Family Code provisions, have both the right and duty to care for their child. Childcare includes protection, upbringing, education, representation, maintenance, and management and disposal of the child's property (art. 68, paras. 1–2 of the Family Code). In this context, parents serve as protective guarantors in relation to their child. Additionally, parents also stand in the position of supervisory guarantors regarding their children.¹⁴ The cited provision of the Law on Misdemeanours specifically reflects the latter obligation. What is unusual for penal law, which is founded on the principle of individual subjective liability, as we have already emphasised, is that parents here are not held liable for the act of neglect itself as a separate offense, but rather the children's actions are attributed to them based on their failure to exercise due supervision over the child. However, there are varying opinions in domestic legal theory regarding the legal nature and basis of this liability. On one hand, this liability is characterised as responsibility for another's misdemeanour, given that parents are responsible due to negligence in supervising the child.¹⁵ Although this appears to have been the legislator's intention, to make this position clearer, the formulation in the Law on Misdemeanours suggesting that they are liable *for* the misdemeanour should be replaced with the formulation that they are liable *because of* the misdemeanour.¹⁶ On the other hand, precisely owing to the use of the words *for* the misdemeanour, there is an opinion that this liability is actually

12 Official Gazette, Nos. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019.

13 Cf. Škulić, 2013b, p. 81.

14 Vuković, 2024b, p. 112.

15 Mrvić Petrović, 2015, p. 172.

16 Pihler, 2016, p. 27.

objective in nature, due to the circumstance that the parent is not actually punished for failing to exercise due supervision, as the provision implies, but rather as if they had committed the misdemeanour themselves.¹⁷

Although the phrase ‘failure of due supervision’ might suggest the exercise of factual supervision implying the mandatory physical presence of parents, these provisions should not be interpreted so narrowly. In the context of the specifics of misdemeanour proceedings, it is essential to consider the manner in which the misdemeanour was committed and the circumstances of the particular case, including whether the offense resulted from educational neglect or lack of care by these individuals.¹⁸ Regarding this circumstance, according to judicial practice, a report should be obtained from the guardianship authority.¹⁹ In any case, a causal link must be established between the specific omission and the committed misdemeanour.²⁰

3. The next condition that must be met relates to the circumstance that the parents were in a position to exercise supervision over the child. This provision addresses the so-called factual possibility of fulfilling the guarantor obligation in a specific case.

In this case, the parents are liable for the misdemeanour as if they had committed it themselves. Legal theory emphasises that the phrase *as if* indicates this is a legal fiction.²¹

As the basis for parental liability for a child’s misdemeanour is explicitly prescribed in the Law on Misdemeanours, this implies that it is unnecessary to explicitly prescribe such liability in special laws.²²

Some scholars argue that it would also be appropriate to allow liability for the misdemeanour to extend to other individuals responsible for supervising the child, such as educators or teachers.²³

While there is an irrebuttable presumption that persons under 14 years of age (children) cannot be held liable for criminal acts and misdemeanours, juveniles are, in principle, liable for misdemeanours. In this regard, misdemeanour liability, similar to criminal liability, is established at the age of 14 years in Serbian law. In accordance with the general rule on the liability of natural persons, a juvenile is liable for a misdemeanour that can be attributed to their fault if they were mentally competent and committed the misdemeanour either negligently or intentionally and were aware or should have been aware that such conduct was prohibited (art. 18, para. 1 of the Law on Misdemeanours). Art. 71, para. 2 contains a general provision stating that special

17 Ristivojević and Milić, 2013, pp. 160–161.

18 Milić, 2013, p. 15.

19 Misdemeanor Appellate Court, Decision Prž. No. 20799/15, 20 November 2015.

20 Vuković, 2024a, p. 132.

21 Pihler, 2016, p. 27.

22 Ristivojević and Milić, 2013, p. 161.

23 Jovanović and Marinović, 2016, p. 183.

provisions of Chapter VI apply to juveniles between the ages of 14 and 18 years who commit a misdemeanour, while other provisions apply only if they do not conflict with these special provisions.

Art. 72, para. 2 of the Law on Misdemeanours introduces a form of joint liability of parents and juveniles. Specifically, special legislation may stipulate that for a misdemeanour committed by a juvenile, the parents, adoptive parents, guardian, or foster parent of a juvenile aged between 14 and 18 years shall also be held liable if the misdemeanour resulted from their failure to exercise due supervision over the juvenile, provided they were in a position to exercise such supervision. As evident from this provision, the conditions are very similar to those prescribed by the Law on Misdemeanours regarding parental liability for children, so the principles we discussed in analysing parental liability for children apply here as well. However, there are certain exceptions, which are addressed below.

Firstly, it is emphasised that this possibility of cumulative liability must be explicitly prescribed. The option to introduce this parallel liability is reserved exclusively for the law, which is crucial to highlight as misdemeanours, under the general provision, can also be established by acts of lower legal force, such as government regulations or decisions of local self-government assemblies (art. 4 of the Law on Misdemeanours).

Furthermore, this liability, unlike the liability for children, is cumulative, meaning that both the parents and the juvenile are liable together. However, the basis for their liability differs significantly. The juvenile is liable based on their culpability, assessed against the objective elements of the misdemeanour, while the parent is liable for failing to exercise due supervision over their child. Here too, this relates to failures in upbringing and neglect of parental duties. Nevertheless, in legal theory, it is suggested that owing to the formulation of this provision, which requires parental liability to be explicitly prescribed, it is unclear whether this special offense should be formulated to penalise the failure of due supervision or if, as in the case of liability for a child, parents should be liable as though they had committed the misdemeanour themselves.²⁴

Finally, in addition to parents, adoptive parents, guardians, or foster parents, the law may prescribe that other persons who have a statutory duty to supervise the juvenile who committed the misdemeanour may also be held liable.

Regarding parental liability in place of children or their joint liability with juveniles, as we have seen, several questions arise. We now add one more, which concerns the selection of sanctions to be imposed on parents. As parental liability is based on a failure of supervision in both cases, this should, in principle, be a factor in determining the appropriate sanction. However, this is extremely difficult, if not impossible, to implement in practice. Furthermore, the Law on Misdemeanours is silent on whether

24 Ristivojević and Milić, 2016, p. 164.

in this case, both parents should be punished instead of the child or jointly with the juvenile, or just one parent, and whether their liability is joint.²⁵ Overall, these provisions appear to leave numerous ambiguities.²⁶

Ultimately, a characteristic of juveniles' misdemeanour liability, which differs from their treatment in criminal proceedings, is the absence of special privileges for so-called young adults, that is, persons who have reached 18 but not 21 years of age. Specifically, under certain conditions, the Law on Juvenile Criminal Offenders may apply to persons who committed a criminal offense as young adults, that is, after turning 18 but before reaching 21 years of age. The literature emphasises that this solution of the Law on Misdemeanours (non-existence of this privilege) is justified, particularly considering the general legal status of persons under 18 years, and their ability to, for example, marry at 16 years and enter employment contracts at 15 years, among other such pursuits.²⁷

3.

Misdemeanour Sanctions Against Juveniles

Although penal law in general (which includes criminal, misdemeanour, and economic infractions law) today recognises various forms of sanctions serving different purposes, punishment remains one of the main instruments of this branch of law. Regardless of the various purposes of punishment discussed in penal law theory today, the essence of any punishment is the infliction of certain harm on the perpetrator due to their conduct.²⁸ However, in the realm of juvenile penal law, including juvenile misdemeanour law, this is not the case. As 'educational neglect' or insufficient parental care is most commonly cited as one of the reasons for delinquent behaviour by juveniles,²⁹ the primary sanctions intended for juvenile offenders, whose purpose can be somewhat inferred from their very name, are educational measures.

25 According to the ruling of the Misdemeanour Appellate Court, Pržm. No. 192/15, 29 October 2015, if proceedings are conducted against both the juvenile and the parents under art. 72, par. 2, and the court finds grounds to hold them responsible, it has two options. If it decides to conduct a joint proceeding, it will conclude with a judgment. However, if it opts to separate the proceedings, in the proceeding against the juvenile, it will rule by decision if it finds that an educational measure should be imposed, while the proceeding against the parents will be concluded with a judgment, in accordance with the general provisions applicable to proceedings against adult offenders.

26 For more on this and other issues, see Ristivojević and Milić, 2016, pp. 162–165.

27 Mrvić Petrović, 2015, p. 172.

28 Stojanović, 2018, pp. 224–227.

29 Milić, 2013, p. 10.

The system of misdemeanour sanctions adopted in the Law on Misdemeanours, similar to the Law on Juvenile Criminal Offenders, is based on the so-called social-protective model, which is modified by the justice model, aiming to achieve reintegration and rehabilitation of the juvenile misdemeanour offender.³⁰

While in the case of juveniles' liability, the only relevant distinction made by the Law on Misdemeanours is between those not liable for misdemeanours (children) and those who are liable (juveniles), when prescribing types of sanctions and possibilities for their imposition, the Law makes another distinction. Specifically, it introduces a division between younger juveniles, who are persons who at the time of committing the misdemeanour had reached 14 but not 16 years of age, and older juveniles, which refers to persons who at the time of committing the misdemeanour had reached 16 but not 18 years of age. Only educational measures may be imposed on a younger juvenile. This solution is fundamentally based on the understanding that this category of offenders has not reached an appropriate level of biological, psychological, and social development to warrant the application of punishment.³¹ Older juveniles, in addition to educational measures, may also be subject to punishments or penalty points. Furthermore, if necessary owing to the nature of the misdemeanour, protective measures may be imposed along with the punishment or educational measure (art. 73).

Several conclusions can be drawn from the formulation of art. 73, para. 4, which stipulates that only a court may impose educational measures, fines, penalty points, juvenile detention, and protective measures on a juvenile. First, juvenile offenders who commit misdemeanours for which the only prescribed punishment is a fixed-amount fine cannot be issued a misdemeanour order.³² Furthermore, although the Law on Misdemeanours provides for three types of punishment – imprisonment, fines, and community service – only fines may be imposed on juveniles. Instead of imprisonment, juvenile detention is imposed on juveniles, which has the status of a distinct type of punishment specifically designed for this category of persons, while community service cannot be imposed on juveniles.³³ Finally, a warning cannot be issued to juvenile offenders, as the system of juvenile sanctions includes a modified and age-appropriate version of this measure, a reprimand, which is a specific type of educational measure.

30 Mrvić Petrović, 2015, p. 172. For different models see Škulić, 2015, pp. 39–40.

31 Perić, 2007, p. 29.

32 A misdemeanour order is issued for offenses that are punishable only by a fixed monetary fine. It is typically issued by authorised officials, such as police or inspectors. The person who receives a misdemeanour order can either accept responsibility and pay the fine (if done within eight days, they can pay only half of the fine), or if they do not accept responsibility, they can initiate misdemeanour proceedings to challenge the ticket (arts. 168–178 of the Law on Misdemeanours).

33 Cf. Samardžić and Milić, 2014, p. 385–386.

The Law on Misdemeanours does not specifically define the purpose of sanctions that may be imposed on juvenile offenders; rather, this is done by the Law on Juvenile Criminal Offenders.³⁴ Art. 10 stipulates that within the general purpose of criminal sanctions (art. 4 of the Criminal Code),³⁵ the purpose of criminal sanctions against juveniles is to influence the development and strengthening of the juvenile's personal responsibility through supervision, protection, and assistance, as well as through the provision of general and vocational training, to promote education and healthy personality development, with the aim of ensuring the juvenile's reintegration into society. From this formulation, and from other provisions governing sanctions, it appears that the primary goal of sanctions against juveniles, particularly educational measures as we shall see later, is special prevention.³⁶ Although this provision speaks of criminal sanctions, this does not preclude the conclusion that it can also apply to the purpose of misdemeanour sanctions in general, given that the system of misdemeanour sanctions for juveniles is, in principle, aligned with the criminal system.

3.1. Educational Measures

When selecting an educational measure, the court considers the juvenile's age, level of mental development, psychological characteristics and motives for committing the misdemeanour, previous upbringing, environment and living conditions, severity of the misdemeanour, whether any educational measure has previously been imposed, and all other circumstances that affect the choice of educational measure best suited to achieve the purpose of education. These circumstances are both objective and subjective in nature, but their enumeration clearly shows that the focus of examination when selecting the measure is on the juvenile's personality rather than the misdemeanour itself.³⁷ To establish these circumstances, the court must hear the parents and adoptive parents of the juvenile, their guardian, and other individuals who can provide necessary information (art. 78). This provision is mandatory in nature, and its purpose is to consistently implement the aforementioned principle of individualisation of sanctions, enabling the court to learn all circumstances relevant

34 Nevertheless, in art. 78, para. 1, which addresses the conditions for educational measures, while listing these conditions, the legislator emphasises that circumstances that 'affect the choice of educational measure that will best achieve the purpose of education' will be considered, from which we indirectly conclude that the purpose of educational measures is to influence the juvenile's education.

35 The general purpose of prescribing and imposing criminal sanctions is to suppress acts that violate or endanger values protected by criminal legislation.

36 Perić, 2007, p. 31.

37 Ristivojević and Milić, 2023, p. 194.

for selecting an appropriate educational measure that will, given the specifics, yield the best results.³⁸ It is also important to emphasise here that no one can be exempted from the duty to testify about circumstances necessary for assessing the juvenile's mental development, understanding their personality, and the conditions in which they live (art. 294).

In addition to being obligated to consider numerous circumstances when selecting an appropriate measure, the court must ensure that the purpose of the educational measure continues to be fulfilled after it has been imposed. In this regard, the Law on Misdemeanours stipulates that when circumstances appear after the decision imposing an educational measure that either did not exist at the time of the decision or were unknown, and these circumstances would have influenced the decision, the execution of the imposed measure may be suspended, or the imposed measure may be replaced with another educational measure (art. 79). This provision indicates a certain flexibility in the system of educational measures, as the court may modify its own final decision if it becomes aware of new circumstances, which is not possible in the system of sanctions for adult offenders.³⁹ The provision requiring the court to reconsider the necessity of executing the imposed measure or special obligation, or replacing it with another educational measure or special obligation, if more than six months have elapsed since the decision imposing any of the educational measures or special obligations became final and execution has not begun (art. 80), also demonstrates that the juvenile is monitored throughout the process of measure execution. Here too, the need to consider the effectiveness and suitability of the measure is emphasised, which may be compromised due to the fact that execution has not even begun after a certain period of time.

The Law on Misdemeanours recognises two types of educational measures: warning and guidance measures, which include reprimand and special obligations, and measures of increased supervision. Warning and guidance measures are imposed when such measures are necessary to influence the juvenile's personality and behaviour, and when they are sufficient to achieve the purpose of these measures. Measures of increased supervision are imposed when longer-term educational measures with appropriate professional supervision and assistance are needed for the juvenile's education and development (art. 74).

Reprimand is the mildest sanction that can be imposed on a juvenile and corresponds to the judicial warning imposed on adult criminal offenders, and the judicial reprimand imposed on juvenile criminal offenders. It is imposed when longer-term educational measures are not necessary for the juvenile offender, particularly when it can be concluded from their attitude towards the committed misdemeanour and

38 Milić, 2013, p. 24.

39 Ristivojević and Milić, 2023, p. 195.

their willingness to refrain from future misdemeanours that the imposed educational measure will achieve its purpose (art. 75, para. 1). For it to achieve its purpose, it is necessary that the juvenile is capable of understanding the significance of their actions, the social unacceptability of their act, and the possibility that other measures may be applied to them in the future – in other words, they must possess a certain level of awareness.⁴⁰ Its content amounts to admonishment, specifically pointing out to the juvenile that their behaviour is socially unacceptable, while simultaneously warning them that if they repeat the misdemeanour, there is a possibility of imposing other educational measures (art. 75, para. 2). In this sense, this measure is completely devoid of repressive character, which does not mean it lacks justification.⁴¹ As the content of this measure is exhausted in pointing out the aforementioned aspects to the juvenile, there are suggestions that this should be done in a special, even ceremonial form.⁴²

Special obligations represent a distinct type of guidance and warning measures that are imposed when the court assesses that it is necessary to influence the juvenile and their behaviour through appropriate requirements and prohibitions (art. 76, para. 1 of the Law on Misdemeanours). They do not have a repressive character; rather, their aim is to influence the proper development of the juvenile and strengthen personal responsibility.⁴³ Special obligations, besides ‘respecting the principle of individualisation when imposing sanctions’,⁴⁴ are significant because by requiring the juvenile to undertake certain actions or refrain from them, compliance with these obligations demonstrates in a concrete way that they accept responsibility, which is of exceptional importance for further development and steering away from a ‘criminal career’, by reducing the likelihood of committing offenses or crimes in the future.⁴⁵

Through this measure, the court may impose one or more of the following obligations on the juvenile:

- 1) to apologise to the injured party;
- 2) to repair or compensate for the damage caused, within their capabilities;
- 3) to avoid certain places and the company of certain persons who negatively influence them;
- 4) to undergo rehabilitation and treatment for addiction to alcohol and other psychoactive substances;

40 Milić, 2013, p. 19.

41 Škulić, 2020, p. 82.

42 Perić, 2007, p. 39.

43 Radulović, 2018, p. 139.

44 Theoretical frameworks emphasise that the general condition for the success of special obligations is precisely strict individualisation when imposing them. The court must ensure that it is appropriate both with regard to the juvenile’s personality and the type and circumstances of the committed misdemeanour; Obradović, 2010, p. 55.

45 Stevanović, 2014, p. 104.

- 5) to be referred to a competent driver training institution for learning or testing knowledge of traffic regulations;
- 6) to engage, without compensation, in activities organised by humanitarian organisations or in environmental, social, or community projects;
- 7) to engage in school sports or other extracurricular activities under the educational supervision of a teacher.

All measures (except for the apology, which is of immediate nature) may last up to six months and must not interfere with the juvenile's regular education (art. 76, para. 2). Additionally, when imposing special obligations, the court shall warn the juvenile that failure to fulfil certain obligations may result in their replacement with another obligation or educational measure (para. 4).

Measures of increased supervision are a special type of educational measures imposed when a more lasting educational measure needs to be implemented for the juvenile (art. 77, para. 1). The Law on Misdemeanours recognises two types of this measure: increased supervision by parents, adoptive parents, or guardians, and increased supervision by the guardianship authority. The condition for imposing the first measure is that the parents, adoptive parent, or guardian have failed to exercise necessary care and supervision over the juvenile, while being capable of exercising such supervision and this can reasonably be expected from them. Legal theory rightfully emphasises that this measure could not be imposed without previously obtaining the opinion of the guardianship authority, or without presenting evidence to determine whether the misdemeanour was committed due to the legal representatives' failure, as well as whether they are capable of consistently implementing the measure.⁴⁶ If this is not the case, or if such a possibility does not exist, the court will impose the latter measure. In this sense, it can be said that it is of a subsidiary nature, meaning its application comes into consideration if there are no conditions for applying increased supervision by parents and other persons.⁴⁷ These measures may last from three months to one year.

3.2. Penalties

Besides educational measures, penalties may also be imposed on juveniles. However, the punishment of juveniles is established as an exceptional measure, in a dual sense. First, it can only be imposed on an older juvenile, meaning a person who had reached 16 years of age at the time of the offense. Additionally, the exceptional nature of the

⁴⁶ Milić, 2013, p. 23.

⁴⁷ Škulić, 2020, p. 91.

measure is evidenced by the formulation used in the Law on Misdemeanours (may be imposed *only if*), as well as the conditions for its imposition: only if at the time of committing the misdemeanour, based on their mental development, they could understand the significance of their action and control their conduct, and if due to more serious consequences of the misdemeanour or a higher degree of culpability, it would not be justified to apply an educational measure (art. 81, para. 1). Unlike educational measures, which consider circumstances related to the juvenile's character, here, the court is obliged to consider circumstances related to the offense itself, as well as the degree of culpability,⁴⁸ with particular emphasis on the component of the juvenile's mental capacity.⁴⁹

The Law on Misdemeanours does not contain special rules regarding the imposition of fines on juveniles; thus, general provisions relating to fines should apply here. The only particularity that exists here relates to the impossibility of converting unpaid fines into imprisonment – they will be collected through enforcement measures (art. 81, para. 4). When imposing a fine, consideration should be given to the realistic possibility of it achieving its purpose, especially vis-à-vis the juvenile's ability to pay by themselves. If the juvenile is unemployed, which will typically be the case, the burden of the fine will ultimately fall on the parents.⁵⁰ In this sense, it cannot achieve its purpose.⁵¹ Therefore, it is not surprising that it is rarely imposed in practice.⁵²

Punishing juveniles should be reserved only for exceptional cases, as previously mentioned. Within this 'system of exceptionality', juvenile detention penalty holds a special status as the most severe punishment for juveniles. In other words, the need for this measure to be imposed exceptionally is further emphasised in art. 81, para. 2 of the Law on Misdemeanours. Additionally, the legislator uses the term *may be imposed*, which leaves the court with the discretion even if all conditions for imposition are met. When imposing this punishment, the nature of the misdemeanour and the juvenile's personal characteristics and behaviour must be considered. The application of juvenile detention penalty is not directly linked to any prescribed range of penalties, unlike juvenile imprisonment as a criminal sanction (which can be imposed for offenses carrying a prison sentence of over five years). It is argued that

48 The legislator emphasises that in this case, there should be a higher degree of culpability. The question may be raised whether this provision limits the application of juvenile detention only to misdemeanours committed with intent.

49 Cf. Perić, 2007, p. 73.

50 Jovanović and Pašalić, 2016, p. 222.

51 Jovanović and Marinović, 2016, pp. 182–183.

52 Jovanović and Sofrenović, 2018, p. 192.

this penalty might be appropriate, for instance, in particularly serious traffic offenses or in cases of extreme recklessness in offenses against public order.⁵³

In legal theory, concerns have been expressed about whether juvenile detention penalty can achieve its purpose, given that its duration is limited to a maximum of 30 days, which is insufficient for it to have a re-educational effect on the juvenile. However, it is also emphasised that if its duration were longer, it would transform into a punitive-preventive measure, which has been generally abandoned in the Serbian legal system suited for juveniles.⁵⁴ Nevertheless, considering that deprivation of liberty itself, regardless of duration, can influence reconsideration of the justification for behaviour that led to the deprivation of liberty, and that during the punishment, trained personnel conduct treatment with the juvenile, some authors believe this punishment is quite adequate and can achieve expected results.⁵⁵

Several factors should be considered here. First, short-term imprisonment penalties are not new in penal law. Moreover, authors see their main advantage precisely in their shorter duration.⁵⁶ Meanwhile, in misdemeanour law, the duration of imprisonment is generally limited to 60 days (under exceptional circumstances, up to 90 days), while the minimum imprisonment term is one day. If the justification for the duration of juvenile detention penalty is questioned, this would directly question the justification of one-day imprisonment imposed on adult offenders. However, the question of whether imprisonment is an appropriate sanction for juvenile misdemeanours in general is of a different kind. It should be kept in mind that misdemeanours are lighter penal offenses compared with criminal offenses.

Finally, in accordance with art. 73, para. 2, penalty points may also be imposed on a juvenile. This is a specific type of sanction that can be prescribed for offenses against road traffic safety. These points are not imposed independently but alongside a penalty. If necessary, additional obligations may be imposed on the offender for driver education or to monitor their behaviour in traffic.

4.

Review of Certain Procedural Legal Solutions

Chapter XXXIII of the Law on Misdemeanours is dedicated to the specific features that apply in proceedings conducted regarding juvenile offenders: in such cases, the provisions of this chapter apply, and other provisions of misdemeanour proceedings apply only if they do not conflict with these provisions. Additionally, unless otherwise

⁵³ Milić, 2013, p. 26.

⁵⁴ Jovanović and Marinović, 2016, p. 182.

⁵⁵ Milić, 2013, pp. 26–27.

⁵⁶ Stojanović, 2018, pp. 234–235.

prescribed by this law, the provisions of the Law on Juvenile Criminal Offenders apply *mutatis mutandis* in misdemeanour proceedings regarding juveniles (art. 291). We proceed to address only certain provisions that we consider particularly important.

The Law takes special care regarding the terminology used, and instead of conducting proceedings against juveniles, it speaks of proceedings and sanctions *regarding* juveniles, which according to some authors, reflects the relationship of the state and society vis-à-vis these categories of misdemeanour offenders.⁵⁷

The Law on Misdemeanours explicitly stipulates in art. 292 that proceedings regarding juveniles are urgent. Although procedural efficiency is a general principle of misdemeanour proceedings (which is generally designed as summary criminal proceedings), here, this efficiency gains particular importance as it evolves into urgency. While the literature emphasises that urgency is justified considering that the primary goals of proceedings regarding juveniles are to prevent future behaviours and exercise supervision,⁵⁸ particular attention should be paid, especially with older juveniles, to the potential for them to lose juvenile status due to delays and reach adulthood.

One of the questions that arises is whether a juvenile must have defence counsel in the proceedings. On one hand, art. 49 of the Law on Juvenile Criminal Offenders stipulates that a juvenile must have defence counsel during the first hearing and throughout the proceedings. As this law applies *mutatis mutandis* in misdemeanour proceedings regarding juveniles and considering the purpose of mandatory defence for juvenile defendants, it could be concluded that the provision on mandatory defence should apply in this case as well. On the other hand, considering that misdemeanours are less severe types of offenses, and that mandatory appointment of defence counsel could prolong proceedings and make them far more expensive, theoretical perspectives suggest limiting cases of mandatory defence to proceedings against older juveniles for misdemeanours punishable by juvenile detention.⁵⁹ Newer judicial practice aligns with the first viewpoint, asserting that, in accordance with the aforementioned provision of the Law on Juvenile Criminal Offenders, a juvenile must have a defence attorney in misdemeanour proceedings.⁶⁰ In one of its decisions, the Supreme Court goes even a step further, requiring that a juvenile must have defence counsel even if they reach adulthood during the proceedings, citing art. 83, para. 1 of the Law on Misdemeanours, which stipulates that when a juvenile offender reaches

57 Milić, 2013, p. 14.

58 Stevanović, 2014, p. 104.

59 Delić and Bajović, 2018, pp. 386–387.

60 Decision of the Misdemeanour Appellate Court, Novi Sad Department, Pržm No. 173/21, 06 July 2021.

adulthood before or during proceedings, provisions regarding juveniles apply to them, except for educational measures.⁶¹

The Law on Juvenile Criminal Offenders stipulates that proceedings conducted against juveniles must involve persons who have acquired special knowledge in the field of children's rights and juvenile delinquency. This applies to prosecutors, judges, lay judges, and defence counsel. The Law on Misdemeanours contains no such provision. Therefore, in scientific papers, particularly those authored by misdemeanour court judges who adjudicate in juvenile proceedings, it has been emphasised that rules on the specialisation of proceeding participants are necessary in misdemeanour cases as well.⁶² In this regard, the Belgrade Misdemeanour Court has established a special Juvenile Department through its Annual Work Schedule for 2023, and subsequently for 2024. The Division was formed in accordance with the Court Rules of Procedure and recommendations of international instruments, enabling judges to accurately assess and maintain uniform procedure in cases of juvenile misdemeanour liability through joint sessions, continuous training, and monitoring of judicial practice. Additionally, in cases of recidivism, judges again handle cases against the same juvenile offenders, allowing them to evaluate the effect of previous sanctions and individualise new measures.⁶³

Art. 296 prescribes a special role for guardianship authorities,⁶⁴ parents, and legal representatives of juveniles. Specifically, these persons have the right to be informed about the course of proceedings, make proposals during proceedings, and point out facts and evidence important for reaching the correct decision. The active participation of these persons in the proceedings is justified considering the specific structure, nature, and objectives of juvenile proceedings, and the fact that

61 Supreme Court Decisions, Kzz Pr No. 36/2021, 21 October 2021, and Kzz Pr No. 43/2021, 23 December 2021. However, in one decision, the Misdemeanour Appellate Court notes that 'if the juvenile was of legal age at the moment of hearing before the first-instance court, and gave their defense in the presence of their father stating that they wish to defend themselves without the presence of counsel, and signed the hearing record personally and without objections', their right to defence was not denied; Judgment of the Misdemeanour Appellate Court, Prž M No. 289/22, 15 November 2022.

62 Jovanović and Sofrenović, 2018, p. 193.

63 Ristanović and Milić, 2024.

64 One of the important links in society's response to penal offenses by children and juveniles belongs to the social protection system. Social protection services treat these offenses as results of problems in social development and the fulfilment of social needs. Their primary goal is the humanisation of relations towards this population, which, owing to their age and developmental characteristics, perceives unlawful conduct differently compared with adult offenders. A particularly important role belongs to the guardianship authority, specifically the centre for social work, which has an irreplaceable function in responding to juvenile delinquency. This centre has a dual role in proceedings against juveniles: on one hand, as an auxiliary body of the court, and on the other, as an independent body that can influence the course of proceedings through its decisions, Jugović and Bogetić, 2018, p. 53.

data concerning the juvenile's personality, intelligence, and maturity are collected during the proceedings.⁶⁵

Art. 297 contains a special provision on the court's ability to discontinue proceedings for reasons of expediency. The court may decide not to conduct misdemeanour proceedings regarding a juvenile if it considers that proceedings would not be expedient given the nature of the misdemeanour, the circumstances under which it was committed, the juvenile's prior life, and their personal characteristics. This possibility is not conditional upon the severity of the misdemeanour for which proceedings are being conducted. Para. 2 of the same article stipulates that the court shall terminate misdemeanour proceedings by ruling, which implies that it must in any case initiate proceedings, and then potentially decide on termination by ruling if it finds that conditions for applying this provision are met. The parent, adoptive parent, guardian, or foster parent of the juvenile and the guardianship authority shall be notified of the committed misdemeanour for the purpose of taking measures within their authority.⁶⁶

5.

Conclusion

The overall impression following the analysis of provisions relating to juveniles is that the legislator has not devoted equal attention and diligence in drafting provisions on misdemeanour liability and misdemeanour proceedings for juveniles as in the case of criminal liability (though such a conclusion could be drawn for misdemeanour law in general, not just the segment relating to this category of offenders). Some oversights relate to legislative technique. Thus, many article titles do not correspond to the content of their provisions (e.g. art. 71), and certain paragraphs seem to be misplaced (see para. 3 of art. 297). Thus far, we have pointed out some problems that may arise in applying (primarily substantive) provisions on liability. However, we have decided to end with the positive aspects of Serbian regulations.

The fundamental idea of proceedings regarding juveniles is that they are conducted in accordance with the juvenile's well-being, while respecting the principle of proportionality. The aim of this approach is to positively influence the juvenile to change their attitude towards socially unacceptable behaviour.⁶⁷

65 Delić and Bajović, 2018, pp. 389–390.

66 The formulation stating that the mentioned persons are notified 'of the committed misdemeanour' may be questionable, due to the fact that the court does not determine whether a misdemeanour was committed or not in the proceedings, but quite the opposite, whether it is justified to conduct proceedings or not; Ristivojević and Milić, 2023, p. 583.

67 Milić, 2013, p. 33.

The balance between rehabilitation and responsibility in Serbian juvenile misdemeanour law appears to be clearly expressed, as evidenced through several key provisions, both substantive and procedural. The legislator has established a framework allowing differential treatment of juveniles depending on their age and level of psychological development, with special emphasis on measures aimed at rehabilitation and improvement, and punishment only in exceptional cases.

First, art. 71 makes a clear distinction between children under 14 years and juveniles aged 14–18 years. Children under 14 years cannot be liable for misdemeanours, which aligns with the principled position that these are persons whose level of development, intelligence, life experience, and other factors are not such as to make them suitable subjects of penal liability. Meanwhile, for juveniles aged 14–18 years, the law provides for more lenient treatment compared with adults, while still introducing responsibility for their actions.

Second, art. 73 further contributes to this balance by introducing different types of sanctions for younger and older juveniles. For younger juveniles (14–16 years), only educational measures may be imposed, while older juveniles (16–18 years) may also receive penalty points, fines, or a juvenile detention sentence in exceptional cases, but with a maximum limit of 30 days. This approach clearly shows the tendency towards rehabilitation, as the law considers younger juveniles more susceptible to behavioural changes through education and educational measures, while providing somewhat stricter treatment for older juveniles due to their maturity.

Third, art. 72 introduces the liability of parents, guardians, or foster parents in cases where the juvenile's misdemeanour results from their failure in supervision. This provision can be said to show how the law balances between individual responsibility of juveniles and the responsibility of adults who have the obligation to supervise and guide juveniles. Such joint responsibility can provide additional support to the rehabilitative approach, as parents and guardians become active participants in the process of correcting the juvenile's behaviour. Although when explained thus, the liability of parents may appear to be a reasonable aspect, joint or vicarious liability is far from the usual approach. In this sense (aside from our intention to conclude on a positive note), we again refer to its criticism, which we have written about extensively in previous lines.

Finally, the law enables a wide spectrum of educational measures, from warnings and reprimands to increased supervision, and special obligations can be directed at changing bad habits and repairing damage caused by the misdemeanour. This introduces flexibility in the approach through the law – the court can adapt the type of measure depending on the specific circumstances of the case and the juvenile's needs, enabling achievement of the rehabilitative goal.

Because of these provisions, the balance between rehabilitation and responsibility in Serbian misdemeanour law is set so that priority is given to re-education

and social reintegration, while punitive measures are applied only when absolutely necessary, always with clear limitations ensuring that the goal remains rehabilitation, not repression.

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Bence Zsolt KOVÁCS*

The Classroom under State Command: A Comparative Analysis of the Nationalisation of Church-Run Educational Institutions in Czechoslovakia, Hungary, and Romania after the Establishment of Soviet-Type Dictatorships

ABSTRACT: *Between the two world wars, churches played a central role in maintaining most educational institutions in the region of Czechoslovakia, formerly part of Transleithania (the Kingdom of Hungary), throughout the territory of Hungary, and among ethnic minorities in Greater Romania. This situation changed fundamentally following the establishment of Soviet-type dictatorships, which led to the nationalisation of church-run schools and kindergartens. This study explores the legal dimensions of this educational transformation across the three countries, focusing on the legislative frameworks that enabled nationalisation. To this end, the concept of nationalisation is defined in both its contemporary and historical meaning, the Marxist perspective on church-operated education is analysed, and the earlier Soviet policies that served as a blueprint for these changes are also reviewed.*

KEYWORDS: *nationalisation, expropriation, Soviet-type dictatorship, communist ideology, church-run educational institutions.*

I reverse the phrase of Voltaire, and say that, if God really existed, it would be necessary to abolish him.¹ – Mikhail Bakunin

1 Bakounine, 1888, p. 17.

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1.

Introduction

One of the most salient theories in sociological jurisprudence was formulated in 1912 by American legal scholar Roscoe Pound (1870–1964). He argued that law can also be perceived as a tool for social engineering, whereby legislators identify societal problems and attempt to solve them through legal means.² In this framework, the legislator seeks to balance public and private interests, weighing them against each other to achieve outcomes deemed socially desirable. This balancing role, however, is less characteristic of Soviet-type dictatorships, where law is more explicitly subordinated to the pursuit of social goals. In such systems, legislation strongly emphasises collective aims – such as nationalisation in the name of the public good – while giving comparatively little weight to the private rights of citizens, including rights to property and enterprise. By contrast, most modern legal systems attempt to preserve both public objectives and individual rights.³

Approximately 35 years after Pound introduced this theory, a massive wave of nationalisation swept across East-Central Europe, as states newly within the Soviet sphere of influence expropriated privately held and church-run assets. These processes can be interpreted through Pound's lens as instances of deliberate social engineering, where state power was used to prioritise collective interests over private or ecclesiastical ones.

Between the two world wars, churches played a central role in maintaining educational institutions in Hungary, in Czechoslovakia (particularly in its former Transleithanian regions), and among ethnic minorities in Greater Romania. This dominance changed fundamentally after the rise of Soviet-type regimes, which led to the nationalisation of church-run schools and kindergartens.

The current study explores the legal dimensions of this transformation across the aforementioned countries. It focuses on the legislative frameworks that facilitated nationalisation, defines the concept of nationalisation in both historical and contemporary contexts, examines the Marxist critique of church-based education, and reviews earlier Soviet policies that provided a model for these reforms.

2 Pound, 1912, pp. 489–516.

3 Gorlizki, 2018, p. 1096.

2.

Contemporary and Historical Definitions of Nationalisation

Before presenting the process of nationalisation, it is necessary to define the term from a legal perspective, as its historical meaning – particularly the one applied in practice at the time – and its current interpretation do not fully coincide. A vivid example of this is found in the legislation of the examined countries that dismantled religious educational institutions: these laws did not declare the nationalisation of such institutions but merely prescribed their transfer or transition into state ownership.⁴ However, the media of the time reported on these state takeovers as nationalisations.

In its literal historical usage, the term “nationalisation” referred primarily to the expropriation of various means of production or exchange. However, in its modern conceptualisation, nationalisation is regarded as an umbrella concept that also encompasses collectivisation and the confiscation of various assets for transfer into state or other communal (effectively state-controlled) ownership. The extension of the term to these latter phenomena likely occurred because these processes occurred simultaneously, utilised similar legal and extrajudicial instruments, served a broader ideological purpose, and – when interpreted teleologically – resulted in outcomes that were either identical or very similar.

Regardless of these distinctions, the legal institution of nationalisation, in its current sense, can be described and defined through the practical implementation of the social experiment driven by communist ideology in East-Central Europe. The following section provides a historical overview of the term “nationalisation” in both its colloquial and legal senses.

2.1. The Concept Before Becoming a Legal Phenomenon

The colloquial usage of the concept of nationalisation dates back to the time of the French Revolution, during which the term *nationaliser* referred to the attribution of a national character to a given object. It acquired its current popular meaning – as

4 In Hungary, the responsible legislative act – Act XXXIII of 1948 – refers to the transfer and assumption of ownership. The Romanian legal provisions (Decree Nos. 175 and 176 of 2 August 1948) speak of the transformation of similar institutions into state schools (*devin școli de Stat*) and their *transfer into state ownership* (*trecerea în proprietatea Statului*). The Czechoslovak legal regulation (Act No. 95/1948 Coll.) provides for the transformation (*přeměňují*) of schools not owned by the state in this direction.

the transfer of an asset into state ownership – only from the 1860s onwards.⁵ The institution’s conceptual precursors in Marxist literature may be found at the end of the first volume of *Capital*, in the section on the historical tendency of capitalist accumulation, with the notion of the *expropriation of the expropriators*,⁶ or in the *Communist Manifesto*, where the “abolition of private property”⁷ is declared as the ideology’s quintessence. Within the latter work, Marx also refers to the ‘centralization of credit in the hands of the state, by means of a national bank with state capital and an exclusive monopoly’.⁸

However, the term of nationalisation appeared expressly in Marx’s terminology after 1870, namely in a speech given by Marx in 1872, stating that the ‘nationalization of land has become a social necessity’.⁹ Subsequently, the concept became ingrained in Marxist thought, as exemplified by later works of Friedrich Engels. In a letter dated 1891, he criticises the institution, stating that ‘so long as the propertied classes remain at the helm, nationalization never abolishes exploitation but merely changes its form—in the French, American or Swiss republics no less than in monarchist Central, and despotic Eastern, Europe’.¹⁰

2.2. As a Legal Concept with its Historical and Current Definitions

As a legal *terminus technicus*, nationalisation was first used to describe the practice established and laid down by the revolutionary Constitution of Mexico, adopted in 1917 – still in force today after numerous amendments – and the decrees implemented in the early Soviet Union.¹¹ Article 27 of the Mexican Constitution vested the Mexican nation with a kind of *dominium eminens* – an original and prior right of ownership – over the country’s waters and all its land. Consequently, in the constitutional interpretation, private property constituted nothing more than a portion of the

5 *Origin and history of nationalization*, 2025.

6 Marx, 1887, p. 789. Marx describes the concentration of capital – which was originally born ‘sweating blood and filth with every pore from head to toe’ – as the expropriation of smaller capital by larger capital, that is, as the result of continuous acts of expropriation. In his view, the historical process of capital concentration essentially involved ‘the expropriation of the mass of the people by a few usurpers’, whereas in the emergence of communism, ‘we have the expropriation of a few usurpers by the mass of the people’. Ibid., p. 790. The phrase expropriation of the expropriators was paraphrased by Lenin in *Pravda* as ‘we plunder the plunder’ and during the October Russian Revolution, it became a slogan chanted by the masses. Lenin, 1918.

7 Marx and Engels, 1848.

8 Ibid.

9 Marx, 1872.

10 Engels, 2010, p. 152.

11 Katzarov, 1964, pp. 23, 31.

nation's own property transferred to others, under the nation's exclusive authority.¹² This article opened the way for extensive land reform in the country.¹³ However, the most significant novelty of the provision lay in its introduction of a new, collectivist approach to the concept of property rights, subordinating them to the real or perceived interests of society.¹⁴ This marked the functionalisation of property rights, attaching societal purposes to their forms of exercise.¹⁵

Regardless of geographical distance, a similar paradigm shift occurred in the Soviet Union after the October Revolution. With the first decree issued on 8 November 1917,¹⁶ the socialist experiment began a complete transformation of economic life through nationalisation.¹⁷

Following the end of World War I, the conceptual framework underlying nationalisation appeared in the constitutions of several major states, such as Germany, France, the United States, and Spain.¹⁸ Nevertheless, the legal institution of nationalisation experienced its European renaissance only after World War II. Most prominently, the incorporation of East-Central Europe into the Soviet sphere of influence resulted in the transplantation of Soviet legal practices in the realm of nationalisation. It is perhaps no coincidence that the most detailed legal analysis of the phenomenon was carried out by Konstantin Katzarov (1898–1980), a jurist originally from Bulgaria who later settled in France, and is considered perhaps the most meticulous scholar on the subject.

In his thematic book published in French in 1960, Katzarov defined the legal institution of nationalisation as follows:

'(1) the transformation (2) in the public interest of a superior kind, (3) (a) of specific assets or (b) of a specific activity, which (4) are, or may be, means of production or exchange in the widest sense of the term, (5) into the assets or activity of the community – (a) the State, (b) a local authority, or (c) a cooperative – with a view to (6) their (a) immediate or (b) future utilization in the general interest and no longer in the private interest'.¹⁹

12 Grote, 2017, p. 633.

13 Ibid., pp. 621–622.

14 Ibid., p. 622.

15 Katzarov, 1964, pp. 32–33.

16 The Bolsheviks seized power on 25 October 1917 under the Old Style (Julian) calendar, with the first nationalisation decree following the next day. In this study, all dates are given according to the standard Gregorian calendar.

17 For details regarding the process, see *ibid.*, pp. 34–36, 39–40.

18 For details regarding the process, see *ibid.*, pp. 36–39.

19 Ibid., p. 160.

In accordance with this definition and Marxist ideology, the objects of nationalisation were the potential instruments of exploitation – namely, the means of production. As churches were not participants in profit-oriented economic life, or only to a limited extent, their assets were not classified as nationalisable goods. The reference to a higher public interest makes the above definition strongly ideological in nature, seeking to legitimise nationalisation.

Such definitions – often questionable in their impartiality – dominated the majority of contemporary academic literature. By contrast, current scholarly works often present definitions that partially or entirely oppose this approach.

According to realist theory of Professor Emőd Veress, nationalisation can be understood as an unchallengeable, unilateral declaration of intent by the state, which may even be executed through an administrative act, and whose object is the totality of the means of production. In terms of effect, ownership is transferred to the state from the moment this intent is declared, without the fulfilment of any other formal requirements. Its purpose is the establishment of a new economic order. As for compensation, even if it formally exists, its actual realisation is deemed impossible, as the prevailing ideological view held that compensation would merely reproduce capital, the capitalist class, and exploitation.²⁰ In the author's view, nationalisation is

'in fact nothing more than expropriation. However, not just any expropriation, but an illegal form of it: expropriation without prior compensation, expropriation on a mass level based on false public utility, affecting the entire society. Ultimately, it is a vile form of abuse of power and coercion, ideologically justified by utopian arguments'.²¹

In line with these considerations, the contemporary understanding of nationalisation – as exemplified by the two aforementioned definitions – now also encompasses the confiscation of church-run educational institutions.

3.

Theory and Initial Practice: Marxism, Educational Policy, and the Nationalisation of Church Schools in the Soviet Union

The nationalisation processes in East-Central Europe had Eastern, Soviet precedents. Soviet practice established the necessary logical connection between these nationalisations and Marxist ideology. The theoretical framework developed in the writings

²⁰ Veress, 2023, pp. 290–300.

²¹ Ibid., p. 300.

of Marx and Engels was primarily a critique of the contemporary capitalist system, rather than a detailed blueprint for constructing a new society. This is especially true in the case of the nationalisation of church- and privately run educational institutions, which is best understood through the Bolshevik program that first attempted to put the ideology into practice. This will be explored in the following subchapters.

3.1. Critique of the Educational System and the Church in Marxist thought

In the writings of Marx and Engels, there is no explicit call for the nationalisation of church-run educational institutions. However, both authors wrote extensively on the necessity of comprehensive educational reform and the justification for introducing free and universal public education. This is reflected in the demand formulated in the *Communist Manifesto* first published in 1848: '[f]ree education for all children in public schools. Abolition of children's factory labour in its present form. Combination of education with industrial production, etc'.²² A few years earlier, in another work, Engels also clearly advocated for secular, state-run public education, criticising the school system maintained by the Anglican "state church" in England.²³

The anticlericalism evident in these writings – rooted in a broader desire for secularisation and in the perceived necessity of separating the church and state for the sake of modernisation – is not novel. It can be traced back at least to the French Revolution, with the short-lived Paris Commune (later epitomised by Engels as the first example of the dictatorship of the proletariat)²⁴ in 1871 even mandating, beside the separation of the state and the church, the secularisation of all catholic run schools. Marx's famous metaphor describing religion as the *opium of the people*²⁵ was meant to convey that religion, similar to law, serves to sustain social injustice in the earthly realm.

As for the relationship between private property and religion, Marx argued as follows:

'[r]eligion, family, state, law, morality, science, art, etc., are only particular modes of production, and fall under its general law. The positive transcendence of private property as the appropriation of human life, is therefore the positive transcendence of all estrangement – that is to say, the return of man from religion, family, state, etc., to his human, i.e., social, existence. Religious estrangement as such occurs only in the realm of consciousness,

22 Marx and Engels, 1848.

23 Engels, 1845.

24 Engels, 1891.

25 Marx, 1843–1844.

of man's inner life, but economic estrangement is that of real life; its transcendence therefore embraces both aspects. [...] Communism begins from the outset with atheism'.²⁶

These works, cited above, can ultimately be interpreted correctly only as documents descriptive of the given era. They primarily illustrate that in the 1840s, the industrialised regions of Western Europe – particularly England – were characterised by widespread illiteracy alongside child labour. The demands articulated in these texts were only realised in England in 1880, with the enactment of the *Elementary Education Act*, which introduced compulsory elementary education.

3.2. “What is to be Done?” Exclusion of the Church from Education in the Soviet Union

The true model for the anti-church measures in East-Central Europe was the broader secularisation that had previously taken place in the Soviet Union. Therefore, it is necessary to analyse both the theory developed by contemporary ideologists that underpinned the nationalisation of church-run educational institutions and the actual decree that implemented nationalisation.

The metaphor equating religion to opium – described as a cornerstone of the Marxist worldview regarding religion – was frequently cited by Lenin in his writings.²⁷ In one of his analogies, designed to render this message more accessible to the Russian public, he wrote: ‘[r]eligion is a sort of spiritual booze, in which the slaves of capital drown their human image, their demand for a life more or less worthy of man’.²⁸ Nevertheless, Lenin held that religion was a secondary issue, asserting that the primary goal was to truly make ‘religion a really private affair, so far as the state is concerned. [...] [T]he proletariat will wage a broad and open struggle for the elimination of economic slavery, the true source of the religious humbugging of mankind’.²⁹

Following the October Revolution, Lenin’s writings became increasingly militant in their atheism, because under communist ideology, religion was expected to wither away naturally with the rise of a communist society. In line with this accelerated “historical necessity”, on 23 January 1918 (5 February in the Gregorian calendar), the Council of People’s Commissars (Sovnarkom), chaired by Lenin, adopted and announced the Decree on Separation of Church from State and School from Church.³⁰

26 Karl Marx, 1844.

27 Lenin, 1909.

28 Lenin, 1905.

29 Ibid.

30 ‘Decree on Separation of Church and State’ in Bunyan and Fisher, 1934, pp. 590–591.

While formally declaring freedom of religion, the decree stipulated the complete separation of the church and state, stripped churches of legal entity status and property, and removed religious education from state institutions. Religious organisations could use buildings and objects required for worship, but only under special decrees from central or local state authorities, and only free of charge. This secularisation measure was also the first decree directly relating to education – followed by decrees on coeducation and mother tongue instruction for national minorities³¹ – and was succeeded chronologically by two other nationalisation decrees (one on the nationalisation of the merchant fleet, and another on the confiscation of private banks' capital).

Through the implicit nationalisation of church-run schools, approximately 30,000 educational institutions were transferred, according to data published by Bukharin and Preobrazhensky.³² Further, according to their figures, in September 1917 – prior to the revolution – Tsarist Russia had 88,887 primary and 1,880 state-maintained secondary schools.³³ Thus, church schools likely accounted for approximately a quarter of all primary educational institutions. Perhaps more accurate are the 1916 estimates presented by the Ministry of Education to the legislature, according to which 15.3% of the 2,804 secondary schools and 26.2% of the 228,339 primary schools were owned by various religious institutions.³⁴

Post factum, or after the schools were effectively nationalised, the program adopted by the Russian Communist Party in March 1919 defined schools as tools for “the communist regeneration of society”³⁵ and for freeing people from “religious prejudices”.³⁶ Accordingly, the party advocated for complete secularisation of education and the introduction of free and compulsory public schooling. This stance – consistent with the Soviet Union's later atheist policies – was codified in Articles 13 and 17 of the Soviet Constitution adopted in July 1919.³⁷ Mimicking the style of revolutionary decrees, these articles formally declared freedom of conscience, affirmed the separation of the church and school (i.e. actual secularisation), and aimed to introduce free and universal public education.

This “spiritual enlightenment of the masses”³⁸ was deemed necessary because the Bolshevik regime sought to “free all learning from the control of capital”³⁹ and

31 Wilson, 1928, p. 32.

32 Bukharin and Preobrazhensky, 1922, p. 256.

33 Ibid., p. 246.

34 Ignatiev, 1933, pp. 662–663.

35 Bukharin and Preobrazhensky, 1922, p. 388.

36 Ibid., p. 389.

37 *Constitution of the Russian Socialist Federative Soviet Republic*, 1918.

38 Bukharin, 1919.

39 Ibid.

“destroy the monopoly of the wealthy in education”,⁴⁰ thereby eliminating the indoc-trination maintained by the “bourgeois” school system. This aligned with the goal of introducing compulsory education – a measure the Tsarist authorities had also planned to implement after the war.⁴¹ Thus, the Bolsheviks’ introduction of compulsory education was essentially infused with new ideological meaning, becoming one of the objectives of broader educational reform.

Similarly, on 1 October 1918, control over all formerly church-owned schools was transferred to the People’s Commissar for Education (at the time, Anatoly Vasilyevich Lunacharsky, a cultural policymaker), and they were reclassified as “unified labour schools”.⁴² Notably, the decree on unified labour schools issued on 16 October forbade compulsory homework and abolished entrance, advancement, and final examinations.⁴³ These provisions reflect the utopian branch of early Soviet legislation, which – predicting the eventual withering away of the state and legal system – sought to abolish the authority-based traditions of the class society as defined by the ideology.⁴⁴

After the Soviets took over the school system – but likely also due to the aftermath of the war – the percentage of children attending any form of education began to decline rapidly. While 91% of children received schooling in 1914, the rate dropped to 62% in 1918, 49% in 1919, and 24.9% in 1920. Consequently, between 1914 and 1920, the rate of illiteracy in the general population rose from 44% to 65%.⁴⁵

In response, the Council of People’s Commissars issued the Decree on the Elimination of Illiteracy (*likvidatsiya bezgramotnosti*) on 26 December 1919. Under the name *libkez*, literacy education was made mandatory for all illiterate individuals aged 8–50 years, requiring them to attend institutions specifically established for literacy training and ideological education. Article 121 of the 1936 Stalin Constitution – while maintaining the separation of the church and state – stipulated compulsory elementary education, now within a system already declaring the attainment of socialism.⁴⁶

The Soviet practice of dismantling church-run educational institutions shows that the Bolshevik leadership’s primary motivation was not the secularisation of the educational system (a secondary objective), but rather the elimination of a competing

40 Ibid.

41 Ignatiev, 1933, p. 663.

42 Ibid., p. 664.

43 *Decree on the Unified Labor School of the Russian Socialist Federated Soviet Republic*, 1918.

44 For a summary on the early tendencies of the Soviet legislation, especially its utopistic branch, see Gorlizki, 2018, pp. 1097–1100. With the 1931 education reform, Stalin partially returned to traditional educational models and reintroduced the examination system. Scanlon et al., no date.

