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Right to a Safe, Clean, Healthy and Sustainable Environment Under the European Convention of Human Rights: Is an Additional Protocol Required for Effective Protection of Environmental Rights?

ABSTRACT: *The right to a safe, clean, healthy, and sustainable environment as a human right is not new to legal scholarship or the international community. This area is dynamically evolving and new challenges to the protection of environmental rights are emerging. Adoption of a new additional protocol to the European Convention of Human Rights on the right to a safe, clean, healthy, and sustainable environment is considered the most effective way to protect environmental rights and ensure a unified approach to combating the environmental crisis from a human rights perspective. However, this approach forces us to analyse the notions of margin of appreciation, victim status, and positive obligations of states once again. New challenges questioning such an anthropocentric approach, the limits of positive obligations, and the margin of appreciation may arise even upon the adoption of the protocol. The economic and financial status of states may vary and this may negatively affect protocol implementation. The uncertainty that arises in defining the boundaries of such obligations under the protection of environmental rights is especially concerning. In terms of positive obligations, the European Court of Human Rights Court tends to allow a certain margin of appreciation to contracting parties in this area of legal protection. Nevertheless, in light of the recent decision regarding climate change, the protocol is not guaranteed to provide an adequate response to the problem. The desire to be at the forefront of the fight against environmental pollution and climate change has further pushed the Court to take unconventional decisions that differ from previous case law. This article discusses the need to adopt an additional protocol; it focuses on the role of the protocol in defining the Court's renewed approach to the margin of appreciation and the scope of states' obligations under the Convention.*

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■ **KEYWORDS:** climate change, margin of appreciation, anthropocentric approach, right to a safe, clean, healthy and sustainable environment, victim status, ECtHR

1. Introduction

The right to a safe, clean, healthy, and sustainable environment as a human right is not new to legal scholarship or the international community. The United Nations has adopted a landmark resolution recognising the human right to a healthy environment.[1] Environmental protection is pivotal to the realisation of the sustainable development goals. This area is dynamically evolving and new challenges to the protection of environmental rights are emerging.

To protect environmental rights and ensure a unified approach to combating the environmental crisis from a human rights perspective, Amnesty International, together with more than 200 non-governmental organisations, recently appealed to the international community in the form of Foreign Ministers and Permanent Representatives of Council of Europe (CoE) member states in an open letter, calling on member states of the organisation to take specific measures, namely to prepare and adopt a new additional protocol to the European Convention on Human Rights (from here on 'the Convention') on the right to a clean, healthy, and sustainable environment.[2] However, the adoption of a new protocol to the Convention and consideration of the obligations of states from a human rights perspective forces us to analyse the positive obligations of states once again – not simply from the perspective of the civil and political rights provided for by the Convention but from the point of view of the right to a safe, clean, healthy, and sustainable environment. We must also consider the necessity of adopting an additional protocol for the effective protection of the right to a safe, clean, healthy, and sustainable environment.

Positive obligations towards civil and political rights are incumbent on member states of the CoE, and they require countries to protect and fulfil human rights. It is important to note that at the time of elaboration of the Convention, the environment was not regarded as a threat to human rights; therefore, the founding fathers of the Convention did not embed any provision on the right to a safe, clean, healthy, and sustainable environment. Nevertheless, the Convention is a living instrument, and therefore, the human rights enshrined therein have been interpreted as including positive obligations for the protection of the right to a

1 UNGA, The human right to a clean, healthy and sustainable environment, A/RES/76/300 (28 July 2022).

2 *Call for the adoption of an additional Protocol to the European Convention on Human Rights on the right to a clean, healthy, and sustainable environment, 2024.*

safe, clean, healthy, and sustainable environment. The European Court of Human Rights (from here on 'the Court') has developed its case law in environmental matters because the exercise of certain Convention rights may be undermined by environmental harm and exposure to associated risks.[3] The Court's history is replete with cases that to one degree or another relate to environmental rights. However, they were considered under existing articles, such as the right to life, the right to respect for private and family life, etc.[4]

The interconnection between human rights and the environment is not contested. The Court recognises that, in today's society, the protection of the environment warrants greater consideration.[5] It has referred to rights included in the Convention on which issues such as noise disturbance, industrial pollution, town planning and construction, waste management, water contamination, and human-caused and natural disasters had an undeniable impact.[6] The recognition of the prevalence of environmental aspects in human rights law, therefore, may guarantee the coercivity of these considerations, and environmental aspects may thus form an inevitable part of the interpretation of certain human rights.[7]

The adoption of a separate protocol poses new challenges in determining the limits of positive obligations since obligations of this type also envisage financial consequences. The economic and financial status of states may vary and this may negatively affect protocol implementation. One key issue is the uncertainty surrounding the boundaries of such obligations under the protection of environmental rights. If one examines the positive obligations covered by the Convention, it becomes evident that the Court tends to allow a certain margin of appreciation to contracting parties in this area of legal protection. The latter decision concerning climate change[8] has provided a platform for the Court to delve into unprecedented issues. The particular nature of the problems arising from climate change, in terms of the issues raised by the Convention, has not so far been addressed in the Court's case law.[9] While the Court's environmental case law to date can offer modest guidance, important differences exist between the legal questions raised by climate change and those addressed so far.[10] The evolving case law relating to climate change has raised new questions and offered new approaches to the question of causation, issues of proof, the effect of climate

3 European Court of Human Rights, 2024.
4 Ibid.
5 *Fredin v. Sweden (No. 1) (*Application no. 12033/86), Judgment, 18 February 1991, para. 48.
6 Council of Europe, Manual on Human Rights and the Environment (3rd edition) (Council of Europe, 2022), para. 20.
7 Raisz and Krajnyák, 2022, p. 76.
8 *Verein Klimaseniorinnen Schweiz and Others v. Switzerland,* (Application no. 53600/20), Judgment, 9 April 2024.
9 Ibid., para. 414.
10 Ibid.

change on the enjoyment of Convention rights, positive obligations, and the proportion of state responsibility.

The ongoing evolution of the case law, along with the potential adoption of an additional protocol to the Convention on the right to a safe, clean, healthy, and sustainable environment, could result in the recognition of a wide range of substantive and procedural rights. These rights would strongly emphasise the intrinsic value of nature and ecosystems, highlighting the profound interrelationship between human societies and nature. However, this may compromise the Court's anthropocentric and individualistic approach. In light of these factors, the main research focus of this article is related to the recent case law of the Court and its impact on the necessity of adopting an additional protocol.

The first part of the article involves the established practice of the Court regarding the right to a safe, clean, healthy, and sustainable environment covering negative and positive obligations under the Convention. The second part is devoted to the recent case law of the Court on climate change. Finally, in the third part, the article focuses on possible advantages and disadvantages arising from adopting the new protocol.

2. Established practice of the Court on the right to a safe, clean, healthy, and sustainable environment

The Convention does not contain any provision entailing the right to a safe, clean, healthy, and sustainable environment. As a 'living instrument', its interpretation of rights and freedoms is not fixed but can take account of the social context and changes in society.[11] The Convention could not be a living instrument if its interpretation remained static.[12] Thus, the Court has developed a significant case law that recognised the violation of different human rights embedded in the Convention as a result of the environmental risks and harm stemming from actions or inactions of state parties. This part is devoted to an overview of key general principles established by the Court for the examination of environmental cases.

Foundational for environmental human rights is the principle conceived by the Court nearly 30 years ago: severe environmental harm that adversely and seriously affects individuals' well-being can be considered as an interference with the right to respect for private and family life or home.[13]

Given that environmental issues may give rise to discussions of matters of a scientific-technical character, the Court recognises a wide margin of appreciation of national authorities when it comes to rendering decisions on environmental

11 Council of Europe, Manual on Human Rights and the Environment (3rd edition) (Council of Europe, 2022), para.34.
12 Rainey, Wicks and Ovey, 2014, p. 74.
13 Kobylarz, 2022, p. 364.

issues. The choice of the specific measures is, in principle, a matter that falls within the State's margin of appreciation.[14] In this respect, the Court acknowledges that an impossible or disproportionate burden must not be imposed on the authorities without consideration being given, in particular, to the operational choices that they must make in terms of priorities and resources; this results from the wide margin of appreciation States enjoy in difficult social and technical spheres.[15] As seen, the margin of appreciation is closely linked to the notion that no disproportionate burden should be imposed on the State concerned. The Court referred to the idea of margin of appreciation not merely in cases concerning hazardous activities of a man-made nature but also meteorological events. This consideration must be afforded even greater weight in the sphere of emergency relief about a meteorological event, which is as such beyond human control, than in the sphere of dangerous activities of a man-made nature.[16]

However, in the recent decision rendered by the Court on climate change, the Court has adopted a wholly different and rather perplexing approach concerning the margin of appreciation.[17] We will thoroughly discuss it in the following chapter.

■ *2.1. Negative obligations under the Convention*

Negative obligations place a duty on state authorities to refrain from acting in a way that unjustifiably interferes with Convention rights.[18] All the rights enshrined in the Convention include, in one way or another, both negative and positive obligations. While the Court seeks to establish whether a fair balance has been struck between competing rights by assessing positive obligations, negative obligations from an environmental perspective are not subject to such scrutiny. Notably, states' negative obligations have been most explored by the Court under art. 8.[19] In many cases, negative obligations go hand in hand with positive commitments. For instance, the case of *Dzemyuk v. Ukraine* concerns the local authority's decision to locate a cemetery just 38 metres from the applicant's home in breach of domestic regulations plus the state's failure to act in securing compliance with the domestic environmental standards.[20] The principles applicable to an assessment of the state's responsibility under art. 8 in environmental cases are broadly similar, regardless of whether the case is to be analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights

14 Guide to the case-law of the European Court of Human Rights, Environment, 2024.
15 *Öneryıldız v. Turkey,* (Application no. 48939/99), Judgment, 30 November 2004, para. 107.
16 *Budayeva and Others v. Russia,* (Application nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02), Judgment, 20 March 2008, para.135.
17 *Verein Klimaseniorinnen Schweiz and Others v. Switzerland,* (Application no. 53600/20), Judgment, 9 April 2024 para.543.
18 *Toolkit Some definitions,* 2024.
19 Guide to the case-law of the European Court of Human Rights, Environment, 2024.
20 *Dzemyuk v. Ukraine,* (Application 42488/02), Judgment, 4 September 2014, para. 88.

under art. 8 para. 1 or in terms of an 'interference by a public authority' to be justified by art. 8 para. 2.[21] In that specific case, the cemetery was built in breach of domestic regulations, meaning that the state infringed its negative obligations. However, violation of positive obligations has also been confirmed since binding judicial decisions were never enforced and the health and environmental dangers inherent in water pollution were not acted upon.[22]

In the cases concerning noise caused by the operation of public civil airports, the Court has relied on the 'economic well-being of the country' and has not explicitly assessed this case concerning negative obligations.[23] Finally, it is incumbent on the Court to assess whether the interference was proportionate to the legitimate aim pursued.

■ *2.2. Positive obligations under the Convention*

Under the notion of positive obligations, states' human rights responsibility comes to an effect where environmental harm stems from activities carried out by private parties or even from the effects of natural occurrences insofar as this ought to be effectively regulated, monitored or mitigated by public authorities.[24]

Notably, the Court has developed the doctrine of positive obligations within the scope of art. 2. That is, public authorities can also be held responsible for the actions of third parties. In the context of the environment, art. 2 has been applied where certain activities endangering the environment are so dangerous that they also endanger human life.[25] Since the scope of the positive obligations under art. 2 largely overlaps with those under art. 8, the principles developed in the Court's case law relating to planning and environmental matters affecting private life and home may also be relied on for the protection of the right to life.[26] There is no exhaustive list of circumstances triggering the State's obligation to act. In a nutshell, states must take all the necessary measures to protect the rights enshrined in art. 8. Those positive obligations may involve the authorities' adopting measures to protect those rights even in the sphere of the relations of individuals between themselves.[27] Nevertheless, for a state to be in line with its positive obligations, it should not only have national legislation providing punishment for polluters in place. This legislation should also be applied in a timely and effective manner. This approach has been acknowledged in the case of *Bor v. Hungary* (2013) where

21 Ibid., para. 89.
22 Ibid., para. 92.
23 Guide to the case-law of the European Court of Human Rights, Environment, 2024.
24 Kobylarz, 2022, p. 364.
25 Council of Europe, Manual on Human Rights and the Environment (3rd edition) (Council of Europe, 2022), para. 38.
26 Guide to the case-law of the European Court of Human Rights, Environment, 2024; cited in *Budayeva and Others v. Russia*, (Application nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02), Judgment, 20 March 2008, para. 133.
27 Ibid, para. 109.

the Court found a violation of art. 8 of the Court as the domestic courts failed to determine any enforceable measures to assure that the applicant would not suffer any disproportionate individual burden for some sixteen years.[28] States should punish polluters who have caused damage to the environment. The Court therefore recognised a principle of international environmental law, the polluter pays principle.[29]

States are expected to strike a fair balance between competing rights. e.g., the Court does not find a violation of the right to property in cases of restrictions on activities imposed by public authorities to protect endangered ecosystems or species unless the measures in question are unforeseeable or disproportionate.[30] Moreover, in cases under art. 8 where a state is faced with complex environmental and economic policy issues, particularly cases involving dangerous activities, the Court has emphasised that the state must, in addition, set in place regulations geared to the special features of the activity in question, particularly concerning the level of risk potentially involved.[31]

In addition to the above rights, one of the main rights of individuals exposed to the negative effects of environmental hazards is the right to receive and impart information on hazardous activities that may have adverse consequences on health. Nevertheless, access to information has been given effective, albeit not automatic or unqualified, recognition under arts. 2, 8, and 10 of the Convention.[32] The state must take measures to provide individuals with information enabling them to assess the risks they might run as a result of the choices they have made.[33]

In addition to the foregoing, the Court has recognised states' environmental obligations guaranteeing the right to a fair trial both for individuals and their associations. Art. 6 can be invoked by an environmental interest organisation where the claim concerns the interests that the organisation defends.[34] Decisions such as *Okyay and others v. Turkey* and *Taşkin v. Turkey* focused on the right to access justice as part of the right to a fair trial.[35]

In summary, states abide by the positive obligations to protect numerous civil and political rights embedded in the Convention from the viewpoint of environmental protection. As part of those positive obligations, the Court has recognised some of the most essential standards of international environmental law, such as the polluter pays principle, the precautionary principle, and the duty

28 *Bor v. Hungary* (Application No. 50474/08), Judgment, 18 June 2013, para. 27.
29 Sands and Peel, 2018, p 240.
30 Kobylarz, 2022, p. 365.
31 Guide to the case-law of the European Court of Human Rights, Environment, 2024.
32 Kobylarz, 2022, p. 365.
33 *Öneryıldız v. Turkey,* (Application no. 48939/99), Judgment, 30 November 2004, para. 108.
34 Peters, B. 2020, '3.1. Individuals or their associations' section, p. 8 cited in *Affaire collectif national d'information et d'opposition à l'usine Melox – Collectif stop Melox et Mox c. France*, (Application no. 75218/01), 12 June 2006, para. 4.
35 Ibid., '4.3.1.2. Procedural environmental obligations' section, p. 14.

to conduct an environmental impact assessment.[36] Positive obligations established in the Court's case law are deemed to be procedural environmental obligations.

3. Recent Court case law regarding climate change: a step closer to an additional protocol on the right to a clean, healthy, and sustainable environment?

It is interesting to see how recent case law from the Court regarding climate change may potentially lead to the development of an additional protocol on the right to a safe, clean, healthy, and sustainable environment. This could have far-reaching implications for environmental protection and human rights across Europe and beyond.

The Case of *Verein Klimaseniorinnen Schweiz and Others v. Switzerland* showcases a slight inclination of the Court to the approach of other regional mechanisms. The Inter-American Court of Human Rights interpreted the right to not only oblige States to protect the life and health of their citizens but also to oblige State parties to protect the environment for the sake of all organisms that live on this planet.[37] Notably, the American Convention on Human Rights (hereafter, ACHR)[38] does not contain explicit provisions on the right to a safe, clean, healthy, and sustainable environment. Nevertheless, art. 11 of the San Salvador protocol of the ACHR grants the right to a healthy environment and the duties of the states to grant it.[39]

The term 'margin of appreciation' refers to the space for manoeuvre that the Strasbourg organs are willing to grant national authorities in fulfilling their obligations under the European Convention.[40] However, the margin of appreciation goes hand in hand with Court supervision. Such supervision concerns both the aim of the measure challenged and its 'necessity'; it covers not only the basic legislation but also the decision applying it, even one given by an independent court.[41] Environmental protection should be taken into consideration by States in acting within their margin of appreciation and by the Court in its review of that margin, but it would not be appropriate for the Court to adopt a special approach in this respect by reference to a special status of environmental human rights.[42]

36 Ibid.
37 Ibid., p. 4, cited in Inter-American Court of Human Rights, The Environment and Human Rights, Advisory Opinion OC-23/17, para. 62, 2017.
38 American Convention on Human Rights (San José, 23 May 1969).
39 Marinkás, 2020, p. 137.
40 Council of Europe The Lisbon Network, 2009.
41 Ibid.
42 *Hatton and Others v. the United Kingdom*, (Application no. 36022/97), Judgment, 8 July 2003, para. 122.

In the present case, the Court applies the reduced margin of appreciation as regards the State's commitment to combating climate change, its adverse effects, and the setting of aims and objectives in this respect. As regards the State's commitment to the necessity of combating climate change and its adverse effects, the nature and gravity of the threat, and the consensus as to the stakes involved in ensuring the overarching goal of effective climate protection through overall greenhouse gas (GHG) reduction targets by the Contracting Parties' accepted commitments to achieve carbon neutrality, call for a reduced margin of appreciation for the States.[43] The State should be accorded a wide margin of appreciation as to the choice of means designed to achieve those objectives.[44] Establishing a reduced margin of appreciation regarding the state's commitment to combat climate change would run counter to the settled practice and approach adhered to by the Court since the margin of appreciation is used only in relation to states' obligations under the Convention. As it is observed, there is no such obligation to combat climate change overtly envisaged in the Convention or implied by the founding fathers in travaux préparatoires. The evolutive interpretation, even if applied, has limits. The Court cannot, using an evolutive interpretation, create a new right apart from those recognised by the Convention or it creates a new 'exception' or 'justification' which is not expressly recognised in the Convention.[45]

By taking such an approach, the Court is at risk of exceeding its authority and putting itself in the position of a body supervising the implementation of obligations undertaken by states under other international legal instruments. A reduced margin of appreciation means that the Court is entitled to wider powers to control the state's adherence to international commitments regarding combating climate change. In light of the facts of the case, specific implementing measures can be scrutinised. Nevertheless, the Court must decide whether the interference was proportionate to the legitimate aim pursued, and in particular whether, having regard to the State's broad margin of appreciation in the environmental sphere, a fair balance was struck between the competing interests.[46] Again, the primary is the choice of means designed to achieve proportionality between the aim pursued and the interference and to strike a fair balance between competing interests. Those competing interests are the rights and freedoms enshrined in the Convention and not climate change taken apart as an independent phenomenon in international relations.

43 *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, (Application no. 53600/20), Judgment, 9 April 2024, para. 543.

44 Ibid.

45 *Austin and Others v. the United Kingdom* (Application nos. 39692/09, 40713/09 and 41008/09), Judgment, 15 March 2012, para. 53.

46 Guide to the case-law of the European Court of Human Rights, Environment, 2024, cited in *Flamenbaum and Others v. France*, (Application nos. 3675/04 et 23264/04), Judgment, 13 December 2012, para. 150.

Moreover, one of the interpretation principles is effective protection. This principle states that, since the overriding function of the Convention is the effective protection of human rights rather than the enforcement of mutual obligations between States, its provisions should not be interpreted restrictively in deference to national sovereignty.[47] In the case of *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, the Court overrides the previous case law and takes on the role of an institution that monitors compliance with states' commitments to reduce carbon emissions. This approach is explicitly mentioned in the case:

When assessing whether a State has remained within its margin of appreciation, the Court will examine whether the competent domestic authorities, be it at the legislative, executive or judicial level, have had due regard to the need to:

a) Adopt general measure specifying a target timeline for achieving carbon neutrality and the overall remaining carbon budget for the same time frame, or another equivalent method of quantification of future GHG emissions, in line with the overarching goal for national and/or global climate-change mitigation commitments;
b) Set out intermediate GHG emissions reduction targets and pathways (by sector or other relevant methodologies) that are deemed capable, in principle, of meeting the overall national GHG reduction goals within the relevant time frames undertaken in national policies;
c) Provide evidence showing whether they have duly complied, or are in the process of complying, with the relevant GHG reduction targets;
d) Keep the relevant GHG reduction targets updated with due diligence, and based on the best available evidence; and
e) Act in good time and appropriately and consistently when devising and implementing the relevant legislation and measures.[48]

Thus, all issues raised in paragraph A will be examined by the Court to assess whether a state has not exceeded its margin of appreciation. It is hard to disagree with Judge Eicke's partly concurring partly dissenting opinion, where he claims that the approach applied in this case goes against the Court's traditional approach about 'difficult social and technical spheres' developed in the context of, arguably, (much) less complex spheres than the fight against anthropogenic climate change.[49] Furthermore, the Court is ill-equipped and ill-suited to assess the issues listed above.[50]

The new approach to the margin of appreciation in cases concerning climate change is justified on different grounds, namely the nature and gravity of

47 Council of Europe The Lisbon Network, 2009, cited in Dijk and Hoof, 1998, p. 74.
48 *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, (Application no. 53600/20), Judgment, 9 April 2024, para. 550.
49 Eicke, 2024, para. 66.
50 Ibid., para. 67.

the threat and the consensus as to the stakes involved in ensuring the overarching goal of effective climate protection through overall GHG reduction targets by the Contracting Parties' accepted commitments to achieve carbon neutrality.[51] Again, a question arises as to what extent the Court is entitled to assess the Contracting Parties' commitments accepted before other international and regional organisations, if those commitments do not directly impact and breach the rights enshrined in the Convention. By establishing a reduced margin of appreciation for states, the Court acts beyond its powers. Additionally, the nature and gravity of the threat directly affecting the applicants, to my mind, have not been established successfully.

Hence, this case goes beyond the approach over which the consensus has been achieved. In the case of *Hatton and others v. the United Kingdom* (2003), the Court considered that in cases, involving State decisions affecting environmental issues, there are two aspects to the inquiry that may be carried out by the Court: first, the Court may assess the substantive merits of the government's decision, to ensure that it is compatible with art. 8; and second, it may scrutinise the decision-making process to ensure that due weight has been accorded to the interests of the individual.[52] Concerning the substantive aspect, the Court has held that the State must be allowed a wide margin of appreciation.[53] Achieving carbon neutrality and keeping the relevant GHG reduction targets updated with due diligence certainly relate to substantive aspects of the inquiry, rather than an assessment of whether the interests of the individual have been considered. Therefore, the state should enjoy a wider margin of appreciation than a reduced one. It is certainly for the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this difficult social and technical sphere; this is an area where the Contracting States are to be recognised as enjoying a wide margin of appreciation.[54] Although a margin of appreciation is left to the national authorities, their decision remains subject to review by the Court for conformity with the requirements of the Convention.[55] In the case of Verein *Klimaseniorinnen Schweiz and Others v. Switzerland*, the decisions of national courts have been scrutinised not mainly from the viewpoint of their conformity with the requirements of the Convention, but rather from the perspective of the nature and gravity of the threat and the consensus as to the stakes involved in ensuring the overarching goal of effective climate protection.

51 *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, (Application no. 53600/20), Judgment, 9 April 2024, para. 543.

52 *Hatton and Others v. the United Kingdom*, (Application no. 36022/97), Judgment, 8 July 2003, para. 99.

53 Ibid., para. 100.

54 Ibid.

55 *Buckley v. the United Kingdom* (Application no.20348/92), Judgment, 29 September 1996, para. 74.

In addition to the aspects mentioned above, this case also deviates from the established approach in terms of severity threshold. The Court has repeatedly noted in several cases that no article is specifically designed to offer protection of the environment as such.

> The Court reiterates at the outset that Article 8 is not violated every time environmental pollution occurs. There is no explicit right in the Convention to a clean and quiet environment, but where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8 (.....). Furthermore, the adverse effects of environmental pollution must attain a certain minimum level if they are to fall within the scope of Article 8 (...). There would be no arguable claim under Article 8 if the detriment complained of was negligible in comparison to the environmental hazards inherent to life in every modern city (...).[56]

Referring to the facts of the case, one cannot completely be convinced that the severity threshold has been met in this specific case. Climate change undoubtedly and adversely affects the quality of private life of the applicants, but there is no fact in the case that makes us assume that the discomfort exercised by them reached the minimum level of severity. The facts of the case do not indicate the direct negative effects of climate change on the well-being of applicants.

It is, of course, one of the characteristics of climate change that its effects have become – at least by reference to any comparators within the respondent State – 'environmental hazards inherent to life in every modern city' and, as such, no applicability of art. 8 is capable of being derived from such a comparison which, in the Court's case-law, tended to be tied to or triggered by an identified source of (potential) pollution within the geographical vicinity.[57] The Court's approach in environmental matters generally relies on the establishment of a causal link between specific sources of harm and the actual harmful effects on applicants. Accordingly, those exposed to that particular harm can be localised and identified with a reasonable degree of certainty, and the existence of a causal link between an identifiable source of harm and the actual harmful effects on groups of individuals is generally determinable.[58] In that specific case concerning climate change, it is scarcely possible to identify a specific source from which environmental harm stems. As it comes to climate change, the Court isolates it from other environmental issues. It acknowledges that there is no single or specific source of harm:

56 *Jugheli and Others v. Georgia*, (Application no. 38342/05), Judgment, 13 July 2017, para. 62.
57 Eicke, 2024, para. 64.
58 *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, (Application no. 53600/20), Judgment, 9 April 2024 para. 415.

> In the context of climate change, the ley characteristics and circumstances are significantly different. [...] GHG emissions arise from a multitude of sources. The harm derives from aggregate levels of such emissions. Secondly, CO_2 – the primary GHG – is not toxic per se at ordinary concentrations. The emissions produce harmful consequences as a result of a complex chain of effects. These emissions have no regard for national borders.[59]

The Court emphasises that it is impossible to identify the source of the harm regarding climate change. Following that logic, one can also argue that it is barely possible to determine where the sources of emissions in a complex chain that produces harmful consequences are located. In the above quote, the Court admits that emissions have no regard for national borders. One of the third-party interveners has also pointed to the fact that '... it was clear that no solely science-based set of criteria could be used to determine precisely and quantitatively what a country's ultimate fair share to limit global warming consisted of'.[60] If so, how does the Court intend to determine the level and limits of a country's responsibility and declare that the GHG emitted into the atmosphere on its territory, and not those of neighbouring states, have caused climate change adversely affecting the rights of citizens protected under the Convention? The Court will exceed its powers once it decides to engage in substantive assessment of environmental policy, instead of moving on with the procedural assessment of the decision-making process. Even though the Court takes on the role of a regional body monitoring climate change issues, its expertise in this specific field is under question. The Court offers a legal assessment of factual elements that emerge from the material available to it. Nevertheless, when a case concerns serious matters of scientific-technical character, all possible reports or assessments in any other form officially published by bodies established for monitoring due implementation of states' obligations about combating climate change should be scrutinised. In the week of 29 January and 2 February 2024, i.e. shortly before this judgment was adopted, an expert review team[61] of the Subsidiary Body for Implementation, set up to assist the governing bodies of the UNFCCC, the Kyoto Protocol and the Paris Agreement, was due to review Switzerland's Eight National Communication and Fifth Biennial Report under the UNFCCC/Fifth National Communication under the Kyoto Protocol to the

59 Ibid., para. 416.

60 Ibid., para. 393.

61 The expert review team which considered and reported on Switzerland's previous (2022) Submissions consisted of 21 experts from different Contracting Parties covering six specialist review areas – 'Generalist', 'Energy', 'IPPU' (industrial processes and product use), 'Agriculture', 'LULUCF and KP-LULUCF' (land use, land-use change, and forestry; and activities under Article 3, paragraphs 3–4, of the Kyoto Protocol) and 'Waste' – with two lead reviewers.

UNFCCC, of 16 September 2022.[62] This report,[63] which runs to 297 densely typed pages, covers inter alia detailed evidence concerning Switzerland's compliance with the quantified emissions limitations and reduction commitments incumbent upon it as an Annex I Party to the Kyoto Protocol.[64] This example once again showcases that the willingness to fight climate change is not sufficient for stepping beyond the permissible limits of evolutive interpretation and such a radical shift in the approaches used by the Court.

Considering the clash between the previous case law of the Court and the international documents on climate change on the one hand, and this case on the other, I agree with the view of the government of Ireland, that this application sought to create a far-reaching expansion of the Court's case law on the admissibility and merits of Articles 2 and 8, that it sought to bypass the democratic process through which climate action should take place if it was to be legitimate and effective and that the application was inconsistent with the dedicated international framework governing climate change to which the Contracting Parties were committed.[65]The foregoing judgment against Switzerland contributed to new currents in environmental human rights challenging various aspects of established jurisprudence.

Finally, we focus on the Court's controversial assessment regarding a victim's status. Since the Court has unanimously declared the complaints of applicants nos. 2–5 under art. 8 of the Convention inadmissible, we will analyse the victim status of the association. According to the well-established practice of the Court, one has to have been 'directly affected' in person by the violation in question.[66] For art. 34 the word 'victim' means the person directly affected by the act or omission in issue.[67]

In that specific case, recognising the association as a victim of a violation contributes to the deviation from the established case law of the Court. The reason why an association may not be considered to be a direct victim is the prohibition on the bringing of an *actio popularis* under the Convention system; that is, an applicant cannot lodge a claim in the public or general interest if the impugned measure or act does not affect him or her directly.[68] For an applicant to be able to argue that he is a victim, he must produce reasonable and convincing evidence of

62 Eicke, 2024, para. 12.
63 Report on the individual review of the annual submission of Switzerland submitted in 2022 (FCCC/ARR/2022/CHE of 24 February 2023).
64 Eicke, 2024, para. 12.
65 *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, (Application no. 53600/20), Judgment, 9 April 2024, para. 369.
66 Guide to the case-law of the European Court of Human Rights, Environment, 2024.
67 *Balmer-Schafroth and Others v. Switzerland* (Application no.67\1996\686\876), Judgment, 26 August 1997, para. 26.
68 *Yusufeli İlçesini Güzelleştirme Yaşatma Kültür Varlıklarını Koruma Derneği v. Turkey* (Application no. 37857/14), Decision, 7 December 2021, para. 41.

the likelihood that a violation affecting him personally will occur; mere suspicion or conjecture is insufficient in this respect.[69] The mere mention of the pollution risks is not enough to justify the applicants' assertion that they are the victims of a violation of the Convention. The mere reference to risks stemming from climate change without its direct impact on an applicant does not suffice for an application to be successful.

Under the Convention, the Court may receive applications from any person, non-governmental organisation, or group of individuals claiming to be the victim of a violation by one of the high contracting parties of the rights outlined in the Convention or the Protocols thereto.[70] Hence, for applicants to raise a successful complaint before the Court, they must prove the personal impact of a state's action or inaction on their rights. This is true even where individuals or NGOs may wish to use the rights-based approach to give realisation to a duty to protect nature.[71] Moreover, the 'direct victim requirement' also implies that the Court will not entertain applications in which a legal entity relies on a Convention right that is inherently attributable to natural persons only – such as the right to respect for private life or home.[72] However, this approach is challenged by the argument that environmental law protects not only individual interests but everyone and the environment itself.[73] This argument can be a slippery slope leading to *actio popularis*. As previously mentioned in the second part of this article, in the case of *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, the Court took a very controversial position by granting victim status to an NGO in a case related to the violation of art. 8 of the Convention.

The Court notes that certain Convention rights, such as those under arts. 2, 3, and 5, by their nature, are not susceptible of being exercised by an association, but only by its members.[74] This approach entails the impossibility of associations claiming victim status in respect of a violation of the Convention arising from environmental problems encountered by natural persons. For the Court to deviate from its classic approach on victim status there should be highly exceptional circumstances.[75] Nothing in the facts of the current case points to a real threat faced by the association and the existence of highly exceptional circumstances.

Moreover, an NGO cannot claim to be the victim of measures that, on account of environmental pollution or disturbances, have allegedly infringed rights granted by the Convention to the NGO's members.[76] However, in the current case, the Court has reached quite the opposite inference. Associations

69 Ibid.
70 The Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.
71 Kobylarz, 2022, p. 370.
72 Kobylarz, 2020, p. 22.
73 A Legal Guide on Access to Justice in Environmental Matters, 2021.
74 Ibid.
75 Eicke, 2024, para. 35.
76 Guide to the case-law of the European Court of Human Rights, Environment, 2024.

are nevertheless now granted the broadest standing to seek the protection of the human rights of those affected, as well as those at risk of being affected, by the adverse effects of climate change.[77] Nonetheless, affected individuals do not by default mean to be victims.

As a ground, the Court referred to 'future risks' and recognised that in the climate-change context, everyone may be, one way or another and to some degree, directly affected, or at a real risk of being directly affected, by the adverse effects of climate change. Leaving aside the issue of jurisdiction, the fact remains that potentially a huge number of persons could claim victim status under the Convention on this basis.[78] Again, I would like to draw readers' attention to the conclusion of Judge Eicke, where he states that there is no basis for drawing any enforceable obligation from the current text of the Convention to combat 'future risk' in respect of the applicants before the Court and even less to combat a 'future risk' in respect of 'future generations', i.e. by or on behalf of individuals who are, by definition, not even before the Court.[79]

As seen from the Court's assessment, the extract from which has been cited above, no legal grounds justifying a drastic change in approach have been substantiated in the judgment. The mere wish to draw attention to the problem of climate change, to my mind, cannot be sufficient for introducing such an interpretation of a victim status which is very similar to *actio popularis*. In my opinion, this Swiss NGO has no standing, because it is not a direct victim of the results of inactions of the state.

Thus, we should acknowledge that the Court has stood for a completely new approach, diverse from the one applied to other environmental cases. The aspiration to contribute to combatting climate change is welcome; nevertheless, it should not lead to exceeding the powers of the Court resulting in a frivolous interpretation of the Convention as a living instrument.

4. Possible advantages and disadvantages arising from adopting the new protocol

In the previous parts of this article, we reviewed the Court's case law on environmental matters and the Court's new approach regarding the obligation of states to combat climate change. In the current situation, in light of the analysis of the foregoing topics, we will attempt to answer the question of whether the adoption of an additional protocol to the Convention would contribute to better protection of the right to a safe, clean, healthy, and sustainable environment.

77 *Verein Klimaseniorinnen Schweiz and Others v. Switzerland,* (Application no. 53600/20), Judgment, 9 April 2024, para. 499.
78 Ibid, para. 483.
79 Eicke, 2024, para. 42.

The climate crisis is triggering unprecedented heat waves, flooding, prolonged droughts, sea-level rise, and wildfires. Natural disasters occur in all corners of the globe. The world's population is suffering the consequences of irreversible loss of biodiversity, disrupted drinking water supplies, and deteriorating air quality. Climate change also threatens food security. These crises have direct health implications, exacerbate existing inequalities, and negatively affect the human rights of marginalised groups.

This section will analyse emerging trends and the current situation in the field of protection of environmental rights. Among other things, the feasibility pros and cons of adopting a separate protocol to the Convention will be examined.

Adoption of a new protocol on the right to a safe, clean, healthy and sustainable environment could have both pros and cons. On the one hand, the protocol could provide a legally binding framework to protect the environment and ensure that measures are taken to mitigate climate change. It could also contribute to greater international cooperation and promote accountability to protect the environment. On the other hand, there may exist impediments hindering the adoption of the protocol. The idea can be received coldly by states since it establishes new obligations and duties on states in terms of the protection of the environment.

In most states of the CoE, environmental rights are legally enforceable and the environment is recognised as a public concern.[80] In forty-two of the forty-six CoE Member States, the right to a safe, clean, healthy, and sustainable environment is already enshrined in and protected through constitutions and national legislation.[81] Nevertheless, the increasing and undeniable impact of climate change on everyday life has forced the international community to recognise the global nature of this problem, which served as a basis for the adoption of various conventions and programs to combat the negative effects of environmental pollution and climate change. Since the primary focus of this article is to analyse the approach of the Court to this issue, we avoid delving into the consideration of other international mechanisms, however, will focus on the approach of the CoE.

Despite the indication of the right to a safe, clean, healthy and sustainable environment in the main legislative acts of most CoE countries, the Committee of Ministers decided to adopt a recommendation on human rights and the protection of the environment.[82] This recommendation reaffirms human rights standards concerning environmental issues established in previous international documents, both binding and non-binding. It contains elements that may have different legal statuses as regards different member states: from standards based

80 For more information, please see: Council of Europe, Manual on Human Rights and the Environment, 2022, pp. 213- 219.

81 *Call for the adoption of an additional Protocol to the European Convention on Human Rights on the right to a clean, healthy, and sustainable environment*, 2024.