45 Ignatiev, 1933, p. 665.

46 *Constitution of the Union of Soviet Socialist Republics. With Amendments and Additions adopted by the First, Second, Third, Sixth, Seventh and Eighth Sessions of the Supreme Soviet of the U.S.S.R.*, 1936.

worldview and the institutions that represented it. The exclusivist communist ideology could not tolerate the existence of alternative systems of belief, even partially compatible ones.

Dimitri Klepinin – an Orthodox priest and university lecturer later canonised for saving Jews – argued that

‘[i]n its war against religion Communism rests on a dogmatic materialistic belief—which is essentially religious. In this consists its paradox; Communism is the genuine religion of a militant materialism, which aims to create a new society, to explain all material phenomena, and to give a new direction to life. Therefore in its conflict with religion, it is fanatical and wishes to usurp the place in human life which always has been and always will be occupied by religion. Its hatred of religion is boundless.’⁴⁷

According to Paul Froese, communist ideology effectively assumed the role of a religion during the general secularisation of society:

‘By the late 1920s, the Soviet regime established the Standing Commission on Religious Questions to study and oversee religious activities, the League of Militant Atheists to spread the message that religion was scientifically falsifiable, and a number of atheist universities to educate a new generation of antireligious intellectuals. In hopes of undermining religion, the Soviet regime made itself into a kind of antichurch, with atheist schools and meetinghouses, antireligious proselytizers, and a clearly defined atheist moral worldview called ‘scientific atheism’.⁴⁸

A striking example of this anti-clericalism and hostility towards the church is Lenin's secret 1922 letter to the Politburo, the head of the political police, the People's Commissariat for Justice, and revolutionary tribunals. In February of that year, citing a famine in the Soviet Union, the Central Committee issued a decree on the confiscation of church valuables. This allowed local authorities to seize liturgical gold and silver objects previously exempt from confiscation under the earlier decree. Naturally, this triggered significant resistance from the clergy and believers alike. In his secret March letter regarding this situation, Lenin stated bluntly: ‘[t]he more priests we manage to shoot on this occasion, the better. Now is the time to teach this scum a lesson so that for decades to come they won't even think of any resistance’.⁴⁹

47 Klepinin, 1933, p. 627.

48 Froese, 2008, p. 5.

49 Horváth, 2024, p. 444.

4.

Nationalisation of Church-run Educational Institutions in Czechoslovakia, Hungary, and Romania

As we have seen, the Marxist ideology does not explicitly list the necessity of nationalising church-run educational institutions. Consequently, during the wave of school nationalisations in East-Central Europe, the Soviet model can be identified as the dominant pattern. In what follows, we present the process of dismantling church educational systems in the three states under examination, with special attention paid to the timing of nationalisation, which also raised constitutional issues.

4.1. *Timing – Constitutional Issues*

The question of *when* church-run educational institutions were nationalised is of key importance, as it clearly reveals that the process under examination followed a master plan directed by Soviet central authority. Although in the Soviet Union, decrees concerning the transformation of the economic and educational system were also adopted with revolutionary speed under the banner of the communist social experiment, in the absence of a precedent, these legal steps can also be understood as the organic outcome of revolutionary and civil war developments. By contrast, the states that came under Soviet influence after World War II tried to compress into a few years all the changes that the Soviet Union had undergone in previous decades. This explains why 100 years after the publication of the *Communist Manifesto* and 30 years after the nationalisation of educational institutions in the Soviet Union, this violent form of secularisation was also implemented in European satellite states.

From the perspective of the school calendar, in all three countries, the laws nationalising private educational institutions were adopted close to or coinciding with the summer break. Consequently, the regulations could come into full effect by the beginning of the 1948–1949 academic year – after the issuance and implementation of the executive norms, which were timed for the summer holidays. This is particularly evident in the case of Hungary, where the number of church-run schools was significantly higher than that in the other two countries. In Hungary, Government Decree No. 6280/1948⁵⁰ designated 10 June as the last school day of the 1947–1948 academic year, regardless of the number of teaching days already completed. Exams and closing ceremonies had to be conducted by 15 June 1948.

50 Government Decree No. 6280/1948: On the conclusion of the 1947/48 school year and the determination of the enrolment period for the 1948/49 school year. It was published in issue No. 125 of the *Magyar Közlöny* (Hungarian Gazette) on 5 June 1948.

From a legal standpoint, the timing primarily raises constitutional issues. The transformation of social life through ideologically motivated legislation – while maintaining the appearance of formal legality – could only be carried out within a new constitutional system. Therefore, in most states that fell under Soviet influence, a new constitution was adopted shortly after communist takeover. As a rule, the first laws related to nationalisation – broadly understood, not only concerning so-called means of production but also the dismantling of church education – were enacted following the entry into force of these new constitutions designed to reshape society along the lines of communist ideology.

Hungary represents an exception to this rule, as it operated under an unwritten constitution before the adoption of a Soviet-style constitution.⁵¹ In the view of communist party leadership, which regarded the adoption of a new constitution – considered a necessary step in Romania and Czechoslovakia – as an unnecessary obstacle, the absence of a formal (written) constitution simply made it easier to reshape law and economy along ideological lines. Perhaps this exception also explains why, while the Soviet-style constitutions adopted at the beginning of the dictatorships in Czechoslovakia and Romania were later replaced,⁵² Hungary's Constitution adopted slightly later – albeit amended several times – remained in force throughout the existence of the totalitarian state.

Table 1. Timing of laws on the nationalisation of private educational institutions and Soviet-style constitutions in Czechoslovakia, Hungary, and Romania (source: compiled by the author)

	Date of adoption, publication, and entry into force of the law on the nationalisation of private educational institutions	Date of adoption and entry into force of the first two Soviet-style constitutions
ČSR	Zákon č. 95/1948 Sb. o základní úpravě jednotného školství (adoption: 21.04.1948; publication: 10.05.1948; entry into force: 01.09.1948)	First Constitution (adoption: 14.04.1948; entry into force: 09.05.1948) Second Constitution (entry into force: 11.07.1960)
HU	1948. évi XXXIII. törvénycikk a nem állami iskolák fenntartásának az állam által való átvétele, az azokkal összefüggő vagyontárgyak állami tulajdonbavétele és személyzetének állami szolgálatba való átvétele tárgyában (adoption, publication, and entry into force: 16.06.1948)	First and last Constitution (adoption: 18.08.1949; entry into force: 20.08.1949)
RO	Decretul nr. 175/1948 pentru reforma învățământului and Decretul nr. 176/1948 pentru trecerea în proprietatea Statului a bunurilor bisericilor congregațiilor, comunităților sau particularilor, ce au servit pentru funcționarea și întreținerea instituțiilor de învățământ general, tehnic sau profesional (adoption, publication, and entry into force: 03.08.1948)	First Constitution (adoption and entry into force: 13.04.1948) Second Constitution (entry into force: 27.09.1952)

51 For the adoption process of the 1949 Constitution, see Horváth, 2024, pp. 84–86.

52 For the analysis of the 1948 Romanian Constitution, see Fazakas, 2024, pp. 121–126.

Despite the formal declaration of freedom of conscience, all three constitutions adopted in the late 1940s contained provisions concerning the role of religion or the church in public life. Article 54(2) of Hungary's 1949 Constitution copies the solution enshrined in the Soviet Union's 1936 Constitution: '[i]n order to ensure freedom of conscience, the Hungarian People's Republic separates church from state'. Article 13(1) of Czechoslovakia's 9 May Constitution declares that all schools are state-maintained. These provisions, which indirectly rendered church education impossible, contrast with Article 27 of Romania's 1948 Constitution, which already includes an explicit ban: '[n]o denomination, congregation or religious community may establish or maintain general educational institutions, only special schools intended for the training of clergy, which shall operate under state control'.

Further articles of the transitional constitutions of Czechoslovakia and Romania also contained provisions on nationalisation of various means of production in accordance with Marxist theory. Alongside the previously existing category of private property, all three constitutions introduced other forms of ownership – not limited to public property – that reflected these ideological transformations.

4.2. Process of the Nationalisation of Educational Institutions in Czechoslovakia

In Czechoslovakia, a unique situation existed in that the transfer of church-run educational institutions into state ownership largely occurred before the school nationalisations that followed the communist takeover. To understand this phenomenon, it is necessary to closely examine the changes that occurred in the territories of present-day Slovakia and the Czech Republic after World War I.

4.2.1. The nationalisation in the Slovakian part

After the Great War, in the Slovak part of the newly formed Czechoslovak state, the church-based educational system was predominant, following the educational model of the Kingdom of Hungary – though the presence of state schools was not entirely excluded. According to certain data, between 1917 and 1918, 74.5% of schools in Slovakia were under church administration.⁵³ This also explains why, unlike the example of Romania, the newly established Czechoslovak state authority after the war began the Slovakisation of church schools. Some Catholic schools were already taken over by state administration at this time, but after the strengthening of the Slovak

53 Kudláčová, 2015, p. 319.

element in the Catholic Church, most of these schools were returned.⁵⁴ Following these initial upheavals, under the effect of the Act XXX of 1883 – an inheritance from the Kingdom of Hungary – new church schools could also be founded. However, this process received less support from the Czech political elite, who were more inclined towards secularisation.

The situation changed radically after the Munich Agreement and the first dissolution of Czechoslovakia. Under the clerico-fascist regime governing the now solely Slovak state, the role of the Roman Catholic Church in education increased substantially, and understandably so.⁵⁵ In response, as a kind of counter-reaction, the Slovak National Council issued Decree No. 5 of 1944 on 29 August during the Slovak National Uprising,⁵⁶ concerning the nationalisation of education in Slovakia. The decree, adopted on 6 September and entering into force the same day, stated in its fourth concise article that '[a]ll schools of every category and level, from daycare centres and kindergartens up to universities, shall be nationalized in Slovakia from the effective date of this decree'.

What is interesting about the decree is its ulterior effect after the occupation of the country by the Soviet forces. Although the uprising was definitively crushed on 28 October by the collaborationist Slovak forces and German troops stationed in Slovakia, after World War II, the re-established Czechoslovak authorities in Slovakia still considered the decree to be in force. In April 1945 – after adopting the Košice government program that stipulated closer ties with the Soviet Union – despite vehement protests by Catholic bishops, the decree began to be applied in an *ad hoc* manner, taking control of certain denominational schools and their entire movable and immovable property.⁵⁷ To maintain the appearance of legal continuity, the legal act was confirmed by the Slovak National Council's Decree No. 34 of 1945 on 16 May. Subsequent legal acts concerned the nationalisation of church-run dormitories, orphanages, and other charitable social institutions.⁵⁸ Regarding the religious communities of the Hungarians remaining in Slovakia, who were deemed collectively guilty alongside the German-speaking population, the state confiscated all their property – including their schools – and, despite protests, generally prevented these assets from returning to the Slovak churches.⁵⁹

54 Johnson, 1985, pp. 318–319.

55 Felak, 2009, p. 16.

56 The Slovak National Uprising, which broke out in 1944, was an armed resistance against the Nazi occupation and the collaborationist Slovak puppet government, aimed at liberating Slovakia and restoring democratic order.

57 Felak, 2009, p. 10.

58 Ibid., p. 17.

59 Ibid., p. 21.

4.2.2. *The nationalisation in the Czech part*

Regarding the Czech part of the country, between the two world wars, the number of church-maintained educational institutions was fundamentally much lower than that in Slovakia.⁶⁰ After World War I, the Catholic Church, supported by the Habsburgs, lost much of its social popularity. Instead, the newly formed Czech Hussite Church became the unofficial state church.⁶¹

As for the period after World War II but before the full communist takeover, the education minister from the communist party, Zdeněk Nejedlý, prepared legislation on the nationalisation of schools based on the Slovak example. However, his proposal was not discussed at the government meeting scheduled for October 1945, as it was postponed due to protests by the Catholic Church.⁶² This granted the denominational schools in the Czech part of the country a three-year grace period compared with their Slovak counterparts.

On the level of anti-church measures, the land reform laws amended in March 1948 affected the properties of the Catholic Church throughout Czechoslovakia. These laws stipulated the state acquisition of certain Catholic Church properties, including patronages – income-generating estates used to finance the churches' religious and social activities. Thus, the basis for the existence and financing of church educational institutions was effectively undermined. Nevertheless, at the beginning of 1948, the Catholic Church still operated six grammar schools, five secondary technical schools, and over 100 elementary schools in the Czech part, totalling approximately 2,497 students.⁶³ Other sources indicate that at the start of 1948, there were as many as 134 schools maintained by the Roman Catholic Church in Bohemia.⁶⁴

Following the communist coup in February 1948, under these circumstances, the already-mentioned legislation mandating the complete liquidation of church education was adopted. While the dismantling of the private education system, prescribed in the transitional provisions of the reform law on establishing a unified state education system, somewhat resembled the Romanian counterpart, the Czechoslovak legislation differed significantly in one aspect from the Romanian and Hungarian nationalisations. Whereas the latter explicitly mandated the nationalisation of church schools, the Czechoslovak regulation did so only implicitly – likely because relatively few schools remained under church control, and these were located only in the Czech part of the country.

60 Anderson, 2013, p. 13.

61 Havlíček, Hupková and Reeves, 2015, p. 2185.

62 Chalupová, 2008, p. 34.

63 Jäger, 2009, p. 803.

64 Cigánek, 2009, p. 140.

Accordingly, Section 4 (1) of Act No. 95 of 1948 on the fundamental regulation of the unified school system prescribed that every school shall be state-operated. Connected to this provision known from the contemporary constitution were Sections 9 and 20, which assigned the authority to found and close kindergartens and schools to the provincial school authorities. The transitional provisions of the law contained the steps to be taken regarding private educational institutions previously operating outside state control, including church schools. Section 81 ordered that schools with “public education rights” previously not under state control fall under the scope of the act and thus be incorporated into the unified state education system. Section 82 was applicable to private schools, stating that ‘funds established for schools, especially those created under the National Schools Act of 1868 (Act XXXVIII), shall be dissolved, and their assets transferred to the proprietor who previously covered the school’s expenses’. Section 83 further stated that ‘the school authority shall be entitled to use movable and immovable property owned by the school’s former proprietor as of January 1, 1948, or used by the proprietor for other reasons, for the purposes of the reorganized school’, without any compensation to former owners. Section 84 dealt with the transfer of previous employees.

Interestingly, similar to the Hungarian legislation, the law did not apply to institutions involved in priestly training, allowing these schools to remain under church control. Section 92 declared that the ‘law shall not apply to higher education institutions, military schools, and theological institutes’.

The primary goal of the educational reform law was essentially to reshape education along communist ideological lines, which it sought to achieve by total nationalisation and centralised control. According to Section 2, the role of schools was to ‘educate nationally and politically conscious citizens who are loyal defenders of the people’s democratic state, courageous patriots, and devoted supporters of the working people and socialism’.

4.3. Process of Nationalisation of Educational Institutions in Hungary

Throughout the modern era in Hungary, the majority of educational institutions were primarily maintained by churches, which also fulfilled their educational functions in this form. The necessity of secularisation in education, supported by multiple reasons, was constantly present in Hungarian political thought after this process started on the western part of the continent. During the 1848 revolution⁶⁵ and the

65 Act XX of 1848 concerning religion declared that ‘[t]he ecclesiastical and educational needs of all recognized religious denominations shall be covered by public expenses’.

period of the Hungarian Soviet Republic,⁶⁶ several unsuccessful attempts were made in this regard.⁶⁷ The statist policies between the two world wars led to the adoption of a new education law⁶⁸ in 1935 that, by abolishing 'local government and church autonomies [...] represented the 'second nationalization' of schools [the first having occurred during the Soviet Republic] in the history of Hungarian education'.⁶⁹ Nevertheless, even in 1945 – uniquely in Europe at that time – churches still held ownership rights over the vast majority of educational institutions.

The churches largely financed their educational responsibilities from the assets of their own institutions. The post-World War II reforms⁷⁰ aimed at dismantling the real property relations akin to feudalism partially rendered the maintenance of the church institutional system unfeasible.⁷¹ Consequently, local administrative units and various enterprises increasingly took part in maintaining church educational institutions. Nevertheless, even after land redistribution, it was 'obvious that the Marxist transformation of educational goals could only be achieved against the majority of society through state power'.⁷²

Thanks to Hungarian historians, the nationalisation process of church schools is particularly well reconstructible.⁷³ The law on the nationalisation of private educational institutions was prepared like a genuine multi-actor script. The *Államvédelmi Hatóság* (State Protection Department) was ordered to perform house searches targeting church schools, which were followed by numerous show trials before courts for non-political offenses (the most notable among these was the case against the Catholic parish priest of Pócspert).⁷⁴ The press reported on these trials in detail as

66 The Revolutionary Governing Council's Decree No. XXIV on the nationalisation of educational and research institutions. Published on March 29, 1919. For the Soviet-model church policy of the proletarian dictatorship in Hungary, see László, 2004, pp. 107–124.

67 Kelemen, 2008, pp. 83, 86.

68 Act VI of 1935 on the Administration of Public Education. Promulgated on 12 June 1935. For the general state control mechanism introduced by this law, see Katona, 2016.

69 Kelemen, 2008, p. 87.

70 Act VI of 1945 on the Elevation to the Force of Law of the Government Decree on the Abolition of the Large Estate System and the Allocation of Land to the Peasantry. Promulgated on 16 September 1945.

71 Specifically, 456,000 hectares were taken from the Catholic Church without any compensation. Only approximately one-third of this area (mostly arable land) was redistributed. Thus, the Catholic Church was left with approximately 45,600 hectares. Of the Reformed Church's 58,140 hectares, approximately 34,000 hectares remained. The Lutheran Church was not affected by the land reform. Under considerable pressure, the churches relinquished the lands that remained under their ownership after the establishment of the Soviet-type dictatorship. Fedor, 2009, p. 45.

72 Pornói, 2019, p. 461.

73 See for example Rapali (no date); Horváth, 2024, pp. 455–457. For the reaction of the churches on the nationalisation of their assets, see Pornói, 2019, pp. 462–465. For an alternative viewpoint, see Balogh and Knausz, 1988, pp. 40–83.

74 Mindszenty, 1989, pp. 205–206; Horváth, 2024, p. 455.

part of an anti-church propaganda campaign. Meanwhile, the Political Committee of the Hungarian Communist Party passed a resolution instructing a delegation of teachers to approach the Prime Minister with complaints and request the nationalisation of church schools. Similarly, the National Assembly was instructed on when the nationalisation law bill should be submitted and debated.⁷⁵ All of these processes were followed on the 11th of June by Government Decree No. 6500/1948, which placed under seal the buildings and equipment of non-state kindergartens, schools, and the associated student homes.

Under these circumstances, the infamous Act XXXIII of 1948 on the State Takeover of the Maintenance of Non-State Schools, the Transfer of Assets Related Thereto Into State Ownership, and the Incorporation of Their Personnel Into State Service was adopted. The reasoning for the adoption of the law informs the reader that 'the state's right to hold the entire public education in its hands is a necessary consequence of economic and social development'.⁷⁶ Furthermore, it became clear that nationalisation was considered an indispensable step for several reasons. First, the churches could not maintain these institutions financially in their then-current situation; second, the education provided contradicted the requirements of modern schooling; and third, it was finally argued that 'the educational ideals of church schools are at odds with the democratic objectives of public schools'.⁷⁷

Quantitatively, before nationalisation, churches maintained 53% of educational institutions. Excluding kindergartens and higher education institutions, approximately 60% of schools were church-maintained.⁷⁸ According to data published by Professor Attila Horváth, this represented a total of 6,505 schools, of which 5,407 were primary and folk schools, 98 teacher training schools and lyceums, and 113 grammar schools. The denominational breakdown is provided in the following table.

75 Ibid.

76 Reasoning for the adoption of Act XXXIII of 1948 on the State takeover of the maintenance of non-state schools, the nationalisation of related assets, and the transfer of their personnel into state service, promulgated on 16 June 1948.

77 Ibid. The reasoning for the adoption of the act briefly addresses the law academies maintained by the churches until then, stating that the 'reasonable resolution of these institutions, which have lost their significance and become outdated, had so far been hindered solely by their separate status'.

78 Fedor, 2009, p. 45.

Table 2. Denominational distribution of nationalised schools in Hungary (source: Mészáros, 2000, pp. 301–302 apud Horváth, 2024, p. 456.)

Church	Elementary school	Secondary school	Remaining institutions
Israelite	26	13	1 gymnasium
Lutheran	342	21	-
Calvinist	1184	46	1 gymnasium
Roman Catholic	2885	301	8 gymnasiums

As seen above, unlike Czechoslovakia (except for institutions excluding priest training) and Romania, the Hungarian law responsible for nationalisation did not entail the nationalisation of all church educational institutions. The state imposed agreements on Protestant and Israelite churches, thereby bringing them under state control.⁷⁹ This agreement with the Reformed Church was concluded even before the adoption of the nationalisation law, so ‘institutions such as the Sárospatak, Debrecen, Pápa colleges, the Budapest boys’ and girls’ grammar schools, and four law academies (which were later abolished by Government Decree No. 4105/1949 on June 26, 1949) were not nationalized at that time’.⁸⁰ Because the Catholic Church’s stance towards its schools was shaped by an apostolic letter issued by Pope Pius XI in 1929,⁸¹ the Catholic Church vehemently opposed nationalisation.⁸² Formally, no valid legal agreement was concluded with state authorities. Nevertheless, the Catholic episcopal conference was forced to accept an agreement – unrecognised by either party later but serving as a reference for the state – through which eight secondary schools were returned to the church.⁸³

Another difference compared with Czechoslovak and Romanian nationalisation laws was that this process in Hungary was not implemented as part of an educational reform law. Consequently, the Hungarian nationalisation law did not yet regulate the removal of compulsory religious and moral instruction.⁸⁴ The latter’s “optionalisation,” effectively its prohibition, only occurred with Presidential Council Decree No. 5 of 1949.⁸⁵

79 For more on these forced agreements, see Horváth, 2024, p. 457; Pornói, 2019, p. 463.

80 Ibid.

81 Pope Pius XI, 1929.

82 Pornói, 2019, p. 463.

83 Horváth, 2024, p. 460.

84 The submitters of the bill place special emphasis on this point in the reasoning for the adoption of the nationalisation act. Their sole aim is ‘to establish the unity of our public education’.

85 Decree No. 5 of 1949 with the force of law on religious education, published in the *Magyar Közlöny*, issues No. 182–184, on 6 September 1949.

The nationalisation law consisted of six sections. Section 1 declared that ‘the maintenance of non-state schools and related dormitories, as well as kindergartens—except educational institutions serving exclusively church purposes (theological colleges, deacon and deaconess training, etc.)—shall be taken over by the state’. Section 2 reclassified the teachers, instructors, and kindergarten teachers of these institutions as state employees, recognising their years of service. Section 3 assigned the buildings, furnishings, equipment, and other assets serving the schools’ or kindergartens’ maintenance (e.g. teacher-owned land or apartments explicitly mentioned) as cultural public property under state ownership. Section 4, as a transitional provision, allowed local governments or enterprises that partly bore the financial burdens of maintaining educational institutions before nationalisation to continue sharing these burdens thereafter. According to reasoning for the adoption of the act, this was necessary because

‘cities and large and small municipalities bear a significant portion of the material maintenance costs of state primary and folk schools and kindergartens. Continuing to bear these burdens, at least partially, is not only justified from the state budget perspective but also because these localities can maintain them more cheaply and satisfactorily with their own resources and knowledge of local conditions than the state’.

Section 5 declared that henceforth, schools or kindergartens could only be established and maintained by government decree.

The nationalisation law was followed by several executive acts issued by the government. Among these, the circular issued by the Minister of Social Welfare on 18 July 1948, numbered 119,490/1948,⁸⁶ was especially important, calling for data provision regarding the implementation of the nationalisation law. The circular addressed all city mayors, municipal chief clerks, and district clerks, requesting an inventory of various kindergartens from authorities.

Regarding the takeover of schools, three almost identical decrees from different ministers deserve mention. Issued in July, in order of issuance, these came

86 Circular No. 119.490/1948 N. M. of the Minister of Public Welfare. Data provision in connection with the implementation of Act XXXIII of 1948, published in the *Magyar Közlöny*, issue No. 161, on 18 July 1948.

from the Minister of Commerce and Cooperatives,⁸⁷ the Minister of Agriculture,⁸⁸ and the Minister of Industry.⁸⁹ These decrees set additional regulations concerning the nationalisation of private school categories supervised by these ministers (e.g. church agricultural or technical secondary schools and commercial vocational schools), detailing provisions of the nationalisation law. Although these decrees came into force on the day of their issuance, their provisions had to be applied retroactively to the moment the nationalisation law took effect, violating the legal prohibition on retroactive legislation.

For example, Section 3 of the decrees ordered that the buildings of schools be immediately marked with inscriptions and names indicating their state nature. From a legal-historical perspective, the provisions of Section 8 detailing how the ownership effects of nationalisation law should be understood are particularly interesting. According to the decrees, ownership of private schools *ipso iure* transferred to the state at the moment the law came into effect – coinciding with its publication – without the need for any further formal requirements. This justified the state's use of "taken over" properties even before their registration in the land registry. These provisions – while maintaining a semblance of legal continuity – aimed to conceal that such a procedure would have been unlawful before the establishment of the Soviet-type dictatorship.

Similarly interesting are the provisions of Section 9 of the decrees, which govern the fate of nationalised movable property. According to the list,

'the school's or dormitory's furnishings, i.e., furniture, heating, bathing, washing, cooking, and laundry equipment, water, lighting, and transportation devices installed or movable within the school, dormitory, practice fields, workshops, kitchens, school youth association, school sports grounds, or sports facilities, become state property. The equipment subject to state ownership includes all living and inanimate equipment serving the purposes of education, teaching, theoretical and practical training,

87 Decree No. 32.200/1948 K. Sz. M. of the Minister of Trade and Cooperatives on the implementation of Act XXXIII of 1948 concerning the state takeover of non-state schools, the state appropriation of assets related to them, and the transfer of their staff into state service, published in the *Magyar Közlöny*, issue No. 148, on 3 July 1948.

88 Decree No. 70.400/1948 F. M. of the Minister of Agriculture on the implementation of Act XXXIII of 1948 concerning the state takeover of non-state schools, the state appropriation of assets related to them, and the transfer of their staff into state service, specifically regarding schools under the supervision of the Minister of Agriculture, published in the *Magyar Közlöny*, issue No. 156, on 13 July 1948.

89 Decree No. 11.500/1948 Ip. M. of the Minister of Industry on the implementation of Act XXXIII of 1948 concerning the state takeover of non-state schools, the state appropriation of assets related to them, and the transfer of their staff into state service, published in the *Magyar Közlöny*, issue No. 159, on 16 July 1948.

and school administration, as well as those ensuring the operation of the dormitory's common economy (e.g., visual aids, storeroom equipment, teachers' and youth libraries, dormitory linens, cooking utensils, etc.).'

However, the decree also stipulates that

'[s]acred images, statues, or other memorial objects serving commemorative purposes, religious statues, pictures depicting the life of the founder or members of the teaching order, and the exclusively religious part of the library do not belong to school or dormitory equipment. The school main-tainer is entitled to take these away. Also excluded from school and dormi-tory equipment are items placed not for teaching or educational purposes but because it was deemed practical or because no other location was available (private property of staff and students, furnishings of church-purpose rooms, collections or libraries not serving school purposes, etc.).'

Approximately two years after the takeover of the church schools and kindergartens, the operation of all monastic orders – except for a few teaching orders – was banned.⁹⁰ Interestingly, Romania moved in the opposite direction, outlawing teaching orders instead.

4.4. Process of Nationalisation of Educational Institutions in Romania

4.4.1. The history of the church maintained educational system before World War II

Prior to World War I, education in the territory of the Romanian Kingdom operated according to a fundamentally different model than in the regions later annexed from the Kingdom of Hungary. The creation of a unified, state-maintained school system – alongside other formal reforms of foreign inspiration, ill-suited to the contemporary Romanian realities – began under the reign of Alexandru Ioan Cuza. The first education law, adopted in 1864,⁹¹ stipulated not only the establishment of compulsory and

90 Decree-Law No. 34 of 1950, promulgated on September 7, 1950. Interestingly, following the nationalisation of the church-maintained educational system, the regime sought to retain the monastic teaching staff as well; however, József Mindszenty, then the prince-primate of Hungary, opposed this transfer, and consequently it could not be carried out, as the monks followed his directive. Mindszenty, 1989, p. 207.

91 Law No. 1150/1864 on Education in the United Principalities of Romania, published in the *Gazeta Oficială* (Official Gazette) issued on 25 November 1864.

free elementary public education but also its complete secularisation.⁹² Prior to World War I, education continued along this secular model, further shaped by subsequent reforms associated with the name of Spiru Haret. Consequently, private educational institutions primarily consisted of schools established by the Jewish community and seminaries operated by the Orthodox Church.

This situation changed radically following World War I. In the field of education, Romania inherited a predominantly church-run school network from the Kingdom of Hungary. Schools maintained by the Orthodox and Greek Catholic Churches – that is, those affiliated with the Romanian denominations of Transylvania – were largely integrated into the state school system in the interwar period, with the exception of institutions dedicated to clergy training.⁹³ By contrast, educational institutions associated with the four historical churches – mainly using Hungarian and German languages – sought to retain their independence. However, this effort was severely impeded by the 1921 Transylvanian land reform,⁹⁴ perceived as a form of “national revenge”,⁹⁵ which confiscated a substantial part of the property serving the charitable and educational work of minority churches.⁹⁶

The unified regulation of the three distinct public education systems inherited from predecessor states, along with primary education in the Old Kingdom, was achieved in 1924.⁹⁷ In parallel, the integration of institutions not absorbed into the state system was to be ensured by the 1925 Private Education Act.⁹⁸ The Hungarian community in Transylvania at the time strongly opposed this law,⁹⁹ as it not only

92 Mize sociale, tradiții și inovații în legislația învățământului românesc (studiu introductiv), 2004, p. 9.

93 Sárándi, 2023, p. 241. This takeover of the Romanian-language church schools was seen as a mistake after the Second Vienna Award ceded back Northern Transylvania to Hungary, because, as state schools, they were then transferred to the Hungarian state. Consequently, the Romanian government issued a decree stating that the earlier takeover referred only to the institutions, while the immovable properties remained in church hands. However, this decree had no effect, as it was issued after the Vienna Award. Ibid., pp. 241–242.

94 Law No. 3610/1921 on Agrarian Reform in Transylvania, Banat, Crișana, and Maramureș, published in the *Gazeta Oficială* (Official Gazette) No. 93, issued on 30 July 1921.

95 Fazakas, 2023, p. 17.

96 For details, see Mikó, 1941, pp. 28–38; Fazakas, 2023, pp. 11–17.

97 Law on State Primary Education (infant schools, primary schools, schools and courses for adults, and special schools and classes for educable mentally disabled and abnormal children) and Normal-Primary Teacher Training, published in the *Gazeta Oficială* (Official Gazette) No. 161, issued on 26 July 1924.

98 Law on Private Education, published in the *Gazeta Oficială* (Official Gazette) No. 283, issued on 22 December 1925.

99 For details on the adoption of the law, see Mikó, 1941, pp. 51–52. Before its adoption, Arthur Balogh, a minority rights lawyer, submitted a petition to the League of Nations, while Gusztáv Károly Majláth, the Catholic bishop, ordered that ‘prayers be held in all Roman Catholic churches in Transylvania, asking God to avert the danger posed to the Church by the private education law’. Ibid., p. 52.

‘downgraded the ancient denominational schools of Transylvania to the status of private institutions’¹⁰⁰ but also included numerous provisions that contravened the minority treaty Romania had signed in exchange for territorial gains following the war.¹⁰¹

4.4.2. *The nationalisation decrees*

These developments were significant, as the nationalisation of private educational institutions – including church schools – after World War II was carried out uniformly. The transfer of educational institutions was ordered by two decrees issued in quick succession by the Presidium of the Grand National Assembly. The first, an education reform decree¹⁰² reminiscent of the Czechoslovak model, declared in Article 35 that all denominational and private educational institutions were to be converted into state schools without exception. Article 36 regulated the transfer of teaching personnel. The newly codified criminal offense of obstructing the nationalisation process was punishable by full confiscation of property and 5–10 years of forced labour.

The second decree¹⁰³ – concerning the transfer to state ownership of assets used for the operation and maintenance of general, technical, or vocational education institutions owned by churches, congregations, communities, or private individuals – implemented and detailed the nationalisation provisions of the preceding act. Two noteworthy aspects may be observed in this regard. First, this second, executive-level regulation held the same normative rank as the general educational reform law. Second, following a general provision defining the concept of designated property, the decree listed by name the educational institutions to be nationalised. In what follows, both the general and specific provisions of the decree are analysed.

100 Ibid.

101 Fazakas, 2021, pp. 340–341.

102 Decree No. 175/1948 on Education Reform, published in the *Monitorul Oficial* (Official Gazette) No. 177 on 3 August 1948. The decree essentially dealt with the nationalisation of education: uniform textbooks were introduced, and the teaching of the Russian language was made mandatory. Article 25 of the regulation clearly shows a strong Soviet influence: similar to the Soviet decree discussed above, it included provisions on the “elimination of illiteracy”, ordering the alphabetisation of the adult population under the age of 55 years. The likely reason for closely copying the Soviet law was that illiteracy was also widespread in contemporary Romania compared with its western neighbours. According to the 1948 census data, the illiteracy rate among the population over 10 years old was 23.1%.

103 Decree No. 176/1948 on the Transfer to State Ownership of the Properties of Churches, Congregations, Communities, or Individuals that Served for the Operation and Maintenance of General, Technical, or Vocational Educational Institutions, published in the *Monitorul Oficial* (Official Gazette) No. 177 on 3 August 1948.

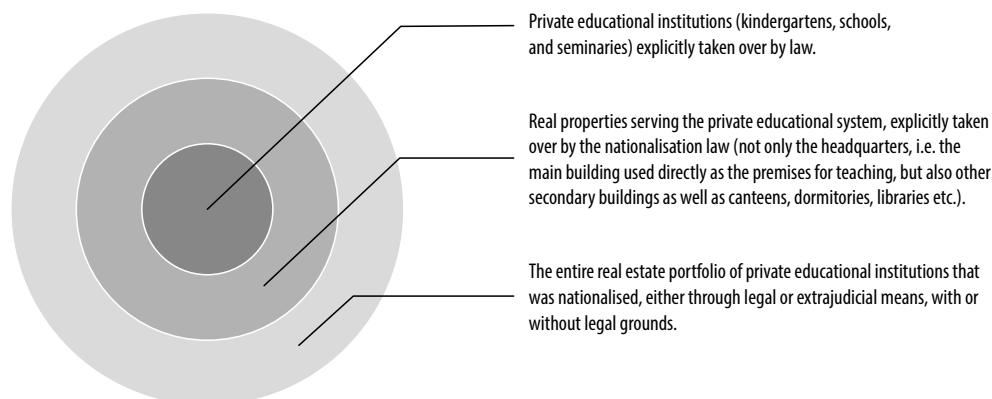
Regarding the general section of the nationalising legislation, it consisted of four articles. Article 1 ordered the nationalisation of all movable and immovable property belonging to private educational institutions ‘for the proper organization and functioning of public education, as well as the expansion and democratization of education’. This provision, in conjunction with Article 2, effectively defined designated property as all movable or immovable assets – whether wholly or partially owned – acquired for the operation, maintenance, or support of schools, boarding houses, colleges, or canteens, or otherwise serving such purposes. Article 3 contained a promise that ‘assets used exclusively for religious ceremonies will be returned to the respective denomination’. Article 4 dissolved all associations responsible for the organisation and operation of private educational institutions and ordered the transfer of their assets.

Regarding the enumerative provisions of the decree listing the real estate of educational institutions, it is worth noting that no consistent methodology was applied throughout the list. Although the properties of nationalised private educational institutions were listed by county, the level of detail varied: some counties included only schools, while others included kindergartens as well, sometimes specifying addresses, sometimes not. In several administrative units, kindergartens were not mentioned at all. Only Bucharest and the county of Trei Scaune (in Hungarian *Háromszék*) recorded 24 kindergartens. In some – mostly Transylvanian – counties, additional properties associated with the schools were also listed. The compiler of the list displayed carelessness regarding the correct transcription of foreign-language school names and street names, as well as the consistent designation of the denominations to which the nationalised institutions had belonged. In some cases, the list also included boarding houses (*internat*), dormitories (*cămin*), teachers’ residences (*imobil pentru corpul didactic*), instructors’ homes (*casa învățătorilor*), canteens (*cantină*), inns (*local*), restaurants (*restaurant*), orphanages (*orfelinat*), and typing institutes (*institut dactilografic*). Nonetheless, the legislation was consistent in one respect: after the name of each private educational institution, it included the standard phrase ordering the nationalisation of the institution’s full property (“*cu întreaga avere, conform inventarului jurnal*”).

The decree explicitly nationalised more than 1,535 educational institutions – including schools (*școală, liceu, gimnasiu, colegiu*), kindergartens (*grădiniță*), and seminaries (*seminariu, academie teologică*). However, the total number of nationalised properties was significantly higher. In addition to the aforementioned non-educational institutions listed as separate items, a large number of auxiliary buildings supporting the operation of the schools were also included – some named explicitly, others not, depending on the county.

The Classroom under State Command

Figure 1. Logical distribution and relationships of properties serving nationalised private education in connection with named institutions (source: author's classification based on Decree No. 176/1948 of the Presidium of the Grand National Assembly)



The 1,535 educational institutions listed have been summarised in the following two tables, based on their identifiable former owners and regional distribution.

Table 3. Distribution of explicitly nationalised private educational institutions by Romanian region and population (source: author's calculation based on Decree No. 176/1948 of the Presidium of the Grand National Assembly)

	Number of counties at the time of nationalisation	Number of nationalised educational institutions	Population (according to the census of 25 January 1948)
Bucharest	-	89	1.025.180
Wallachia (excluding Bucharest) and Dobruja	19	79	6.106.615
Moldavia	15	66	3.005.814
Transylvania, Partium, and Banat	24	1.301	5.735.015
Total	58 (not taking Bucharest into consideration)	1.535	15.872.624

Table 4. Number of nationalised private educational institutions by identifiable former owner (source: author's calculation based on Decree No. 176/1948 of the Presidium of the Grand National Assembly)¹⁰⁴

Identifiable owner of the educational institution (denomination/diocese and their foundations)	Number of nationalised educational institutions
Orthodox Church	≈30
Greek Catholic Church ¹⁰⁵	34
Calvinist Church	380
Roman Catholic Church	266
Unitarian Church	6
Lutheran Church	208
Jewish Community	110
Muslim Community	3
Owner not specified by the legal norm	≈498

¹⁰⁴ Referring exclusively to traditionally Hungarian denominations (Calvinists, Unitarians, Roman Catholics in Transylvania, as well as some Lutherans), we are familiar with two partly different statistics. First, according to the August issue of the *Romániai Magyar Szó* daily newspaper and the regional newspaper *Szabad Szó*, based on the statistics of the 1947 school year, a total of 849 Hungarian-language church educational institutions (kindergartens and schools) were nationalised. Beszédes számok az államosított felekezeti iskolákkal kapcsolatban, 1948. Kulcsár, 1948. Second, according to Gábor Vincze's calculation, '[a] total of 468 educational institutions of the three Roman Catholic dioceses; 531 of the two Reformed church districts; 34 of the Unitarian church; and 8 of the Hungarian Evangelical church were nationalized'. Vincze, 1999, p. 196. So, in total, the author talks about 1041 nationalised educational institutions. This number corresponds to the one mentioned in a 1943 report, regarding such educational institutions in the beginning of the school year of 1944–1945. Barabás, 1943, pp. 271–286, 351–363 apud Tismăneanu, 2007, p. 523. Although it is not clear to the author of the present article on what basis Vincze Gábor founded his calculations, it is quite conceivable that the total number of nationalised educational institutions was indeed significantly higher than the numbers presented in the table above. Considering that nationalisation cannot be regarded as a thoroughly lawful process, the takeover of institutions potentially omitted from the list could have taken place without any formal legal basis whatsoever.

¹⁰⁵ The Greek Catholic Church was dissolved in the very same year that the schools were nationalised – exactly 30 years after the Romanian Great National Assembly in Alba Iulia, during which priests of this church played such an important role – by a decree from the Minister of Education. Its remnants were forcibly merged into the Romanian Orthodox Church. Decree No. 358/1948 on establishing the legal status of the former Greek Catholic denomination was published in the *Monitorul Oficial* (Official Gazette) No. 281, on 2 December 1948. The process followed an earlier Soviet model. In 1946, Nikita Khrushchev, then Prime Minister of the Ukrainian Soviet Socialist Republic, banned the Ukrainian Greek Catholic Church on Stalin's orders. In 1950, the liquidation of the Uniate Church was carried out in Slovakia. Mindszenty, 1989, p. 217.

As can be seen, the overwhelming majority (approximately 85%) of the nationalised educational institutions were located in the territories gained after World War I – primarily from Hungary. It is also apparent that the dismantling of the educational systems maintained by them most severely affected the minority churches.

4.4.3. The minority language education before and after the nationalisation of the church maintained educational system

Given that religious and ethnic identity in Romania largely overlapped, it can be concluded that the greatest losers of the nationalisation process were the country's ethnic minorities. This is illustrated by the fact that, of the approximately 266 schools belonging to the Roman Catholic Church listed in the nationalisation decree, only 15 were located east of the Carpathians.

The overrepresentation of minority properties can be explained by the fact that in the interwar period, education in minority languages was exclusively entrusted to the churches, the only institutions possessing a degree of relative autonomy.¹⁰⁶ This mirrored pre-World War I practice in Transylvania, with the difference that after the war, the Romanian state assumed responsibility for maintaining Orthodox and Greek Catholic denominational schools. Thus, approximately 2,786 originally Orthodox and Greek Catholic schools became state institutions.¹⁰⁷ During this period, a significant portion of minority pupils were compelled to attend Romanian-language schools. By the mid-1930s, '26% of children belonging to the Hungarian minority received education in church-run schools in Hungarian, only 5.4% attended state schools with Hungarian-language sections, while 42% studied in Romanian schools'.¹⁰⁸

In the four years following the Second Vienna Award, which effectively divided Transylvania between Romania and Hungary, the contentious issue of schooling was raised again. Relations between the two states functioned on a system of reciprocity,

106 Regarding the state and communal school network, after World War I, it transformed from a tool of Magyarisation policy into an instrument of violent assimilation efforts in Romania. Although the minority treaty theoretically guaranteed education in the minority language at a certain percentage – based on the number of school-age children belonging to the minority – this provision became illusory. The number of state-maintained schools teaching in minority languages declined annually. Vincze, 1999, p. 187. While 'the Ministry of Public Education's 1933 report listed 427 Hungarian state schools and departments out of 4,295 schools', 'by the end of the 1936/37 school year, only 17 state elementary schools with Hungarian as the language of instruction and 27 state schools with Hungarian departments remained, a total of 44 schools where Hungarian-speaking school-age children were taught'. Mikó, 1941, pp. 162–163.

107 Ibid., p. 161.

108 Fazakas, 2021, p. 341.

which in practice meant mutual retributions. Romanian-language state schools in the territory ceded back to Hungary continued to operate, with Romanian as the language of instruction. However, this was hampered by the shortage of remaining Romanian teaching staff.¹⁰⁹ As for the mostly Hungarian and German church schools, they were left in the hands of the churches. The establishment of new church schools in Northern Transylvania was hindered by the Hungarian government's intransigent stance on this issue, despite the continuous wishes of the Romanian churches and even some Hungarian intellectuals. In Southern Transylvania, which remained under Romanian control, government representatives attempted to pressure the Hungarian side by threatening to close the remaining Hungarian-language church schools.¹¹⁰

After the conclusion of World War II, the Paris Peace Treaty of 1947 ceded northern Transylvania back to Romania, which meant a return to the interwar dual national-ecclesiastical school system. For example, 'in the 1947/48 academic year, 45% of students in all Hungarian-language elementary schools, 75% in upper secondary schools, and 56% in teacher training colleges were enrolled in institutions owned by churches or religious orders'.¹¹¹ By the spring of 1948, the attitude of the historical Hungarian churches in Transylvania towards the impending nationalisation of schools closely mirrored the reactions of their Hungarian counterparts. While the Roman Catholic Church actively opposed the plans, the Protestant churches reluctantly acknowledged the state's right to take over educational institutions. The Reformed Church leadership hoped that by adopting a "more loyal attitude", it could retain control over five prominent colleges of its choice – similar to the arrangement implemented in Hungary just a month prior.¹¹² However, this hope was entirely dashed following the enactment of the nationalisation decrees.

At the same time, nationalisation did not necessarily entail the abolition of minority-language education. As a result of the "Leninist-Stalinist nationalities policy" that characterised the first decade of Romania's Soviet-style dictatorship, the number of Hungarian-language elementary schools began to increase. In parallel, however, the number of Hungarian-language secondary schools declined significantly.¹¹³

109 Sárándi, 2023, pp. 71–72.

110 Ibid., pp. 241–245.

111 Vincze, 1999, p. 196.

112 Ibid., p. 310.

113 Ibid., p. 200.

Regarding theological training, the Cults Law,¹¹⁴ issued on 4 August 1948 – immediately after the nationalisation of educational institutions – mandated that each recognised denomination establish one seminary. Consequently, this form of education also took place in state-provided facilities. These were, in most cases, the remnants of buildings previously used for clerical education. For theological instruction serving both the Roman Catholic and the Hungarian Protestant Churches, only one single building was allocated.¹¹⁵

One year after the nationalisation of educational institutions of the different churches, the Council of Ministers issued Decision No. 810 of 29 July 1949,¹¹⁶ prohibiting the operation of Roman Catholic monastic orders that had previously engaged in teaching activities, effectively dissolving 15 out of the 25 so far extant orders in Romania.¹¹⁷

5. Concluding Thoughts

Nationalisation is a *par excellence* 20th-century legal institute, which can also be perceived as a real social engineering tool in the Poundian sense. In the Soviet practice that emerged during and after the October Revolution, initially only the means of production could be subject to nationalisation. However, the methods and consequences of nationalisation bore a resemblance to other coercive measures that also effectively brought certain assets under state control – such as the liquidation of church-run educational institutions. These similarities broadened the scope of the concept of nationalisation to include such phenomena, even in the media of the time. Today, from a purely legal perspective, nationalisation may also be understood as an unlawful form of expropriation that affected the entire socio-economic order – occurring without prior compensation and justified by a fabricated public interest, regardless of the nature of the confiscated assets.

When it comes to the confiscation of church-run educational institutions – which, from today's viewpoint, can likewise be described as nationalisation – the process was formally questionable from a legal standpoint. From the practices of Soviet-style

114 Decree No. 177/1948 on the general regime of religious cults, published in the *Monitorul Oficial* (Official Gazette) No. 178, 4 August 1948. Practically, this decree abolished the remaining autonomy of the churches. Its provisions include the reduction in the number of Roman Catholic dioceses, as well as the requirement that the authorities confirm and recognise the elected church leaders. Vincze, 1999, p. 310.

115 Ibid., p. 197.

116 Published in the *Monitorul Oficial* (Official Gazette) No. 51 of 29 July 1949.

117 Bánkuti, 2016, p. 49.

systems, three primary motivations can be discerned. First, the exclusive ideology of communism could not tolerate the existence of a competing worldview or its institutional representation. Second, as inherently conservative institutions with an interest in maintaining the status quo, churches stood in the way of radical societal transformation. Third, the centralisation and state control of education enabled the communist indoctrination of youth and initiated a purge of the so-called clerical reaction. In the Soviet Union, the secularisation policy implemented during the revolution aimed to achieve a radical separation of the church and state (and education) through complete asset confiscation. This practice was not fully replicated in the countries that fell into the Soviet sphere of influence after World War II. While anti-church measures drew on the model of revolutionary Soviet decrees, they more closely reflected post-war Soviet church policy, which was relatively more tolerant, particularly towards the autocephalous Orthodox churches. Harsher actions were generally directed against churches under foreign authority – namely, Roman and Greek Catholics. Thus, in East-Central Europe, regimes focused primarily on reducing the social role of the churches, especially in sectors critical to the establishment of the new order. In Czechoslovakia and Romania, the nationalisation of church-run education was prefigured by transitional constitutions that served the legitimising purpose of reshaping national legal systems along Soviet lines. In all three countries, the nationalisation of schools and kindergartens occurred in the summer of 1948, following the full communist takeover. This timing illustrates how prominently this measure featured in the Soviet-directed blueprint for establishing a proletarian dictatorship.

After the peace treaties concluding the First World War, the successor states emerging in the Carpathian Basin had to settle the status of the churches, which had until then played a prominent role in public education. In Romania, the integration of schools operated by Romanian churches into the state education system occurred only partially, as minority churches, however, resisted giving up their educational autonomy. Until the end of World War II, the existing educational models remained dominant in Hungary and the Slovak part of Czechoslovakia. The legal acts that finally abolished church-run education in all three states in 1948 reflect, to some degree, the extent of the churches' involvement in public education at that moment. The table below is intended to illustrate the differences among the states.

Table 5. Approximate number of church-run educational institutions nationalised in 1948 in Czechoslovakia, Hungary, and Romania (source: author's own calculation based on previously cited sources)

Country	Approximate number of nationalised church-run educational institutions in 1948
Czechoslovakia	≈130
Hungary	≈6505
Romania	≈1037

In Czechoslovakia, the implicit elimination of church-run education in 1948 – via an educational reform law – was possible because by then, only a small number of schools remained in ecclesiastical hands, and these only in the Czech part of the country. In Slovakia, the predominantly church-run education system had already begun to be dismantled in 1945, leading to earlier state takeovers. By contrast, in Hungary, even immediately before the establishment of the Soviet-style dictatorship, churches still operated more than half of all schools. Therefore, a specific law was needed to implement the nationalisation of church-run education. In Romania, a hybrid legal solution emerged. While the general law on nationalising private education and restructuring it along communist lines resembled the Czechoslovak approach, the implementing decree was more akin to the Hungarian model. The adoption of the latter was mainly justified by the fact that prior to nationalisation, minority churches in Transylvania had managed to retain some role in educating youth of ethnic minority backgrounds. Nonetheless, Romania's nationalisation decree was distinctive for two reasons: first, it held the same legal weight in the hierarchy as the general legal act on the educational reform; and second, it explicitly listed the private-education buildings to be nationalised.

The greatest victims of nationalised education in Romania were clearly the minorities. Initially, education in the minority languages was granted in the newly formed state schools system. Later, however, the regime's economic failures led to a crisis of legitimacy. Coupled with the withdrawal of Soviet troops from Romania in 1958, this situation triggered a paradoxical ideological shift that gave birth to Romanian national-communism. The rediscovered nationalism, filling a gradually increasing demand for legitimacy, resulted in a chauvinist turn. In many ways, this became a continuation of pre-World War II nation-building efforts – this time once again employing forced assimilation methods and, when possible, even “selling” members of the German and Jewish minorities to West Germany and Israel, respectively, amounting to interstate human trafficking on a mass scale. With the monopoly

over minority education, the ruling party aimed first at the gradual erosion and eventually the complete elimination of education in minority languages.

Institutions for training clergy were also treated differently in the examined countries. In Czechoslovakia and Hungary, such institutions remained formally under church control. In Romania, however, seminaries were also nationalised. In the best-case scenario, when it came to minority churches, one seminary per denomination was allowed. This act of centralising priest education formally severed the legal continuity between pre-existing seminaries and the new institutions that served the same purpose.

In every state of East-Central Europe that fell within the Soviet sphere of influence, the elimination and nationalisation of church-run schools, foundations, and religious orders – in effect, nearly the entire ecclesiastical estate – was completed. At the time, there was no doubt as to which denomination had lost which schools and kindergartens. After regime changes in the region, several states began a process of partial compensation for churches, mostly in the form of transitional justice measures. In Romania, this process began somewhat later than in neighbouring countries but took shape in a currently valid restitution law that is particularly favourable to the churches.¹¹⁸ Nonetheless, recent judicial experiences¹¹⁹ with this restitution process suggest that churches were only ever regarded as proper legal entities when it came to the confiscation of their assets. In this regard, it may be observed that certain reflexes of the former totalitarian regime remain active even today.

118 For the history and current form of this legislation, see Markó, 2021.

119 See for example, Veress, 2020, pp. 76–94.

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Artificial Intelligence in Criminal Procedure: Instigating Imbalances in Traditional Tendencies

ABSTRACT: *The evolution of criminal procedural law has historically been characterised by a clash between two fundamental tendencies, present since the inception of the field. First, there is the pursuit of an effective criminal procedure, aimed at safeguarding society and individuals by identifying and punishing offenders. This goal is contrasted with the aim of ensuring a robust defence for every citizen subject to criminal proceedings, thereby preventing the wrongful conviction of the innocent and restricting any arbitrary or abusive exercise of state authority. Historically, the imbalance between these tendencies often stemmed from differing legal, philosophical, and political perspectives. In the 21st century, criminal procedural law faces a new challenge in balancing these traditionally conflicting aspirations due to the advent and integration of new technologies, particularly artificial intelligence (AI). This technological disruption, favouring the effectiveness of criminal prosecution, presents a dilemma for the conventionally and historically slower-evolving criminal procedural law, which struggles to respond at a pace in line with the rapid development and application of AI in criminal proceedings. The first segment of this research delves into the historical analysis of criminal procedural law, examining the interplay and shifting dominance of traditional tendencies through time. It aims to identify the challenges that influenced their interplay and, based on historical insights, presume future developments. The second part focuses on a systematic examination of individual AI systems, using specific examples of their implementation in criminal procedure. This analysis aims to determine whether these technologies genuinely represent a shift towards prioritising the efficiency of criminal proceedings over strong defence rights. Finally, the study explores current legislative responses to these emerging challenges, primarily the AI Act of the European Union and the draft AI Treaty of the Council of Europe. These legislations lay the groundwork for national responses to the utilisation of AI in criminal procedure, and their impact on the balance of traditional legal tendencies is critically assessed.*

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1.

Introductory Remarks

The development of criminal procedural law is marked by a constant conflict between two traditional tendencies. To achieve the objectives and social purpose of criminal procedural law, it is necessary to regulate criminal procedure normatively, with numerous factors influencing the process.¹ Among these, the dominance of one traditional aspiration over another, depending on differing goals and social purposes, has significantly shaped the normative structure of criminal procedure. One of these tendencies emphasises the effectiveness or functionality of punishment, aiming to protect individuals and the community by identifying and punishing each guilty offender. The other focuses on safeguarding citizens' rights by normatively limiting the state's repressive power, ensuring that every individual has the opportunity for a complete defence to avoid wrongful convictions and prevent arbitrary or abusive state actions.² Achieving a balance between these opposing goals is the ideal, though it remains uncertain whether it has been or will be fully achieved in the future.

Various disruptive factors have impacted the regulatory design of criminal procedure, including influences from the state system, social values, and political and economic factors. These influences have, at certain times, tilted the scales towards greater criminal prosecution effectiveness and, at others, towards upholding the full rights of citizen defence. Thus, the first chapter of this work examines the historical development of criminal procedural law, emphasising the dominance of aspirations, causes behind these shifts, and disruptive factors that subsequently spurred entirely new procedural developments. The analysis primarily explores accusatory, inquisitorial, and mixed criminal proceedings, highlighting the foundational features through which the balance of these traditional aspirations can be observed. The hallmark of the 21st century is rapid technological progress, epitomised by artificial intelligence (AI), which has irreversibly impacted all areas of society, including criminal procedural law. Consequently, the study further examines AI as a disruptive factor in modern criminal procedural law, focusing on systems that affected it the most. The influence of these technologies on contemporary criminal proceedings is discussed

1 Krapac, 2020, p. 11.

2 Ibid.

through a brief analysis of mass communication interception and surveillance, facial recognition technologies, and risk assessment systems. Finally, the study assesses the impact of new regulations on the effort to balance these traditional tendencies.

The central hypothesis of this research posits that AI has had a significant impact on modern criminal procedure. A secondary hypothesis suggests that AI influences the balance between traditional criminal procedural tendencies, potentially altering the equilibrium between procedural efficiency and the right to a full defence. The third hypothesis proposes that AI contributes more significantly to the procedural efficiency of criminal justice than to ensuring a comprehensive right to defence.

The analysis employs a range of qualitative research methods to examine AI's impact on criminal procedural law. A doctrinal approach is used to explore traditional criminal law doctrines alongside modern AI regulations, such as the European Union (EU) Artificial Intelligence Act (AIA). Comparative analysis highlights differences across legal systems, specifically accusatorial, inquisitorial, and mixed procedures, demonstrating how AI may influence each aspect uniquely. Through empirical case analysis of real-life examples such as ANOM, EncroChat, and Sky ECC, the study provides concrete illustrations of AI's effects on procedural fairness and defence rights. The historical method adds depth by tracing the evolution of criminal procedural tendencies, showing how AI disrupts long-standing legal principles. Additionally, normative analysis addresses the ethical implications of AI, particularly the challenge of balancing procedural efficiency with the right to a full defence. Finally, legal policy analysis evaluates current regulatory frameworks, assessing how well they adapt to AI's unique challenges in criminal law. Together, these qualitative methods create a comprehensive framework for understanding the role of AI in reshaping criminal procedure.

2.

Traditional Tendencies Through the Historical Development of Criminal Procedure

Throughout the historical development of criminal procedure, various social goals have been pursued, each influencing the norms that govern legal processes. In ancient Rome, criminal procedure aimed to ensure equal standing for both parties. However, owing to a misinterpretation and incorrect reception of these rules and norms, the late imperial period saw the emergence of inquisitorial proceedings. This shift marked the rise of a system focused heavily on the efficiency of criminal prosecution. The advantages and disadvantages of these different approaches highlighted the need for an optimal model that could incorporate the best elements of both systems, ultimately giving rise to the mixed criminal procedure. By examining

the evolution of these tendencies, key aspects emerge that can be applied to modern challenges, such as the disruptive impact of AI on criminal proceedings. The following section of the study explores this historical development in greater detail.

2.1. Accusatorial Criminal Procedure

The earliest form of criminal procedure developed in the ancient communities of Greece and Rome. It represented a legal dispute between two parties – the plaintiff and the accused – brought before an independent and impartial court for resolution.³ The position of the accused is crucial for understanding the relationship between traditional tendencies. First and foremost, the burden of proof rested on the prosecutor, meaning that the accuser had the obligation to prove their case, as reflected in the maxim *actore non probante, reus absolvitur*. The defendant presented evidence only insofar as they believed the prosecutor had succeeded in proving their case.⁴ However, it is important to note that the regulations prohibited the defendant from being used as a source of information. Specifically, the prosecutor was not allowed to interrogate the defendant or use them or their statement as evidence to support their claims. When we examine the types of evidence used in Roman accusatorial proceedings, they are nearly identical to those used today, primarily witnesses, experts, and their statements and documents. The favourable position of the accused was further supported by the fact that decisions were made through public, oral, and adversarial hearings, where the court's role was passive and limited to ensuring the proper presentation of evidence.⁵ Additionally, unlike the prosecutor, the defendant had the option to hire a defence attorney, although only as a procedural assistant, meaning the defendant still had to be present during proceedings. This was significant because the prosecutor did not have the same option.⁶ This is especially relevant because we are discussing a type of criminal procedure that lacked an authorised body to initiate and conduct prosecutions, relying entirely on citizens, initially only the injured party, but later any citizen, in what was known as the popular criminal lawsuit system or *actio popularis*. This system had its drawbacks, particularly vis-à-vis the initiation of criminal proceedings, as the responsibility for pursuing cases rested solely with private individuals, with no formal prosecuting authority. Given the importance of the rights and freedoms protected in criminal proceedings, both for individuals and the community, this lack of systematic prosecution represents a significant weakness

3 Krapac, 1995, pp. VII–VIII.

4 Bayer, 1995, p. 6.

5 Roodt, 2004, p. 139.

6 Bayer, 1995, p. 9.

in terms of the efficiency of the criminal justice process.⁷ This is even more notable given the existence of *juramentum calumnie* (an oath against false accusations) and the prosecutor's criminal liability in cases of defamatory lawsuits. Additionally, the prosecutor was required to provide a property guarantee to ensure they would see the proceedings through to the end.⁸ The prosecutor was also held criminally liable if, without the court's consent, they reached an agreement with the accused and dropped the charges. Another significant disadvantage of this system was the absence of any legal remedy, which somewhat weakened the defendant's position. However, through this procedure and under the principle of legality, the elements of a criminal offense were defined, creating *crimina legitima* and establishing legal punishments (*poenae legitimae*), which significantly contributed to legal certainty and protection against arbitrariness.⁹ Moreover, the free evaluation of evidence, based on the judge's free conviction, further strengthened the defendant's position.

When examining the pure Roman accusatorial procedure, it is evident that the position of the defendant was more than equal to that of the prosecutors. The fact that criminal prosecution depended solely on the will of private individuals highlights the reality that criminal proceedings were not always guaranteed to be initiated, the motives for which could vary. Additionally, the threat of criminal liability in cases of defamatory lawsuits or abandoning the prosecution could serve as a further demotivator for the plaintiff.¹⁰ Therefore, the mere initiation of criminal proceedings did not contribute to efficiency, as there was no systematic approach, and the decision to prosecute could be influenced by various personal motives, potentially leading to the non-initiation of proceedings. Additionally, owing to the rule on the burden of proof, the defendant was not required to actively defend themselves, and the outcome of the case depended solely on the prosecutor, a layperson without the right to a procedural assistant, such as a lawyer. Furthermore, the defendant could not be interrogated or questioned, either by the prosecutor or the court, and the court itself played a passive role, merely overseeing the regularity of the proceedings. While the lack of legal remedies weakened the defendant's position, other guarantees significantly improved it compared with that of the prosecutor, who faced limitations. This leads to the undeniable conclusion that the tendency to fully enable the right to defence in Roman accusatorial procedure was far more dominant.

Nevertheless, such a procedure was sufficient during the Roman Republic – a time when there was a strong sense of responsibility towards the community, and citizens regularly took the initiative to commence criminal proceedings. However, the collapse of the Republic and the rise of the Empire introduced disruptive factors

7 Mousourakis, 2021, pp. 172–173.

8 Ibid., p. 171.

9 Levy, 1938, p. 297.

10 Bayer, 1995, p. 6.

that reshaped the criminal procedure, placing greater emphasis on the effectiveness of criminal prosecution. This shift continued into the Middle Ages following the fall of the Roman Empire.

2.2. Inquisitorial Criminal Procedure

Inquisitorial criminal proceedings can be defined as the unilateral exercise of state power when a commission of a criminal offense is suspected, with the aim of identifying and punishing the perpetrator. This system developed during the Roman Empire period and later, through the Roman canon law of the Catholic Church, entered the practice of secular courts in the Italian city-states of the 13th century. It was further refined by the legal schools of glossators and post-glossators, adopted by the legislative acts of the Habsburg emperors in the German lands during the 16th century, and later by the ordinances of the French monarchy in the 17th century.¹¹ According to Bayer, part of the reception of the inquisitorial criminal procedure in the medieval Italian city-states was flawed, leading to the development of strict and formal rules that significantly influenced the future evolution of criminal procedure.¹² However, it is important to note that the inquisitorial criminal procedure is not inherently negative, as it is often perceived. In fact, some of its principles were later adopted and have endured in modern criminal procedures. The main proponent of a more objective view of the inquisitorial procedure, *Damaška*, highlights that one of its key features is the initiation of criminal proceedings *ex officio* by the judge, which remains a fundamental aspect.¹³ This shift was a response to the disruptive factors following the collapse of the Roman state, such as state particularism and changing values and culture, which made it difficult to find private citizens willing to initiate criminal prosecutions. Regarding the position of the defendant, it was no longer equal to that of the criminal prosecution authorities. The defendant was now required to answer questions and, under certain conditions, could be subjected to torture. However, *Damaška* urges caution, emphasising that torture was not easily imposed, as there were legal standards that had to be met, including a specific amount of evidence or indications. Furthermore, any evidence obtained through the illegal use of torture, including the defendant's statements, was deemed inadmissible.¹⁴ Torture was a consequence of the misapplication of criminal procedure rules at the end of the Roman imperial era, which introduced rigid rules for evaluating evidence. These legal standards dictated how certain crimes were to be proven, both in terms

11 Krapac, 2020, pp. 16–17.

12 Bayer, 1995, p. 12.

13 Damaška, 2001a, p. 479.

14 Damaška, 2013, pp. 181–182.

of the quality and quantity of evidence. For example, more serious crimes, especially those involving bloodshed, could only be proven through the defendant's confession or the testimony of two impeccable witnesses, an occurrence that is rare today and was even rarer at the time. However, there were also extra-legal factors, justified by prevailing worldviews, religious influence, and the values inherent in that mindset, which played a role in shaping these procedural practices.¹⁵ The defendant's position was further complicated by the fact that proceedings were conducted in secret, with judges making decisions indirectly, relying solely on the case files.¹⁶ Although the process was initiated *ex officio* and there was no division of procedural functions, the maxim *actore non probante, reus absolvitor* did not apply for another reason. Specifically, *absolutio ab instantia* referred to a decision to temporarily suspend criminal proceedings without finality, used in cases where guilt could not be proven but suspicion remained. This left the defendant in a precarious position, as the case could be reopened later.

The position of the defendant in inquisitorial criminal proceedings was significantly worse than that in accusatorial criminal proceedings. The cumulation of functions, where the court conducted both the investigation and trial, severely undermined the effectiveness of the defence.¹⁷ This was especially true since the trial was based primarily on the case file compiled by the investigator, who was also the judge, leaving little room for direct assessment of evidence and facts. The entire process was closed to the public, and the defendant's right to a defence attorney was rarely granted, typically only at the end of the proceedings. One of the most significant challenges was that the defendant's statement, considered highly valuable evidence at the time, could be obtained by torture. Torture often led even innocent defendants to confess, which contradicts earlier principles such as those reflected in *Emperor Trajan's maxim*.¹⁸ Despite these harsh conditions, the development of the right to appeal marked a step forward in the realisation of effective defence rights. However, this shift was far from sufficient to establish a balance between the traditional tendencies in criminal procedure. Although the defendant remained the subject of the proceedings, despite some authors' claims that they were treated as an object, their defence rights were often illusory and difficult to fully exercise due to numerous obstacles.¹⁹ It is evident that much greater emphasis was placed on making criminal proceedings as efficient as possible, often at the expense of the defendant's position.

15 For further information, see Damaška, 2021, pp. 45–57.

16 Beccaria, 1990, pp. 98–101.

17 Krapac, 2020, pp. 16–17.

18 Iustinianus, 1963, p. 846, D. 48.19.5.

19 Damaška, 2013, pp. 175–188.

The overemphasis on the effectiveness of criminal procedure, and the extreme measures it entailed, significantly increased the risk of wrongful decisions, often to the detriment of the defendant. The secrecy of the process, use of torture, reliance on indirect evidence, lack of public scrutiny during procedural actions, and limited access and rights of defence attorneys all raised serious doubts about the fairness of the procedure, and consequently, the outcomes.²⁰ Under the influence of emerging ideas about human rights and fundamental freedoms, which took shape more concretely during the Age of Enlightenment and the French Revolution, criminal procedure underwent significant reform. This reform aimed to establish a more balanced approach by integrating elements from both inquisitorial and accusatorial systems, creating a more just and equitable legal process.²¹

2.3. Mixed Criminal Procedure

Considering Krapac's definition

'Modern mixed criminal procedure represents a synthesis of the elements of accusatory (accusatory) and investigative (inquisitorial) type of criminal procedure in the legal system of actions and measures of state bodies in the case of the probability of a criminal offense, undertaken with the aim of properly distinguishing the guilty from the innocent and realizing the principle of public punishment of them'.²²

The reform of inquisitorial criminal procedure in the second half of the 19th century brought about transformative changes.²³ Influenced by Enlightenment ideas and civil liberalism, French legislation sought to align criminal procedure with the emerging concepts of fundamental human rights and freedoms. This reform included the search for acceptable procedural models, with the English criminal procedure serving as an example. From the English system, several core principles were adopted, including the principle of public trials, immediate evaluation of evidence, adversariality, and the participation of lay citizens in trials.²⁴ According to Ljubanović, Novokmet, and Tomičić,

20 Damaška, 2001b, pp. 6–7.

21 Damaška, 1995, pp. 42–44.

22 Krapac, 2020, p. 18.

23 Krapac, 1994, p. 518.

24 Krapac, 1995, p. VII.

'Modern mixed criminal procedure originates from the French Code of Criminal Investigation (Code d'instructioncriminelle), which was adopted in 1808 during the reign of Napoleon Bonaparte. Under this Code, first-degree criminal proceedings were divided into two stages: the preparatory procedure and the main hearing. The main hearing was conducted before the court based on an indictment filed by an authorized prosecutor'.²⁵

Contemporary criminal procedure in the Republic of Croatia remains a mixed system, a legacy from the period of Bach's absolutism and the country's subsequent independence. Although it has undergone significant reforms and changes over time, with the most recent major revisions made in 2013, the procedure still fundamentally represents a synthesis of accusatorial and inquisitorial elements. Akin to most European continental systems, Croatia's criminal procedure, while distinct in certain aspects, shares similar elements, principles, and structural characteristics with other systems across the continent.²⁶ Accusatorial elements present in nearly all modern mixed criminal proceedings include the organisational division of the criminal court into professional judges and lay judges, and the clear separation of functions between state attorneys responsible for prosecution and judges who lead the proceedings. The position of the accused is safeguarded with procedural rights, such as the right to defence counsel from the earliest stages; the right to be informed of the charges; the ability to propose evidence and certain evidentiary actions; the right to be present during their conduct; and the public's participation in the hearing, which is conducted orally and directly. Despite the oft-negative connotations associated with inquisitorial proceedings, some of their features persist in modern mixed criminal procedures. These include the division of the criminal process into stages; the principle of officiality, where the state attorneys have a duty to initiate proceedings; the possibility of questioning the accused without the obligation to testify; and placing certain burdens of proof on the accused. These inquisitorial elements continue to shape the structure and functioning of contemporary criminal justice systems.

Such a mixed criminal procedure aims to strike a balance between traditional tendencies, granting criminal prosecution authorities the tools for effective prosecution while providing the defendant with the opportunity for a full and effective defence. Over time, various influences have weighed on the scales of these aspirations, and the most recent disruptive factor to significantly impact this balance is the introduction of AI, which has increasingly found application in criminal proceedings.

25 Ljubanović, Novokmet and Tomičić, 2020, pp. 209–210.

26 Derenčinović and Dragičević Prtenjača, 2022, pp. 91–95.

3.

AI: A New Disruptive Factor in Criminal Proceedings?

New technologies, particularly AI, have made an irreversible impact on citizens' daily lives. Owing to their advantages and potential applications, they were quickly adapted for use in criminal proceedings.²⁷ Nevertheless, for relatively traditional fields such as criminal law and criminal procedure, this new factor represents a disruptive element of the 21st century. The introduction of AI in criminal proceedings challenges fundamental principles and concepts, demanding significant adaptation and reconsideration.²⁸ Considering the wording of current regulatory initiatives, court decisions, the frequency of system use, and the profile of system users, it is evident that AI systems are significantly more advantageous for prosecuting bodies and law enforcement authorities than for defendants. This analysis examines distinct types of systems and their applications, aiming to provide an overview of how AI has been used in criminal proceedings and the disruptive impact it has had on traditional legal practices.

3.1. Bulk Communication Interception

The new concepts of big data and data mining as collection and processing techniques have enabled unprecedented access to and analysis of vast amounts of data.²⁹ Law enforcement has leveraged these technologies, particularly through the decryption of encrypted communications, to gather extensive evidence, including messages, photos, and media content, to investigate criminal activities. This is evident in the ENCROCHAT, ANOM, and Sky ECC cases, where the interception of communications, particularly in crime-heavy areas, significantly aided investigations into organised crime.³⁰

3.1.1. EncroChat

EncroChat, an encrypted communication platform, was heavily utilised by criminal organisations. In 2020, French and Dutch authorities successfully infiltrated the service, intercepting communications from over 60,000 users, resulting in

27 Kaspar et al., 2023, pp. 3–5.

28 Quattrocchio, 2020, pp. 3–4.

29 Završnik, 2018, pp. 3–7.

30 Simović and Šikman, 2023, pp. 228–230.

the capture of approximately 115 million messages. These interceptions led to the identification of 6,558 suspects, significant seizures of assets totalling hundreds of millions of euros, and the confiscation of tons of drugs and weapons, making it one of the most impactful law enforcement operations against organised crime in Europe.³¹ Legal challenges primarily focused on procedural fairness under Art. 6 of the European Convention on Human Rights (ECHR). In Dutch case law, such as the Dutch Supreme Court 2024, the admissibility of *EncroChat* data was upheld despite defence arguments concerning the legality of the interception and lack of transparency regarding the methods used. The Dutch Supreme Court upheld the use of *EncroChat* evidence, addressing key fair trial concerns raised by the defence. The court balanced operational secrecy with the need for judicial oversight, ensuring that the interception of encrypted data by French authorities did not violate Art. 6 of the ECHR. Although the defence argued for more access to the technical methods used in interception, the court ruled that transparency in the case file and mutual trust between EU states were sufficient to maintain the fairness of the trial.³² A critical development related to these issues is the ruling by the Court of Justice of the European Union (CJEU) in Case C-670/22 (*M.N. - EncroChat*), which addresses key aspects of the European Investigation Order (EIO) under Directive 2014/41/EU. Art. 6(1) of Directive 2014/41 allows a public prosecutor to issue an EIO to transmit evidence already held by the executing State's authorities if it meets the issuing State's domestic legal conditions, even when the evidence involves intercepted, encrypted telecommunications obtained in the issuing State.³³ It clarifies that an EIO for transmitting already obtained evidence does not need to be issued by a judge if national law allows a public prosecutor to do so. Furthermore, it affirms that telecommunications interception must be notified to the concerned Member State to protect the rights of affected individuals. Evidence must be excluded if the accused cannot comment effectively on it.³⁴ Therefore, it is possible to use evidence obtained legally under the laws of an EU member state, such as through mass interception, and subsequently request this evidence through the EIO framework. This allows the evidence to be introduced and used in court proceedings of the state that initially requested it, even if the method of evidence acquisition differs from its legal standards. This practice raises a significant concern regarding forum shopping in evidence collection, where authorities may seek out jurisdictions with more permissive evidence-gathering laws to bypass stricter national standards.³⁵ This tactic can undermine the fairness of proceedings, as it may limit the defence's ability to challenge the legality and admissibility of evidence collected

31 Burić et al., 2023, pp. 244–245.

32 Hoge Raad der Nederlanden, ECLI:NL:HR:2024:192, 2024, paras. 2.2.–2.4.

33 CJEU, Criminal proceedings against M.N. (*EncroChat*), 2024, para. 106.

34 Ibid., paras. 77, 119, 131.

35 Burić et al., 2023, p. 266.

through processes not typically allowed in the jurisdiction where the trial takes place. Such practices highlight the need for harmonised EU regulations on evidence admissibility to prevent imbalances in rights protections across different legal systems.

3.1.2. ANOM

ANOM, covertly operated by the Federal Bureau of Investigation (FBI) and Australian Federal Police, intercepted over 27 million messages from approximately 12,000 users in more than 90 countries.³⁶ Defence teams, particularly in Finland, questioned the legality of this evidence, arguing that it breached privacy protections under national and EU law. In KKO case 2023:14, the Finnish Supreme Court admitted ANOM messages into evidence despite privacy violations under Art. 8 of the ECHR, which protects the right to privacy in communication. The court reasoned that the relevance of the messages to organised crime outweighed the privacy breach, especially as the defence could challenge the evidence and its credibility.³⁷ The court emphasised that even when there are privacy violations, as long as trial fairness is preserved under Art. 6, such evidence may still be admitted.³⁸ The court further acknowledged that while privacy concerns were significant, the ANOM evidence had high probative value, especially given its role in revealing organised criminal networks. The Finnish Supreme Court underscored that given the scale of the operation and serious nature of the offenses under investigation, the need to protect public safety and combat organised crime justified a degree of privacy infringement. It emphasised that as long as defendants had access to legal representation and could challenge the reliability and relevance of the evidence, the principles of fair trial rights remained intact. This decision reflects a careful balancing act between upholding individual rights and addressing the broader interests of justice in cases involving sophisticated, transnational criminal activities.

3.1.3. SKYECC

Sky ECC, another encrypted communication platform used by over 170,000 people globally, including many involved in organised crime, became the subject of a joint operation by Belgian, Dutch, and French authorities. The interception of over tens of millions of encrypted messages led to significant arrests and prosecutions.³⁹

³⁶ Europol, 2021.

³⁷ Finnish Supreme Court, KKO:2023:14, 2023, paras. 9–18.

³⁸ Ibid., paras. 52–53.

³⁹ Burić et al., 2023, pp. 243–249.

In Croatia, the use of Sky ECC data in criminal law cases raised serious legal questions. Key defence challenges focus on the privacy violations stemming from mass surveillance that intercepted communications of all users, not just suspected criminals, raising concerns under Art. 8 of the ECHR. Additionally, the lack of transparency in the investigatory methods limited the defence's ability to challenge the reliability and authenticity of evidence, impacting the right to a fair trial under Art. 6 of the ECHR.⁴⁰ Issues of cross-border evidence transfer further complicated procedural fairness. A significant legal issue arises from the fact that not all legal systems recognise bulk communication interception as a valid investigatory tool. For example, the Croatian legal framework lacks specific provisions for such broad surveillance. This creates complications when such evidence is transferred from foreign jurisdictions where it is lawful. The defence argues that bulk interceptions should be subsumed under special evidentiary actions, requiring strict procedural safeguards to protect individual rights and ensure fairness in cross-border evidence use.⁴¹ In this context, individually establishing grounds for suspicion for each person whose communications are intercepted, and ensuring each is covered by a specific warrant, would align better with the rights of the defence. Such a requirement would mandate a tailored, individualised rationale for each interception decision, enabling the defence to challenge the admissibility of evidence based on this specificity. This approach would help ensure that interception is justified on a case-by-case basis, reinforcing procedural safeguards and the rights of the individuals involved. Currently, however, the broader approach simplifies evidence gathering for law enforcement, often allowing more generalised warrants or less specific grounds for interception. While this facilitates the investigative process, it can undermine the defence's ability to scrutinise the legality and proportionality of evidence collection, potentially impacting the fairness of proceedings.

3.2. Facial Recognition Technologies

The use of biometric and facial recognition technologies has clearly expanded across various applications, from seemingly harmless smartphone unlocking to critical functions in border control, emotion recognition, and beyond.⁴² In the context of criminal prosecution, these technologies serve two primary purposes: first, to establish the identity of individuals suspected of criminal offenses, known as verification; and second, to identify persons whose identity is otherwise unknown,

40 Oerlemans and Royer, 2023, pp. 445–457.

41 Burić et al., 2023, pp. 260–265; Republic of Croatia, 2008, Criminal Procedure Code, Arts. 332–339.

42 Novokmet, Tomičić and Vidaković, 2023, pp. 526–527.

known as identification. The significant advantages of these technologies, enabled by advanced AI systems and extensive biometric databases of photos and videos, facilitate both real-time and post-event recognition. This capability is invaluable for criminal proceedings, as it enhances the accuracy and efficiency of identity verification processes.⁴³

3.2.1. Real-Time Facial Recognition

Given the inherent characteristics of facial recognition systems, it is essential to distinguish between real-time and post-event recognition. Real-time facial recognition involves the immediate identification of biometric facial features, comparing them with a predefined watchlist in just seconds to determine an individual's identity.⁴⁴ This process, however, raises significant concerns regarding accuracy; the discretionary powers involved in creating comparison lists; and the potential consequences, such as arrests and the initiation of criminal proceedings. Real-time recognition, therefore, presents a high level of intrusion into fundamental human rights and freedoms, which has led to a restrictive approach in regulatory frameworks – a topic explored further in the final chapter. The issues are well illustrated by the Court of Appeal's findings in *Edward Bridges v South Wales Police*.

In *Edward Bridges v. South Wales Police*, the Court of Appeal addressed the lawfulness of the use of automated facial recognition (AFR) technology by South Wales Police under Arts. 6 and 8 of the ECHR. The court acknowledged the intrusion into privacy caused by the use of AFR technology due to its large-scale collection of biometric data in public spaces, affecting individuals not suspected of crimes.⁴⁵ However, it deemed the surveillance proportionate to its purpose in crime prevention and provided safeguards such as prompt deletion of non-matching data and clear guidelines on watchlist criteria. This ruling reflects a balance between operational efficiency and individual rights, especially given concerns about the potential for error and the discretionary power in creating watchlists, which could affect personal freedoms. The court highlighted that such surveillance needs stringent regulation to prevent arbitrary application.⁴⁶

43 Faraldo Cabana, 2023, pp. 35–38.

44 European Union, 2024, Regulation (EU) 2024/1689, recital 17 and Art. 1(43).

45 Court of Appeal, *Bridges*, 2020, paras. 57–59.

46 Court of Appeal, *Bridges*, 2020, paras. 84, 93–108.

3.2.2. Post-Event Remote Biometric Identification System

Although post-event recognition represents a slightly lower degree of intrusion into fundamental human rights and freedoms due to the time lag in analysis, certain risks remain. This is evident in administrative decisions concerning the use of the Videmo360 system in Hamburg, and the conclusions drawn by the Data Protection Authority (DPA). Similarly, in *Glukhin v. Russia*, the European Court of Human Rights (ECtHR) highlighted issues related to the use of such systems under Art. 8 of the ECHR, underscoring the privacy risks associated with delayed biometric analysis.

In the Videmo360 DPA Hamburg case, the Hamburg DPA critically assessed the deployment of the Videmo360 facial recognition system, identifying substantive privacy concerns under Art. 8 of the ECHR. The DPA determined that while Videmo360 may enhance public security, its capacity for real-time surveillance and extensive data processing poses significant risks to individual privacy. The DPA concluded that stringent limitations on data retention and clear, narrowly defined criteria for selecting individuals for surveillance are necessary to safeguard against arbitrary monitoring and ensure that the use of such technology aligns with privacy rights.⁴⁷ The decision reflects the DPA's insistence on balancing security imperatives with robust privacy protections, especially in contexts where individuals may be surveilled without suspicion.

The ECtHR case *Glukhin v. Russia* addressed similar concerns about surveillance technologies within the framework of Art. 8 of the ECHR. The court reaffirmed that surveillance systems with the potential for broad, indiscriminate data collection must incorporate rigorous safeguards to protect individuals' privacy rights. The ECtHR stressed that such surveillance must be "in accordance with the law" and demonstrably necessary within a democratic society, particularly when affecting non-suspect individuals.⁴⁸ The ruling in *Glukhin* underscores the ECtHR's requirement that even post-event biometric technologies adhere to high standards of legality, necessity, and proportionality to prevent disproportionate intrusions into private life.

3.3. Risk Assessment Tools

Assessing the risk of recidivism is a traditional activity of both courts and law enforcement authorities. The development of technology has undoubtedly contributed to the wider use of AI tools for such assessment in criminal proceedings. In this way, and through the infiltration of technology, the transformation of criminal procedure has

47 Hamburg Data Protection Authority, 2023, pp. 9–11, 14–15, 18–19.

48 ECtHR, *Glukhin v. Russia*, 2023, paras. 49–57, 78–91.

shifted from a traditional, retrospective, and individualised model that emphasises a deliberate and personalised approach to pursuing justice and truth, to a prospective, aggregated model that includes a more efficient but impersonal and distant approach, aligning with the concept of actuarial justice.⁴⁹ According to Novokmet, Tomićić and Vinković:

'So-called actuarial risk assessment instruments (RAIs) are the most used tools that, based on pre-entered data, calculate the probability that the mentioned risk will be realized as a precondition for determining pre-trial detention. The purpose of their use is to identify, based on pre-known historical data, the patterns by which a risk assessment is performed for each individual in order to make an objective and transparent decision as to whether a person should be remanded in custody or released before the trial'.⁵⁰

The transformation to a new model under the influence of AI and new technologies aimed to achieve greater consistency, transparency, and accuracy compared with human judgement.⁵¹ Although research suggests that algorithms can make better decisions than judges and other officials, there are specific objections and challenges associated with the usage of such systems.⁵² Some of these issues were highlighted in the case *Loomis v. Wisconsin*, where the Wisconsin Supreme Court ruled that using the COMPAS risk assessment tool in sentencing did not violate due process, despite the tool's proprietary, undisclosed methodology. The court required judges to be informed of COMPAS's limitations, including its non-transparent nature and potential biases, particularly concerning minority offenders.⁵³ It also stipulated that COMPAS scores should not serve as the sole basis for sentencing but rather be part of a broader evaluative process. The defence argued that reliance on an algorithm with undisclosed methods compromised the defendant's right to an individualised sentence and accurate information, pointing to potential gender and racial biases as a violation of fair trial rights.⁵⁴ While the court acknowledged these concerns, it ultimately found that procedural safeguards were sufficient to mitigate the risks of unfairness in sentencing.

The objections highlighted above underscore criticisms of AI in criminal proceedings, underscoring issues with new, aggregated, and non-personalised models.

49 Karsai, 2021, pp. 15–16.

50 Novokmet, Tomićić and Vinković, 2022, pp. 4–6.

51 Goel et al., 2021, pp. 9–10.

52 Ibid., p. 13.

53 *Harvard Law Review*, 2017, pp. 1531–1532.

54 Ibid., pp. 1533–1535.

This concern is particularly relevant given that sentencing must be individualised, considering the unique context and circumstances of each defendant.⁵⁵ Similarly, assessments for determining or extending pre-trial detention are conducted individually, adhering to standards set by the ECtHR.⁵⁶ Such an approach, alongside the shortcomings highlighted by the defence in the analysed case, demonstrates that despite the intent to unify procedures, transparency and accuracy remain challenging aspects. These limitations directly impact the right to defence and hinder the ability to effectively challenge the outcomes produced by such systems.

4.

European Approach of AI Regulation – Balancing the Scale or Shooting in the Dark?

While technology and AI offer numerous advantages, they also introduce substantial risks, particularly for defendants. To apply these tools responsibly and minimise associated risks, effective regulation is essential. One challenge lies in the fragmented regulatory landscape, involving multiple unconnected actors attempting to govern AI use.⁵⁷ However, recent progress has been made with the adoption of Regulation (EU) 2024/1689 of the European Parliament and of the Council of 27 April 2022, laying down harmonised rules on AI (AIA) and amending certain Union legislative acts. These regulatory frameworks will play a crucial role in shaping the application of AI in criminal proceedings in European continental law systems. The following analysis examines these regulatory approaches, focusing on balancing traditional legal principles with new technological capabilities.

4.1. EU AIA

The regulatory framework under the AIA follows a risk-based approach, initiated by the European Commission's White Paper on Artificial Intelligence, which laid the foundation for future regulations.⁵⁸ This approach aims to balance innovation with the protection of fundamental rights, as evidenced by the provisions of the AIA and its sector-specific requirements. To establish proportionate and effective binding rules for AI systems, a clearly defined risk-based framework is necessary.⁵⁹ The type and

55 Novoselec and Bojanić, 2013, p. 428.

56 ECtHR, *Šoš v. Croatia*, 2015, paras. 95–100.

57 Cihon, Maas and Kemp, 2020, pp. 546–547; Nikolinakos, 2023, pp. 353–369.

58 European Commission, 2020, White Paper on Artificial Intelligence.

59 Novokmet, Tomičić and Vinković, 2022, pp. 4–6.

content of the rules should be aligned with the intensity and scope of risks posed by AI systems. Thus, the AIA prohibits certain unacceptable AI practices, sets requirements for high-risk AI systems, and establishes transparency obligations for specific AI applications. This proportionate approach aims to balance risk reduction from AI use with the innovations and benefits AI systems bring.⁶⁰

While *Ebers* supports a risk-based approach as ideal for AI regulation, he argues that the EU's approach does not fully align with the original concept of risk-based regulation. His critique focuses on the EU's reliance on predefined, fixed risk categories for regulating AI, which lack empirical grounding and may struggle to keep pace with rapid AI advancements.⁶¹ Additionally, the European Commission's authority to update the list of high-risk systems could be influenced by political rather than empirical factors. *Ebers* advocates for a more dynamic approach, allowing risk assessments within specific contexts rather than relying on static categories.⁶²

Such an approach is also evident from the specific provisions of the relevant regulation. According to Art. 5 of the AIA, the use of remote biometric identification systems in real time in public spaces for criminal prosecution is allowed only if deemed necessary for specific objectives: locating victims of crimes such as abduction or trafficking, preventing significant and immediate threats to life or safety, or identifying suspects in serious crimes. Each instance of usage must be pre-authorised by a judicial or independent administrative authority based on objective evidence of necessity and proportionality.⁶³ In emergencies, the system may be used without prior authorisation, provided that approval is requested within 24 h; if denied, data must be immediately deleted. All usage must comply with safeguards on data protection, necessity, proportionality, and minimal data retention. Member States must establish detailed guidelines and notify relevant supervisory bodies, with the European Commission receiving aggregated annual reports to ensure adherence to fundamental rights.⁶⁴ However, systems solely intended for biometric verification, where the purpose is simply to confirm that a person is who they claim to be, are excluded from this category. Additionally, certain AI systems have been designed for biometric categorisation, which involve classifying individuals based on sensitive or protected attributes inferred from certain characteristics. Another subset includes AI systems for emotion recognition, aimed at detecting and interpreting individuals' emotional states.

The market placement, deployment, or use of AI systems for risk assessments aimed at evaluating or predicting the likelihood of a person committing a criminal

60 Cancela-Outeda, 2024, p. 3.

61 Ebers, 2024, pp. 7, 11–21.

62 Ibid.

63 Zulehner, 2024, pp. 15–16.

64 Lynch, 2024, pp. 3–4.

offense, based solely on profiling or assessments of personal traits and characteristics, is prohibited. This ban does not apply to AI systems used to support human judgement in determining a person's involvement in criminal activity, provided this assessment is based on objective and verifiable facts directly linked to criminal activity.⁶⁵ Similarly, the market placement, deployment, or use of AI systems that create or expand facial recognition databases by indiscriminately collecting facial images from the internet or CCTV footage is also prohibited.⁶⁶

According to Art. 6(2) and Annex III, 6(a-d) of the AIA, in the realm of criminal prosecution, AI systems are permitted under Union or national law for specific purposes. These include systems used by law enforcement to assess the risk of an individual becoming a victim of crime, and those employed as polygraphs or similar investigative tools. Additionally, AI can be used to evaluate the reliability of evidence in investigations or prosecutions. Some systems are further employed to assess the likelihood of an individual committing or re-committing a crime, not only based on profiling as outlined in Directive (EU) 2016/680 but also through analysis of personal traits and prior criminal behaviour of individuals or groups.

According to Arts. 9–14, high-risk AI systems are subject to strict conditions to safeguard citizens' security, privacy, and fundamental rights. Prior to deploying such systems, a comprehensive risk and impact assessment on fundamental rights must be conducted to identify potential risks to individuals and society. Transparency is essential, requiring systems to be explainable and accessible so that users can understand their outputs, facilitating the verifiability of decisions. High-risk AI systems also demand human oversight, ensuring that they do not operate autonomously without human assessment and intervention. The use of high-quality, accurate data further minimises the risk of incorrect results, which is particularly crucial in high-risk applications.

This approach classifies systems based on the risk they pose, with certain systems being prohibited, and others designated as high-risk, subject to strict conditions for their use. The primary objective is to achieve a balance between safeguarding human rights and fundamental freedoms and harnessing the potential advantages these systems can offer. This regulatory framework also encompasses systems applied within criminal proceedings, underscoring its critical importance. While the current sectoral approach is suitable, future regulation, potentially in the form of a directive or another more adaptable instrument, may be necessary to address the specific complexities associated with AI use in criminal proceedings.

65 Regarding predictive policing systems for individual profiling, see Rossbach, 2023, p. 169.

66 Ibid.; Lala, 2024, pp. 42–43.

4.2. Council of Europe Framework Convention on AI and Human Rights, Democracy, and the Rule of Law

The Council of Europe's AI Framework Convention represents a ground-breaking development in international AI governance, setting a precedent as the first legally binding treaty dedicated to AI. Anchored in a human rights-based approach, this AI Framework Convention seeks to address the fundamental risks AI poses to human rights, democracy, and the rule of law. It envisions an AI regulatory landscape grounded in the principles of privacy, transparency, and non-discrimination.⁶⁷ This approach notably aligns AI regulation with pre-existing human rights frameworks, ensuring that the expansion of AI technologies does not come at the cost of individual rights and social justice. A unique characteristic of the AI Framework Convention lies in its global applicability and jurisdictional reach. While current AI regulations, such as the AIA, apply regionally, the AI Framework Convention has the potential to reach beyond Europe. The current signatories, in addition to the EU, include the United States of America (USA), the United Kingdom (UK), Israel, Norway, and other countries. This represents a broad coalition of states that have accepted two identical definitions of AI, encompassing some of the leading countries in AI development, such as the USA, Israel, and the UK.⁶⁸ With active participation from states outside the EU, it promises a level of harmonisation in AI governance previously unattained in this field. Such global applicability is particularly apt for AI technologies that inherently cross borders, affecting multiple jurisdictions through their expansive data processing, decision-making capabilities, and implications for personal privacy. Consequently, the Convention addresses the cross-border challenges associated with AI, from data protection to issues of accountability in digital environments, while aiming to set a consistent standard for AI development and deployment on an international scale.

Another critical dimension of the AI Framework Convention is its commitment to a full lifecycle regulation – an approach that governs AI systems through each stage of their existence, from design and development to application and decommissioning. By encompassing every phase, the Framework Convention ensures that regulatory oversight extends to adaptive AI systems that may evolve in ways unforeseen at the initial deployment stage. Such a lifecycle approach thus fosters a framework of accountability, ensuring that AI technologies always meet established ethical and legal standards, particularly as these systems integrate deeper into decision-making

67 Van Kolschooten and Shachar, 2023, pp. 2–4.

68 Council of Europe, 2024, Chart of signatures and ratifications of Treaty 225 – Framework Convention on Artificial Intelligence.

processes that directly impact individuals.⁶⁹ Nonetheless, the broad, sector-neutral scope of the AI Framework Convention brings both advantages and challenges. While the sector neutrality of the Convention positions it as a flexible, cross-sectoral regulatory framework, this general approach may fail to fully capture the nuanced risks AI poses in specific domains.⁷⁰ For instance, AI applications in particular contexts may require specialised provisions to address unique ethical, legal, or technical concerns. The absence of sector-specific guidelines in the Convention could limit its efficacy in translating general human rights principles into targeted protections within highly specialised or sensitive domains.

It may significantly impact specific aspects of criminal procedure, especially traditional aspirations for procedural efficiency and the protection of defence rights. The AI Framework Convention, emphasising human rights protection through mandatory risk assessments and adherence to principles of transparency, privacy, and non-discrimination, has the potential to enhance safeguards for individuals involved in criminal proceedings. A key feature of this regulation is its potential to protect the rights of suspects and defendants via a mandatory risk assessment conducted before AI systems are applied in a criminal context. In criminal proceedings, this regulation could mandate that AI tools used during investigation, evidence analysis, and even sentencing undergo strict ethical and legal evaluations. Such requirements may influence traditional processes, particularly where AI tools might otherwise jeopardise the right to a fair trial, access to defence, or individual privacy. Moreover, the transparency obligation imposed by the regulation may limit the use of *black box* AI systems, namely, those whose decision-making processes are not easily explainable or accessible to defendants or their legal teams. By enforcing transparency, the regulation helps guard against potential biases or errors in automated systems, which is critical in procedures impacting individual freedom and rights. This emphasis also aligns with broader principles of fairness and public accountability in criminal proceedings.

In summary, the Council of Europe's AI Framework Convention is a critical, unprecedented step in establishing a human rights-centred regulatory framework for AI.⁷¹ With its full lifecycle approach, international reach, and foundation in fundamental rights, it has the potential to shape the global landscape of AI governance. However, its broad scope and ambitious objective to serve as a universally applicable instrument underscore the importance of balancing flexibility with specificity, ensuring that the Convention remains both impactful and resilient amid the evolving demands of global AI regulation. While the current form of the AI Convention

69 Council of Europe, 2024, Explanatory Report to the Council of Europe Framework Convention, p. 6, paras. 23–25.

70 Smuha, 2020, pp. 591–604.

71 Niklas, 2021, pp. 528–530.

provides a framework for safeguarding rights within criminal proceedings, its effectiveness in this realm will depend on how specifically it is applied to criminal justice AI systems.

5.

Discussion and Conclusion

Since the earliest stages of criminal procedural law development, external factors have continually shaped criminal procedures. Although some traditional influences persist, a new disruptive factor has emerged, facilitated by technological advancement – namely, AI. To assess whether AI indeed qualifies as a disruptive factor, it is essential to establish its presence and role within modern criminal proceedings. Recent judicial cases demonstrate the use of encrypted communication content as evidence, particularly in cases involving platforms such as ANOM, SKY ECC, and EncroChat. While this study examines only a selection of examples, the substantial number of arrests, suspects, asset confiscations, and other outcomes suggests that these technologies are becoming integral to modern investigative practices.⁷² Similarly, facial recognition technologies have broadened in application, not only within commercial domains but also significantly within criminal investigations and law enforcement. Cases such as *Edward Bridges v. South Wales Police* and *Videmo360* exemplify the legal and procedural implications of these systems.⁷³ Beyond these cases, numerous examples reflect the growing reliance on facial recognition by law enforcement agencies. In the Netherlands, systems including CATCH are employed for real-time surveillance, while in Croatia, law enforcement is currently implementing similar technologies for police use.⁷⁴ In addition to identification purposes, these technologies are increasingly used for tracking and evidentiary purposes, which can raise significant concerns. Given the expanding presence of cameras and surveillance systems, it is evident that both the quality and frequency of these technologies in criminal proceedings are unlikely to decrease. Among the listed AI-driven systems, risk assessment tools were among the earliest to be integrated into criminal procedure. Notably, *Loomis v. Wisconsin* stands as a landmark case regarding the application of COMPAS, although many similar systems now exist. If we consider predictive policing systems as a subset of risk assessment tools, these applications have the longest and most extensive presence in criminal proceedings, as supported by judicial precedents. Moreover, when factoring in relatively benign systems, such

⁷² Burić et al., 2023, pp. 244–249.

⁷³ Novokmet, Tomičić and Vidaković, 2023, pp. 548–549.

⁷⁴ Montag et al., 2021, pp. 61–67.

as those for transcribing statements from witnesses, defendants, and experts, and tools for researching case law and even legal assistance bots, it becomes evident that AI is embedded in criminal procedure. The presence of AI in this field is poised only to increase, making it an influence that cannot and should not be ignored.

The previous conclusions are supported by the existence of numerous global, supranational, regional, and national initiatives aimed at regulating AI and its applications. While not all initiatives specifically address the use of AI in criminal proceedings, two of the most significant regulatory frameworks – the AIA and AI Framework Convention – demonstrate a concerted effort to mitigate the risks posed by AI to fundamental human rights and freedoms. The EU's risk-based approach in the AIA underscores the necessity of balancing the risks and benefits of AI, particularly highlighting the high-risk nature of AI systems used by law enforcement. Certain AI applications are outright prohibited, while others are permitted only under strict conditions.

Through this regulatory framework, covering the 27 EU member states and the broader European legal context, a clear message is conveyed: the use of AI in criminal proceedings must be regulated to safeguard individual rights. This regulation substantiates the argument that AI profoundly impacts modern criminal procedure. Provisions within Arts. 5 and 6 of the AIA outline prohibitions on specific high-risk AI uses, as detailed in Annex III. Additionally, Arts. 9–14 set out stringent requirements for high-risk systems, demonstrating the recognition that certain AI applications carry risks too substantial for unregulated implementation in criminal contexts. This approach and regulatory framework highlight the significant influence of AI systems in favour of state authorities, specifically in the context of criminal prosecution. This influence requires careful limitation, as excessive discretion in AI usage can tilt the balance towards state authority, often at the expense of defendants' rights, thus favouring the efficiency of prosecution over the right to defence. The Council of Europe's regulation is equally crucial and holds broader influence, as several non-EU countries, including the USA and Israel, have joined and signed the AI Framework Convention. The approach to AI regulation is not sector-specific, meaning there are no unique provisions solely for criminal proceedings. However, the key principle lies in applying regulatory standards to the entire lifecycle of AI systems, which plays a vital role in balancing fundamental human rights and freedoms with the benefits and risks of AI use. This inclusive approach consequently encompasses AI systems used in criminal proceedings as well. While there are criticisms of human rights as an imperfect concept,⁷⁵ and consequently of this regulatory approach, the alignment between the Council of Europe's regulation and the EU's framework, especially per Art. 1 of the AI Framework Convention, creates a comprehensive approach to AI

75 Smuha, 2020, pp. 91–104.

governance. This framework seeks to mitigate the efficiency-driven risks posed by AI while strengthening protections for human rights and fundamental freedoms. Within the context of criminal procedure, it is essential that the utility and efficiency of AI systems align with the objective of ensuring an effective defence. As such, the following critical question remains: Have these legal frameworks achieved an adequate balance between leveraging AI's benefits and safeguarding defendants' rights within criminal proceedings?

The introduction of AI in criminal proceedings raises the question of whether it disrupts the relative balance of traditional principles in today's mixed-type criminal procedure. Addressing this issue requires an examination of both the technical characteristics and legal challenges associated with AI technologies, as highlighted by judicial decisions regarding three primary categories of systems. One key category involves systems used to decrypt, intercept, and admit encrypted communications as evidence, which has generated a host of legal questions. First, transnational investigations, often involving cooperation across multiple continents, pose challenges regarding the control and legality of actions performed across different jurisdictions. This issue is further complicated by differences in legal frameworks governing the mass interception of communications, as not all systems regulate this concept in the same way. This discrepancy raises significant questions about the legality of evidence acquisition and its admissibility when transferred for use in national courts, especially in countries that were not directly involved in investigative and joint actions. Consequently, these legal complexities place a heavier burden on the defence, requiring familiarity not only with domestic criminal law but also with EU law and the laws of multiple foreign jurisdictions. This added layer of complexity can place defendants at a disadvantage, particularly in ensuring that evidence used against them complies with legal standards across varied legal systems. Assuming the legality of the evidence obtained, the sheer volume of intercepted data often poses a major challenge for the defence, as it may consist of hundreds of millions of messages. According to ECtHR practices, unrestricted access to all data for the defence is typically unfeasible.⁷⁶ Additionally, even if such access were permitted, few law firms have the resources required for such extensive review. This volume of data complicates the duty of the state attorney and court to identify facts both harmful and favourable to the defendant, as not all data may be incriminating.⁷⁷ Recognising this issue, the ECtHR has endorsed the involvement of the defence in developing criteria for searching relevant data to ensure an effective defence.⁷⁸ A second issue arises from the lack of transparency in decryption technologies. For instance, in the ANOM

76 ECtHR, *Rook v. Germany*, 2019, paras. 65–69.

77 Republic of Croatia, 2008, Criminal Procedure Code, Art. 9(1).

78 ECtHR, *Sigurður Einarsson and Others v. Iceland*, 2019, paras. 90–91.

cases, the FBI did not disclose technical details of its decryption systems, which prevents the defence from challenging the validity of technical evidence, an essential part of the right to a fair trial. Access to source code for independent verification remains a significant barrier. Even if this obstacle could be resolved, few experts are equipped to analyse such complex systems, and the costs associated with their services are substantial. Furthermore, the duration required for thorough technical examinations could extend the criminal proceedings beyond legally acceptable limits, thus disadvantaging the defendant by delaying the resolution of their case. The lack of qualified experts in smaller countries presents a disproportionate burden on the defence, often necessitating the search for experts outside national borders. The challenge of explainability in AI systems is also a significant issue; the processes and operational mechanics of these systems are often opaque, and if they cannot be clearly explained, or if access to the source code is restricted or there is a lack of qualified experts to interpret it, the defence's options become considerably limited. Although these communication tools are generally available as legal applications, they might benefit defendants in some cases, potentially aiding the commission of offenses. However, their decryption and use as evidence threatens not only the right to defence, an essential element of the right to a fair trial under the ECHR, but also the right to privacy in correspondence, as enshrined in Art. 8 of the Convention. The utilisation of these systems by criminal prosecution agencies marks a substantial advancement, enabling quicker evidence collection, enhanced mobility across jurisdictions, and the opportunity to operate within legal frameworks that may favour prosecution, often leading to so-called forum shopping for evidence as *Burić et al.* noted.⁷⁹ Consequently, it is evident that prosecution bodies are becoming significantly more effective, encountering fewer obstacles in evidence gathering than traditional methods, which presents new challenges for the defence. Therefore, the emphasis has shifted markedly towards prosecutorial efficiency.