82 Council of Europe. Recommendation CM/Rec(2022)20, R*ecommendation on human rights and the protection of the environment (*Strasbourg: Council of Europe Publishing, 2022).

on the Convention, which is legally binding for all member states through treaty-based standards that are legally binding only for those states that have ratified the treaty in question (f/ex: European Social Charter, the CoE Convention on Access to Official Documents (Tromsø Convention), or the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention); to standards based on non-binding instruments.[83] The present Recommendation does not have any effect on the legal nature of the instruments on which it is based, or on the extent of States' existing legal obligations; nor does it seek to establish new standards or obligations.[84] This document recommends that the governments of the member states consider nationally recognising this right as a human right that is important for the enjoyment of human rights and is related to other rights and existing international law, as well as ensure that national legislation and practice are consistent with the recommendations, principles (no harm principle, the principle of prevention and precaution, the polluter pays principle), and guidance.[85]

The Recommendation alludes to ensuring by states, without discrimination, the effective enjoyment of the rights and freedoms outlined in the Convention including regarding the environment.[86] Specific measures may be required to ensure effective implementation of the Convention in the environmental context.[87] This provision reaffirms the commitment of states to apply the Convention rights to environmental matters. Special attention is paid to access to information and justice in environmental matters, participation in decision-making, and environmental education.[88] Additionally, human rights should be considered at all stages of the environmental decision-making process.[89]

This recommendation does not offer anything radically new. It has already been noted above that the vast majority of CoE countries already recognise the right to a safe, clean, healthy, and sustainable environment. The importance of this document lies in the fact that it defines the content and scope of this right by setting out the main principles of environmental law. By bringing their domestic legislation up to the minimum standards delineated in this Recommendation, a consensus will emerge on several issues in the European region, which may in

83 Council of Europe. Explanatory Memorandum to Recommendation CM/Rec(2022)20, Human rights and the protection of the environment, (Strasbourg: Council of Europe Publishing, 2022), para .2.

84 Ibid.

85 Council of Europe. RecommendationCM/Rec(2022)20, R*ecommendation on human rights and the protection of the environment (*Strasbourg: Council of Europe Publishing, 2022), p. 3.

86 Ibid.

87 Council of Europe. Explanatory Memorandum to Recommendation CM/Rec (2022)20, Human rights and the protection of the environment, (Strasbourg: Council of Europe Publishing, 2022), para. 14.

88 Ibid.

89 Ibid.

the future serve to modify and deepen the approach of the Court in environmental cases.

As has already become clear from the second part of this article, the relationship between environmental rights and human rights also includes matters related to the state's obligation to combat climate change. It is also worth considering the dynamics of climate lawsuits submitted to the various international bodies with jurisdiction to hear individual complaints. As of the end of April 2024, 150 cases out of 798 suits against governments have referenced human rights.[90] The growing popularity of human rights instruments to address climate claims is directly linked to the inadequacy of the international oversight mechanism for the implementation of States' climate action commitments. According to Savaresi and Setzer, these rights-based lawsuits aim to fill the accountability and enforcement gaps left by international and national climate change law by typically seeking to hold public authorities and private sectors accountable for not taking adequate climate action.[91] States' human rights obligations associated with climate change cover both positive and negative substantive obligations along with procedural obligations. These cases form part of the 'human rights turn' in climate litigation, with numerous persons turning to human rights law to support their arguments concerning climate-related litigation.[92] Scholars predict that in the future, more rights-based litigation is likely to focus on the enforcement of climate legislation and the protection of procedural rights associated with it.[93] In parallel, human rights cases with a specific focus on climate change may cause a backlash in the form of so-called 'just transition litigation'. These cases rely on human rights law to challenge initiatives (projects or laws) adopted for energy transition.[94] Both the UK and the EU have been found to breach their obligations under the Aarhus Convention, for adopting renewable energy law and policies without adequate public participation.[95]

As has been repeatedly pointed out, the protection of environmental rights is not new to the Court. Over the past decades, the Court has issued numerous decisions on the subject. The Convention should reflect the realities and values of modern society and regulate relations that have already arisen. In this sense, to keep up with changing social conditions without losing consistency, an additional protocol to the Convention could be adopted covering the right to a safe, clean, healthy, and sustainable environment and the obligations of states to combat climate change, thereby defining both the rights of applicants and the framework of state obligations.

90 *Global Climate Change Litigation*, 2024.
91 Savaresi and Setzer, 2022, p. 8.
92 Yoshida and Setzer, 2020, p. 140.
93 Savaresi and Setzer, 2022, p. 31.
94 Tigre and Urzola, 2023.
95 Savaresi and Setzer, 2022, p. 30.

Nonetheless, recognising a right to a safe, clean, healthy, and sustainable environment as a separate right in an additional protocol is fraught with some semantic risks. It is worth emphasising once again that at the moment the Court considers and evaluates this right from the prism of civil rights specified in the Convention. By adopting the right to a safe, clean, healthy, and sustainable environment as a separate and independent right, the Convention will expand its scope to include collective and socio-economic rights. By adopting an additional protocol, the Court is likely to turn to the established approaches of various international and regional mechanisms to enrich its case law. It can be noted that the Inter-American Court of Human Rights (IACHR) has outlined a far-reaching approach to this topic. In its Advisory Opinion OC-23/17, the IACHR noted the following:

> The Court considers it important to stress that, as an autonomous right, the right to a healthy environment, unlike other rights, protects the components of the environment, such as forests, rivers, and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals. This means that it protects nature and the environment, not only because of the benefits they provide to humanity or the effects that their degradation may have on other human rights, such as health, life, or personal integrity, but because of their importance to the other living organisms with which we share the planet that also merit protection in their own right. In this regard, the Court notes a tendency, not only in court judgments, but also in Constitutions, to recognise legal personality, and, consequently, rights to nature.[96]

As understood in this way, this approach leads to the recognition of the rights of nature as separate legal entities claiming protection. The automatic transfer of the IACHR's approach to the Court's case law is under question unless a separate right to a safe, clean, healthy, and sustainable environment is enshrined in a new additional protocol. Considering the unprecedented decision of the Court in the case of *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, this option for the development of case law should not be dismissed. Copying this approach and applying it to the case law of the Court could negatively affect the anthropocentricity[97] of the Convention. Some scholars claim that the interpretation of the Convention in an anthropocentric manner makes the Court system ill-suited for questions of general environmental degradation, climate change, and the loss of

96 Inter-American Court of Human Rights, The Environment and Human Rights, Advisory Opinion OC-23/17, para. 62.

97 Anthropocentricity places human beings and their human rights at the center of protection provided by a relevant legal mechanism.

biodiversity.[98] Nevertheless, in my view, deviation from anthropocentrism may call into question the well-established approach to the victim status and the scope of States' obligations, etc.

Having said all that, I do not mean to diminish the importance of adopting an additional protocol – quite the reverse. The adoption of a protocol could help to delineate the positive obligations of states. Recognising a convention right to a safe, clean, healthy and sustainable environment would consolidate public authorities' environmental human rights obligations, promoting legal certainty, the effective implementation of Convention rights, and effective public administration.[99] I believe that it is not the protocol's adoption but its content that should be the subject of legal discussion. Whatever the case, the wording must be such as not to depart from the anthropocentric course of the Convention.

5. Conclusion

Undoubtedly, environmental pollution as well as climate change, depending on the intensity, directly affect the quality of life and human rights. Referring to the doctrine of the living instrument, the Court has created a rather rich case law covering different articles of the Convention, in one way or another related to complaints about the actions/inactions of states in the field of environment. Despite the absence of a separate right to a safe, clean, healthy, and sustainable environment, the Court has built a consistent position and thus, responded to the challenges of the last decades related to environmental pollution.

Meanwhile, environmental complaints cover an increasingly wide range of issues that have not been legally assessed in previous Court judgments. This is particularly the case concerning states' positive obligations to combat climate change and the limits of the Court's discretion. Responsibility for climate change, unlike responsibility for other environmental problems, is difficult to determine because it is not easy to establish a direct link between a particular act or omission of the state and the harm caused.

However, in the case of *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, the Court reviewed its case law and adopted a revolutionary approach in the case. Even though international civil society organisations have supported the approach of the Court in the aforementioned case,[100] the court's judgment risks opening Pandora's box. The Court's determination to be at the forefront of the fight against climate change urges it to focus on the intention itself rather than on justifying changes to its legal approach, overshadowing legal points such as the

98 Peters, 2020, '1. Introduction: the environment before the European Court of Human Rights' section, p. 2.
99 Balfour-Lynn and Willman, 2022, p. 4.
100 Bharadwaj, 2024.

Court's jurisdiction, the positive obligations of States, the victim status of NGOs under Art. 8, and the issue of causation, etc.

The environment should be deemed as a source of threat to the classic civil and political rights of people, rather than a collective and social right under the Convention. Nevertheless, the adoption of a new additional protocol can also be considered as an option. In light of the above, the importance of adopting an additional protocol increases to determine the limits of the right to a safe, clean, healthy and sustainable environment, the margin of appreciation of states, the competence of the Court, etc. The adoption of an additional protocol would help bring consistency to the Court's decisions. Nevertheless, it is important to endeavour not to depart from the anthropocentricity inherent in the spirit of the Convention.

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Croatia and Federalist Ideas

ABSTRACT: *This paper sheds light on different stages of development of the ideas and practice of federalism and the intriguing diversity of actors in the development of constitutionalism in Croatia during the 19th, 20th, and 21st centuries. Constitutional development shows that federal ideas and practices were not unknown in the Croatian national framework. Croatia, until it achieved the independence and sovereignty of which the 1990 Constitution of the Republic of Croatia is a crucial manifesto, participated in various political organisations with federal characteristics. The Preamble of the Constitution of the Republic of Croatia is a concise reminder that Croatia was a member of many alliances over its turbulent history. The common feature of all those, longer or shorter periods of time in which Croatia participated in pseudo-federal or real federal alliances, is their focus on 'constitutional moments'. Historical experience also shows that the interest of the Croatian nation in federalism weakened whenever the chances of overcoming their own status as a mere political etatist fragment in the wider federal entity increased. With the adoption of the Declaration on the Proclamation of the Sovereign and Independent Republic of Croatia and the Constitutional Decision on Sovereignty and Independence of 25 June 1991, the Republic of Croatia was finally realised as a 'unitary and indivisible, democratic, and social state' with the constitutional capacity of entering into different alliances with other states. The result of the accession of the Republic of Croatia to the EU then enabled a different understanding of the federal principle, which is of permanent importance to all constitutional democracies.*

KEYWORDS: Republic of Croatia, Croatian federalists, federalism, federation, EU

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Alice: Would you tell me, please, which way I ought to go from here?
The Cheshire Cat: That depends a good deal on where you want to get to.
Alice: I don't much care where.
The Cheshire Cat: Then it doesn't much matter which way you go.
Alice: ...So long as I get somewhere.
The Cheshire Cat: Oh, you're sure to do that, if only you walk long enough.'
— Lewis Carroll, Alice in Wonderland

1. Introduction

The dominant determinant of early research on the establishment of new democratic regimes in ex-socialist countries conducted at the end of the 1980s was 'constitutional choice'. Exactly this syntagm was used, for example by *Arend Lijphart*, to describe a political game in which key actors, in a given moment, legitimately decided on the adoption of fundamental options regarding the electoral system (majoritarian vs. proportional system) and model of relations between legislature and executive (presidential vs. parliamentary government). Among the most important factors that, according to Lijphart, explained the constitutional choice, were the logic of the democratisation process and the problem of ethnic divisions and minority representations.[1] Other authors argue that the democratisation process depends on its complex relation with federalism, as democratisation and federalisation are widely connected through numerous significant constitutional political strands. According to *Sonnicksen*, in the complex of division of powers democracy and federalism represent two distinct dimensions of government based on different constituent powers. Further, in different perspectives of their complex constitutional relation combined in the framework of one polity, both old as well as new tensions and challenges for the state and society are elaborated.[2] In any case, the relationship between federalism and the democratic process remains an open question that is not outdated and definitely not closed. Conversely, the positioning and application of democratic ideas in a transnational context only prove that this relation will continue to exist.[3]

Constitutional choice, thus, is an integral part of the more comprehensive and concrete historical processes of 'political choice', 'rational choice', 'social engineering', and so on. In other words, such phenomena constitute reflections of a wide range of causes and dilemmas with which the creators of constitutional law have been confronted repeatedly in the dialogue on a comparative level.[4] This

1 Lijphart, 1991a, p. 17 et passim; Lijphart, 1991b, p. 72 et passim.
2 Sonnicksen, 2022, pp. 1–17.
3 Dahl, 1983, pp. 97–98.
4 Tribe, 1985; Dorff, 1994, pp. 99–100 et passim.

was also the case in most countries, as well as the ex-socialist world, including Croatia. In the long and never fully completed process of democratisation, *inter alia*, specific issues of the organisation of government in the successive appearances of federal and unitary states were brought up and solved in different ways. The Declaration on the proclamation of a sovereign and independent Republic of Croatia, adopted by the Croatian Parliament (Sabor) on 25 June 1991, reveals dramatic reminiscences in this regard and points us to the conclusion that the question of Croatian 'constitutional choice' (i.e. determination between constitutionality of unitary or federal character) has been a permanent and critical question throughout the Croatian political history. This important document of modern Croatian statehood emphasises that the Croatian people have preserved the self-awareness of their own identity and the right to self-determination in the 'independent and sovereign state of Croatia' for many centuries. At the same time, the tradition of Croatian historical law preserved 'Croatian statehood throughout the history'. However, the Declaration does not forget to remind us that the Croatian nation:

> ...by a confluence of historical circumstances, being on the border between Eastern and Western Christianity, two often opposing civilizations and cultures and different political, economic and other interests ... was under the rule of Croatian national rulers and the Croatian Parliament, either independently or in personal and contractual unions and state-legal alliances with other nations, but always vigilantly keeping its ancient state selfhood and sovereignty...[5]

'Independence', 'personal union', or 'state alliances with other nations' are permanent and well-known questions for Croatian statehood and its constitutional history. In this article, we try to briefly elaborate on the evolution of both the theory and practice of federalism in Croatia to shed light on its contribution to the realisation of the values of constitutional democracy. This brief analysis of the most significant stages of federal theory and practice in Croatia considers the works of researchers on federalism who believed that federalism is beneficial for maintaining the established democracy, but that it can also be futile, even a nuisance to new political regimes:

> 'In all federal democracies central governments have a difficulty to credibly commit not to encroach on the benefits promised to minority constituencies. The theoretical solution for credibly enforcing the

5 See Declaration on the proclamation of sovereign and independent Republic of Croatia (25 June 1991), available at: https:// www.sabor.hr/hr/deklaracija-o-proglasenju-suverene-i-samostalne-republike-hrvatske-25-lipnja-1991

> agreed-upon federal terms is to limit the effectiveness of potential coalitions in favour of revising those terms. High-functioning democracies accomplish this by developing complex competitive structures. New and low-functioning democracies resort to imposing direct restrictions on coalition formation thus scaling back democratic competitiveness. This means that in low-functioning democracies the federal form stunts democratic development'.[6]

The following premises formed the starting point for this article as short and critical overview of theory and practice of federalism in Croatia. Federalism is, as summarised by Lijphart, a 'most typical and drastic method of dividing power: it divides power between entire levels of government', that is, in federalism, the power is divided between central and regional governments. Having in mind the work of *William H. Riker,* as modern classic of federal thought, we understand federalism as 'a political organization in which the activities of government are divided between regional governments and a central government in such a way that each kind of government has some activities on which it makes final decisions'.[7]

It is thus our intention to demonstrate that Croatia, until it achieved the independence and sovereignty of which the 1990 Constitution of the Republic of Croatia is a crucial manifesto, participated in various political organisations with federal characteristics through a series of historical sequences, as noted by Riker.[8] The common feature of all those, longer or shorter periods of time in which Croatia participated in pseudo-federal or real federal alliances is their focus on 'constitutional moments', that is, on the projection and realisation of a certain type of 'union of states' (i.e. such federalist modes of political organisation that Croatia formed with the rest of its constituent parts, no matter what they were called).[9] We consider 'constitutional moments' as such occasions or episodes in history when '... significant steps were taken in the definition or redefinition of polities. Their actors were writers or politicians, rulers or ruled, who found inspiration in a distant past or instead looked towards a future to be drawn anew'.10

By shedding light on the different stages of the development of federalist ideas and practice in Croatia, we reveal the intriguing diversity of the actors of constitutional thought and their actions in the context of time. Their evident positions and beliefs show that federalist ideas and practice during the 19th, 20th, and early 21st centuries were not unknown to the national framework. Constitutional and political thought in that period always understood federalism, 'essentially, if

6 Filippov and Shvetsova, 2013, pp. 167–184.; Elazar, 1996, pp. 45–62.
7 Riker, 1975; see Dorff, 1994, p. 100; Greenstein and Polsby, 1975, pp. 93–172.
8 Ibid.
9 Forsyth, 1981, p. 3.
10 Gil, 2024.

not exclusively', as a question of structure.[11] However, it is also evident that the interest of the Croatian nation in federalism weakened whenever the chances of overcoming the status of a mere political etatist fragment in the wider federal entity grew. An obvious proof of such a conclusion is the realisation of the national referendum on state independence. The referendum on the independence of Croatia was held on 19 May 1991. The turnout was 83.6%, while 93.94% majority of voters who cast their vote opted for Croatia to become a sovereign and independent state. With the adoption of the Constitutional Decision on the Proclamation of the Sovereignty and Independence of the Republic of Croatia and Constitutional Declaration on the Proclamation of sovereign and independent Republic of Croatia of 25 June 1991. the Republic of Croatia was finally realised as 'unitary and indivisible democratic welfare state'.[12]

2. Theory and practice of federalism in Croatia in the 19th and 20th centuries

The process of the formation of nation-states in Europe after the civil wars in England and France represents a differentiated and violent asymmetric process that mostly took place to the detriment of small European nations. One such nation is Croatian nation, which during the 19th century and most of the 20th century was positioned between stronger political powers (Italy, Austria, Hungary, and later Serbia) and their nationalisms; as such, it did not have the strength to fight for the creation of its own nation-state in the sense of an independent and equal subject of newly emerging and more complex international relations. In realistic relations, in which there was no regard at all for lofty revolutionary or democratic ideas and principles of 'liberté, égalité, fraternité' of 1789 and 1848, large post-revolutionary waves of centralisation, politics of power, colonisation and expansion of stronger European states (e.g. France, Germany, Italy, Austria, etc.) prevailed. This state of affairs paved the way for competing, unitary, and homogenising states with ethnic national cores:

> The new type of sovereign nation states became closed units with strong boundaries. They pursued centralisation policies in the name of their national interests... The reality is that the sovereign nation states, in their internal and external political practices, often successfully suppressed the autonomy principle of persons and of

11 Dorff, 1994, p. 100.

12 Constitution of the Republic of Croatia (1990), Art. 1., Official Journal Narodne novine 56/1990.

> different communities. Federalism was rejected as dismembering force weakening the (nation) state.[13]

However, in contrast to state policies, the ideas of certain political thinkers also developed. Between Rousseau's unitarism and Montesquieu's federalism as fundamental principles of organising new postrevolutionary state and society, they wholeheartedly advocated new and different federalist ideas.[14] Such were also the Croatian 'federalists'.

3. Federalist ideas and their proponents and critics in Croatia from the 19th to the 21st century

It was not prior to the 19th and 20th centuries that federations became widely accepted as a model of the constitutional organisation of a state. Their further global expansion was not halted by the evident and widely accepted nationalism of strong European nations. Obvious inconsistency of these two projects (i.e. nation-state as sovereign political organisation of nation on one side and federation as compound state that had the potential of constitutionally organised coexistence of different ethnic groups on the other side) was a favourable environment for creation of new, important, and complex ideas.[15] In this sense, among Central European federalist thinkers, some of the most important were Hungarian *Eötvös József* (1813–1871), Czech *František Palacky* (1798–1876), German *Friedrich Naumann* (1860–1919), and Austrians *Karl Renner* (1870–1950) and *Richard Nikolaus Eijiro von Coudenhove-Kalergi* (1894–1972).[16] Under the Croatian national framework, the following federalist thinkers, among others absolutely deserve to be mentioned: *Bogoslav Šulek* (1816–1895), *Josip Pliverić* (1847–1907), *Ladislav Polić* (1874–1927), *Stjepan Radić* (1871–1928), *Jovan Stefanović* (1896–1964), *Zvonko Lerotić* (1938), and *Branko Smerdel* (1949). While Šulek, Pliverić, Polić, and Radić lived and worked under the political framework of the Habsburg monarchy (1815–1918) and Kingdom of Serbs, Croats, and Slovenes (1918-1929), Stefanović, Lerotić, and Smerdel elaborated on the position and rights of Croatia as a federal actor inside Federative People's Republic of Yugoslavia (FNRJ) and Socialist Federal Republic of Yugoslavia (SFRJ). The work of Smerdel is of particular importance, as he carefully elaborates on the Croatian position from a constitutional standpoint regarding the process of constructing the 'European Croatia'; hence, it comes its accession to a new alliance which is fundamentally different from the unwanted 'South Slavic

13 Bóka, 2006, p. 311; Ziblatt, 2004, pp. 70–98.
14 Wang, 2013, p. 168; Ward, 2006, pp. 551–577.
15 Hesse and Wright, 1996, pp. 1–6.; Potulski, 2011, pp. 73–87.
16 See, for example, Bóka, 2003.

union, or any form of consolidated Balkan state', as it was plainly stipulated by the Croatian constitution-makers immediately after the war ended.[17]

■ *3.1. The federalist ideas of Bogoslav Šulek (1816–1895), Josip Pliverić (1847–1907), Ladislav Polić (1874–1927), and Stjepan Radić (1871–1928)*

The transformation of politics and society in imperial Austria by the end of the 19th and beginning of the 20th century, as well as the basic characteristics of nationalist politics and political crisis that followed the modernisation of the Habsburg monarchy and its constituent parts, structurally determined the growing significance of different nationalities and created conditions for new forms of nationalisms, their ideologies, politics, and movements. In his empirical research, *P. Decker* explains how particular patterns of political modernisation determined the development of nationalism under the monarchy: 'state policies, province-based intellectuals and cultural institutions were critical for explaining the building of the nation in Habsburg Central Europe'.[18] Important actors of these events were 'provincial intellectuals', thinkers coming from different parts of the Habsburg Empire. We will briefly present below the federalist thought of Bogoslav Šulek, Josip Pliverić, and Ladislav Polić.

(I) Bogoslav Šulek (1816–1895). As a public figure, Šulek mainly shaped his active engagement as a creator and interpreter of political views of the Croatian liberal citizenry before and after the revolutionary 1848.[19] At that time, the Croatian parliament and Ban Josip Jelačić decided to sever political connections with Hungarian government and opted for building closer political links with neighbouring Slovenian and Serbian regions in south Hungary, as well as strengthened the territorial integrity of Croatia. Šulek offered a broader interpretation of successive parliamentary conclusions in the Zagreb press, and - following political events in Monarchy - progressively and cautiously began to advocate the federalist position of Croatia in the Habsburg monarchy.

Šulek believed that all countries of the monarchy should form a federal state 'in which every state would be free as it regards its internal home affairs and would only be in alliance with others as far as general interests are concerned'. Against the centralist politics of Vienna that desired to compress all parts of the monarchy into one whole, 'federalist party wants to transform monarchy into a confederation, i.e. a closer union of all peoples

17 'Any procedure for the association of the Republic of Croatia into alliances with other states, if such association leads, or may lead, to a renewal of a South Slavic state union or to any form of consolidated Balkan state is hereby prohibited' - Art. 142, para. 2 of the Constitution of the Republic of Croatia (consolidated text), Official Journal Narodne novine 85/2010. See also: Bašić, 2015; pp. 1165–1166; Osiander, 2010., p. 1–18.

18 Decker, 2017., p. 1–346.

19 See https://www.enciklopedija.hr/clanak/sulek-bogoslav for details.

of the Austrian Monarchy'. After the adoption of the Octroyed Constitution (1849), he still believed that only a federation could achieve political peace in Austria. Every new alliance must consider freedom of Croatia and its national interests.

Advocating an essentially Austro-Slavist policy of restructuring the empire into a federal state, Šulek indeed believed that federalism, following the Swiss model, after Austria's exit from the German alliance and defeat by Prussia, never had better chances of success in that complex multinational state. Šulek thus advocated federalist ideas until the end of his professional and public career.[20]

(II) Josip Pliverić[21] (1847–1907), professor of Constitutional Law at the University of Zagreb, Faculty of Law, was undoubtedly versed in all the facts and difficulties regarding the theory and practice of federalism in German countries which, since the 17th century, have had great difficulties with the application of the federal principle. The famous remark of *Samuel Pufendorf* (1632–1694) is an eloquent evidence on complicated federalist construction of German states: *'Irregulare Aliquod Corpus Et Monstro Simile'*.[22] Plivarić first reacted to *Georg Jellinek's* (1851–1911) book on associations of states (*Die Lehre von den Staatenverbindungen,* Haering, Berlin, 1882), in which he characterised Croatia as a 'Hungarian province', while in his later book, *Die Staat Fragmente* (1896), he considers Croatia as an entity that is 'more than a province, but less than a state'.[23] Since Jellinek argued that sovereignty is indivisible and absolute because it can belong to only one entity and cannot be divided, he concludes that there can be only one sovereign in each union, either at the federal or national levels. Sovereignty can belong to independent member states in the case of a confederation, or can belong to a federation (i.e. federal state).[24]

Unlike Jellinek, for whom Croatia within the Empire before and after Metternich was a 'fragment-state', Pliverić explained Croatian statehood according to the Croatian-Hungarian Settlement (1868) and earlier tradition. In his Contributions to the Hungarian-Croatian common state law (*Prinosi ugarsko-hrvatskomu zajedničkom državnom pravu – Beiträge zum Ungarisch-kroatischen Bundesrechte,* 1886). Pliverić tried to prove that Croatia formed a real union with Hungary and, as part of the union, it had all elements of statehood: territory, population, and government. The contractual character of the Settlement from the Croatian side rested on all three elements. According to Pliverić, the Croatian-Hungarian state alliance did not have the legal

20 Markus, 2007, pp. 181–204.
21 See https://www.enciklopedija.hr/clanak/pliveric-josip for details.
22 Šmit, 2018, pp. 893–918.
23 Čepulo, 2007, pp. 185–187.
24 See Frost, 2019.

character of a state because both Hungary and Croatia were sovereign states that were contractually associated to jointly perform certain state affairs. In the book *Croatian State* (*Der kroatische Staat,* 1886), he argues that the relation between Croatia and Hungary differs from a pure model of real union, while in his last work, titled *Spomenica o državnopravnih pitanjih hrvatsko-ugarskih* (1907), he points to numerous breaches of the original settlement agreements done by Hungary.[25]

Pliverić's impressive defence of the Croatian projection of federal relations in Austria came after the proclamation of the December Constitution in 1867. Despite the expectations that the new constitutional law would encourage and expand the liberal potential of the Constitution (Croatia is explicitly recognised as a distinct political unit, political nation), real politics demonstrated all illiberal limitations. The Empire thus abandoned the idea of federalism during the 1860s. In the Compromise with Hungarian politicians of 1867 and to gain the consent of Hungarian nation, the aspirations of Czechs, Slovaks, Serbs, Croats, and Romanians, who were still largely loyal to the Empire at that time, were sacrificed. The Dual Monarchy was created and the territorial integrity of Hungary was restored, while the concept of the lands of the crown of St. Stephen was set as the foundation of the Hungarian nation state. The ruling Hungarian oligarchy became dominant vis-à-vis other nations throughout the Dual Monarchy.

(III) Ladislav Polić (1874–1927). As a European student, educated in Germany under Georg Jellinek, and as the successor of Josip Pliverić at the Department of Constitutional Law at the Faculty of Law, at the University of Zagreb, Polić mainly interpreted and advocated Pliverić's ideas. Its contribution mainly concerns the idea of original statehood of Kingdom of Croatia and Slavonia in relation to Hungary and the rights of Croats as a 'political nation'. These ideas originate from the Croatian-Hungarian Settlement. Polić was regarded as federalist also in the Kingdom of SHS (1918–1931). After 1926, he was one of the leaders of the Croatian Federalist Peasant Party.[26]

(IV) Stjepan Radić (1871–1928). One of the most prominent Croatian politicians from the end of the 19th to the first decades of the 20th century and a student of law and political science at different European universities (e.g. Zagreb, Budapest, Prague, Paris), was also a constitutional and political writer who, in a number of his works, left inspiring thoughts about federalism and its significance for the Croatian nation. In this sense, his most important book is *Savremena ustavnost* (*Modern constitutionality,* 1911), although he started dealing with the issue of federalism even earlier than that. Namely, inspired by the historical ideas of Austro-Slavism, in his *Slavic Politics in the Habsburg*

25 Jelušić, 2007, pp. 189–203.

26 See https://www. enciklopedija.hr /clanak/polic-ladislav for details.

> *monarchy* (1906), he lays out the vision of future Austrian federation which mostly coincides with the programme of Austrian Christian democrats. Monarchy should become federation of five states (Austria, Hungary, Galicia, Croatia, and Czechia).[27]

After the end of the First World War, when the unification of South Slavic nations became very likely, S. Radić proposed a federation based on national unity and equality. There would be three equal Regents (the crown Prince of Serbia, the Croatian Ban, and the President of the Slovenian National council). Federal government would be composed of three ministries (foreign affairs, defence, production and supply). The highest body of the federal government would be the Supreme council of SHS, and each nation would have its own autonomous government. However, the adoption of the Vidovdan Constitution in 1921 (Constitution of the Kingdom of SHS) marked the complete rejection Radić's idea of 'neutral federative republic of Yugoslavia'.[28]

■ *3.2. Federalist ideas of Jovan Stefanović (1896-1964), Zvonko Lerotić (1938) and Branko Smerdel (1949)*

As notable 'constitutional personae' of their time, Šulek, Pliverić, Polić, and Radić directly participated as initiators of:

> the most important project of Croatian politics in the 19th century: national program connected with ideas of modern society, and especially with Austroslavism and federalism. That was the program concerning the establishment of Austrian and/or central European federation in which the Croatian nation would acquire political integrity and independence. That was undoubtedly the key Croatian political project in 19th century, fully accommodated to Croatian national program and European model of modernity. That federalist program, which was permanently present in Croatian politics from 1848–1849, enabled the territorial integrity of Croatian lands and the building of Croatian nation.[29]

Rationalising further the complex issue of federal state in the 20th century, *Jovan Stefanović* (1896–1964), *Zvonko Lerotić* (1938–), and *Branko Smerdel* (1949–) acted in a similar way. All three of them were university professors, remarkably well versed in the evolving issues of federalism, as well as in the place and role of Croatia in the new circumstances of socialist or transnational federalism.

27 See https://hbl.lzmk.hr/clanak/radic-stjepan.
28 Antić, 1982, pp. 136–222.
29 Korunić, 2006, p. 45.

(I) Jovan Stefanović (1896–1964). Professor J. Stefanović held the Constitutional Law Chair at the University of Zagreb Faculty of Law and was well respected as an authority in the field of new socialist federalism in Croatia as well as in Yugoslavia (1945–1963).[30] He wrote extensively on federalism, both in his textbooks and in special studies on contemporary federalism. One of his most influential works is *Širenje federalizma i njegovo uporedno slabljenje po sadržaju* (1954). In this book he points out that the worldwide expansion of federalism is accompanied by weakening of its content:

> ... through successive constitutional changes... These changes are especially noticeable in relations between the competences of central government and federal units; competences of central government are expanded without opposition. The reasons for this must be sought in the expansion of state intervention in economic and social domain.[31]

Having in mind the popular sovereignty principle in the framework of development of socialist statehood, Stefanović fully attributes the characteristic of nation state to Croatia. Croatia is no longer just a 'fragment' in federal mosaic as it was considered in traditional thought. If FNRJ is a 'federal people's republic', then the People's Republic of Croatia is a singular 'nation state'. Nevertheless, Stefanović points out that only a federation can be considered as a state 'in the true sense of the word'. It has undoubtedly higher authority over particular federal units – the authority of the federal state.[32]
As the most authoritative expert on federalism in the new national, socialist Croatia, Stefanović in other words saw the strengthening of unitarism in the 'weakening of the content of the federal principle', under which circumstances it was difficult to preserve the healthy seed of federalism. Therefore, statehood and sovereignty of republics – their political autonomy – will continue to be of secondary importance in relation to the democratic centralism of communist party for a certain time.

(II) Zvonko Lerotić (1938–). In the group of new authors who more intensively observed the development of federalism in Croatia and Yugoslavia after the 'Croatian Spring' in 1971, Professor of political science Z. Lerotić from Zagreb Faculty of Political Sciences stood out. He is one of those Croatian scholars who approached the issue of federalism in Croatia in the open process of 'federating of federation', which emerged after the failure of the Croatian Spring episode as Croatia's attempt to redirect the development of federalism

30 See https://www.enciklopedija.hr/clanak/stefanovic-jovan for details.
31 Stefanović, 1954, p. 43.
32 Stefanović, 1950, p. 331.

in the Yugoslav federation on new, more egalitarian bases. He wrote several books on federalism, among which the most known are: *Načela federalizma višenacionalne države* (1985) and *Jugoslavenska politička klasa i federalizam* (1989); these books develop the idea of the so-called symbiotic federalism, in which the constituent nations join together in a federation based on the idea of consensus.

The fundamental determinant of Lerotić's understanding of new federalism is that, in a multinational community, the principle of majority decision-making, as well as the so-called veto-system, must be replaced by consensus as a way of making decisions. The essential characteristics of consensus are establishing the agreement of opinion and behaviour, tolerance, acceptance of other people's beliefs, interests and values as one's own etc. In an intensive exchange of opinions with his integralist contemporaries, Lerotić strongly advocated the ideas of the so-called participatory federalism, that is, a form of federalism based on the participation of all federal units in making federal decisions and laws; he insists on the equal participation of the federal units, that is, on the egalitarian principle that manifests itself as a system of parity.[33] As the crisis of Yugoslav federalism approached its peak, Lerotić finally advocated the idea of Croatia as an independent and free state, which is an equally important subject of international relations in Europe and the world after the collapse of the socialism through the idea of confederalism.[34]

(III) Branko Smerdel (1949–). In the long history of the Constitutional Law Chair at the University of Zagreb Faculty of Law, the 'constitutional persona'[35] of Professor B. Smerdel represents all the virtues of the tradition of a versatile, competent, and critical interpreter of the theory and practice of modern federalism. Profound knowledge of the issues of 'old' and 'new' (i.e. classical and modern as well as comparative federalism) found its expression in numerous of Smerdel's works on characteristics and nature of federalism and federal relations in which Croatia found itself, both in the past and today. Professor Smerdel is the author of numerous critical projections of Croatia in the web of Yugoslav federalism, but also an authoritative interpreter of the status, rights and perspectives of Croatia in the complex network of federal-confederal-sui generis relations that the European Union has generated over the years. His fundamental premise is that one must take care that political processes in complex state communities constantly generate specific political problems and questions

33 Smerdel, 1985, pp. 1274–1276; Katunarić, 1990, p. 578.
34 Lerotić, 1979, pp. 238–250; Lerotić, 1996, p. 143
35 Sunstein, 2015.

> that need to be resolved in a manner that is adequate for application and preservation of the federal principle. This constitutes the very essence of federal solutions, which contain an ambivalence between the requirement to join a wider community and the imperative to preserve autonomy and identity in such a community.[36]

For this Croatian constitutionalist, every specific federative structure is an institutional expression of contradictory tensions between the reasons why federal units must remain small and autonomous (but not completely) and what is large and unique in the community (but not completely either). The differences between federations arise from the differences in the aforementioned two sets of reasons. Smerdel is one of the few scholars in Croatia who pleaded for a realistic assessment and verification of the national capacities regarding the EU accession, while demanding protection and guarantees of constitutional and national identity. His euroscepticism was based on the conviction that only euro realism can save us from possible disappointments of coexistence in a new alliance. For the same reason, it is important to know the community we wish to join:[37]

> We are about to join a political interstate community in which we will have to protect our identity and stand up for our interests. In any form of interstate integration, the last stronghold is the national constitution. Croatia is no exception. The Constitution will be very important and necessary for us when (and if) the referendum decision of Croatian citizens is finally confirmed by the governments or citizens of all 27 European Union members. This is why those lawyers who believe that real equality in the EU is a privilege of the great and powerful are wrong.

Today, Professor Smerdel is one of the strongest actors in the renewal of the traditionally strong Croatian federalist thought, which was systematically suppressed and even underestimated since gaining state independence, all according to logic that the former Yugoslav federation 'is to blame for all our troubles'. His constant message is that any entry into a complex community of states – and today the EU is such a community – requires knowledge and application of adequate political principles of behaviour, as well as the necessity of systematic and wise action when choosing coalitions and joining alliances, so that the Republic of Croatia as a small state could advocate for its interests and preserve its identity.

36 Smerdel, 2011, p. 8.
37 Smerdel, 2011, pp. 5–16.

4. Concluding remarks

The Preamble of the Constitution of the Republic of Croatia (1990) is a concise reminder that Croatia was a member of many alliances over its turbulent history.[38] Nevertheless, among the numerous alliances enumerated in the text of 'Historical foundations' (*Preamble*) of the Croatian Constitution by its author, the first President of sovereign and independent Republic of Croatia, *Franjo Tuđman*,[39] there are only

38 In the wording of Historical foundations (i.e. Preamble) numerous entities with which Croatia (Slavonia, Dalmatia) formed an alliance throughout history are enumerated. In those alliances Croatia did not enjoy status of federal unit – it has become true subject of federalism only in socialist Yugoslavia (1945–1990).

39 'The millennial national identity of the Croatian nation and the continuity of its statehood, confirmed by the course of its entire historical experience in various political forms and by the perpetuation and development of the state-building idea grounded in the historical right of the Croatian nation to full sovereignty, has manifested itself: – in the formation of the Croatian principalities in the seventh century; – in the independent medieval state of Croatia established in the ninth century; – in the Kingdom of the Croats established in the tenth century; – in the preservation of the attributes of statehood under the Croatian-Hungarian personal union; – in the independent and sovereign decision of the Croatian Parliament in 1527 to elect a king from the Habsburg Dynasty; – in the independent and sovereign decision of the Croatian Parliament to ratify the Pragmatic Sanction in 1712; – in the conclusions of the Croatian Parliament of 1848 regarding the restoration of the integrity of the Triune Kingdom of Croatia under the authority of the ban (viceroy), rooted in the historical, national and natural right of the Croatian nation; – in the Croatian-Hungarian Compromise of 1868 regulating relations between the Kingdom of Dalmatia, Croatia and Slavonia and the Kingdom of Hungary, resting on the legal traditions of both states and the Pragmatic Sanction of 1712; – in the decision of the Croatian Parliament of 29 October 1918 to sever all constitutional ties between Croatia and Austria-Hungary, and the simultaneous accession of independent Croatia, invoking its historical and natural national rights, to the State of Slovenes, Croats and Serbs, proclaimed in the former territory of the Habsburg Empire; – in the fact that the Croatian Parliament never ratified the decision made by the National Council of the State of Slovenes, Croats and Serbs to unite with Serbia and Montenegro in the Kingdom of Serbs, Croats and Slovenes (1 December 1918), subsequently proclaimed the Kingdom of Yugoslavia (3 October 1929); – in the establishment of the Banate of Croatia in 1939, which restored Croatian state autonomy within the Kingdom of Yugoslavia; – in the establishment of the foundations of state sovereignty during the course of the Second World War, as expressed in the decision of the Territorial Antifascist Council of the National Liberation of Croatia (1943) in opposition to proclamation of the Independent State of Croatia (1941), and then in the Constitution of the People's Republic of Croatia (1947) and in all subsequent constitutions of the Socialist Republic of Croatia (1963-1990), at the historic turning-point characterised by the rejection of the communist system and changes in the international order in Europe, in the first democratic elections (1990), the Croatian nation reaffirmed, by its freely expressed will, its millennial statehood; – in the new Constitution of the Republic of Croatia (1990) and the victory of the Croatian nation and Croatia's defenders in the just, legitimate and defensive war of liberation, the Homeland War (1991-1995), wherein the Croatian nation demonstrated its resolve and readiness to establish and preserve the Republic of Croatia as an independent and autonomous, sovereign and democratic state.' Constitution of the Republic of Croatia (consolidated text), Official Journal Narodne Novine 85/2010.

two federative states that had a 'federative indication' in their name and during which Croatia was formally and legally a federal subject. The first one was FNRJ (1946–1963), and the second one was SFRJ (1963–1990), certainly one of only a few socialist federations in the world at that time (USSR, ČSSR). With the formation of Yugoslavia, which included six federal units (republics), each of six republics had its own constitution and its own organisation of state power. Therefore, Croatia as a federal unit existed in all stages of the existence of Yugoslavia.

Of course, this still does not mean that federalism in the countries that joined Yugoslavia in 1945, including Croatia, only began with the adoption of the federal Constitution of the FNRJ in 1945 (i.e. the Constitution of the People's Republic of Croatia in 1946). We have shown earlier that different ideas on federal principles existed in Croatia before the constitutions that provided the federal organisation of government.

Such ideas appeared simultaneously with the manifestation of the desire for the realisation of national independence from the end of the 18th and to the beginning of the 19th century, which was logical to expect considering the situation of the Croats and all other South Slavic nations within the framework of the Habsburg and Ottoman empires. All such (or similar old) alliances in which Croatia found itself due to the force of historical circumstances factually 'disturbed and complicated the national story'.[40]

After the collapse of the federal state, Croatia won its status as an independent, autonomous, sovereign democratic state through the Homeland War (1991–1995), with the legitimate constitutional potential of association into new alliances, which was used in 2013 by joining the European Union.[41] The Croatian membership of the European Union in the same time opened new perspectives for the development of federalist ideas in Croatia and a critical assessment of its new political position and related interests. Over half a century of existence within the Yugoslav federation and long history of Croatian federalist thought should be beneficial in that regard.

40 Frost, 2017, p. 37. Regarding the confusion on names, see Degan, 1991, pp. 3–46.
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LILLA BERKES*

The Role of Education in Coexistence

ABSTRACT: *In the increasingly federalised European Union, cultural diversity has become both an asset and a challenge. From a cultural viewpoint, this diversity includes many dominant cultures, indigenous and national minority cultures, as well as immigrant community cultures, as a result of large population movements. There are similarities and differences between these cultures, and the states and, ultimately, the European Union must seek to strike a balance between them, avoiding confrontation, tensions, and clashes, while simultaneously creating social peace, solidarity, and loyalty. Important elements in this process are socialisation, adaptation, the application of integration policies, and, ultimately, education. Culture is a learned factor, as people acquire cultural patterns through socialisation, and education is one of the most important arenas for this socialisation. Education, if it considers the cultural differences in society, does so primarily by promoting the coexistence of cultures, building bridges between different cultures through the means of understanding, and thus promoting social justice. Currently, Member States in the European Union are addressing these challenges according to their own objectives and national needs. The study therefore examines in general terms how Member States are responding to the emergence of different cultures. It also takes into account the process of federalisation of the European Union, in which the question of how to respond to cultural diversity may become a common – and shared – concern for the European Union. The study therefore also looks at educational responses to cultural diversity in the European Union.*

KEYWORDS: acculturation, education, European Union, diversity, integration, inclusive education, minorities

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1. Introduction

The European Union is a culturally diverse entity. This diversity needs no further explanation, as we are aware that it is home to countless nations, nationalities, and majority and minority cultures. Member States are diverse as well, but at the level of the European Union, this diversity becomes multilevel: the majority, the dominant culture of each state, is only one culture among many, joined by the cultures of the various nationalities, indigenous communities, and immigrant groups. Looking at the history of the development of the European Union, we can see that diversity has been constantly increasing, mainly because of different population movements (whether we are talking about immigrants from third countries or population movements between Member States).

In an increasingly federalised European Union, cultural diversity is becoming both an asset and a challenge. Cultural differences can significantly affect many aspects of life.

Education, if it considers the cultural differences in society, does so primarily with a view to promoting the coexistence of cultures, building bridges between different cultures through means of understanding each other, and thus promoting social justice.

Increasing diversity necessarily implies the need to learn about cultural patterns that are different from our own to strengthen our ability to cooperate, manage conflict, and take advantage of diversity. This can be achieved through learned skills and processes, in which education plays a key role. At many levels, the challenge for education is to be able to effectively respond to and influence these processes. The federalisation process will reach a point where the focus will shift to the question of whether education should remain entirely within the competence of the Member States or whether the centre can promote it, as education also plays a key role in forging a sense of belonging to the European Union, in shaping a common identity, and in dealing with the impact of the high level of diversity on the European Union.

2. Protection or loss of culture

Cultures interact constantly with each other. Each culture has elements that are the same (or very similar) and others that are distinctive. For example, there may be minor differences between nationalities and the majority culture, whereas there may be major differences between the dominant culture and the culture of an immigrant group. This also includes cultural practices that are (or should be) declared unacceptable in Western cultures (e.g. there is a high degree of consensus on the condemnation of genital mutilation or child marriage).

The emergence of a different (alien) culture has always been a potential source of tension in the society and for the state. The source of this tension stems from the need to maintain sovereignty on the host side and autonomy on the alien side. This is because the experience of the differences between them (at the level of language, beliefs, rituals, daily life, etc.) creates a rupture in the original experience of homogeneity on both sides and raises the question of what the words and actions of the other person mean, whether the other person is a threat to the host, or whether the host is a source of danger to the alien.[1] Related to this is the diminishing state authority as a result of globalisation, which amplifies the fear that the presence of alien cultures works against sovereignty.[2]

The meeting of cultures with such a high degree of diversity necessarily implies the introduction and implementation of certain social organisation policies. Historically, this has been the case with the use of assimilation methods and the experimentation with integration mechanisms that have replaced assimilation policies.[3]

Traditionally, the state has favoured a certain level of homogeneity in society as a basic preference for its operations. This was based on the idea that cultural differences, that is, habits that differ from or do not conform to the cultural pattern promoted by the authorities, could be used to subvert national and political unity. In this process, political loyalty and trust were combined with cultural conformity, citizenship and cultural conformity were merged, and culturally diverse groups abandoned their original cultural customs to share their rights and goods.[4] Therefore, the state also contributes to the achievement of homogeneity (homogenisation) by active means. This includes the creation of cultural homogeneity from the 17th and 18th centuries onward (e.g. through the introduction of nationally based folk school education, the establishment of cultural institutions, the creation of population registers, language reform) and the formation of traditional ethnic groups into nations (ethnic homogenisation, where the creation of linguistic unity also played a role), typically through assimilation in its modern form from the 19th century onward. The further stages of homogenisation included religious and social unification, religious wars, the creation of state churches, and social movements.[5] These homogenisation trends were often interlinked. However, by the 20th century, states had typically abandoned national homogenisation, partly as a consequence of the failure of forced assimilation.[6]

However, this does not indicate the complete extinction of assimilation tendencies. The objective is less evident for national or indigenous groups.

1 Biczó, 2004, p. 19.
2 Falk, 2002, pp. 17, 23.
3 Berkes, 2024, pp. 14–19.
4 Bauman, 1997, pp. 54–55.
5 Berkes, 2020, p. 27.
6 Gulyás, 2018, pp. 21–25.

However, in the case of immigrants, the objective of the state is for immigrants to adopt, at least to some extent, the culture and customs of the majority society (*acculturation*). This process may only include some forms of integration policies but could ultimately lead to assimilation, that is, the disappearance of newcomers as a distinct group.[7] The greater are the frequency and breadth of contact with the majority culture and the extent of the dominant culture's numerical superiority, the higher the speed of this process becomes.

One of the most cited sociologists, Milton M. Gordon, distinguished seven stages of the assimilation process: 1) acculturation, where cultural patterns are adapted to the culture of the host society; 2) structural assimilation provides opportunities for broad access to the institutions of the host society (cliques, clubs, etc.); 3) assimilation through marriage; 4) identification assimilation, which is already associated with a sense of belonging; 5) attitudinal assimilation, which means a lack of prejudice towards the minority group; 6) behavioural assimilation, which means freedom from discrimination; 7) civil assimilation, lack of conflicts of values and power.[8]

Four main factors contribute to the loss of culture and its weakening: an independent economic base, demographic level, traditions, and the ability to preserve language. Of these, economic independence is most easily lost, while the original language that can be preserved to the final stages of integration.[9] Today, but even more so in the future, the challenge at the European Union level is to decide whether to promote acculturation or support the preservation of diverse cultures. This question is not just a matter for Member States, as the development of common asylum and immigration policies has been a source of increased diversity for some time.

Thus, although the extent differs by region, there is now an approach to *accommodation*, whereby the majority society gives up its rights and power to better accommodate minority cultures and improve their situation.

The difficulty in adapting is that the emergence of alien (foreign) cultures has led to the development of certain stereotypes[10] about these cultures, whether well founded or not, which do not necessarily have negative or hostile content; however, if the difference between groups is perceived as alien, otherness, and distinctiveness, it can trigger negative prejudicial thinking, which can lead to conflict situations.

According to Allport's scale, the first level of negative action resulting from prejudice is formed by negative verbal comments (*antilocution*). The next step is the avoidance of members of the disliked group, followed by discrimination, which is an active behaviour directed at the group and an institutionalised version

7 Carmon, 1996, p. 23.
8 Gordon, 1964, p. 71.
9 Boglár, 2002-2003.
10 Dranik, 2009.

of segregation. The fourth level is a physical attack, which is a violent behaviour, while the most serious level is extermination in the form of lynchings, pogroms, massacres, and genocide.[11] Hostilities are based on identity-based competition between groups, often for access to resources. Competition between groups leads to prejudice and discrimination, whereas cooperation reduces prejudice and promotes integration.[12]

Simultaneously, mutual cooperation and adaptation between groups can create solidarity among communities and loyalty to the state or society, which form the basis for social peace and the functioning of a diverse state (i.e. federation).

These processes are the root of the questions of which habits and social practices should or should not (or cannot) be adapted and what effect (e.g. increasing or decreasing opportunities and chances) this adaptation has.[13] The difficulty of translating these questions into the language of law is that while law must apply equally to all, while the essence of adaptation is flexibility, whereby two seemingly identical behaviours may not (must not) be judged in the same way by the state. [14]

3. The role of education

The link between culture and identity is established by the socialisation process, as a result of which the human personality – the identity of a person – is influenced by culture. In this way, habits and patterns of behaviour are formed, which then become the objects of the aforementioned accommodation.

Socialisation is the process of acquiring values and norms through which an individual adopts certain behaviours, reacts to certain situations by imitation, learns to adapt to environmental challenges, seeks understanding, and develops a set of values. Socialisation is a lifelong process; most patterns are established in childhood, and by adulthood key identity issues are clarified (but this does not mean that personality cannot change as a result of adult influences).[15]

In the process of socialisation, individuals adapt their personality traits, inclinations, and characteristics to the social framework. In a society where an individual is a member, the relationship between the individual and society is maintained and regulated by a sense of identity.[16] This sense of identity constitutes an identity. When, in the course of socialisation, an individual becomes part of a

11 Allport, 1954, pp. 14–15.
12 Esses et al., 2005, p. 227.
13 Lovett, 2010, pp. 243–267.
14 See e.g. Waldron, 2002, pp. 3–34.
15 Zsolt, 2005, pp. 35–37.
16 Papp, 2007, pp. 109–110.

group and develops an identity associated with it, he or she becomes a part of the components of culture and society.[17]

Every culture is comprised of six main elements: values, norms, beliefs, symbols, technologies, and languages. Values are a culture's collective ideas regarding what is good, right, wrong, desirable, or rejected. Values are also a central aspect of culture, with many similarities, but also vast differences in the way people seek to achieve their goals and realise their values. Different values can be found even within the same country; for example, some groups of people have individualistic values, whereas others value cooperation. Norms provide models to follow and guide human behaviour but also show a high degree of diversity. Beliefs are convictions, faiths, and ideas that have accumulated throughout human history and influence our daily lives. Religious customs strongly nuance the differences in human behaviour from one region to another and from one ethnic group to another. Technology includes a wide variety of objects, tools, instruments, machines, and electronic equipment, and technological developments have increased the diversity of human cultures. Human culture and civilisation are inextricably intertwined through the use of symbolic systems. Language, as a system of symbols, is a key element of communication between people, information transmission, and culture, being the mainstay of culture for transmitting cultural content.[18] Language is thus the vehicle of culture and key to its development.

If a state wishes to accommodate the needs of culturally diverse groups, it must consider these elements and adapt its instruments accordingly. Education is also an important aspect of this toolbox. Culture is a learned factor, as people acquire cultural patterns through socialisation and education is a key (although not exclusive) arena for this socialisation. Education, if it considers the cultural differences in society, does so primarily with a view to promoting the coexistence of cultures, bridging the gap between different cultures through means of understanding and, thus, promoting social justice.[19]

Solutions that focus on different cultures and harmonise their needs with those of the majority culture are a significant challenge, as they may require solutions that are unusual or alien to the usual methods and do not necessarily promise success. The diversity, constant variation, and specificity of the components make it difficult to develop universally applicable and workable solutions. Therefore, the focus is (and should be) on flexibility and adaptability rather than fixed patterns.

17 Byron, 2002, p. 442.
18 Torgyik and Karlovitz, 2006, pp. 11–13.
19 Berkes, 2020, p. 188.

4. Education focusing on the presence of different cultures

It is already a fact in all the Member States of the European Union, that the presence of different cultures is a major challenge for their education systems, which have existed and evolved for centuries. This challenge is greater in cases where large numbers of people with different customs, behaviours, and languages (e.g. newcomers because of the Arab Spring or currently Ukrainian refugees, whose number is more than 4 million in the European Union[20]) arrive over a short period of time and need to be integrated into the education system. In such cases, one of the greatest challenges is overcoming language barriers. While the issue of language rights is usually related to the preservation and use of the mother tongue by minorities and immigrant groups, we can also see examples of the needs and demands of the majority culture in this respect.[21] Overall, the mixed system of rules – consisting of legal norms and policy objectives – that Balázs Gerencsér calls the law of coexisting languages must be able to incorporate a number of preferences; that is, it must be sufficiently flexible to adapt to social changes and, at the same time, reflect the specific characteristics of countries.[22]

In the event that the European Union and its Member States promote adaptation solutions, this will also lead to the spread of so-called multicultural (intercultural) education[23] in the field of education.

20 Temporary protection for persons fleeing Ukraine - monthly statistics https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Temporary_protection_for_persons_fleeing_Ukraine_-_monthly_statistics (Accessed: 28 July 2024). According to the European Commission, the number of refugees in the European Union is estimated at around 7 million, but it is unclear whether the statistics refer to all forms of asylum or only to those recognised as refugees. In addition, around 27 million of the EU population are currently non-EU citizens. Statistics on migration to Europe https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-life/statistics-migration-europe_en#people-living-in-the-eu (Accessed: 28 July 2024)

21 See, for example, the Latvian example. Manzinger, 2024a, pp. 65–91; Manzinger 2024b, pp. 157–172.

22 Gerencsér, 2022, p. 13.

23 The literature is not consistent as to whether the two concepts are the same or not. Multicultural education and intercultural education are often used as synonyms (Nieto, 2006; Hill, 2007), while others indicate that there is a difference between the two. In the multicultural and intercultural literature it is often unclear what the concepts mean and whether they are referring to the same or different things. Often the difference in use seems mostly geographical. In Europe the preferred term is intercultural education while especially the United States but also the rest of North America, Australia and Asia use the term multicultural education (Hill, 2007; Leeman & Reid, 2006). However, in Europe there are differences between countries as well. For example, in Sweden and the Netherlands intercultural education is used while in Great Britain and Finland multicultural education is the commonly used term. Interestingly multicultural and intercultural education are often used as if the terms are universally understood and referring to only one type of education. As can be seen in Sleeter and Grant (2003) multicultural education can take

It should also be stressed that the application of multicultural solutions is fundamentally community dependent. Although the European Union is culturally diverse, its diversity varies. In some regions, national minorities are much more prevalent, there are no significant cultural differences, and the preservation of cultural, religious, and linguistic specificities is more about stopping the assimilation process, whereas in other areas, the integration of immigrants is a priority. The choice of instruments must be made accordingly, such as curriculum development, teacher training, the involvement of parents and local communities, and funding reforms (in which the European Union could also play a role, as it does by supporting targeted research, drawing up recommendations, and developing student and teacher mobility). Therefore, subsidiarity is of utmost importance in the choice of instruments and methods, and each Member State must make decisions in light of local communities and circumstances.

An important element of multicultural education is to combat racism, negative prejudice, and discrimination; create equal educational conditions for all students, regardless of their background; and help them acquire the knowledge, attitudes, and skills they need to function effectively in a pluralistic, democratic society.[24] This is achieved by emphasising the factors that bind groups together while simultaneously seeking to reduce the risk of overpoliticising differences. This also requires that certain challenges, such as conflict management, teamwork, and adaptation, be addressed in depth.[25]

In the long term, multicultural education promotes integration – that is, integration at work, school, and society – and becomes an important cohesive force. Further, it is based on mutual awareness, sensitivity to global problems, and a sense of responsibility.[26] This is rooted in equal opportunity and the right to education.

In this form,

> multicultural education is not only a sensitivity to different races, cultures, social groups, different cultural values, but also a paradigm shift that implies the acceptance of different ways of thinking as values, and which simply takes pluralism, diversity of human thought and culture for granted. Multicultural education is characterised by inclusiveness (...), inclusive of all groups, from which no one can be excluded, and which is also beneficial and valuable for all (...).[27]

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many different directions. Likewise intercultural education is sometimes mostly focused on intercultural relations but at other times more structural issues are part of the focus. (Holm and Zilliacus, 2009, p. 11)

24 Peacock, 2015, pp. 6, 13.

25 Jones, 2000, pp. 111–125.

26 Torgyik, 2004.

27 Torgyik and Karlovitz, 2006, p. 32.

Multicultural education grew out of the American civil rights movement of the 1960s, which demanded the end of discrimination in schools. The next step was to demand that educational institutions reform their curricula to reflect the history, culture, and experiences of particular ethnic groups and that schools employ more ethnic teachers who could serve as role models for children. Therefore, the need for community supervision in schools has increased. The first educational programs tried to respond to these new needs without adequate preparation and without a comprehensive strategy, typically in the form of optional subjects, and was met with resistance in most cases. The next step was the emergence of educational demands by feminist movements to transform male-oriented curricula, followed in the 1970s by the demands of other marginalised groups: the elderly, the disabled, and sexual minorities.[28]

In the 1980s, multicultural education came to the fore, with researchers and activists becoming increasingly active on this subject. At this time, Banks developed the concept of educational equality, which included the study and transformation of all aspects of schooling. He soon joined Carl Grant, Christine Sleeter, Geneva Gay, and Sonia Nieto, who developed new programs based on the principle of equal access to education, going beyond the transformation of curricula to identify, discuss, and critique oppressive approaches to education; funding disparities; the classroom climate; discriminatory employment practices; and other symptoms of a difficult and oppressive education system. As an increasing number of people have recognised that the education system is seriously unequal and in need of reform, an increasing number of solutions have emerged, resulting in dozens of models and frameworks for multicultural education.[29] It is on this foundation that multicultural education emerged and spread to ethnically diverse countries. The concept is rather broad and adapts to the needs of the community concerned; therefore, there are many different solutions.

The experience of the initial period, which was still focused on the possible adaptation of the curriculum, showed that, if the lesson on the culture of each ethnic group was not sufficiently integrated into the curriculum (e.g. by allocating only one week) and only provided superficial information, it would do more harm than good because it would send the message that ethnic groups are not part of society and should be further marginalised. Recognising this, attempts have been made to present the life opportunities of ethnic groups rather than their ways of life (e.g. victims of victimisation and institutional discrimination). This has been followed by the advocacy of a more holistic approach, which not only presents the experiences of particular groups in an accurate and sensitive way but also allows these groups to learn about the experiences of both mainstream and other minority groups from the perspective of different ethnic, racial, or cultural groups, thus

28 Banks, 2016, pp. 3–5.
29 Gorski, 2012.

promoting a multiplicity of approaches. In addition to the curriculum, there is a strong emphasis on the role of teachers as both cultural mediators and 'agents of change' in a multicultural education system. This requires teachers to possess social science knowledge, clear cultural insights, positive intergroup and racial attitudes, and appropriate pedagogical skills.[30]

Multicultural education covers more than simply adapting to a curriculum. Banks recognised the need to create the five dimensions when he realised that most teachers thought that multicultural education was merely the integration of content, when this was only at the entry level. Indeed, multicultural education is not just about introducing children to other cultures but also involves changing children's thinking, making them more critical, changing teachers' teaching techniques and strategies to meet the needs of children from different groups, breaking down prejudices, and transforming the entire school environment.[31] The five dimensions of this are content integration, knowledge construction, prejudice reduction, equity pedagogy, and empowering school culture and social structures.[32]

Content integration: Teachers use examples and information from different cultures to support the content of their subjects. In the process, they consider how the knowledge elements they choose will be integrated into the existing curriculum, the framework within which this knowledge will be transmitted, and the target group: minority students only or majority students as well.

Knowledge construction: The teacher facilitates understanding and processing students from different ethnic groups and cultures.

Prejudice reduction describes students' attitudes and strategies towards racial and ethnic groups. An equal-opportunity pedagogy is followed by the educator when he facilitates the academic achievement of students from different racial, ethnic, and social groups. They find a method that will best improve the achievement of minority students who come from low-status population groups and lag behind the majority of students in learning.

An empowering school culture: The culture of the school, teaching/learning style of the teachers (examination methods, choice of textbooks), atmosphere, structure, and physical environment of the institution.

Paul C. Gorski, another key researcher in the field of multicultural education, summarised the principles of multicultural education below, based on the most important authors in the field (i.e. Nieto, Banks, Sleeter, Grant):

- Multicultural education is a political movement ensuring social justice for historically disadvantaged students;

30 Banks, 2006, pp. 93–97, 101–103.
31 Banks and Tucker, 2019.
32 Banks, 2009, p. 15.

- Multicultural education recognises that while, in some cases, classroom activities are consistent with multicultural educational philosophies, social justice is an institutional issue that can only be achieved through comprehensive school reforms;
- Multicultural education insists that comprehensive school reform can only be achieved through a critical analysis of systems of power and privilege;
- The fundamental aim of multicultural education is to eliminate educational inequalities;
- Multicultural education is a good form of education for all students.[33]

For multicultural education to achieve its goals, it must develop competencies that enable individuals to contribute effectively and appropriately in a multicultural situation based on their specific approaches, knowledge, skills, and thinking.[34] This type of education results in multicultural transformation; that is, when an individual is able to interact effectively with others in culturally diverse environments and situations.[35]

Gorski also developed guidelines to achieve multicultural education. The first is to challenge existing programs. This goes beyond considering simple changes in curricula or programs as multicultural education because multicultural education is a holistic process and such solutions, separated from the larger process of transformation, cannot be considered multicultural education per se. The second guideline is to move forward, whereby the educator must constantly ask him/herself how his/her work moves education towards equality. If they cannot answer this question, they should consider using the resources allocated to multicultural education for programs that do not challenge the status quo, but rather recreate or support existing stereotypes or hierarchies. The third directive models equality and social justice, ensuring that unequal dynamics are not replicated in courses and professional development workshops, in which educators participate as contributors. As an educator, you should also consider whether you are only exploring the experiences of oppressed groups with your students or whether you are also exploring the experiences of the privileged. The fourth guideline is to cure the 'Ruby Payne' syndrome (i.e. to critically examine the materials used for multicultural education, whether they are sufficiently in-depth and whether they promote complex and critical thinking about equality and education). The fifth guideline aims to maintain multicultural education as a policy issue. Teachers must maintain their commitment to the political and transformative nature of multicultural education and not relativise it by reinforcing its oppressive elements.

33 Gorski, 2006, pp. 164–165.
34 Sipos, 2016, pp. 10, 93. The author analyses in detail the concept of competence, its elements, the different approaches that encompass the impact of competences on behaviour, emotional intelligence, or the role of communication. Ibid. pp. 92–98.
35 Robins et al., 2005, p. 11.

The sixth aspect is critical thinking. Multicultural education is an active, practical process. Finally, the seventh guideline contextualises multicultural education by facilitating experiences through which educators can learn to examine concerns about equality. If these concerns are removed from the broader context, it is easier to believe that they can be eliminated.[36]

5. The European Union and diversity in education

Article 165(1) TFEU states that the Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content and organisation of education and their cultural and linguistic diversity. The Union's action in the field of education is, thus, more a matter of organisation, coordination, and soft law, but this does not mean that it does not have an impact on the development of the education systems of Member States. By contrast, documents published in recent years provide a fairly clear picture of how the European Union believes that national education systems should address cultural diversity. We now highlight some of these, showing the tendency of EU institutions to promote inclusive education that is responsive to cultural diversity and allows it to be preserved.

In 2017, the Council of the European Union and the Representatives of the Governments of the Member States adopted the 'Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on inclusive diversity for achieving quality education for all'[37]. It stressed, inter alia, that education policy plays a key role in promoting inclusion and respect for diversity in the European Union. Inclusive education addresses and responds to learner needs, and the diversity of European societies presents both opportunities and challenges for educational and training systems. This calls for a greater focus on promoting inclusion and common values to help people with different cultural identities live together in a peaceful and democratic Europe.

The document also states that, in Europe, diversity will continue to grow in the future; that there is a real need to combat all forms of intolerance and social exclusion affecting both European citizens and migrants, especially newcomers; and that promoting diversity in education and training policies is essential for building an inclusive society.

On the one hand, these statements make it clear that the European Union is and will continue to be committed to the protection and promotion of cultural

36 Gorski, 2006, pp. 174–175.

37 Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on Inclusion in Diversity to achieve a High Quality Education For All. Official Journal of the European Union 2017/C, 62/02.

diversity. On the other hand, by suggesting that the TFEU marks a new stage in the process of creating an ever-closer union among the peoples of Europe, it also indicates that federalisation is part of European Union's perspective for future development. In this process, education is not only a means of promoting these objectives, but also a European policy in which the European Union has and can have room for manoeuvre and potential.

The document also stresses that education should promote inclusive diversity and the need to acquire intercultural competences while recognising the need to promote cultural diversity, and that education should be based on inclusion, equality, and equity.

Against this background, Member States are invited, according to their national circumstances, to promote a democratic and inclusive school culture and ethos and to encourage cooperation between education and training institutions, local communities, local and regional authorities, parents, the wider family, youth policy actors, volunteers, social partners, employers, and civil society as to promote inclusion and foster a sense of belonging and a positive self-image. Moreover, the document proposes that Member States should promote the integration of third-country nationals, including recent arrivals granted international educational protection.

The Commission is invited to promote the exchange of good practices and innovative approaches to achieving inclusive, high quality, inclusive and equitable education for all; to set up working groups; to provide support; to provide partnership advice on 'inclusive diversity' in education by organising meetings for experts from Member State administrations; to enhance mobility schemes; and to provide evidence-based information and guidance on the implementation of inclusive education, building on the work of the Fundamental Rights Agency.

The coordinating, organising, and supporting role of EU bodies is also reflected in the desire for inclusive education, as the instruments listed above provide for increasingly intensive cooperation between Member States and between EU bodies and Member States in the field of education. Therefore, an ever-closer union among people is beginning to be linked to education.

In 2018, the EU Council issued recommendations to promote common values, inclusive education, and the European dimension of education.[38] Populism, xenophobia, divisive nationalism, and discrimination, which can hinder the sense of belonging, have been identified as central challenges. The Council pointed to a trend which it perceives as a threat, although it does not specify the causes of these phenomena but stresses the importance of education as a response.

38 Council Recommendation of 22 May 2018 on promoting common values, inclusive education, and the European dimension of teaching. ST/9010/2018/INIT Official Journal of the European Union 2018/C, 195/01.

The Recommendation refers to the Commission's Communication titled 'Strengthening European Identity through Education and Culture'[39], which states that strengthening European identity remains essential and education and culture are the best means of doing so. On However, it also underlines the crucial role of education in preventing radicalisation leading to violent extremism. Emphasis is also placed on the inclusion of a European dimension in education, which should enable pupils to experience European identity in all its diversity and strengthen a sense of positive and inclusive European belonging, complementing local, regional, and national identities and traditions.

The adopted recommendations include the aim of strengthening a sense of positive and inclusive belonging at the local, regional, national, and EU levels, tolerant and democratic behaviour, and intercultural competences.

On 11 November 2021, the European Parliament adopted a resolution on European education.[40] It also urged Member States to promote a culture of tolerance as a priority and critical tool at all stages of the learning process, and called on the Commission and Member States to eliminate bullying, cyberbullying, and other forms of harassment, discrimination, and violence to improve cultural, ethnic, and gender diversity through the creation and exchange of good practices across Europe.

In 2021, the European Commission adopted an action plan on integration and inclusion during 2021–2027.[41] It states that inclusion is a fundamental feature of European way of life. Integration and inclusion are key to the long-term prosperity of people coming to Europe, local communities, the long-term well-being of our societies, and the stability of our economies. To help our societies and economies prosper, we must support everyone who is part of society, and integration must be both a right and duty for everyone.

The Action Plan stresses that education and training are the foundations for successful participation in society and one of the most effective tools for building more inclusive societies. Inclusion and gender equality are among the six dimensions of the European Education Area and are implemented through a series of concrete initiatives by 2025. In addition, schools have the potential to become centres of inclusion for children and their families.

The Action Plan recognises that increasing the participation of children from migrant and immigrant backgrounds in early childhood education and care programs, as long as these programs are appropriate for children from different cultural and linguistic backgrounds, can have a positive impact on their

39 COM(2017) 673 final.

40 European Parliament Resolution of 11 November 2021 on the European Education Area: A shared holistic approach (2020/2243(INI)).

41 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Action plan on Integration and Inclusion 2021–2027. COM(2020) 758 final.

subsequent schooling, including their knowledge of the host country's language and the integration of their parents and extended families. Therefore, the Action Plan addresses the issue in a comprehensive way, with a strong emphasis not only on preserving cultural diversity but also on achieving integration. It seeks to make societies inclusive and enable people from migrant backgrounds to become a part of them.

Among the tools needed to achieve these goals are a cooperative school environment; adequate training for teachers; support for language learning, coaching, and mentoring; and facilitation of the recognition of qualifications acquired in third countries.

To achieve this, the Commission should provide guidance and targeted support for teachers to develop the competencies needed to manage cultural, religious, and linguistic diversity in the classroom through Erasmus teacher-training academies and targeted training; facilitate the transfer of experience; and promote dialogue between Member States on the provision of complementary/reconciliation courses for migrants. Similarly, the Commission will work with Member States to further develop comprehensive and accessible language-learning programs through funding and the exchange of experience.

Member States are encouraged to increase the number of migrant children and children from migrant backgrounds in early childhood education and care; ensure recognition of foreign qualifications; make the management of culturally and linguistically diverse classrooms a priority skill in teacher training; develop support programs specifically for unaccompanied minors; or even make full use of EU funding possibilities, including the European Social Fund Plus, the Asylum and Migration Fund, and the European Regional Development Fund, to support programs and actions related to education, skills development, and language training.

Therefore, it can be concluded that the European educational area is increasingly focusing on an education that responds to cultural differences and that, in addition to the formulation of principles and objectives, more concrete proposals are emerging. Obviously, their implementation will depend on local conditions, which is a complex challenge; however, the European Union is increasingly calling for concrete solutions. Consequently, the education systems of the Member States aim at some degree of (increasingly intensive) multicultural education, which goes beyond language learning, civic education, and basic knowledge of the host community.

6. Conclusion

In an increasingly federalised European Union, cultural diversity is both an asset and a challenge. From a cultural point of view, this diversity includes many

dominant cultures, indigenous and national cultures, as well as the cultures of immigrant communities as a result of large population movements. There are similarities and differences between these cultures, and the States, and ultimately the Member States and the European Union itself, must seek to strike a balance between them, avoiding confrontation, tensions and clashes, while at the same time creating social peace, solidarity and loyalty. An important element of this is socialisation, adaptation, the application of integration policies and, ultimately, education.

The study reviewed how states have so far responded to the emergence of different cultures and what educational responses can be made to this diversity in a culturally diverse European Union. It has explored the concept and tools of multicultural education and the EU's approach to this cultural diversity in education. In this respect, it can be concluded that the European Union sees cultural diversity not only as an existing feature, as a fact, but also as a value to be defended and a process that will be further strengthened in the future. As a result, its institutions are increasingly trying to promote inclusive education in the Member States, which is no longer seen as a value, a principle or a distant goal to be achieved, but is also increasingly being proposed as a means of introducing and implementing specific instruments, and providing the framework and financial support for this.

In addition to inclusiveness, one of the future questions for the institutions of the European Union in terms of federalisation is to decide how, by what means and to what extent to focus on the European Union as a value and as a connecting factor in this process, with the aim of ensuring that the peoples of the European Union, in addition to their own, often already multiple identities, also have European identity, identification with the European Union and loyalty to it as an element of their identity.

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Life Sentences, Penal Populism, and Security Confinement***

ABSTRACT: *This paper critically reflects on the normative and practical meaning and purpose of life sentences and long-term prison sentences, which essentially resembles life sentences in their effect. The analysis provides in-depth knowledge about current trends in the global abolitionist movement, showcasing the current opinio iuris on the jus cogens status of the safeguards against the death penalty. Fully subscribing to said opinio iuris, the authors discuss its likely implications in terms of a future rise in life sentences, focusing on their meaning and relation to long-term prison sentences. This is not only a matter of normative definition but also an important issue in comparative penology that empirically investigates the imposition of life sentences. To test their assumptions about the dubious labelling of essential life sentences as ordinary (long-term) prison sentences, a normative analysis of the current legal framework in nine European states (Croatia, Serbia, Slovenia, Poland, Slovakia, Hungary, Germany, France, and Switzerland) is presented in this paper. Preliminary findings show that what is labelled 'life sentence' in one jurisdiction tends to be a far less severe punishment than the sanction's name might imply when compared to 'ordinary (long-term) prison sentence' in another jurisdiction. However, the matter is far more complex, as numerous states apply the so-called 'security confinement' as a security measure. Nevertheless, the*

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authors find that in their effects, such security measures, although not labelled as sanctions, come dangerously close to actual sanctions such as life and long-term prison sentences, thereby normatively undermining current European human rights standards. Since there appears to be a rise in such 'false labelling', the phenomenon is considered in the context of penal populism and, in conclusion, discussed as a matter of the very foundations that criminal law builds upon in an attempt to suggest normative and practical solutions.