Facial recognition technology has diverse applications, from verifying a person's identity to detecting emotions or facial expressions, and potentially assessing the truthfulness of statements. However, the most contentious use is real-time facial recognition, where decisions are made almost instantaneously based on recognition results. This rapid processing poses risks, as system accuracy remains questionable, and any immediate response can lead to invasive actions against individuals. Given these concerns, the AIA takes a restrictive stance, limiting the use of such technology. Accuracy issues are especially problematic. As highlighted in the case *Edward Bridges v. South Wales Police*, it is essential to delete personal data immediately if individuals not actively under identification are involved; however, this requirement complicates accuracy checks. Regarding criminal procedure, real-time facial recognition

⁷⁹ Burić et al., 2023, p. 266.

should be excluded from procedural stages where the *in dubio pro reo* principle applies, as this technology cannot guarantee 100% accuracy. Novokmet, Tomičić, and Vidaković argue that such inaccuracies render it incompatible with the presumption of innocence.⁸⁰ Another concern is the considerable discretion granted to police in deploying these systems and compiling watchlists of potential suspects. This degree of control allows authorities to determine which individuals are targeted by the system, raising questions about proportionality, oversight, and potential biases in law enforcement. Individuals are typically unaware that they are on surveillance lists or subject to recognition by facial recognition systems, nor are they given the opportunity to challenge the results. Such systems can be integrated with smart devices, such as cameras and doorbells, allowing access to civilian-recorded databases. If a dispute arises, the defence may rely on an expert to interpret technical aspects – a complex and resource-intensive task. Another issue involves the retention of recordings and their potential use for prosecutorial purposes. For example, if individuals participating in protests are identified by these systems, they may experience a chilling effect on their freedom of expression, as the possibility of future criminal charges may discourage their participation. This resembles a modern, adapted form of the historical legal concept of *absolutio ab instantia*, where suspicion based on pre-existing evidence could trigger new investigations or even criminal proceedings. While, in theory, such systems might benefit the defence by confirming that the defendant's identity is distinct from the perpetrator's, they overwhelmingly serve law enforcement. These technologies enable authorities, particularly the police, to analyse large crowds and act based on recognition results without the individuals' knowledge. The restrictions in the AIA regarding real-time recognition are thus a positive step towards rebalancing the scales between prosecutorial efficiency and the defendant's rights to robust defence.

Assessing the risk of re-offending or offending for the first time is a complex and contentious task, even without AI. Any risk assessment has significant implications, potentially affecting measures from pre-trial detention to restrictions through precautionary conditions. The transparency of AI systems in this context is particularly problematic; even if the decision-making parameters of AI were understood, the defence would still face challenges in contesting the evaluation criteria. For an effective defence, it is essential to know and comprehend the AI's decision-making basis; yet, algorithmic processes inherently lack the individualisation central to criminal procedural principles. Risk assessments for criminal justice decisions are expected to be case-specific, particularly in the determination of penalties. The highly algorithmic nature of AI in these assessments can undermine this expectation, making it extremely difficult for the defence to challenge decisions, especially

80 Novokmet, Tomičić and Vidaković, 2023, pp. 557–559.

compared with traditional judgments that the court is required to explain thoroughly – a requirement the ECtHR has established as a foundational standard for fair proceedings.⁸¹ This situation raises the possibility of automating court decisions, which poses risks to judicial independence and fairness. The AIA addresses this concern by classifying systems used as decision-support tools for such judicial determinations as high-risk in Art. 6(2) and ANNEX III(8)(a). This classification aims to enhance oversight and mitigate risks associated with over-reliance on automated systems in legal settings. Beyond criminal law, the *SCHUFA* case offers relevant insights. The CJEU underscored that AI-based auxiliary tools, here in the context of credit scoring, can qualify as automated decisions if they operate without adequate human oversight.⁸² This perspective reinforces the importance of human control in decisions influenced by AI, regardless of the specific domain. Extending this to predictive policing, where systems forecast potential offenders, victims, or crime locations, the AIA takes a cautious approach by limiting individual profiling. Specifically, the AIA restricts profiling individuals as potential criminals, deeming it appropriate only as an auxiliary tool to support human judgement based on verified and objective facts. This regulatory step aims to prevent over-reliance on AI predictions and ensure that such decisions remain grounded in human assessment, thus safeguarding against the erosion of individual rights in criminal proceedings. In essence, these systems generate suspects for actions that have not been committed, and that may never be, without extending the rights typically afforded to suspects. Consequently, any associated risk assessment falls upon the defendant, and the opacity, lack of explanations, and inherent *black box* nature of these systems further complicate their position. While these technologies significantly boost efficiency, allowing for a less personalised approach to risk assessment and streamlining processing for courts and law enforcement, this efficiency often comes at the expense of individual rights. In cases of individual profiling, the person being assessed remains unaware of their status and of the rights that would apply to them as a formal suspect.

The application of AI systems in criminal proceedings is set to expand both in quality and quantity, offering increasing appeal for criminal prosecution bodies and courts due to their advantages. These developments are reshaping traditional criminal procedure, pressing modern criminal law to seek adjustments to accommodate and regulate such technologies. Current regulatory attempts, though largely sectoral, represent positive steps towards balancing efficiency with the traditional principles of criminal law. However, the use of AI remains largely skewed towards enhancing prosecutorial effectiveness, placing the defence in a more challenging position. This

81 ECtHR, *Peša v. Croatia*, 2010, para. 91; ECtHR, *Perica Oreb v. Croatia*, 2013, paras. 107–108; ECtHR, *Orban v. Croatia*, 2013, para. 51.

82 CJEU, *OQ v Land Hessen, SCHUFA Holding AG*, 2023, paras. 40–50.

imbalance is evident in the regulatory efforts that, while aiming to preserve human rights and freedoms, reflect a clear tilt towards supporting the prosecution. The defence's position is weakened as AI systems grant prosecutorial bodies enhanced tools for investigation and evidence gathering, often with limited transparency and accountability. Within the framework of the ECtHR, the concept of human rights and freedoms is upheld; yet, the need to limit or even restrict AI use indicates its profound impact, effectively granting prosecutorial authorities a higher level of efficiency, often at the expense of the defendant's right to a robust defence.

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Protection of Victims' Rights under Directive 2012/29/Eu: An Analysis of Changes and Future Perspectives

ABSTRACT: *The protection of victims' rights is a cornerstone of modern legal systems, particularly in the European Union (EU), which strives to harmonise minimum standards across its Member States. This study analyses the framework established by Directive 2012/29/EU, highlighting its role in improving victim treatment, access to justice, and support. While the Directive has raised awareness and introduced individualised measures, its implementation faces challenges due to varying legal traditions and administrative capacities. The study also examines the ambitious 2023 amendments proposed by the European Commission, addressing matters such as secondary victimisation; cybercrime; and the need for inclusive, victim-focused support for vulnerable groups. Emphasising the use of modern technology to improve reporting and privacy protection, the proposals aim to adapt to a changing social and technological landscape. By reflecting on the progress and proposed reforms of the Directive, the current study underscores the importance of balancing harmonisation with respect for national legal systems, ensuring the EU remains a space where victims are supported, and their dignity is upheld.*

KEYWORDS: *victims, vulnerable groups, protection, support, harmonisation, sovereignty*

1. Introduction

The protection of victims' rights is one of the pillars of modern legal and social systems, and its importance is particularly evident within the European Union (hereinafter: the EU). The functioning of the single market and free movement of

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citizens contribute to fostering unity and solidarity at the EU level. Yet, this places a requirement on Member States to develop more integrated solutions in the field of human rights protection, including the rights of those affected by crime. However, in this context, it is particularly important to maintain an appropriate balance between integration and the sovereignty of Member States, especially in the area of criminal law and procedures, which reflect specific legal traditions, social structures, and value systems. Criminal law is considered a key element of national sovereignty, as it pertains to fundamental principles of justice, social norms, and the punishment of crimes within a state's borders. While the EU strives to harmonise minimum standards for the protection of victims' rights, it must respect these diverse approaches to avoid interfering in the internal affairs of Member States.¹

Secondary legislation of the EU, such as directives, is based on the principle of minimum harmonisation. This principle allows common standards to be established while enabling Member States to adapt their national legislation to local circumstances. This means that each state can implement more advanced solutions tailored to its needs, provided that the minimum requirements set out in the directive are met. Such an approach helps maintain a balance between the harmonisation of legislation and respect for the sovereignty of Member States. This balance is fundamental to preserving the original vision of the EU as a community of diverse nations and legal traditions.²

The adoption of Directive 2012/29/EU (hereinafter: the Victims' Rights Directive)³ established minimum standards for the rights, support, and protection of victims of crime, outlining the course of action that Member States should take to ensure a common baseline and enhance the effectiveness of support provided to victims. The legislation particularly emphasised the need for an individualised approach to victims, considering their specific needs, life circumstances, and potential risks. However, despite its ambitious objectives, the implementation of the Victims' Rights Directive has revealed numerous challenges faced by Member States. The diversity of legal systems, budgetary constraints, and evolving social and technological realities are just some of the factors that have hindered the full achievement of the directive's goals. Secondary victimisation has also remained a significant issue, where victims experience additional stress and trauma due to inappropriate treatment by law enforcement, the judiciary, or other institutions. These difficulties necessitate the

1 Wielec, 2017; Brack, Coman and Crespy, 2019, pp. 3–30; Ouwerkerk, 2015, pp. 11–31; Rozmus, Topa and Walczak, 2010, p. 14.

2 Thomson, Torenvlied and Arregui, 2007, pp. 685–709; Duina, 1997, pp. 155–179; Barry and Kane-matsu, 2016, pp. 89–96; Krause, 2006, p. 155; Horspool and Humphreys, 2012.

3 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

continuous improvement of legislation to better address the needs of victims and adapt to the dynamically changing challenges of the modern era.⁴

The advancement of technology, globalisation, and increasing societal mobility present legislators with new challenges. In response to these developments, in 2023, the European Commission proposed amendments to the Victims' Rights Directive aimed at addressing existing shortcomings and adapting the legislation to contemporary realities.⁵ The introduction of integrated protection mechanisms, such as digital tools for reporting crimes or dedicated support hotlines, and specific protective measures for vulnerable groups such as children or persons with disabilities, are just some of the proposed actions aimed at strengthening the victim support system within the EU.⁶

The protection of crime victims is not merely a formal matter but also a testament to the EU's commitment to building a space of freedom, security, and justice where human rights are safeguarded and respected at the highest level. Strengthening the position of victims within the legal system is crucial for restoring their sense of dignity, security, and trust in public institutions. Integrated actions at the EU level aim to enable Member States to draw on best practices and experiences, which should lead to raising the standards of victim protection. At the same time, the need to reconcile universal principles with the diversity of legal and social systems in individual countries requires legislators to adopt a flexible approach that maintains a balance between harmonisation and local needs. In this context, a minimum harmonisation approach and further cross-border cooperation are essential for effectively combating crime and ensuring appropriate support for victims.⁷

The analysis of the initial assumptions and planned changes in the area of victim rights protection not only allows for an evaluation of the EU's achievements in this field but also provides insights into the challenges facing the community in the context of dynamic social, technological, and legal transformations. The proposed solutions have the potential to become a milestone in advancing the EU's fundamental values, such as solidarity, equality, and respect for human dignity, making this issue highly significant from both legal and social perspectives.

4 Buczman, 2013, pp. 235–250; Mazzucato, 2016, pp. 8–26; Kaczorkiewicz, 2021, pp. 285–297.

5 Proposal for a Directive of the European Parliament and of the Council amending Directive 2012/29/EU establishing minimum standards on the rights, support, and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA - General approach.

6 Piskorski and Błaszczak, 2023; Halliday and Osinsky, 2006, pp. 447–470.

7 Jacqué, 2011, pp. 995–1023; D'Hollander, Marx and Wouters, 2014; Tardy, 2017; Hobbing, 2016, pp. 155–182.

2.

Fundamental Principles of EU Legislation on Victim Protection

The Victims' Rights Directive replaced the earlier Council Framework Decision 2001/220/JHA.⁸ The new provisions reflect the EU's ambition to create a coherent and comprehensive system of support and protection, encompassing diverse measures such as access to information, specialised psychological support, legal assistance, and protection mechanisms in cases of immediate danger to life or risk of serious harm. These objectives are rooted in the core values enshrined in the Treaty on the EU⁹ and the Charter of Fundamental Rights of the EU, which emphasise the importance of safeguarding human rights, dignity, and freedom.¹⁰

The legal basis for actions aimed at protecting the rights of crime victims is found in the Treaty on the Functioning of the EU, particularly in Article 82(2).¹¹ The provisions of the Directive are based on the principles of territoriality and jurisdictional connection, which define the framework for the application of law within the EU. In practice, this means that the legislation apply to crimes committed within the territory of the EU and criminal proceedings conducted within its borders. Exceptionally, protection may be extended to victims of crimes committed outside the EU if there is a connection to criminal proceedings taking place within the Union.

The personal scope of the Victims' Rights Directive is broad and includes both direct and indirect victims. The definition of a "victim" encompasses, first, 'a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence'. Second, it also includes 'family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death'.¹² In line with the EU's human-centred approach to the protection of victims' rights, a family member is also understood to include individuals living in a stable and lasting relationship with the victim, regardless of the nature of their relationship.¹³

In this context, the principle of personal universalism, characteristic of human rights protection, expands the scope of individuals whose rights should be safeguarded under the implementation of the directive. This means that the protection

8 2001/220/JHA: Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings.

9 Treaty on European Union.

10 Charter of Fundamental Rights of the European Union.

11 Treaty on the Functioning of the European Union.

12 Mazzucato, 2016, pp. 8–26.

13 Solursh, 1990, pp. 155–162.

outlined in its provisions goes beyond formalities, encompassing any person affected by a crime, regardless of their nationality, residence, or immigration status. The implementation of the directive by Member States is a fundamental element of its effectiveness, as it obliges states to achieve specific objectives while granting them flexibility in selecting the means to do so. Notably, in certain circumstances, the directive may have direct vertical effect. This allows individuals to invoke its provisions before national courts when its implementation is incomplete or flawed, as confirmed by the case law of the Court of Justice of the EU, for instance, in cases 148/78 Ratti¹⁴ and 41/74 van Duyn.¹⁵ This type of legal protection serves as a vital tool for victims, enabling them to assert their rights directly under EU law when national implementation fails to meet established requirements.

The implementation of the directive's provisions requires that every victim be treated in a non-discriminatory and individualised manner, considering their specific needs and life circumstances. Particular care should be given to children, whose rights must be safeguarded in a way that is appropriate to their age, level of maturity, and specific needs. This principle is rooted in both the Charter of Fundamental Rights of the EU and the United Nations Convention on the Rights of the Child,¹⁶ which emphasise the need to prioritise the best interests of the child. Similarly, persons with disabilities require special attention in the implementation of the directive's provisions. A key aspect of ensuring their rights is the removal of architectural, procedural, and informational barriers that may hinder their access to justice. Member States are obligated to guarantee full access to legal procedures, which includes providing communication support and specialised assistance when needed. The directive identifies categories of victims requiring particular attention in terms of tailored support mechanisms. The aim is to mitigate the impact of traumatic events as much as possible and provide a sense of security.¹⁷

The EU legislation, aiming to ensure a balance between the protection of victims' rights and the rights of offenders, considers both the necessity of preventing secondary victimisation and safeguarding the fundamental principles of criminal proceedings. The rights granted to victims must not infringe upon the guarantees afforded to individuals suspected or accused of committing a crime. The directive precisely defines the term "offender" as encompassing both individuals convicted of a crime and those suspected or accused but not yet found guilty. In this context, the provisions

14 Judgment of the Court of 5 April 1979, Criminal proceedings against Tullio Ratti, Case 148/78, Reference for a preliminary ruling: Pretura di Milano – Italy, Dangerous preparations.

15 Judgment of the Court of 4 December 1974, Yvonne van Duyn v Home Office, Case 41/74, Reference for a preliminary ruling: High Court of Justice, Chancery Division - United Kingdom, Public policy.

16 Convention on the Rights of the Child.

17 Fuller-Thomson and Brennenstuhl, 2012, pp. 1573–1574; Child et al., 2011, pp. 247–267.

fully respect the principle of the presumption of innocence, which is a cornerstone of modern criminal law and enshrined in the Charter of Fundamental Rights of the EU and the European Convention on Human Rights.¹⁸ Adherence to this principle reflects the integrity of criminal proceedings and ensures the equal treatment of all parties involved. An equally important aspect of maintaining balance between the parties to the proceedings is strengthening the protection of victims' rights without limiting the right to defence, which is guaranteed to every individual subject to criminal proceedings. Therefore, actions taken in support of victims must be implemented in a manner that is fully compatible with the procedural rights of the accused. Such an approach aims to address the needs of victims while upholding high standards of justice, ensuring fairness and integrity within the legal system.¹⁹

It is worth mentioning the phenomenon of secondary victimisation, which is particularly significant in the context of criminal proceedings, where victims may be exposed to contact with offenders or face additional emotional burdens arising from the ongoing proceedings. The directive provides several measures to counteract this issue, such as conducting individual assessments of victims' needs, limiting contact between the victim and the offender during proceedings, and ensuring adequate infrastructure in court buildings. All these measures are implemented with due respect for the principle of proportionality, so as not to infringe on the rights of the accused.²⁰

To ensure that victims of crime receive adequate information, support, and protection, and the opportunity to actively participate in criminal proceedings, the directive grants them a wide range of rights. These include access to information and support, the ability to participate in proceedings, and the provision of protection tailored to the individual needs of each victim. Particular emphasis is placed on an individualised approach, considering the specific characteristics of victims, as reflected in the directive's alignment with the Charter of Fundamental Rights of the EU and universal principles of human rights protection. Member States are required to establish a system that ensures victims of crime are treated with respect, professionalism, and empathy, regardless of their race, gender, age, religion, sexual orientation, residence status, or other characteristics. One of the obligations set out in the directive is the individual assessment of each victim's needs. This approach considers not only the nature of the crime but also the specific characteristics of the victim and the circumstances of the incident. The purpose of such an assessment,

18 European Convention on Human Rights.

19 Groenhuisen, 1996, pp. 163–176; O'Hear, 2006, p. 83; Ward, Gannon and Birgden, 2007, pp. 195–216.

20 Orth, 2002, pp. 313–325; Tamarit, Villacampa and Filella, 2010, p. 281; Tavares et al., 2023, pp. 2594–2615.

carried out in accordance with national procedures, is to determine the necessary protective measures.²¹

Victims identified as requiring special protection have the right to measures that significantly enhance their safety and comfort during criminal proceedings. Member States are obligated to ensure that the questioning of such victims takes place without undue delay following the reporting of the crime and that the number of interviews is limited to the necessary minimum. This approach aims to reduce the stress and trauma associated with having to repeatedly recount painful events. For victims with specific needs, as determined through an individual assessment, additional protective measures are provided. Their interviews should take place in specially designed or adapted rooms that ensure a sense of safety and minimise stress. Furthermore, interviews are conducted by trained professionals, allowing for a professional approach that considers the victims' emotional and psychological needs. To minimise further burden on the victims, it is recommended that all interviews be conducted by the same individuals, unless doing so conflicts with the requirements of justice. In cases involving victims of sexual or gender-based violence, there is an additional provision allowing the victims to choose the gender of the interviewer, addressing the specific needs of victims in such cases.²²

In the case of children, who are a particularly vulnerable group of victims, EU legislation have introduced additional measures aimed at ensuring their full protection during criminal proceedings. Interviews with children should be recorded in an audio-visual format, allowing them to be used later as evidence in court proceedings. This mechanism eliminates the need for children to provide testimony multiple times, significantly reducing the risk of secondary victimisation and the stress associated with participating in criminal proceedings. Specific rules regarding audio-visual recording procedures are determined by the national laws of each Member State. Furthermore, during both the investigative and judicial stages, when the victim is a child, their age, maturity, and individual needs must be taken into account. In cases where parental authorities cannot represent the child due to a conflict of interest or when the child has no guardians, Member States are required to appoint a special representative for the minor. This representative ensures that the child's interests are safeguarded and that their rights are properly protected. Additionally, if the child is entitled to legal counsel, they have the right to their own lawyer and legal representative, particularly in cases of a potential conflict of interest with their guardians. Moreover, in situations where the age of the victim cannot be determined but there

21 Dunbar, 2006, p. 323.

22 Milne and Bull, 2006, pp. 7–24; Holmberg, 2004, pp. 155–170; Jakobsen, 2021, pp. 1155–1170.

are reasonable grounds to believe that the person is a child, the directive provides for treating such a person as a child for the purpose of applying protective measures.²³

3.

Obligations of Member States Arising from EU Legislation

The EU legislation on the protection of crime victims aim to establish common minimum standards that Member States are obligated to implement within their legal systems. These standards do not apply directly but require transposition into national legal frameworks, allowing for the consideration of the specific legal, cultural, and social conditions of each country. While maintaining the freedom to choose the methods and means of implementation, Member States can develop solutions tailored to their local circumstances. However, the key requirement is that the implemented legislation ensure at least the same level of protection and support as provided by EU standards. This approach allows for the harmonious integration of shared EU values with respect for the sovereignty of Member States, particularly in areas as significant and sensitive as criminal law and procedure. Thus, each state can build its own system of victim protection that addresses local social needs while fulfilling pan-European commitments to human rights protection.²⁴

Member States are obligated to create legal frameworks that enable crime victims to fully exercise their rights in practice. This includes ensuring access to clear and understandable information, specialised psychological support, protection against secondary victimisation, and respect for the individual needs of victims at every stage of criminal proceedings. A key element in achieving these objectives is the implementation of systematic training programs for law enforcement officers, prosecutors, and the judiciary, aimed at guaranteeing a professional and empathetic approach in interactions with victims. These training programs must take into account the specific needs of victims and the context of the situations they are facing.²⁵

To fully implement EU standards for the protection of crime victims, the involvement of various entities is essential to create a cohesive support system. In this context, non-governmental organisations (NGOs) play a significant role, often complementing state efforts and serving as an indispensable link in providing assistance to victims. NGOs are the entities offering psychological, legal, and material support; running shelters for victims of violence; and organising support groups. However,

23 Back and Lips, 1998, pp. 1239–1252; Whitcomb, 1994; Lyon, 2014, pp. 73–89.

24 Kaiafa-Gbandi, 2001, p. 239; Perry, 2011, p. 71; Donnelly, 2014, pp. 225–238; Donat-Cattin, 2015, pp. 1682–1712.

25 Pastore, 2015, pp. 32–46; Květenská and Prokopová, 2019, pp. 10929–10934; Neff, Patterson and Johnson, 2012.

their activities, though highly valuable, are often dependent on financial stability, which in many cases remains insufficient or short-term. The lack of systemic support from states and limited access to public or EU funding can lead to organisational uncertainty, making it difficult for NGOs to perform their tasks at the required level. Collaboration between states and NGOs, especially those running specialised support centres, serves as a model of good practice. Despite their commitment and knowledge of local needs, the role of these organisations is often marginalised in the process of shaping public policy. Consequently, while fulfilling a crucial role in victim protection, NGOs are frequently forced to operate with limited resources and face bureaucratic barriers that hinder their access to funding and collaboration with state institutions. These realities highlight the need for partnerships between states and social organisations to be more structured and long-term in scope.²⁶

The implementation of directive provisions also requires Member States to monitor the effectiveness of the solutions introduced and report progress to the European Commission. In line with its obligations, the European Commission submits a report to the European Parliament and the Council on the implementation of the directives. These reports serve as the primary tool for monitoring the effectiveness of directive implementation by Member States. To prepare such a document, the Commission may request detailed information from Member States regarding the implementation of the directive at the national level. In practice, this means that while Member States are not required to report regularly, they are obligated to cooperate in the monitoring and evaluation process. This allows the Commission to assess the degree of alignment of national legislation with the directive's requirements and identify potential challenges and gaps in its implementation. The report also serves as a foundation for formulating recommendations and further legislative actions aimed at improving the protection of victims' rights across the EU.²⁷

Furthermore, the directive promotes cross-border cooperation and the exchange of experiences between Member States, enabling the development of more effective practices and the harmonisation of standards across the EU. One of the key challenges in implementing the directive is the protection of victims in cross-border situations. Crimes such as human trafficking, smuggling, cybercrime, or violence against migrants require close collaboration between authorities in different Member States. In such cases, unified protection standards are essential to ensure that victims have the same rights regardless of where the crime was committed or where they reside. An example of the realisation of these goals is the use of shared European mechanisms, such as the European Protection Order, which allows protective measures for victims to be transferred to another Member State. However, such cooperation and

26 Bräutigam and Segarra, 2007, pp. 149–181; Beigbeder, 2023.

27 Lantschner, 2020, pp. 444–471; Groenhuijsen, 2014, pp. 31–48.

unified standards rely on robust national frameworks, which, despite EU integration, must take into account local realities and social needs. Minimum harmonisation serves as the key foundation upon which Member States can develop their support systems while maintaining consistency at the EU level. Nevertheless, the implementation of the directive is not without challenges. In some Member States, budgetary constraints pose a significant barrier to the development of essential support services, such as assistance centres or information systems. Additionally, differences in the interpretation and application of provisions by individual Member States can result in inconsistencies in the enforcement of victims' rights. A particular issue remains the shortage of trained specialists capable of effectively responding to the needs of victims, highlighting the necessity for investment in education and the professional development of personnel in this area.²⁸

4.

Analysis of Proposed Amendments in the Area of Crime Victims' Rights Protection

On 12 July 2023, the European Commission submitted a proposal to the Council and the European Parliament for a directive amending Directive 2012/29/EU. This amendment aims to update the minimum standards for the rights, support, and protection of victims of crime and replace the Council Framework Decision 2001/220/JHA. This initiative arises from the need to address shortcomings identified during the practical implementation of the current legislation. Problems such as victims' difficulties in accessing psychological support, information, or physical protection have highlighted the necessity of clarifying provisions and introducing additional measures.

The legislative basis for the proposed amendments is Article 82(2)(c) of the Treaty on the Functioning of the EU, which allows the European Parliament and the Council to establish minimum standards concerning the rights of victims of crime. The proposal, which received an opinion from the European Economic and Social Committee on 13 December 2023, is a response to extensive consultations and reports on the implementation of the existing legislation. It also addresses new challenges such as cybercrime and cross-border offenses and underscores the need to introduce more effective mechanisms to prevent secondary victimisation.²⁹

One of the key objectives of the new legislation is to ensure easy and swift access to information about the rights available to victims and the forms of assistance offered.

28 Yang, 2023, p. 72.

29 Summers et al., 2014.

Victims will be able to choose whether they prefer to receive this information in person or through modern technologies, aiming to tailor the communication process to individual preferences and circumstances. Under this approach, Member States will be required to implement information and communication tools that enable the reporting of crimes, access to information about victims' rights, and contact with relevant authorities and support services. Electronic communication channels will complement traditional methods while ensuring that victims still have the option of personal contact should they prefer.³⁰

Another aspect of the changes is the introduction of a harmonised helpline with the number "116 006" available throughout the EU. This helpline is intended to provide emotional support to victims, inform them about their rights, and refer them to appropriate services. The helpline will be operated in the official languages of the respective Member State and, where possible, in additional languages commonly spoken in the country. The aim is to enhance the accessibility of support for crime victims, regardless of their origin or life circumstances.³¹

Attention has also been drawn to the necessity of providing emotional support to victims present in court buildings, where the stress associated with the judicial process can intensify. It has been proposed that such support be offered by trained volunteers, court staff, or other designated individuals. The presence of these dedicated individuals can help victims feel safer and reduce the tension caused by court procedures, enabling them to participate more fully in the proceedings.³²

Additionally, the amendments provide for the development of targeted psychological support for victims identified as having special needs. Such victims may include not only victims of sexual, gender-based, and domestic violence but also victims of human trafficking or organised crime; individuals with disabilities; or victims of exploitation, hate crimes, terrorism, or crimes under the jurisdiction of the International Criminal Court. Member States will be required to develop networks of specialised support services that not only provide psychological assistance but also tailor it to the individual needs and circumstances of the victims.³³

Equally important is the strengthening of personal data protection for victims. Victims will have the right to raise concerns about the disclosure of their personal information, such as their home address or contact details, which could potentially reach the offender. Relevant authorities will be obligated to assess the risk and decide not to disclose this information if there is a danger of intimidation, retaliation, or other forms of violence. These measures are aimed at protecting victims from

30 Altan and Baudoin-Naneix, 2024; Wood et al., 2022, pp. 9–20.

31 Hamer Vidmar and Bajto, 2018, p. 61.

32 Wilson, McWhinnie, Picheca, Prinzo and Cortoni, 2007, pp. 1–15.

33 Walby, Apitzsch, Armstrong, Balderston, Follis, Francis and Tunte, 2016; Hillman, 2021.

further harm and creating a safer environment for their participation in criminal proceedings.³⁴

The new measures also encompass the group most vulnerable to long-term effects of trauma and secondary victimisation – children. Particular attention has been paid to situations where a child is in conflict with a person holding parental authority. Under the proposed changes, actions taken on behalf of a child, such as reporting a crime, undergoing medical examinations, or referral to support services, will not require the consent of the person with parental authority if such consent could compromise the child's best interests. This measure is primarily aimed at protecting children in situations where the perpetrator of violence or neglect is a close family member. It seeks to provide children with a genuine opportunity to receive support without additional formal barriers.³⁵

Similar principles are reflected in the provisions concerning the protection of crime victims who are third-country nationals. The new legislation aims to eliminate fears associated with negative consequences of reporting crimes that may arise due to the victim's residency status. The proposed changes ensure that all actions related to protection, such as access to support services, reporting crimes, or participation in criminal proceedings, will be carried out in a non-discriminatory manner, regardless of citizenship or residency rights. A particularly important aspect of these provisions is the guarantee that victims residing in the EU unlawfully will not be at risk of deportation as a result of taking legal action against the perpetrator. These provisions also include the possibility of issuing special residence permits or other forms of protection, especially in cases involving victims of human trafficking or domestic violence. Member States will be required to ensure that no administrative formalities related to residency status prevent victims from receiving adequate care and support. Consequently, both children and other particularly vulnerable groups will be provided with comprehensive protection throughout the EU.³⁶

To enhance crime detection and improve overall public safety, the proposed changes to the directive focus on streamlining mechanisms for reporting crimes and ensuring greater accessibility to support services for victims and witnesses. While the directive does not explicitly mandate that information campaigns be organised, it emphasises the need to create safe conditions for reporting crimes and raise public awareness about the issue of criminality.

In this context, Member States could consider implementing educational and informational campaigns as an additional measure to support these objectives. Such campaigns could promote crime reporting and increase public awareness of citizens'

34 Malsch, 2021, p. 161; Ballauri, 2021, pp. 315–329.

35 Satink, Schuyt and Sombroek, 2023, pp. 17–55.

36 Briddick, 2020, pp. 1013–1034; Simic, 2004.

roles in combating criminal activity. They should address the needs of diverse social groups, including both victims and potential witnesses, and utilise a wide range of traditional and digital media platforms, such as television, newspapers, online portals, and social media, to reach the broadest possible audience. These campaigns could also help overcome psychological barriers, such as fear or shame, which often prevent victims from reporting crimes. By addressing these barriers, the campaigns would support the overarching goals of the directive and contribute to fostering a more supportive and proactive environment for addressing crime.³⁷

In parallel, a recommendation has been made to introduce mechanisms that make the process of reporting crimes more accessible and secure, particularly for victims in challenging situations. The proposed amendments to the directive emphasise the need to ensure the possibility of reporting crimes through easily accessible information and communication technologies. These tools should, where possible, also allow for the submission of evidence in electronic form, while respecting national procedural laws.³⁸

The collection and regular publication of data are among the key elements of creating an effective system for protecting the rights of crime victims in the EU. The introduction of a requirement for Member States to collect and transmit harmonised data to the European Commission every three years aims to provide a solid foundation for shaping policies and strategies. Such data, available at the central level, will enable assessments of the effectiveness of national procedures and the support provided to victims. In this process, the Fundamental Rights Agency plays an essential role, supporting both the European Commission and Member States in creating, analysing, and disseminating statistics that demonstrate how victims exercise their rights. It is worth emphasising that the directive in question, as a horizontal legal instrument, aligns with other EU acts that regulate the rights and needs of specific groups of victims in greater detail, such as victims of human trafficking, domestic violence, or terrorism, ensuring coherence and complementarity of actions at the EU level.³⁹

5.

Summary and Future Perspectives

The existing legislation, particularly Directive 2012/29/EU, have played a significant role in improving the situation of crime victims across the EU. The establishment of minimum standards for protection, support, and access to information has enabled

37 McGuire, Evans and Kane, 2021, pp. 417–433; Choi, Lee and Chun, 2014.

38 Butler and Fitzgerald, 2002, pp. 1–29; Oręziak, 2020, pp. 187–196.

39 Byrne and Entzinger, 2019.

the harmonisation of victim treatment principles in all Member States, contributing to an increased sense of justice and security for victims. The directive has positively influenced the perception of victims' rights as an integral part of the justice system, emphasising their individual needs and diverse life circumstances. The implemented provisions have allowed victims to benefit from more transparent procedures, improved access to psychological assistance, and specialised support.

The proposed amendments to the directive aim to strengthen the rights of victims in the face of contemporary challenges. The dynamic development of technology and related phenomena, such as cybercrime and online violence, necessitate the adaptation of legislation to new realities. Similarly, increasing societal mobility, cross-border crime, and changing demographic structures require more harmonised solutions that consider the diverse life circumstances of victims. The introduction of these changes to Directive 2012/29/EU, despite their potential benefits, may encounter several challenges stemming from the diversity of legal systems and organisational and financial constraints in individual Member States. A primary challenge relates to budgetary limitations, which may hinder the development of appropriate support structures for victims, such as psychological assistance centres, shelters, or helplines. Implementing modern communication technologies and tools for reporting crimes also requires significant financial investments, which could pose a barrier, particularly for countries with more limited budgetary resources.

An additional challenge is the cultural and legal diversity across Member States – each country has its own legal, social, and organisational traditions, which can lead to differences in the interpretation and implementation of new provisions. For instance, countries with a more developed victim support system may be able to implement changes more quickly and effectively, whereas states with less established infrastructure will require more time and resources to meet the required standards. Another issue Member States may face is insufficient staffing, particularly in the context of training specialists such as support centre workers, police officers, or prosecutors. The introduction of new legislative measures necessitates the development of training sessions and workshops to prepare personnel to work in accordance with the new standards, which can be both time-consuming and costly.

The protection of the rights of crime victims is not only a legal obligation but also a moral commitment of the EU to ensure justice, support, and dignity for every person affected by crime. To meet future challenges, it is essential to continue refining the legal framework and strengthening cooperation at both the EU and national levels. Only through collective action and the engagement of all relevant stakeholders can an environment be created where every victim has genuine access to assistance, protection, and justice.

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Bicameralism in Former Yugoslav Republics: Influences and Perspectives

ABSTRACT: *This study examines the concept of bicameralism in the former Yugoslav republics, exploring its role and potential within these societies, which are mostly considered complex and heterogeneous. Bicameralism, which can be a tool for balancing interests in divided societies, has been approached differently across the former Yugoslav states. While countries such as Slovenia maintain a bicameral system, others such as Croatia and Serbia have largely favoured unicameral solutions. By analysing historical and theoretical arguments, this study explores whether a second chamber could enhance democratic processes by representing diverse societal interests or if it is unnecessary in unitary states. Additionally, the study examines alternative mechanisms to bicameralism, assessing their effectiveness in achieving the same goals.*

KEYWORDS: *bicameralism, unicameralism, divided societies, former Yugoslav republics, diversity, constitutional engineering*

1. Introduction

In its recently published report, the Venice Commission has stated that bicameralism is a response to the socio-political demands of modern societies, and that some global trends (e.g. democratic backsliding)¹ demonstrate a new and increasing interest in this institutional mechanism.² Indeed, bicameralism is one of the topics that has sparked various discussions for centuries. Almost all theoretical debates on this issue are framed in terms of pros and cons. However, the question of whether to choose

1 Venice Commission (2024) 'Report on Bicameralism' [Online]. Available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2024\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2024)007-e) (Accessed: 21 October 2024), p. 28.

2 Ibid., p. 3.

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a solution where the parliament has one or two chambers is not only a theoretical matter but also a highly practical one. Choosing one option over the other means opting between two concepts of democracy.³ The debate between unicameralists and bicameralists somewhat quieted down towards the end of the 20th century, only to be revived in the 1990s when new constitutional solutions began to be sought by countries of the former real-socialist bloc.⁴ Another reason for the renewed interest in this topic can be found in the increased scientific focus on finding new constitutional solutions that would adapt to very complex, heterogeneous, and often divided societies. The second half of the 20th century and the era of globalisation opened up a field for so-called constitutional engineering.⁵ Various models of bicameralism for the new “environment” are also part of this tendency in constitutional law and political science.

Interestingly, most Eastern European countries in the process of democratic transition have not embraced bicameralism as one of the tools for improving democracy, while other European countries have.⁶ What makes the situation even more paradoxical is that in most of these Central and Eastern European countries, traditions of bicameralism exist. The former Yugoslav republics constitute a notable example.⁷ These states shared a common history for 70 years, first as the Kingdom of Yugoslavia, and later as socialist Yugoslavia. The first state was unitary, while the latter was federal. After the breakup of Yugoslavia, the new states faced, among other things, the question of how to organise their institutions. The question of parliamentary structure is particularly interesting from a research perspective, as the states have responded to this question in very different ways. Accordingly, Slovenia and Croatia adopted a bicameral solution. However, Slovenia is quite specific because it opted for the so-called socio-economic bicameralism. Croatia introduced the second chamber as a territorial representation of counties, but in the 2001 reform, the parliament was transformed into a unicameral one. Serbia and Montenegro, as members of the Federal Republic of Yugoslavia (later the State Union of Serbia and Montenegro), opted for a unicameral parliament. They retained such solutions in their constitutions after the dissolution of the State Union of Serbia and Montenegro. Macedonia did the same. However, not only at the time of constitution drafting but also later, the issue of a bicameral parliament was often raised, and in some countries,

3 Petrov, 2017, p. 44.

4 Ibid.

5 A pertinent example is the work of Arend Lijphart. See: Lijphart, 1984; Lijphart, 1999.

6 Venice Commission (2024) ‘Report on Bicameralism’ [Online]. Available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2024\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2024)007-e) (Accessed: 21 October 2024), p. 9.

7 Under the term “former Yugoslav republics” in this paper, I refer to Serbia, Montenegro, North Macedonia, BiH, Croatia, and Slovenia.

formal proposals were made to amend the constitution in this regard. In Bosnia and Herzegovina (hereinafter: BiH), the solution of a bicameral parliament is the only undisputed one because it is a federal state. All this evidence clearly shows that the former Yugoslavia is a “perfect research field”, as it encapsulates all the questions related to the structure of parliament – from the purpose of the second chamber, its position, and competences, to the way members are elected.

The main question in this study concerns the need for the existence of a second chamber in the former Yugoslav states, based on past experience and current solutions. Broadly speaking, the assumption is that all the societies under consideration are heterogeneous, some less so, and some deeply divided. The assumption, as stated by Von Achenbach, is:

“to constitute a democratic order based on freedom and equality, the political system of a society needs to reflect its complexity. Processes of collective decision-making need to allow for the political expression of societal differentiation and diversity. Bicameralism is a crucial mechanism in this regard. Most basically, bicameralism means a diversification of political institutions. It establishes yet another layer of structural complexity within the legislative branch and the actual law-making procedure. It diffuses and decenters legislative power. It allows for expressing certain aspects of political pluralism and disagreement”.⁸

Based on these assumptions, the aim is to determine whether a bicameral parliament in the former Yugoslav states can be an additional instrument in the development of democratic institutions or if it is truly unnecessary. First, the study addresses the conceptual question of the purpose of bicameralism, particularly from the perspective of its suitability in heterogeneous (ethnically, culturally etc.) societies, as well as in unitary states (all former Yugoslav states, except BiH, are unitary). Then, the common traditions of the six mentioned states are examined. The study specifically analyses the examples of Slovenia (the only country that still has a bicameral parliament); Croatia, which once had one but later replaced it with a unicameral system; and Serbia, which has a very strong unicameral tradition, though the question of the second chamber has been raised multiple times throughout history. Finally, conclusions are drawn on the possible advantages of introducing a second chamber to respect the complex structure of society.

8 Von Achenbach, 2014.

2.

Notion of Bicameralism

The term bicameralism in a broader sense exists when a parliament is composed of two chambers,⁹ regardless of the relationship between the chambers. However, in a narrower sense, bicameralism exists when there is a bicameral system. It exists when the chambers must jointly decide on certain issues and are equal in matters of joint jurisdiction.¹⁰ Therefore, the essence of bicameral decision-making is that no decision can be made without the agreement of both chambers. Such a system, where the chambers are equal, is also called egalitarian bicameralism. In cases where one chamber is given precedence, it is referred to as non-egalitarian bicameralism.¹¹

2.1. Types of Bicameralism

The Venice Commission distinguishes between several types of second chambers based on the mode of election and nature of representation: the federal second chamber; the second chamber of a regionalised and decentralised state; the second chamber constituted on the principle of popular representation; and in the fourth category, second chambers constituted on other organisational principles.¹²

The federal second chamber is implied in federal states. Originating from the Connecticut Compromise¹³ in the USA, it allows for the representation of both the citizens of the federation (who are represented in the second chamber) and the federal units. However, in this study, we are interested in the second chambers in unitary states. The fundamental question is whether a second chamber makes sense if the state is unitary. The theoretical basis for this argument lies in the idea of popular sovereignty

9 Out of 190 national parliaments in the world, 78 are bicameral and 112 are unicameral (National Parliaments (2024) Interparliamentary Union [Online]. Available at: <https://www.ipu.org/national-parliaments>; Accessed: 10 September 2024)

10 Petrov, 2017, p. 48.

11 Marković, 2015, pp. 298–299.

12 Venice Commission (2024) 'Report on Bicameralism' [Online]. Available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2024\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2024)007-e) (Accessed: 21 October 2024), pp. 11–15.

13 The Connecticut Compromise of 1787 represents a compromise on the bicameral structure of the legislature of the United States of America, which managed to satisfy the interests of large states such as Virginia, as well as smaller ones such as New Jersey. The essence of the compromise was that while the Lower House would be elected on a popular basis, proportionate to the electorate as a whole, the Senate would provide equal representation for the states irrespective of their size. Palermo and Kessler, 2017, p. 167.

by Jean-Jacques Rousseau.¹⁴ From this idea, it is concluded that if the people as a whole are sovereign, they must be represented as such, in a unified manner.

However, today, many unitary states also have a second chamber to represent other interests. Thus, citizens of territorial units of a unitary, decentralised state can be represented. Elections for such a second chamber can be either indirect or direct. It is common for the elections to be indirect, and in this case, the second chamber is somewhat weaker than the first. The idea is that an individual citizen appears in a dual capacity: as a citizen of the state (and as such, represented in the lower chamber) and as a citizen of a territorial unit within the state (and as such, represented in the upper chamber).

However, there are cases where both chambers are directly elected. A typical example is Romania, where both the lower and upper chambers (the Senate) are directly elected using the same electoral system.¹⁵ In the Czech Republic, the lower chamber is elected using a proportional system, while the upper chamber is elected using a majoritarian electoral system.¹⁶ Such a structure of chambers can be quite controversial. Namely, if the upper chamber exists to represent specific interests that are not represented in the lower chamber, then having two identical chambers with the same electoral base is rather illogical and does not contribute to respecting the plurality of interests. This duplication lacks a clear logical foundation.

Finally, besides being a member of a community as a citizen, an individual simultaneously has other identities:¹⁷ based on their profession, linguistic community, and religious community, among other such aspects. In this sense, the second chamber can be a political space where the voices of those in various professions, social classes, and linguistic communities can be heard. This group includes the Irish Senate or the Slovenian National Council. This is the basis of the so-called socio-economic bicameralism.¹⁸ The main issue with such a second chamber lies in whether it is truly possible to isolate it from political influences. Additionally, it is often emphasised that historical examples of socio-economic bicameralism have not proven very successful.¹⁹ However, they existed in socialist countries, which means the basic prerequisite was missing: democratic pluralism.

14 Petrov, 2017, p. 44.

15 Ilić, 2022, pp. 217–218.

16 Ibid., p. 133.

17 Venice Commission (2024) 'Report on Bicameralism' [Online]. Available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2024\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2024)007-e) (Accessed: 21 October 2024), pp. 8–9.

18 Ibid.

19 Leaving aside corporatist assemblies in fascist regimes, such as the Council of Fascists and Corporations in Mussolini's Italy and the Corporative Chamber in Salazar's Portugal, the attempts by Charles de Gaulle in France in the 1960s to reduce the powers of the Senate and transform it into a mixed chamber (Chambre mixte) also proved unsuccessful (Marković, 2015, p. 297).

What particularly interests us is the theoretical arguments in favour of the existence of a second chamber to ensure the representation of as many different interests as possible and to secure the normal functioning of interests in heterogeneous societies.

2.2. Bicameralism in Heterogeneous Societies – Theoretical Approach

Numerous authors, especially in the late 20th and early 21st centuries, have highlighted the many advantages of bicameralism from different perspectives. Unlike classic arguments in favour or against it, the newer theory of bicameralism has been largely examined through the application of political methods. One of the most important questions in the field of constitutional law concerns the issue of constitutional engineering – how to create specific constitutional institutions and mechanisms.²⁰ For instance, Lijphart, who offered solutions for heterogeneous societies and proposed a comprehensive framework for systems of consociational democracy, emphasised that bicameralism is one of the key features of this system.²¹ As Bulmer notes, this is entirely consistent with the principle of consensual democracy that seeks to involve as many people as possible in governance.²² Moreover, it aligns with the idea that the second chamber should include various socio-cultural minorities, as they should have the right to veto laws that they see as unsuitable for their needs or as a threat.²³ Bruce Ackerman points out that, ‘although constitutional engineering may be tricky, a second chamber may enhance the deliberative character of political life. Talking over a measure twice may well expose serious difficulties and generate useful reformulations of ill-considered initiatives. The two-step process provides a breathing space in which to reconsider the nature of our civic obligations to one another’.²⁴ He, of course, raises a question that must be seriously analysed in each individual system: ‘does adding complexity and opacity without providing much in the way of extra deliberative engagement worth it’.²⁵

20 Milosavljević and Popović, 2019, pp. 216–217.

21 Lijphart, 1999, pp. 200–211.

22 Bulmer, 2011, p. 116.

23 Bulmer, 2011, p. 117.

24 Ackerman, 2000, p. 684.

25 Ibid., p. 687. At the beginning of the 20th century, one of the main arguments of bicameralists was that unicameral systems were very rare in democratic states. However, after World War II, some countries with a very stable and long democratic tradition abolished their second chamber, such as Denmark in 1963, Sweden in 1969, and Iceland in 1991. (Venice Commission (2024) ‘Report on Bicameralism’ [Online]. Available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2024\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2024)007-e) (Accessed: 21 October 2024), p. 5).

For this study, the key argument derives from the purpose of bicameralism. Undoubtedly, any constitutional institute or mechanism must meet the needs of a particular society. Bicameralism can serve as a significant barrier against the absolute power of a single chamber. It appears, provided it is appropriately composed, as a safeguard against the tyranny of the majority. Bulmer notes the importance of having mechanisms that protect socio-cultural minorities in the context of the relationship between the popular and parliamentary majority.²⁶ Pettit reasons similarly. Discussing the possibilities of limiting power in the decision-making process, he distinguishes between substantive and procedural limitations. One aspect of the latter is the introduction of a second chamber, and the basic argument is that it allows for the representation of as many people's interests as possible.²⁷

Finally, in analysing the advantages of the bicameral system, the Venice Commission also highlights the argument of representing those interests that are not fully represented in the lower chamber. This allows for the institutionalised representation of diverse interests.²⁸ Additionally, another commonly cited advantage is the regulation of community tensions.²⁹ As stated by Von Achenbach:

“an increase in nationalist or regionalist sentiments, growing political polarization within society, popular disappointment with the politics and politicians of a first chamber and the executive, experiences of gridlock and inefficiency of the legislature, or perceptions of regional economic imbalances within a nation can all alter the public's attitudes towards the complex representative claims embodied in a bicameral system”.³⁰

Political transitions are always accompanied by various regulatory mechanisms, among which bicameralism can be one. However, precisely in the context of the aforementioned constitutional engineering, an argument against bicameralism can also be offered. Instead of a bicameral parliamentary structure, other institutional mechanisms can be considered. They are simpler and cheaper (as the second

26 Bulmer, 2011, p. 108.

27 Pettit, 2001, p. 168.

28 The most typical examples are the second chambers in Ireland and Slovenia. Ireland's bicameralism is asymmetrical in nature. The Seanad (second chamber) is intended to play an advisory and revising role rather than to be the equal of the popularly elected first chamber, that is, Dáil (Venice Commission (2024) 'Questionnaire for Report on Bicameralism – Ireland' [Online]. Available at: <https://www.venice.coe.int/files/Bicameralism/IRL-E.htm>; Accessed: 31 October 2024). In 2013, a referendum was held to abolish the second chamber, but it was unsuccessful. Finally, after decades of objections, the Seanad was reformed in 2020 (Ilić, 2022, pp. 179–183).

29 Venice Commission (2024) 'Report on Bicameralism' [Online]. Available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2024\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2024)007-e) (Accessed: 21 October 2024), p. 9.

30 Von Achenbach, 2014.

chamber incurs significant costs), and they avoid the possibility of potential deadlock in the work process.³¹ Comparing the advantages and disadvantages of a second chamber, particularly in the context of divided and heterogeneous societies, Bulmer concludes that strong egalitarian bicameralism in such societies would be a necessity, specifically to over-represent and thereby protect socio-cultural minorities. In relatively homogeneous societies, medium-strength bicameralism is desirable, but alternative mechanisms can be proposed. Finally, in homogeneous societies and small states, preference should be given to other mechanisms, such as minority-veto referendums³² designed to enable direct public participation.³³

This argument about the second chamber as a deliberative body that can represent as many interests as possible forms the basis of this research. Thus, using the example of former Yugoslav states, as well as the experiences of other countries, the question addressed is whether a second chamber can serve as an additional safeguard in heterogeneous societies.

3.

Idea of Bicameralism in Former Yugoslav Republics

The formation of the first Yugoslav state was accompanied by numerous disagreements among various political (and national) groups on diverse issues. As Marinković notes, if in the 19th century, the constitutional question was about how to limit the ruler, in the first Yugoslav state (i.e. the Kingdom of Serbs, Croats, and Slovenes, and later, the Kingdom of Yugoslavia), it took on a new dimension – whether the state should be unitary or federal.³⁴ The question of the form of governance was no less controversial, with proposals even for republican constitutions.³⁵ However, the first Constitution from the time of the Kingdom of Serbs, Croats, and Slovenes, the so-called St. Vitus Constitution of 1921 (*Vidovdanski ustav*), envisioned a unicameral parliament,³⁶ which certainly did not meet the needs of the highly heterogeneous

31 One example is the so-called minority-veto referendum mechanism. Neil McCormick drafted a constitution for an independent Scotland, and one of the proposals was the establishment of a single-chamber parliament. The purpose of this additional corrective instrument was to protect the parliamentary minority: 'Having a single-chamber Parliament was regarded by some commentators as risky, but our response was that a robust committee system coupled with blocking rights for a substantial minority would be sufficient security against the abuse of majority power' (cited in: Bulmer, 2011, p. 108).

32 This mechanism enables a parliamentary minority to impose a suspensive veto on laws, which are then subject to decision-making in a referendum. *Ibid.*, p. 107.

33 *Ibid.*, p. 119.

34 Marinković, 2020, p. 107.

35 For various constitutional drafts, see: Jovanović, 1932b, pp. 348–385.

36 See Art. 69 of the so-called St. Vitus Constitution.

society at the time. The second constitution, the so-called September Constitution from 1931, provided for a bicameral parliament. The Senate, as the second chamber, had two groups of members – those appointed by the king and those elected (Art. 50), with the matter of elections left to law. However, this chamber was more a tool in the hands of the king than an extension of the principle of the separation of powers or a check on the king's autocracy.³⁷

The second Yugoslav state was completely different, being federal and socialist. Instead of the separation of powers, a system of unity of powers was established, with the Assembly as the central body, while the vertical organisation of power was characterised by the principle of democratic centralism.³⁸ Under such conditions, all the constitutions (1946, 1953, 1963, and 1974) and constitutional law (adopted in 1953) of socialist Yugoslavia provided for the existence of multiple chambers. Moreover, this state conducted a sort of experiment in terms of the organisation of the second chamber by promoting the concept of socio-economic bicameralism and, simultaneously, introducing the multicameral system.

According to the 1946 Constitution, the assembly was organised following a pure federal bicameral model: the People's Council (*Veće naroda*) as the general representative body, and the Federal Council (*Savezno veće*) as the representative body of the federation as a unified political community.³⁹ In 1953, the Constitutional Law, which introduced the idea of self-management into the constitutional order, brought significant changes to the structure of the parliament. Alongside the Federal Council, the so-called Producers' Council (*Veće proizvođača*) was introduced. The Federal Council consisted of people's deputies elected by citizens in districts and cities based on general, equal, and direct suffrage, and people's deputies elected by the republican councils and provincial or regional councils from among their members (Art. 25). The Producers' Council consisted of people's deputies elected by producers employed in production, transport, and trade, proportionate to the participation of economic sectors in the total social product of the Federal People's Republic of Yugoslavia (Art. 26). The role of the newly introduced Producers' Council was to decide on all matters related to the economy, finance, labour, and social security.⁴⁰ The 1963 Constitution continued to deepen this Yugoslav experiment of self-management, which was reflected in the structure of the parliament, now comprising five chambers: the Federal Council (*Savezno veće*), Economic Council (*Privredno veće*), Educational-Cultural Council (*Prosvetno-kulturno veće*), Social-Health Council (*Socijalno-zdravstveno veće*), and Organisational-Political Council (*Organizaciono-političko veće*). The fundamental idea was to represent not only the interests of citizens but also other interests

37 See: Marinković, 2019, p. 57.

38 Ibid., p. 62.

39 Đorđević, 1982, p. 489.