■ **KEYWORDS:** penology, life sentence, penal populism, security confinement, *Sicherungsverwahrung*, death penalty, *jus cogens*

1. Background and introduction

The idea and concept for this paper evolved in November 2022 under the powerful and lasting impact of the 8th World Congress Against the Death Penalty in Berlin[1] (hereafter, World Congress).[2] Being confronted for several days by the horrors of the ongoing *barbaric practice*[3] of the death penalty, while experiencing an unprecedented enthusiasm and conviction on the path to its universal abolition, makes one critically reflect upon the relative ease with which European scholars might dismiss the topic as somewhat irrelevant or even obsolete. From a purely Eurocentric perspective and outside the context of historical approaches, the scholarly and practical dealings with the death penalty in Europe have lost their purpose and appeal.[4] Nevertheless, *Beccaria*'s infamous '*Who has ever willingly given up to others the authority to kill him?*'[5] still stands, with the death penalty remaining a

1 For further details, see: ECPM, 2023; Council of Europe (CoE), 2023b.

2 Prof. Dr. Getoš Kalac would like to sincerely thank the organisers of the World Congress, especially Mr. Raphaël Chenuil-Hazan, Executive Director of the Ensemble Contre la Peine de Mort, for their kind speaker invitation and the opportunity to actively participate in a truly extraordinary event.

3 Cit. Network for the Abolition of the Death Penalty and Cruel Punishment, 2022a, p. 3.

4 As the territories of the current 46-member states of the CoE form a '*death penalty free zone*', with the last execution conducted in 1997 (CoE, 2023a), from a strictly Eurocentric perspective, the death penalty issue falls under contemporary criminal law, criminology, and even penology and is commonly dismissed as no longer relevant; thus, one might even deem it obsolete. A noteworthy exception relevant in the context of the current paper is the jurisprudence of the European Court of Human Rights (ECtHR) on the abolition of the death penalty. For a summary of up-to-date case law, see: ECtHR, 2022a.

5 Cit. Beccaria, 1995, p. 66.

global mankind issue.[6] It is also a constant reminder of how little humanity has evolved throughout the past quarter of a millennium vis-à-vis the most severe criminal punishments (death penalties and their so-called *humane* alternative, life sentences). Therefore, we find it scientifically compelling and appropriately timed (in light of the recent 'World and European Day against the Death Penalty' on 10 October[7]) to present to the Central European comparative legal science community the current *opinio iuris* on the *jus cogens* status of safeguards against the death penalty, as provided in the 'Manifesto on the Abolition of the Death Penalty as a Peremptory Norm of General International Law (Jus Cogens)' (hereafter, Manifesto):[8]

ABOLITION OF THE DEATH PENALTY AS A PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW (*JUS COGENS*)
On the Occasion of the 8th World Congress Against the Death Penalty
Berlin, 15–18 November 2022

1 This 8th World Congress Against the Death Penalty occurs in the year of the 15th anniversary of the UN General Assembly's first vote on the Resolution on the moratorium against the death penalty. In 2007, the resolution received 107 votes in support, subsequently rising to 123 in 2020. During this period, Amnesty International recorded that the abolitionist countries in the world had increased from 144 to 170. This is a clear demonstration of a global trend solidifying the legal standards for a world free of the death penalty.

2 Following this rate of change, we have reached a significant moment in the history of the death penalty. The temporary exception in the International Covenant on Civil and Political Rights (hereinafter: ICCPR) article 6(2), which allows for the application of the punishment for the 'most serious crimes', is now starkly brought into focus through article 6(6), which states '[n]othing in this article shall be invoked to delay or to prevent the abolition of capital punishment'. This is a time-sensitive feature that allows us to question the retentionist member states' claims that they can justifiably continue to use the death penalty in perpetuity.

6 The abolition of the death penalty is not just *one* of the global mankind issues, but *the* issue, because "*[t]he right to life is nowadays universally acknowledged as a basic or fundamental human right. It is basic or fundamental because 'the enjoyment of the right to life is a necessary condition of the enjoyment of all other human rights'.*" (cit. Weiss, 1992, s.p., with reference to cit. Przetacznik, 1976, p. 589, 603).

7 For more details, see: CoE, 2023c.

8 Cit. Network for the Abolition of the Death Penalty and Cruel Punishment, 2022a, with listing of signatures as of November 2022 and presented at the World Congress. The first steps in drafting the Manifesto were taken at the international scientific congress, 'Against Death Penalty: *Opinio Iuris* and International Law' held in May 2022 in Madrid. For more details, see: Network for the Abolition of the Death Penalty and Cruel Punishment, 2022b. See also the collection of topical open access publications: Network for the Abolition of the Death Penalty and Cruel Punishment, 2022c.

3 Today, over two-thirds of the states affirm this abolitionist position. We are now within a new moment in the promotion of global synergy for abolition. All countries should join the abolitionist community, as General Comment no. 36 on the right to life:

> reaffirms the position that State parties that are not yet totally abolitionist should be on an irrevocable path towards complete eradication of the death penalty, de facto and de jure, in the foreseeable future. The death penalty cannot be reconciled with full respect for the right to life, and abolition of the death penalty is both desirable [...] and necessary for the enhancement of human dignity and progressive development of human rights[9].

4 As humanity has evolved and we reflect upon the sanguinary history of sovereign power's relationship with capital punishment, we should utilise our refined interpretive tools of the ICCPR to demonstrate what is legitimate in a government's application of punishment.

5 The United Nations [UN] has provided a multi-faceted review to achieve this assessment. The UN has clearly signalled and created mechanisms for the aspiration of global abolition through the following:

- The international legal mechanism for abolition is articulated in the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty.
- Article 6(2) is often misunderstood. It is not a licence to execute but rather a necessary imposition of restrictions on the use of capital punishment by those states that still cling to the barbaric practice.
- The ECOSOC Safeguards (and amendments) identifying minimum standards in the capital judicial processes should be observed and interpreted to provide impetus for governments to consider national abolition.
- The Secretary General's Quinquennial Report on the death penalty assesses state compliance with the Safeguards and identifies practices inconsistent with treaty standards.
- The Human Rights Council's High-Level Panel Discussions on the question of the death penalty include dialogues on pertinent issues regarding the punishment and observe global trends leading towards abolition.
- The UN Special Procedures regularly use their mandates to denounce the death penalty around the world. Reports state the global norms towards abolition and specific communications in capital cases identifying treaty violations.
- The concluding observations of UN committees call retentionist countries to adhere to treaty standards,

9 General comment no. 36 (2018) under article 6 of the International Covenant on Civil and Political Rights, on the right to life (CCPR/C/GC/36, 30 October 2018, para. 50, p. 12).

- highlighting issues of unfairness and discrimination in capital trials, inhumane conditions on death row, and the cruelty and torture imposed through executions.
- The Universal Periodic Review [*UPR*] has witnessed increased recommendations for retentionist states under review. Following the three completed UPR cycles, there is a corpus of recommendations for the initiation of moratoriums, *de jure* abolition, and the ratification of the Second Optional Protocol. Both recommending states and civil society organisations use this peer-review mechanism to bring transparency on the inhumanity of the death penalty.
- The abolition of the death penalty reflects one of the Sustainable Development Goals [*SDG*]. Although SDG 16 aims for 'Strong Institutions and Access to Justice and Build Effective Institutions', the application of the death penalty is not included in this goal. Specifically, SDG 16.1 aims to reduce death rates, promote equal access to justice, and protect fundamental freedoms. The use of the death penalty does not signal legitimate strength in institutions, but renders counterproductive and inhumane consequences, including a brutalising effect upon society.

6 This sophisticated UN framework aiming to rectify the problem of the death penalty demands that the punishment should now be considered as a violation of the inalienable dignity and the rights of the person.

7 No capital judicial process consistently maintains the legal protections necessary to satisfy fair criminal proceedings under ICCPR Article 14.

8 The death penalty is not a justifiable form of governmental and societal retribution and cannot be proven to possess a special deterrent effect for the prevention or reduction of crime over and above terms of imprisonment.

9 Today, we have extensive empirical knowledge about the modes of execution and know that these generally result in a cruel and inhumane way of killing. This is seen from the phenomenon of death row to the evident failure of procedures once presented as the most humane, which have also systematically incurred inhumane pain and suffering in the form of 'botched executions'.

10 Methods of execution are cruel and have psychological and physiological impact on the condemned. It is inherently a cruel and inhumane invasion of the condemned person and negatively impacts the families and the community.

11 In seeking to create humane ways to protect society and appropriately punish violations of the criminal law, we find ourselves in a historical moment. As a global community that advances principles of human rights, we are in a position of normative legitimacy to maintain that the death penalty is a per se violation of human rights. There is cumulative evidence to suggest that the abolition of the death penalty is now a new global norm, a peremptory norm of general international law (*jus cogens*).

12 Abolition would, therefore, enable people within the jurisdictions of retentionist countries to benefit from this advancement in understanding. The leading research on the death penalty demonstrates:
a) It is not a justifiable function of legitimate government;
b) It violates human rights; and therefore,
c) It contravenes the peremptory norms of general international law (*jus cogens*).

13 For all of the above reasons, the undersigned understand that the proscription of the death penalty from punitive systems is a demand based on the right to life and the right not to subject human beings to torture or inhuman treatment, which we consider to be rights integral to *jus cogens*.

We, therefore, call for a global abolition of the death penalty. The death penalty has no place in our world today.

> SIGNATURES
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Based on the presented Manifesto and its findings,[10] we analyse the implications of a (universal) abolition of the death penalty for the life sentence and how the prospects of the life sentence contravene *jus cogens* (Section 2). Here we pay particular attention to the impact of the life sentence (commonly considered a *humane* alternative to the death penalty) (Section 2.2). To analyse this, we build on a conceptual and terminological clarification of the meaning and measurement of

10 For in-depth argument see: Bessler, 2018; Bessler, 2022; Bessler, 2023; Hood and Hoyle, 2008; Schabas, 2002; Stearns, 2020. For an example of counter argumentation, see: Short, 1999. For an analysis of the dubious empirics of the highly questionable deterrent effect of the death penalty, see: Donohue and Wolfers, 2005.

life sentences (Section 2.1) and conclude with a review of the relevant penological research (Section 2.3). In addition, we critically analyse the prospects of upholding established human rights standards for the imposition and execution of life sentences in times of rising penal populism (Section 3). Thus, it is necessary to briefly present these standards, particularly as developed through the relevant case law of the European Court of Human Rights (ECtHR; Section 3.1). Finally, given the ongoing rise in penal populism worldwide, we find it necessary to examine (potential) legal loopholes that successfully circumvent and, thus, undermine these minimal standards for life sentences by introducing the 'security confinement' (German: *Sicherungsverwahrung*). In this context, we also briefly examine a peculiar debate about the rights of incarcerated convicts and security-confined inmates to assisted suicide in Switzerland. This recently evolved debate has been resolved in both theory (through normative clarification) and practice (through successfully executing the first assisted suicide of a security-confined inmate on February 28, 2023).[11] This case raises numerous questions on penology and criminal and human rights law. Among these, we investigate the severe suffering of (indefinitely) incarcerated persons due to their confinement conditions as a cause of (assisted) suicide. This question is not only of great importance in view of the dubious claim that life sentences are a *humane* alternative to death sentences, but it also raises the issue of potential criminal liability and human rights violations for creating favourable conditions that lead to suicide.

The current paper does not aim to universally or ultimately resolve any of the examined issues or the mysteries of criminal punishment. All questions addressed as or within a (sub)section of this paper deserve a full-fledged scientific monography. Nevertheless, we purposefully opted for a very broad contextual approach rather than a targeted, in-depth single-issue analysis. Although this allows for an understanding of the discussed topics imbedded in their wider normative and penological contexts and in a transdisciplinary manner, it also limits the depth of our analysis. Therefore, the presented analysis should be understood as an exploratory venture into the countless questions raised by criminal punishment. Therefore, our goal is not only to discuss major challenges in current criminal punishment. We also aim to provide scientific arguments into an otherwise populist public and policy debate about sentencing (expectations) and the most severe types of punishment, while highlighting the neglected yet promising future paths for penological research.

11 Boos, 2023; ZüriToday, 2023.

2. Life sentences – A normative and penological analysis

This section aimed to resolve major conceptual and definitional (mis)understandings frequently encountered across the scholarly and professional discourse on life sentences. We also reveal key methodological challenges to measuring (life) sentences across time, space, and contexts, which explain the lack of relevant international or global comparative empirical data. This is followed by a condensed overview of basic argumentation on why life sentences should not be considered a *humane alternative* to the death penalty and why they are *not humane punishments*. The section concludes by providing key findings from a preliminary normative and penological review of the state of art in proscribing, imposing, and executing life sentences.

■ *2.1. The meaning and measurement of life sentences*

This subsection explores the complexities of life imprisonment across legal systems. It delves into interpreting guilt variations, dangerousness assessments, and human rights considerations. Furthermore, it distinguishes between life imprisonment and preventive detention, highlighting the challenge of justifying prolonged imprisonment based solely on a person's presumed 'dangerousness'. In this context, the concept of life sentences entails a fundamental question: how do we define a 'life' in the context of imprisonment? The main challenge in tackling this topic lies in how we conceptually approach the notion of life and its quality, which can be seen as a strategy to establish enduring personal conditions throughout one's life.[12] Some scholars[13] emphasise a multifaced perspective encompassing physical, psychological, social, functional, relational, and environmental aspects, which incorporates a broad spectrum of daily life elements, such as housing, recreation, employment, the environment, and income.[14] However, the question remains whether and to what extent life sentences allow those who serve them to have a life at all, i.e., a life that provides any of the qualities, opportunities, and experiences inherent to human life and not of purely physical existence?

The idea of life imprisonment can differ across jurisdictions, reflecting a range of interpretations and practices. This variation is inevitable because it reflects how guilt is understood within different legal frameworks and its connection to the concept of dangerousness.[15] How we approach dangerous offenders depends on the concept of guilt within any given criminal justice system.[16] This plays a crucial role in shaping the system of sanctions imposed on individuals who

12 Karajić, 1992, p. 486.
13 E.g., Hörnquist, 1982; Maslow, 2013.
14 See more in: Campbell, 1976.
15 Drenkhahn and Morgenstern, 2020, p. 88.
16 Ibid.

are deemed a threat.[17] Moreover, the principle of 'life should mean life' renews the focus on permanent incarceration; however, human rights considerations advocate for dignity-based analysis of the life imprisonment sentence.[18] The same was emphasised in the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which stressed the lack of uniformity in Europe's approach, leading to divergent practices and consequences for prisoners with life sentences.[19] As explained in this report, the prison sentence is tied to offenders' past behaviour and guilt, whereas secure preventative detention serves as a measure for the protection of the public. Although assessing dangerousness is crucial, the difficulty lies in rationalising prolonged imprisonment solely on the grounds of 'dangerousness'.[20] In this regard, determining release often depends on assessing the future 'dangerousness' of an individual serving a life sentence, specifically referring to the risk of that person committing another serious crime.[21] Considering such a scenario, the following question arises: what distinguishes life imprisonment as an indeterminate penalty from preventive detention as a measure of safeguarding public security?[22]

While navigating these intricate matters, it must be emphasised that the use of the term 'life sentence' in this discussion refers to a broader concept. This includes the conceptual framework of the definition involving the 'meaning of life', which goes beyond the exclusive idea of a sentence with no possibility of parole or release. By contrast, in instances where we discuss 'life sentence *stricto sensu*', we point to the definition of 'life imprisonment', which refers to a sentence resulting from a criminal conviction, allowing the state authority to keep an individual incarcerated until their natural death,[23] excluding any consideration of the death penalty.

Regarding the mentioned complexity, there is an obvious ambiguity surrounding the terminological distinction between 'life sentence' and 'preventive detention' across different legal systems. In essence, the discourse on life sentences revolves around untangling the complex interplay between notions of life, guilt, dangerousness, and the safeguarding of society. It is necessary to highlight that sentences which are not explicitly defined as 'life imprisonment' could still align with the broader concept of a life sentence, encompassing situations

17 Ibid.
18 van Zyl Smit and Appleton, 2019, p. 16.
19 For more details, see: 25th General Report, 2016, pp. 33–43.
20 UN, 1994, p. 12.
21 Ibid.
22 This is what van Zyl Smit, 2002, p. 2 pointed out: 'The problem with these different modes of detention is that it is not always obvious whether a life sentence is being imposed as punishment or whether one is dealing with some measure that is merely a non-penal form of indeterminate, compulsory treatment, imposed with no intent directly to penalise the offender.'
23 van Zyl Smit and Appleton, 2019, p. 35.

where the state retains the prerogative to incarcerate individuals until the end of their lives.[24]

■ *2.2. Life sentence as a humane alternative to death penalties?*

Beccaria recognised the deterrent horrors of imprisonment, imagining that one '*shall be reduced to so dreary and so pitiable a state if* [committing] *similar crimes*'.[25] Indeed, being reduced to such a 'dreary and so pitiable a state' of spending one's days incarcerated, without any realistic prospect of living a life, cannot qualify as a *humane alternative* to the death penalty, or as a *humane punishment* at all. In this regard, *Flander's* argument on the '*lack of resources within the various punishment theories*' to '*criticise certain modes or methods of punishment*', such as the death penalty (and in our perspective, the life sentence), is enlightening as it captures the challenge at its very core and encourages one '*to look at ideas of human dignity, or of decency, or of civilisation*'.[26] He underlined that '*the problem is not merely that the death penalty might not be compatible with the norms of a civilised society, but that much of the way we punish is incompatible with those norms*'.[27] Against this backdrop, we pose the case against life sentences as an *inhumane punishment*.

As the author of a thoughtful anti-death penalty critique states, '*ending the death penalty is important – but so is how we end it*'.[28] As a substitute, life imprisonment may initially seem to provide a more humane option; however, closer examination reveals a complex array of ethical and practical concerns that challenge its status as a practicable substitute. One abolitionist argued that life sentences were "*in fact a 'civil' death penalty.*"[29] Being sentenced to the death penalty is a condemnation to die, whereas life imprisonment is a condemnation to die in prison. Although both sentences are permanent in theory, the death penalty is perceived as more radical.[30] The concept of a life sentence as a humane alternative to the death penalty underscores the importance of providing prisoners with the opportunity for release in order to avoid any perception of inhumanity and degradation.[31] Continued debates surround the efficacy of life imprisonment, whether as an alternative to the death penalty or when compared to extended fixed terms of imprisonment, with a focus on its role in deterrence and retribution.[32] Unlike

24 Such sentences (as per van Zyl Smit and Appleton, 2019, p. 35) are described as informal life sentences.

25 Cit. Beccaria, 1995, p. 67, in which the full-length quote is worded as follows: "*Much more potent than the idea of death, which men always regard as vague and distant, is the efficacious because often repeated reflection that I too shall be reduced to so dreary and so pitiable a state if I commit similar crimes.*"

26 Cit. Flanders, 2013, p. 619.

27 Cit. Flanders, 2013, p. 619.

28 Cit. Simon, 2014, p. 488.

29 Cit. van Zyl Smit, 2002, p. 58.

30 Cit. Bernaz, 2013, p. 471.

31 Cit. van Zyl Smit and Appleton, 2019, p. 22.

32 van Zyl Smit and Appleton, 2019, p. 11.

fixed-term sentences, which offer inmates a clear endpoint, life imprisonment – especially without the possibility of parole – lacks characteristics such as hope.[33] Although the intention behind considering life sentences as humane alternatives is to avoid the moral complexities of the death penalty, reality presents a range of issues that challenge this perspective.

■ *2.3. (Legal) Facts and (penological) figures*

The following subsection focuses on the Central European region, conducting a normative examination of six countries: Croatia, Serbia, Slovenia, Poland, Slovakia, and Hungary. Subsequently, encompassing a broader geographical scope beyond Central Europe, the analysis expands to Germany, France, and Switzerland. The Criminal Code of Croatia recognises the penalty of 'long-term prison sentence' (Croatian: *kazna dugotranog zatvora*).[34] The Serbian legal system similarly implements life sentences (Serbian: *doživotni zatvor*).[35] The Slovenian Criminal Code introduces a life sentence as a 'sentence of imprisonment until death' (Slovenian: *kazen dosmrtnega zapora*).[36] In Poland there is a literal equivalent of 'lifelong imprisonment' (Polish: *dożywotnie pozbawienie wolności*).[37] Slovakia also recognises life imprisonment in its Criminal Code (Slovak: *trest odňatia slobody na doživotie*).[38] The Hungarian legal system also has a sanction of life imprisonment (Hungarian: *az életfogytig tartó szabadságvesztés*).[39] Germany's Criminal Code uses the term 'lifelong prison sentence' (German: *lebenslange Freiheitsstrafe*).[40] Both the French criminal system and the Swiss Criminal Code recognise lifelong imprisonment (French: *la détention criminelle à perpétuité*)[41] and life sentences (Swiss: *lebenslange Freiheitsstrafe*).[42] The following table provides a summarised overview of

33 See more in: Van Zyl Smit, 2006, p. 409.
34 Croatian Criminal Code, Art. 46.
35 Serbian Criminal Code, Art. 44a.
36 Slovenian Criminal Code, Art. 46. par. 2.
37 Polish Penal Code, Art. 88. par. 5.
38 Slovak Criminal Code, Art. 47.
39 Hungarian Criminal Code, Art. 41. par. 1.
40 German Criminal Code, Art. 38. par. 1.
41 French Penal Code, Art. 131-1.
42 Swiss Criminal Code, Art. 40.

the minimum and maximum durations of life sentences,[43] parole possibilities, and specific restrictions regarding sentencing policies across different countries:

Table 1: Duration of life sentences in countries[44]

Country	Minimum duration in years	Maximum duration in years	Restrictions
Croatia	21[45]	40,[46] exceptionally 50[47]	cannot be imposed on an offender under the age of 18[48]
Serbia	21[49]	until the end of prisoner's life	cannot be imposed on an offender under the age of 21[50]
Slovenia	31[51]	until the end of prisoner's life	cannot be imposed on an offender under the age of 18[52]
Poland	26[53]	until the end of prisoner's life	cannot be imposed on an offender under the age of 18[54]
Slovakia	26[55]	until the end of prisoner's life	no provisions that would permit or forbid for an offender under the age of 18 to be sentenced for life
Hungary	26[56]	until the end of prisoner's life	cannot be imposed on an offender under the age of 20[57]

43 For the scope of this analysis, the table presents information on the duration of life sentences in countries that acknowledge such penalties. Alternatively, using the logical deduction based on the stipulated norms in the respective legal acts, we show the minimum and maximum durations of imprisonment for long-term sentences. If the legal act does not specify a precise duration for a lifelong or long-term prison sentence, we consider that the minimum term extends one year beyond any explicitly stated prison sentence. Furthermore, when determining the maximum duration in legal systems with life imprisonment, we apply the rationale that the maximum duration extends until the end of the prisoner's life while in legal systems, with long-term imprisonment expressed as years of duration that are stated in the law act.

44 Authors' own work.

45 Croatian Criminal Code, Art. 46. par. 1.

46 Croatian Criminal Code, Art. 46. par. 1.

47 Croatian Criminal Code, Art. 46. par. 2.

48 Croatian Criminal Code, Art. 46. par. 4.

49 The Serbian Criminal Code in Art. 45. par. 1. prescribes that '*The prison sentence cannot be shorter than thirty days or longer than twenty years*'. Therefore, all sentences imposed for a period longer than 20 years fall under the category of life sentence.

50 Serbian Criminal Code, Art. 44a. par 2.

51 The Slovenian Criminal Code in Art. 46. par. 1. says that '*Imprisonment may not be shorter than one month or longer than thirty years*'. Thus, life sentences would be longer than 30 years.

52 The Slovenian Criminal Code does not implement a life sentence for offenders under the age of 18, but refers to special criminal legislation for minors in Art. 5. par. 1.

53 Since the Polish Penal Code recognises special institute of deprivation of liberty for 25 years (Art. 88. par. 4.), a longer prison sentence can be considered a life sentence.

54 Polish Penal Code, Art. 54. par. 2.

55 Since the Slovak Criminal Code, Art. 46, states that 'definite period of time of not more than twenty-five years or life imprisonment', a life sentence would encompass a prison term of more than 25 years.

56 According to the Hungarian Criminal Code, Art. 36., the longest fixed-term imprisonment is 25 years, implying that any sentence longer than this would be considered life imprisonment.

57 Hungarian Criminal Code, Art. 41. par. 1.

Country	Minimum duration in years	Maximum duration in years	Restrictions
Germany	15[58]	until the end of prisoners' life	cannot be imposed on an offender under the age of 18[59]
France	31[60]	until the end of prisoners' life	cannot be imposed on an offender under the age of 18[61]
Switzerland	21[62]	until the end of prisoners' life	cannot be imposed on an offender under the age of 18[63]

The presented data underscores the complexity of different approaches to life imprisonment, prompting discussions about the balance between punishment, rehabilitation, and reintegration within diverse criminal justice systems reflecting different cultural and legal traditions. Although the concept of a life sentence,[64] which is described in the criminal code, may not exist in a certain country (e.g., Croatia), when looking at the actual maximum duration of fixed prison sentences (40 or 50 year in Croatia) and comparing them to the maximum of life sentences in other countries (e.g., 15 or 25 years in Germany), it becomes obvious that the mere notion of a life sentence does reveal much and can be misleading in some cases when comparing and assessing punitivity across countries. Thus, in instances besides pure normative analysis, one must consider the actual sentencing and early or conditional release practices to fully understand whether and to what extent 'life sentences' are actual incarcerations until the end of a convict's life, or are, in fact, far more lenient than long prison sentences in other countries.

58 As the German Criminal Code Art. 38. par. 2 prescribes that the maximum term of a fixed-term period of imprisonment is 15 years, any sentence longer than that can be considered a life sentence.

59 The German Criminal Code, Art. 10. refers to special Youth Courts Act, which does not proscribe a life sentence for offenders under 18.

60 Since the French Penal Code Art. 131-1. lists imprisonment of up to 30 years, sentences longer than that period can be considered life sentences.

61 French Penal Code Art. 122-8. states that, 'Minors capable of discernment are criminally liable for the crimes, offences or contraventions of which they have been convicted, taking into account the mitigation of liability they enjoy because of their age, under conditions set by the Code of Criminal Justice for Minors'. Meanwhile, Ordinance No. 45–174. Art. 20–2. par. 1. states that, 'If the sentence incurred is imprisonment or life imprisonment, they may not impose a sentence of more than twenty years of imprisonment or criminal detention'.

62 Art. 40. par. 2 states that the maximum term of custodial sentence is 20 years, if life sentence is not explicitly stated.

63 The Swiss Criminal Code Art. 9. par. 2. refers to special Youth Criminal Law, which does not proscribe a life sentence for minors.

64 The term 'life sentence', as used by the authors, does not run counter to the national legislation nor aim at normatively redefining national legal provisions. The aim is purely scientific and serves the conceptual purpose of identifying those prison sentences which, regardless of their national normative denotation (e.g., long-term prison sentence in Croatia), may be considered *de facto* life sentences owing to their penological effect, especially when compared to other relevant European 'life sentences' (e.g., Germany), where such sentences *de facto* are much shorter (shorter than the 20–40 years of the Croatian long-term prison sentence), although they are normatively denoted as 'life sentences' in the national legislation.

To further expand the comparative overview of life sentencing practices illustrated in the previous table, we consult the Council of Europe Annual Penal Statistics, which offers data about the implementation of life imprisonment in European countries. Analysing the reports of the Council of Europe, we observed a dynamic pattern. First, in 2018, a noticeable decrease was noted in the average percentage of people sentenced to life imprisonment, dropping to 1.2%.[65] However, the annual report from 2019 showed an average of 2.5% of prisoners serving life sentences.[66] In the following year (2020), it increased by 0.7%.[67] Reports examining the overall situation in European countries in the past ten years (2013–2023) show that the punishment of life imprisonment was implemented steadily, but the percentage of life sentences imposed was between 2.5% and 3.3%,[68] with the abovementioned variations.

A considerable body of research shows that imprisonment negatively alters cognitive functioning, which increases the risk of recidivism.[69] Although such a criminogenic impact of incapacitation in the context of the life sentence might be seen as irrelevant, it poses the question of the rehabilitative purpose of punishment, even in the case of life sentences. As neurosciences further evolve and transdisciplinarity[70] replaces inter- and multi-disciplinarity, new intersections relevant for (criminal) law sciences emerge, including 'neurolaw',[71] 'neurocriminology',[72] 'neuropenology',[73] or 'neurosociology and penal neuroabolitionism'.[74] Therefore, we must include findings from these steadily evolving fields and fundamentally reconsider 'why' and 'how' we punish.

65 Aebi and Tiago, 2018.

66 Aebi and Tiago, 2020.

67 Aebi and Tiago, 2021 show the average percentage of the 2.7% of the prisoners sentenced to life sentence in their report.

68 Aebi and Delgrande, 2015; Aebi, Cocco, Molnar and Tiago, 2022; Aebi, Cocco and Molnar, 2023; Aebi, Tiago and Burkhardt, 2015; Aebi, Tiago and Burkhardt, 2016; Aebi, Tiago, Berger-Kolopp, Burkhardt, 2017.

69 For an overview of relevant studies and their key findings, as well as a study on cognitive decline due to incarceration, see: Umbach, Raine and Leonard, 2018. The importance of neuropsychological research has recently been discussed against the backdrop of the ECHR by Ligthart et al., 2019.

70 For example, see: Getoš Kalac, 2020.

71 For example, see: Pardo and Patterson, 2013.

72 For more details, see: Nordstrom et al., 2011.

73 Getoš Kalac and Feuerbach, 2023.

74 According to *Borbón*, Research has yielded valuable results on the adverse neuropsychological effects of prison (Nurse, 2003; Huey and McNulty, 2005; Haney, 2012; Schnittker et al., 2012; Brinkley-Rubinstein, 2013; Meijers et al., 2015; Constantino et al., 2016; Haney, 2017; Meijers et al., 2018; Edgemon and Clay-Warner, 2019; Piper and Berle, 2019; Reiter et al., 2020). Overall, these findings tend to correlate prison with poorer mental health, as impoverished spaces, punitive practices, and the prison environment are profoundly disadvantageous factors for mental health and general well-being. For example, the study by Meijers et al. (2018), suggests that three months of imprisonment may lead to reduced self-control, increased risk taking, and significant deterioration in attention.(Borbón, 2022, p. 2).

3. Upholding European human rights standards against rising penal populism?

In 2022, the National Commission for the Prevention of Torture found that the practice of security confinement in Switzerland does not partially align with human rights standards, particularly because of the placement of security-confined persons within closed prison wards of the general sentence serving system (German: *Normalvollzug*).[75] The Conference of the Cantonal Justice and Police Directors responded that their resources are limited and that a strictly separated placement of security-confined persons with a specific confinement regime is neither requested by law nor established in daily practice (for now).[76] This example, taken from one of the most developed European countries in principle, reflects a setting encountered in many countries that justifies the notion of the prison system being the 'ugly duckling'[77] of the criminal justice system. Fortunately, it is not very popular. It sits at the very end of the criminal processing with little (if any) influence over all of the previous processes and decisions which eventually determine what the prison or correctional system has to deal with (usually much more than it can handle). In the abovementioned example, this would be the normative construction and adjudication of security confinement as a 'measure' (not a 'sentence'), imposed on those deemed 'dangerous' to society after already having served their prison sentence. In the case we present, this includes dealing in daily practice with a suicidal 72-year-old man who barely moves around after he already served his ten-year sentence and must serve another 20 years of security confinement. Such cases pose challenges to the prison or correctional system; however, at its very core, they are a consequence of crime policy decisions taken at a very distant level.

It is this initially highly unfavourable setting in which the prison or correctional system is placed in, that one needs to be immersed in, in order to fully comprehend the devastating consequences of (the rising) 'penal populism'.[78] First, we provide the key points (benchmarks) of the current European human rights

75 National Commission for the Prevention of Torture, 2022.

76 Konferenz der Kantonalen Justiz- und Polizeidirektorinnen und -direktoren, 2022, p. 3.

77 For a Croatian case study, see: Getoš Kalac, Bezić and Šprem, 2021.

78 According to Garland, Tony Bottoms was the first one to raise the issue of 'populist punitiveness' in 1995. Garland defined penal populism as a form of political discourse that, directly or by implication, denigrates the views of professional experts and liberal elites and claims instead the authority of 'the people' whose views about punishment it professes to express. […]. Penal populism typically has a punitive, reactionary cast – which is why we often think of it as a synonym for 'populist punitiveness'.(Garland, 2022, p. 251).

standards on life sentences as established through the ECtHR case law.[79] Then, we present a vivid real-life case of what practice looks like and what might happen if standards and practice were to collide. Within this section, we focus on the normative construct of security confinement to showcase an example of penal populism and highlight the fine normative line separating security confinement from life sentences, which is commonly non-existent in practice.

■ *3.1. Current European human rights standards on life sentences*

Examining the domain of justice and human rights, we focus on the current guidelines established by the ECtHR. One of the key standards in the context of life sentences set forth by the ECtHR is the requirement that life sentences "*must be reducible both* de jure *and* de facto*, ensuring the prospect of release and the possibility of review.*"[80] The jurisprudence of the ECtHR addressed the prohibition of irreducible life sentences and identified the need to avoid sentences that lack any possibility of release, ensuring that detention remains proportionate and respects human dignity.[81] The ECtHR emphasises that prisoners subjected to life sentences must be provided with clarity and certainty regarding the criteria and conditions for potential release.[82] Furthermore, it advocates for the protection of family life and correspondence, allowing life prisoners to maintain their relationships and communication with relatives.[83]

In this context, the ECtHR sets crucial standards for security confinement (*Sicherungsverwahrung*). As per its interpretation, long or even indefinite deprivation of liberty may be permissible following a conviction, and the determination regarding the release of convicted individuals from such measures can be made

79 An up-to-date summary of the impact of ECtHR's decisions on life sentences on national legislation and practice, as reported by the states in question has been published in May 2023 in CoE, 2023d. It provides insight specifically into the following issues: 'review mechanisms; conditions of detention; risk of irreducible life sentences in cases of extradition; the right to respect for family life and correspondence; and legal remedies to challenge the length of criminal proceedings and lawfulness of detention.' Cit. CoE, 2023d, p. 2.

80 Cit. CoE, 2023d, p. 2.

81 Ibid.

82 See more in ECtHR judgements: *Marcello Viola v. Italy* (no. 2) (application no. 77633/16), judgement of 13 June 2021 [online]. Available at: https://hudoc.echr.coe.int/fre?i=002-12494 (Accessed: 14 August 2023); *Vinter and Others v. the United Kingdom* (applications nos. 66069/09, 130/10 and 3896/10), judgement of 9 July 2013 [online]. Available at: https://hudoc.echr.coe.int/?i=001-122664 (Accessed: 14 August 2023); *Petukhov v. Ukraine* (no. 2) (application no. 41216/13), judgement of 12 March 2019 [online]. Available at: https://hudoc.echr.coe.int/rus?i=002-12379 (Accessed: 14 August 2023).

83 CoE, 2023d, p. 8.; see more in ECtHR judgements: *Kalda v. Estonia* (application no. 35245/19), judgement of 6 June 2016 [online]. Available at: https://hudoc.echr.coe.int/fre?i=001-160270 (Accessed: 14 August 2023); *Dickson v. the United Kingdom* (application no. 44362/04), judgement of 4 December 2007 [online]. Available at: https://hudoc.echr.coe.int/eng?i=001-73360 (Accessed: 14 August 2023); *Trosin v. Ukraine* (application no. 39758/05), judgement of 23 May 2012 [online]. Available at: https://hudoc.echr.coe.int/eng?i=001-109197 (Accessed: 14 August 2023).

in subsequent phases.[84] The ECtHR has significantly influenced the evolution of preventive detention practices, particularly in Germany. Noteworthy cases, such as *M. v. Germany*[85] and *Ilnseher v. Germany*[86], have represented the efforts taken by ECtHR to define the preconditions[87] for a form of preventive detention that aligns with the human rights standards set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms[88] (ECHR). In the cases mentioned above, preventive detention imposed on the person no longer constituted a penalty but was preventive in nature.

According to jurisprudence of the ECtHR, any deprivation of liberty must be in accordance with the law. Article 5 of the ECHR outlines the conditions for lawful detention, including preventive detention. This type of detention, similar to other forms of liberty deprivation, must adhere to established rules. Furthermore, under Article 5 of the Convention, the ECtHR established the general acceptance of preventive detention.[89] However, debates on the interpretation of Article 5 occurred in a segment that tackled individuals of 'unsound mind'.[90] In that context, the ECtHR applies the Winterwerp criteria,[91] stipulating the need for objective medical expertise to establish a genuine mental disorder; its severity and persistence must be determined to justify compulsory confinement and

84 Drenkhahn and Morgenstern, 2020. p. 97.

85 *M. v. Germany* (application no. 19359/04), judgement of 17 December 2009 [online]. Available at: https://hudoc.echr.coe.int/fre?i=002-1190 (Accessed: 14 August 2023).

86 *Ilnseher v. Germany* (application no. 10211/12, 27505/14), judgement of 4 December 2018 [online]. Available at: https://hudoc.echr.coe.int/fre?i=001-187540 (Accessed: 14 August 2023).

87 E.g., in *M. v. Germany* (19359/04), paragraph 128, the ECtHR states that
...preventive detention orders may be made only against persons who have repeatedly been found guilty of criminal offences of a certain gravity. It observes, in particular, that there appear to be no special measures, instruments or institutions in place, other than those available to ordinary long-term prisoners, directed at persons subject to preventive detention and aimed at reducing the danger they present, and thus, at limiting the duration of their detention to what is strictly necessary in order to prevent them from committing further offences.

88 Drenkhahn and Morgenstern, 2020. p. 96.; ECHR and Fundamental Freedoms, 1950.

89 The ECtHR took the same position in several cases, see in: *van Droogenbroeck v. Belgium* (application no. 7906/77), judgement of 24 June 1982 [online]. Available at: https://hudoc.echr.coe.int/eng?i=001-57471 (Accessed: 14 August 2023); *Weeks v. the United Kingdom* (application no. 9787/82), judgement of 2 March 1987 [online]. Available at: https://hudoc.echr.coe.int/eng?i=001-57594 (Accessed: 14 August 2023). (Accessed: 14 August 2023); *Stafford v. the United Kingdom* (application no. 6295/99), judgement of 29 May 2001 [online]. Available at: https://hudoc.echr.coe.int/fre?i=001-22163 (Accessed: 14 August 2023); *Grosskopf v. Germany* (application no. 24478/03), judgement of 21 October 2010 [online]. Available at: https://hudoc.echr.coe.int/fre?i=001-101177 (Accessed: 14 August 2023); *Kallweit v. Germany* (application no. 17792/07), judgement of 13 January 2011 [online]. Available at: https://hudoc.echr.coe.int/fre?i=001-102799 (Accessed: 14 August 2023).

90 See more in: Drenkhahn and Morgenstern, 2020. p. 96.

91 This is criteria named after the case *Winterwerp v. the Netherlands* (application no. 6301/73), judgement of 27 November 1981 [online]. http://www.bailii.org/eu/cases/ECHR/1981/7.html (Accessed: 14 August 2023), paragraph 3.

continued confinement validity.[92] Finally, special consideration regarding Article 7 of the ECHR debated whether preventive detention can be categorised as a form of punishment. In that context, the ECtHR observed that despite minor differences in preventive detention conditions and regular imprisonment, the significant distinction between a prison sentence and prolonged detention as a preventive measure order is unclear.[93]

■ *3.2. Security confinement as a reflection of growing penal populism*

The prison system has come a long way, from abolishing death penalties to establishing relatively high standards for the imposition and execution of life sentences throughout Europe. However, the question remains whether and how such high standards will prevail and develop further against the backdrop of steadily rising penal populism. To assess this, this paper examines security confinement as a result of growing penal populism. Although normatively constructed as a 'security measure' instead of a 'sentence' to which the ECtHR's (life) sentencing standards would apply, security confinement often resembles indeterminate or life prison sentences. This certifies that various European countries (such as Germany,[94] Switzerland,[95] Austria,[96] Belgium,[97] France,[98] Poland,[99] Czech Republic,[100] Italy[101] The Netherlands,[102] Denmark,[103] and Norway[104]) have identified certain types of criminals for which they deem incarceration necessary and justified after a fully served prison sentence. Under the leitmotif of 'dangerousness' and 'protection of society', both well-established argumentative anchors of penal populism or the

92 Drenkhahn and Morgenstern, 2020. p. 98.
93 See more in: Drenkhahn and Morgenstern, 2020. p. 97.
94 Tober, 2019.
95 National Commission for the Prevention of Torture, 2022.
96 Drenkhahn and Morgenstern, 2020, pp. 93-94.
97 Drenkhahn and Morgenstern, 2020, p. 94.
98 Drenkhahn and Morgenstern, 2020, pp. 94-95.
99 Szwed, 2021.
100 Kalvodová, Fryšták, 2022.
101 Ferracuti et al., 2019.
102 van Marle, 2002.
103 Lappi-Seppälä, 2023.
104 Ibid.

'Preventive State'[105] and core features of what *Jakobs* termed 'enemy criminal law' (German: *Feindstrafrecht*)[106], these countries have created a normative loophole that has very successfully avoided ECtHR's minimal life sentence standards thus far, as the following case from Switzerland demonstrates:

> Mr. Peter Vogt, aged 72, is a violent sex offender who spent more than half of his life in prison for repeatedly committing rape and sexual assault. His victims were aged 7, 12, 14, 15, 17, and 40 years old, and his crimes were despicable. He has been in and out of prison throughout his whole life. On three occasions following the sentence he served, he had been kept in security confinement but then released. He was arrested once again on 7th October, 1994 – the last day he spent out of prison – for strangling a prostitute close to death. He served his ten-year prison sentence and spent almost twice the sentence time in security confinement from 2004 onwards. The last expert assessment calculated the risks of his criminal relapse (recidivism) within the next ten years to be 80%. Prior assessments found him to be manipulative with an IQ of 136 and unresponsive to therapy. He was married twice and is still in contact with his second wife and their daughter, but his first wife and their two children did not remain in touch with him. He kept close relations with a lady friend, his *sunshine*, since 1993. In 2004, for his security confinement, he was placed in a less restrictive regime where he undertook several excursions, could leave the prison facility, and had an MP3 player, his own computer, and access to a printer. He also has more frequent visitation and communication rights. This abruptly ended after an outside incident occurred concerning another security-confined person, leading to general restrictions for the security confinement regime. Mr. Vogt was heavily affected by the changes in his security confinement regime, and on 9th July, 2018, he got in touch with an assisted suicide organisation to plan his 'demise'.

105 Zedner and Ashworth, 2019, who highlight the feature of what they term '*incapacitative detention*' in relation to the Preventive State and practices of prevention, posit:
Probably the largest expansion of coercive powers for preventive purposes has been with respect to postconviction detention. Even in legal systems that subscribe to proportionality in sentencing, there is often an exception for incapacitative sentences for those deemed dangerous (McSherry and Keyzer 2011). [...] The contestability of judgments of dangerousness is well known (Monahan 2006, Skeem and Monahan 2011, Zedner 2012). In relation to eligibility for incapacitative detention, it has been argued that conviction for a serious violent crime should be sufficient to displace the normal presumption that each individual will be law-abiding, and this loss of the presumption of harmlessness therefore opens the way for an assessment of risk posed by a convicted offender with a view to long-term preventive detention (Floud and Young 1981; Walen 2011a,b).
Cit. Zedner and Ashworth, 2019, p. 436.

106 Jakobs, 2004.

> He stated in his own words, "*...under such conditions, for me, this life in no longer worth living. Therefore, the time has come to plan my demise and, if necessary, to legally fight for ending this pointless life.*" A physician found the reasons for his suicide wish to be "*on the one side, lack of prospects; on the other side, chronic progressive deterioration of physical condition without prospect of improvement.*"[107]
>
> In 2021, he was transferred from Bostadel to Solothurn, which re-subjected him to a regime resembling a normal sentence and was far more restrictive than the prior conditions of security confinement he was placed (e.g., no MP3 player, computer, printer, and less visitation and communication rights). Although Solothurn has a special building with a less restrictive regime for those in security confinement, it lacks free places. He also could not walk around because he has difficulty using the stairs. Additionally, he weighs 170 kg, which is too heavy for the stair lift.[108]

The case of Mr. Vogt, who completed his ten-year prison sentence and an additional security confinement of 20 years (30 years in total), confirms several important findings within the context of this paper. It showcases that a factual life sentence might be executed in practice under the normative disguise of a security measure, based on the assessment of one's dangerousness to society without any retribution or even rehabilitation (and in essence, not even an incarceration purpose). This is because these purposes or grounds have already been consumed by sentence serving. Thus, the debate between the public and experts, triggered by Mr. Vogt's media appearances, in which he voiced his suicide plans, vividly reflected the main reason why we punish: retribution and revenge. The main issue discussed was the possibility that sentenced and security-confined criminals may 'escape' their just punishment and atonement through suicide. The discussion involved the point at which, in the process of sentence serving or security confinement, should these persons be granted the right to take their own life. Serving two-thirds of a prison sentence was suggested as a general finding, whereas for security-confined persons, no limitation seemed appropriate; it was argued that by killing themselves, they will fulfil the purpose of their confinement, thus protecting society.[109]

If the case concluded by Mr. Vogt's successful assisted suicide within the execution of his security confinement, it would pose (at least) two main legal questions from the perspectives of the criminal and human rights law; however, there should be little doubt about him actually serving an additional prison sentence rather than being merely security confined. From the perspective

107 Source of case information and citations: Holzapfel, 2023.

108 Source of case information: Boos, 2022.

109 See in full detail: Schweizerisches Kompetenzzentrum für den Justizvollzug, 2019; Universität Zürich Kompetenzzentrum Medizin – Ethik – Recht Helvetiae, 2019.

of the criminal, there is a well-documented and direct causal link between his psychological suffering and the worsened confinement conditions he was placed in. Additionally, the prison administration, which had a duty of care towards him (German: *Fürsorgepflicht*), knew about his suicide intention and the causes of his severe suffering (cognitive element). By not resolving the worsened confinement conditions, the prison administration accepted and even actively endorsed the outcome of his suicide (voluntative element). In terms of liability, this would constitute at least indirect or even direct criminal intent. Without further diving into the depths of criminal law dogmatics and practice or deliberation on who exactly in the prison administration would be liable, we preliminary conclude that granting an assisted suicide request resulting from severe or unbearable suffering due to disproportionally harsh confinement conditions to both security-confined and sentence-serving persons exposes prison officials to criminal liability for murder by omission (or commission), depending on how the matter of granting the assisted suicide request is addressed.

From the human rights law perspective and based on the jurisprudence of the ECtHR,[110] a (hypothetical) successful assisted suicide by Mr. Vogt within the execution of his security confinement, granted by the prison administration and caused by the worsened confinement conditions that breach the 'normalisation principle' (German: *Normalisierungsgrundsatz*),[111] constitute violations of Articles 2 (right to life) and 3 (prohibition of inhuman or degrading treatment) of the ECHR. In this regard, we find it difficult to imagine that any prison administration might grant an assisted suicide request in a case such as that of Mr. Vogt, especially without at least having made a reasonable effort to fulfil its obligations arising from the 'normalisation principle'. However, the jurisprudence of the ECtHR is rich in cases one would have found difficult to imagine.

110 For example, see *Ketreb v. France* (application no. 38447/09), judgement of 19 July 2012 [online]. Available at: https://hudoc.echr.coe.int/eng?i=001-112285 (Accessed: 17 July 2023) and *Renolde v. France* (application no. 5608/05), judgement of 16 October 2008 [online]. Available at: https://hudoc.echr.coe.int/eng?i=001-88972 (Accessed: 17 July 2023). And . The ECtHR finds that
'[u]ltimately, for a positive obligation to arise where the risk to a person derives from self-harm, such as a suicide in custody or in a psychiatric hospital, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual and, if so, that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (Younger v. the United Kingdom (dec.); Fernandes de Oliveira v. Portugal [GC], § 110).'
Cit. ECtHR, 2022b, p. 12.

111 The 'normalisation principle' proscribes that "*life in prison shall approximate as closely as possible the positive aspects of life in the community*" (cit. CoE, 2020, p. 2). This rule "*emphasises the positive aspects of normalisation. Life in prison can, of course, never be the same as life in a free society. However, active steps should be taken to make conditions in prison as close to normal life as possible*" (cit. CoE, 2018, p. 7). See also National Commission for the Prevention of Torture, 2022, pp. 40, 49,

To summarise, the presented current and prospective developments and the analysed case suggest that penology and criminal and human rights law and practice must fundamentally reconsider whether any of the three major theories of punishment (retributive, deterrent, or rehabilitative) can justify the normative construct of 'security measures' such as the security confinement, which, in reality, is *de facto* (indeterminate or life) prison sentences. This is of relevance within the European context and against the backdrop of the minimal standards developed by the ECtHR on the imposition and execution of life sentences. This is because such *de facto* (life) sentences, normatively disguised as 'security measures', not only undermine these standards but also erode the very foundation that modern criminal law builds upon: *nullum crimen sine lege*.

4. Conclusion and food for thought

There is an undeniable and longstanding global trend in the abolition of the death sentence, whereby the current *opinio iuris* makes a strong case for the *jus cogens* status of the safeguards against the death penalty as a peremptory norm of general international law. With the abolition of the death sentence in Europe, the issue may be considered to have merely a historical dimension at best. However, several arguments raised against death penalties are of great relevance regarding life sentences, long-term sentences, and security confinement. Thus, with the abolition of the death penalty and the seemingly rising implementation of penal populism, such *humane* alternatives to the death penalty become more attractive in dealing with dangerous crimes and the criminals who commit them. Whether or not such criminal law acrobatics make any penological sense is first and foremost a matter of conceptualisation, terminology, and measurement – a current challenge in penology. The current paper provided some answers, and in turn, most likely created even more questions. The matter of labelling a normatively proscribed sentence as either a life sentence, an ordinary (long-term) prison sentence, or a security measure (security confinement) does not tell us much about its actual punitive effects. Moreover, the mere labelling may be highly misleading because, in many instances, long-term prison sentences in one state are harsher than life sentences in other states. Furthermore, security measures, such as security confinement, are normatively not constructed and, therefore, commonly not even considered sentences; however, in their practical application, they may be regarded as indeterminate actual life sentences.

As demonstrated, the exploration of various jurisdictions' legal approaches to life sentences shows a complex interplay shaped by historical, legal, and societal elements. These divergent frameworks reflect the ongoing struggle to harmonise the principles of punishment, rehabilitation, human rights, and societal safety. The concept of life imprisonment is a subject that demands careful consideration of its

multifaceted implications. Several questions emerge in this context, including how to accurately assess the quality of life of those serving life sentences, ensure humane treatment for imprisoned individuals, evaluate the reliability of methods for predicting future societal danger, and address challenges related to justifying prolonged imprisonment based solely on anticipations of future criminal behaviour.

Regarding justice and human rights, a fundamental standard established by the ECtHR in the context of life sentences is the requirement for both *de jure* and *de facto* reducibility, ensuring the potential for release and review. Given the strong impact of the ECtHR's interpretations, the question of how national legal systems can effectively integrate human rights considerations, such as proportionality and individual dignity, into their security confinement frameworks, while simultaneously navigating the challenge of balancing pressures of penal populism with the firm commitment to upholding strong human rights standards arises. There is a continuous need to further explore security confinement and the thin line that separates preventive measures with "*their primary justifying aim [...] to restrict individual liberty in order to prevent future harm and not to punish wrongdoing (even where the measure is imposed as a consequence of past wrongdoing)*" from sentences with *"large part of their rationale* [being] *punitive*."[112] As demonstrated, such a distinction is not merely a matter of normative (comparative) analysis and human rights evaluation but actually a penological investigation into the countless practicalities of applying such security measures.[113]

Finally, to overcome the current discrepancies between the proclaimed rule of law and 'false-labelled' security measures (such as security confinement), criminal law must fundamentally reconsider its very basic concepts and the principles they were built upon. If it focuses on criminalising and punishing mere risks that have not yet materialised, then it seems far overdue to normatively reflect upon what criminal law has become. Therefore, "*the task of thinking imaginatively about how the Preventive State might pursue the goal of reducing risk and mitigating harm might best be served by bridging disciplinary boundaries to collaborate on the ambitious task of reconceiving the Preventive State along less coercive, less rights-eroding, and more socially constructive lines.*"[114] In this sense, the goal of this paper to provide interdisciplinary insights while raising cross-disciplinary new questions has been successfully accomplished, i.e., laying the foundations for further explorations into sentencing and punishment and the meaningfulness of (preventative) criminal law.

112 Cit. Ashworth and Zedner, 2010, p. 62.

113 'The perils of under-criminalisation may be less immediately apparent than those of over-criminalisation but are no less grave where the result is that disproportionate, ill-defined, and often burdensome intrusions upon individual liberty are imposed in the name of prevention without appropriate procedural safeguards.'
Cit. Ashworth and Zedner, 2010, p. 60.

114 Cit. Zedner and Ashworth, 2019, p. 444.

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ATTILA DUDÁS**

Consumer Rights in the Event of Lack of Conformity of the Goods in Czech, Slovak, and Polish Law

ABSTRACT: *This work analyses and compares the remedies available to consumers in case of lack of conformity of the goods with the contracts in Czech, Slovak, and Polish law. The Czech Republic and Poland have already transposed Directive (EU) 2019/771 in 2022, but due consideration is also given to the previous regulation based on Directive 1999/44/EC, because rules in the Slovak Civil Code are still based on Directive 1999/44/EC. The authors' primary objective is to determine similarities, particularities, and divergences between the examined national laws. Each examined legal order entitles the consumer to the remedies of repair, replacement, price reduction, or termination of the contract. Although the interrelation between the remedies and requirements for their application considerably diverged when all the examined legal orders were influenced by Directive 1999/44/EC due to its minimum harmonisation approach, their hierarchy – comprising repair and replacement as the primary remedy with price reduction and termination of the contract as the secondary set of claims – is noticeable. However, the nature of price reduction, as the secondary remedy, is disputed in Czech law. An important exception exists in Slovak law where price reduction substitutes replacement as the primary remedy when the goods are sold for a lower price or when the lack of conformity affecting the second-hand goods is attributable to the seller's fault. The transposition of Directive (EU) 2019/771 in Czech and Polish law has made the relation between the remedies uniform in these legal orders. It dispelled any doubts regarding their hierarchy in Czech law. Thus, repair and replacement are considered primary while price reduction and termination of the contract are secondary remedies in both the Polish and Czech national laws.*

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■ **KEYWORDS:** conformity, Czech Civil Code, Slovak Civil Code, Polish Civil Code, Polish Consumer Rights Act, repair, replacement, price reduction, termination of the contract

1. Introduction

The adoption of Directive 1999/44/EC in certain aspects of the sale of consumer goods and associated guarantees indicates that the legislative organs of the European Union have paid particular attention to the issue of the consumer's legal position in sales contracts, especially in the event of lack of conformity of goods. This directive, notably inspired by the United Nations Convention on Contracts for the International Sale of Goods,[1] is characterised by the minimum harmonisation approach. Thus, Member States were allowed to adopt or maintain in force more stringent provisions to ensure a higher level of consumer protection.[2] It is stated that it had 'the greatest impact on contract law'.[3]

The mentioned directive was repealed by Directive (EU) 2019/771 as regards certain aspects concerning contracts for the sale of goods. Contrary to the former, Directive (EU) 2019/771 is hallmarked by the maximum harmonisation approach.[4] Accordingly, Member States of the European Union are not allowed to maintain or introduce provisions differing from those laid down in the same directive, which comprises more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in the directive.[5]

The rules of consumer sales contracts in the Czech Republic, Slovakia, and Poland have been preponderantly influenced by the *acquis communautaire.* This work focusses on remedies at the consumer's disposal when there is lack of conformity of the goods with the contract in the mentioned countries. Since the Czech Republic and Poland have amended their legislation by transposing Directive (EU) 2019/771, but Slovakia has not done so yet, the previous legal solutions are also covered in this work.[6] Finally, for sake of clarity, each section commences with a brief discussion devoted to the legal sources of the relevant rules. The authors' primary objective is to determine similarities and differences between the examined national laws.

1 Afferni, 2022, p. 194; Schwenzer, 2014, p. 44.
2 Directive 1999/44/EC, Art. 8, Sec. 2.
3 Twigg-Flesner, 2008, p. 59.
4 Carvalho, 2020, p. 33.
5 Directive (EU) 2019/771, Art. 4.
6 Remark of the editor: The manuscript was submitted in the beginning of 2024 and the peer-reviewing process conducted in the spring. Later on, in the same year Slovakia also transposed Directive (EU) 2019/771.

2. The Czech Republic

■ *2.1. Legal Sources*

Provisions on the consumer's position in the event of lack of conformity of the goods with the contract in the novel Czech Civil Code[7] (hereinafter referred to as "the CzeCC") – which was adopted in 2012 and replaced the old 1964 Civil Code[8] – are based on Directive 1999/44/EC. Namely, the relevant rules are contained in Subsection 5 (Sections 2158–2174), devoted entirely to consumer sales contracts. The general rules on the performance of the contract (Sections 1916–1925) are also applicable.[9] It is worth mentioning that certain relevant provisions are included in the Consumer Protection Act (hereinafter referred to as "the CzeCPA"),[10] where Section 19, governing the procedure of handling and resolving the consumer's claims, is of particular importance.

The Czech legislator transposed Directive (EU) 2019/771 by Act No. 374/2022,[11] amending the CzeCPA and CzeCC. The new rules entered into force on the 30th day after the promulgation of this act[12] – that is, their application commenced on 6 January 2023. The mentioned amendments did not introduce any conceptual difference, since the CzeCC remained *sedes materiae* for defective performance in the case of consumer sales contracts, supplemented by the CzeCPA, which contains rules on accepting and deciding on the consumer's claims.

■ *2.2. Consumer's Rights*

In essence, before the 2022 amendments, the CzeCC differentiated three categories of remedies at the consumer's disposal: repair and replacement as rights aiming to ensure performance of the contract, termination of the contract, and appropriate price reduction.[13] Concerning the right to replacement, the Czech legislator made it subject to the requirement of proportionality, the purpose of which was to protect the seller.[14] Namely, in the event of the consumer goods' lack of conformity with the contract, the CzeCC entitled the consumer to request the supply of new,

7 Občanský zákoník [Civil Code], Sbírka zákonů [Collection of Laws], No. 89/2012.
8 For more information about the codification of civil law in the Czech Republic, see Veress, 2022, pp. 13–34.
9 Hrádek, 2020, p. 9.
10 Zákon o ochraně spotřebitele [Consumer Protection Act], Sbírka zákonů [Collection of Laws], No. 634/1992.
11 Zákon, kterým se mění zákon č. 634/1992 Sb., o ochraně spotřebitele, ve znění pozdějších předpisů, a zákon č. 89/2012 Sb., občanský zákoník, ve znění pozdějších předpisů [Act amending Act No. 634/1992 Coll., on consumer protection, as amended, and Act No. 89/2012 Coll., Civil Code, as amended], Sbírka zákonů [Collection of Laws], No. 374/2022.
12 Act No. 374/2022, Part III, Art. V.
13 Hrádek, 2020, p. 12.
14 Tichý, 2014.

flawless goods unless it was disproportionate to the nature of the defect.[15] Since the term "disproportionate" (*nepřiměřený*) was not defined in the CzeCC,[16] the Czech legal theory interpreted it as the condition of being 'subject to assessment of the value of the item and the cost of replacing the part of or repairing it'.[17] The consumer was entitled to request goods of the same or even better quality.[18] However, if the lack of conformity affected only a part of the goods, the consumer was entitled to request the replacement of that part.[19]

In case it is impossible to exercise the right to replacement due to disproportion in relation to the defect's nature, particularly when the lack of conformity could be removed without undue delay, the consumer is entitled to have the goods repaired free of charge.[20] It may be inferred that the proportionality condition or test distinguished between the rights to replacement and repair, since the disproportionality hindered the consumer from opting replacement over repair. Such a legal solution seems similar to the one adopted in the Proposal for a Directive of the European Parliament and of the Council on common rules promoting the repair of goods and amending Regulation (EU) 2017/2394, Directives (EU) 2019/771, and (EU) 2020/1828 stipulating that where the costs for replacement are equal to or greater than the costs for repair, the seller shall repair the goods to ensure their conformity.[21]

Furthermore, the CzeCC places the replacement remedy at the consumer's disposal, involving the goods in their totality or only in part, even if the lack of conformity could be fixed, if the consumer is unable to use the goods properly due to repeated occurrence of lack of conformity after the repair or because of a large number of defects.[22] According to the case law of the Supreme Court of the Czech Republic, repeated occurrence of lack of conformity after the repair is to be interpreted as a situation in which 'the same defect, which has already been removed at least twice during the warranty period, occurs again'.[23] Moreover, a defect is considered the same if it 'had the same manifestations in the properties of the purchased goods', while how it was removed had no importance.[24] Interestingly, the consumer is also entitled to terminate the contract in the abovementioned cases.[25] Therefore, validity of the consumer sales contract depends on the free will of the consumer, who could opt for the remedy of replacement to preserve it.

15 CzeCC, Sec. 2169 (1).
16 Chvátalová, 2015, p. 351.
17 Hrádek, 2020, p. 12.
18 Hajnal, 2022, p. 186; Hrádek, 2020, p. 12.
19 CzeCC, Sec. 2169 (1).
20 CzeCC, Sec. 2169 (1).
21 The Repair of Goods Proposal, Art. 12.
22 CzeCC, Sec. 2169 (2).
23 Decision of the Supreme Court of the Czech Republic, File No. 33 Cdo 1323/2013.
24 Decision of the Supreme Court of the Czech Republic, File No. 33 Cdo 1323/2013.
25 CzeCC, Sec. 2169 (2).

Besides the abovementioned cases regarding unsuccessful repair, another situation in which the consumer could terminate the contract concerns the impossibility of replacing the goods or their part.[26] Thus, the relevant criterion enabling the termination of the contract is the possibility of replacement, the purpose of which is to protect the seller's position.[27] However, the minor nature of the lack of conformity hinders the use of this remedy.[28] It is worth mentioning that the legal effect of termination of the contract is the cessation of the obligations of the contractual parties *ex tunc*.[29] It presupposes the consumer's obligation to return the goods to the seller at the latter's expense, while, on the other hand, the seller is obliged to reimburse the price paid by the consumer.[30] The Supreme Court of the Czech Republic decided that the seller is not entitled to compensation for a reduction in the value of the goods resulting from their 'normal (usual) use and related wear and tear until the contract is cancelled' if the buyer used them in good faith during the period when the contract was in force.[31]

Finally, the consumer is entitled to obtain the appropriate price reduction if he/she did not exert the right to terminate the contract or the remedies of replacement or repair of the goods.[32] Moreover, the appropriate price reduction is available to the consumer when the seller could not replace the goods in their totality or in part, repair them, or provide a remedy within a reasonable time, or when the seller provided such a remedy that caused substantial difficulties to the consumer.[33] The conditions of reasonable time and substantial difficulties caused to the consumer that render the appropriate price reduction possible were introduced to protect the consumer's position.[34] The notion of reasonable time was to be determined by considering the type of lack of conformity, difficulty of the repair, specific circumstances of the case, and intensity of the consumer needs.[35]

Some in the Czech legal literature argued that the appropriate price reduction in Czech law was not a secondary or tertiary claim but a separate primary claim available to the consumer in case of lack of conformity of the goods with the contract.[36] Thus, repair, replacement, and appropriate price reduction are primary remedies, while termination of the contract is only a subsidiary remedy at the consumer's disposal. In that case, it may be inferred that the hierarchy

26 CzeCC, Sec. 2169 (1).
27 Tichý, 2014.
28 Eliáš, 2012, cited in Chvátalová, 2015, p. 351.
29 Veress et al., 2022, p. 467.
30 Hrádek, 2020, p. 13.
31 Decision of the Supreme Court of the Czech Republic, File No. 30 Cdo 68/2007.
32 CzeCC, Sec. 2169 (3).
33 CzeCC, Sec. 2169 (3).
34 Tichý, 2014.
35 Tichý, 2014.
36 Tichý, §2169 in Švestka, Dvořák, Fiala et al., 2014, p. 983, cited in Hradek, 2020, p. 13.; Hrádek, 2020, pp. 15-18.

of remedies in Czech law differs from the legal solution contained in Directive 1999/44/EC, which distinguishes repair and replacement as primary and price reduction and termination of the contract as secondary remedies.[37] On the other hand, some legal scholars defined the appropriate price reduction as a subsidiary right[38] and 'the last means of legal protection'.[39]

In addition, the consumer is entitled to compensation for damage incurred by lack of conformity. Namely, the CzeCC explicitly envisages that a right from defective performance does not exclude the right to compensation for damage. At the same time, what could be achieved by exerting the right from defective performance could not be claimed on other legal grounds.[40] The Supreme Court of the Czech Republic explained the difference between liability for defects (i.e. lack of conformity) and liability for damage. It asserted that 'liability for defects aims to provide remedy for deficiencies of the seller's own performance and ensures that the buyer receives from the binding legal relationship performance without any defect'. In contrast, the purpose of liability for damage is 'to compensate for material damage incurred as a result of a breach of a legal obligation or as a result of another fact recognised by law'.[41]

Although Directive 1999/44/EC permitted the Member States to oblige the consumer to inform the seller of the lack of conformity within two months from the date on which he/she detected such lack of conformity,[42] the CzeCC did not contain any provision in this regard in the subsection dedicated to the sale of consumer goods.[43] However, the legal theory claimed that good morals demand that such notification should be made without undue delay, considering that such a delay is *contra bonos mores*.[44] Good morals are to be interpreted as 'rules that must be unconditionally upheld in the society'.[45] Furthermore, the CzeCPA stipulated that the consumer's claim is to be settled without delay, within 30 days of lodging the claim at the latest, unless a longer period was agreed between the seller and consumer.[46] Thus, the contractual parties could agree on extending the period within which the seller is obligated to eliminate the lack of conformity.

The transposition of Directive (EU) 2019/771 into Czech law brought significant novelties. If appropriate price reduction is considered as a separate primary claim, it indicates a change in its qualification in the remedial scheme, being added

37 Directive 1999/44/EC, Art. 3, Sec. 2. For more details, see Weatherill, 2013, p. 163; Miklitz and Reich, 2014, p. 180.
38 Chvátalová, 2015, p. 351.
39 Tichý, 2014.
40 CzeCC, Sec. 1925.
41 Decision of the Supreme Court of the Czech Republic, File No. 25 Cdo 1612/2004.
42 Directive 1999/44/EC, Art. 5, Sec. 2.
43 Hajnal 2022, p. 186.
44 Tichý, §2165 in Švestka, Dvořák, Fiala et al., 2014, p. 971, cited in Hradek, 2020, p. 14.
45 Dudás et al., 2022, p. 182.
46 CzeCPA, Sec. 19 (3).

alongside termination of the contract as a secondary remedy. On the other hand, repair and replacement remained the primary set of remedies. It may be stated that the novel regulation introduced a more precise and coherent interrelation between the remedies. The consumer is still entitled to compensation for damage since the mentioned Section 1925 of the CzeCC was not amended.

Concerning primary claims, the Czech legislator, transposing Article 13, Section 2 of Directive (EU) 2019/771, allowed the consumer to demand from the seller the elimination of the lack of conformity by delivering new goods without defect (replacement) or making repairs. Nevertheless, the consumer's freedom of choice is not absolute, since the chosen remedy will not be utilised if such a claim is impossible or disproportionate compared to another remedy, particularly considering the significance of the lack of conformity, value of the goods if there were no lack of conformity, and whether such lack could be addressed by an alternative remedy without significant inconvenience to the consumer.[47] The impossibility of the chosen remedy can be legal or factual, as stated in Recital 48 of Directive (EU) 2019/771.[48] It is worth underlining that the proportionality test is to be conducted in relation to another remedy.[49] More precisely, it is applied exclusively in relation to repair and replacement, as affirmed by the Court of Justice of the European Union (CJEU) in the *Weber and Putz case* (Joined Cases C-65/09 and C-87/09).[50] The Explanatory Memoranda for Act No. 374/2022[51] explicitly mention as disproportionate the consumer's request to replace the goods in their totality when the lack of conformity concerns solely a part of the goods and can be addressed by replacing that part, as in the case of a non-functioning car air conditioner.[52]

Moreover, the seller is entitled to refuse to bring the goods into conformity if it is impossible or disproportionate, especially considering the significance of the lack of conformity and the value the goods would have without it.[53] This provision represents the transposition of Article 13, Section 3 of Directive (EU) 2019/771.

The CzeCC mandates the seller to eliminate the lack of conformity within a reasonable time from the moment he/she has been notified about it by the consumer without causing significant inconvenience to the consumer and considering the nature of the goods and the purpose for which the consumer purchased them.[54] The notion of reasonable time should be interpreted as 'the shortest possible time necessary for completing repair or replacement'.[55] In this regard, the CzeCPA envisages that it is of paramount importance that the consumer's complaint,

47 CzeCC, Sec. 2169 (1).
48 Explanatory Memoranda, p. 142.
49 Explanatory Memoranda, p. 142.
50 Mišćenić et al., 2021, p. 67; Michel, 2018, p. 223.
51 Zákony Pro Lidi, 2022.
52 Explanatory Memoranda, p. 143.
53 CzeCC, Sec. 2169 (2).
54 CzeCC, Sec. 2170 (1).
55 Directive (EU) 2019/771, Recital 55; Explanatory Memoranda, p. 143.

including elimination of the lack of conformity, is to be settled and the consumer must be informed of it no later than 30 days from lodging of the claim, unless the seller and consumer agree on a longer period.[56] The rule in Section 2170 (1) of the CzeCC may be regarded as an incomplete transposition of Article 14, Section 1 of Directive (EU) 2019/771, since it does not stipulate that the seller shall remove the lack of conformity "free of charge". Although the Explanatory Memoranda explicitly stated that the seller is obliged to ensure the removal of the lack of conformity at his/her own expense,[57] the CzeCC only specifies that the seller bears the cost of taking over the goods.[58] Interestingly, it introduces the consumer's liability for the storage fee payment to the seller if the consumer does not take over the goods within a reasonable time after the seller notified him/her of the possibility of taking them over after the repair.[59] This legal solution, not envisaged in Directive (EU) 2019/771, has been influenced by initiatives from business organisations.[60]

Having transposed Article 14, Section 3 of the new Directive, the Czech legislator foresees a specific rule applicable to the situation wherein elimination of the lack of conformity requires disassembly of the goods, the assembly of which was carried out in line with their nature and purpose before the lack of conformity became apparent. In that case, the seller's obligation to repair and replace comprises dismantling the non-conforming goods and installing replacement or repaired goods, or bearing the associated costs.[61] It is worth mentioning that this provision was introduced in Directive (EU) 2019/771 under the influence of the CJEU's jurisprudence, more precisely by the already mentioned *Weber and Putz case* (Joined Cases C-65/09 and C-87/09).[62]

Regarding the subsidiary set of remedies, the consumer is entitled to the appropriate price reduction or termination of the contract in the following cases:

1. if the seller refused to remove the lack of conformity, or he/she did not remove it by Sec. 2170, paras. (1) and (2);
2. if the lack of conformity manifests itself repeatedly;
3. if the lack of conformity represents a fundamental breach of contract or
4. if it is apparent from the seller's statement or the circumstances of the case that the lack of conformity will not be eliminated within a reasonable time or without significant inconvenience to the consumer.[63]

56 CzeCPA, Sec. 19 (3).
57 The Explanatory Memoranda, p. 143.
58 CzeCC, Sec. 2170 (2).
59 CzeCC, Sec. 2170 (3) and Sec. 2159 (3).
60 The Explanatory Memoranda, p. 143.
61 CzeCC, Sec. 2170 (2).
62 Rodrigo, 2022, p. 1300; Loos, 2016, p. 12.
63 CzeCC, Sec. 2171 (1).

This provision transposes Article 13, Section 4 of Directive (EU) 2019/771. The issue of repeated occurrence of the lack of conformity is to be assessed objectively according to the circumstances of the case. The Explanatory Memoranda, influenced by Recital 52 of the mentioned directive, explicitly states that it would be justified to allow the seller another attempt to remedy the lack of conformity if the goods are complex or have higher value.[64] Furthermore, the fundamental breach of contract, rendering possible the immediate use of the secondary set of claims, is defined in Czech law as a remedy for a case wherein the party in breach of contract, at the time of its conclusion, knew or should have known that the other party would not have concluded the contract had it foreseen such a breach.[65]

Termination of the contract is not admissible when the lack of conformity is insignificant.[66] The Czech legislator introduced a rebuttable presumption that the lack of conformity is not insignificant, with the burden of proof on the seller.[67] Therefore, if the seller demonstrates the minor significance of the lack of conformity, the appropriate price reduction is the only secondary remedy at the consumer's disposal. These rules represent the implementation of Article 13, Section 5 of Directive (EU) 2019/771. It is worth noting that the CJEU, in case C-32/12 (*Duarte case*), authorised the national court to grant on its own motion an appropriate price reduction when the consumer unsuccessfully invoked the termination of the contract because of the minor nature of the lack of conformity and because the national law rendered the application of price reduction impossible or considerably difficult.[68]

Moreover, the CzeCC, transposing Article 16, Section 3 of Directive (EU) 2019/771, obliges the seller, in case of termination of the contract, to reimburse the consumer the price paid without undue delay after receiving the goods or after the consumer proves that he/she sent them back.[69] It may be inferred that the consumer's action of returning the goods to the seller precedes and triggers the seller's obligation to reimburse the price. It seems that the Czech lawmakers did not transpose Article 16, Section 1,[70] and Section 2[71] of the mentioned Directive.