40 Ibid., pp. 489–490.

in economic and non-economic spheres. Finally, the 1974 Constitution returned to a bicameral parliamentary structure. The Council of Republics and Provinces (*Veće republika i pokrajina*) was a typical federal chamber, while the Federal Council (*Savezno veće*) was constituted as a delegation of the working class.⁴¹

All the former Yugoslav states, with their legacy of strong socio-economic bicameralism but within the conditions of a one-party system and the absence of political pluralism, faced this heritage when they began adopting their constitutions during the breakup of the state. Macedonia and Montenegro opted for unicameral parliaments. In Montenegro, the issue of bicameralism was never seriously considered, which can be attributed to its small territory and population, as well as its strong unicameral tradition – factors that likely justify such a decision. Meanwhile, although Macedonia is a small country with approximately 2,000,000 inhabitants, in 2005, a discussion on transforming the parliament into a bicameral one was initiated. At that time, the VMRO-NP (Internal Macedonian Revolutionary Organisation – Peoples' Party) parliamentary group proposed such a solution, and the Democratic Party of Albanians did the same in 2010, albeit for different reasons.⁴² North Macedonia is an ethnically heterogeneous country with frequent internal conflicts between members of different nationalities (particularly North Macedonians and Albanians), which is where the reasons for introducing a second chamber should be sought. The party representing the interests of the Albanian minority particularly advocates for such a solution to ensure the representation of this minority and provide an institutional framework for expressing its own interests.⁴³

Finally, BiH will be considered briefly in this study because it is a federal state, and true federations without bicameralism do not exist. BiH⁴⁴ is a federal state composed of two federal units (so-called entities): the Federation of BiH and Republika

41 Ibid., p. 493.

42 Venice Commission (2024) 'Questionnaire for Report on Bicameralism – North Macedonia' [Online]. Available at: <https://www.venice.coe.int/files/Unicameral/MKD-E.htm> (Accessed: 21 October 2024).

43 Ibid.

44 The Constitution of BiH of 1995 has a specific legal nature, as it is not the product of a constituent power vested in the people. From a formal perspective, the Constitution of this state was adopted as Annex IV of the Dayton Peace Agreement of 1995, which brought an end to the war in BiH.

Srpska.⁴⁵ Both of these entities have adopted their own constitutions,⁴⁶ which, in accordance with the provisions of the federal constitution, must be consistent with it.⁴⁷ The federal parliament (Parliamentary Assembly of BiH/*Parlamentarna skupština Bosne i Hercegovine*) is bicameral and consists of the House of Representatives (*Predstavnički dom*) and House of Peoples (*Dom naroda*) (Art. IV of the Constitution of BiH). The House of Representatives represents the citizens and has 42 members, who are directly elected by citizens from the entities, with two-thirds elected from the territory of the Federation and one-third from the territory of Republika Srpska (Art. IV.2 of the Constitution of BiH). The House of Peoples can conditionally be described as the upper chamber; however, unlike comparative models where the upper chamber represents federal units, in BiH, this chamber represents the constituent peoples.⁴⁸ It has 15 members, of whom 10 are from the Federation of BiH (five Croats and five Bosniaks) and five from Republika Srpska as representatives of the Serbs (Art. IV.1 of the Constitution of BiH).

Certainly, the efficiency of the federal parliament's work, the organisation of federal units, and the extent of their competencies are very significant issues, especially considering the difficulties in the functioning of this state. However, these issues fall outside the scope of this research. As previously noted, the broader question guiding this study concerns the need for a second chamber in unitary states, examined through the example of the former Yugoslav states, all of which, except BiH, are unitary.

Therefore, the following sections analyse in detail the examples of Slovenia, which has a second chamber; Croatia, which had one but abolished it in 2001; and Serbia, which has a strong unicameral tradition, though the issue of bicameralism has always been more or less present throughout its history.

45 By an arbitral decision of 1999, the Brčko District was established as a separate political-territorial unit, which some authors have characterised as an unconstitutional act, given that no corresponding revision of the federal constitution, explicitly providing for two entities, was carried out. The highest legal act of the Brčko District is the Statute. Marković, 2012, pp. 170–171; 173.

46 The Constitution of the Federation of BiH was adopted in 1994, and the Constitution of Republika Srpska in 1992, although both have been amended several times following the adoption of the Dayton Agreement. The National Assembly of Republika Srpska (*Narodna skupština*) is unicameral (Art. 71 of the Constitution of Republika Srpska), while the Parliament of the Federation of BiH (*Parlament Federacije Bosne i Hercegovine*) is bicameral and consists of the House of Representatives (*Predstavnički dom*) and House of Peoples (*Dom naroda*) (Art. IV.A.a of the Constitution of the Federation of BiH).

47 Marković, 2012, p. 158.

48 Ibid., p. 97.

3.1. Slovenia – “Unusual” Second Chamber

After the breakup of the former common state, Slovenia adopted a new constitution in 1991. The decision to establish a bicameral parliamentary structure was very interesting, as Slovenia opted for socio-economic bicameralism.⁴⁹ The Constitutional Commission for drafting the constitution presented two proposals with two different concepts of bicameralism,⁵⁰ but the one that envisioned the National Council as the second chamber prevailed, thus establishing non-egalitarian socio-economic bicameralism.⁵¹ According to the provisions of the Constitution, the parliament consists of two chambers: the National Assembly (*Državni zbor*) and National Council (*Državni svet*), where the first is directly elected and consists of 90 members representing the citizens of Slovenia (Art. 80), while the second has 40 members representing social, economic, professional, and local interests (Art. 96).

Some Eastern European countries (e.g. Romania) adopted a bicameral parliamentary structure after the collapse of socialism, arguing that this was a return to their democratic roots and traditions.⁵² In Slovenia's case, it cannot be said that there was any significant influence of an older tradition, as the country gained independence for the first time with the Constitution from 1991. However, it inherited the tradition of socio-economic bicameralism⁵³ from socialist Yugoslavia. Nevertheless, some authors note that the Bavarian Senate had a significant influence on the solution adopted in the Slovenian constitution.⁵⁴ Namely, from 1946 to 1999, the Bavarian Parliament consisted of two chambers, the second of which was a socio-economic senate with a composition similar to that of the Slovenian National Council.⁵⁵

The Slovenian Constitution detailed the electoral rules for the lower chamber, stipulating that members would be elected directly, with the electoral system left to be determined by law. The Constitution also provides that the Hungarian and Italian

49 Since the adoption of the Slovenian Constitution, there have been ongoing discussions about whether Slovenia actually has a bicameral parliament, as this is not explicitly stated in the Constitution. Such debates continued until the Constitutional Court of Slovenia issued its decision (Štrus and Brezovnik, 2023, p. 64).

50 The first envisaged an egalitarian form of bicameralism, while the second was based on a solution according to which the relationship between the chambers would be non-egalitarian. The latter solution was ultimately adopted (Ilić, 2022, p. 185).

51 Ibid.

52 Ibid., p. 212.

53 About socio-economic bicameralism, see: Marković, 2015, pp. 296–297.

54 See Ilić, 2022, p. 187.

55 Art. 34 of the Bavarian Constitution that was in force until 1999: ‘The Senate represents the social economic and cultural corporations and self governing units of the Land’.

ethnic communities have the right to one representative each (Art. 80, para. 3).⁵⁶ Meanwhile, Art. 96 specifies the number of members and composition of the upper chamber. It states that four members represent employees; four represent employers; four represent farmers, tradesmen, and independent professionals; six represent those engaged in non-economic activities; and 22 represent stakeholders with local interests. As can be seen, these are four large groups encompassing a wide variety of interests. The Constitution does not go into detail about how many representatives belong to each subgroup within the four main groups (e.g. who the representatives of non-economic activities are), leaving this to a special law.⁵⁷ Additionally, the Constitution clearly states that all 40 members must be elected, not appointed, but the method of election is also left to be regulated by law (Art. 98). Finally, the Constitution stipulates that the mandate of members of the upper chamber lasts for five years (Art. 98), unlike the four-year mandate of the lower chamber's representatives (Art. 81).

Regarding its competencies, evidently, the relationship between the two chambers is non-egalitarian. The upper chamber primarily plays an advisory role, unlike the lower chamber. It has the right to propose laws to the lower chamber, provide opinions to the National Assembly on matters within its jurisdiction, request the lower chamber to reconsider statutes prior to their proclamation, request the calling of a legislative referendum, and call for the establishment of a Parliamentary Inquiry into a matter of public importance (Art. 97). This overview of competencies clearly shows that the upper chamber does not participate in the debate or voting on laws.

56 The Hungarian and Italian ethnic communities are considered autochthonous minorities, even though there is no definition of that term in positive law. All other minorities have the status of non-autochthonous groups. Being entitled to the status of autochthonous groups means a stronger level of protection for them (for a detailed explanation, see Petričušić, 2004).

57 The law is called the Law on National Council (*Zakon o državnom svetu*). In the first group specified by the Constitution, there are four representatives of employees chosen by employee associations/trade unions (Arts. 26–27). Four representatives from the second group are selected by employers' associations (Arts. 24–25). The third group includes two representatives of farmers chosen by professional organisations of farmers organised at the national level; one representative of artisans chosen by professional organisations of artisans organised at the national level; and one representative of independent professionals selected by professional organisations of other professions, also organised at the national level (Arts. 28–33). From the fourth group, one seat belongs to representatives of universities chosen by the universities, one seat belongs to a representative in the field of education chosen by professional organisations of educational workers, one represents the field of research activities selected by professional organisations of researchers, one representative in the field of culture and sports, one representative from the healthcare field, and one representative from the field of social protection (Arts. 34–37). Finally, the fifth group consists of representatives with local interests who have 22 seats, with 22 electoral districts constituted for this purpose (Arts. 38–42).

It can propose laws, and a relatively strong tool in the hands of the Council is the suspensive veto.⁵⁸ However, the final decision is made by the lower chamber.

The competencies, composition, and structure of the second chamber in Slovenia demonstrate some significant theoretical advantages of this arrangement. Representing an individual not only as a citizen but also through their other roles significantly increases the degree of democracy and enhances the decision-making process. It is a fact that representatives of the chamber directly elected by all citizens today largely represent and defend the political interests of political parties. The representation of various social (economic and non-economic) interests only contributes to the parliament being a truly deliberative body. These interests are appropriately introduced into the sphere of political and institutional decision-making.⁵⁹

However, practice deviates from the theoretical model. Calls for reform of the Council have been heard for quite some time.⁶⁰ Discussions are mainly based on the argument that the Council lacks significant competencies, and this is one of the reasons for its inefficiency. Although Slovenian authors emphasise that it was designed not to make decisions but to advise the National Assembly,⁶¹ it is noted that the second chamber also lacks legitimacy.⁶² Meanwhile, the previously mentioned theoretical advantage of excluding political parties from the work of the second chamber has not been fully validated in practice. Namely, Štrus and Brezovnik point out that political parties play a significant role in the election of a considerable number of Council members.⁶³ These two authors recently conducted a study on bicameralism and the position of the second chamber of the Slovenian parliament, drawing some

58 Article 91: '...The National Council may require the National Assembly to reconsider any statute within 7 days of the same being enacted and prior to its proclamation. On the reconsideration of any statute, the same shall be deemed to be enacted if a majority of all elected Deputies of the National Assembly votes in favour of it, save where this Constitution requires a greater number of votes for enactment. Any such reconsideration of a statute by the National Assembly shall be final...'

59 Ilić, 2022, p. 187.

60 Štrus and Brezovnik, 2023, pp. 63–64. Although various objections are constantly emphasised, the only formal proposal was made in 2012, but without success. There were four main reasons enlisted in the proposal to abolish the National Council. The first reason was the improvement of effectiveness of the legislative process and the quality of the legislation adopted. The second reason was the simplification of the political system and state regulation. The third reason was the final resolution of the dilemma whether the parliament in Slovenia is bicameral or not. The last but not the least was the balance of public finances and reduction of public spending. Venice Commission (2024) 'Questionnaire for Report on Bicameralism – Slovenia' [Online]. Available at: <https://www.venice.coe.int/files/Bicameralism/SLO-E.htm> (Accessed: 21 October 2024).

61 Ibid., p. 65.

62 Lijphart has perceived legitimacy as a limited contributor to the strength of bicameralism but nevertheless claimed that a lack of legitimacy may render a second chamber unable to use its full powers (cited in: Štrus and Brezovnik, 2023, pp. 66–67).

63 Ibid., p. 69.

conclusions about possible issues in the functioning of this chamber. They highlight that distrust in the Council arises when it uses a suspensive veto or delays the legislative procedure, while public confidence in its work increases when, for example, it proposes laws. The public, therefore, gains confidence and the legitimacy of this body increases when it takes on a proactive role. They thus advise introducing mandatory consultations with civil society, regular public reporting, and stronger ties with the electoral base, among other such measures.⁶⁴ Accordingly, we can conclude that socio-economic bicameralism should not be dismissed lightly, as the problems in its functioning are mainly caused by inadequate institutional solutions that turn a chamber that *per definitionem* should advise and assist into a “surplus” that generates “costs”.⁶⁵

3.2. Croatia – “Unnecessary” Second Chamber

The 1990 Croatian Constitution provided for the existence of two chambers: the House of Representatives (*Zastupnički dom*) and House of Counties (*Županijski dom*) (Art. 70 of the Constitution). The House of Representatives is elected directly and serves as the general representative body of all citizens. Meanwhile, the House of Counties comprises citizens from each county (*županija*),⁶⁶ with each county's citizens directly electing three representatives. Additionally, the President of the Republic could appoint up to five members to the House of Counties as representatives of the Republic (particularly distinguished citizens). Finally, besides the elected and appointed members, the President of the Republic, upon the end of their term, becomes a lifelong member of this body, unless they explicitly renounce this duty (Art. 71 of the Constitution).

The term of office for members of both chambers is four years (Art. 72, para. 1 of the Constitution). Regarding the competencies of the House of Counties, despite having a stronger and more direct electoral base than the Slovenian parliament, its role is very similar to that of the Slovenian Council. It proposes laws and referendums to the House of Representatives; discusses and may give opinions on matters within the scope of the House of Representatives; provides prior opinions to the House of Representatives in the process of adopting the Constitution and laws governing national rights; and elaborates on the freedoms and rights of individuals and citizens

64 Ibid., pp. 71–72.

65 This was precisely one of the arguments for abolishing the Bavarian Senate.

66 According to the provisions of the 1990 Constitution, a county is a unit of local government and self-government. The areas of the counties are determined by law in such a way that they reflect historical, traffic, and economic factors and are capable of being natural self-governing entities within the Republic (Art. 131, para. 1).

established by the Constitution, electoral system, organisation, jurisdiction, and functioning of state bodies; as well as the organisation of local self-government and administration. Lastly, the House of Counties also holds a suspensive veto (Art. 81 of the Constitution). Unlike the Slovenian Council, which is entirely excluded from the process of constitutional changes, the Croatian House of Counties had an advisory role in that process (Art. 81, para. 1, point 3 of the Constitution).

At the turn of the century, Croatia began significant constitutional reforms aimed at changing the system of governance – from a semi-presidential to a parliamentary system. The most significant revision was carried out in 2000. Although there were ideas about abolishing the second chamber even then, this was executed a year later, in 2001.⁶⁷ The main arguments were those commonly faced by almost all second chambers subject to criticism – that it was inefficient, under party control that prevented it from truly representing regional interests, and essentially not structured to enable the representation of interests different from those represented in the lower house. It seems another problem was that the term length was the same.⁶⁸

The trend of abolishing second chambers in unitary states is evident. However, as in the case of Slovenia, the question is whether the arguments are truly justified. Undoubtedly, the existence of a second chamber incurs costs, but the question is whether it should be abolished for this reason or reformed instead. In both practical and theoretical terms, a second chamber serves as a brake in a positive sense, as an additional step in the legislative process, and in transitional countries where

67 For a detailed explanation, see: Smerdel, 2009. With the abolition of the second chamber, the unicameral parliament became a general representative body, meaning that counties were no longer represented in the parliament. Today, eight seats are reserved for members of minority groups (Croatia – Croatian Parliament (2024) Interparliamentary Union [Online]. Available at: <https://data.ipu.org/parliament/HR/HR-LC01/> (Accessed: 31 October 2024)). According to the provisions of the Constitutional Law on the Rights of National Minorities, as amended in 2010, members of national minorities constituting more than 1.5% of the total population of the Republic of Croatia are guaranteed at least one but no more than three seats based on general voting rights. Meanwhile, minorities constituting less than 1.5% of the population are guaranteed five representatives in the Parliament through special voting rights, in addition to general voting rights. In practice, this compromise has divided Croatia's minority population, which makes up approximately 10% of the total population, into two parts: a more homogenous group, composed of the Serbian minority, which is easier to mobilise during election campaigns and therefore only given general voting rights, and a more heterogeneous group of 21 other minorities, which are granted dual voting rights. However, the unresolved issue remains – namely, several national minorities compete for a single seat in the legislative body. An extreme example is that one representative may represent up to 12 national minorities, which undoubtedly fails to respect the right of all national minorities to equal representation. Article 17, para. 7 of the Law on the Election of Representatives to the Croatian Parliament stipulates that members of the Austrian, Bulgarian, German, Polish, Roma, Romanian, Rusyns, Russian, Turkish, Ukrainian, Vlach, and Jewish national minorities jointly elect one (highlighted by A.C.) representative to the Parliament. See Baketa and Kovačić, 2010, p. 12.

68 Bačić, 2007, pp. 102–103.

institutional abuse is common, additional mechanisms of institutional protection are necessary.

3.3. Serbia – “Without” a Second Chamber

As previously mentioned, the adoption of a bicameral system is conditioned by numerous factors, including historical experience and tradition. The past is not an isolated fact, mechanically separated from the present.⁶⁹ Their relationship is bidirectional. The legacy of the past represents a contextual framework that determines the scope of possible options.⁷⁰ If the past is seen in a positive light, it serves as a model; if it is viewed in a negative manner, it functions as a guide to avoid poor solutions. The past and present are necessarily intertwined. Therefore, in some cases, examining the issue of a bicameral system must necessarily reflect on the past.

The case of Serbia in this regard is particularly interesting. It shared the same tradition of bicameralism with other countries during the socialist era. However, the constitutional history of Serbia during the 19th and early 20th centuries undeniably demonstrates that the idea of bicameralism never held a significant place in constitutional practice. Nevertheless, constitutional law scholarship of that time in Serbia kept pace with European discussions on this issue.

This issue was first seriously raised before the adoption of the so-called Regency Constitution of 1869 (*Namesnički ustav*). Discussions on this issue took place in the constituent committees, but ultimately, the solution of a unicameral parliament was accepted.⁷¹ The issue arose for the second time in 1881. The constitutional question actually opened at the beginning of the 1880s, and discussions about a new constitution with numerous drafts continued practically until the adoption of the 1888 constitution. A known division remained from that era in constitutional law scholarship between supporters and opponents of the bicameral system. One of the supporters of the bicameral system, Professor of Constitutional Law Slobodan Jovanović, emphasised that a second chamber, including the intelligentsia, could help in the development of society. He saw that the failure to accept the bicameral system throughout the 19th century was due to the ongoing struggle between the king and the Assembly, logically leading the Assembly to want to turn itself into a “war machine”.⁷² He believed that some authors of that era supported unicameralism for practical reasons. They thought it was first necessary to strip the king of as much power as possible, and only then discuss advanced solutions for the organisation of

69 Dimitrijević, 2007, pp. 234–235; cited in: Cvetković, 2021, p. 4.

70 Ibid., p. 236; cited in: Ibid.

71 Jovanović, 1932a, p. 28.

72 Ibid., p. 48.

government.⁷³ The only time the bicameral system was introduced was in the 1901 Constitution, which was in effect for less than two years. The bicameral system in that Constitution was not the result of serious debates but was imposed by the king.⁷⁴

These 19th-century discussions are interesting because the debate about a unicameral or bicameral system then, as now, revolves around whether such a solution is necessary for a particular society. However, the preceding question is what the objective needs are. Thus, while one faction in 19th-century Serbia fought for greater parliamentary power, seeing the king as a significant threat, Jovanović emphasised the danger of parliamentary omnipotence.⁷⁵

Following the period of the Kingdom of Yugoslavia and “socialist constitutionalism”, where Serbia shared its “parliamentary history” with other former Yugoslav states, Serbia restored its liberal constitutionalism with the 1990 Constitution. This was a rather interesting situation because Serbia was a member of the two-member federation of the Federal Republic of Yugoslavia (*Savezna Republika Jugoslavija*),⁷⁶ but unlike the experience in the “second” Yugoslavia (Socialist Federal Republic of Yugoslavia/*Socijalistička Federativna Republika Jugoslavija*), where the parliamentary structure at the federal level was mostly mirrored at the level of federal units, Serbia adopted a unicameral system under the 1990 Constitution. However, owing to issues with the autonomous province of Kosovo and Metohija and the scope of its competencies, as well as with the other province of Vojvodina, a new question emerged, which occupied a certain place in constitutional life – regarding the regionalisation of the state. The 1970s in Europe were marked by the idea of the regional state, which represents a *tertium genus* compared with federal and unitary states.⁷⁷ In the 1990s, Serbian Professor of Constitutional Law Miodrag Jovićić proposed the regionalisation of Yugoslavia to overcome the issues related to the competencies of autonomous provinces and secessionist tendencies in Kosovo and Metohija, as well as problems in the functioning of the two-member federation.⁷⁸ In his draft of the so-called United Serbian Lands (*Ujedinjene Srpske Zemlje*),⁷⁹ he proposed the introduction of a bicam-

73 Ibid., pp. 55–58.

74 The bicameral National Representation consisted of the National Assembly and the Senate. The Assembly was elected directly, by secret ballot, on the basis of proportional representation system. Most of the Senate members were appointed by the king, and to those who were elected, a high census suffrage was applied, both for the active and passive right to vote. Marinković, 2019, p. 40.

75 Jovanović, 1932a, p. 76.

76 The Constitution of the Federal Republic of Yugoslavia was adopted in 1992. Serbia retained its 1990 Constitution. Under the conditions of the new federal arrangement, the Constitution of Montenegro, as a federal unit, was adopted in 1992, shortly after the adoption of the Constitution of the Federal Republic of Yugoslavia.

77 Palermo and Kessler, 2017, pp. 50–58.

78 Jovićić, 1996b, pp. 9–14.

79 Earlier that year, he published a constitutional study titled “Regional State”. See Jovićić, 1996a.

eral National Assembly. The House of Citizens (*Veće građana*) would have 120 directly elected members with a four-year mandate.⁸⁰ Meanwhile, in the House of Regions (*Veće regiona*), representatives of the regions would sit, elected in direct elections organised at the regional level. This would ensure the representation of the regions.⁸¹ Although Jovičić's proposal significantly contributed to the science of constitutional law in Serbia, it was never accepted. The 1990 Constitution provided for a unicameral National Assembly with 250 members, and the same solution is prescribed in the current 2006 Constitution. Since then, occasional proposals have been made to reduce the number of deputies,⁸² but not to introduce bicameral representation.

Serbia, with two autonomous provinces that are not represented in the national parliament, and with a large number of national minorities and a very complex ethnic issue in the past, theoretically appears as very suitable terrain for bicameralism. However, there seem to be two arguments in favour of a unicameral representation. First, Serbia has a very strong unicameral tradition, and therefore the citizens are not sufficiently familiar with the idea of bicameralism. Second, the unicameral parliament in 1990 was quite clearly intended to demonstrate a shift in paradigm from socialist constitutionalism and promote the concept of a single, unified representation, given that during socialism, the provinces of Kosovo and Metohija and Vojvodina had achieved a level of autonomy similar to federal units. Thus, unicameralism is a forced solution resulting from complex historical circumstances. As the issues with Kosovo and Metohija were not resolved at the time of the adoption of the 2006 Constitution, the idea of a unicameral National Assembly was maintained.

4. Conclusion

The trend of abolishing second chambers in unitary states is evident. However, the question remains whether the arguments for this trend are truly justified. Both practically and theoretically, a second chamber can serve as a valuable safeguard, adding an extra step in the legislative process. In the former Yugoslav republics, where institutional abuses are common, additional mechanisms for institutional

80 Ibid., p. 16.

81 Ibid., pp. 17–18.

82 At the beginning of 2011, a proposal to amend the constitution to reduce the number of members of parliament entered in parliamentary procedure, based on a petition from over 300,000 citizens. However, although this proposal came from (then) an opposition party, which came to power in 2012, the proposal was never even considered. See *Predlog za promenu Ustava ušao u proceduru* (2011) Radio-televizija Vojvodine, 15 March [Online]. Available at: https://www.rtv.rs/sr_lat/politika/predlog-za-promenu-ustava-usao-u-proceduru_243606.html (Accessed: 28 October 2024). See also: Pavlović, 2012, pp. 78–79.

protection are essential. In societies with divisions or inherited, unresolved conflicts, the crucial question is regarding which instruments are necessary for the democratisation process. These typically include mechanisms that consistently enforce the principle of separation of powers or protect citizens from state authority. In this study, the question addressed is whether bicameralism could serve as such a solution. The answer is complex. In countries such as Slovenia, the issue lies not in the mere existence of a bicameral parliament, nor is it certain that a unicameral parliament would address existing problems more effectively. This example suggests that a second chamber can serve as an additional step, a mechanism promoting deliberation, though only with proper institutional design.

Bulmer's assessment of the necessity of bicameralism, as previously mentioned, is generally accurate. In strongly divided societies, bicameralism is essential. In relatively homogeneous societies, moderate bicameralism is desirable, although alternative mechanisms may be proposed. Finally, in homogeneous societies and small states, preference should be given to other mechanisms. However, examples from former Yugoslav states show that this assessment must be more nuanced. For instance, in North Macedonia, there are strong divisions between ethnic communities; yet, a unicameral parliament aims to prevent further divisions. The size of the state must also be considered. Conversely, in Serbia, the unicameral parliament stems from tradition, which should be carefully considered, as the influence of tradition and historical circumstances can outweigh theoretical recommendations. The case of Croatia also illustrates that the insufficient maturity of the political system can create serious obstacles to bicameralism, which seeks to represent the interests of diverse territorial communities.

In conclusion, bicameralism, viewed theoretically, is a highly suitable tool for overcoming conflicts and enhancing the democratic process. It can facilitate the representation of multiple identities among citizens. After all, there is no doubt that the rule of law can only exist if citizens can pursue various and often conflicting interests within the community. The institutional structure must be designed to represent the broadest possible range of interests. However, alongside theoretical recommendations, particular attention must be paid to tradition, culture, history, and society's readiness to embrace certain solutions.

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From Independence to Integration: The Role of the Slovenian Parliament in EU Accession and Institutional Adaptation

ABSTRACT: *The article deals with the accession process of the Republic of Slovenia to the European Union (EU), especially focusing on the Slovenian Parliament's role as one of the key actors along with its committees. Considering the bicameral nature of the Slovenian Parliament, the special focus is on the role of the lower house, the National Assembly (slov. Državni zbor), as the main legislative and representative body; the upper house, the National Council (slov. Državni svet), primarily has an advisory role. This article also examines the role of the Parliament in the Early Warning Mechanism (EWM) and critically assesses its activity. Using descriptive analysis, it outlines the development of the parliamentary system in Slovenia, while constitutional and legal provisions related to EU affairs are analysed through the dogmatic-legal method. Finally, the Slovenian Parliament's use of the EWM is explored.*

KEYWORDS: *National Assembly (Državni zbor), Committees of EU affairs, Constitutional amendments, the Rules of Procedure, EU accession, Early Warning Mechanism (EWM)*

1. Introduction

This article examines the constitutional and institutional trajectory of the Republic of Slovenia. It traces the country's evolution from a constituent republic within the former Socialist Federal Republic of Yugoslavia to an independent democratic state, and subsequently, a full member of the European Union (EU). The aim is to provide a systematic overview of the legal and institutional adjustments undertaken by Slovenia in the process of European integration, particularly the normative and functional transformation of its parliamentary system. By focusing on the legal foundations and

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structural evolution of the Slovenian Parliament, the article evaluates the effectiveness of Slovenia's approach to accession, highlighting the most significant normative and institutional milestones that facilitated its successful alignment with EU standards.

Slovenia constitutes a notable example of a post-socialist state that achieved a relatively swift and stable democratic transition, marked by institutional innovation and progressive legislative harmonisation. Compared with other successor states of the former Yugoslavia, Slovenia distinguished itself through its early establishment of a functional parliamentary democracy, underpinned by a strong constitutional framework and clearly defined separation of powers. Central to this transformation has been the role of the Slovenian Parliament, whose structural configuration, normative competences, and legislative procedures have undergone continuous adaptation in response to both domestic political developments and the exigencies of European integration.

The article provides an in-depth legal analysis of the constitutional development of the Slovenian Parliament, particularly its bicameral structure comprising the National Assembly (*Državni zbor*) as the lower house and National Council (*Državni svet*) as the upper, primarily consultative chamber. It further explores the normative rationale underlying the establishment of bicameralism in Slovenia, recurrent constitutional debates concerning the role and necessity of the National Council, and the unsuccessful legislative initiatives aimed at its abolition. Moreover, the article critically assesses Slovenia's legal and institutional mechanisms for parliamentary oversight of EU affairs, with particular reference to interinstitutional cooperation, the competences and functioning of the Committee on EU Affairs (CEUA), and the implementation of the Early Warning Mechanism (EWM) pursuant to the Lisbon Treaty and its protocols.

Finally, the analysis situates these institutional arrangements within the broader legal-political context of Slovenia's post-socialist transformation, encompassing socio-economic reforms and progressive approximation to the *acquis communautaire*. Essentially, it examines the key constitutional amendments, legislative reforms, and administrative adaptations from the early 1990s until Slovenia's accession to the EU in 2004. Through this, the article demonstrates that the Slovenian Parliament has operated not merely as a passive institution of national representation, but as an active constitutional actor and a key stakeholder in the legal and political processes underpinning European integration.

2.

The Slovenian Parliament and European integration

Slovenia, as one of the ex-Yugoslav countries, is the best example of a successful and relatively rapid transition from an authoritarian system to a democratically governed system, as some scholars call it a stable post-communist democracy. During the 1990s, the first democratic elections in Slovenia elected a tricameral parliament, which was essentially a legacy from socialism and the Habsburg Monarchy. This elected body adopted a Constitution that established a parliamentary system characterised by a weak, directly elected president. Subsequently, a bicameral parliament was established and continues today. Herein, the lower house, the National Assembly is directly elected by the citizens, with 90 seats. Further, according to article 80 of Slovenian Constitution, it includes two representatives of Italian and Hungarian national minority.¹ Meanwhile, the upper house, the National Council, is indirectly elected. Its 40 seats represent specific interest groups, including local or socioeconomic ones. Notably, the role of the National Council is relatively weak, considering that it only has the possibility of exercising a suspensive veto. In these cases, the National Assembly can override it by a majority of all representatives.²

Before the formation of the Slovenian Constitution itself, various structures for the Slovenian Parliament were considered. The first draft of the Constitution included the idea of a unicameral system, while ideas about a bicameral parliament emerged later. The concept of a unicameral parliament entailed representatives who would represent regional interests in a special legislative process. Meanwhile, two ideas were proposed for the bicameral system: 1) establishing a Regional Assembly similar to the National Assembly, and 2) creating a weaker National Council. However, during the constitutional drafting phase, several additional proposals regarding the structure of Slovenia's representative body were presented, inspired by models from Western countries. For instance, a structure similar to that of the Bavarian Senate was suggested, entailing a second chamber (comprising employees, employers, regions and experts) that would allow for various approaches to parliamentary decision-making. For comparison, Slovenia's National Council, like the Bavarian Senate, had powers similar to those of the former Croatian Chamber of Counties. Another proposal was inspired by the Norwegian model of a kind of 'semi-chamber', comprising a Regional Assembly that would separately debate certain issues. Systems of other Western European countries, such as France, Italy, and Spain, were also considered as potential models. However, due to a lack of time for further discussion and the breadth of

1 Pegan and Krašovec, 2021, pp. 1–7.

2 Ibid., p. 2.

other issues that had to be addressed, a compromise had to be found. Eventually, it was decided to establish an upper chamber, the National Council.³

The decision subsequently attracted much criticism and many proposals to abolish the National Council. Still, only one formal proposal was submitted in 2012. Specifically, a group of Parliament members initiated a procedure to amend the Constitution concerning the organisation of the National Council. However, no final changes were adopted. The proposal for its abolition cited reasons such as improving the efficiency of the legislative process and quality of adopted legislation. These were not particularly strong arguments. Rather, abolition would likely worsen the quality of adopted laws. A second argument was that abolishing the National Council would simplify the entire political system, including state regulation. A third argument cited achieving a balance in public finances by reducing public spending. However, this latter argument is essentially unfounded, as the annual budget of the National Council is very low. Finally, some argued that abolishing the National Council would finally resolve the long-standing dilemma regarding the structure of the Parliament regarding whether it should be unicameral or bicameral. Ultimately, the National Council was not abolished. All criticisms and proposals overlooked the most crucial argument: the principle of separation of powers and the functionally balanced system of control embodied in the role of the National Council itself (i.e. the system of checks and balances). Beyond its role as a body with a suspensive veto, a functional mechanism for expressing its opinion in the legislative process, the National Council also acts as an oversight body monitoring the executive branch, particularly through its right to request parliamentary inquiries. Essentially, the most prominent strengths of the Slovenian parliamentary system lie in the representation of interest groups, which is the core characteristic of the National Council's structure, and the cooperation which the National Council fosters with civil society. These features enhance the legitimacy of legislation and improve the oversight of the legal system.⁴

3.

A short Overview of the Slovenian Parliamentary System

Every transition and change of a political system, especially from authoritarian to democratic systems, requires exceptional efforts from all state and political actors who are expected to implement progressive institutionalisation. Political scholars (Zajc) essentially state that this process can be defined as very contradictory, stating that immediately after the transition, a kind of crisis occurs that needs to be overcome.

3 Venice Commission, Council of Europe, n.d.

4 Venice Commission, Council of Europe, n.d.

After this, a parliamentary form of democracy is established or restored, where individuals are given the opportunity to choose by voting for individual officials. In political theory, two directions are distinguished that analyse the possible causes, course, and success of transitional processes: macro-sociological, which analyses social conflicts, and state organisation and activities; and micro-political, which focuses on the analysis of strategies used by all actors in the transition process. Undoubtedly, the functioning of modern political societies requires the achievement of evolutionary prerequisites: a stable legal system, bureaucracy, general free elections, the right to association, and a market economy.⁵ Likewise, as Zajc emphasises, we should not ignore the fact that to understand what kind of society we are talking about, the people must be included in the political decision-making processes. Looking back at the situation from a political view can offer interesting perspectives, with a special concentration on issues related to surplus labour (i.e. the position of workers in society): When Slovenia and Croatia were part of ex-Yugoslavia, the concentration of power was centralised. Therefore, the aim was to introduce market mechanisms that would create greater responsibility of economic entities; redistribute social power in favour of those who generate income. Examining the historical solutions can help us understand certain contemporary problems.⁶

Specific features that distinguish Slovenia from other countries of the former Yugoslavia, and Eastern and Central Europe countries are noticeable given that Slovenia maintained a high level of previous economic development. This was achieved, among other things, because the Slovenian economy was among the most developed and was well-connected to Western markets. Meanwhile, Slovenian industry also enjoyed some advantages in the Yugoslav internal market.⁷

4.

Constitutional Framework and Other Legal Bases Connected to EU Affairs

Regarding the Slovenian experience in creating a new democracy, unlike other countries of the former Yugoslavia, the focus of the process was based on the idea of a strong parliament as opposed to the government, while the president of the republic was only envisaged with a protocolary role.⁸

The creators of the Slovenian Constitution considered a system that would be structured as a parliamentary democracy with a strong Constitution containing a

5 Zajc, 1997, pp. 47–62.

6 For more on this topic see: Zajc, 1984, pp. 79–101.

7 Zajc, 2000, pp. 127–134.

8 Zajc, 1997, pp. 49–50.

detailed list of rights.⁹ Thus, the aforementioned systematic choices resulted in a special (specific) political system that had a strong influence on the work and role of the newly formed National Assembly. Meanwhile, a special neo-political body, the National Council, was also established. The Slovenian Parliament, therefore, comprises a limited bicameral system: The upper house has limited powers and is structured according to the principle of functional-territorial representation, while the composition of the lower house encompasses the party parliamentary system. The prevailing power of the Parliament concerning the government is visible from the constitutional provision which foresees that the National Assembly appoints and dismisses ministers, on the proposal of the Prime Minister, while the duty of the government is mainly focused on the implementation of policies envisaged by the National Assembly.¹⁰

Therefore, the adoption of the Slovenian Constitution was accompanied by two major changes: the transition from a socialist and undemocratic to a democratic political system based on respect for human rights and fundamental freedoms, and the parallel proclamation of independence. All these changes influenced the formation of a strong constitution, which is visible both through the establishment of a special Constitutional Court charged with the protection of the Constitution, and through explicit constitutional guarantees of human rights and the like. However, the position of the representative assembly after the Constitutional revision of 1991 still gives it a superior character compared to other branches of government, maintaining the position it had in the previous Constitution (inheritance from the 1974 Constitution, including its amendments of 1989 and 1990).¹¹

Meanwhile, amendments to the Slovenian Constitution related to the EU were primarily related to provisions on the liberalisation of land acquisition by foreigners, considering that the introduction of this provision was one of the requirements of the EU accession agreement.¹² The first reaction of the Constitutional Court to the latter amendment was to determine the association agreement as partially unconstitutional, the consequence of which was the initiation of the procedure to amend Article 68 of the 1997 Constitution. This ultimately resulted in the Constitutional reform and liberalisation of land acquisition. Its conditions were defined from that moment on by an international agreement or by law. However, a significant amendment to the Constitution again happened in 2003: the amendment of Article 47 of the Constitution. This entailed an absolute ban on the extradition of a domestic citizen in relation with a special condition provided for in the newly formed Article 3a, which in turn

9 Republic of Slovenia, 1991. The English version is available on the website of the Constitutional Court.

10 The provision was often criticized, especially by the government itself. See: Zajc, 1997, pp. 49–50.

11 Bardutzky, 2019, pp. 687–744.

12 It is a constitutional amendment from 2003, No. 24/03.

prescribes the European clause. This clause enabled the transfer of part of sovereign rights to international organisations through the process of ratification of an international treaty, with a possible previously held referendum.¹³ The fundamental basis for the relationship between the legislative and executive branches concerning EU issues is provided by the Constitution, as revised before admission.¹⁴

5.

The Role of the Slovenian Parliament and Committee on European Union Affairs

The Slovenian Parliament (particularly the National Assembly) can be credited for modernising Slovenian legislation both for its significant role in the process of democratisation of Slovenia and increasing role in the EU accession process. Namely, all processes of political democracy and modernisation that the countries of Eastern and Central Europe faced are closely related to the processes of re-parliamentarisation. This entailed the establishment of a traditional democratic order, which required a strong role of legislative bodies (i.e. parliaments). In this sense, the process of transition and selection of essential constitutional solutions predetermined the future role of the parliament. Slovenia, unlike, say, Croatia, which chose a semi-presidential system after secession from the former Yugoslavia, opted for a relatively pure parliamentary system. Even during the previous assembly, at the end of 1989, a new law on elections was adopted, which enabled the first free elections in Slovenia in April 1990.¹⁵

The Provisional Assembly established after the elections, including the first National Assembly, became a key body that influenced the further disintegration of the Yugoslav socialist federation, prescribing a referendum (with the main question of whether Slovenia should become independent) in December 1990. After the Assembly became a legitimately elected representative body, the first modern independent constitution was adopted on 23 December 1991, although independence had been gained half a year earlier. Furthermore, in terms of political representation, the new constitution foresaw a unicameral classical parliament. Still, the National Council was established as a special representative body that represented the interests of individual groups (i.e. territorial and functional interests). Moreover, it had relative

13 Bardutzky, 2019. p. 690.

14 Republic of Slovenia, 1991. The English version is available on the website of the Constitutional Court.

15 Zajc, 2005, pp. 111–132.

control functions such as the right to a suspensive veto on adopted laws and right of legislative initiative.¹⁶

From 1991, when the Slovenian Constitution was adopted, the National Assembly has held a strengthened position within the country's political system. It has successfully overseen the formation of the government, including the appointment of ministers following recommendations by the President. In line with the provisions of the Government Act, the Assembly has dealt not only with domestic issues but also with matters falling under the executive's jurisdiction and foreign policy topics. As such, the Assembly is considered the key body that facilitated Slovenia's successful integration into the EU and helped build consensus on EU membership. Compared to other countries that joined the EU in the same wave, Slovenia's National Assembly stands out as the only parliament where all governmental negotiating positions were addressed and discussed within its standing committees. The success of these committees in aligning national legislation with the EU *acquis* was exceptional and further strengthened the role of the Assembly. This was also supported by the adoption of a new Rules of Procedure in 2002, which modernised and made the legislative process more efficient so much so that it inspired the European Commission to consider the Slovenian model in improving the EU's own legislative process.¹⁷

A constitutional amendment, specifically Article 3, further encouraged the institutional adaptation of the Assembly to its evolving roles. This article imposed an obligation on the executive to inform the Assembly about key legal acts and decisions adopted at the EU level that affect national sovereignty. In turn, the Assembly was granted the right to reshape Slovenia's positions on all matters within its competence. This right was later explicitly defined and guaranteed by the Law on Cooperation between the National Assembly and the Government (LRNAG).¹⁸ The latter law was inspired by the Swedish and Finnish models. LRNAG allows the Assembly to participate in the EU decision-making process through the activities of the government. Here, the government's role includes the mandatory provision of information to the Assembly about EU legislative proposals, the assessment of their impact on Slovenia, and enabling the Assembly to discuss and shape the national positions before they are presented at the EU level.¹⁹ This law was crucial later because in 2010, it included provisions after the adoption of the Treaty of Lisbon. This resulted in a more effective involvement of the National Assembly in decisive European processes. The latter consequently contributed to a more engaged activity of the working bodies responsible for discussing EU affairs.

16 *Ibid.*, p. 115.

17 *Ibid.*, p. 116.

18 Official Gazette of the Republic of Slovenia: Nos. 34/04, 43/10, 107/10 and 30/15.

19 *Zajc*, 2005, p. 116.

While the main role of the National Council lies in its consultative function, its participation and coordination with the National Assembly are regulated by the internal rules of procedure of both institutions. Between Slovenia's independence and prior to EU accession, a special body was established in 1992 within the National Council to deal with EU and international affairs, called the Commission for International Relations and European Affairs (CIREA). CIREA's main task was to review and discuss positions proposed by the government (with documentation forwarded by the President of the National Assembly), particularly concerning EU legislation and policies. Thus, CIREA did not discuss or analyse the original EU laws or acts, but exclusively focused on the government's position regarding them. While its opinion on these government positions was not binding, an obligation existed to forward it to other relevant bodies. Within the Commission, discussions were organised so that the chairperson set the agenda and invited the government representatives to the sessions. This is because the plenary of the National Council never debated legislative proposals.²⁰ Furthermore, the Commission does not have the authority to deliberate on original legislative proposals, but is only responsible for reviewing and discussing the government's positions. Once it adopts its opinion on such a position, it forwards it to the CEUA of the National Assembly. In certain cases, the Committee on Foreign Policy (CFP), another Assembly Committee, may also be involved. Ultimately, CIREA is unable to engage in deeper analysis because of the limited institutional affirmation on the National Council, reflected in weak administrative support (with only a minimal number of staff per committee), tight deadlines, and generally low engagement of National Council members.²¹

CEUA, the successor to CIREA after Slovenia's accession to the EU, plays a central role in adopting Slovenia's official positions on EU matters, while the CFP handles foreign and security policies. Discussions are typically held behind closed doors. However, at the request of a group of MPs, the Assembly may open a debate on any EU-related issue. At least once a year, the Prime Minister presents a report on the state of EU affairs and Slovenia's position within them. The government is obliged to follow general guidelines set by the Assembly in its annual resolutions. The legal basis for this practice was established in 2004 through amendments to the Rules of Procedure, which institutionally strengthened the National Assembly for more effective management of EU affairs. The system distinguishes three categories of EU-related matters: 'U' issues, where the Assembly retains decision-making authority if sovereign rights have not been transferred; 'S' issues, referring to government reports on EU activities; and 'E' issues, which cover general matters within the government's jurisdiction. This classification ensures the comprehensive democratic oversight of

20 Kajnič Lange, 2015, pp. 649–667.

21 Ibid., p. 658.

European affairs.²² The detailed legal provisions significantly enhanced the institutional capacity of the National Assembly in handling EU matters. They allow the Assembly to take a proactive role, replacing the earlier reactive approach, and create a clear institutional channel from the government to the EU institutions. New rules and specific instructions have been introduced to define the roles of key actors, from parliamentary group leaders to the Council of Presidents of the Assembly. Thanks to constitutional provisions, the Act on Cooperation with the EU, and amendments to the Rules of Procedure, the National Assembly enjoys a relatively strong position compared to the government in EU-related matters. Its ongoing, ex-ante cooperation with the government throughout all stages of the legislative process, combined with the active involvement of CEUA and other standing committees, places the Slovenian Parliament among the more advanced legislative bodies in Europe. However, implementing this enhanced role was not without challenges, particularly during the initial period following EU accession (2004–2008). An analysis of the work of CEUA, other committees, and plenary sessions is essential to assess the gap between the formal institutional model and the actual parliamentary practice in managing EU affairs.²³

Regarding its history, CEUA was established in May 2004. The activities of this committee were not particularly extensive, considering that only eight sessions were held. During them, discussions were primarily focused on the activities and composition of government representatives in the Council of Ministers. However, a few months later in November, a second CEUA was established, which actually achieved significant results during its four-year mandate. Perhaps contributing to the improved results was the fact that this latter committee, especially in terms of assessing the impact and objectives of EU acts concerning national legislation, supported the government's positions in a large number of cases. However, in matters concerning the participation of Slovenian representatives at meetings of the Council of Ministers ('Type S' issues), this committee contributed to strengthening the role of the legislative authority in relation to the executive by giving its consent to the proposal of the previous government regarding Slovenia's presidency of the EU Council in 2008.²⁴ CEUA also performed substantial work in relation to many other important EU documents, including preparing the policies and strategies of the National Assembly regarding meetings of national parliaments concerning the Lisbon procedure and formulating positions on the accession of other candidate countries, among others. Meanwhile, CEUA took some time to adjust and develop working methods, considering that it faced new and inexperienced members who had to deal with an

²² Zajc, 2008, pp. 3–22.

²³ *Ibid.*, pp. 3–22.

²⁴ *Ibid.*

overwhelming volume of EU documentation and draft acts, attempting to learn from the mistakes of the previous committee's members. Therefore, the approach to the procedures for considering the priorities and elaborating on the topics of the EU Presidency countries remained the same as the previous committee. The efficiency of the committee was also aided by the fact that it had access to the government's database, which provided better insight into EU documentation, and the contribution of parliamentary services, which created a special database for this purpose (EU Affairs; slov. Zadeve EU). Later, thanks to the aforementioned Cooperation Act, the committee gained a pivotal role in addressing EU matters, taking over all responsibilities that had previously belonged to other standing bodies. The committee's contribution was especially visible in the period following Slovenia's accession to the EU, acting innovatively in relation to government legislative proposals concerning the Declaration on the Activities of the Republic of Slovenia, and operating efficiently by not overburdening the legislative agenda with topics it did not consider highly relevant.²⁵

Furthermore, specialised committees also play a role in resolving EU issues, especially in relation to the role in discussing and preparing positions. These committees deal with union issues (subjects marked U) and all other EU-related issues (marked S). However, the overall role of these committees was not overly significant due to the limited scope of their activities. Thus, the most active were the Committee on Internal Policy, which discussed slightly more than a hundred issues marked U, while the others were mostly represented in discussions and formation of Slovenia's position on the EU, including issues of the Lisbon Strategy. The weak role and influence of these committees is justified by the lack of experience, the increased complexity of EU policy, the limited institutional support, and, ultimately, the slowdown of EU legislative activity after enlargement.²⁶

6.

Mechanism of Government Oversight and Activities Under the Early Warning Mechanism

Amendments to the LRNAG and Rules of Procedure of the National Assembly (RoPNA) were necessary steps after the Lisbon Treaty entered into force. The most important changes regarding the role of EU national parliaments were the introduction of provisions on the EWM in connection with violations of the principle of subsidiarity. The latter was provided for in Protocol 1 of the Lisbon Treaty, including the transitional

²⁵ Ibid.

²⁶ Ibid.

clauses (prescribed by Article 48(7) of the Treaty on European Union).²⁷ The changes included the provisions of family law with cross-border effect, including the supervision of the implementation of EU policies in the area of freedom, security, and justice. The RoPNA also provides for a procedure for the annulment of an EU act if the National Assembly establishes a violation of the principle of subsidiarity, and procedures in the case of a third country's application for EU membership. However, the National Council is excluded from these proceedings, despite the clear provisions of the Lisbon Protocol 1, which mandates the participation of all houses in bicameral parliaments. Importantly, all these updates excluded the National Council. This was because the LRNAG regulates only the interactions between the government and lower house, while the RoPNA, addresses the roles of both houses in overseeing the government's EU activities mainly by empowering the National Assembly. This is despite Protocol 1 of the Lisbon Treaty stating that in bicameral systems, all chambers of Parliament should have the right to participate in subsidiarity checks. Feeling marginalised, the National Council challenged the LRNAG in the Constitutional Court, arguing that both houses should be equally involved in overseeing EU affairs. The court, however, ruled in October 2012 that the LRNAG did not violate the Constitution or Treaties, emphasising that the Lisbon Treaty protocols govern the relationship between national parliaments and EU institutions, and not how member states internally structure their parliamentary processes.²⁸

Next, consider the steps of the subsidiarity check procedure. Notably, since January 2011, only the National Assembly has had a formal process to evaluate whether EU proposals violate the subsidiarity principle. Specifically, the process starts when at least a quarter of MPs, or a relevant committee (sectoral, CEUA, or CFP) initiates a request. The Parliament's legal service must prepare an opinion within seven days. If the legal opinion supports the review, the issue moves to the sectoral committee, and CEUA or CFP. The sectoral committee evaluates the matter and forwards its opinion to the CEUA. CEUA reviews the case and makes a decision. If a breach is found, CEUA or a quarter of MPs can request a plenary vote. The usual parliamentary process follows, allowing for amendments. CEUA adopts a final position. The plenary votes by a simple majority. If subsidiarity is deemed breached, a reasoned opinion is sent to the EU institutions. The National Council is only informed but not involved. Previously, subsidiarity checks were done informally using simplified procedures aligned with guidelines of the Conference of Community and European Affairs Committees of Parliaments of the EU.²⁹

27 Kajnič Lange, 2015, p. 658.

28 Ibid., pp. 658–659.

29 Ibid., p. 659.

Since the institutionalisation of the process, it was first used in 2012 regarding the Monti II proposal entailing the European Commission regulation on the exercise of the right to take collective action. Here, when the CEUA initiated a review, no breach was found. Thus, the process ended there.

The second time was in the case of the second yellow card in 2013, which was concerning the European Commission's proposal on the establishment of the European Public Prosecutor's Office, where the Slovenian National Assembly also submitted its reasoned opinion. Differing views existed on the EU legislative proposal, marked by a lack of consensus between parliaments. Despite the objections, the European Commission kept the proposal unchanged initially. However, the final version was significantly revised, showing that parliamentary scrutiny influenced the outcome.

Finally, the third time was the EWM procedure, which was launched in the context of the directive on posted workers in 2016, where a reasoned opinion of the Slovenian National Assembly was provided together with other parliaments, albeit mainly from Central and Eastern Europe. These countries were expressing concerns over its negative impact on their citizens' ability to provide cross-border services.³⁰

7.