64 Explanatory Memoranda, p. 143.
65 CzeCC, Sec. 2002 (1).
66 CzeCC, Sec. 2171 (3).
67 CzeCC, Sec. 2171 (3); Explanatory Memoranda, p. 144.
68 Jansen, 2014, p. 990.
69 CzeCC, Sec. 2171 (4).
70 Art. 16, Sec. 1: 'The consumer shall exercise the right to terminate the sales contract by means of a statement to the seller expressing the decision to terminate the sales contract'.
71 Art. 16, Sec. 2:
Where the lack of conformity relates to only some of the goods delivered under the sales contract and there is a ground for termination of the sales contract pursuant to Article 13, the consumer may terminate the sales contract only in relation to those goods, and in relation to any other goods which the consumer acquired together with the non-conforming goods if the consumer cannot reasonably be expected to accept to keep only the conforming goods.

In line with Article 15 of Directive (EU) 2019/771, the CzeCC stipulates that the appropriate price reduction should be determined as the difference between the value of the goods without lack of conformity and the value of non-conforming goods received by the consumer.[72]

Finally, the Czech legislator did not set a deadline for notifying the seller of the lack of conformity, with the reasoning that introducing such a notification deadline could restrict consumer rights.[73] The consumer's position is further strengthened by the provision stating that the court will grant the rights arising from the lack of conformity, even if it was not pointed out without undue delay after the consumer could have discovered it with sufficient care.[74]

3. Slovakia

■ *2.1. Legal Sources*

The relevant provisions governing the consumer's position in the event of lack of conformity in Slovak law are contained in the Civil Code[75] (hereinafter referred to as "the SloCC"), while the Consumer Protection Act[76] (hereinafter referred to as "the SloCPA") regulates in detail the process of realisation of consumer rights.[77] The transposition of Directive 1999/44/EC occurred with the adoption of Act no. 150/2004 Coll.[78] amending the SloCC. Slovakia has not yet transposed Directive (EU) 2019/771, because of which the Commission of the European Union initiated a procedure against this Member State.[79]

■ *2.2. Consumer's Rights*

The SloCC differentiates addressing the lack of conformity by repair and replacement, termination of the contract, and appropriate price reduction. The Slovak legislator enables the consumer to have the lack of conformity eliminated through repair free of charge in a timely and proper manner.[80] Moreover, the seller is

72 CzeCC, Sec. 2171 (2).
73 Explanatory Memoranda, p. 141.
74 CzeCC, Sec. 2165 (3).
75 Občiansky zákonník [Civil Code], Zbierka zákonov [Collection of Laws], No. 40/1964.
76 Zákon o ochrane spotrebiteľa a o zmene zákona Slovenskej národnej rady č. 372/1990 Zb. o priestupkoch v znení neskorších predpisov [Act on Consumer Protection and Amendment to Act of the Slovak National Council No. 372/1990 Coll. on offenses as amended], Zbierka zákonov [Collection of Laws], No. 250/2007.
77 Mészáros, 2020, p. 74.
78 Zákon z 2. marca 2004,ktorým sa mení a dopĺňa zákon č. 40/1964 Zb. Občiansky zákonník v znení neskorších predpisov [Act of March 2, 2004 amending Act No. 40/1964 Coll. Civil Code as amended], Zbierka zákonov [Collection of Laws], No. 150/2004 Coll.
79 https://ec.europa.eu/commission/presscorner/detail/EN/INF_22_5402 (accessed on 31 January 2024)
80 SloCC, Sec. 622 (1).

obliged to repair the goods without undue delay.[81] The SloCPA contains more precise provisions on the deadline for performing the repair, stipulating that the seller shall carry it out immediately after determining the method of how the consumer's complaint will be resolved. At the same time, in justified cases, it may be settled even later. However, it may not take longer than 30 days from the date of filing the complaint.[82]

Moreover, the consumer may request replacement of the goods, or if the lack of conformity does not concern the goods in their totality, replacement of the flawed part, unless the seller incurs disproportionate costs because of the price of the goods or the gravity of the lack of conformity.[83] As the SloCC gives equal merit to these two remedies, treating them as the primary set of claims, as evident in the provision enabling the seller to always replace the defective goods instead of repairing them if it does not cause serious difficulties to the consumer.[84] It is worth underlining that this requirement, limiting the application of the remedy of replacement, is introduced in the consumer's favour.

Furthermore, the SloCC envisages that if the lack of conformity cannot be removed or prevents the goods from being used properly as goods without a defect, the consumer is entitled to request their replacement or terminate the contract.[85] The same remedies are at the consumer's disposal if the lack of conformity can be removed and the consumer cannot use the goods properly due to reappearance of the lack of conformity after the repair, or due to a larger number of defects.[86] It may be stated that the Slovak legislator demonstrated the endeavour to preserve the contract's validity by permitting the consumer to replace the goods. Thus, the contract's validity exclusively depends on the consumer's free will, expressed by his intention to not exert his/her right to terminate the contract. The Supreme Court of the Slovak Republic interpreted the reappearance of lack of conformity after the repair as the situation 'when the same defect that was removed during the warranty period occurs again', while the same defect signifies that 'the defect has the same manifestations in the properties of the goods, it is not important how the defect was removed'.[87]

The appropriate price reduction is available to the consumer if other irremovable defects exist.[88] Interestingly, the SloCC introduced a peculiar legal solution applicable when the goods were sold at a lower price, or when second-hand goods have lack of conformity for which the seller is responsible. In these cases, the consumer is entitled to appropriate price reduction instead of replacement of

81 SloCC, Sec. 622 (1).
82 SloCPA, Sec. 18 (4).
83 SloCC, Sec. 622 (2).
84 SloCC, Sec. 622 (3).
85 SloCC, Sec. 623 (1).
86 SloCC, Sec. 623 (1).
87 The Supreme Court of the Slovak Republic, 4 Cdo 10/2009.
88 SloCC, Sec. 623 (2).

the goods.[89] Thus, the remedies of repair and termination of the contract remain at the consumer's disposal. It may be inferred that, in this situation, the appropriate price reduction, substituting the replacement, becomes a primary remedy.

The hierarchy of remedies in the SloCC, consisting of repair and replacement as primary remedies and appropriate price reduction and termination of the contract as the secondary set of claims, follows the spirit of Directive 1999/44/EC. However, placing appropriate price reduction, instead of replacement, into the primary set of remedies – when the goods were sold for a lower price or lack of conformity affecting the second-hand goods was attributable to the seller's fault – notably diverts from the model introduced by the European legislator in the mentioned directive. In addition, the SloCPA grants the consumer the right to an adequate financial compensation from the person liable for violating a right or obligation established by the SloCPA and special regulations in case of a successful claim of such a violation in court.[90] It is worth noting that this provision is applicable when consumer rights are exerted by courts, that is, in judicial proceedings.[91]

Finally, the Slovak legislator did not use the opportunity provided by Article 5, Section 2 of Directive 1999/44/EC to institute a two-month period for the consumer, starting from the date of detection of the lack of conformity, to inform the seller about it to benefit from his/her rights. It may be stated that the legal solution of the Slovak law is more beneficial to the consumer since the SloCC envisages that the rights arising from the liability for lack of conformity expire if they are not exercised within the warranty period.[92] It is worth mentioning that the warranty period is 24 months.[93] However, the Slovak legislator introduced two exceptional solutions applicable in the case of perishable and second-hand goods. Concerning perishable goods, the consumer shall exercise his/her rights no later than the day following the purchase.[94] Regarding second-hand goods, the consumer's rights can be exercised within 24 months from the date of receipt of the goods or until the expiry of a period agreed upon by the seller and consumer, which cannot be shorter than 12 months.[95]

89 SloCC, Sec. 624.
90 SloCPA, Sec. 3 (5).
91 Mészáros, 2020, pp. 81–82.
92 SloCC, Sec. 626 (1).
93 SloCC, Sec. 620 (1).
94 SloCC, Sec. 626 (2).
95 SloCC, Sec. 626 (3) and Sec. 620 (2).

4. Poland

■ *4.1. Legal Sources*

Directive 1999/44/EC was first transposed into Polish law in 2002 by adopting the Act on Special Conditions of Consumer Sales.[96] This Act was repealed in 2014[97] by transposing the mentioned directive in the Polish Civil Code (hereinafter referred to as "the PoCC").[98] This occurred jointly with the transposition of Directive 2011/83/EU on consumer rights into the PoCC.[99] It is worth noting that the rules on warranty for defects were applicable to both consumer sales contracts and contracts concluded outside the consumer context. However, the exclusive application of certain provisions to consumer sales contracts was explicitly specified.[100]

The Polish legislator transposed Directive (EU) 2019/771 by adopting the Act of 4 November 2022, amending the Consumer Rights Act, Civil Code, and Private International Law Act.[101] The novel provisions entered into force on 1 January 2023.[102] The legal rules relevant for the assessment of the consumer's position in the event of lack of conformity are now contained in the Consumer Rights Act (hereinafter referred to as "the PoCRA"). The PoCRA explicitly stipulates that the provisions of Book Three of Title XI, Section II of the PoCC shall not apply to agreements obliging the transfer of ownership of goods to the consumer, particularly including sales contracts.[103]

■ *4.2. Consumer's Rights*

Prior to the transposition of Directive (EU) 2019/771, the hierarchy of consumer's rights followed the spirit of Directive 1999/44/EC. Namely, in case of lack of conformity, the consumer was entitled to price reduction or termination of the contract.[104] However, the seller could prevent the realisation of these consumer requests if he/she immediately, and without excessive inconvenience to the consumer, replaced

96 Ustawa z dnia 27 lipca 2002 r. o szczególnych warunkach sprzedaży konsumenckiej oraz o zmianie Kodeksu cywilnego [Act of July 27, 2002 on Special Conditions of Consumer Sales and Amending the Civil Code], Dziennik Ustaw [Journal of Laws], 2002/141/1176.

97 Dębski, 2016, p. 76.

98 Ustawa z dnia 30 maja 2014 r. o prawach konsumenta [Act of May 30, 2014 on Consumer Rights], Dziennik Ustaw [Journal of Laws], 2014/827; Kodeks cywilny [Civil Code], Dziennik Ustaw [Journal of Laws], 1964/16/93.

99 Jagielska, 2020, p. 43; Hejbudzski, 2018, pp. 218–219.

100 Jagielska, 2020, p. 43.

101 Ustawa z dnia 4 listopada 2022 r. o zmianie ustawy o prawach konsumenta, ustawy - Kodeks cywilny oraz ustawy - Prawo prywatne międzynarodowe [Act of 4 November 2022 amending the Act on Consumer Rights, the Civil Code and the Private International Law Act], Dziennik Ustaw [Journal of Laws], 2022/2337.

102 Act of 4 November, Art. 5.

103 PoCRA, Art. 43a (1).

104 PoCC, Art. 560 (1).

the defective goods or removed the lack of conformity by repair.[105] Such a limitation of the consumer's rights was not applicable if the goods had already been replaced or repaired by the seller or the seller failed to fulfil his/her obligation to replace the goods or eliminate the lack of conformity by repair.[106] It was stated in the Polish legal literature that the requirement that repair or replacement take place immediately signified that they were to be carried out as soon as the consumer handed over the goods and a preliminary examination confirmed their defectiveness.[107] At the same time, the notion of excessive inconvenience to the consumer should have been interpreted while considering the specific situation of a particular consumer.[108] It is worth mentioning that lesser nature of the lack of conformity excluded the right to terminate the contract.[109] Therefore, in that case, price reduction was the only secondary remedy at the consumer's disposal.

Moreover, the PoCC permitted the consumer to demand the replacement of the flawed goods, instead of repairing them as proposed by the seller and, *vice versa*, to request the lack of conformity to be removed by repair instead of the replacement requested by the seller. Such a possibility was excluded if it were impossible to bring the goods into conformity with the contract in the manner chosen by the consumer or it required excessive costs compared to the method proposed by the seller. The notion of excessive costs was to be determined considering the value the goods would have had if there were no lack of conformity, the type and significance of the lack of conformity, and inconvenience to which the buyer would have been exposed if the manner chosen by the seller were to be realised.[110] It is worth underlining that this provision, which essentially concedes to the consumer the liberty of choice between repair and replacement as the primary set of remedies, was applicable only if one of the contractual parties was a consumer.

Substantially, the consumer could terminate the contract or request price reduction when the lack of conformity appeared for the first time if the seller did not use his/her right to eliminate it by repair or replacement immediately and without excessive inconvenience to the consumer.[111] Since termination of the contract and price reduction were conditioned by the impossibility of removing the lack of conformity by repair or replacement expressed in terms of time and inconvenience to the consumer, it seems that repair and replacement were treated as primary set of remedies. On the other hand, the price reduction and

105 PoCC, Art. 560 (1).
106 PoCC, Art. 560 (1).
107 Dębski, 2016, p. 79.
108 Dębski, 2016, p. 79.
109 PoCC, Art. 560 (4).
110 PoCC, Art. 560 (2).
111 Jagielska, 2020, p. 45; Dębski, 2016, p. 77.

the termination of the contract were considered the secondary or subsidiary set of claims.

The consumer was also allowed to request replacement or repair independently.[112] Interestingly, the Polish legislator stipulated that if the consumer demanded a replacement or repair, or made a statement on the price reduction, specifying the amount for which the price was to be reduced, and the seller did not respond to this request within 14 days, such a request was considered as justified.[113] This provision applied solely to consumers. However, it should be underlined that this rule was not applied to the termination of the contract.[114]

In addition to the mentioned primary and secondary claims, the consumer was entitled to compensation for damage. Namely, if the consumer made a statement on termination of the contract or opted for a price reduction, he/she was allowed to demand compensation for damage suffered by concluding the contract without knowing about the existence of lack of conformity, even if the damage resulted from circumstances not attributable to the seller's liability. The PoCC explicitly mentioned reimbursement of the costs of concluding the contract; collecting, transporting, storing, and insuring the goods; and incurring expenditure as long as the consumer did not benefit from such expenditure.[115] This right did not prejudice the obligation to redress the damage caused according to the general principles of tort law.[116] The same provision also applied if the lack of conformity was eliminated by repair or replacement.[117]

Finally, the Polish legislator abolished the two-month time limit, starting from the discovery of lack of conformity, for the consumer to notify the seller. Therefore, the consumer could inform the seller about the lack of conformity and enforce his/her claim throughout the warranty period of two years, regardless of the moment of its discovery.[118]

The hierarchy of claims, consisting of repair and replacement as primary remedies and price reduction and termination of the contract as secondary remedies, is retained in the transposition of the Directive (EU) 2019/771 into the PoCRA. However, the PoCRA does not mention the right to compensation for damage. Since the mentioned directive follows the principle of maximum harmonisation,

112 PoCC, Art. 561 (1).
113 PoCC, Art. 561^5.
114 Jagielska, 2020, p. 50.
115 PoCC, Art. 566 (1).
116 PoCC, Art. 566 (1).
117 PoCC, Art. 566 (2).
118 Jagielska, 2020, p. 47; Dębski, 2016, p. 78; Hajnal, 2022, p. 187.

a significant part of the rules is identical to the rules contained in the CzeCC.[119] Thus, only the peculiarities and divergences of the Polish regulation compared with the legal solutions from the CzeCC shall be examined.

Unlike the CzeCC, which only specifies that the seller bears the costs of taking over the goods, the PoCRA explicitly stipulates that the costs of repair and replacement – including, in particular, the costs of postage, transport, labour, and materials – shall be borne by the seller.[120] This provision, together with the requirements to carry out repair or replacement within a reasonable time from the moment the consumer informed the seller about the lack of conformity and without undue inconvenience to the consumer, transposes Article 14, Section 1 of Directive (EU) 2019/771. It should be emphasised that the costs of postage, transport, labour, and materials are mentioned by way of example; thus, the liability of the seller accrues for all possible expenses.

Moreover, the PoCRA obliges the consumer to make the goods subject to repair and replacement available to the seller. On the other hand, the seller shall collect the goods from the consumer at his/her own expense.[121] The Polish legislator does not charge the consumer storage fee to be paid to the seller if the consumer does not take over the goods within a reasonable time after the seller notified him/her of the possibility of taking them over after the repair. If the remedy of replacement is being applied, the consumer is not liable to pay for the normal use of goods that have subsequently been replaced.[122] This provision is in accordance with Article 14, Section 4 of Directive (EU) 2019/771. It should be noted that it was introduced in the mentioned directive under the influence of the CJEU judgment in the *Quelle case*.[123] Namely, the CJEU affirmed that Article 3 of Directive 1999/44/EC

119 The identical legal solutions as in the CzeCC are regarding the following issues: the alternative choice between repair and replacement granted to the consumer (Art. 43d (1) of the PoCRA); situations in which such alternative choice is excluded, that is, the consumer's choice does not oblige the seller (Art. 43d (2) of the PoCRA); situations in which the seller is entitled to refuse to bring the goods into conformity (Art. 43d(2) of the PoCRA); the requirement to carry out repair and replacement within a reasonable time and without undue inconvenience to the consumer (Art. 43d (4) of the PoCRA); the issue of dismantling the non-conforming goods, installing replacement or repaired goods or bearing the associated costs (Art. 43d (6) of the PoCRA); situations in which the consumer may request price reduction and termination of the contract (Art. 43e (1) of the PoCRA) with the only difference that the PoCRA mentions the lack of conformity of such a serious nature instead of the fundamental breach of contract; minor relevance of the lack of conformity that impedes the termination of the contract (Art. 43e (4) of the PoCRA); the definition of price reduction (Art. 43e (2) of the PoCRA); and non-existence of the deadline for notifying the seller about the lack of conformity.

120 PoCRA, Art. 43d (4).

121 PoCRA, Art. 43d (5).

122 PoCRA, Art. 43d (7).

123 Carvalho, 2019, p. 83.

> … is to be interpreted as precluding national legislation under which a seller who has sold consumer goods which are not in conformity may require the consumer to pay compensation for the use of those defective goods until their replacement with new goods.[124]

The PoCRA explicitly states that a consumer exercises the subsidiary set of remedies (price reduction or termination of the contract) by submitting a statement.[125] This legal solution aligns with the rule contained in Article 16, Section 1 of Directive (EU) 2019/771, extending it to price reduction. In that manner, the PoCRA dispels any doubt on how to exercise the price reduction.[126] Transposing Article 16, Section 2 of the mentioned Directive, the Polish lawmaker introduced a general rule, according to which when lack of conformity solely concerns some of the goods delivered under the contract, the consumer may terminate the contract only regarding the flawed goods. However, it is possible to terminate the contract entirely if the consumer cannot be reasonably expected to keep only the conforming goods.[127] Such a rule is inspired by the principle of preservation of the contract.[128]

Regarding the obligations of the contractual parties in the event of the termination of the contract, the PoCRA requires the consumer to return the goods to the seller immediately at the seller's expense. On the other hand, the seller shall reimburse the price to the consumer immediately, but not later than within 14 days from the receipt of the goods or proof of their return.[129] This deadline is introduced to guarantee a certain degree of legal certainty to the consumer and induce the seller to fulfil his/her obligations.[130] The same time limit (immediately, but not later than within 14 days) also applies to the seller's obligation to reimburse part of the price paid by the consumer, commencing from the receipt of the consumer's statement on the price reduction.[131] Finally, using the opportunity to determine the modalities of reimbursement conceded by Article 16 of Directive (EU) 2019/771, the Polish lawmaker specifies that the seller reimburses the price using the same payment method as the consumer did, unless the consumer expressly agrees to a different reimbursement method not causing any costs to him/her.[132] Thus, it is admissible to use another reimbursement method solely by explicit consumer consent, provided that it does not lead to any cost to the seller.

124 CJEU, Case C-404/06 of 17 April 2008.
125 PoCRA, Art. 43e (1).
126 Romanò, 2020, p. 358.
127 PoCRA, Art. 43e (5).
128 Afferni, 2022, p. 292.
129 PoCRA, Art. 43e (6).
130 The Reasoning, p. 9.
131 PoCRA, Art. 43e (3).
132 PoCRA, Art. 43e (7).

5. Concluding remarks

The rules on the consumer's position in the event of lack of conformity of the goods with the contract in the examined countries are based on the European Union directives. While the Czech Republic and Poland transposed Directive (EU) 2019/771, the Slovak regulation is still influenced by Directive 1999/44/EC. However, it is expected that Slovakia will implement Directive (EU) 2019/771 in the near future. The relevant rules are contained in the Civil Codes of the Czech Republic and Slovakia. On the other hand, the Polish legislator decided to transpose Directive (EU) 2019/771 into the Consumer Rights Act, excluding the application of the Civil Code provisions on this subject matter.

All the examined countries envisage the following remedies: repair, replacement, price reduction, and termination of the contract. The interrelation between the mentioned remedies and the requirements for their application diverge, primarily when the rules of all the studied countries are based on Directive 1999/44/EC. Such a divergence results from the minimum harmonisation character of the mentioned directive. Nevertheless, the hierarchy of the remedies available to the consumer also existed in the Czech Republic and Poland before the transposition of Directive (EU) 2019/771. Polish law distinguished repair and replacement as primary and price reduction and termination of the contract as secondary remedies. Conversely, the legal nature of price reduction in Czech law was disputed, since the Czech legal theory characterised it as a separate primary claim and "a last means of legal protection". Moreover, Slovak law differentiates repair and replacement as primary remedies and price reduction and termination of the contract as the subsidiary set of claims. Interestingly, price reduction becomes a primary remedy, substituting replacement, when the goods are sold for a lower price or the lack of conformity affecting the second-hand goods can be attributed to the seller's fault.

Implementation of Directive (EU) 2019/771 within Czech and Polish law due to its maximum harmonisation character renders identical the interconnection between the claims and their hierarchy (repair and replacement as the primary with price reduction and termination of the contract as the secondary claims). However, there are certain differences between these two laws. For example, the Czech lawmaker charges the consumer a storage fee to be paid to the seller if the consumer does not take over the goods within a reasonable time after the seller notified him/her of the possibility of taking them over after the repair. On the other hand, the Polish Consumer Rights Act contains a precise deadline for the seller's obligation in case of price reduction and termination of the contract. Moreover, the Polish legislator determined the means of reimbursement, specifying that the seller shall reimburse the price using the same payment method as the

consumer did unless the consumer expressly agrees to a different reimbursement method that does not entail any cost to him/her.

Finally, it is worth underlining that none of the examined countries instituted a time limit for the consumer to inform the seller about the lack of conformity to be able to use his/her rights, which is an option provided for by the directives.

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Principal Issues of the Responsibility for Damage Caused by Spatial Planning in Poland: Liability for Spatial Damage From a Bird's Eye View**

ABSTRACT: *Liability for planning damage is gaining importance in Polish and European law due to the effects of the accelerating development of civilisation and the increase in the world's population. These phenomena result in the ever-increasing transformation of land for the needs of transforming societies and the economy. However, natural and spatial resources are limited. Moreover, sometimes it is not possible to change a space once developed, or it becomes very difficult and expensive. The above-mentioned circumstances make it necessary to exercise public authority in planning and spatial development to an increasing extent. In turn, the expansion of the scale of public authority activities in this sphere entails a proliferation of the legislation normalising the principles, boundaries and forms within which it should take place. Finally, an increase in the intensity with which planning and zoning tasks are carried out by public authorities leads to a rise in the frequency of planning damage, that is, the damage created to citizens' rights to real estate. In this paper, liability is aimed at compensating for these damages.*

KEYWORDS: planning and zoning, planning damage, municipality, local zoning plan, planning authority, claim for compensation, claim for expropriation of property

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1. Introduction

Liability for planning damage is related to the exercise of public authority in the sphere of planning and spatial development. In European countries, until the formation of the institution of property in modern terms and the development of legislation on planning and spatial development, there was no need to create a legal basis for the liability of public authority for actions related to planning and spatial development, meaning that liability for planning damage has a relatively short history. For instance, its regulation appeared in 1928 for the first time in Polish law in the Presidential Order of 16.02.1928 on the law of construction and development of settlements.[1] After WWII and during the socialist system from 1945 to 1989, the legislator returned to concepts from the interwar period. With the return to a democratic system, the regulation of public authority liability for planning damage was restored with the introduction of Article 36 of the Law of 7.07.1994 on Spatial Development.[2] At present, this matter is primarily regulated by Articles 36 and 37 of the Law on spatial planning and development of 23.03.2003 (LSPD).[3] The current legislation is a continuation of the normative solutions in the preceding law. On 24.09.2023 a law significantly amending the Polish planning and zoning system came into force.[4]

According to the current planning and spatial development regulations, the municipality, as an entity at the bottom of the three-tier hierarchy of local government units, is the primary entity responsible for shaping and conducting spatial policy.[5] To be able to carry out the tasks imposed on it, it has been equipped with planning authority. As an authorisation, which is anchored in the law, it legally determines the use and principles of land development in the form of a binding legal act, regardless of the will and demands of other entities.[6] This authority is exercised by the municipality within the limits of the planning autonomy granted to it. It is accepted in the doctrine that planning independence means 'the ability to carry out in its own name and on its own responsibility tasks in the scope of spatial planning without any interference from other organs or persons'.[7] Both

1 Rozporządzenie Prezydenta Rzeczypospolitej z 16.02.1928 roku o prawie budowlanym i zabudowaniu osiedli (Dz.U.1928.23.202).
2 Ustawa z 7.07.1994 roku o zagospodarowaniu przestrzennym (Dz.U. 1999, nr 15, poz. 139 ze zm.).
3 Ustawa z 27.03.2003 roku o planowaniu i zagospodarowaniu przestrzennym (Dz.U. 2003, nr 80, poz. 717).
4 Ustawa 7.07.2023 o zmianie ustawy o planowaniu i zagospodarowaniu przestrzennym oraz niektórych innych ustaw (Dz.U. 2023, poz. 1688).
5 Krawczyk, 2015, p. 130.
6 Leoński and Szewczyk, 2002, pp. 78–80; Niewiadomski, 2019, p. 21; Zwolak, 2019, p. 12.
7 Dziedzic-Bukowska and Jaworski and Sosnowski, 2016, pp. 187–188; Sosnowski, 2011, pp. 27–28; Boć, 2010, p. 199.

the planning authority and planning independence may not be abused.[8] If the authority is abused, the action of the local government unit becomes unlawful.

The municipality performs planning and zoning duties by developing documents such as strategies, plans, analyses. Some of these are general, while others are for specialised planning.[9] The documents are often interrelated, in that the content of one directly affects the content of others. However, the documents have different legal status. Some are only internally binding on the municipality while others have effects on other entities. For example, the municipality's strategy is enacted on a mandatory basis but has only internal force, that is, it binds internal municipal bodies when creating spatial planning acts. The municipality is also obliged to develop a general municipal plan for the entire territory. This document recently replaced the municipality's zoning study, which was not a normative act and did not have universally binding force.[10] This general plan of a municipality takes the form of a resolution of the municipal council, and consists of a textual and graphic (map) part. The text of the municipal general plan mandatorily defines planning zones and municipal urban planning standards, while optional areas of development replenishment and downtown development areas may also be defined. The graphic part is a mapping of the regulations in the textual part. Due to the need to include the entire area of the municipality on the map, the graphic part is schematic and inaccurate. The dispositions of the municipality's general plan are binding on all private and public entities, in particular during the preparation of planning documents by administrative bodies, including decisions on the conditions of building development and land development. Such decisions can be issued only if the municipality has defined an area of supplementing development in the general plan and only if the investment is made within the boundaries of this area. Another planning document developed by the municipality is the local development plan. Similarly to the general plan, it introduces dispositions on land use in a given area that are binding for everyone.[11] Some varieties less frequently used in practice are the local revitalisation plan and integrated investment plan, which is a new institution in Polish law. All three types of local plans have the same legal status and are subject to the same regulations regarding the consequences of their adoption or amendment. In this article, whenever reference is made to the local development plan, it should also be understood to include its other two specific types.

The municipality's general plan (hereinafter: general plan) and the municipality's local development plan (hereinafter: local plan) have been given a special status in the legal order because they were given the status of normative acts that apply to a strictly limited territory, specifically, to the whole area or, most often,

8 Jakimowicz, 2012, p. 52; Parchomiuk, 2014, pp. 26–37.
9 Niewiadomski, 2002, p. 79.
10 Wlaźlak, 2009, pp. 16–17.
11 Dąbek, 2020, p. 170; Leoński and Szewczyk, 1997, pp. 41–44.

only a part of the municipality that adopted them. In the hierarchy of law sources, both plans are considered acts of local law.[12] Therefore, rules like those for normative acts should be applied to the interpretation of general plans and local plans.[13] When in doubt about interpretation, the principle of *in dubio pro libertate* must be applied. Plan provisions cannot be interpreted in an expansive manner.[14]

Despite the equal and equivalent normative status of the two plans, the most significant is the local plan due to the level of detail of its disposition, scale and the type of determinations made therein. Further attention should therefore be paid to the local plan.

The local plan is adopted by a resolution of the municipal council, which is the decision-making body. Once passed, it is announced in the official journal of the voivodship. After the expiration of *vacatio legis*, which is, as a rule, 14 days, the provisions of the local plan begin to directly affect the legal sphere (interests) of legal and natural persons with legal title to real estate.[15] The amendment of the local plan follows the same procedure as its adoption. The municipality can, with the exceptions explicitly articulated in the law, freely decide whether it wants to introduce a local plan in a given area. Similarly, it retains a relatively high degree of autonomy in determining individual provisions.[16] In particular, it establishes: the purpose of the land, the location of public purpose investments, the manner of development and the conditions for development of the land, as well as the principles of merging and dividing real estate. The most restrictive provision that a local plan may contain is a prohibition on real estate development. The types of land use that a municipality may specify in the local plan are exhaustively listed in implementing legislation (i.e. ordinances). For example, the following types of land use are specified: areas for residential or service development, agricultural use, greenery and water, technical-production development, communications, and technical infrastructure. The land use in the local plan should correspond to the type of planning zone specified in the general plan. In addition to property designation, the local plan details the conditions for the realisation of rights to property, including specifying the rules for its development. The local land use plan consists of a textual part, which describes the rules for the use and development of land in the area, and a graphic part, in which the individual areas are illustrated along with their designation.

Therefore, the momentousness of a local plan is due to the effects that its enactment produces. The local plan has legal effects against any person entitled to the property from the date of its entry into force. A change of ownership does not cause a new purchaser to evade the contents of the local plan affecting the

12 Niewiadomski, 2011, p. 149.
13 Zwolak, 2020, p. 47.
14 Buczyński, 2014, p. 54.
15 Zachariasz, 2015, p. 29.
16 Niewiadomski, 2019, pp. 22-23.

property. Moreover, the provisions of the local plan are binding on all other entities, including state and local government bodies and the municipality that adopted it. The nature of the legal norms contained in the local plan means that it most strongly affects land that has not been developed. Its provisions thus directly shape the content of the right of ownership, determining the extent to which an authorised person can use his own property.[17] They also apply to the right of perpetual usufruct, if it has been established on the property. Further, the provisions on the right of ownership apply *mutatis mutandis* to the right of perpetual usufruct. The impact on the content of the subjective right causes the manner of exercising this right to change as well.[18] Of the powers distinguished in the science of law that specify the right of ownership, the local plan can only lead to a depletion of the right to use real estate. However, outside the scope of the local plan's impact is the right to dispose of property. Despite the enactment of the local plan, there is no exclusion or restriction of the owner's right to dispose of or encumber his real estate with limited property or contractual rights.[19] Nonetheless, different opinions that the local plan could also limit a right to dispose of property are reported in the science of law.[20]

The municipality should weigh public, local, and private interests when determining land use and property development in the local plan.[21] Because of the need to also consider the interests of the public and the local community, the way in which the local plan affects property ownership rights can potentially be both positive and negative from the owner's viewpoint. In the event of an increase in the scope of rights, the municipality's executive body may require the owner to pay a so-called planning fee (up to 30%) for the increase in property value. Collection of the planning fee is carried out administratively after issuing of a decision to determine the one-time fee. However, the local plan may lead to a restriction of the right to use the property, usually entailing a reduction in value. Under Polish law, damage is understood as damage to legally protected goods (and interests) arising against the will of the injured party.[22] Planning damage, being a special case of damage, consists of damage to the legally protected goods and interests of the property owner as a result of the enactment or amendment of the local plan. In terms of the Polish law, the damage can manifest itself both on the property and

17 Bosek, 2012, p. 589; Popardowski, 2012, pp. 212-213; Zięty, 2011, p. 48.
18 Stańko, 2004, p. 93; Szwajdler, 1990, p. 321.
19 Sobel, 2010a, p. 53.
20 Dolnicki, 2019, p. 113.
21 The judgements of the Polish Supreme Court as follows: wyrok SN 18.11.1993, III ARN 49/93, OSN 1994, nr 9, poz. 181; as well as the judgments of the Polish Supreme Administrative Court as follows: wyrok NSA 25.02.2020, II OSK 1048/18; wyrok NSA 11.01.2017, II OSK 932/15; wyrok NSA 28.03.2014, II OSK 518/13.
22 Radwański and Olejniczak, 2021, pp. 91, 94-95. The other definition damage is an impairment to the legally protected rights or interests of the victim, which the legal norm requires to be compensated. Zagrobelny, 2019, p. 577.

on the person, depending on the type of goods and interests affected. However, as the doctrinal understanding of damage is broad, liability for the negative consequences of a legal event manifesting itself in non-property goods is limited only to cases in which there is a clear, explicit legal basis for claiming compensation. Adoption or amendment of a local plan may entail negative consequences for non-property goods. Nonetheless, the scope of possible compensation covers only damages arising in property goods. Therefore, it is not possible to claim compensation for mental suffering and other types of damage to non-property goods as a result of the adoption or amendment of the local plan. However, damage to property, in accordance with the principle of full compensation expressed in Article 361 § 2 of the Act of 23.04.1964 of the Civil Code (hereinafter, the Civil Code), is subject to compensation in full, unless a specific provision states otherwise. Damage understood in this way consists of two elements: the losses that the injured party suffered (*damnum emergens*) and the benefits that he could have achieved (*lucrum cessans*) if the damaging event had not occurred. The amount of property damage is estimated using the differential method (difference method).[23] As a rule, the damage is calculated as the difference between the hypothetical state of the injured party's property that would have existed if the local plan had not been enacted or amended and the state of his property formed as a result of the legal event.

Therefore, the planning damage consists primarily of the property damage revealed as a result of the restriction of the content of the right of ownership of the property possibly established on it. A consequence of the restriction of the right to real estate may also be a reduction in the natural and civil benefits previously enjoyed by the holder. In addition, planning damage may also take the form of expenses incurred in connection with the planned future development of the property in question, which lose their meaning due to the enactment or amendment of the local plan. This category includes, for example, the cost of expert services (architects, engineers, surveyors, geologists etc.) performed for development, the cost of purchasing construction materials, the incurred remuneration for construction work performed, or prepared work for further construction work.

For planning damage, it is not necessary to prove that the damage occurred against the will of the injured party. As previously indicated, the competence of a municipality to make a sovereign, binding determination of the use and principles of land use in the local plan, regardless of the will and demands of others, is the essence of planning authority and autonomy. While entities with a legal interest may postulate certain amendments to drafts of the study or the local plan, as well as participate in public consultations, they are not binding for the municipality.[24] Property owners can only appeal against a resolution to adopt or amend a local

23 Banaszczyk, 2018, pp. 1165, 1206, 1208, 1231; Kaliński, 2014, p. 170.
24 Bielecki, 2007, pp. 166–170.

plan to an administrative court. If the complaint is upheld, the plan loses legal force in whole or in part. However, a possible claim for damages is based on a different legal basis in such a situation. Annulment of a resolution to adopt or amend a local plan triggers liability for unlawful exercise of public authority under Article 417 - 417[1] of the Civil Code. This is a liability based on the opposite premise from the provisions governing the recovery of planning damage. This is because the starting point for liability for planning damage is that the local plan is valid and effective, and the actions of the municipality are within the limits of the law. In other words, for liability for planning damage to be attributed, it is necessary that the action that is the source of the damage is lawful. An action for a declaration of the illegality of a municipal council resolution moves the consideration of liability for damages to a different plane. By contrast, within the limits of the events that fall within planning damage liability, the injured party does not have any legal instruments that can bind the municipality against its will to affect the way it lawfully performs planning and zoning tasks.[25] Any damage caused by the amendment or enactment of a local plan thus arises independently of the will of the injured party.

2. General liability for planning damage in the Polish law

As noted at the outset, liability for planning damage is currently regulated primarily in Articles 36 and 37 LSPD. Article 36 paragraph 1 LSPD provides that: 'If, in connection with the enactment of a local plan or its amendment, the use of real estate or a part thereof in the previous manner or in accordance with its previous purpose has become impossible or significantly restricted, the owner or perpetual usufructuary of the real estate may, subject to paragraph 2 and Article 37[1] paragraph 1, demand from the municipality or from the ruler of the closed area, if the enactment of the plan or its amendment was caused by the needs of defence and national security: 1) compensation for the actual damage suffered, or 2) redemption of the property or a part thereof'.

The next two editorial units of Article 36 paragraph 1 LSPD also refer to Article 36 paragraph 1 LSPD. In the next paragraph, the legislator lists the cases in which claims under Article 36 paragraph 1 LSPD are excluded. Then, Article 36 paragraph 2 LSPD stipulates that the realisation of claims under Article 36 paragraph 1 LSPD may also take place by way of the municipality offering the owner or perpetual usufructuary a replacement property, which leads to the expiration of these claims as of the date of the conclusion of the swap agreement.

In Article 36 paragraph 3 LSPD the legislator has normalised another creditor's claim arising in liability for planning damage: 'If, due to the enactment of the

25 Szlachetko, 2017, pp. 57–60, 111–206.

local plan or its amendment, the value of the real estate has been reduced, and the owner or perpetual usufructuary disposes of this real estate and has not exercised the rights referred to in paragraphs 1 and 2, he may demand from the municipality compensation equal to the reduction in the value of the real estate'.

The final part of Article 36 LSPD sets forth the rules for claiming reimbursement of benefits paid to the owner or perpetual usufructuary, which were undue due to the invalidity of the local plan.

In turn, in Article 37 LSPD, the legislator provides detailed rules relating to the manner of calculating the amount of damage and the value of the property, the procedure and the time limit for asserting claims. This provision also partly normalises the prerequisites for determining the planning fee, the analysis of which does not fall within the issue of liability for planning damage.

However, the few provisions in which reference has been made to the appropriate application of Articles 36 and 37 LSPD (Article 37^1 paragraph 2, Article 37na paragraph 7 and 8 LSPD, Article 58 paragraph 2 LSPD and Article 63 paragraph 3 LSPD), show some distinctiveness that does not allow them to qualify for liability for planning damage. Thus, the legislative technique used underscores a certain dissimilarity between the core of the regulations in Articles 36–37 LSPD and these cases.

Analysing the construction of Articles 36 and 37 LSPD and comparing it with the other provisions of the law, which provide for the right to claim compensation for damage resulting from the municipality's planning activities, one can identify several distinguishing features of this liability. First, the obligation to compensate for damage has been linked to the municipality's exercise of planning authority and the planning autonomy exercised within its boundaries (which can be described as a subjective criterion). Therefore, damages caused by actions not based on the municipality's exercise of its own planning and zoning authority remain outside the scope of liability. As such, the narrowing of liability for planning damage may be a consequence of the limitation or exclusion of the municipality's independence in determining the content of the local plan. In addition, the obligation to compensate for planning damage arises when the municipality enacts or amends the local plan or, exceptionally, it is considered as sanction for failure to comply with the obligation to enact or amend a general plan under Article 13k paragraph 2 LSPD (which can be described as an action criterion). Thus, liability is only linked to the adoption of a normative act establishing on the territory of a municipality the use of land and the manner of its development, with direct effects in the legal sphere on subjects with legal title to real estate. Liability for planning damage cannot include cases of introduction of some restrictions on the use of real estate on the basis of other legal acts (especially laws) and adoption of other planning acts by the municipality. Only a public authority (which can be defined as an entity criterion) can be liable for planning damage. As a general rule, the obligation to compensate for the damage rests with the municipality and, as an

exception of marginal practical significance, with the State Treasury represented by the relevant organisational unit. Outside the circle of entities that may be liable for planning damage are non-public entities. It is thus excluded that there are two private entities on different sides with such claims.

Having isolated certain characteristics of the construction of liability for planning damage, we can define it. The definition of legal liability *sensu largo* should be the starting point. In the Polish science of law, liability is considered 'the incurring of negative consequences by a subject of rights for events or states of affairs that are subject to negative legal qualification and are attributed to a specific subject in the legal order'[26]. Therefore, liability for planning damage should be understood as the totality of negative legal consequences borne by a municipality or the State Treasury in connection with the enactment or amendment, within the limits of the planning authority granted to the municipality, of a local spatial development plan, local revitalisation plan, or integrated investment plan or in connection with the failure to perform an obligation to enact or amend a general plan in certain situations.

Once the definition of liability for planning damage has been established, it is necessary to determine the entities entitled to claim compensation for the damage and associate with them the legal remedies to which they are entitled, as well as the entities obliged to compensate for the damage. The enactment or amendment of the local plan may be felt by everyone who has legal title to the property. However, not everyone with legal title to a property can seek legal protection for an unfavourable provision of the local plan. The legislator has provided a total of four legal instruments to compensate for planning damage. The choice of three of them is up to the aggrieved party alone, while one is left to the joint decision of the aggrieved party and the party responsible for the damage.

The first legal remedy arising from Article 36 paragraph 1 LSPD is a claim for compensation for the actual damage suffered or for buying back the property or part of it. This claim is vested in the owner or perpetual usufructuary of the property. If more than one person is entitled to the property, the claim is due to all co-owners or perpetual users. In the event that perpetual usufruct has been established on the property, the creditor can be only one of the entities indicated as entitled in Article 36 paragraph 1 LSPD. According to Article 233 of the Civil Code, the perpetual usufructuary may use the land to the exclusion of others and his right, like any other right *in rem*, is effective *erga omnes*, not excluding the owner himself.[27] This means that, for the establishment of perpetual usufruct, the person who will be able to raise a claim under Article 36 paragraph 1 LSPD is the perpetual usufructuary and is entitled to claim compensation or redemption of his right to the property, because he cannot dispose of the ownership right to

26 Banaszczyk, 2015, p. 2; Dzienis, 2006, p. 2.
27 Bocianowska and Ciszewski, 2019, p. 409.

a property to which he has no legal title. The entity obliged to satisfy the claim is either the municipality or the State Treasury represented by the entity in charge of the closed area. Under Polish law, a municipality is a unit of local self-government separate from its inhabitants, which is granted legal personality by law.[28] In mentioning the second obligated entity, the legislator refers in Article 2 paragraph 11 LSPD to the legal definition of a closed area in Article 2 paragraph 9 of the Act of 17.05.1989 Geodetic and Cartographic Law. According to this definition, a closed area is an area of nature reserved for state defence and security, as determined by the competent ministers and heads of central offices. Closed military, railroad, and other areas can be distinguished and are established on the basis of regulations or administrative decisions.[29] From the viewpoint of liability for planning damage, their practical significance is marginal.

Article 36 paragraph 1 LSPD provides for two independent claims in a disjoint alternative to each other. The claim for compensation does not lead to the loss of the right to real estate, aiming only to compensate for the loss of property created in the property of the injured party. The claim for redemption of the right to real estate or a part thereof aims to compensate for the damage by paying its value before the enactment or amendment of the local plan in exchange for the transfer of the right to real estate to the responsible party. As a result, the injured party loses the right to the property but receives a sum of money equivalent to its value before the enactment or amendment of the local plan.

Therefore, Article 36 paragraph 1 LSPD provides for two separate claims that are self-executing in nature.[30] The exercise of one of these rights entails the compensation of the damage and, thus, the termination of the compensation obligation.

The second remedy is provided in Article 36 paragraph 2 LSPD. Its use requires the initiative of the municipality and the approval of the creditor. This is because the legislator made it possible for the municipality to exempt itself from the obligation to execute the claim under Article 36 paragraph 1 LSPD for compensation for the actual damage suffered, or to redeem the property or part of it by offering a replacement property. After the aggrieved party accepts the offer, a swap agreement is concluded within the meaning of Article 603 of the Civil Code. Under this agreement, the owner or perpetual usufructuary transfers his right to the municipality in exchange for an amount of money equivalent to the value before the damage was caused. The power to offer a replacement property is only granted to the municipality, which means, first, that it cannot be exercised by the entity that owns the closed area, and second, that the initiative in using the above institution rests with the municipality. As such, the aggrieved party

28 Note the reference to the legal basis in the Polish act on the district: Article 1.1 i 1.2. ustawa from 8.03.1990 o samorządzie gminnym (Dz.U. 2020, poz. 713).

29 Kamińska, 2013, pp. 41, 45.

30 Plucińska-Filipowicz and Filipowicz and Kosicki, 2018, p. 454; Niewiadomski, 2019, p. 334.

cannot effectively demand that the municipality provide a replacement property against its will, and the municipality cannot force the aggrieved party to enter a swap agreement.

To execute a claim under Article 36 paragraph 1 LSPD or conclude a swap agreement, the authorised owner or perpetual usufructuary must retain legal title to the property until the final conclusion of legal proceedings in the second instance of court or the conclusion of an agreement in due form.[31]

The third legal remedy to redress planning damage is regulated by Article 36 paragraph 3 LSPD. Under this provision, the owner or perpetual usufructuary, if the property is sold, may demand compensation from the municipality equal to the reduction in value. Only the municipality may be obliged to compensate for the damage. The right to demand compensation equal to the reduction in value of the real estate is available only if the holder fails to exercise the first or second legal remedies in Article 36 paragraphs 1 and 2 LSPD. If the planning damage had already been repaired due to the realisation of claims under Article 36 paragraph 1 LSPD or the concluding of an exchange agreement, the obligation to demand compensation equal to the reduction in value of the real estate would also expire.

Under Polish law, initially, responsibility for planning damage rested only with the municipality. In practice, however, municipalities abandoned optional local plans due to the threat of liability for damages. Currently, only a small but growing percentage of the country's area is covered by local plans. In an effort to encourage municipalities to be more proactive in adopting a local plan, the legislature has recently introduced several important legislative changes. In 2018, Article 37[1] LSPD was introduced, which led to the exclusion of the municipality's responsibility if the local plan establishes restrictions on development and land use in connection with the location of airport service facilities. This responsibility was shifted to the Polish Air Navigation Agency. In 2020 there was a limitation on the municipality's liability for damages resulting from the introduction of provisions caused by the needs of state defence and security. Since this amendment, liability for planning damage is borne by the entity in charge of the closed area. Article 36 paragraph 1a LSPD specifies situations when Article 36 paragraph 1 LSPD does not apply, that is, when planning damage does not arise. Although legislative changes in recent years have tended to limit the scope of a municipality's liability for enacting a local plan, it is still a principle that the legislature broadly protects the right of property ownership against such damage.

Another tendency to limit the liability of the municipality for damages related to the implementation of planning and zoning tasks is the fact that no liability for damages has been associated with newly adopted general plans into

31 Note the judgements of the Polish Supreme Court as follows: wyrok SN 6.10.2015, IV CSK 778/15; wyrok SN 29.09.2015, II CSK 653/14; the judgements of the Polish courts of appeal: wyrok SA in Krakow 22.02.2021, I ACa 1256/19; wyrok SA in Katowice 20.02.2018, I ACa 850/17; wyrok SA in Katowice 19.03.2018, V ACa 273/17. Note also: Lewicka, 2018, p. 164.

the legal order. As a result, although the general plan, as a normative act, can affect the status of real estate, in particular the content of property rights in it due to its definition of planning spheres and determination of the possibility of its development, the legislature does not provide the same protection as in the case of the adoption or amendment of a local plan. Under the current state of the law, the owner must wait for the enactment of the local plan to claim the damage caused by the fact that his property was not included in the supplementary development zone in the general plan, so that he could not obtain a decision permitting planned investment. The situation of the aggrieved owner is not favourable, as it is not certain when the local plan introducing a development ban behind the general plan would be enacted. In addition, it is not certain that the municipality, before enacting the local plan, will not change the disposition of the general plan as to lift the prohibition on development. If the enacted local plan did not ultimately include a prohibition on development indirectly resulting from the disposition of the previously adopted general plan, the owner could not claim compensation for the period during which his rights to the property were depleted. As such, the legislature's exclusion of liability for damages arising in connection with the adoption or amendment of the general plan should be strongly criticised. Indeed, on the basis of the recently effective state of the law, there is a violation of property without a certain and available remedy from the moment of interference compensating for the depletion in the property.

Liability for planning damage implements the constitutional principle of property protection, but also has a strong axiological foundation. As previously indicated, this liability is a case of the municipality bearing the negative consequences of the lawful exercise of public authority. The related extension of the indemnification obligation also requires a particularly strong extra-normative justification. This is because the principle is a liability for the unlawful exercise of public authority and its absence in the event of lawful action by state and local government bodies.[32] In the Polish legal order, universal theories justifying the liability of public authority for damage caused by its lawful exercise have been adopted without reservation. Therefore, as an axiological foundation for liability for legal damage, one can see the principle of equality of citizens before public burdens (*l'egalité devant les charges publiques*) together with the principle of protection of property, acquired rights and equity developed in French law.[33] In the science of law, one can also find references to the concepts of *Lastengleicheitspriznzip* and *allgemeinen Aufopferungsgedanken* drawn from German legal science.[34] With regard to the planning damage, a theory of breach of trust of the citizen in the planning activities of public authorities responsible for urban planning (*Vertrauensschaden)*

32 Zaradkiewicz, 2016, p. 577, 587.
33 Guillard, 2016-2017, p. 121; Bagińska in Bagińska and Parchomiuk, 2016, p. 94.
34 Bosek, 2012, p. 567; Parchomiuk in Bagińska and Parchomiuk, 2016, pp. 61, 67, 69-70, 148.

was created in German law. According to its assumptions, a citizen who wants to use his property in a way that corresponds to the content of the applicable planning documents acts in trust in the public authority, as well as the permanence and consequences of its spatial policy. As the citizen is prevented from loss of the right to use the property previously guaranteed to him, he should not suffer the negative consequences of acting in trust in the content of the adopted planning documents, as well as a change of spatial policy that is unpredictable from his perspective.[35] All these concepts are directly applicable to the Polish regulation of liability for planning damage.

In summary, liability for planning damage falls into the category of cases of damage indemnification resulting from the fully lawful exercise of public authority. In Polish law, this liability can undoubtedly be attributed to civil law character. The legal relationship that arises between the injured party and the responsible party is compensatory and creates an obligation. However, controversy may arise as to whether claims in liability for planning damage can be included in the tort regime or should be considered *quasi-delict*. In legal science, opinions concerning the character of the claim which arose from the legal action of the public authority are divided on this issue.[36]

3. Claim for compensation for actual damage or redemption of property

In the event of planning damage, the injured party is entitled to the claim provided for in Article 36 paragraph 1 LSPD for compensation for the actual damage suffered or to redeeming the property or part of it. The positive prerequisites of the claim differ depending on which entity is obliged to satisfy the claim. Negative premises are regulated uniformly for each of the liable entities.

If the liable entity is a municipality, the demand for compensation for damages under Article 36 paragraph 1 LSPD depends on the cumulative fulfilment of the following conditions:

1) a local development plan has been adopted or amended;
2) use of the property or part of it in the previous manner or in accordance with its previous use has become impossible or significantly restricted; and
3) there is a causal relationship between the enactment or amendment of the local spatial development plan and the impossibility or significant limitation of the possibility of using the property or part of it in the previous manner or in accordance with its previous use.

35 Battis, 2019, pp. 815-816; Jarass and Kment, 2017, pp. 412–413.
36 Łętowska, 1979, pp. 84-86.

However, if the entity in charge of the closed area is responsible for the damage, it can be demanded to enforce the claims of Article 36 paragraph 1 LSPD if the following conditions are cumulatively met:

1) the local development plan was either enacted or amended as a result of the needs of state defence and security;
2) use of the property or part of it in the previous manner or in accordance with its previous use has become impossible or significantly restricted; and
3) there is a causal relationship between the enactment or amendment of the local spatial development plan, which was adopted due to the needs of state defence and security, and the impossibility or significant limitation of the possibility of using the property or part of it in the previous manner or in accordance with its previous use.

The positive prerequisite for claims under Article 36 paragraph 1 LSPD is not a decrease in the value of the property. Most often, the introduction of unfavourable provisions in the local plan will entail a decrease in the value of the right to the property. Sometimes, in exceptional situations, restrictions on the use the property will not cause a decrease in the value of the right. It is possible to raise claims for compensation for the actual damage suffered in a such situation, or to demand the redemption of the right to the property or part of it. This conclusion is justified not because of the content of the provision, but primarily because the claim serves to compensate for the damage caused to the entire property of the right holder, not only to his right to the property. Moreover, planning damage consists in the reduction of the possibility of permissible use of the property. Therefore, it does not matter whether the restriction of this possibility further leads to a decrease in the value of the right. All that matters is the restriction of a certain sphere of the possibility of dealing with the property.

Consequently, the maintenance of the existing value of the right to the property certainly does not preclude the realisation of claims under Article 36 paragraph 1 LSPD. However, if the enactment or amendment of the local plan would lead to an increase in the value of the property, planning damage will likely not arise at all. This is because the increase in the value of real estate as a result of the adoption of a local plan is most often caused by the enactment of provisions favourable to the holder of the property. However, there may be some controversy if the provisions of the local plan simultaneously affect the property in question favourably and unfavourably. It seems that then the rule of *compensatio lucri cum damno* provided for in Article 361 § 2 of the Civil Code should be applied. If the damage exceeded the increase in property value, it would be possible to successfully claim compensation for the planning damage, minus the amount of the benefit gained.

The prerequisites of the two claims in Article 36 paragraph 1 LSPD are shaped in the same way. This means that there is no justification for the interpretation according to which the demand to redeem the property or part of it can be made only for more serious violations of the right to the property. The rules developed under administrative law in the context of real estate expropriation cannot be transferred to the case of planning damage. In particular, the aggrieved party cannot be required to prove that it could not have availed itself of a claim that is less onerous for the municipality, that is, a demand for compensation, before making a demand for the redemption of the right to real estate.[37]

Negative prerequisites for claims under Article 36 paragraph 1 LSPD, leading to the exclusion of the right to compensation for planning damage, are stipulated as situations in which a provision of the local plan negatively affecting the property does not constitute an independent determination by the municipality of the socio-economic use of the land and the manner of its use, but results from one of the alternatively specified circumstances from:

1) hydrological, geological, geomorphological or natural conditions relating to the occurrence of flooding and related restrictions, as determined under separate regulations;
2) decisions on the location or implementation of public purpose investments, issued by other than municipal authorities, public administration bodies or the State Water Company Wody Polskie;
3) prohibitions or restrictions on development and land use, specified in the provisions of laws or acts, including local laws, issued on their basis.

■ *3.1. Adoption or amendment of the local development plan*

In Article 37 paragraph 11 LSPD the legislator has defined what is meant by enactment or amendment of a local plan. At present, there should be no doubt that enactment of a local plan refers to the case where no local plan was previously in effect in a given area, or when, although a local plan was in effect, it expired before the local plan that led to the planning damage came into effect, or where a previously enacted local plan is still in effect but is being replaced in its entirety by a new local plan. A local plan amendment a refers only to the situation where a previously adopted local plan is already in effect in a given area and only a modification of the plan is needed, which does not lead to the repeal of the plan in its entirety. Two different local plans cannot be in effect in the same area (the same property) at the same time.[38] The legislator binds liability for planning damage only to the enactment or amendment of a local plan. As indicated above, the consequences of the municipality undertaking other planning and spatial activities are

37 Otherwise: Nowak, 2012, p. 16.
38 Note the judgement of the Polish Supreme Court: wyrok SN 28.04.2016 r., V CSK 473/15.

outside the scope of liability (besides of the mentioned earlier sanction in article 13k paragraph 2 LSPD).

Liability for planning damage is not excluded by the circumstance that some provision, by way of exception to the rule of optionality of enacting local plans, obliges a municipality to pass a resolution to adopt or amend the local plan in a given area. This is because a municipality may be disciplined for having evaded the obligation to adopt or amend a local plan by a complaint for inaction. However, an administrative court may not, in a ruling upholding such a complaint, force a municipality to fulfil its obligation within a certain period.[39]

It is also irrelevant for the municipality to be held liable under Article 36 paragraph 1 LSPD whether the local plan is adopted under the ordinary procedure (i.e. by resolution of the municipal council) or under the substitute procedure described in Article 13k paragraphs 2 and 3 LSPD. The substitute mode is used in the event of a municipality's inaction in enacting or amending an obligatory general plan (i.e. when the municipality has failed to make arrangements in the general plan to enable the implementation of investments of national, provincial, metropolitan, or district significance). Adoption of a local plan under the substitute procedure is a result of the issuance of a so-called substitute order by the governor supervising the municipality's planning activities.

A local plan should be valid and effective. Problems are caused by the moment from which the local plan has legal effects. Some of the jurisprudential and doctrinal statements assume that a local plan can adversely affect a property as soon as it is voted on by the municipal council.[40] However, the normative nature of the resolution to adopt or amend a local plan makes it necessary to take the opposite position. The local plan has legal effects only from its entry into force, which occurs with the lapse of *vacatio legis,* which in the absence of a different provision in the resolution of the municipal council is 14 days from the date of its announcement in the official journal of the voivodship. It is irrelevant that the working out of a draft resolution on the adoption or amendment of a local plan, as well as the voting on this draft cause fluctuations in real estate sales prices. The change in transaction prices prior to the entry into force of the local plan is largely speculative. This view seems to dominate in legal science and judicature.[41]

39 Dolnicki, 2021, pp. 455-456; Stahl, 2013, pp. 68, 71–73, 75.

40 Note the judgement of the Polish Supreme Court: wyrok SN 23.04.2009, IV CSK 508/08; wyrok SN 30.06.2010, V CSK 452/09; wyrok SN 5.07.2012, IV CSK 619/11.

41 Kwaśniak, 2011, p. 245; Świderski, 2006, p. 24. Note the judgement of the Polish Supreme Court: wyrok SN 28.04.2016, V CSK 473/15; wyrok SN 17.03.2016, V CSK 414/15; wyrok SN 28.04.2016, V CSK 473/15; wyrok SN 5.07.2012, IV CSK 619/11.

■ *3.2. Restrictions of the ability to use the property in the previous manner or in accordance with the previous use*

This premise applies to two factual situations: (I) when, in connection with the enactment or amendment of the local plan, the use of the property in accordance with its previous purpose has become impossible or significantly restricted and (II) when, in connection with the adoption or amendment of the local plan, it has become impossible or significantly restricted to use the real estate in the previous manner. The impossibility or substantial limitation of the possibility of using the real estate in accordance with its previous purpose or in the previous manner is alternative. Thus, for claims to arise, it is sufficient that just one of the above effects is realised.[42]

Recently, there has been controversy over whether the claims in Article 36 paragraph 1 LSPD also apply when the owner or perpetual usufructuary has not taken any steps to realise the potential enjoyment of his right. This led to the introduction of Article 37 paragraph 11 LSPD into the legal order, which provides guidelines for estimating the value of property before the damage was done. The legislator ordered to count this value based only on the actual use of the land according to the state on the date of entry into force of the local plan. After the aforementioned amendment, the minor representatives of science interpreted this provision as narrowing liability for planning damage to the case when the injured party began to use the property in a potentially previously permissible way.[43] However, the view that planning damage when there has been a restriction of the purely potential possibility of using the property, although the owner or perpetual usufructuary has not taken any steps to realise his rights beforehand, still seems to prevail.[44] This view appears correct, as it considers the construction and protection of the right to property. Ownership is categorised as an absolute right *in rem*, effective *erga omnes*. The right of ownership gives the right to use a thing in any possible way that is not prohibited by law. Nowadays, of course, ownership is not seen as an absolute right in any European legal order. Nevertheless, with the exception of restrictions imposed by statute, principles of social coexistence and the socio-economic purpose of the law, under Polish law, the owner retains a sphere of free, undisturbed ability to exercise his right. It follows that the potential possibility of using a thing, which is not actually used, also co-creates the content of the subjective right belonging to the owner. Consequently, the depletion of this potential sphere of possibility constitutes planning damage. Article 37 paragraph 11 LSPD, which only specifies the method of calculating the value of the property,

42 Otherwise: Świderski, 2006, p. 25.

43 Dumin, 2015, p. 231.

44 Niewiadomski, 2019, pp. 354-355; Nowak, 2020, pp. 185, 195; Fisz, 2018, pp. 317, 321-322. Note the judgements of the Polish Supreme Court: wyrok SN 19.12.2006, V CSK 332/06; wyrok SN 8.01.2009, I CNP 82/08; wyrok SN 11.09.2009, V CSK 46/09; wyrok SN 5.07.2012, IV CSK 619/11; wyrok SN 9.04.2015, II CSK 336/14; wyrok 19.09.2016, V CSK 117/16.

does not modify the prerequisites for claims under Article 36 paragraph 1 LSPD. It is only a technical provision intended to facilitate the realisation of claims for compensation for actual damage suffered or the redemption of the property. It is thus inappropriate to give it a different purpose, contrary to the intentions of the legislator, claiming that it serves to limit the scope of liability for compensation only in cases where it is not possible as a result of the enactment or amendment of the local plan to continue the previous, actually performed use of the property.

Another important problem that arises against the backdrop of the claims under Article 36 paragraph 1 LSPD is the interpretation of the concepts of the use of the property in the previous manner or in accordance with the previous use (purpose). In the science of law and jurisprudence different views have been expressed on this issue. According to the prevailing opinion, the purpose of real estate should be understood as the unrealised, only potential possibility of using it in accordance with the existing dispositions of the local plan or other relevant piece of law passed by municipality, while the existing manner of use refers to the possibility of use actually realised on it, so to the chosen way of developing the property.[45] This problem is not settled unanimously, because the concept of the use (purpose) of the property is understood differently. Some believe that it can be established not only in the local plan, but also in administrative decisions that are issued for the property.[46] Others believe that even the municipality's zoning study (or after the amendment the general plan) can indicate the property's designation.[47]

In my opinion, it is the consideration of the use (purpose) of the property and the rules for its determination by the municipality that should be considered the starting point. In Article 37 paragraph 11 point 2 LSPD, Article 4 paragraphs 1 and 2 LSPD, and Article 15 paragraph 2 point 1 LSPD the legislator clearly indicated that the use (purpose) of the property can be determined only in the local plan. This is because the use (purpose) of the property appears only in the context of this plan. Other planning documents and individual administrative decisions issued by public authorities (decisions on building permits or on zoning and development conditions) can only indicate the manner of using real estate. This is because the use (purpose) of real estate is a technical-legal phrase and should be interpreted strictly. Apart from the use (purpose) of the property, local plans also specify the permitted manner of using of the property. This is important because the damage caused by the enactment or amendment of a local plan may simultaneously consist

45 Note the judgements of the Polish Supreme Court: wyrok SN 22.03.2019, I CSK 52/18; wyrok SN 19.10.2016, V CSK 117/16; wyrok SN 22.11.2013, II CSK 98/13; wyrok SN 13.06.2012, II CSK 639/11.

46 Szewczyk, 2019, pp. 209-210.

47 Note the judgements of the Polish Supreme Court: wyrok SN 22.03.2019, I CSK 52/18; wyrok SN 10.01.2019, II CSK 714/18.

in the establishment of an unfavourable use (purpose) of the property, as well as restrictions on the manner of using it.

Assuming that the intended use (purpose) of the property can only result from the local plan, for planning damage consisting in a significant restriction or exclusion of the sphere of the possibility of using the property in accordance with its previous intended, potential use, it is necessary that, at the time of the adoption of the local plan, a previously adopted local plan was in effect in the area. To restrict the sphere of possibility to use the property in accordance with its intended use, it is thus necessary that there is a direct succession of two local plans. In this regard, it is irrelevant whether the entitled person made efforts to take advantage of the potential use of the property provided for in the local plan or whether he did not exercise his right. However, the second case described in the premise occurs, as a rule, when there was no direct consequence of two local plans. The previous manner of using the property is determined both on the basis of the actually realised manner and the potential, although unrealised, possibility of using the property in the manner provided for in various planning documents or individual administrative decisions. Exceptionally, the analysed premise of change in the previous manner of using the property may refer to the case of a direct succession of two local plans. However, the analysis of local plans should be limited to the provisions relating to the manner of use of the property. Therefore, the dispositions of the local plan regulating the use (purpose) of the property are omitted during such an analysis. The analysed premise refers to two different situations.

■ *3.3. The causal relationship between the adoption or amendment of the local plan and the restriction of the possibility of using the property*

The causal relationship between the injurious event and the damage is a prerequisite of any type of obligation arising in liability for damage.[48] For this reason, this institution is regulated by the general provisions on obligations (i.e. Article 361 of the Civil Code). The premise of causation formed on the basis of Article 36 paragraphs 1 and 3 LSPD does not deviate from the general construction of this institution. Therefore, the general provisions should be applied directly to obligations to repair a planning damage. However, due to the nature of the damage, it is not necessary to prove a direct link between the enactment or amendment of the local plan and planning damage.[49]

Some doubts arise regarding the details. The case in which planning damage finds its source in a local plan that covers the entire area of the property by regulation is not controversial. Conversely, one may wonder how to qualify cases in which the local plan normalises the legal status of only a certain part

48 Parchomiuk, 2016, pp. 556-557.

49 Note the judgement of the Polish Supreme Court: wyrok SN 5.07.2012, IV CSK 619/11.

of the injured party's property or refers in its entirety only to the neighbouring property. The jurisprudence has expressed an opinion that recognises the possibility of planning damage in the described circumstances.[50]

In context of the inclusion only in part of the property's area in the regulation of the local plan, the approving position of the jurisprudence law is justified. This is because all parts of the property are functionally and economically related, while the right of ownership serves the holder indivisibly over the entire property. However, the opinion of jurisprudence on the right to claim planning damage when the amended or enacted local plan affects only the entire neighbouring property seems too far-reaching. For the occurrence of planning damage, which is regulated by Article 36 paragraph 1 LSPD, there should be an effect of the change in the content of the right to the property. A local plan regulating the legal status of a neighbouring property cannot make changes relating to the use of another property because the provisions of a local plan cannot be effective outside the area for which it was developed. The fact that a specific use (purpose) has been established for a neighbouring property cannot cause *per se* a change in another property (a change in the use or purpose of the other property would also require the adoption of a local plan regulating the area of that property, which is excluded in this configuration). Therefore, the planning damage in this situation could result only from a change in the permissible use of the property, which would have to be an effect of the adoption of a local plan for the neighbouring property. In practice, it is difficult to imagine factual states that meet these assumptions. Most often, the property owner suffers an impediment to the performance of his right not because of the change or adoption of a local plan for the neighbouring property, but because of the use actually implemented on the neighbouring property. Such cases are beyond liability for planning damage precisely because of the lack of causation. Usually, the injured party can benefit from the legal protection provided by other laws, such as remedies for a nuisance.

4. Claim for compensation equal to the reduction in value of the property

The claim for a compensation equal to the reduction in the value of real estate, regulated by Article 36 paragraph 3 LSPD, depends on the cumulative fulfilment of five positive prerequisites:

1) adoption or amendment of the local plan;
2) reduction in the value of the property;

50 Note the judgement of the Polish Court of Appeal in Krakow: wyrok 18.09.2018, I ACa 1664/17.

3) the causal relationship between the adoption or amendment of the local plan and the reduction in the value of the property;
4) disposal of the real estate; and
5) not exercising of the rights referred to in Article 36 paragraph 1 and 2 LSPD.

The claim under Article 36 paragraph 3 LSPD has prerequisites stipulated in the same way as the claim under Article 36 paragraph 1 LSPD described above but also new ones.

■ ***4.1. Adoption or amendment of the local plan***

In this regard, the considerations in relation to the claim under Article 36 paragraph 1 LSPD remain fully valid. However, legal science and jurisprudence recognise a problem that did not arise in the previous claim, which is indirectly related to the date from which the local plan begins to have legal effects. In view of the necessity of disposing of the property for the claim under Article 36 paragraph 3 LSPD to arise, the question appears whether a person who disposed of the property after the adoption or amendment of the local plan but before it came into force can effectively invoke this provision. More supporters prefer the interpretation that denies the previous owner in this situation the right to claim compensation for the reduction in the value of the property.[51] Since the local plan has legal effects only after its entry into force, the disposal of the right to the property before that date appears still in the previous legal state. In practice, the property owner, to protect himself from selling the right at an undervalued price due to the new pending regulation, should refrain from making dispositive legal acts.

■ ***4.2. Reduction in value of property***

In the context of this premise a fundamental difference in the regulation of damage between claims under Article 36 paragraphs 1 and 3 LSPD is noticeable. The science of law has carried out an analysis of whether the reduction in the value of real estate can be understood as an instance of damage subject to civil law regulation, or whether it is a *strictly* autonomous concept, which is fully regulated in the special provisions referred to above. According to the legislator's definition, a reduction in the value of real estate is a property damage determined by the difference between the value of real estate before the date of entry into force of the new or amended local plan and its value after that date. A detailed description of the method of calculating the diminution in the value of real estate is contained in Article 37 paragraph 1 LSPD. Characteristic of the method of determining the

51 Klat-Górska, 2006, p. 131; Sobel, 2010b, p. 46. Note the judgements of the Polish Supreme Court: wyrok SN 6.10.2016, IV CSK 778/15; wyrok SN 28.04.2016, V CSK 473/15; wyrok SN 17.03.2016, V CSK 414/15. Otherwise: Nowak, 2020, p. 187. See also: wyrok SN 30.06.2010, V CSK 452/09; wyrok SN 23.04.2009, IV CSK 508/08.

damage repaired under Article 36 paragraph 3 LSPD is its restriction to strictly defined types of damage - only those that arise in the right to real estate. Thus, the other assets, unlike in the case of a claim under Article 36 paragraph 1 LSPD, are omitted. It is also important to refer to the value, not the price of the property, as a criterion for determining the extent of the damage. In the science of law it is argued that these concepts should be differentiated. Ultimately, the price of real estate is determined for the purposes of a particular legal action, while its value - is objectified and determined in a broader context than a unitary sale, considering a number of similar transactions concluded within a specific territorial and temporal framework.

The definition of the concept of diminution in the value of real estate under the LSPD is a source of interpretive divergence. Some representatives of legal science and jurisprudence assume that the factual price of the disposal of real estate is irrelevant for determining the amount of compensation due. This is because the reduction in the value of real estate is calculated only according to purely objective criteria.[52] Supporters of the opposing interpretation believe otherwise: the price of disposal of the injured party's real estate, achieved by virtue of the legal act performed, is relevant to the final estimation of the compensation claim amount.[53] The first view is based on the assumption that the adoption of the special regulation in a specific normative act such as the LSPD resulted in an exclusion of the general provisions on damage and liability provided for in the Civil Code. The second view takes the exact opposite claim as its starting point. This dispute is not merely theoretical. Indeed, in individual factual situations, there may be a situation in which the reduction in property value, calculated according to objective criteria, is partially or completely diminished by the sale price of the property obtained as a result of its disposal, which deviates from market rules in favour of the owner. For example, the owner may negotiate a price of 400,000 zlotys for the sale of a property objectively worth 300,000 zlotys after the adoption or amendment of the local plan. According to the first interpretation, the excess price obtained from the sale of the right to the property should not reduce compensation. According to the second view, the opposite solution should be adopted, so the compensation should be 100,000 zlotys lower.

In my opinion, it should be assumed that the general provisions on liability for damages apply in such a situation. As a result, the compensable damage may be lower than the objectively estimated difference in value of the property. This is because the compensation should serve to cover the damage actually revealed in the property of the injured party. Otherwise, there would be enrichment of the injured party.

52 Fisz, 2020, pp. 328, 330, 336; Klat-Górska, 2006, p. 131; Zachariasz, 2013, p. 230.
53 Lewicka, 2018, p. 166; Nowak, 2020, p. 187.

■ *4.3. The causal relationship between the enactment or amendment of the local plan and the reduction in property value*

The general remarks on causation made in the context of a claim under Article 36 paragraph 1 LSPD are fully applicable to a claim under Article 36 paragraph 3 LSPD. Liability on this basis can be triggered only if the reduction in property value is a normal consequence of the enactment or amendment of the local plan. If the reduction in the value of real estate occurred due to other causes, such as fluctuations in real estate prices resulting from economic phenomena, the claim under Article 36 paragraph 3 LSPD is excluded. To assess whether there is a causal relationship, the general provisions of civil law should be applied.

However, in the context of a claim for compensation for reduced real estate value, there is an additional problem of the extent of the impact of the local plan. The claim under Article 36 paragraph 3 LSPD does not depend on whether, as a result of the enactment or amendment of the local plan, the possibility of using the property in the previous manner or in accordance with its previous use has been restricted. This is because the compensable damage is the decrease in the value of the property. Therefore, the question arises of whether liability for damage covers cases where the reduction in value would be manifested in a property or part thereof to which the provisions of the local plan do not explicitly apply. In other words, it may be questionable whether liability for a reduction in the value of real estate arises if the effects of the enactment or amendment of the local plan manifest themselves outside the boundaries of legal regulation issued by the local plan.

In the science of law, it is unanimously accepted that claims under Article 36 paragraph 3 LSPD are also available when the reduction in the value of a property results from provisions of the local plan that do not explicitly regulate its legal status.[54] As such, a local plan that directly regulates the legal status of another property may cause planning damage to a property that is outside the scope of its regulation. This view should be considered, given the way the premises of the claim are formulated. This position is also justified from a practical viewpoint. This is because it would be difficult, when assessing whether the prerequisites for a claim under Article 36 paragraph 3 LSPD are met, to determine to what extent the change in the value of the property is due to the impact of the local plan directly regulating its legal status, and to what extent it is a consequence of the impact of the local plan on neighbouring properties. The areas regulated by the local plan often form a functional whole. These links can best be observed in the context of investments of infrastructural and communications nature. It is practically impossible to separate the effects of enacting or amending a local plan on the value of a specific property.