Accession Period and Institutional Adjustments

Slovenia signed the Cooperation Agreement with the EU in 1993. The Europe Agreement on the Path to Accession was signed in June 1996. The application for EU membership was submitted shortly after the signing of the Europe Agreement, while the negotiation process began at the end of 1997. At that time, the European Commission prepared an opinion regarding the degree to which the six countries that requested membership (Czech Republic, Cyprus, Estonia, Hungary, Poland, and Slovenia) fulfilled the Copenhagen criteria. The Commission advised member states to initiate accession negotiations with all six countries given its conclusions. It concluded that Slovenia met the appropriate degree of compliance with the first two Copenhagen criteria and could be considered a stable democracy. However, before Slovenia could be granted full EU membership, it would need to put in substantial work to be able to adopt and implement the *acquis*, especially in the areas of the internal market, the environment, employment, social affairs, and energy. Finally, if Slovenia wanted to have the systems in place to properly implement and enforce the acquisition, more administrative changes would be essential.³¹

30 Cygan, 2021, pp. 421–435.

31 Potočnik and Garcia Lombardero, 2004, pp. 367–380.

Other instruments that significantly contributed to the accession process included the European Agreement (Association Agreement), the Accession Partnership, the National Program for the Adoption of the Acquis, and, ultimately, the Poland and Hungary: Assistance for the Restructuring of the Economy (PHARE) program. Through the latter partnership and based on the European Commission's opinion, legislative and structural reforms were defined as priorities. Concerning the partnership, the specified national program provided a detailed description of how Slovenia would adopt and implement the EU's legislative requirements, serving as a guide throughout the entire process. Both instruments established a link between Slovenia's progress in legislative and institutional reforms, and the financial assistance provided by the EU. Another key instrument was the PHARE program, which initially focused on economic development, namely, reforms and privatisation. However, it later proved to be a crucial tool for strengthening legislative and administrative capacities necessary for implementing the acquis. Judicial reform was essential for the application of EU law, considering that it involved key areas of legislative changes, backlog reduction, and judicial training. Significant progress was also achieved in internal market-related areas. As with other former candidate countries, the most challenging step in the process was the transposition and implementation of the acquis into national legislation. In Slovenia's case, this was particularly evident in the implementation of measures in areas such as internal market liberalisation, the Common Agricultural Policy, labour market regulation, and environmental legislation. All these efforts required substantial institutional and financial investment. In the area of justice, Slovenia also adopted the Schengen Action Plan, which involved harmonisation with the Schengen acquis, particularly legislation concerning border control, migration, and asylum. Slovenia also achieved macroeconomic stability, although some challenges remained in the privatisation process. Ultimately, from a legislative perspective, by the time of accession, Slovenia had achieved a high degree of legislative alignment with the acquis, made significant institutional improvements for the implementation and enforcement of EU law, and ultimately, demonstrated continuity in fulfilling its accession commitments.³²

Therefore, since Slovenia was included in the negotiation process simultaneously as the other nine countries of the group, negotiations with the group began at the beginning of 1998 and were concluded at the Copenhagen summit at the end of 2002. A referendum on Slovenia's accession to the EU was held in early 2003, with 88.6% of voters voting in favour of joining the EU. Final accession took place on 1 May 2004, together with all other countries in the group.³³

32 Potočnik and Garcia Lombardero, 2004, pp. 371–374.

33 Kajnc Lange, 2015, pp. 649–650.

8. Conclusion

Slovenia's parliamentary evolution and its path towards European integration represent a unique blend of post-socialist transition, democratic consolidation, and institutional adjustment. The Slovenian Parliament, especially the National Assembly, has played a decisive role in shaping the country's modern political identity, leading its transformation from a republic within a socialist federation to a fully sovereign parliamentary democracy integrated into the EU. Its commitment to representative governance, legal reform, and constitutional accountability has been crucial for the country's political stability and legislative efficiency.

Despite ongoing debates about the relevance and functionality of the National Council, Slovenia's limited bicameral system has provided a framework for the inclusion of both political and functional interests, increasing the legitimacy and inclusiveness of the legislative process. The establishment of strong procedural and legal mechanisms, such as the Act on Cooperation with the Government, the Rules of Procedure, and the work of the EU Affairs Committee, has empowered the National Assembly to significantly influence EU-related decisions and ensure the effective oversight of the government.

Crucially, Slovenia's success in aligning with the EU *acquis*, adapting its legal infrastructure, and meeting the Copenhagen criteria was not only the result of external pressure, but also of a domestic political culture that prioritised parliamentary debate, institutional resilience, and civic engagement. Although challenges remain in balancing the roles of the two chambers and deepening the functional participation of the upper house in EU affairs, the Slovenian parliamentary model represents a strong example of democratic adaptability in a rapidly changing European context. Ultimately, the main features of the Slovenian Parliament's experience demonstrate the necessity of early parliamentary involvement in the EU integration process. The formation of committees and subcommittees has also significantly advanced more effective adaptation. Overall, the Slovenian experience demonstrates both the necessity and significance of the role of parliament, and the transparency of the entire process to the public. As such, the Slovenian experience underscores the ongoing significance of robust legislative institutions in facilitating national reforms and supranational integration.

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Jan STAJNKO*

Juvenile Offenders in Slovene Criminal Law

ABSTRACT: *This contribution provides a brief overview of the Slovene juvenile justice system and its status as of September 2024. I begin by introducing the relevant substantive and procedural provisions. This de lege lata introduction is key to understanding the second part of this contribution, which focuses on three topical issues. First, criminological perspectives are explained by introducing relevant statistical data that evidence issues, such as: (a) a sharp increase in (perceived?) juvenile criminality in year 2023, (b) a high percentage of repeat juvenile offenders (recidivism rate), and (c) a disproportionately high number of male, Roma, and Muslim offenders. Second, the struggle for a dedicated juvenile justice legislation and the recent push for a firmer juvenile justice approach are explained. Finally, the latest findings of the Slovene Human Rights Ombudsman are presented.*

KEYWORDS: *Child offenders, Slovenia, educational measures, recidivism, Roma, juvenile prison, juvenile justice*

1.

Educational Measures and Sanctions for Juvenile Offenders

Slovenia does not have a comprehensive legislation covering juvenile sanctioning or procedure. Instead, sanctions and educational measures for juvenile offenders are detailed in the old Criminal Code (KZ-94)¹ from 1994 and were deliberately excluded from the new Criminal Code-1 (KZ-1)² from 2008.

Under Slovene criminal law, juvenile offenders are sanctioned to ensure their rehabilitation, and provide education, re-education, and proper development through

1 Kazenski zakonik (KZ), Uradni list RS, št. 95/04 – uradno prečiščeno besedilo in 55/08 – KZ-1).

2 Kazenski zakonik (KZ-1), Uradni list RS, št. 50/12 – uradno prečiščeno besedilo, 54/15, 6/16 – popr., 38/16, 27/17, 23/20, 91/20, 95/21, 186/21, 105/22 – ZZNŠPP in 16/23.

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protection and assistance, supervision, professional training, and the development of a sense of personal responsibility.

While addressing children and juvenile offenders, the possible sanctions to be imposed on the offender vary depending on his age. For children – offenders not yet 14 years of age – the criminal substantive legislation is not applicable (Art. 71 KZ-94) and they cannot be tried in criminal law courts (Art. 452 of the Criminal Procedure Act - ZKP³). In such cases, the child or underage offender involved in committing a criminal offence is handled through social welfare services.

The second group are younger juveniles – offenders who were 14 years of age at the time of committing the offence but not yet 16 years of age. For this group of juvenile offenders, only educational measures may be imposed.

In some cases, only a reprimand may be issued, comprising a warning that the court may impose a more severe criminal sanction if the individual commits a new crime (Art. 76 KZ-94).

Instructions and prohibitions – The court can choose between 11 options (Art. 77 KZ-94), including involuntary humanitarian work, involvement in a social training programme, regular school attendance, prohibition from driving a motor vehicle, and similar other prohibitions. Instructions such as involuntary humanitarian work are temporally limited (e.g. 60 hours over a three-month period for settlement with the injured party by the juvenile perpetrator) and must be arranged in manner that the minor's schooling or employment is not hampered.

Supervision by a social welfare centre may be imposed to have a lasting influence on the juvenile offender's education and proper development (Art. 78 KZ-94). This supervision may not be less than 1 year or longer than 3 years.

If the juvenile offender needs to be removed from his environment and placed under the constant supervision of professional educators to achieve (re)education goals, he may be committed to an educational institution (Art. 79 KZ-94). Again, this educational measure is subject to temporal limits – a minimum of 6 months and a maximum of 3 years.

The most disruptive educational measure that may be used as a last resort is transferal to a re-education institution for a minimum of 1 year and not longer than 3 years (Art. 80 KZ-94). There is only one such re-education institution in Slovenia – the Re-education home Radeče. It has a capacity for 47 juveniles, with 13 offenders being held there as of the end of 2022.⁴

The final educational measure is the committal to an institution for physically or mentally handicapped youth – a so called “training institute” (Art. 80 KZ-94). The

3 Zakon o kazenskem postopku (ZKP), Uradni list RS, št. 176/21 – uradno prečiščeno besedilo, 96/22 – odl. US, 2/23 – odl. US, 89/23 – odl. US, 53/24, 93/25 – ZNUZJV in 10/26 – ZKOM.

4 Uprava Republike Slovenije za izvrševanje kazenskih sankcij, 2023, p. 15.

offender remains in a training facility for as long as necessary for his or her training, treatment, or care, but not for more than 3 years. Currently, there are five institutions in Slovenia that undertake such training programmes: CUDV⁵ Dolfke Boštjančič Draga and CUDV Matevža Langusa Radovljica in the Western Slovenia cohesion region and CUDV Črna na Koroškem, CUDV Dobrna and CUDV dr. Marijana Borštnarja Dornava in the Eastern Slovenia cohesion region. As of August of 2024, available capacity for whole-day care was 1 person in Western Slovenia and 11 in Eastern Slovenia.⁶

The third group of offenders are older juveniles – offenders who had attained 16 years of age at the time of committing the offence but were not yet 18 years of age. For this group of offenders, criminal law punishment type of sanctions may be imposed if the education measures are not adequate. Thus, as a rule, educational measures should be imposed, and a punishment may be imposed only in exceptional cases.

A financial penalty may be imposed for punishable offences involving imprisonment up to 5 years or a fine (Art. 88 KZ-94). However, this is possible only if the juvenile offender can pay for himself, as per his income. If the financial penalty is paid by his parents or other relatives, the sanction would miss its educational purpose and effectively punish the perpetrator's parents. In cases where a fine cannot be enforced, the court imposes one of the educational measures.

If the offence committed by the juvenile offender is punishable by imprisonment of 5 years or more, he may be sent to a juvenile prison (Art. 89 KZ-94). The imprisonment may last from 6 months up to 5 years (up to 10 years in exceptional circumstances, where a sanction of 30 years of imprisonment may be imposed for regular offenders). There is only one juvenile prison in Slovenia – the Celje Juvenile and Adult Prison.⁷ As of the end of 2022, only 1 offender was held in the juvenile prison.⁸ Besides the financial penalty and juvenile prison, ancillary sanctions may also be imposed, including a prohibition of operation a motorised vehicle illegally (Art. 39 KZ-94).

The fourth group includes young adults – offenders who committed criminal offences as adults but have not yet attained 21 years of age during the trial (Art. 94 KZ-94). For such an offender, an educational measure may also be imposed if appropriate. However, it may last no longer than until the offender reaches the age of 23. There are additional provisions on sanctioning an adult for offences committed as a minor. For example, a person over the age of 21 cannot be tried for an offence committed as a younger juvenile (Art. 92 KZ-94).

5 CUDV – »Center za usposabljanje, delo in varstvo« (Centre for Training, Work and Care).

6 Uprava Republike Slovenije za izvrševanje kazenskih sankcij, Izvajanje dnevnega varstva oz. programa vzgoje in izobraževanja (VIZ) ter celodnevne varstva za otroke, mladostnike in odrasle do 26. leta (ki so vključeni v VIZ) na dan 31. 8. 2024. [Online]. Available at: <https://www.gov.si teme/centri-za-usposabljanje-delo-in-varstvo/> (Accessed: 28 September 2024).

7 Zavod za prestajanje mladostniškega zapora Celje.

8 Uprava Republike Slovenije za izvrševanje kazenskih sankcij, 2023, p. 29.

2. Criminal Proceedings Against Juvenile Offenders

Similar to sanctions and educational measures, the procedural legislation against juvenile offenders is also not regulated as a separate legal act. Instead, it can be found in the XXVII. chapter of the Criminal Procedure Act (ZKP).⁹ The proceedings may be divided into five stages: (a) the pre-criminal police investigation and initiation of the procedure, (b) preliminary (pre-trial) stage, (c) indictment stage, (d) trial stage before the juvenile panel, and (e) appeal stage (legal remedies).

Once the relevant evidence is gathered, criminal proceedings may be initiated only upon a formal request from the state prosecutor (Art. 465 ZKP). However, if the prosecutor refuses to initiate the proceedings, the victim may, instead, request the juvenile panel to initiate the proceedings. It should be noted that the state prosecutor has immense room for discretion – a deviation from the principle of legality, which is the main principle of Slovene criminal proceedings.¹⁰ In case of offences punishable by imprisonment for up to 3 years or a fine, the public prosecutor has the discretionary authority to waive the initiation of criminal proceedings where this is not prudent.¹¹ He may further decide not to initiate proceedings in cases where the execution of a sentence or an educational measure for another offence committed is already in progress (Art. 466 ZKP).

The *dominus litis* of the preliminary investigative proceedings is the juvenile judge. He is tasked with collecting additional evidence (if needed) and producing an individual appraisal of the juvenile. The production of an individual appraisal is a novelty in Slovene criminal law against juvenile offenders and was introduced in 2019 with the amendment ZKP-N.¹²

In 2024, the Ministry of Justice adopted the Guidelines for production and updating of the individual appraisal of the juvenile.¹³ These guidelines were drafted by members of the judiciary (Higher Court in Ljubljana and District Court in Celje), state prosecution (District State Prosecutor's Office in Ljubljana and District State Prosecutor's Office in Celje), social welfare centres (from Ljubljana and Maribor), the

9 Zakon o kazenskem postopku (ZKP), Uradni list RS, št. 176/21 – uradno prečiščeno besedilo, 96/22 – odl. US, 2/23 – odl. US, 89/23 – odl. US in 53/24.

10 Šepec, 2023, pp. 230–233.

11 The state prosecutor may also use the standard instruments of opportunity, which are referred to as the settlement procedure (161.a ZKP) or postponement of prosecution (162 ZKP). However, these are also limited to offences punishable by imprisonment for up to 3 years. Hence, the incentive for the prosecution to reach these instruments is rather unlikely.

12 Zakon o spremembah in dopolnitvah Zakona o kazenskem postopku – ZKP-N (Uradni list RS, št. 22/19 z dne 5. 4. 2019).

13 Smernice za izdelavo in posodabljanje individualne ocene mladoletnika v kazenskem postopku. [Online]. Available at: <https://www.gov.si/assets/ministrstva/MP/Slike-novic/2024/Smernice-za-izdelavo-IOM-julij-2024.pdf> (Accessed: 28 September 2024).

Association of centres for social work, Ministry of Justice, Ministry of Labour, Family, Social Affairs and Equal Opportunities, and the Social Affairs Inspection Service.

The guidelines are a comprehensive account of the content of individual appraisal (including formal data, family history, content data on the juvenile, appraisal of risks, pre-existing treatment of the juvenile by social welfare centres, other welfare measures provided to the juvenile or his family, opinion, and proposal) and the drafting and updating procedure.

At this stage of the proceedings, various provisional measures may be imposed, including committal to a transient home, diagnostic centre, or placed under the supervision of a social welfare agency, or sent to a foster home (Art. 471 ZKP). A remand in custody is also possible during preliminary investigative proceedings, but it cannot exceed 1 month. However, in extraordinary cases, the juvenile panel may extend it for an additional 2 months.

The juvenile judge collects suitable evidence, issues his individual appraisal, and sends the documents to state prosecutors, who review them and decide to either produce a motion for punishment or educational measure; alternatively, they can propose to the juvenile judge to discontinue the proceedings (Art. 475 ZKP). If the juvenile judge disagrees with the motion of the public prosecutor, the matter is decided by the superior court's juvenile panel.

During the trial stage, the case is heard by the juvenile panel (and not the juvenile judge). The trial is not public – when a minor is tried, the public is always excluded. However, persons involved in the juvenile's upbringing and supervision as well as scholars are allowed to be present at the trial (Art. 480 ZKP). Where appropriate, the court may remove the minor during the examination of certain evidence or statements.

Discretion of the court in its decision making is expanded when compared with regular criminal proceedings. Even in cases where it is found that the juvenile is responsible for committing a crime, the court may terminate the proceedings if it deems it “insensible” to impose either a sentence or an educational measure on a minor (Art. 483 ZKP).

A thorough analysis of the protection of the juvenile's rights would exceed the scope of this contribution.¹⁴ Nonetheless, two important provisions of the Slovene proceedings are mentioned. In the context of dealing with juvenile migrant offenders, the “in dubio pro youth” principle is important. If the juvenile's age cannot be ascertained, it is presumed that he or she has not yet reached the age of doubt (Art. 452.a ZKP).

Regarding obligatory formal defence, it should be noted that the engagement of a defence counsel is not provided by the state in all cases of juvenile criminal

14 For a Slovene perspective, see Filipčič and Mihelj Plesničar, 2017; for a discussion on the EU legal framework see Radić, 2020; De Vocht et al., 2014.

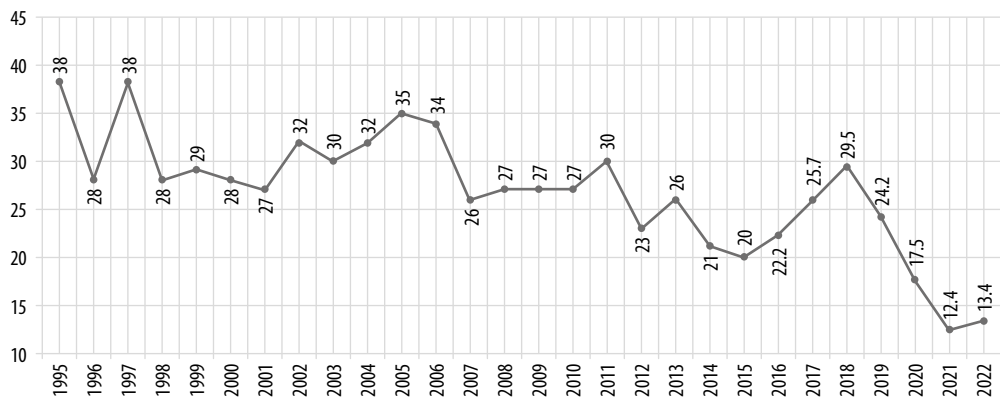
proceedings. This is mandatory: (a) only if the proceedings are pending against the offender for an offence punishable by imprisonment for more than 3 years – from the commencement of the preparatory proceedings; (b) from the time of deprivation of liberty; and (c) if the juvenile judge finds it necessary (at the discretion of the court) (compare Arts. 452.d and 454).

3.

Statistics in Juvenile Offenders in Slovenia

The following chapter presents the relevant criminological data on criminal law sanctioning and imposing of educational measures in Slovenia. Figure 1 represents the average number of juvenile offenders in the juvenile prison in Celje and the re-education institution in Radeče combined. The steady trend of decline observed was exacerbated by the COVID-19 pandemic in 2020 and 2021. Recent data available for free capacities in the re-education institution Radeče (September 2024) do not show any drastic changes in the metric, as it currently houses 12 juveniles, the same number as in 2022.¹⁵

Figure 1: Average number of juveniles in prisons and juvenile detention centres. Source: gov.si¹⁶

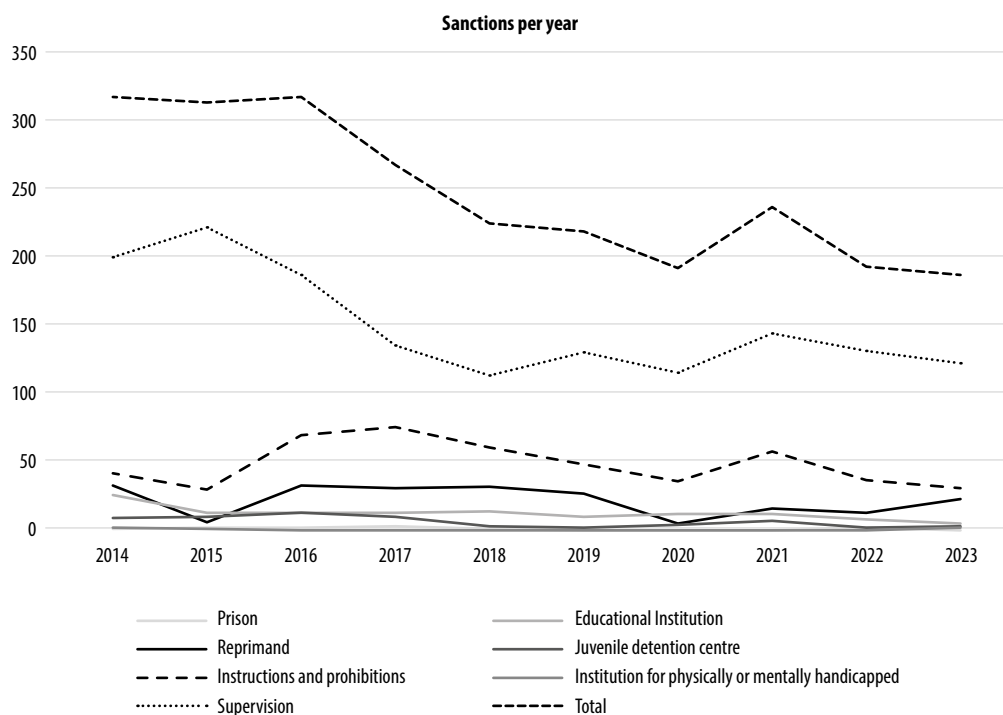


15 Uprava a izvrševanje kazenskih sankcij, Zasedenost zavodov za prestajanje kazni zapor in prevzgojnega doma – 23. 9. 2024 ob 00:00. [Online]. Available at: <https://www.gov.si/assets/organi-v-sestavi/URSIKS/Dokumenti/Zaporska-statistika/2024/Stevilo-zaprtyh-oseb-in-zasedenost-zavodov-dne-23.-9.-2024.pdf> (Accessed: 28 September 2024).

16 Uprava a izvrševanje kazenskih sankcij, Povprečno število mladoletnikov (mladoletniški zapor in prevzgojni dom). [Online]. Available at: <https://www.gov.si/assets/organi-v-sestavi/URSIKS/Dokumenti/Zaporska-statistika/2023/Letni-trendi/Povprecno-stevilo-mladoletnikov.pdf> (Accessed: 28 September 2024).

Figure 2 represents the number of sanctions and educational measures imposed on juvenile offenders. A consistent decline can be observed in the imposed sanctions and educational measures. Overall, supervision of the social welfare centre is by far the most common educational measure, with instructions and prohibitions declining and the reprimand rate improving in 2022 and 2023. The number of cases where juvenile prison or committal to a juvenile detention centre (re-education institution) is imposed is negligible, explaining the low numbers of juveniles in these institutions, as observed in Table 1. Long-term trends (not directly visible from Table 2, but noticeable from older reports and contributions¹⁷) include the decline in imposed reprimands (from 60% in the early 90s to about 5% in 2023); a rise and decline in the educational measure of instructions (from 2% in the early 90s to 20% in 2000s and about 5% in 2023); and a steady rise in the education measure of supervision (from 30% in the early 90s to about 60% in 2023).

Figure 2: Statistics on sanctions and educational measures per year. Source: SiStat



¹⁷ Compare data with Filipčič, 2015, p. 17.

Figure 3 shows the charges brought to prosecution versus the number of cases dropped. It is useful to observe the overall juvenile criminality and the extent to which various mechanisms of opportunity are used in practice. The percentage of dropped cases is consistent with independent studies, which report a declining rate of approximately 48.5%.¹⁸ However, the sharp increase in juvenile criminality in 2023 is conspicuous. Crimes that increased notably in 2023 include threats, violent conduct (violence not reaching the threshold covered by offences against life and limb), minor bodily injuries, and economic or white-collar crimes. The general police report of 2023 notes that in 2019, the police processed 39 threats and 83 minor bodily injury offences, while in 2023 they processed 116 threats and 112 minor bodily injuries.¹⁹

Figure 3: Charges brought and dropped. Source: SiStat

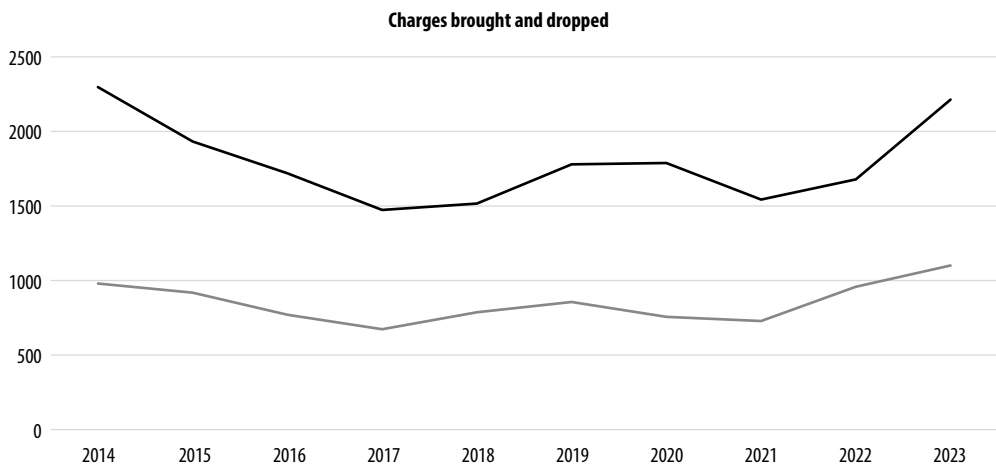


Figure 4 addresses the specific type of criminal offences committed by juvenile offenders for which they were convicted. Consistent with the police report data, crimes against life and limb, violent conduct, and threats jointly accounted for 42.25% of the total convictions.

18 Arnež and Mihelj Plesničar, 2024, p. 65.

19 Ministrstvo za notranje zadeve Republike Slovenije, 2023, p. 30.

Figure 4: Types of crimes committed by juvenile offenders in 2023. Source: SiStat.

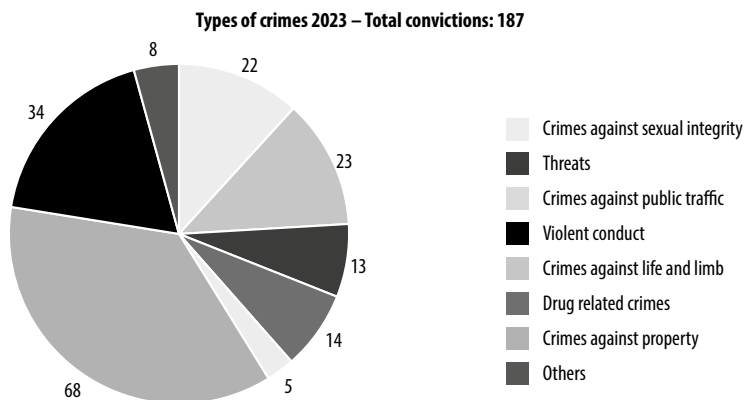


Figure 5 focuses on recidivism of juvenile offenders. The authors of this study reviewed 170 judgements issued by four district courts between 2015 and 2019.²⁰ The number of repeat juvenile offenders is strikingly high (40%), indicating that further studies are inevitable and must be performed and solutions implemented in this regard.

Figure 5: Offenders by recidivism 2015–2019. Source: Arnež/Plesničar, RKK 75 (2024), 59–71

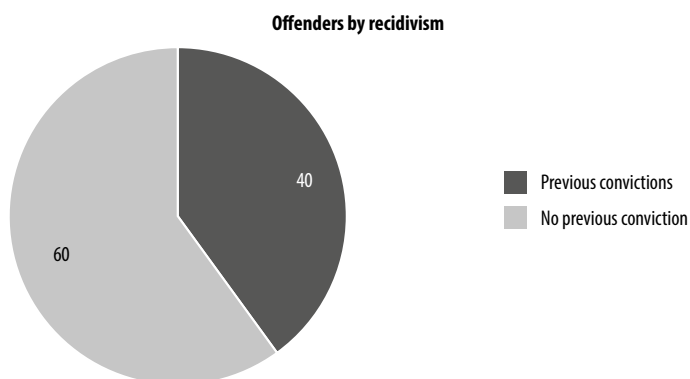


Figure 6 shows a typical state of juvenile offenders by gender. Male offenders represent 87% of juvenile convicts. The question of whether this problem stems from inherent psychological and developmental predispositions of the male gender or is compounded by inadequate societal structures and failed state policies in dealing

²⁰ Arnež and Mihelj Plesničar, 2024, p. 63.

with the juvenile male population is debatable. The dividing line also concerns the type of crime; for instance, female offenders are extraordinarily well represented in crimes against property, while male offenders commit crimes related to sexual integrity, drugs, and public traffic exclusively.²¹

Figure 6: Offenders by gender 2015–2019. Source: Arnež/Plesničar, RKK 75 (2024), 59–71

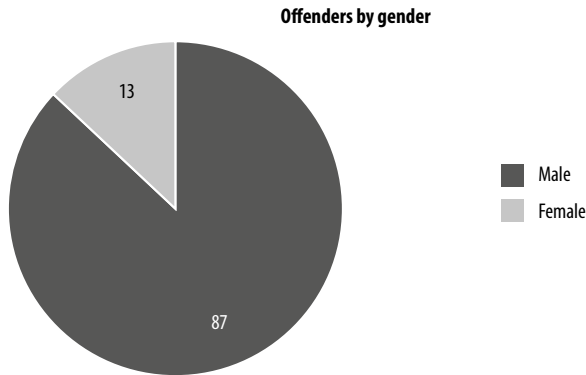
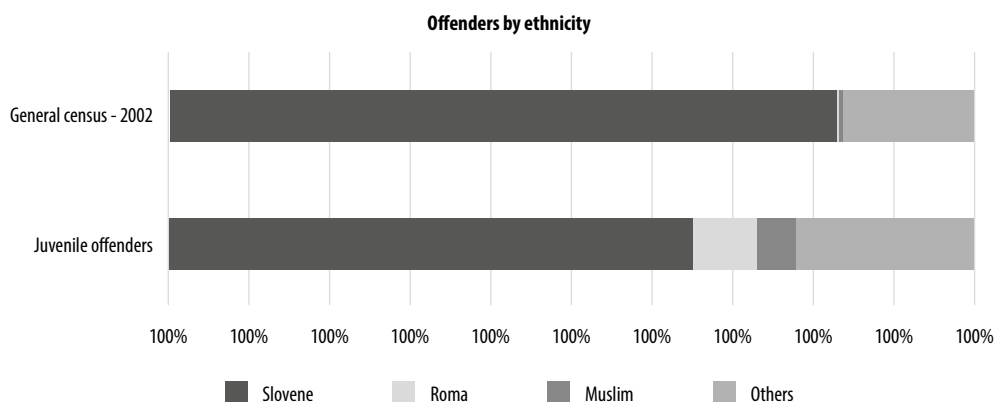


Figure 7 focuses on juvenile offenders by ethnicity and compares the results with the last Slovenian census (last held more than 20 years ago, in 2002). It indicates the disproportionately high percentage of Roma and Muslim juvenile convicts compared to the general population, indicating the ineffectiveness of state policies regarding the integration and de-marginalisation of these population segments. This issue escalated in the summer of 2024, with multiple stakeholders (unfortunately) linking the failed policy interventions for Roma juvenile offenders to implementing broader legislations designed to address juvenile crimes in general (see below).

21 Ibid., p. 64.

Figure 7: Offenders by ethnicity 2015–2019. Source: Arnež/Plesničar, RKK 75 (2024), 59–71



4.

The Dedicated Juvenile Criminal Legislation Saga 2008–2025 (and Beyond?)

As indicated above, Slovenia does not have a dedicated legislation covering substantive and procedural aspects of juvenile criminal law. Such a legislation was first promised in KZ-1 in 2008, which anticipates in Art. 5 that the criminal liability of minors must be determined through a special legislation. Until such a legislation is passed, educational measures, sanctions, and other questions related to criminal liability of minors are still regulated per the old criminal code of KZ from 1994.

An analysis and a first draft of the Act Addressing Juvenile Delinquents (ZOMP) was provided in 2010 – courtesy of the research done by the Institute of Criminology at the Faculty of Law in Ljubljana.²² However, this draft was never presented in parliament,²³ with the topic of juvenile offenders seemingly forgotten until 2019 and unveiled only with the proposal for an Act Addressing Juvenile Criminal Offenders

22 Zakon o obravnavanju mladoletnih prestopnikov – osnutek, EVA: 2011-2011-0052. [Online]. Available at: <https://e-uprava.gov.si/si/drzava-in-druzba/e-demokracija/predlogi-predpisov/predlog-predpisa.html?id=1693> (Accessed: 29 September 2024).

23 For a critical comment, see Fišer, 2017, pp. 15–16.

(ZOMSKD).²⁴ Unfortunately, this proposal was again deferred, that is, a comprehensive legislation covering the area of juvenile offenders did not come to pass until late 2024.

There are, however, positive developments. From 2021 until 2023, the Council of Europe and the European Union jointly funded a 24-month joint project to support Slovenia in its efforts to improve its justice system: 'Improving the juvenile justice system and strengthening the education and training of penitentiary staff in Slovenia.'²⁵ A comprehensive analysis was drafted by the researchers, including a National Research and Gap Analysis,²⁶ Case Law Analysis,²⁷ multiple Recommendations (contained within the said documents), and a Roadmap for Implementation.²⁸ These documents not only provide vivid insights into the strengths and shortcomings of the Slovene juvenile justice system but also make concrete suggestions for improving the existing proposal of the ZOMSKD. Moreover, the Roadmap for Implementation suggests that the ZOMSKD is to be adopted by the end of 2025 – a plan that seemed rather ambitious due to a new conflict disrupting the situation.

In mid-summer 2024, a group of (mostly juvenile) Roma offenders physically assaulted two police officers with their fists and clubs while the police officers were attempting to sanction two juvenile delinquents for driving an unregistered car. The incident was filmed and quickly became a media sensation.²⁹ Municipalities in southern Slovenia, with a sizeable Roma population (Kočevje, Ribnica, Novo mesto, and Črnomelj) joined the discussion, arguing that criminal groups within the Roma population were going "out of control" due to a lenient criminal law.³⁰ The government responded by creating a special Subdivision for improvement of safety in areas with Roma population³¹ and increased the presence of police in municipalities with Roma population.³²

During this time, the opposition is advocating stricter measures and a firmer approach toward juvenile offenders, including extension of juvenile prisons to younger juveniles (14–16 years age group) and for older juveniles (16–18 years age

24 Predlog Zakona o obravnavanju mladoletnih storilcev kaznivih dejanj, EVA: 2018-2030-0046. [Online]. Available at: <https://e-uprava.gov.si/drzava-in-druzba/e-demokracija/predlogi-predpisov/predlog-predpisa.html?id=9999> (Accessed: 29 September 2024).

25 Project information and deliverables available at: <https://www.coe.int/en/web/cooperation-in-police-and-deprivation-of-liberty/improving-the-juvenile-justice-system-and-strengthening-the-education-and-training-of-penitentiary-staff-in-slovenia> (Accessed: 28 September 2024).

26 Mihelj Plesničar et al., 2023.

27 Arnež, 2023.

28 Urumova, 2023.

29 Gregorc, 2024.

30 See for example Fajfar, 2024; Božič, 2024.

31 STA, 2024.

32 G. K., 2024.

group) to criminal offences punishable by imprisonment of 1 year or more (instead of the existing period of 5 years or more).³³ While it is doubtful if these suggestions yielded any immediate results,³⁴ the new public perception that juvenile justice is linked to criminal groups within the Roma minority did not bode well for the ZOMSKD proposal, which (rightfully so) aimed to address some key issues in the Slovene juvenile justice system, as pointed out by the Slovene Human Rights Ombudsman.

5.

Findings of the Human Rights Ombudsman

I shall conclude this contribution by highlighting some key issues afflicting the Slovene criminal juvenile justice system. In his 2023 Yearly Report, the Slovene Human Rights Ombudsman laid bare two practical issues. First, there were complaints that juvenile judges do not regularly visit the juvenile detention centre in Radeče. However, the Ombudsman collected responses via the Supreme court and District courts in Maribor, Celje, and Ptuj, which revealed that juvenile judges conduct regular visits to juveniles housed within their jurisdictions. However, other courts, notably from Ljubljana, Kranj, and Koper, did not respond. This resulted in a recommendation for other District courts to conduct regular visits to juvenile offenders in Radeče.³⁵

The second issue is regarding the available institutional capacity for physically or mentally handicapped youth. A District court notified the Ombudsman in 2023 that it wanted to place a minor in a local institution. However, the capacities were full, which was not acceptable as the child had to be removed from his immediate environment to prevent harm to himself and others around him. Broadly, the Ombudsman also indicated the inadequate state of training programmes for physically or mentally handicapped juveniles. It is entirely unacceptable to place children in an environment with handicapped adults, without offering adequate training and educational programmes, and not providing experts or similar support.³⁶ The state of these programmes is so alarming that the Ombudsman reiterated that placing children in such environments is undesirable.

In the context of legislative issues, the Ombudsman restated its approval of the proposed ZOMSKD, attributable to the following legislative solutions: mandatory instead of discretionary monthly visits of juvenile judges to the juvenile prison and detention centre; obligatory formal defence, not merely for cases of deprivation of

33 M. Z., 2024.

34 M. Z. and G. K., 2024.

35 Varuh človekovih pravic Republike Slovenije, 2023, pp. 566–567.

36 Ibid., pp. 330–331.

liberty, consistent with ZKP but also for police detention; placing rigorous limitations on a remand in custody – not merely in the preliminary procedure but also at the trial stage; and reform of the provisions governing criminal punishment of juvenile offenders.³⁷

6.

Epilogue – the 2025 Proposal for an Act Addressing Juveniles Because of Criminal Offences

It is common that when a significant interval elapses between the speech given at an event and the subsequent preparation of a written contribution, that further important twists and turns give the author an opportunity to share in writing additional new insights. However, this shall also be the case, as this epilogue includes recent important events impacting the development of criminal law on juvenile offenders in Slovenia.

As stated above, the proposed ZOMSKD from 2019 was put on hold and rigorously re-examined from 2021 to 2023 in a project jointly funded by the Council of Europe and the European Union. At the time of the Annual Scientific Conference of the Central European Academy (ASCEA III) conference in Budapest, which took place in autumn 2024, the project did not result in an upgraded or even new proposed legislative effort.

However, in early 2025, the Slovene Ministry of Justice unveiled the new proposal for an Act Addressing Juveniles because of Criminal Offences (ZOMZKD).³⁸ The proposal is still in public discussion, enabling the public to express their opinions on the proposal. After this period is concluded and the proposal (possibly) revised by the Ministry of Justice, further changes may be introduced in the parliamentary procedure. However, there is good reason to believe that the new proposal on juvenile offenders will be passed in the following months. Hence, I shall in the remainder of this contribution introduce, albeit briefly, this new proposed legislation.

Similar to the previous two proposals for ZOMP (2010) and ZOMSKD (2019), the new proposal for ZOMZKD aims to create an overarching legal framework on juvenile offenders, covering substantive criminal law issues, procedural aspects, and enforcement of sanctions. Here, I shall reflect on some interesting changes to substantive criminal law provisions which are currently regulated in KZ and have been discussed above.

³⁷ Ibid., pp. 33, 321.

³⁸ Zakon o obravnavanju mladoletnikov zaradi kaznivih dejanj (ZOMZKD), EVA: 2025-2030-0001. [Online]. Available at: <https://e-uprava.gov.si/download/edemokracija/datotekaVsebina/714071> (Accessed: 10 March 2025).

First, the proposed changes to the educational measure of reprimand are staggering. The softest of educational measures may, according to the proposal, only be used if the juvenile offender *confesses* to the crime (“takes accountability for the criminal offence”). This additional condition aligns with the general move of Slovene criminal procedure towards *plea bargaining* and other instruments, which reward the defendant for his confession. However, introduction of such instruments into juvenile criminal law seems unfortunate for reasons which cannot be fully explored here.

Regarding the educational measure of instructions and prohibitions, the law now clearly states that if a settlement is imposed, the juvenile offender needs to cover the reparations from his own financial assets. This indicates that he does not meet the instructions provided by the court when his parents or another person compensate the victim. This change is welcomed as it aligns the educational measure with the existing regulation on financial penalty as a sanction for juvenile offenders.

There are three additional prohibitions that the court can impose upon a juvenile offender. First, a prohibition on approaching or communicating with either the victim or any other person may be imposed. Second, the court may forbid the juvenile offender to associate with certain persons. Lastly, the court may also prevent access to certain places or events. It should be noted that a ban on approaching or communicating with the victim may be imposed as a security measure.³⁹ This leaves room for speculation if the new prohibitional education measure ought to be seen as *lex specialis* to the already established security measure. The dilemma is not merely theoretical – education measures are limited to 1 year, while the security measure may continue for 3 years!

The temporal extent of the educational measure of supervision by a social welfare centre has been drastically reduced. The minimum duration was shortened to 6 months (from 1 year in KZ) and a maximum duration of 2 years (from 3 years in KZ). While the additional flexibility regarding imposition of a short supervision measure must be welcomed, the proposal does not explain the reason underlying the decision to shorten the maximum duration.

The set of circumstances where the maximum duration in a juvenile prison may be extended to 10 years has been extended. As a rule, the longest duration for which a juvenile offender may be sent to prison remains 5 years. However, now the court has the discretion to impose a prison sanction for up to 10 years in cases where the minimum incarceration sanction foreseen for the offence is 15 years (and not 30 years as is the case in the present legislation). This will allow the court to send the juvenile offender to prison for 10 years even for a “simple” murder and core international crimes (war crimes, crimes against humanity, genocide, etc.). For crimes

39 See Art. 71.a KZ-1 and Art. 33 of the proposed ZOMZKD.

such as premeditated killing of a human being or rape (including gruesome physical brutality towards the victim), the maximum prison sentence remains 5 years.

Additional novelties are regarding the question of security measures, which may be imposed on the juvenile offender. Under Art. 72, KZ already allows to impose security measures on older juveniles alongside an education measure, financial sanction, or juvenile prison, except the prohibition to practice a profession. However, there was no scope to impose a security measure as a stand-alone penalty in criminal proceedings. This is now supposed to change as Art. 34 ZOMZKD allows for imposing security measures such as compulsory psychiatric treatment, care in a health institution, and mandatory extra-institutional psychiatric treatment.

Additionally, Art. 35, now ZOMZKD, provides for additional, stricter conditions for imposing these security measures on juvenile offenders in comparison to when they are imposed on regular criminal offenders. Hence, compulsory psychiatric treatment and care in a health institution may only be imposed if the offence committed is punishable by imprisonment of 2 years or more. Additionally, regarding offences against property, it may be imposed only in cases which involve violence. The maximum duration of the security measure is 3 years (in comparison, the security measure may last up to 5 years for regular criminal offenders).⁴⁰ The proposal also stresses that the juvenile offender's treatment should be conducted in a forensic psychiatric department of the health institution, which must ensure multidisciplinary treatment of the minor and compliance with the special safety conditions established by the sectoral legislation (compare above with recommendations of the Slovene Ombudsman regarding mentally handicapped youth).

Surprisingly, there are no additional safeguards for mandatory extra-institutional psychiatric treatment in comparison to the security measure that targets regular criminal offenders. According to the proposal, the maximum duration of the extra-institutional treatment is limited to 3 years. In comparison, the security measure may last up to 2 years for regular criminal offenders.

This short overview shows that the proposed changes are not major reforms or revisions of the Slovene legislation on juvenile offenders, at least in the context of substantive criminal legislation. For example, the extension of juvenile prison to younger juveniles or older juveniles for less serious crimes is not anticipated in the proposal.⁴¹ The most problematic aspect of ZOMZKD may be identified in the proposed binding of the reprimand to a juvenile's confession.

Admittedly, this seems a rather mild complaint in comparison to the rather rigorous solution in the procedural part of the legislation, as Art. 51 stipulates that while children cannot be sanctioned for a criminal offence (or an educational measure

40 See Art. 70.a KZ-1.

41 However, this is still a topic for parliamentary discussion. See Robida, 2025, p. 20.

imposed), they shall be tried in criminal proceedings for unlawful acts involving elements of violence, punishable by imprisonment for 8 years or more. In such criminal (!) proceedings, a measure that protects the best interests of the children under the Family Code may instead be imposed.⁴² I hope that such doctrinal hiccups will be remedied in the parliamentary proceedings.

42 Compare Fišer, 2025, p. 8, and Robida, 2025, p. 20.

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Harmonising Private International Law for Succession: Analysis of the European Union Succession Regulation and Its Impact on Montenegrin Private International Law

ABSTRACT: *This article presents a comparative analysis of the Private International Law (PIL) for succession in Montenegro and in the European Union (EU). Montenegro, as a candidate country for EU accession, has undertaken significant efforts to align its PIL rules on succession with the relevant EU legal framework. Despite significant degree of harmonisation in this area, certain discrepancies remain, particularly with regard to the rules on jurisdiction and applicable law. These differences provide the rationale for the present paper's analysis of both aspects, which enable to identification of potential coordination problems which may arise when discussing inheritance with foreign element. The first part of the research examines jurisdiction rules for succession matters with a foreign element in the EU Succession Regulation and in Montenegro and procedural mechanisms for prevention of jurisdictional conflicts. The analysis then focuses on the conflict-of-law rules applicable to succession matters and the mechanisms for determining the governing law, focusing on provisions that may cause coordination problems. Based on the conducted analysis, the study demonstrates that divergences of the rules on international jurisdiction and applicable law may complicate the resolution of cross-border succession cases involving Montenegro and Member States of EU, thereby undermining legal certainty and procedural efficiency. The findings highlight the need for greater coordination and harmonization of the relevant legal frameworks. In this regard, the research identifies potential legislative solutions aimed at reducing or eliminating the adverse effects of these differences, ultimately contributing to more predictable outcomes and more effective adjudication of international succession disputes.*

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KEYWORDS: *Succession Regulation, Montenegrin Private International Law, cross-border inheritance, international jurisdiction in probate proceedings, law applicable to succession.*

1. Introduction

This research presents a comparative analysis of the Private International Law (PIL) for inheritance in Montenegro and in the European Union (EU), with particular regard to the impact of the provisions of Succession Regulation on the Montenegrin PIL Act.

Montenegro is a candidate country for accession to the EU, and it has the obligation to harmonise its law with the EU *acquis*. Therefore, provisions of the Montenegrin PIL Act,¹ in the domain of inheritance, provide similar solutions as Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition, and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (Succession Regulation).²

At the outset, the study examines probate proceedings and the role of notaries in managing cross-border succession cases within Montenegro and EU Member States. Next, a comprehensive analysis of jurisdiction rules for succession with foreign element is conducted, with emphasis on provisions that may cause positive jurisdictional conflicts between courts of EU Member States and Montenegro and procedural tools for their prevention. Subsequently, conflict-of-law rules are assessed, with particular reference to situations that may cause coordination problems.

The purpose of the study is to examine whether different provisions on international jurisdiction influence the distribution of succession matters between courts, and whether differences in legal norms on determining the applicable law can have an impact on the final inheritance legal result, and to propose solutions to overcome these issues in practice.

1 Private International Law Act, Official Gazette of Montenegro, Nos. 1/14, 6/14, 11/14, 14/14 and 47/15.

2 Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201, 27 July 2012, pp. 107–134, hereinafter: “Succession Regulation”.

2.

Probate Procedure and the Role of Notaries

In Montenegro, probate proceedings are conducted in a non-contentious procedure and are initiated by the court *ex officio* as soon as it finds out that a person has died or has been declared dead. Then, the court examines whether procedural prerequisites are met (whether it has international jurisdiction, among others) and only when this criterion is satisfied, it proceeds to the stage of deciding on the substance of the case.³

The international jurisdiction of Montenegrin courts in succession matters is governed by the rules of the PIL Act,⁴ whereas rules on material and territorial jurisdiction are provided by the Civil Procedure Act, in connection with the Non-Contentious Procedure Act.⁵ The Basic Court in the area where the deceased had his residence at the time of his death is competent to discuss the succession (probate court).⁶

Amendments on the Non-Contentious Procedure Act from 2015 introduced the obligation of the notaries to act upon appointment of a court, as court commissioners in probate proceedings, and to issue a decision on succession.⁷ Acts of the appointed notary are deemed as acts of the court. However, in the case that there is a dispute in relation to legal issues or the facts, the case is returned to the court for a decision.⁸ The court will entrust the notary with conducting the probate procedure and deliver to him the death certificate and the proposal for initiation of the probate procedure.⁹ When the notary carries out actions in the process of discussing inheritance as an commissioner of the court, he is authorised, as with the court, to take actions and make decisions; thus, he shall apply foreign applicable law *ex officio*.

3 Jakšić, 2021, p. 381; Stanivuković, Đundić and Đajić, 2022, p. 233.

4 Art. 2, para. 2 of the Non-Contentious Procedure Act, read in conjunction with Art. 29 of the Civil Procedure Act, stipulates that the rules on international jurisdiction for civil proceedings are accordingly applied to non-contentious procedure, that is, probate proceedings.

5 Arts. 29 and 30 of the Civil Procedure Act.

6 Art. 95 of the Non-Contentious Procedure Act.

7 Art. 94, para. 4 of the Non-Contentious Procedure Act provides that the notary cannot conduct the probate procedure in case it is necessary to appoint a temporary guardian of the estate, or a request has been made to separate the estate from the property of the heir, or it is necessary to determine measures to secure the estate.

8 Korać, 2018, p. 262.

9 Art. 94, paras. 1 and 2 of the Non-Contentious Procedure Act.

Data on the PIL application in probate proceedings are publicly available, and last year, Montenegrin notaries resolved 185 succession proceedings with a foreign element.¹⁰

Thus, Montenegro's approach to probate procedures appears to align with practices within the EU. Even though the Succession Regulation does not affect the competence of the authorities of the Member States to deal with matters of succession,¹¹ it places emphasis on the role of notaries, who are, per the Regulation, considered to constitute the "court". Namely, in resolving specific disputes within the framework of the relevant procedure, where their decisions carry the weight of the decisions of a court, notaries may be regarded as a court under Art. 267, para. 2 of the Treaty on the Functioning of the EU (TFEU). Active legitimation of the notary to refer to the Court of Justice of the EU (CJEU) comes from the fact that they act upon appointment of a court as a court commissioner in succession matters.¹²

3. International Jurisdiction

The rules on international jurisdiction in Montenegro are similar to the rules contained in Succession Regulation. This section comparatively analyses the rules on general jurisdiction (Arts. 4 of the Succession Regulation and 127 of the PIL Act), subsidiary jurisdiction (Arts. 10 of the Succession Regulation and 128 of the PIL Act), necessity jurisdiction (Art. 11 of the Succession Regulation), as well as the rules on choice-of-court agreements (Arts. 5 of the Succession Regulation and 129 of the PIL Act).¹³

3.1. General Jurisdiction

Art. 127 of the Montenegrin PIL Act¹⁴ mirrors Art. 4 of Succession Regulation, and provides that courts of the state where the deceased had his habitual residence at the

10 Ministry of Justice (2024) Report on the Application of Private International Law (July 2023–July 2024) [Online]. Available at: <https://www.gov.me/dokumenta/906b58d9-b643-431d-8115-585bc3dab902> (Accessed: 31 October 2024).

11 Art. 2 of the Succession Regulation.

12 Dutta, 2013, p. 2; Bogdan, 2016, p. 38.

13 Đorđević, 2020, p. 29.

14 Art. 127 of the PIL Act provides that the court of Montenegro has jurisdiction to rule on succession if the deceased had his habitual residence at the time of death in Montenegro.

time of death shall have jurisdiction to rule on the succession as a whole, regardless of the place where his property is located.

Unlike its predecessor, the Act on Resolution of Conflict of Laws with Regulations of other Countries,¹⁵ the New PIL Act does not provide for exclusive jurisdiction of the court of Montenegro to rule on immovable property located in Montenegro. The Montenegrin legislator has taken this approach with the aim of establishing the essential conditions for maintaining the principle of unity of succession, while aligning domestic legislation with EU standards. Therefore, when the PIL Act was adopted, the rules on exclusive jurisdiction for immovable property were omitted from the Act on Resolution of Conflict of Laws with Regulations of Other Countries; thus, international jurisdiction for inheritance, whether of immovable or movable property, is determined according to the rules on elective jurisdiction.

The main reason for introducing the habitual residence as a connecting factor for successions in the Montenegrin legal system was the need for harmonisation with the Succession Regulation, which would satisfy the need for close connection with the given state and enhance legal certainty and predictability.¹⁶ At the EU level, habitual residence is the most important objective connecting factor – that is, an integrative factor enabling that the same law is applied to all members of the international family. Further, by the application of habitual residence, the problem of classification under foreign law is avoided, whereas nationality is traditionally qualified by the *lex cause*.

Besides these commendable aspects, the habitual residence of the deceased was criticised in doctrine as a vague concept that leaves too much discretion to the courts when deciding and that it may lead to *forum shopping*.¹⁷

To determine the habitual residence, the court should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, considering all relevant factual circumstances, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence. The habitual residence thus determined should reveal a close and stable connection with the State concerned, taking into account the specific aims of this Regulation.¹⁸

Therefore, to establish that the deceased had a habitual residence in a particular country, it is necessary to demonstrate that he had been present there for a sufficient period of time.¹⁹ Although it indicates the stability of residence, the time factor (regular presence) cannot be considered decisive in itself; other conditions should

15 Jurisdiction rules in cross-border succession cases were contained in Arts. 71, 72 and 73 of the Act on Resolution of Conflict of Laws with Regulations of Other Countries.

16 Kostić-Mandić, 2022, p. 570.

17 Aras Kramar, 2020, p. 100; Poretti, 2019, p. 14.

18 Recital 23 of the Succession Regulation.

19 Lamont, 1997, p. 137.

also be met, such as the family situation and the social integration of the deceased in a certain community, which would indicate a close connection with the country in question. If the habitual residence cannot be determined on that basis either, it will be determined based on the principle of closest connection.²⁰ It may be the case that there is an aspiration to establish a habitual residence in a short period of time, and the intention of the person concerned to establish the habitual centre of his or her interests in a particular place.²¹ In this case, the relationship between the length of stay and the intention to stay in a certain place will have to be weighed.²² Therefore, in this assessment, the shorter the period of residence, the more important the question of intention will be.²³

In the *E.E.* case, the CJEU established that the deceased can have only one habitual residence at the time of death. This view is supported by the arguments of predictability, legal certainty, and prevention of contradictory decisions and the fact that the intention of the Regulation is to regulate succession as a whole to prevent its fragmentation.²⁴

This decision is significant because the CJEU set a standard, that is, a hierarchy of terms for determining the habitual residence of the deceased in complex cases. First, to determine the habitual residence, the authority should carry out a comprehensive assessment of the circumstances of the deceased's life during the years preceding his death and at the time of his death, considering all relevant facts, in particular the duration and permanence of the presence of the deceased in the country in question and conditions and reasons for that presence. Next, the authority should check where the centre of interests of the deceased was his family and social life. Depending on the circumstances of the case, the deceased can still be considered to have his habitual

20 Nita, 2022, p. 269.

21 There is no minimum time required before a new habitual residence can be established; it depends on the facts of the particular case, but it may be acquired in as little as one day. See *AB v CD* [2018] EWHC 1021; HR (2018) Case no. C-512/17, ECLI:EU:C:2018:513.

22 A. (2009) Case no. C-523/07, ECLI:EU:C:2009:225.

23 Rogerson, 2000, p. 96.

24 A citizen of Lithuania married a German citizen, and from the moment of her marriage until her death, she lived in Germany with him and her minor son from an earlier relationship, E.E. While living in Germany, she travelled back to Lithuania, where she drew up a will at a notary's office, in which she left all her inheritance to her son E.E. After the death of his mother, E.E. contacted the notary's office in Lithuania with a request to start the inheritance procedure and issue a certificate of inheritance rights. The notary refused to initiate probate proceedings, arguing that, according to the Succession Regulation, the deceased's habitual residence at the time of death was in Germany and that the German authorities were competent. The deceased's spouse clearly stated that he waives the inheritance and consents to the jurisdiction of the Lithuanian courts. One of the questions raised in the proceedings was whether, for the purposes of the Regulation, a person can have more than one habitual residence. See *E.E.* (2020) Case no. C-80/19, ECLI:EU:C:2020:569.

residence in his State of origin in which the centre of interests of his family and his social life was located.

Only if this is still not sufficient to establish habitual residence, in cases where the deceased lived in several States alternately or travelled from one State to another without settling permanently in any of them, a secondary set of criteria should be considered – the nationality and place where the assets are located. If the deceased was a national of one of those States or had all his main assets in one of them, his nationality or the location of those assets could be a special factor in the overall assessment of all the factual circumstances.²⁵

Even if the PIL Act makes it clear that courts, and notaries as commissioners of the court, have elective jurisdiction to rule on inheritance as a whole, in practice, a certain number of notaries continue to generally assume exclusive jurisdiction over matters involving immovable property situated in Montenegro. For instance, this was the case in the succession procedure that was discussed in front of a notary from Podgorica, who provided us with information for the purposes of this research. The deceased was a citizen of Croatia, where he also had habitual residence at the time of his death in 2018. Inheritance consisted of immovable property located in the municipalities Labin (Croatia) and Danilovgrad (Montenegro). The Croatian notary refused to rule on the immovable property located in Montenegro and instructed the heirs to address the notary in Montenegro.²⁶

This practice remained because the Act on Resolution of Conflict of Laws with Regulations of Other Countries, which was applied for a long time before the New PIL Act was introduced, provided exclusive jurisdiction for immovable property. However, currently, there is no positive law provision that would allow such an interpretation. To prevent similar practices in the future and provide detailed instructions for notaries, guidelines for the application of the PIL in the practice of notaries were formulated.²⁷

3.2. *Subsidiary Jurisdiction*

In some cases, general jurisdiction rules may be insufficient – for instance, when the deceased has had a habitual residence outside EU, in a third State, but there is still a need for jurisdiction of the court of the EU Member State, because the case is closely connected with that Member State.²⁸ However, it should be emphasised that

25 Recital 24 of the Succession Regulation; E.E. (2020) Case No. C-80/19, ECLI:EU:C:2020:569, para. 40.

26 Kostić-Mandić, 2022, p. 595.

27 Ibid., p. 28.

28 Dutta, 2013, p. 2.

Art. 10 cannot be applied in situations when the last habitual residence cannot be determined, because the Succession Regulation rests on the assumption that every deceased person has a habitual residence.

Rules on subsidiary jurisdiction apply if the habitual residence of the deceased at the time of death is not located in a Member State, and has as a criterion the place where the assets are located. Namely, in this case, Art. 10, para. 1 of the Succession Regulation provides that the courts of a Member State in which assets of the estate are located shall nevertheless have jurisdiction to rule on the succession as a whole in so far as the deceased had the nationality of that Member State at the time of death; or, failing that the deceased had his previous habitual residence in that Member State, provided that, at the time the court is seized, a period of not more than five years has elapsed since that habitual residence changed. This provision is in accordance with the principle of unity of succession, because it provides jurisdiction for the inheritance as a whole.

However, the same cannot be said for Art. 10, para. 2, which represents an exception from the principle of the unity of succession. The jurisdiction provided by this paragraph is limited to the assets located in the territory of the court.²⁹ This article provides that where no court in a Member State has jurisdiction pursuant to Art. 10, para. 1, the courts of the Member State in which assets of the estate are located shall nevertheless have jurisdiction to rule on those assets.

This provision is criticised in doctrine for possibly causing positive conflicts of jurisdiction between courts of the member states and courts of third states.³⁰ Further, it is suggested that motives of the lawmaker for deviating from the principle of unity of succession are not clear, while it does not take into account the possibility that courts of the third states may also have jurisdiction to rule on inheritance as a whole.

The rules on subsidiary jurisdiction contained in Art. 128 of the PIL Act differ to some extent from those in Art. 10 of the Succession Regulation, which provides: 'if the deceased did not have a habitual residence in Montenegro at the time of death, the court of Montenegro will have jurisdiction based on the fact that the assets are located in Montenegro and that the law of Montenegro is chosen as applicable in accordance with Art. 72 of the PIL Act; or the deceased was a Montenegrin citizen at the time of death; or the application of this article applies only to those assets'.³¹

The possibility that courts of Montenegro have jurisdiction to decide on assets located in Montenegro when Montenegrin law is chosen as applicable is what makes this article somewhat different from the rule contained in the Succession Regulation.

29 Radoja, 2019, p. 53.

30 Ibid., p. 56.

31 Art. 128 of the PIL Act; Kostić-Mandić, 2017, p. 136.

It is also criticised in doctrine that it may cause a scission of succession and positive conflicts of jurisdiction.

3.3. Choice-of-court Agreement

There are notable distinctions between the provisions of the Succession Regulation and those of the Montenegrin PIL Act regarding the prorogation of jurisdiction.

Namely, Art. 5 of the Succession Regulation provides: ‘when the law chosen by the deceased to govern his succession pursuant to Article 22 is the law of a Member State, the parties concerned may agree that a court or the courts of that Member State are to have exclusive jurisdiction to rule on any succession matter’.

To ensure the close connection between the deceased and the chosen law, it is provided that the deceased may choose the law of his nationality at the time of making the choice or at the time of death.³²

Parties may agree on jurisdiction through formal choice-of-court agreement, which shall be expressed in writing, dated, and signed by the parties concerned;³³ or through informal acceptance of jurisdiction, or a court previously seized has declined jurisdiction in the same case, because it considers that the courts of the Member State of the chosen law are better placed to rule on the succession, considering the practical circumstances of the succession, such as the habitual residence of the parties and location of the assets.³⁴

This provision has faced doctrinal criticism for imposing severe limitations on party autonomy.

First, these provisions allow only the choice-of-court of the Member States. If the deceased has chosen a law of the third state of his nationality, parties will not be able to prorogate jurisdiction to courts of that state.³⁵ The Regulation does not consider the possibility that courts of third countries, such as Montenegro, could have jurisdiction to rule on inheritance as a whole. The harmonisation of legal rules for jurisdiction and applicable law should not be at the detriment of the parties.

From the perspective of a court of a Member State, if the deceased was a Montenegrin citizen, with habitual residence in Germany for example, the general rule in Art. 4 of the Succession Regulation provides that German courts have jurisdiction to rule on succession as a whole. If the deceased left a testament with a choice of Montenegrin law, German courts will still have jurisdiction and heirs (parties in

32 Art. 22, para. 1 of the Succession Regulation.

33 Art. 5, read in conjunction with Art. 7(b) of the Succession Regulation.

34 Art. 7 of the Succession Regulation.

35 Radoja, 2019, p. 57.

probate procedure) will not have the opportunity to prorogate jurisdiction to the Montenegrin court.³⁶

The second critique regarding restrictions of party autonomy in Art. 5 relates to the fact that the deceased does not have the option to unilaterally choose a competent court that will decide upon his inheritance.³⁷ In the best-case scenario, the deceased can conclude agreement on inheritance with future heirs, but he cannot prevent parties from annulling that agreement after his death.

It may be inferred that amendments to Art. 5 of the Regulation are necessary. In cases where the deceased has chosen the law of a third state to govern his succession, *de lege ferenda*, the parties concerned should be enabled to agree that the courts of third states of the chosen law have jurisdiction to rule on succession and allow the courts of the Member States to decline their jurisdiction in favour of the courts of third states, provided that these courts are competent to decide on succession as a whole.

Additionally, the deceased should be allowed to unilaterally prorogate jurisdiction for his property to the courts of the Member States, as well as to the courts in third countries, provided that these courts are competent to rule on inheritance as a whole.³⁸ If adopted, these solutions appear likely to prevent the fragmentation of succession at the procedural level, thereby upholding the principle of unity of succession when a choice-of-court agreement is in place.

Meanwhile, Article 129 of the PIL Act provides that the deceased may, by disposing of the property in the event of death, determine that the courts of the country of his nationality or habitual residence at the time of choosing the applicable law or of death (the court or courts of the State whose law may be chosen as applicable to succession in accordance with Art. 72), shall also be competent to discuss all or part of the inheritance.³⁹ For the inheritance of immovable assets, the testator can choose to prorogate jurisdiction to the courts of the country where assets are located, whose law is also applicable per Art. 72. The jurisdiction of the chosen court is exclusive.

The possibility of the testator choosing a competent court for part of the inheritance leads to a scission of succession and opens space for positive conflicts of jurisdiction with the courts of the EU Member States.⁴⁰ Further, a question concerns whether such a choice of the court is valid from the perspective of courts of Member

36 Ibid.

37 Dutta, 2013, p. 12.

38 Radoja, 2019, p. 61.

39 Kostić-Mandić, 2017, p. 369.

40 Đorđević and Meškić, 2019, p. 218.

States, when it does not entail succession as a whole.⁴¹ In essence, it is a question of whether courts of the Member States would accept jurisdiction in this situation.⁴²

Art. 129 is inadequately formulated and ambiguously phrased, with three main arguments supporting the assertion that it represents an editorial error.

First, one of the basic rules of international civil procedural law is that the domestic legislator cannot provide rules on the international jurisdiction of foreign courts and *vice versa*.⁴³ Therefore, the Montenegrin PIL Act cannot provide for the jurisdiction of foreign courts, and even if it does, foreign courts would not accept it.

Second, this provision comes from the Commentary on the Draft Succession Regulation by the Max Planck Institute,⁴⁴ but it was not adopted in this form in the Succession Regulation. The words 'any succession matter' in Art. 5 are criticised in doctrine as ambiguous and it is not clear if they imply ruling on the succession as a whole. However, there is consensus that the choice-of-court agreement concluded in favour of the court of the Member State may cover any issue related to succession as a whole,⁴⁵ that is, the chosen court can decide on the entire property.⁴⁶

Third, given that Art. 129 of the PIL Act stipulates that the chosen jurisdiction of the court is exclusive, problems may arise if the testator chooses a law of the third country for which there is an exclusive jurisdiction of a foreign court. For example, if the testator prorogates jurisdiction to the court of another country for immovable property located in Serbia, for which the Serbian court has exclusive jurisdiction,⁴⁷ the decision made by the chosen court will not be recognised in Serbia.

Finally, it appears that this provision is not in accordance with the purposes of the Succession Regulation, including to ensure the unity of succession, establish clear guidelines for jurisdiction and the applicable law, harmonise legal rules and ensure the protection of heirs' rights, and to set forth criteria for the recognition and enforcement of decisions.⁴⁸

41 Radoja, 2019, p. 53.

42 For instance, it could be questioned whether a German court would accept that it has exclusive jurisdiction to rule on immovable assets located in Germany. From the perspective of the German court, where a choice-of-court agreement is concluded, the chosen court has jurisdiction to rule on the inheritance as a whole.

43 Jakšić, 2019, p. 154.

44 Max Planck Institute for Comparative and International Private Law (2010) 'Comments on the European Commission's Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession', 74, pp. 522–720 [Online]. Available at: <https://www.europarl.europa.eu/document/activities/cont/201005/20100526ATT75035/20100526ATT75035EN.pdf> (Accessed: 31 October 2024).

45 Frimston, 2013, p. 108.

46 Đorđević, 2020, p. 30.

47 Art. 71, para. 1 of the Act on Resolution of Conflict of Laws with Regulations of Other Countries.

48 Golobardes, 2015, p. 22.

Consequently, amendments to Art. 129 of the PIL Act seem necessary. Even in the absence of amendments, this article should be interpreted systematically, in accordance with Arts. 72 and 128 of the PIL Act, in such a way that the deceased may, by disposing of the property in the event of death, determine that the court of Montenegro will be competent if the law of Montenegro is chosen as the applicable law for part or all of the inheritance.

The Succession Regulation, as well as the PIL Act, leave some questions open – for instance what happens when the heirs agree on jurisdiction of the court, but an unknown heir appears at a later stage? The solution to this dilemma would be that if an unknown heir does not contest jurisdiction in front of the chosen court, that court may have jurisdiction. Meanwhile, if an unknown heir contests jurisdiction, then the general jurisdiction rule from Arts. 4 and 10 of the Succession Regulation and Arts. 127 and 128 of the PIL Act should be applied.

3.4. *Forum Necessitates*

According to Art. 11 of the Succession Regulation, if the habitual residence of the deceased was in a third state and it is impossible to establish the jurisdiction of any other Member State court under jurisdiction rules of the Succession Regulation, the courts of a Member State may, on an exceptional basis, rule on the succession, if proceedings cannot reasonably be brought or conducted or it would be impossible in a third State with which the case is closely connected.⁴⁹

The case must have a sufficient connection with the Member State of the court seized. Rules on necessary jurisdiction deal with the assets of the estate that are located in a third state.⁵⁰

Meanwhile, the PIL Act does not contain rules on *forum necessitates* in succession proceedings, but rather a general provision contained in Art. 113 of the PIL Act. Similarly, it stipulates that when PIL Act does not provide for the jurisdiction of a court or other authority in Montenegro, and the procedure cannot be initiated in another state or cannot reasonably be expected to be initiated in another state, jurisdiction to decide the case has court in Montenegro with which the case has a sufficient connection.

49 Đorđević, 2020, p. 29.

50 Ibid., p. 30.

4.

Preventing Positive Conflicts of Jurisdictions

Even though rules on jurisdiction in Montenegro are based on the same criteria as the Succession Regulation and follow the principle of unity of succession, there are several provisions which may cause a scission of succession at the procedural level. Based on the analysis, it can be concluded that among the provisions presenting the greatest challenges in this regard is Art. 10, para. 2, which represents a deviation from the unity of succession in the Succession Regulation and increases the possibility of parallel proceedings. Further, the choice-of-court rules have been subject to substantial criticism. Art. 129 of the PIL Act, allowing a testator to designate exclusive jurisdiction of the courts of the country where immovable assets are located, introduces the potential for a positive jurisdictional conflict with the courts of EU Member States, which may result in decisions that will not be recognised at a later stage.

The Regulation recognises that there is an unavoidable possibility of parallel proceedings before different authorities in Member States relating to the same succession, which may result in the division of the estate as regards the management of succession and in contradictory decisions that will not be recognised in another state.

However, positive conflicts of jurisdiction are anticipated to arise more frequently when assets are situated in third countries that adhere to the principle of scission of succession and provide exclusive jurisdiction of their courts for rulings on the immovable assets.

The primary mechanism for resolving positive conflicts of jurisdiction encompasses rules on *lis pendens* contained in Art. 17 of the Succession Regulation and Art. 114 of the PIL Act.

Pursuant to Art. 17 of the Succession Regulation, where proceedings involving the same cause of action and between the same parties are brought to courts of different Member States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established. Where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction in favour of that court.

The rules on *lis pendens* contained in Art. 114 of the Montenegrin PIL Act are somewhat different compared with those in the Succession Regulation. Namely, the notary public in Montenegro does not consider *ex officio* whether proceedings are already being conducted before a foreign court on the same matter and between the same parties, but only upon request of the party. The notary will suspend the domestic procedure if the following conditions are cumulatively fulfilled: 1) that there is a party's request; 2) that the proceedings for that dispute were first initiated before

a foreign court; 3) that there is no exclusive jurisdiction of the court of Montenegro; 4) that it can be reasonably expected that the decision of a foreign court will be eligible for recognition and enforcement in Montenegro.

Additionally, Art. 12 of the Succession Regulation contains a rule on the limitation of proceedings as an effective tool for preventing positive conflicts of jurisdictions with third state courts. The Montenegrin legislator, at the time of the adoption of the PIL Act, had the text of the Proposal of the EU Succession Regulation from 2009 as the model, which did not anticipate the limitation of proceedings – the main reason why this institute is omitted from the PIL Act.⁵¹

The limitation of proceedings represents an inherent limit from the principle of the unity of succession that empowers the Member State courts to decide not to rule on one or more of assets of the deceased located in the third state, if it may be expected that its decision in respect of those assets will not be recognised and where applicable, declared enforceable in the third state.⁵²

There are four conditions that need to be fulfilled for the court of the Member State seized to limit its proceedings. First, the court of the Member State should have jurisdiction (pursuant to Art. 4 or Art. 10 of the Succession Regulation) to rule on the estate comprising the assets located in a third country. Scholars have varying views about situations where the jurisdiction is established in accordance with a choice-of-court agreement. The prevailing opinion is that the parties have the right to request the limitation of proceedings in accordance with Art. 12 in this situation.⁵³ Second, assets shall be located in a third country. Third, it must be determined that there is an expectation that the decision of the Member State court seized will not be recognised in a third country in respect of the assets located there, taking into consideration all the grounds for refusal of recognition established by the laws of that third state. However, exclusive jurisdiction of a third state court seems to be the most frequent

51 Kostić-Mandić, 2017, p. 367; Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, COM(2009) 154 final, No. 2009/0157 (COD) [Online]. Available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0154:FIN:EN:PDF> (Accessed: 31 October 2024).

52 Art. 12 of the Succession Regulation.

53 Đorđević, 2020, p. 21; Dutta, 2013, p. 24. The other opinion is based on a different interpretation of the wording “any succession matter” in Art. 5 of the Succession Regulation. It holds that the parties had the opportunity to exclude assets located in a third state from their choice-of-court agreement but did not do so; the omission should be interpreted as an implicit waiver of their right to request the application of Art. 12(1). See Panopoulos, 2017, p. 101.

reason for invoking the Art. 12.⁵⁴ Finally, its application depends on the request of the parties.

This raises the question of the relationship between the rules on *lis pendens* and the limitation of the proceedings. Are the *lis pendens* provisions in the Montenegrin PIL Act sufficient to prevent positive jurisdictional conflicts between courts of Montenegro and other third countries and is it necessary to incorporate the institute of limitations of proceedings into Montenegrin law? Namely, if there is a possibility to apply rules on *lis pendens* in every situation where positive conflicts of jurisdiction arise, that would make the institute of limitations of proceedings superfluous.

Both institutes may be applied in instances where proceedings concerning immovable property situated in a third country were initially commenced within that jurisdiction. However, the purpose of the institute of limitation of proceedings is to prevent decisions that will not be recognised in third states. That is, rules on the limitation of proceedings do not limit the jurisdiction of member state courts, but instead they restrict the scope of the proceedings by excluding its assets situated in a third state.⁵⁵ Further, the application of the institute of limitation of proceedings is left to the discretion of the courts; yet, the courts of Member States still have jurisdiction to rule on those assets, but they may decide not to do so in a particular case.

Hence, there are situations where proceedings before the court of Member States cannot be suspended in accordance with *lis pendens* rules, which is where rules on the limitation of proceedings come into play. The application of Art. 12 may be considered reasonable, as the decision to exclude immovable assets situated in a third country from the proceedings of the Succession Regulation effectively prevents any subsequent determination by the court of the Member States to continue the proceedings, which may occur when proceedings are suspended because of international *lis pendens*.⁵⁶

The findings from the analysis indicate that rules on *lis pendens*, even though an effective tool for prevention of positive conflicts of jurisdiction, cannot prevent contradictory decisions in every situation. Therefore, as a recommendation, the Montenegrin PIL Act should incorporate provisions on the limitation of proceedings in alignment with Art. 12 of the Succession Regulation in future legislative interventions.

54 If the court of a Member State is seized to rule on the inheritance of immovable assets located in a third country that provides for the exclusive jurisdiction of its courts to rule on immovable assets, the exclusive jurisdiction of a court of that third state may represent a ground for non-recognition under the law of the third state. See Đorđević, 2020b, p. 34.

55 Đorđević, 2020, p. 31; Panopoulos, 2017, p. 106; Radoja, 2019, p. 59.

56 For instance, when the procedural rights of the defendant were clearly violated in the procedure before the courts of the third country, such that the decision will not be recognised before the courts of the Member States, the courts of the Member States may decide to continue with the proceedings initiated before them. See Đorđević, 2020b, p. 36.

5. Conflict-of-law Rules

When determining the applicable law for succession, Montenegrin courts, similar to courts of EU Member States, apply the principle of unity of succession on both levels and provide habitual residence of the deceased as the main connecting factor.

The principle of the unity of succession is often advocated for its advantages in minimising coordination issues and facilitating the distribution of inheritance.⁵⁷ However, the current research illustrates that this does not always have to be the case and that due to the existence of choice-of-court agreement, the estate can be divided at the procedural level, which may ultimately result in two decisions that are not compatible with each other and may not be recognised in another country.

Even if the principle of the unity of succession is implemented consistently, there are situations where laws of different countries might be applied, either due to rules on international jurisdiction (because the same law applies only to that part of the inheritance for which the court has jurisdiction) or due to the application of one of the general institutes of PIL (*renvoi*, escape clause, adjustment, prior question, qualification problem), which may lead to splitting of the applicable law and application of the law of another state.⁵⁸ Further, there are mandatory rules of *lex fori*, which may provide some limitations when it comes to ownership rights of foreign citizens.

For instance, in cross-border succession cases, a situation may arise when it is unclear which institute of private law should be applied. This was observed in the

⁵⁷ Kostić-Mandić, 2017, p. 356.

⁵⁸ *Ibid.*, p. 357.

recent CJEU decision in the *T.N.* case,⁵⁹ where the question arose whether the waiver of inheritance before the competent court could be qualified as a matter of form (and not of substantive law), which would make the law of the Member States in which waiver was made applicable. However, if this question is qualified as one of substantive law, substitution could be applied.

The CJEU held that a declaration concerning the waiver of succession made by an heir before a court of the Member State of his habitual residence is regarded as valid as to form in the case where the formal requirements applicable before that court have been complied with. That is, for the declaration on the waiver of inheritance to be valid, it is not necessary for the declaration to meet the formal conditions prescribed by *lex successionis*.⁶⁰

Finally, although the intention of the Montenegrin legislator was to align rules on cross-border inheritance with solutions in EU, the PIL Act does not contain a provision, as is the case for contractual and non-contractual obligations,⁶¹ that domestic authorities shall interpret and apply the provisions of PIL for inheritance in accordance with EU law.⁶²

59 The deceased was a Dutch citizen who died in Bremen, where he was habitually resident. His heirs were his widow and the two children of his predeceased brother. His widow applied for a joint certificate of inheritance before the court in Bremen, which would grant her three quarters of the inheritance and one eighth to each of the heirs. However, the two heirs declared before the court in The Hague, where they had their habitual residence, that they were waiving their inheritance. In the proceedings before the court in Bremen, T.N. and N.N. were heard and, in a letter in Dutch, submitted copies of their declarations of renunciation of inheritance. The German court replied that it would not take these documents into account until it had received a German translation. The court in Germany issued a decision recognising them as heirs, together with the widow of the deceased, because the period prescribed by German civil law, six weeks after learning of the inheritance, had expired, and within that period they had not submitted a declaration of renunciation in German. The court does not state whether this interpretation was achieved through substitution or qualification as a matter of form, but, given that it generally followed the approach of the Advocate General, it seems that it accepted that this qualifies as a matter of form. Further, the court found that it is sufficient to meet the conditions prescribed in the country of habitual residence of the heir, as long as the court called upon to decide on the succession is aware of the existence of such a declaration of renunciation [49]. The threshold for this awareness appears to be very low, but, 'in the absence of a single system in EU law providing for the communication of declarations' referred to here, the person submitting the declaration must ensure that it is brought to the attention of the court [48]. The aim of the Regulation is to enable heirs to make declarations of renunciation of inheritance in the Member State of their habitual residence, meaning that the heirs are not required to take further formal actions before the courts of other Member States other than those provided for by the law of the Member State in which such a declaration was made, as such declarations would be considered valid. See *T.N. and N.N.* (2022) Case No. C-617/20, ECLI:EU:C:2022:426.

60 *T.N. and N.N.* (2022) Case No. C-617/20, ECLI:EU:C:2022:426, paras. 35 and 37.

61 Arts. 49 and 67 of the PIL Act.

62 Kostić-Mandić, 2022, p. 567.

5.1. General Rule

Art. 71 of the Montenegrin PIL Act mirrors Art. 21 of the Succession Regulation and provides that the law applicable to the succession as a whole shall be the law of the State in which the deceased had his habitual residence at the time of death. The Succession Regulation provides for universal application and stipulates that any law specified by this Regulation shall be applied regardless of whether it is the law of a Member State.⁶³ The same conclusion can be drawn regarding the PIL Act.

The Succession Regulation also contains the escape clause and states that where, by way of exception, it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State, other than the State whose law would be otherwise applicable, the law applicable to the succession shall be the law of that other State.

Given the broadness of the concept of habitual residence, it is surprising that the European legislator considers that additional fairness in individual cases can be achieved by providing for the escape clause. However, the purpose of this escape clause is to allow the court to apply foreign law, with which the testator is closely related, but to leave out of question its own international jurisdiction, which is based on the habitual residence of the deceased.⁶⁴

5.2. Choice-of-law

Aligned with contemporary trends in comparative inheritance law, the Succession Regulation and PIL Act provide rules on party autonomy for inheritance. However, this autonomy is constrained with the requirement for a substantial connection between the deceased and the chosen law.

Namely, Art. 22 of the Succession Regulation provides that a person may choose, as the law to govern his succession as a whole, the law of the State whose nationality he possesses at the time of making the choice or at the time of death. A person possessing multiple nationalities may choose the law of any of the States whose nationality he possesses at the time of making the choice or at the time of death.

However, Art. 72, para. 2 of the PIL Act differs from Art. 22 of the Succession Regulation, which provides that the testator may choose, as the law to govern his succession as a whole, the law of the State whose nationality he possesses at the time of making the choice or at the time of death. A person possessing multiple nationalities

⁶³ Art. 20 of the Succession Regulation.

⁶⁴ Dutta, 2013, p. 14.

may choose the law of any of the States whose nationality he possesses at the time of making the choice or at the time of death.⁶⁵

For the inheritance of immovable assets, the deceased can choose the law of the country where the immovable assets are located. In this case, *dépeçage* is an exception to the regime of unitary succession.⁶⁶

The choice of law must be explicit or clearly derived from the circumstances of the case and in the form provided for the disposal of property in the event of death (will, joint will, or inheritance contract). The existence and material validity of the choice of applicable law is assessed according to the chosen law.⁶⁷

However, it should be stressed that the existence and material validity of will are assessed either in accordance with the chosen law or with the law of habitual residence. The legal capacity to create a will is also governed by the law that is applicable for the existence and validity of the last will. If the applicable law has been changed at a later stage, it will not have an influence on the capacity to create a will.⁶⁸

The rights of intestate heirs on their compulsory share represent mandatory rules and are protected by the Succession Act of Montenegro.⁶⁹ Therefore, the testator cannot exclude these rules by choosing another applicable law, because the court will, at the request of the parties, find that the right on compulsory share is violated by testament.⁷⁰ The only exceptions to this rule would be those rare cases where conditions, provided by the Succession Act, on exclusion of the right to the compulsory share are met.⁷¹

A similar issue was discussed before the German Federal Court of Justice, which held that the choice of English law for the succession of a British citizen, with habitual residence in Germany, was not valid, because it was contrary to German Public Policy. In this case, the testator has completely excluded his son from the will and has chosen English law as applicable. The court emphasised that the son, a German national, had a constitutional right to a compulsory share under German law, which was part of German Public Policy.⁷²

65 Art. 22, para. 1 of the Succession Regulation.

66 Kostić-Mandić, 2022, p. 81.

67 Dika, Knežević and Stojanović, 1991, p. 75.

68 Kostić-Mandić, 2017, p. 370.

69 Arts. 27, 28 and 29 of the Succession Act of Montenegro.

70 Kostić-Mandić, 2017, p. 370.

71 Art. 46 of the Succession Act of Montenegro.

72 BGH, Case No. IV ZR 110/21, Decision of 29 June 2022.

5.3. Scope of Applicable Law

When dealing with cross-border successions, a problem of characterisation may arise. This problem is usually solved by acceptance of the characterisation *lex fori*, meaning that a court dealing with an inheritance case will, in most situations, opt for characterisation by the law of the country of the court. The only generally accepted exception to this rule is the designation of things as movable or immovable, which should be characterised *lex causae*. For instance, in some situations, the jurisdiction of the probate court may depend on the characterisation of assets, and applying this rule, the characterisation should be carried out according to the place where the matter is located.⁷³

In the context of the EU's PIL, the characterisation problem is often manifested in defining the boundaries of applicability among various legal instruments, because EU law is contained in diverse legal instruments. Specifically concerning the Succession Regulation, there are many bordering areas, which remain outside the scope of European choice-of-law rules, so the question of their characterisation may arise.⁷⁴

On the level of European choice-of-law rules, the characterisation problem shall be resolved autonomously – that is, applying the principle of autonomous interpretation of the EU law.⁷⁵

To avoid problems of characterisation, in Art. 76 of the PIL Act, as in Art. 23 of the Succession Regulation, the Montenegrin legislator provides that law determined by these rules shall govern in particular:

'(a) the causes, time, and place of the opening of the succession; (b) the determination of the beneficiaries, of their respective shares, and of the obligations that may be imposed on them by the deceased, and the determination of other succession rights, including the succession rights of the surviving spouse or partner; (c) the capacity to inherit; (d) disinheritance and disqualification by conduct; (e) the transfer to heirs and, as the case may be, to the legatees of the assets, rights, and obligations forming part of the estate, including the conditions and effects of the acceptance or waiver of the succession or of a legacy; (f) the powers of the heirs, the executors of the wills, and other administrators of the estate, in particular as regards the sale of property and payment of creditors, without prejudice to the powers referred to in Arts. 29(2) and (3); (g) liability for the debts under the succession; (h) the disposable part of the estate, the reserved shares,

73 Stanivuković and Živković, 2023, pp. 259–261.

74 Solomon, 2016, p. 193.

75 Bogdan, 2010, pp. 134–147.

*and other restrictions on the disposal of property upon death, as well as claims that persons close to the deceased may have against the estate or heirs; (i) any obligation to restore or account for gifts, advancements, or legacies when determining the shares of the different beneficiaries; and (j) the sharing-out of the estate’.*⁷⁶

5.4. Renvoi

The renvoi is provided in Art. 34 of the Succession Regulation with the aim of promoting international harmony of decisions in cross-border succession cases.⁷⁷

The renvoi applies only to cases where the applicable law determined by the Succession Regulation refers to the law of a third State as the law applicable to the succession, including its rules of PIL in so far as those rules make a *renvoi* to the law of a Member State or to the law of another third state that would apply its own law.⁷⁸

Further restrictions are provided in Art. 34, para. 2, which excludes the application of renvoi with respect to the laws of third states designated by the escape clause,⁷⁹ or in the case of the choice of law,⁸⁰ formal validity of dispositions of property upon death made in writing,⁸¹ and special rules imposing restrictions concerning or affecting the succession with respect to certain assets.⁸²

In contrast to its predecessor, the Act on the Resolution of Conflict of Laws with Regulations from other Countries, which led to different interpretations of this institute,⁸³ the PIL Act has opted for selective renvoi in one step.⁸⁴

Under the PIL Act, where reference is made to foreign law, it includes foreign conflict-of-law rules and those rules shall also apply, unless otherwise provided for by the PIL Act or some other Act.⁸⁵ If it reverts to Montenegrin law, domestic substantive law shall apply, and if a foreign conflict rule redirects to the law of a third country, the substantive law of a third country shall apply.⁸⁶

Therefore, the law foresees the mandatory application of renvoi, except in the cases that are exhaustively listed in Art. 4, para. 2 of the PIL Act, when renvoi is

76 Art. 23 of the Succession Regulation.

77 Recital 57 of the Succession Regulation; Đorđević, 2020a, p. 91.

78 Art. 34, para. 1 of the Succession Regulation; Đorđević, 2020a, p. 92.

79 Art. 21, para. 2 of the Succession Regulation.

80 Art. 22 of the Succession Regulation.

81 Art. 27 of the Succession Regulation.

82 Art. 30 of the Succession Regulation.

83 Dika, Knežević and Stojanović, 1991, pp. 25–30.

84 Kostić-Mandić, 2017, p. 87.

85 Art. 4 of the Private International Law Act.

86 Art. 4, para. 3 of the Private International Law Act.

not allowed, specifically when it comes to: '1) the legal position of legal entities and forms of organisation that do not have legal status; 2) forms of legal affairs; 3) choice of governing law; 4) maintenance; 5) contractual relations; and 6) non-contractual relations'.

It is generally considered that it is not justified to apply *renvoi* in a situation where the parties themselves have chosen the applicable law (because the parties chose the substantive law of that country, not the conflicting norms) or the goal of the conflicting norm is to keep a certain legal transaction in force or protect a weaker contractual side.⁸⁷

6. Conclusion

This study comparatively analysed the PIL rules for inheritance in the EU and in Montenegro. Rules on international jurisdiction, from the perspective of prevention of positive conflicts of jurisdiction were examined, followed by a comparative analysis of choice-of-law rules. Even though jurisdiction rules are based on the principle of unity of succession, there are situations where they may lead to a scission of succession. This is particularly so in cases involving third countries or situations involving choice-of-court agreement.

This may lead to fragmentation of succession at the procedural level and can cause parallel proceedings with different outcomes, that is, divergent decisions that will not be recognised in another state. Coordination problems can also arise due to different conflict-of-law rules, which in the final outcome, can have an impact on the distribution of the inheritance and significantly influence the inheritance result.

Examples include a decision according to which the same person is the heir per the law of one state but not of another state, or a decision in which one of the heirs will obtain a larger or smaller share of inheritance than he would receive if the entire inheritance was discussed only before the authorities of one legal order.

When the court of one country declares itself competent to decide on a probate matter, then the parties have the right to be treated equally in the same situations. That is, the interest of the parties is that the substantive legal solution is the same, regardless of the court of which country the decision is made, and failure to meet this standard may prevent the legitimate expectations of the parties from being realised.⁸⁸

The problem of uncoordinated cross-border successions between EU and third countries, such as Montenegro, can only partially be mitigated through the

⁸⁷ Kostić-Mandić, 2022, p. 139.

⁸⁸ Jakšić, 2017, p. 537.

recognition of foreign judgments, the application of *lis pendens*, and institute of limitation of procedures. However, achieving this remains an ideal that is, to a large extent, aspirational even between countries that have substantially harmonised rules on PIL with EU law.

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Social Strategy of the European Union for the Protection of Non-Standard Workers: European Law's Direct Influence on Macedonian Labour Law

ABSTRACT: *From the outset, the need to establish the Treaty of Rome emerged due to economic demands, as well as the need to enable the free movement of production and factors of production (goods, services, labour and capital). It was proven that the European Community needed to unite the economic forces of the European countries. Yet, a key question arose: Should the European Union have a social strategy and what will be its evolution? The answer, clearly affirmative, underscores the need for effective social protections for non-standard workers, which should be equivalent to those provided to workers employed under traditional full-time, permanent contracts. This paper examines the application of the Labour Relations Law. The provisions that provide legal protection to non-standard workers are precisely determined – cases that we increasingly encounter in practice. Insufficient awareness can lead to falling into the so-called legal mazes, that is, ambiguous legal solutions that employers use in order to protect themselves at the expense of the employee. This paper seeks to explain the mechanisms of functional legal protection that workers enjoy during the employment relationship and after the termination of the employment contract, as well as which institutions in North Macedonia are responsible for protecting workers' rights through the application of European and domestic law, all with the aim of enabling better social protection for non-standard workers. Since its independence, the Macedonian labour market has been characterized by high unemployment and low rates of employment and activity. Nevertheless, in the last decade, there has been significant progress in all major labour market indicators.*

KEYWORDS: *Social strategy; EU; Macedonian Labour Relations Law; social protection*

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1. Introduction

Non-standard forms of employment are an umbrella term for different employment arrangements that differ from standard employment. According to Eurofound,¹ there are various forms of non-standard employment, such as part-time and on-call employment; temporary employment; disguised employment and dependent self-employment; and temporary agency work and other multiparty employment relationships. Besides these forms of non-standard employment, it is significant to mention that one of the most relevant future developments related to non-standard work, regardless of its contractual form, is digitalization. Nowadays, living in an environment where it is inevitable to use technological tools, with just a simple internet connection, we have a 'winning combination' and a 'sea of opportunities' to earn income from a laptop or PC. We have chosen to mention earning income through digitalization for several reasons, which we will elaborate on later. Namely, when it comes to digitalization, including work through online platforms, an income-generating opportunity is enabled through an inflow of funds regardless of the age or even the experience of the worker. In such cases, where the job is performed online, regardless of the number of years of experience,² the worker can earn a favourable and easily accessible income through the possession of certain skills that satisfy the employer's hiring criteria. Work through online platforms, such as freelancing, is one of the most accessible ways of earning income, although it does not satisfy the traditional form of employment—standard work, that is, the classic relationship between an employee and an employer based on an employment contract for an indefinite period. Although it is often speculated that this is the future of labour law, we cannot discuss the future without first looking back at history. Historically, the concept of non-standard employment contracts became more formally recognized in the 1970s and 1980s,³ because the economies of that period around the world, especially in Europe and North America, began to shift from production-based to service-based models. This shift led to a greater demand for flexibility in the labour market, where employers increasingly hired part-time or temporary workers to reduce labour costs. In fact, an ILO report from 1976, when the world was still living with the post-war consequences, warned that the post-war period was marked by a growing gap in income and wealth between a small number of industrialized countries and the majority of other countries. More than five decades ago, in 1972, industrial market economies

1 Eurofound is the agency of the European Union dedicated to improving living and working conditions.

2 When we discuss experience for a certain job position, one of the conditions is often several years of experience, which is not necessarily the case with online work.

3 International Labour Organization, 1976, p. 10.

(also known as ‘developed’ or ‘advanced’ economies), with less than one-fifth of the world’s population, accounted for two-thirds of world production. At the other extreme, a quarter of the world’s population lived in countries with average per capita incomes of less than US\$200 at the time, and their total output accounted for less than 3% of global output. Today, this gap has not been overcome but has widened over the years and become even more visible, with growing inequality in income and in the social protection of workers. The OECD also highlighted this issue in its 2015 report, ‘In It Together: Why Less Inequality Benefits All’,⁴ stating that the gap between the rich and the poor is constantly increasing. This long-term increase in income inequality is not only a social and political concern but also an economic concern, as income inequality tends to reduce GDP growth in the long run within domestic economies.

The effects of the increasing proportion of employment in non-standard work arrangements in recent decades have become central to debates on the social protection of workers. Since the 1980s, labour markets in OECD countries⁵ have been subject to major structural changes. Along with these institutional changes, demographic and social factors, such as population aging and higher participation of women in the labour market, have greatly influenced the composition of the labour force. Non-standard work is often associated with lower earnings and job insecurity, increasing its potential negative impact on the distribution of individual earnings as well as household income. The OECD report⁶ showed the impact of non-standard work on the level of overall earnings inequality: adding the earnings of part-time workers to the distribution of full-time employees increased earnings inequality by almost 20%, while the inclusion of self-employed workers increased inequality by an additional 5%.

Speaking about social and labour movements, Beverly J. Silver (2015:3) explains that in the past there was a strong tendency to dismiss labour movements as irrelevant. This was especially evident in newly industrialized countries⁷:

‘...For while the decline of Fordist mass production industries⁸ in wealthy core countries was leading to the disempowerment of established working classes and their trade unions in the 1970s and 1980s, the rapid economic expansion of the NICs in the same years was leading to the creation of large

4 OECD, 2015, p. 10.

5 The OECD, founded in 1961, includes many of the world’s industrialized, high-income economies. Today, it has 38 member countries, representing a diverse set of advanced and some emerging economies.

6 OECD, 2011, p. 10.

7 Newly industrialized countries include Brazil, India, Russia, Iran, Saudi Arabia, China, Mexico, etc.

8 Fordist mass production is a system of industrial production that uses assembly methods, standardized parts, and mass production. The term was pioneered by Henry Ford, who helped popularize the concept in the 1920s, and Fordism came to signify modernity in general.

*industrial working classes and the emergence of powerful independent labour movements'*⁹

Such movements contributed to the successful realization of economic, social, and democratic justice for workers. As already mentioned, non-standard workers are not only those categories of workers who have the classic working hours from 8 am to 4 pm. Nor can we refer to workers who exercise their rights under the standard form of work and receive social, health, and pension insurance through a contract concluded for an indefinite period. Nevertheless, non-standard workers, as well as standard workers, aim for effective and stable protection during the performance of their work duties, regardless of the form of employment contract.

In the continuation of this paper, we will use a comparative methodology to examine European regulations and how non-standard forms of employment are regulated in Macedonian legislation. At the same time, in addition to the comparative method, we will emphasize several countries that are member states of the European Union and are historically close to the legal system of North Macedonia, such as Croatia and Slovenia, and examine how these countries, which represent EU law, regulate the issue of non-standard workers and the extent to which they are protected from a social, health, economic, democratic, and even political perspective in accordance with their legislation. The purpose of this paper is to contribute to the harmonization of Macedonian labour law with European labour law because, for Macedonia as a candidate country for entry into the European Union, it is indisputable that domestic legislation should be harmonized, thereby enabling non-standard workers to enjoy effective and efficient protection in the realization of their rights before national institutions.

2.

Models of Health and Social Protection of Non-standard Workers in North Macedonia: Beveridge Model Versus Bismarck Model

In the field of labour law, when it comes to the protection of workers, one of the key factors is the health and social protection available to workers and the manner in which they access it. So far, two different models of financial systems for the social protection of workers have been accepted, differing from country to country, regardless of whether a country has candidate status for entry into the European Union

9 Della Porta et al., 2015.

or is already a member state. Namely, taking into account that member states enjoy sovereignty¹⁰ in deciding matters related to workers' health-care systems, each member state within the European Union has the freedom to choose which system model it will use. To illustrate this, we may refer to the legislation of France, where the Bismarck model is used, as well as Germany, Belgium, the Netherlands, and Austria.¹¹ Nevertheless, before making a European comparison of financial systems, it should be noted that, unlike the Beveridge model, the Bismarck model¹² is primarily based on social security contributions, that is, a system financed through mandatory contributions from employees and employers.¹³ Such a system is characterized by several prerequisites, namely that insured persons must be employed, financing is realized through contributions, and the contributions to be paid are based on the wages received by workers for completed work duties.¹⁴

The Bismarck model is also the model adopted in North Macedonia, where employees, together with employers, contribute to the Health Insurance Fund,¹⁵ while institutions advocate for the smooth functioning of the system in order to ensure that services provided by public and private health-care providers are accessible and available to the population without hindrance. As for the Beveridge¹⁶ model, this model can be found in the Scandinavian countries, the United Kingdom, and Spain,¹⁷ and is primarily focused on financing through taxation, with the government covering health-care costs. Such a system advocates the protection of the entire population through specific financial allocations from the state budget, whereby uniform, lump-sum contributions are paid. It relies on two goals: tackling poverty and income inequality in order to promote social cohesion, and improving individual security while mitigating unknown social risks. Although under present conditions there is no strictly accepted model of social and health protection for workers, previous research shows a degree of interweaving of models in European countries, resulting in the existence of hybrid systems.¹⁸ Apart from this, it should be noted that the government is always involved in the planning and management of health services, resulting in a strategic health-care option for all that is funded through taxation.¹⁹

10 Bifulco and Nato, 2020.

11 Bevan, Helderma, and Wilsford, 2010, pp. 251–267.

12 This model is named after the Prussian Chancellor Otto von Bismarck, who in the 19th century introduced the welfare state as part of the unification of Germany.

13 Ifo Institute for Economic Research, 2008, pp. 69–71.

14 Ibid.

15 FZO, 2024.

16 The Beveridge model is named after William Henry Beveridge, who submitted a comprehensive report on social policy to the British Parliament (1942), with specific proposals for the creation of a comprehensive social security system.

17 Ibid.

18 Ibid.

19 Ramos Leite et al., 2022.

In order for non-standard workers to receive effective social and health protection in North Macedonia, within a system that has adopted the Bismarck model of financing and advocates health care through the payment of contributions, the following question arises: How suitable is the Bismarck model for non-standard workers? When considering which social security model is most suitable for non-standard employment, such as gig work, part-time jobs, freelance work, or temporary positions, the answer depends on various factors. Under the Bismarck model, benefits are based on contributions, and workers may have additional motivation to earn more and thereby increase their future benefits. However, this model is particularly beneficial for standard workers because non-standard workers may not qualify for benefits if their earnings fall below a certain threshold. By contrast, the Beveridge model may be regarded as a more inclusive model for non-standard workers because it offers a social safety net that is not directly linked to income level, thereby providing greater security for workers employed under fixed-term contracts.

Comparing both systems, that is, funding models, and considering the protection of non-standard workers in Macedonia, it can be concluded that institutions should be directed toward finding an acceptable solution through a hybrid system, similar to those adopted in other EU member states,²⁰ in order to provide more comprehensive protection for non-standard workers. This is particularly important because the Beveridge model appears to function more effectively for non-standard employment due to its universal coverage. Such a model provides a safety net for those with irregular or low incomes, thereby reducing risks for these categories of workers.



Picture 1. Source: EFFAT²¹

20 Schroedera, Futh and Jantz, 2015.

21 EFFAT, 2024.

3.

Macedonian Legislative Protection of Non-standard Workers

Macedonian legislation relies mainly on the concept of the ‘standard protection of the worker’, where standard protection can be analysed from contextual, normative, and sociological perspectives. From a sociological perspective, the employment relationship between the employee and the employer is viewed as a relationship that provides a stable and socially protected form of employment, while the normative perspective refers to the fulfilment of work obligations by the employee and the provision by the employer of a favourable working environment and working conditions²² in accordance with the employment contract and obligations that do not exceed the limits of labour law.²³ The non-standard form of employment generally differs from the standard form for several reasons. In general, when one thinks of standard employment, one refers to employment for which no time frame has been determined, whereas one of the most characteristic features of non-standard employment is that such employment is based on a fixed-term arrangement. A detailed analysis of the Macedonian Labour Relations Law shows that it is structured in a manner that provides maximum protection for standard workers. By contrast, although non-standard workers are also covered by the law, there remains room for uncertainty,²⁴ because contracts may be abused²⁵ and not renewed. Nevertheless, Macedonian legislation should be adapted to the needs of the global labour market and contemporary conditions. Digitization and new forms of work that did not exist in the past should also be taken into account. In particular, non-standard employment may offer flexibility in the organization of working hours and work duties, while it may also result in higher earnings due to the non-payment of social security contributions.

According to the International Labour Organization, non-standard employment is considered a form of employment that deviates from standard employment and may include temporary employment; part-time and on-call work; temporary agency work and other multiparty employment relationships; as well as disguised employment and dependent self-employment.²⁶ Several forms of non-standard work are recognized in Macedonia under the Labour Relations Law, including fixed-term employment (Art. 46), seasonal work (Art. 47), part-time employment (Art. 48), part-time employment with multiple employers (Art. 49), employment involving the

22 Labour Law. Assembly of the Republic of North Macedonia, 2005a, Art. 19.

23 Labour Law. Assembly of the Republic of North Macedonia, 2005b, Art. 12(2).

24 Akademik, 2016a.

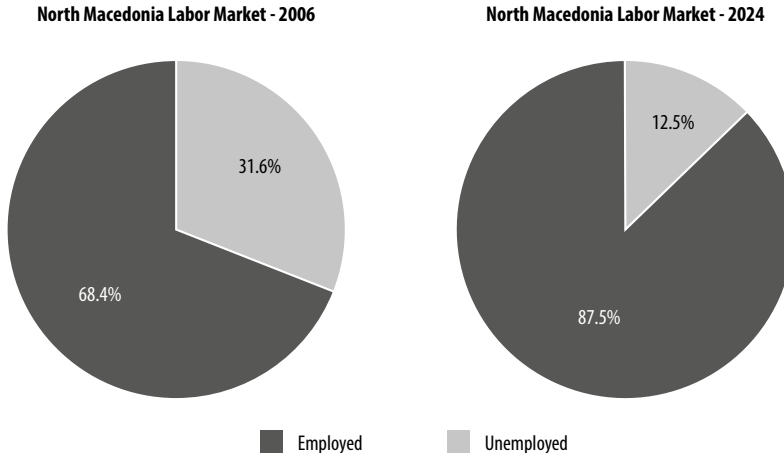
25 Akademik, 2016b.

26 ILO, 2024.

performance of work at home (Art. 50), employment of domestic helpers (Art. 53), and the employment of business persons (management agreement, Art. 54).²⁷

The changes occurring at the global level in terms of demographics, economic developments, technological advances, labour market regulations, diversity in work arrangements, and the greater integration of workers into new job positions are also affecting the Macedonian labour market. It can be observed that unemployment in Macedonia has declined significantly over the last two decades. In 2006,²⁸ the unemployment rate was 36.3%, while in the second quarter of 2024, according to data from the State Statistical Office of North Macedonia,²⁹ it was 12.5%.³⁰

Fixed-term employment is often chosen by workers who combine work with education, work more than one job to earn a higher salary, or have certain responsibilities or plans that do not allow them to commit to permanent employment. However, data obtained from the Labour Force Survey show that 70%³¹ of workers in North Macedonia are employed on a fixed-term basis because they cannot find employment under an indefinite term employment contract, indicating that fixed-term employment is often not a matter of choice. In such cases, legislation plays a major role in preventing the abuse of these types of contracts. This can be achieved by limiting renewals, restricting the total duration of fixed-term employment, or prohibiting the conclusion of fixed-term employment contracts for permanent tasks.



Picture 2. Indicators of the Labour Market in North Macedonia

²⁷ Ibid.

²⁸ Federation of Trade Unions of Macedonia, 2022, p. 2.

²⁹ State Statistical Office of the Republic of North Macedonia, 2024a.

³⁰ State Statistical Office of the Republic of North Macedonia, 2024b. Announcement No. 98.

³¹ Ibid.

It is necessary to differentiate between non-standard and informal employment. As already explained in the research, according to the ILO and Eurofound, the non-standard form of employment means a deviation from the standard form and most often refers to temporary, seasonal, or fixed-term employment, while informal employment within the informal economy most often refers to a hidden work relationship³² regarding undeclared employment. Thus, the Law on Labour Relations does not contain provisions that can be treated as practical methods/techniques for determining the existence of an employment relationship. The emphasis in this paper is placed on non-standard employment, and the importance of providing labour and social protection to the employee is highlighted. However, non-standard forms do not have to be strictly related to unstable work, but rather impose the need for a perception of flexibility in the working hours and responsibilities available to non-standard workers. For the purposes of this paper, during the legislative analysis of the Law on Labour Relations, a tendency was observed to move from a fixed-term employment contract to an indefinite-term employment contract, favouring this type of contract [indefinite term] according to Art. 46, paragraph 3, and imposing the need to transform the employment relationship between the employee and the employer into one for an indefinite period.

The labour market, both in the world and in North Macedonia, is changing. According to the latest data obtained from the survey on the need for skills in the labour market in the Republic of North Macedonia for 2023 by the Employment Agency, conducted among employers in the private sector in order to raise the skills of unemployed persons, increase their competitiveness in the labour market, and contribute to the creation of conditions for its better functioning by matching the supply and demand of suitably qualified labour. Among the activities covered are the following: Agriculture, hunting, forestry and fishing; Mining and quarrying; Processing industry; Supply of electricity, gas, steam and air conditioning; Water supply, wastewater removal, waste management and environmental remediation activities; Construction; Wholesale and retail trade, repair of motor vehicles and motorcycles; Transportation and storage, accommodation facilities and food service activities; Information and communications; Financial and insurance activities; Professional, scientific and technical activities; Administrative and auxiliary service activities; Education; Health and social protection activities; Arts, entertainment and recreation; and Other service activities.³³ The survey covers eight regions, where the need for new employment is emphasized in the manufacturing industry, administration, information and communications, construction, wholesale and retail trade, etc. From the results of the surveys obtained, we can conclude that in Macedonia there

32 Petreski et al., 2023.

33 Employment Agency of the Republic of North Macedonia, 2023.

is still not much space for new forms of employment, such as the gig economy, and that the labour market still adheres to traditional forms of work. Unlike Macedonia, according to Eurofound, nine new³⁴ forms of employment are recognized that differ from standard employment. These include employee sharing, job sharing, voucher-based work, interim management, casual work, ICT-based mobile work, platform work, portfolio work, and collaborative employment. It is crucially important for the Macedonian labour market to make changes to the Law on Labour Relations in order to address the challenges posed by new forms of employment. While the world of work has changed in North Macedonia, as elsewhere, labour legislation has not. This has left many new types of jobs (such as the gig economy³⁵) unregulated and outside the social protection system, while also leading to lost tax revenues for the country. As mentioned above, the latest Labour Force Survey data do not show a rise in non-standard forms of employment in North Macedonia, which is actually the opposite of the global trends observed.

4.

Non-standard Forms of Employment through the Prism of European Regulation

Flexible forms of work, such as part-time or temporary work, do not necessarily have to be associated with insecure forms of work, since the concept of flexibility is becoming dominant in the European Union in the new millennium and worldwide. We must be aware that there are two sides³⁶ when it comes to non-standard employment. While for some employees this kind of employment is a choice, mainly resulting from the need for greater flexibility in working hours, higher earnings due to the non-payment of social security contributions, personal organization of work, and so on, for many workers non-standard employment is the only option for earning an income, and it is often associated with limited, or sometimes non-existent, labour and social protection. Non-standard forms of employment are not exclusively reserved for the EU but are a common feature of labour markets worldwide. Their importance has increased over the past few decades in both developed and developing countries, and their use has been extended to new sectors and new types of occupations, especially after 2020, when the pandemic shook the world.

34 Mandl, 2020.

35 A gig economy is a free-market system in which temporary positions are common and organizations hire independent workers for short-term commitments. The term 'gig' is a slang word for a job that lasts for a specified period of time.

36 Ibid.

For the purposes of this paper, the Slovenian and Croatian legislation has been analysed from the aspect of labour law and the protection of non-standard workers, for a reason followed by a historical element, that is, the fact that Macedonia, in the same way as Slovenia and Croatia, was a former constituent republic of Yugoslavia that shared the same legislation. Today, these two member states represent the legislation of the European Union, while Macedonia, with candidate status for entry into the European Union, is focused on the implementation of European legislation and its incorporation into Macedonian legislation in a way that will bring European law closer to Macedonian law.

According to Croatian legislation, the non-standard form of employment is regulated in the Labour Law or, in Croatian, 'Zakon o radu',³⁷ Article 12 of the same law, which is similar to Macedonian law to a large extent. However, the difference between these two laws is that a fixed-term contract in Macedonia may be concluded for a duration of up to five years, while in Croatia it may be concluded for a maximum of three years. In addition, the Macedonian Law on Labour Relations does not specify the number of fixed-term contracts that may be concluded with the same employee, while Croatian law limits this to three contracts with the same employee. The employer is obliged to provide the same working conditions to an employee who has a fixed-term employment contract as to an employee with an indefinite-term employment contract, if they perform the same work tasks. What is positive in Croatian law is that an employee who has concluded a fixed-term contract may, after the expiration of six months from the day of employment, ask the employer to conclude an employment contract for an indefinite period.

Unlike Macedonian legislation, which does not leave room for non-standard workers to ask the employer, after a relatively short period of employment, to replace the employment contract with a new employment contract for an indefinite period in order to obtain effective legal protection within the legislation framework, such a possibility exists only if the employee has worked for more than two years at a workplace (Art. 46:3) and the employer determines that there is a permanent need for that employee. Regarding seasonal workers, just as in Macedonian labour law, they are also provided for in Croatian labour law. Comparatively, Macedonian law provides for the performance of seasonal work, which is performed during certain periods of the year due to climatic or natural conditions and does not exceed eight months (Art. 47:1) during a year, that is, within 12 consecutive months. In Croatia, this period is nine months (Art. 16: 2), and the contract may be concluded for either an indefinite or fixed term.

Slovenian labour law protects the non-standard worker by using the legal mechanisms provided in the Labour Relations Act or 'Zakon o danih razmerjih', in

37 Ministarstvo rada, mirovinskog sustava, obitelji i socijalne politike, 2024.

a way that precisely specifies the job positions in which an employee may be hired to fulfil work requirements. Slovenian law is not very different from Macedonian law; moreover, there are significant similarities between these two countries in terms of the protection of workers. This is particularly evident in the duration of fixed-term employment contracts,³⁸ but also in the overall arrangement and similarity of the laws themselves. This similarity is due to the historical connection between these two countries, namely the fact that they are former constituent republics of Yugoslavia.

5.

Conclusion

In order to be able to approach a thorough resolution of the issue of labour protection for non-standard workers in the Macedonian legal system, it was crucial to examine the regulatory landscape of several EU member states with well-developed labour policies. European countries are often considered good examples in terms of the realization of labour rights, social security, and the protection of workers, and North Macedonia can learn valuable lessons from them. Non-standard employment, which includes part-time, temporary, freelance, and gig economy roles, is on the rise across Europe. However, labour laws in North Macedonia have struggled to keep pace with this change, leaving non-standard workers as a vulnerable category facing job insecurity, insufficient benefits, and limited protection. Non-standard workers are therefore often confronted with challenges such as exclusion from health and social benefits, lack of job security, and limited opportunities for career growth. Analysing the laws of three different countries, among which two are member states of the European Union and one (in this case, North Macedonia) is a country with candidate status for entry into the European Union for a little less than 20 years, we can conclude that Macedonia has room to improve its legislation, as well as to implement new amendments to the Law on Labour Relations, in order to enable better labour and social protection for workers who belong to the group of non-standard workers, in the direction of effective legal protection and the creation of explicit working conditions for non-standard workers in North Macedonia.

The purpose of this research is to protect them from abuse by employers, especially considering the fact that in the Macedonian Law on Labour Relations there is no limit on the number of fixed-term contracts that may be concluded, and such employment can continue indefinitely, while the employee is placed in a position of constantly fearing for the security of their job and lacking a degree of motivation to perform work tasks in accordance with work regulations and collective agreements.

38 Pravno-informacijski sistem Republike Slovenije, *Employment Relationships Act*, Art. 55, p. 10.

Besides, given that there are two models as mechanisms for achieving financial, social, and health protection—the Beveridge model and the Bismarck model—Macedonia can consider introducing a hybrid model, as many other European countries have done, because the current Bismarck model relies on a system financed through mandatory contributions from employees and employers. The Beveridge model provides universal health care, allowing everyone access to services regardless of income or employment status. The fact that we live in a time of digitalization, economic expansion, and the recognition of new forms of employment, in accordance with global trends, and that North Macedonia is not excluded from this process, requires additional protection for workers who work through online platforms, a category that is not expressly regulated by law. A concerning issue is that, despite the rise in non-standard employment in North Macedonia, many new job types and workers remain outside the scope of specific regulations and, consequently, outside the social protection system. In order to improve the protection of these workers, it is necessary to make significant changes to the Law on Labour Relations, enabling social and labour protection for non-standard workers in Macedonia. By following the example of other European countries and introducing greater protection for workers regardless of the type of employment contract, North Macedonia can become an example for other countries in the region and beyond. This will encourage non-standard workers to perform their work duties and enable them to feel secure under the protection of the Macedonian legislative system.

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Regulatory and Legal Framework for Radioactive Waste Management and Decommissioning in Türkiye

ABSTRACT: Nuclear energy and radiation applications are used in many areas such as electricity generation, health sector, industry, and food sector. These activities generate radioactive waste and need to be managed through various specific policies and strategies. In this context, Türkiye's national legal framework and strategy are defined in Nuclear Regulation Law No. 7381. Additionally, Türkiye is a party to the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management. Furthermore, the country has regulations specifically aimed at governing radioactive waste management. With this regulatory and legal structure, the country aims to manage radioactive waste in a safe, secure, sustainable, and responsible manner within the framework of international agreements and well-accepted standards. Currently, only one radioactive waste processing and storage facility exists in Istanbul, operated by the Türkiye Energy, Nuclear and Mineral Research Agency. Additionally, Türkiye is currently developing a Near Surface Disposal Facility, which is expected to begin accepting radioactive waste in the 2030s. Considering plans for putting its nuclear power plant into operation in the very near future, the country's ever-increasing energy need, and prioritisation of nuclear energy for energy diversity, the current status of Türkiye's nuclear law and regulations regarding radioactive waste is extremely important. This article analyses the basic principles and concepts of Türkiye's regulatory and legal framework for radioactive waste management and decommissioning.

KEYWORDS: Radioactive waste, decommissioning, nuclear law, legal framework, regulatory framework

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1.

Introduction

Nuclear energy and radiation applications are used in many areas, such as electricity generation, health sector, industry, and food sector. However, these activities generate radioactive waste. Given its hazardous nature, radioactive waste needs to be managed via specific policies and strategies. In this context, Türkiye's national legal framework and strategy are defined in Nuclear Regulation Law No. 7381. Additionally, Türkiye is a party to the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management. Furthermore, it has regulations specifically aimed at governing radioactive waste management. Through this regulatory and legal structure, the country aims to manage radioactive waste in a safe, secure, sustainable, and responsible manner within the framework of international agreements and well-accepted standards. Currently, a single radioactive waste processing and storage facility exists in Istanbul, Türkiye. It is operated by the Türkiye Energy, Nuclear and Mineral Research Agency (TENMAK). Additionally, Türkiye is developing a Near Surface Disposal Facility, which is expected to begin accepting radioactive waste in the 2030s.

Given the country's plan to put a nuclear power plant into operation in the near future, its ever-increasing energy needs, and prioritisation of nuclear energy for energy diversity, understanding the status of Türkiye's nuclear law and regulations regarding radioactive waste is extremely important. This article analyses the basic principles and concepts of Türkiye's regulatory and legal framework for radioactive waste management and decommissioning. Section 1 outlines Türkiye's radiation source summary. Section 2 gives an overview of the nuclear legal framework of Türkiye. Section 3 describes the main provisions about radioactive waste management and decommissioning. Finally, Section 4 offers concluding remarks.

2.

Türkiye's Radiation Source Summary

According to 2023 data, 25 radiation facilities and approximate 60,000 radiation applications were in use in Türkiye.¹ In addition, the country has 3 nuclear power plant projects. The Akkuyu Nuclear Power Plant (NPP), Türkiye's first step into nuclear power generation, has four units of VVER-1200 reactors. The first unit of Akkuyu NPP was granted a commissioning permit on November 21, 2023, while the construction

1 *Türkiye'de Radyasyon Kaynakları.*

of the other three units is ongoing.² For the second nuclear power plant project, the site approval was given in 2024 by the Nuclear Regulatory Authority (NRA). For Sinop NPP, technology providers have not yet been decided. However, negotiations are currently underway under the responsibility of the Ministry of Energy and Natural Resources.³

In addition, the country has two research reactors (TENMAK and İTÜ TRİGA). Furthermore, a rare earth mining and thorium storage project is being planned. Specifically, Eskişehir-Beylikova Complex Ore (Barite, Fluorite, Rare Earth Elements, Thorium) Quarry, Ore Preparation, and Enrichment and Storage Facility obtained the affirmative environmental impact assessment decision in 2020. The NRA granted a limited work permit and construction license to the facility in January 2023.⁴

Additionally, a Radioactive Waste Processing and Storage Facility is operated by TENMAK, which was established in 1986 in İstanbul and plays a crucial role in the management of radioactive waste in Türkiye. This facility is designed for the processing and storage of very low-level radioactive waste together with low and intermediate level radioactive waste resulting from activities conducted in the country.

Additionally, Türkiye has initiated efforts to establish a Near Surface Disposal Facility to meet the disposal needs expected in the meantime, especially with the start of the nuclear power programme. This project is in the site selection stage.⁵

Radioactive wastes generated during the mining and scrap recycling activities with the application of radiation in industry, medicine, research, and calibration are stored in TENMAK Radioactive Waste Processing and Storage Facility in İstanbul, Türkiye. Radioactive wastes generated during the operation phase of the research reactors are also sent to this facility.

This facility's inventory has very short-lived, very low-level, and low and intermediate level radioactive wastes. In Türkiye, no spent fuel and high-level waste exist in the inventory. However, the future operations of research reactors and NPPs are expected to generate spent fuel and high-level waste. As stated in the Agreement Between the Government of the Republic of Türkiye and the Government of the Russian Federation on Cooperation in Relation to the Construction and Operation of an NPP at the Akkuyu Site, May 12, 2010 (IGA), spent fuel of Russian origin may be reprocessed in the Russian Federation through a separate agreement to be concluded between the parties. Negotiations on spent fuel reprocessing are currently ongoing between the parties, and no agreement has yet been signed. Therefore, without an intergovernmental agreement between the parties for the reprocessing of spent

2 [Online]. Available at: <https://www.ndk.org.tr/en-US/licensing-of-akkuyu-nuclear-power-plant> (Accessed: 28 October 2024).

3 *Sinop Nuclear Power Plant: Authorization of Nuclear Facilities.*

4 *Turkish National Report for the Joint 8th and 9th Review Meeting, 2022.*

5 *Country Nuclear Power Profiles: Turkey.*

fuel of the Akkuyu NPP, the spent fuel from the Akkuyu NPP will be stored on site for the lifetime of the Akkuyu NPP and then transferred to the disposal facility, in accordance with the Law No. 7381.

3.

Nuclear Legal and Regulatory Framework of Türkiye

Türkiye established its first nuclear regulatory body, the Atomic Energy Commission (AEC), on August 27, 1956, with Law No. 6821. It pursued this effort to benefit from international experience in the area and became one of the founding members of the International Atomic Energy Agency (IAEA) in 1957. The AEC was replaced by the Turkish Atomic Energy Authority (TAEA) in 1982 under Law No. 2690.⁶ The regulations of all activities in the field of peaceful uses of nuclear energy, including issuing regulations, conducting safety reviews and assessments, granting permissions and licenses, conducting inspections, and applying enforcement actions, were among the authorities and responsibilities of TAEA. Additionally, TAEA had responsibilities as the operator of facilities requiring regulatory control, including a research reactor and a radioactive waste storage facility.

The Convention on Nuclear Safety, with its seventh and eighth articles, stipulates that the Parties shall have a legal and regulatory framework in the field of nuclear safety, and the establishment or designation of a Regulatory Authority tasked with the implementation of the said legal and regulatory framework.⁷ Similarly, Article 19 of the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management states that, 'Each Contracting Party shall establish and maintain a legislative and regulatory framework to govern the safety of spent fuel and radioactive waste management'.⁸ Within this scope, in 2018, Türkiye established a new national framework, and the regulatory and supervisory authorities were separated from operational duties. NRA was established to perform only regulatory duties. In addition, TENMAK was established in 2020 with Presidential Decree No. 4 and 57. It has its research and development functions, and the responsibility for the management of all national radioactive waste, including disposal activities.

The Turkish legal framework comprises the Constitution, law, regulation, and other regulatory decisions. In addition, it has non-mandatory guides. The norm pyramid in the field of nuclear law is illustrated in Figure 1. The main domestic

6 Turkish National Report for the Joint 8th and 9th Review Meeting, 2022.

7 Convention on Nuclear Safety, 1994.

8 Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management (1997).

sources of law in hierarchical order are the Constitution, laws and international treaties, presidential decrees, regulations, and guides.

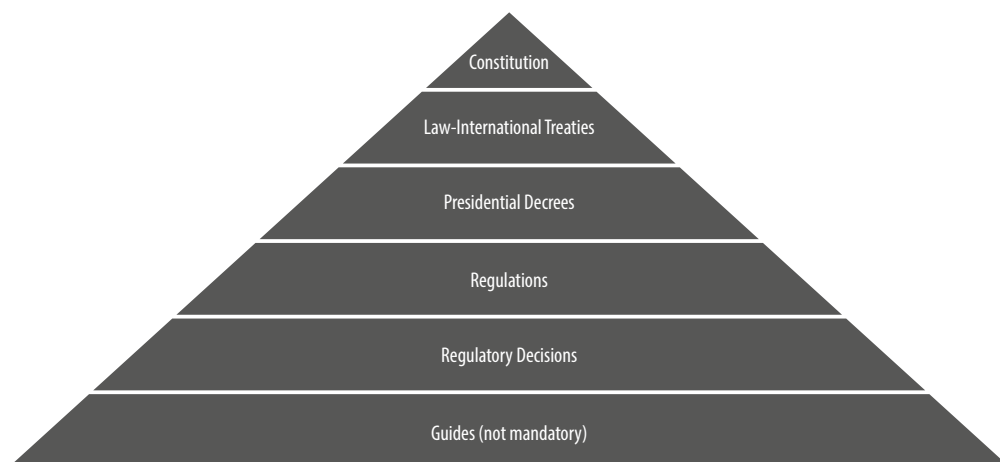


Figure 1. Turkish norm pyramid

The main legal framework for the spent fuel and radioactive waste management is defined by the Nuclear Regulation Law No.7381. Moreover, secondary legislation and guidelines have been prepared for the implementation of the law. Additionally, a National Radioactive Waste Management Plan has been prepared for the 2021-2025 period by TENMAK, and determined by the Ministry of Energy and National Resources by taking the opinion of the NRA as a basis for establishing the national policy and strategy for the management of radioactive waste and spent fuel.

The objective of the Nuclear Regulation Law is to determine, based on the peaceful use principle, the fundamental principles and rules to be applied for the protection of workers, the public, the environment, and future generations from the possible harmful effects of radiation during activities regarding the utilisation of nuclear energy and ionising radiation, and to determine the responsibilities of the parties. Further, along with the definition of the organisation, duties, and authorities of the NRA, it also defines its regulatory control over these activities.⁹ Essentially, the Nuclear Regulation Law contains provisions and requirements on general principles of radiation protection, safety, security, and safeguards; authorisations and inspections; administrative and criminal sanctions; coordination of activities between different governmental bodies regarding interfaces between them while regulating nuclear and radiation facilities and activities; roles and responsibilities

9 Nuclear Regulation Law, 2022.

for decommissioning and the management of spent fuel and radioactive waste; third-party liability for nuclear damage arising from nuclear incidents; establishment of an independent nuclear regulatory body, NRA, and establishment of the Nuclear Technical Support Joint Stock Company (NUTED A.Ş.), the technical support organisation. Besides this law, Presidential Decree No. 95 regulates the NRA's functions and organisational structure.

The duties and responsibilities of the NRA are defined in Presidential Decree No. 95, dated 8 March 2022. NRA is composed of a Nuclear Regulatory Board (Board) and a Presidency. NRA is independent in terms of its regulatory decisions. The Board is its decision-making organ.

Furthermore, some additional important legislation affect the radioactive waste and spent fuel management facilities, such as Environment Law No. 2872, which regulates the environmental impact of radioactive waste and spent fuel management facilities. However, other institutions or organisations may have the authority to regulate in the relevant areas. According to Article 3, paragraphs 6 and 7 of the Nuclear Regulation Law, administrative actions and measures by other organisations that regulate or oversee activities outside the scope of the Law in the field of nuclear energy and radiation cannot compromise safety, security, and nuclear safeguards. Additionally, provisions of other regulations that do not meet the requirements for safety, security, and nuclear safeguards will not apply to activities within the scope of Nuclear Regulation Law.

3.1. International Agreements

The last paragraph of Article 90 of the Constitution stipulates that 'international agreements duly put into effect have the force of law'.¹⁰ Therefore, the international treaties are situated on the same level as laws in the Turkish norm hierarchy. The agreements to which Türkiye is a party with respect to nuclear energy and ionising radiation are outlined in Table 1.

10 Constitution of the Republic of Türkiye No. 2709, 1982.

Table 1. International agreements signed/ratified by the Republic of Türkiye¹¹

International Agreement	In Force
Convention on Third Party Liability in the Field of Nuclear Energy (the Paris Convention)	01.04.1968
1964 Protocol to Amend the Paris Convention	05.04.1968
1982 Protocol to Amend the Paris Convention	07.10.1988
2004 Protocol to Amend the Paris Convention	04.01.2022
Treaty on the Non-Proliferation of Nuclear Weapons (NPT)	17.04.1980
Convention on the Physical Protection of Nuclear Material (CPPNM)	08.02.1987
Amendment to the Convention on the Physical Protection of Nuclear Material (CPPNM/A)	08.05.2016
Convention on Early Notification of a Nuclear Accident	03.02.1991
Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency	03.02.1991
Convention on Nuclear Safety	24.10.1996
Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention	26.06.2007
International Convention for the Suppression of Acts of Nuclear Terrorism	24.09.2012
Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management	21.05.2023

The Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management officially entered into force on May 21, 2023, in Türkiye. Its aim is to ensure spent fuel and radioactive waste management in a safe, secure, and sustainable manner in line with internationally recognised principles and good practices related to nuclear and radiation safety. After the ratification of the Joint Convention and officially becoming a Contracting Party, Türkiye presented its first national report for the 8th Review Meeting of the Joint Convention held in March 2025.

3.2. Secondary Legislation about Spent Fuel and Radioactive Waste

Two main regulations govern spent fuel and radioactive waste: Regulation on Authorizations and Safety Principles Regarding Radioactive Waste Facilities; and Regulation on Radioactive Waste and Spent Fuel Management.

11 Nuclear Regulatory Authority: International Treaties.

According to the Nuclear Regulation Law, safety means establishing and maintaining proper conditions to ensure the protection of workers, the public, the environment, and future generations from radiation during the conduct of activities related to nuclear energy and ionising radiation, and preventing accidents or mitigating the consequences of accidents. Further, as per the Law, activities related to nuclear energy and ionising radiation, and persons, facilities, devices, and materials related to these activities are subject to regulatory control in terms of safety, security, and nuclear safeguards. According to the Nuclear Regulation Law, NRA determines the activities that require notification or authorisation based on safety and security principles.

NRA prepared the Regulation on Authorizations and Safety Principles Regarding Radioactive Waste Facilities, enacted in 2022, to determine the procedures and principles pertaining to the authorisation of activities and the safety principles to be followed in these facilities, and to confirm that the activities associated with radioactive waste facilities are conducted in accordance with the principles of radiation protection, safety, and security.¹²

Next, the Regulation on Radioactive Waste and Spent Fuel Management was enacted in 2023 to define the procedures and principles regarding the safe management of radioactive waste and spent fuel. The responsibilities of the authorised person for the safety of spent fuel or radioactive waste management are prescribed in the Nuclear Regulation Law, and Regulation on Radioactive Waste and Spent Fuel Management. Article 5 of the Regulation, titled 'Protection of workers, public, environment and future generations', says that 'radioactive waste cannot be released into the environment'. Paragraph 2 states that necessary precautions are taken by the authorised person to ensure that the effects of radioactive waste and spent fuels on workers, public, environment, and future generations do not exceed acceptable levels. Paragraph 3 says that 'relevant legislative provisions are applied in matters regarding the protection of workers, public and environment from radiation in activities related to radioactive 'waste and spent fuel management'. Additionally, paragraph 5 states that 'in the management of radioactive wastes and spent fuels, the possible effects of radioactive wastes and spent fuels on the public and the environment beyond the country's borders are taken into account'. According to the Regulation, the person authorised to conduct activities that result in the generation of radioactive waste or its management shall take necessary measures, including reuse and recycling, to minimise the quantity, volume, and radioactivity of such waste to the lowest possible and reasonable extent. In addition, the Regulation states that the processing of radioactive waste comprises pretreatment, treatment, and conditioning processes. The treatment process shall be carried out in such a way that as small a volume

12 Regulation on Authorizations and Safety Principles Regarding Radioactive Waste Facilities, 2022.

of radioactive waste as possible is delivered to subsequent radioactive waste management.¹³

According to the Regulation on Clearance and Release of Radioactive Materials, 2023, methods such as decontamination or radioactive decay may be implemented with the aim of decreasing the activity of radioactive materials below the clearance limit.¹⁴

In addition, the Regulation on Safe Transport of Radioactive Material; Regulation on Safeguards; Regulation on Management System in Nuclear Facilities, Radiation Facilities and Radioactive Waste Facilities; Regulation on Authorizations Regarding Radiation Facilities and Radiation Practices; Regulation on the Authorization of Environmental Remediation Activities of Radioactively Contaminated Areas; Regulation on Management of Radiation Emergencies; Regulation on Clearance and Release of Radioactive Materials; Regulation on National Radiation Monitoring and Radiation Control; Regulation on Security of Nuclear Facilities and Nuclear Materials; Regulation on Radioactive Waste Management Special Account, and Decommissioning Special Account and the Accounts Management Board have some provisions that affect the radioactive waste management system.

3.2.1. Inspection

The Regulation on Inspections and On-site Examinations Regarding Nuclear Energy and Ionizing Radiation was published in 2023.¹⁵ This regulation outlines the inspection process in accordance with the provisions of Nuclear Regulation Law.

In accordance with Nuclear Regulation Law and Presidential Decree No. 95, the NRA has the following responsibilities regarding inspection:¹⁶

- To inspect or examine the activities and authorised persons on-site before or after the authorisation,
- To prepare annual inspection programs regarding inspection activities in coordination with the relevant departments,
- To carry out the works and procedures related to the implementation of administrative sanctions in matters falling within its scope of duty and authority, in coordination with the relevant service units,
- To receive technical support services from specialised public institutions and organisations, private law legal entities, and real persons, within the scope of the inspection and on-site examination to conduct the examination,

13 Regulation on Radioactive Waste and Spent Fuel Management, 2023.

14 Regulation on Clearance and Release of Radioactive Materials, 2023.

15 Regulation on Inspections and On-site Examinations Regarding Nuclear Energy and Ionizing Radiation, 2023.

16 Nuclear Regulation Law, 2022; Presidential Decree No. 95, 2022.

research, determination, and reporting in a way that will not be binding on the Authority in terms of results, and

- To inform the authorised person about the findings determined as a result of the inspection activities, follow up the works and procedures of the authorised person regarding the findings, report findings that have not been satisfactorily resolved, and carry out the works and procedures stipulated in the relevant legislation in coordination.

Additionally, inspectors and other NRA personnel assigned to accompany the inspection have the authority to enter relevant places or facilities for inspection purposes to supervise the activities and inspect them on the spot; meet with the people they deem necessary and conduct examinations, research, and investigations on the issues they deem necessary; request, examine, retain, or take copies of all kinds of information, documents, and records; take, remove, retain, properly dispose of, or have any material or sample; make or perform measurement, analysis, inspection, and testing using any device; and keep visual, audio, or written records.

For the documentation and reporting, the Nuclear Regulation Law gives responsibility to the authorised person to keep records, make notifications, and report as defined in legislation and its management system. Additionally, the Regulation on Management System in Nuclear Facilities, Radiation Facilities and Radioactive Waste Facilities includes requirements regarding records to be kept according to the management system of the facilities and their reporting. Regarding radioactive waste and spent fuel management, the Regulation on Radioactive Waste and Spent Fuel Management regulates the records and reporting in detail.

3.2.2. Enforcement

The Nuclear Regulation Law provides provisions for the enforcement of applicable regulations and terms of licenses. As a general principle, as stated in Article 3, paragraph 3, activities related to nuclear energy and radiation and persons, facilities, devices, and materials related to these activities are subject to regulatory control in terms of safety, security, and nuclear safeguards.

According to the Nuclear Regulation Law, nuclear enforcement system comprises criminal sanctions and administrative sanctions. Article 24 regulates the criminal sanctions and implementation of these sanctions that are not part of the regulatory functions of NRA. It falls within the jurisdiction of the criminal courts. Article 25 regulates administrative sanctions, which comprise cancellation, suspension, restriction of authorisation, and administrative fines. The Nuclear Regulatory Board is authorised to decide on administrative sanctions. The NRA could apply

administrative sanctions together or separately. In cases where safety or security is endangered or may be compromised, the NRA may decide to suspend or restrict the authorisation in addition to the administrative fine.¹⁷

Law No. 7381, Article 25, paragraph 2, states that besides the administrative fines applied pursuant to the first paragraph, an appropriate time is given to the person concerned by the NRA to rectify the violations. If the violations are not remedied within the given time, administrative fines are applied in the amount of twice the previous penalty each time. If it is determined that a false document or misleading information has been submitted, or a change in the authorisation conditions, which are the basis for the authorisation, has occurred and that it is not possible to correct it, the authorisation may be suspended, restricted, or cancelled, in addition to applying the administrative fine. The administrative sanctions to be applied by the NRA are determined with a graded approach. This approach is based on the type and characteristics of the activity, risk of exposure, and the magnitude of the radiation exposed, together with the presence and magnitude of the damage.

For the implementation of administrative sanctions, a regulation has been issued to clarify the procedural issues in 2023: the Regulation on Administrative Sanctions of the Nuclear Regulatory Authority. The enforcement process begins with the identification of a violation. Violations are graded on four levels depending on the consequences of the violations. Further, a calculation table and formula have been provided to determine the influence of the criteria given in the Regulation on the administrative sanction to be applied.¹⁸

Crimes, penalties, and administrative sanctions are defined in Nuclear Regulation Law such that they are compatible with the international instruments' provisions. Additionally, the Turkish Criminal Law No. 5237 defines some nuclear and radiological related crimes and penalties.

4. Basic Provisions about Spent Fuel and Radioactive Waste Management

According to the Nuclear Regulation Law, basic provisions about spent fuel and radioactive waste management are defined as follows¹⁹:

¹⁷ Nuclear Regulation Law, 2022.

¹⁸ Regulation on Administrative Sanctions of Nuclear Regulatory Authority, 2023.

¹⁹ Nuclear Regulation Law, 2022.

- Spent fuel and radioactive waste must be managed in a safe, secure, sustainable, and responsible manner within the framework of intergovernmental agreements and well-accepted standards.
- Necessary precautions shall be taken to ensure that the effects of spent fuels and radioactive wastes on workers, the public, the environment, and future generations do not exceed acceptable levels. In activities related to spent fuel and radioactive waste management, relevant legislative requirements shall be applied in matters regarding the protection of workers, the public, and the environment from radiation.
- Non-radiological hazards, and occupational health and safety issues shall be also considered in the management of spent fuel and radioactive waste.
- In the management of spent fuel and radioactive waste, the possible effects of spent fuel and radioactive waste on the public and the environment beyond the country's borders shall be considered.
- It is prohibited to import radioactive waste generated from activities conducted outside the jurisdiction area of the Republic of Türkiye. This requirement does not apply to radiation sources produced within Türkiye's borders that are exported under the condition of being returned when their usage period expires, nor to the transit passage of radioactive wastes or imports of materials contaminated with naturally occurring radioactive materials.
- Disused sealed sources shall be returned to the country of origin or, if that is not possible, to a radioactive waste facility.
- Radioactive waste shall not be released or left to the environment.
- The authorised person that generates radioactive waste shall take the necessary measures to keep the waste at the lowest possible and reasonable levels in terms of quantity, volume, and radioactivity.
- The spent fuel generated in NPPs shall be stored at the NPP site throughout the operational life of the NPP.
- NRA is responsible for establishing regulations concerning the safe management of spent fuel and radioactive waste, the release, and the clearance of radioactive materials and orphan radioactive materials.
- TENMAK is responsible for the disposal of radioactive waste generated as a result of activities carried out in the sovereignty area of the Republic of Türkiye and the management of orphan radioactive materials.
- TENMAK must prepare the draft National Radioactive Waste Management Plan as a basis for establishing the national radioactive waste policy and strategy for the management of radioactive waste and spent fuel. The draft Plan shall be approved by the Ministry of Energy and National Resources, considering the comments of the NRA, and shall be updated every five years.

- All responsibility for the management of the spent fuel or radioactive waste excluding their disposal belongs to the person authorised for the activity.
- The authorised person who produces spent fuel or radioactive waste is responsible for all kinds of transportation of such material inside or outside the facility.
- All kinds of responsibility for the radioactive waste that arise during the decommissioning activities belong to the authorised person.
- The Ministry of Energy and National Resources is responsible for establishing the radioactive waste management special and decommissioning special accounts. These accounts must be opened with the central accounting unit of the Ministry. Any revenue collected on behalf of these special accounts must be used for the intended purpose only.
- The Accounts Management Board is responsible for determining the contributions to the special accounts. For nuclear power plants, the contributions shall be based on the electricity produced per kilowatt-hour and the guarantees shall be based on per megawatt of installed power. For other facilities, contributions and guarantees shall be set according to the facility type, application, and waste characteristics. These contributions and guarantees shall be reviewed annually and shall be updated to cover anticipated expenses by the Accounts Management Board.
- Authorised persons who generate radioactive waste during activities subject to authorisation are responsible for making a contribution payment to the radioactive waste management special account in the amount determined by the Accounts Management Board in accordance with relevant legislation.
- Persons authorised to operate nuclear facilities, radiation facilities, and radioactive waste facilities are responsible for making a contribution payment to the decommissioning special account in the amount determined by the Accounts Management Board in accordance with relevant legislation.
- Payments shall be made to TENMAK from the radioactive waste management special account for:
 - I) Determination of areas for establishing a radioactive waste disposal facility and related siting studies.
 - II) Design, authorisation, construction, operation, maintenance, closure, and release of the radioactive waste disposal facility from regulatory control.
 - III) Research and development activities for the specified purposes.
- Payments shall be made to the authorised person from the decommissioning special account to carry out:

- I) Decommissioning of nuclear, radiation, and radioactive waste facilities, including the costs of disposal of radioactive wastes generated during decommissioning, and
- II) Remediation of the site compatible with the conditions for the end state of the facility site.
- It is a condition of authorisation for the operation of a facility that the Accounts Management Board shall report to the NRA that the guarantee is adequate to cover the necessary costs for radioactive waste management and decommissioning in the event of early decommissioning of the facility.
- If the balance in the special accounts for radioactive waste and decommissioning proves insufficient to cover expenses associated with decommissioning or radioactive waste management, including early decommissioning, the costs shall be covered by the guarantee provided by the authorised person. If the guarantee is deemed inadequate, the authorised person is responsible for covering the remaining amount.
- Persons applying for authorisation to operate the facilities are required to submit a cost plan for decommissioning and radioactive waste management to the Ministry of Energy and National Resources. Each facility shall have its own decommissioning special account.

4.1. Authorisation of Radioactive Waste Facility

According to Nuclear Regulation Law and secondary legislation, radioactive waste facilities are defined as the facilities where radioactive waste is processed, stored, or disposed of. The Regulation on Authorizations and Safety Principles Regarding Radioactive Waste Facilities²⁰ includes provisions for authorisation of radioactive waste processing, storage, and disposal facilities. The site of any radioactive waste facility must be approved by the NRA. The regulation specifies that the following activities require authorisation from the NRA:

- Construction,
- Commissioning,
- Operation,
- Modifications affecting safety and security at the facility, and
- Decommissioning or closure of the facility.

20 Regulation on Authorizations and Safety Principles Regarding Radioactive Waste Facilities, 2023.

According to the regulation, the organisation shall apply the graded approach principle according to the type and nature of the facility in which the activities are carried out within the scope of ensuring radiation protection, safety, and security at the radioactive waste facility. Furthermore, the NRA shall apply the graded approach principle according to the type and nature of the facility in the review and assessment processes of authorisation applications for radioactive waste facilities.

To establish a radioactive waste facility, the organisation must first submit a notice of intent to the NRA containing detailed information about the organisation and the proposed facility. This information includes contact details, administrative structure, management system certificates, technical experience, and an anticipated project schedule. The NRA then registers the organisation and initiates the preparation of the Regulatory Documents List, which serves as the basis for licensing and includes national and international standards and guidelines. The Regulatory Documents List is periodically reviewed and updated as necessary to ensure compliance with safety and regulatory requirements.

For radioactive waste facilities, first, a site approval must be obtained from the NRA, which involves submitting a comprehensive site report and conducting detailed site studies to ensure that the site is suitable. The organisation must then apply for a construction permit, which involves submitting safety analysis reports and environmental monitoring programs. Once construction is complete, a commissioning permit is required, which involves testing and verifying that the facility is operating as designed. Following the commissioning permit, the organisation must apply for an operating license. After obtaining an operating license, the organisation must comply with the safety and security regulations, conduct periodic reviews, and obtain a permit for any significant modifications. Finally, the decommissioning process requires a separate permit to ensure that all activities meet regulatory standards until the site is released from regulatory control.

The authorised person for the activity shall bear full responsibility for the effective and efficient management of radioactive wastes and spent fuels within the site, or alternatively, for the management of radioactive wastes at designated locations where radiation application or other related activities are being conducted according to the Regulation on Radioactive Waste and Spent Fuel Management. Furthermore, the authorised person has the prime responsibility to ensure safety and security in an activity or at a facility. To comply with the terms and conditions of a granted authorisation and related legislation, or to be under regulatory control, delegation or contracting to outsource its responsibilities shall not reduce or remove the responsibility of the authorised person.

According to the Nuclear Regulation Law, and the Regulation on Radioactive Waste and Spent Fuel Management, the authorised person for the activity shall bear

the full responsibility for all kinds of transportation of radioactive waste and spent fuel inside or outside the facility.

4.2. Radioactive Waste Classification

In Türkiye, the radioactive waste classification scheme is defined in the Regulation on Radioactive Waste and Spent Fuel Management. The radioactive waste classification scheme is based on the IAEA General Safety Guide on Classification of Radioactive Waste, GSG-1, with minor differences.²¹

According to the regulation, radioactive waste is classified according to its radioactivity concentrations and the half-lives of the radionuclides it contains into very short-lived, very low-level, low and intermediate level, and high-level radioactive waste.

Table 2. The radioactive waste classification scheme²²

Radioactive Waste Class	Limits on Half-life or Radioactivity Concentration	Final Route
Very Short-lived Radioactive Waste	Half-life of less than about 100 days	Clearance or release
Very Low-level Radioactive Waste	Radioactivity concentrations below one hundred times the clearance limits and not classified as very short-lived radioactive waste	Near surface, intermediate depth, or deep disposal facility
Low and Intermediate Level Radioactive Waste	- Radionuclides with half-lives less than 31 years. - For long lived alpha emitting radionuclides: Radioactivity concentration below 400 Bq/g on average for all radioactive waste packages and below 4,000 Bq/g for individual packages. - For long lived beta and gamma emitting radionuclides: Radioactivity concentration below approximately 10 kBq/g.	Near surface, intermediate depth, or deep disposal facility
	- For long lived alpha emitting radionuclides: Radioactivity concentration above 400 Bq/g on average for all radioactive waste packages and above 4,000 Bq/g for individual packages. - For long lived beta and gamma emitting radionuclides: Radioactivity concentration above 10 kBq/g.	Intermediate depth or deep disposal facility
High Level Radioactive Waste	- Spent fuels that have been recognised as radioactive waste. - Radioactive waste resulting from reprocessing and containing fission products and actinides with a total radioactivity concentration of more than about 108 Bq/g. - Radioactive waste containing around 108 Bq/g of radioactivity concentration.	Deep disposal facility

21 International Atomic Energy Agency General Safety Guide on Classification of Radioactive Waste, GSG-1, 2009.

22 Regulation on Radioactive Waste and Spent Fuel Management; Turkish National Report for the Joint Convention Meeting, 2024.

4.3. Disused Sealed Sources

All activities with radioactive sources including the use, manufacture, and possession of radioactive sources, are subject to obtaining a license from the NRA. According to Nuclear Regulation Law, the operations to be carried out at all stages, from the manufacture or supply of the sealed radioactive source to its export, return to the origin, delivery to the radioactive waste facility, sale, or transfer, shall be carried out by the authorised persons. Authorisation stages, the application procedure, and radiation protection, safety, and security principles for radiation facilities and radiation practices, which cover the use, manufacture, and possession of radioactive sources, are described in the Regulation on Authorizations Regarding Radiation Facilities and Radiation Practices. According to the regulation, activities must be justified based on societal benefits and must comply with dose limits specified by the NRA.

According to the Regulation on Authorizations Regarding Radiation Facilities and Radiation Practices.²³

- The authorised person must regularly review the radioactive source inventory to identify disused sealed sources, and ensure their continuous safety and security.
- One of the following appropriate actions shall be taken by the authorised person with respect to the disused sealed sources:
 - a) In case of a request for reuse of disused sealed sources for another purpose, the NRA shall be notified with the necessary information and documents. Disused sealed sources may be reused only with the consent of the NRA and within the scope of the provisions of this Regulation.
 - b) For transfer requests of the disused sealed sources, the transfer of the disused sealed source shall be conducted only if the authorised person notifies the NRA and the licence application made by the transferee is approved by the NRA.
 - c9 If disused sealed sources are not reused or transferred, the disused sealed sources shall be returned to the country of origin or, if that is not possible, shall be delivered to the radioactive waste facility operated by TENMAK.
- Disused sealed sources cannot be left in the environment or stored indefinitely by the authorised person.

Bringing radioactive waste generated by an activity implemented outside the area of jurisdiction of the Republic of Türkiye into the territory of the Republic of Türkiye is forbidden by the Nuclear Regulation Law except for the radiation sources produced within the borders of the Republic of Türkiye and exported with the condition of being

23 Regulation on Authorizations Regarding Radiation Facilities and Radiation Practices, 2023.

returned to the country of origin when their usage period expires and the transit passage of radioactive wastes, and the importation of materials contaminated with natural radioactive materials.

4.3.1. Orphan Radioactive Materials

In accordance with Article 14 of the Regulation on Radioactive Waste Management and Spent Fuel Management, TENMAK shall designate the required procedures for the control of orphan radioactive materials, take or have taken the necessary measures in cooperation with the relevant institutions and organisations when necessary, and perform the necessary works and procedures including disposal. Costs that may arise due to orphan sources shall be compensated by the last owner, if any, as identified by the NRA. To minimise the harmful effects of orphan radioactive materials, radiation measurement systems including fixed-portal detectors have been installed at the entrances of facilities importing scrap metal, ports, and customs.

Additionally, Article 24 (1)(b) of the Nuclear Regulation Law states that, 'Persons who leave the place or facility where the activity is carried out, nuclear material, radioactive source or radioactive waste without an owner, before their obligations regarding the activity expire, are subject to imprisonment from three years to eight years and a judicial fine of five thousand days'.²⁴

4.4. Decommissioning

According to the Regulation on Authorizations for Radioactive Waste Facilities and Safety Principles, radioactive waste processing and storage facilities are subject to a decommissioning permit. The organisation operating such a facility is obliged to decommission the facility. The decommissioning process is undertaken in accordance with the conditions for the decommissioning or closure permit, and in accordance with the documents in the Regulatory Documents List determined by the NRA, provided that it is demonstrated that the site will be made compliant with the re-use conditions. Within this scope, the organisation operating the facility shall prepare and implement reports, plans, and programs for all decommissioning activities aimed at removing radioactive materials from the site and removing radioactive contamination, together with the dismantling and environmental harmonisation of the site. For the decommissioning process, in addition to the aforementioned conditions, the

24 Nuclear Regulation Law, 2022; Regulation on Radioactive Waste Management and Spent Fuel Management, 2023.

organisation shall submit the radioactive waste management, radioactive release, environmental radiological monitoring, and personal dose and radiation measurement reports to the NRA every year starting from the date permission is granted for decommissioning. The content of these reports is determined by the NRA. The operating organisation also immediately notifies the NRA of any extraordinary event and reports the planned measures to be taken.²⁵

The application file for the decommissioning permit shall include the Safety Analysis Report prepared for decommissioning, the quality assurance document of the decommissioning process, radiation emergency plan, safety plan regarding the decommissioning process, environmental radiological monitoring program, radiation protection program, and design information questionnaire for radioactive waste facilities with nuclear material, including a nuclear material counting and control system. These documents submitted with the application shall be evaluated by the NRA in terms of their adequacy and compliance with the requirements of the documents in the Regulatory Documents List.

The organisation shall make the decision on the closure of the disposal facility and notify the NRA. Then, it shall make plans to start and complete the closure activities as soon as possible and apply to the NRA for a closure permit. In this scope, the organisation shall take the decision on the decommissioning of the radioactive waste facility and notify it to the NRA. It shall make plans to start and complete the decommissioning activities as soon as possible and apply to the NRA for a decommissioning permit.

Within the scope of the decommissioning process, first, the authorised organisation shall perform all activities included in the quality assurance document of the decommissioning process of the radioactive waste facility. Next, it shall submit the radioactive waste management, radioactive release, environmental radiological monitoring, and personal dose and radiation measurement reports, with the contents determined by the NRA, to the NRA every year starting from the date permission is granted for decommissioning.

5. Closure

Requirements concerning the post-closure period of a disposal facility are also stated in the Regulation on Authorizations and Safety Principles Regarding Radioactive Waste Facilities. As per this regulation, the organisation shall take measures to maintain radiation protection, safety, and security in the radioactive waste facility that it has decided to close and fulfil its responsibilities regarding nuclear safety, if any.

25 Regulation on Authorizations for Radioactive Waste Facilities and Safety Principles, 2022.

For the closure, the organisation shall implement active and passive safety measures on and around the site during the control period after the closure of the facility. The organisation reports the results of radiological environmental monitoring activities, and maintenance and repair activities to the NRA every year, starting from the date of the closure permit, during the post-closure active control period until it is released from regulatory control.

The organisation shall be responsible for the removal of such facilities from regulatory control. In the application file for such removal, the organisation shall apply to the NRA with a report demonstrating that the conditions necessary for the removal have been met. The release of the disposal facilities from regulatory control occurs following a post-closure period of active control and only limited use of the site. Monitoring and control studies shall be conducted to ensure the monitoring and maintenance of the integrity of the barriers throughout the active control period after the closure.²⁶

6.

Conclusion

Türkiye has appropriate infrastructure for spent fuel and radioactive waste management with its latest regulatory and legal framework developments. Nuclear Regulation Law and secondary legislation related to it outline the fundamental principles of the organisational system which can support the safe management of radioactive waste and spent fuel.

In particular, a very important development is the entry into force of the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management before the nuclear power plant project is commissioned. The legal framework regarding radioactive waste, which is already in a good state, should be completed once the necessary determinations related to the process of special accounts are made and put into operation.

²⁶ Ibid.

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REVIEWS

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Review of the 26th Traditional International Scientific Conference of the International Criminal Law Association, 12–15 June 2026, Palić, Serbia

The 26th Traditional International Scientific Conference of the International Criminal Law Association, entitled *International Criminal Law at a Turning Point – Reform of Criminal Legislation of the Republic of Serbia*, was held in Palić, Serbia, between 12 and 15 June 2026. The conference brought together academics, legal practitioners, judges, attorneys, doctoral researchers, and representatives of public institutions from several European countries to discuss contemporary challenges in criminal law, international criminal justice, and the ongoing reform of Serbian criminal legislation.

The conference commenced with an opening ceremony featuring welcome addresses by distinguished representatives of Serbian academia and the judiciary, including Professor Milenko Kreća, President of the International Criminal Law Association, Professor Milan Škulić, President of the Organizational Committee, as well as representatives of the Constitutional Court, the Judicial Academy, the Bar Association, and the Institute for Criminological and Sociological Research.

Their speeches emphasized the importance of international academic cooperation and highlighted the necessity of adapting criminal law to emerging global challenges. The opening keynote lectures established the intellectual framework of the conference.

Professor Milenko Kreća examined the role of the International Court of Justice and the International Criminal Court in adjudicating the crime of genocide, offering valuable reflections on the interaction between public international law and international criminal justice. This was followed by Professor Milan Škulić's presentation on the implemented and planned amendments to the Criminal Code of Serbia, providing participants with an overview of the country's ongoing legislative reforms and the policy considerations underlying them. These introductory presentations effectively

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linked theoretical developments in international criminal law with current legislative initiatives at the national level.

The English-language session represented one of the highlights of the conference. The programme demonstrated the interdisciplinary nature of contemporary criminal law research by covering topics such as criminal law theory, international criminal justice, victims' rights, corruption, artificial intelligence, cybercrime, humanitarian law, juvenile delinquency, and comparative criminal procedure.

Several presentations addressed the increasing impact of technological innovation on criminal justice systems. Particularly noteworthy were the contributions discussing artificial intelligence-assisted jurisprudence analysis, AI-assisted crime committed by young people, and the application of customary international humanitarian law to new technologies in armed conflicts. These presentations demonstrated how technological developments increasingly influence both substantive criminal law and criminal procedure, while also creating new legal and ethical challenges for legislators and courts.

The conference also devoted considerable attention to victims' rights and international criminal justice. Presentations concerning the procedural status of victims before the International Criminal Court, the legal protection of victims during the Nuremberg Trials, and international responses to armed conflicts and humanitarian crises illustrated the continuing relevance of victim-centred approaches within international criminal law.

These discussions reflected broader trends in international legal scholarship, where the protection of victims has become an increasingly significant component of contemporary criminal justice policy.

An especially valuable feature of the conference was the opportunity to compare different national legal systems. Presentations examined criminal law reforms and procedural solutions in Serbia, Poland, Croatia, Romania, Bosnia and Herzegovina, and other European jurisdictions. Comparative analyses of the European Arrest Warrant, preliminary criminal proceedings, criminal sanctions, and juvenile delinquency provided participants with a broader understanding of both shared legal challenges and diverse legislative approaches adopted across Europe. Such comparative discussions greatly enriched the academic value of the conference by encouraging dialogue between researchers working in different legal traditions.

The afternoon round table on the conditional release of persons convicted by the International Criminal Tribunal for the Former Yugoslavia and the Mechanism for International Criminal Tribunals represented another significant component of the programme. Rather than focusing solely on theoretical questions, the discussion examined practical and policy-oriented issues concerning the execution of international criminal judgments, reintegration of convicted persons, and the relationship between international criminal justice and domestic legal systems. The participation

of both academics and experienced practitioners contributed to a balanced discussion combining doctrinal analysis with practical experience.

The second full day of the conference continued with parallel sessions devoted to international criminal law, the rule of law and human rights, and criminal procedure. These thematic panels reflected the growing interconnectedness of criminal law with constitutional law, human rights protection, and international legal standards. The concluding book presentation, featuring leading Serbian criminal law scholars, also highlighted the continuing importance of academic publishing in supporting legal education, legislative reform, and judicial practice.

Participation in this conference proved highly valuable from both academic and professional perspectives. The event provided an excellent opportunity to become acquainted with current debates surrounding the reform of Serbian criminal legislation while also following broader developments in international criminal law and comparative criminal justice. The diverse composition of participants fostered meaningful academic exchange and facilitated networking among senior scholars, early-career researchers, and legal practitioners from various European countries.

Beyond the formal academic programme, the conference created an atmosphere conducive to informal discussions and future cooperation. Coffee breaks, shared meals, and social events offered additional opportunities to exchange research ideas, discuss ongoing doctoral projects, and establish professional contacts that may lead to future joint research initiatives. Such interactions constitute an essential element of international scientific conferences and contribute significantly to the development of long-term academic cooperation.

Overall, the 26th Traditional International Scientific Conference of the International Criminal Law Association successfully fulfilled its objective of providing a forum for discussing contemporary developments in international and domestic criminal law. The high scientific quality of the presentations, the diversity of topics addressed, and the active participation of both established scholars and young researchers made the conference an intellectually stimulating and professionally rewarding event. The discussions demonstrated that criminal law is currently undergoing substantial transformation in response to technological innovation, evolving international standards, and changing societal expectations. Consequently, the conference made a valuable contribution to ongoing scholarly debate while strengthening international academic cooperation in the field of criminal law.