54 Zięty, 2011, pp. 57-59; Świderski, 2006, p. 25.

■ *4.4. Disposal of real estate*

Some controversy over the claim under Article 36 paragraph 3 LSPD arises in connection with the interpretation of the premise of disposal of real estate. Disposal of real estate in civil law is understood as a disposition by legal action *inter vivos* (between living persons) under a special title (concerning one or only a few assets, not the entire estate), transferring the right to a thing, an intangible good, a mass of property or an organised group of tangible and intangible components. Disposal refers to the situation of transferring an already existing right to another entity, and can be carried out as a result of a paid (as a result of which both parties receive a benefit) or unpaid (as a result of which only one person receives some benefit) legal transaction[55]. In the most general terms, the disposal of real estate means the transfer of the right to it from the previous owner to his successor in title on the basis of a legal transaction concluded between them. Problems with the premise of the claim under Article 36 paragraph 3 LSPD could be comprised in the question of whether it arises only when the disposal is for consideration (paid legal act) or also when it is gratuitous (unpaid legal act).

Currently, the prevailing view in jurisprudence is that a claim for compensation for a reduction in the value of real estate can arise only in the event of a paid legal act.[56] Therefore, outside the bracket of liability, there are cases of disposal of real estate through a gratuitous legal act, such as donations. It can be argued in the jurisprudence that a contrary view would contradict a purposive interpretation. If the claim under Article 36 paragraph 3 LSPD were to also arise in the event of a gratuitous legal transaction, it would make no sense to make its emergence dependent on real estate disposal. This is because, in such a case, the claim would, in principle, always arise if there was a change of ownership of the property, the value of which was reduced as a result of the enactment or amendment of the local plan. According to the legislator's intention, the claim under Article 36 paragraph 3 LSPD is intended to compensate for damage caused by the transfer of real estate after the adoption or amendment of the local plan, which consists in the failure to obtain additional benefits from the sale of the right to the real estate. Although different views are reported in the doctrine, the majority of its representatives take the position that the concept of disposal on the basis of Article 36 paragraph 3 LSPD does not include gratuitous legal transactions.[57] This is supported primarily by the argument that the essence of gratuitous legal transactions implies the owner's consent to the loss of the right to the property without obtaining from the other entity a consideration equivalent to this right. As the owner, by entering into a contract of donation or other gratuitous contract,

55 Gniewek, 2020, pp. 334-335; Kępiński and Kępiński, 2021, p. 1297.

56 Note the judgements of the Polish Supreme Court from: 23.04.2009, IV CSK 508/08; 11.03.2011, II CSK 321/10; 9.03.2016, II CSK 411/15.

57 Popardowski, 2012, p. 222; Klat-Górska, 2006, pp. 133-134; Lewicka, 2018, p. 165; Fisz, 2018, pp. 326-327; Zachariasz, 2013, p. 230; Zięty, 2011, p. 59.

agrees that he will lose the right to the property without any consideration, he cannot make a claim for damages by arguing that he actually received from the counterparty a consideration of less value than he would have received if the local plan had not been enacted or amended.

The categories of contracts whose conclusion may give rise to claims under Article 36 paragraph 3 LSPD include, among others, a contract of sale, exchange, lifetime maintenance agreement, and contribution of real estate to a company in exchange for taking up shares in it.

■ *4.5. Not exercising of the rights referred to in Article 36 paragraph 1 and 2 LSPD*

The legislator requires that the entity asserting a claim under Article 36 paragraph 3 LSPD has not previously exercised the rights referred to in Article 36 paragraphs 1 and 2 LSPD. It should be interpreted that, if the entity claiming compensation for planning damage has previously exercised the claim under Article 36 paragraph 1 LSPD or entered into a swap agreement referred to in Article 36 paragraph 2 LSPD, it may not claim compensation under Article 36 paragraph 3 of the LSPD. It is accepted in jurisprudence and legal science that this refers to all situations in which the right holder has not made use of his rights, regardless whether he was entitled to them at all.[58] Use of rights should be understood as voluntary fulfilment by the entity responsible for the damage, termination of the obligation as a result of surrogacy, or the final settlement of the dispute on the claim under Article 36 paragraph 1 LSPD.

5. Enforcement of claims

Claims for compensation for planning damage are asserted at two consecutive stages: pre-court and court. In the pre-court stage, the aggrieved party addresses a request to the liable entity to fulfil the benefits of Article 36 paragraphs 1 or 3 LSPD. The request does not initiate any administrative proceedings but is in fact a kind of pre-court summons to fulfil the obligation to pay a certain sum of money or to redeem the property for a certain amount. The obligated entity has six months to fulfil the requested performance. After this date, it falls into delay and the entitled party may claim statutory interest on this account. The legislator allows the parties to change the date of fulfilment, but this is rather uncommon in practice. During the pre-litigation stage, the parties may enter into negotiations and reach an agreement on the remedy. In practice, it is extremely rare to settle a dispute at this stage. Most often, the parties do not reach an agreement and it becomes necessary to bring an action in a civil court demanding payment of

58 Nowak, 2020, p. 187; Sobel, 2010b, p. 47. See also: wyrok SN 17.12.2008, I CSK 191/08.

damages or a judgment replacing the municipality's statement of will to purchase the right to the property from the injured party for a certain amount. Claims are heard in a civil trial.

The issue of time limits for the bringing claims under Article 36 paragraphs 1 and 3 LSPD to court is controversial. Different views are reported in the jurisprudence and doctrine. The statutory regulation provides only one provision explicitly referring to the time within which claims for compensation for planning damage may be submitted. Article 37 paragraph 3 LSPD contains a provision according to which claims under Article 36 paragraph 3 LSPD can be filed within five years from the date on which the local plan or its amendment become effective. The time limit in Article 37 paragraph 3 LSPD applies only to claims under Article 36 paragraph 3 LSPD.59 This term is preclusionary, which means that the claim for a compensation equal to the reduction in the value of the property expires with its expiration.60 However, there is no unified opinion in the science of law and jurisprudence as to the further legal consequences of the expiration of this time limit. Most seem to accept that its lapse closes the right to submit the claim under Article 36 paragraph 3 LSPD before the court. According to the majority, claims under Article 36 paragraph 3 LSPD are not subject to the regulation of the Civil Code and only Article 37 paragraph 3 LSPD establishing a five-year preclusion period should be applied.61 Some rightly believe that this term was reserved only for summons to fulfil an obligation to pay a compensation, not for bringing the case to court. That is, if the summons to fulfil an obligation is sent before an expiration of this term, the general rule of termination of the claims under Article 36 paragraph 3 LSPD regulated in the civil law should apply. The creditor may sue the debtor after the expiration of the five-year's time limit, but before expiration of the six-time limit regulated in the general provisions of the civil law (Article 117 and the following of the Civil Code).

Conversely, to the claims under Article 36 paragraph 1 LSPD, according to the majority of legal scholars and jurisprudence, the general provisions on the limitation of claims found in Article 117 and the following of the Civil Code will apply.62

In my opinion, the due date for both types of claims falls at the end of the six-month period from the date on which the injured party could, at the earliest, file a claim for compensation for damage. Therefore, the beginning of the running of the limitation period for the claim under Article 36 paragraph 1 LSPD will fall on the day after the expiration of six months from the date of entry into force of the local plan. In my opinion, contrary to the majority position of legal science and

59 Fisz, 2018, p. 331. See also: wyrok SN 20.10.2016, II CSK 53/16.

60 Sobel, 2010b, p. 49.

61 Myśliwiec, m2016, p. 20.

62 Klat-Górska, 2006, pp. 128, 130; Zięty, 2011, pp. 52-53. See also: wyrok SN 20.10.2016, II CSK 53/16.

jurisprudence, questioning the applicability of regulations of the Civil Code to claims under Article 36 paragraph 3 LSPD, the start of the running of the limitation period for claims for compensation for a reduction in the value of real estate will begin with the expiration of the six months from the date of disposal. Claims under Article 36 paragraphs 1 and 3 LSPD are subject to the regulation of limitations under the general rules of Civil Code with the expiration of six years from the date of their enforceability. According to the prevailing view, the provisions on the three-year term reserved for claims related to the activities of entrepreneurs do not apply.63

6. Conclusions

Under Polish law, liability for planning damage has been broadly regulated. The legislator provides several legal remedies to compensate for the damage caused by the municipality's spatial policy. As a rule, the negative consequences of passing a resolution on the adoption or amendment of a local plan or those equated with it in legal effect (local revitalisation or an integrated investment plan) are subject to compensation. However, legal remedies do not seek to restore the *status quo* prior to the adoption or amendment of the municipal resolution. Liability for planning damage thus has constitutional and axiological legitimacy. The necessity of this regulation is the consequence of the status of property as a freedom and subjective right adopted in the Basic Law. Therefore, liability for planning damage appears as protection of freedom, which is guaranteed at the level of constitutional provisions. From an axiological viewpoint, liability for planning damage is justified for the same reasons that liability for damage caused by the lawful action of a public authority is allowed.

Despite its strong constitutional and axiological foundations, liability for planning damage is not absolute. The Polish legislator explicitly and systematically seeks to narrow its limits and link it to the activities of entities whose functioning is associated with the establishment of a restriction on the use of the property in question. However, any limitation should be in accordance with the rule of protection of property regulated in constitutional law.

63 Niewiadomski, 2019, pp. 334, 347-348; Lewicka, 2018, pp. 164-165; Sobel, 2010b, p. 49. See also: wyrok SN 20.10.2016, II CSK 53/16; wyrok SN 10.01.2017, V CSK 222/16.

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WOJCIECH LIS*

The Right to Life of the Conceived Child in the Provisions of the Constitution of the Republic of Poland

ABSTRACT: *Human life is a fundamental value that conditions the existence of a human being, along with the entire range of freedoms and rights. These rights are secondary to life, without which they lose their meaning. However, the problem is to determine the beginning of human life, on which its legal protection depends. This is of great importance in a world where the essence of natural law is being undermined and values are being relativised. This leads to the danger of objectifying human beings, especially those who are at the earliest period of their lives. The issue, therefore, is to answer the question of when human life begins and, consequently, to determine the moment at which the status of a human being is obtained. In the background, another equally important question emerges regarding the limits of human legislation that aspires to replace the universal laws of nature.*

KEYWORDS: human dignity, conceived child, protection of life, permissibility of abortion, windows of life

1. Introduction

The right to life is a fundamental principle that conditions the existence of a human being, together with his or her inherent freedoms. Human life is the greatest value and asset protected by law. However, a clear distinction must be made between the right to life, which has a natural law basis, and its protection, which must be ensured by the state.

At the normative level, problems exist in determining the point in time when one acquires the attributes of a human being, and consequently, the status of a subject of freedoms and rights. In the context of the right to the protection

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of life, it is difficult to determine the point in time from which this protection is due. The attribute of humanity is undoubtedly possessed by a human being in the postnatal (post-birth) period. However, there is no consensus on recognising the humanity of a child conceived in the prenatal (pre-birth) period of life, which generates serious consequences, including the possibility of the child's death. Therefore, the problem lies in answering the question of when one can speak of a child – whether from the moment of conception or only from the moment of birth. In other words, is a human being only human in the postnatal period, or also in the prenatal period of life? Consequently, the moment from which human life should be protected must be determined.

The controversy over determining the moment when human life should first be protected is a subject of fierce polemics, particularly in the political arena. The public debate on the right to life of conceived children emphasises two opposing views: one advocating for full protection from the moment of conception (without any exceptions) and a total ban on abortion (without any exceptions), and the other supporting unrestricted freedom to kill them, justifying it in various ways. There is a clear dissonance in the protection of the right to life, particularly in the case of children. On one hand, there is a need to empower children by increasing the protection of their rights. On the other hand, there is the possibility of depriving conceived children of their lives, which automatically deprives them of those rights. Expensive research is being carried out on ways of protecting the lives of children conceived through the development of prenatal medicine, and various forms of support for pregnant women and single mothers are being constructed. At the same time, "programmes for solving demographic problems" are being created through abortion and the promotion of early abortifacients. Therefore, it is rightly noted that a consequence of the hypocrisy of postmodern science is the thesis of the permissibility of killing people in the context of promoting human rights, especially so-called reproductive rights.[1] Moreover, the law permitting the killing of conceived children has become a criterion for states that consider themselves democratic, guaranteeing an uncritical homage to procreative freedom, which includes the possibility of abortion.

When considering the right to the protection of the life of conceived children, attention should be drawn to the Convention on the Rights of the Child

1 'The basis of reproductive rights is the recognition of the fundamental right of all couples and individuals to decide freely and responsibly the number, spacing and timing of bringing children into the world, the right to information, access to the means to do so, and the right to maintain the highest standard of sexual and reproductive health. These rights also imply the right of all to make decisions concerning their reproduction free from discrimination, coercion and violence', Programme of action of the International Conference on Population and Development, Cairo, 1994, New York: United Nations 1995, paragraphs 7.2-7.3.

(CRC),[2] whose preamble states that its purpose is to protect the rights of the child both before and after birth. At the normative level, it is rare to find such an explicit definition of a human being in the prenatal period. The terms "foetus" or "pregnancy" do not appear; instead, the term "child" is used, which clearly refers to a human being beyond any doubt. This is remarkable, given the United Nations' stance of promoting abortion by treating the killing of children as an instrument for birth control.[3] Therefore, since the child before birth – the conceived child – is a human being, it is entitled to the protection due to a human being. In Poland, the basic principles concerning the protection of the conceived child first stem from the Constitution of the Republic of Poland, adopted on 2 April 1997.[4] The aim of this study is to present Polish legal regulations on protecting the life of the conceived child, which conditions the possibility of having and exercising civil rights.

2. Constitutional guarantees for the protection of life

The Polish Constitution is the supreme law of the Republic of Poland, as confirmed by the catalogue of sources of law (Article 87 of the Polish Constitution). In view of the primacy of the Constitution in the Polish legal system, any consideration of the right to life and its protection should begin with an analysis of its provisions.

The starting point is the categorical declaration in Article 2 of the Polish Constitution, which states that 'the Republic of Poland is a democratic state governed by the rule of law, implementing the principles of social justice'. Under the rule of law, a democratic state places human beings and the goods most precious to them as its supreme value. One such good is life, which must be protected at every stage of its development within a democratic state under the rule of law.[5] Life is an essential attribute of the human being. Deprivation of life annihilates him or her as a subject of freedoms and rights. The extent to which the right to life is protected is the yardstick for democracy, the value of which is determined, *inter alia*, by the criterion of protecting the freedoms and rights of the most vulnerable – namely, the conceived child.

This conviction is confirmed by the principle of protecting human dignity, which constitutes the axiological foundation of the constitutional order and the entire legal system. It also constitutes a link between the order based on natural law and that stemming from positive law. Article 30 of Poland's Constitution expresses the principle of the protection of human dignity, stating that 'The inherent and

2 Convention on the Rights of the Child adopted by the United Nations General Assembly on 20 November 1989, Dz. U. 1991, No. 120, item 526, hereinafter: CRC.
3 Andrzejewski, 2017, p. 16.
4 Constitution of the Republic of Poland of 2 April 1997, Dz. U. 1997, No. 78, item 483 as amended.
5 Judgment of the Constitutional Tribunal of 28 May 1997, K 26/96, OTK 1997, No. 2, item 19.

inalienable dignity of the human being constitutes a source of human and civil freedoms and rights. It is inviolable and its respect and protection is the duty of public authorities'. Dignity is granted to a human being by the mere fact of being human and is independent of any other circumstances. Since it is a constitutive element being human, it follows that it belongs to everyone equally, without differentiation. Therefore, every human being has the same value, making it inadmissible to say that, because of the stage of life, one human is worth less than another. Human development and his or her personality formation are gradual processes that extends from before to after birth. Therefore, dignity, which is inherent and inalienable, and the corresponding legal protection of life, cannot be arbitrarily restricted to fully formed persons or specific prenatal stages. Respect for and protection of human dignity applies to every living human being; regardless of the period of life or the stage of development.[6]

> The protection of dignity requires that the designator of the constitutional concept "human being" be defined as broadly as possible, without any exclusions, in a complete manner. Indeed, the interpretation of the concept of "human being" by public authorities may not lead to the exclusion from the category of subjects of human rights of any human being, regardless of his or her stage of development, developmental defects, state of health and any other features secondarily defining it. Human dignity, by its very nature, does not allow for any exclusions, and this means linking it to membership of the human species (the full scope of the category "human being" without any specific feature). Acknowledging the possibility of applying subjective exclusions would deprive the principle of the protection of dignity of its meta-legal character, we would make it contradictory, the principle would lose its axiological justification, its normative value, it would become a perversion of itself. It would turn out that legal subjectivity and the protection of human freedoms and rights would derive - contrary to the purpose of this principle - not from "humanity" in the species, biological sense, but from the arbitrary decision of an authority as to who should be considered a human being ("normative humanity").[7]

The principle of protecting human dignity must be viewed as the obligation to ensure the protection of human life. Human dignity cannot be protected if sufficient guarantees for the protection of life are not provided for every human being,

6 Judgment of the Constitutional Tribunal of 22 October 2020, K 1/20, OTK 2021, item 1.
7 Ciepły, 2014, p. 79.

without exception. This means that it is impermissible to differentiate the value of human life according to social standing, age, or any other characteristics.[8]

The protection of life is the protection of the biological existence of a human being, which the Republic of Poland ensures for every human (Article 38 of the Polish Constitution). The protection of the purely biological aspect of human existence is expressed in a provision of the same degree of detail as is inherent in all provisions on civil liberties and rights in Chapter II, 'Freedoms, rights and duties of man and citizen', of the Polish Constitution. As the first article in the section on personal freedoms and rights, it provides for the protection of values that enable the individual to be the subject of further freedoms and rights. It also allows for a fairly precise identification of this subjective right. It is not so much the right to life, which is a philosophical or theological category, but the right to the legal protection of life. Its counterparts should be the state's various positive actions, carried out in specific legal forms, that create both legal and factual institutions to reduce or eliminate threats to human life.[9]

The solution adopted resulted from the majority's attitude in the Constitutional Committee of the National Assembly, which adopted a minimalist approach to legislation. This stance cannot be assessed unequivocally. On one hand, it seems rational, as it allows for the creation of constitutionally ideologically neutral provisions that allow for changes in the legal system without the need to revise the Constitution. The adopted construction of the provision, which eliminates the necessity of addressing extra-legal issues, may contribute to the fact that Poland's Constitution will be a long-lived act, not subject to revisions as the political system evolves. Conversely, the current formulation of Article 38 of the Constitution is characterised by exceptional brevity, which deprives it of clear axiological colouring, thus creating a convenient position for the legislator who, by remaining silent on sensitive issues, has avoided taking an unambiguous position.[10]

Article 38 of the Constitution has been broadly constructed with an open formula, meaning it does not specify the moment from which life is subject to protection nor the moment in which this protection ends. Such a construction of a provision placed in a normative act, which is the supreme law of the Republic of Poland, creates uncertainty regarding the actual guarantees of the protection of life. It is not known when this protection begins or when it ends, allowing the legislator a relatively high degree of discretion in this respect, which undermines legal certainty, harms legal security, and, consequently, the right to a secure existence.[11] It follows from the literal wording of Article 38 of the Constitution that the beneficiary of the norm guaranteeing the protection of life is, therefore, every

8 Judgment of the Constitutional Tribunal of 7 January 2004, K 14/03, OTK-A 2004, No. 1, item 1.

9 Sarnecki, 2016, point 4.

10 Grabowski, 2005, pp. 101–102.

11 Lis, 2022, p. 195.

human being residing in Poland, irrespective of race, nationality, sex, age, state of health, expected duration of his or her life, or any other criterion. The norm resulting from Article 38 does not contain any prerequisites regarding the recognition or non-recognition of certain entities as human beings or certain biological situations as human life. This means that the guarantees of the legal protection of life apply to human beings from the very beginning of their existence, that is, from the moment of their conception until the moment of their death.

In the absence of a normative definition of the moment from which human life begins – and, consequently, when the right to its protection is actualised – a colloquial understanding linking the beginning of life to fertilisation must be adopted. It is therefore the moment when the ovum and the sperm fuse into a single cell that constitutes the embryo of a new organism.[12] Fertilisation of the ovum is the first step in human development during prenatal and postnatal life. As a result of fertilisation, the chromosomes from the mother and father fuse, containing all the genetic information that determines the specific characteristics and individual qualities of the new organism – such as the sex of the child, the colour of its skin, eyes, and hair, its facial features, body shape, and character traits. It follows that humanity is not something acquired at a certain point in personal development, nor is it contained somewhere between fertilisation and birth, understood merely as the moment of leaving the mother's body.[13] Human life is a continuum, characterised by a certain process that begins at conception and progresses through successive stages of development up to birth, and is then linked to the stages of infancy, childhood, youth, adulthood, and old age until death. The subject's identity is preserved; he is the same person throughout, with only a shift in the phase of the life cycle due to the passage of time. Each phase is necessary in order to move on to the next. Given this, it is impossible to assume that a human being, according to Article 38, is only considered a human being from the moment of birth. Birth is only a change in the environment during a specific phase of the life cycle, not the beginning of life itself.[14] Indeed, humans are subject to biological processes related to personal development, which includes two basic periods. The first stage, pre-birth (prenatal), begins at the moment of conception (fertilisation) and encompasses the development that occurs in the mother's organism up to the moment of birth. The second stage, post-birth (postnatal) lasts from the moment of birth until death. Therefore, since human life appears at the moment of conception, from that moment one is a human being, although only at the initial stage of ontogenesis. From this moment, therefore, begins the legal protection of his life guaranteed under Article 38 of Poland's Constitution.[15] This implies that a conceived child, although unborn, is a human

12 Fertilisation (Zapłodnienie).
13 Lis, 2022, pp. 196–197.
14 Żelichowski, 1997, p. 111.
15 Kowalski, 2009, p. 45.

being albeit at the earliest stage of its ontogenesis. The legislator could, in theory, postpone the moment at which a conceived child acquires its status. However, assuming minimal rationality, it would be an abuse to claim that, by using the term "conceived child", the legislator tacitly referred to an undefined criterion of "personification" or "individualisation" of the human embryo. No such criterion was defined, leaving it up to the interpreter to decide, which contradicts the linguistic interpretation of "conception". The dictionary definition of this concept, derived from the colloquial understanding, does not point to any later stage of human life beyond fertilisation.[16] This clarity, rooted in natural law, frees one from the arbitrariness of deciding whether or not to grant the status of human being, and makes one independent of accepted worldview concepts, which shift with the change of those in power.

Therefore, the concept of humanity encompasses all human beings, irrespective of their stage of development, whether brought into existence naturally or through medically assisted procreation. It is important to emphasise that the essence of humanity is determined by possessing certain morphological characteristics of the human organism and the structure and shape of the organism proper to the human species, but in the possession of the human genotype, which determines that a given living being is a human being.[17] On normative grounds, various terms are used to describe a prenatal human being: embryo, zygote, foetus, conceived child, and unborn child.[18] These are merely technical terms used to describe the stages of human development. However, they all describe a human being. The use of different terminology to describe the human at different development stages does not disprove his humanity, deprive him of his dignity, or make him less human. Therefore, the conceived child is not an indefinable product of the human organism but a human being in the prenatal period of life who deserves protection, like any other human.

It is also worth noting that the autonomy to use any reproductive method reflects the desire of expectant parents to have a child. However, subordinating these methods to this goal leads to the objectification of the child. The *in vitro* procedure is particularly controversial, involving the creation of more embryos than are ultimately intended for transfer into the woman's body. Embryos deemed unsuitable for normal development are destroyed. This means that the legal protection of life does not apply to all embryos. The assessment of an embryo's potential for normal development is made by a doctor solely based on medical criteria. Embryos deemed incapable of normal development are treated as medical waste under the Waste Act of 14 December 2012. This means that the human embryo, the

16 Gałązka, 2007, p. 29.
17 Żelichowski, 1997, pp. 108–109.
18 For a broader discussion, see Ciepły, 2015, pp. 79 et seq. For the purposes of this study, the term embryo has been adopted, synonymous with embryo; both are used here to describe the earliest form of human existence.

earliest stage of human development, is not only deprived of the legal protection of life but also treated in a way that affronts human dignity by being equated with medical waste, subject to disposal.[19] This implies that not all embryos created through medically assisted procreation procedures are entitled to the legal protection of life. The remaining viable embryos are subject to preservation and storage procedures. The legal principles expressed, *inter alia*, in Poland's Constitution guarantee the embryo's right to life and prohibit its subjective treatment. The *in vitro* procedure must not involve embryo destruction, thawing several embryos, selection, or re-freezing unused embryos.[20] Current legislation on the legal status of embryos resulting from IVF does not provide an adequate level of protection for surplus embryos that have not been transferred into the female body.

'The right to the legal protection of life imposes an obligation on the state to take measures to reduce or eliminate threats to human life. This implies a commitment towards protection rather than neutrality of the law'.[21] It should be emphasised that the law is not and cannot be axiologically neutral, since every system of law presupposes, expresses, and implements a certain set of moral values. This opens up the perspective of such analyses, which, by their very nature, must refer to a fundamental worldview–such as ethical, moral, religious.

> The Constitution of the Republic of Poland, in the totality of its provisions, gives expression to a certain objective system of values (...). For the definition of this system of values, the provisions on the rights and freedoms of the individual play a central role (...). Among these provisions, the principle of the inherent and inalienable dignity of the human being takes a central place.[22]

One cannot overlook the fact that the solemn introduction of the Constitution of the Republic of Poland refers first and foremost to God, who is the source of truth, justice, goodness and beauty, and to the Christian heritage of the nation, from where the imperative of respect for the life of another human being, including the conceived child, to whom everything precious from over a thousand years of the Polish State's heritage will be handed down. It follows that the nature and objectives of the law are determined by its axiology. It encompasses the fundamental values on which the law is built, which determine the sense of its existence, constitutes moral standards for its evaluation, and should be considered.[23]

Both the content of Article 38 of Poland's Constitution and the nature of the Constitution as the highest law in the Polish legal system indicate that

19 Lis, 2022, p. 219.
20 Order of the Constitutional Tribunal of 18 April 2018, S 2/18, OTK-A 2018, item 20.
21 Grabowski, 2006, p. 179.
22 Judgment of the Constitutional Tribunal of 23 March 1999, K 2/98, OTK 1999, No. 3, item 38.
23 Michalik, 2005, p. 386.

subconstitutional norms, issued to implement its provisions, should create situations that ensure the "protection of life", which, according to the disposition of this provision, is to be ensured by the state. The creation of a situation where life is unprotected must remain a drastic exception, as it concerns the first of human rights – the most important one – which naturally conditions the existence of all further freedoms and rights.[24]

The legal protection of life is a duty of the state that should be implemented by all possible means. Negative and positive aspects of this duty can be identified. In the negative aspect, this obligation implies a prohibition of depriving a person of life, which is referred to as the defensive content of the right to life. The addressees of this prohibition are both public authorities and private actors. The negative aspect of the legal obligation to protect life limits the legislator's freedom to legislate, as it excludes the possibility of authorising public authorities to

> deliberately and intentionally deprive a person of life - especially if there is no such necessity from the point of view of the protection of other freedoms and rights, or if it concerns a person who by his action has not caused the necessity of such a reaction.[25]

The right to the legal protection of life is not absolute; it can be abrogated by the legalisation of a state of superior necessity, of necessary defence, or the use of force by security and law enforcement officers. In its positive aspect, the duty of legal protection of life includes the injunction to eliminate or minimise emerging threats to human life and react when these threats materialise. This includes threats originating from other persons, as well as those resulting from factors beyond human control, such as flooding or earthquakes. The protection of human life in its positive aspect should encompass preventive measures (within the limits of the foreseeability of the occurrence of a given threat) and repressive measures (aimed at enforcing responsibility for acts constituting unlawful attacks on human life). At the same time, the state's protective duties are not limited to securing life in terms of biological existence but should also include measures to promote all-round human development.[26]

Among the provisions guaranteeing the legal protection of life, indicating the essence of the state, is Article 5 of Poland's Constitution, according to which 'the Republic of Poland shall safeguard the independence and inviolability of its territory, ensure the freedoms and rights of man and citizen and the security of its citizens, protect the national heritage and ensure the protection of the

24 Sarnecki, 2016, point 8.

25 Judgment of the Constitutional Tribunal of 30 September 2008, K 44/07, OTK-A 2008, No. 7, item 126.

26 Judgment of the Constitutional Tribunal of 28 May 1997, K 26/96, OTK 1997, No. 2, item 19.

environment, guided by the principle of sustainable development'. Article 5 does not contain any premise suggestion to make an ideological argument that the human rights it guarantees refer only to a certain category of people, excluding the unborn.[27]

The protection of the life of the conceived child is emphasised by Article 18 of Poland's Constitution, according to which 'Marriage as a union between a man and a woman, family, maternity and parenthood are under the protection and guardianship of the Republic of Poland'. Here, the legislator has expressed the desired sequence of events provoked by marriage, which forms the basis for the establishment of a family, maternity, and parenthood. The concept of maternity expresses the necessary relationship between mother and child, which occurs on many levels: biological, emotional, social, and legal. The function of this relationship is the proper development of human life in its initial period, in which special care is required.[28] Highlighting motherhood emphasises the woman's special role in procreation and child-rearing, and the ties that bind her to the child during pregnancy and immediately after childbirth. It should be added that the legislator, by extending protection and care to motherhood, automatically extends it to the child at every stage of its life. Maternity points to the mother, and since there is a mother, there must also be an object of reference, namely the child, because maternity is relational in nature, presupposing the existence of two separate entities: the mother and the child. Indeed, motherhood refers to both the period before and after the birth of the child and begins at the moment of conception. Therefore, the extension of maternity to protection and care means extending protection and care to the conceived child, without whom maternity would lose its meaning. This is confirmed by Article 68(3) of Poland's Constitution, which imposes an obligation on public authorities to provide special healthcare to, inter alia, children and pregnant women. Furthermore Article 71(2) of the Constitution grants the mother before and after the birth of her child the right to special assistance from public authorities, the scope of which is determined by law. It should be added that special healthcare goes beyond the sphere of ordinary, general healthcare and should therefore be more intensive or specialised, that is, tailored to the specific needs of a given group.[29]

The protection of the right to life of conceived children is supported by the principle of equality and non-discrimination, guaranteed by Article 32 of Poland's Constitution, according to which '1. All are equal before the law. Everyone has the right to equal treatment by public authorities. 2 No one shall be discriminated against in political, social or economic life for any reason'. The subjective scope of the principle of equality and non-discrimination has been defined by

27 Mazurkiewicz, 2017, p. 22.

28 Judgment of the Constitutional Tribunal of 28 May 1997, K 26/96, OTK 1997, No. 2, item 19.

29 Judgment of the Constitutional Tribunal of 22 July 2008, K 24/07, OTK-A 2008, No. 6, item 110.

the terms "everyone" and "no one". Thus, the legislator has defined the scope of subjects to whom the principle of equality applies. It follows that this scope has been extended to every human being, regardless of their legal situation.[30] The principle of equality and non-discrimination is rooted in primary equality – that all humans belong to the same species, share the characteristics of humanity, and consequently possess equal dignity. Therefore, considering only post-natal humans as human beings and denying the humanity of a prenatal human being constitutes unlawful discrimination.

Ensuring the legal protection of life also guarantees the protection of health[31]. Both values are closely interlinked, mutually conditioning each other with the proviso that health protection, although an intrinsic value, has a servile character in relation to life, which is the most important value. Health protection would be meaningless if it did not preserve or improve the quality of life. It should be emphasised that the protection of life is a value to which every human being is equally entitled. Indeed, the legislator does not differentiate between the protection of life – and consequently health – and the phase of human life. It follows that human life should be protected from its inception, that is, from the moment of conception.[32]

> The Republic of Poland shall ensure the protection of the rights of the child. Everyone has the right to demand from public authorities the protection of the child against violence, cruelty, exploitation, and demoralisation.[33]

A specialised body, the Ombudsman for Children's Rights, is the guardian of children's rights[34]. Given this, the constitutional status highlights the need to protect children's rights.

3. Consequences of recognising the protection of the life of the unborn child

The constitutional guarantees for the protection of life lead to statutory provisions that safeguard the life of the conceived child. The Ombudsman for Children, whose competences and method of appointment are specified in the Act of 6 January

30 Ciepły, 2014, p. 75.
31 Article 68(1) of Poland's Constitution.
32 Lis, 2021, pp. 39-40.
33 Article 72(1) of the Constitution of the Republic of Poland.
34 Article 72(4) of the Polish Constitution.

2000 on the Ombudsman for Children, is particularly suited for this role.[35] Under the Act, a child is defined as any human being from conception to adulthood[36]. It should be emphasised that this is the only provision in the Polish legal system that recognises the subjectivity of the child from the moment of conception. The Ombudsman for Children takes measures to ensure the full and harmonious development of the child, respecting his or her dignity and subjectivity. In particular, the Ombudsman protects the rights to life and health, family upbringing, decent social conditions, and education[37]. In exercising its powers, Ombudsman for Children is guided by the best interests of the child and considers that the family is the natural environment for the child's development. The protection of children's rights is also ensured by the Ombudsman, who upholds the freedoms and rights of human beings and citizens set out in Poland's Constitution and other normative acts, including the implementation of the principle of equal treatment. In matters related to children, he or she is obliged to cooperate with the Children's Rights Ombudsman.[38]

It should be emphasised that the conceived child, as *nasciturus,* was already endowed with legal capacity under Roman law. This was a recognition of its humanity and allowed for its integration into society even before birth. Such a child had legal capacity, provided that it was born alive, which was of great importance for both family and property relations. The principle *nasciturus pro iam nato habetur, quotiens de commodis eius agitur* (a child conceived is considered to be already born whenever its benefit is at stake) is reflected in the provisions of the Civil Code Act of 23 April 1964.[39]

Under Article 927 § 2 of the Civil Code, a child conceived at the time of the opening of an inheritance may be an heir if it is born alive. Inheritance is acquired at the time of opening and the child becomes an heir as if he were alive at the time of the testator's death. An analogous solution concerning the establishment of a bequest for the benefit of a conceived child is provided in Article 972 of the Civil Code. Additionally, Article 994 § 2 of the Civil Code stipulates that descendants entitled to a legacy are protected already at the prenatal stage of life. By analogy with Article 927 § 2 of the Civil Code, case law holds that a child is entitled to the benefits of an insurance contract in the event of the father's death if the death occurred before the child was born, and that he has the possibility of being the beneficiary of a donation made during his foetal life. Therefore, a conceived child can be named as a beneficiary under a life insurance policy and, if properly

35 Act of 6 January 2000 on the Ombudsman for Children, consolidated text Dz. U. 2023, item 292, hereinafter: uRPD.

36 Article 2(1) of the Ombudsman for Children Act.

37 Article 3(1-2) of the uRPD.

38 Article 1(2-2a) of the Act of 15 July 1987 on the Ombudsman; consolidated text Dz. U. 2023, item 1058.

39 Act of 23 April 1964 Civil Code, consolidated text Dz. U. 2022, item 1360 as amended, hereinafter: the Civil Code.

represented, be a party to a donation contract, although the legal effects of the insurance or donation will only take effect after the child is born.

A consequence of recognising the legal subjectivity of the conceived child is the child's right to claim compensation for damage caused before birth, commonly referred to as prenatal damage, in order to safeguard its future interests. Prenatal damage refers to harm caused to the conceived child either directly to his or her organism or to the organism of his or her mother, resulting in a violation of the organism's integrity. Pursuant to Article 4461 of the Civil Code, 'From the moment of birth, the child may claim compensation for damage suffered before birth'. Thus, the legislator recognised that a human being can suffer damage during prenatal life while also prejudging that he or she can claim damages after birth. A tort committed against a pregnant woman, resulting in harm to the conceived child that alters its normal development process and causes subsequent disability, is considered a tort against the child if the child is born alive. Indeed, such a child cannot be in a worse situation than one who has suffered harm during or immediately after birth.[40] At the same time, such a child has the right to claim for prenatal damages not only from the mother but also from third parties. The claim for prenatal harm is an independent claim made by the child, independent of the claims of the mother or others.

In all these cases, the conceived child becomes the subject of certain rights (and obligations) despite the lack of legal capacity, which it acquires only at birth[41].

The protection of the health of the conceived child is guaranteed by the Act of 5 December 1996 on the Profession of Physician and Dentist,[42] which prescribes that participation in a therapeutic experiment[43] by pregnant women must be subjected to a particularly thorough assessment due to the associated risks for the mother and the conceived child[44]. The Act categorically prohibits conducting a research experiment[45] on the conceived child[46]. Any actions taken to benefit to the health of the pregnant woman must always be assessed for the risk of danger

40 Judgment of the Supreme Court of 3 May 1967, II PR 120/67, OSNC 1967, No. 10, item 189.

41 Article 8(1) of the Civil Code.

42 Act of 5 December 1996 on the profession of physician and dentist, consolidated text Dz. U. 2022, item 1731 as amended, hereinafter: uzl.

43 A therapeutic experiment is the introduction of new or only partially tried diagnostic, therapeutic or prophylactic methods with the aim of achieving a direct benefit for the health of the sick person. It may be carried out if the methods used hitherto are not effective or if their effectiveness is insufficient (article 21(2) of the uzl).

44 Article 21(2).

45 A research experiment primarily aims to expand medical knowledge. It may be carried out on both a sick and a healthy person. The conduct of a research experiment is permissible when participation in it is not associated with risk, or the risk is minimal and is not disproportionate to the possible positive results of such an experiment (article 21(3) of the uzl).

46 Article 23a(1), point 1.

to the health and life of the conceived child. Thus, the legislator has chosen to limit the possibility measures aimed at curing the pregnant woman by requiring consideration of the need to protect the health and life of the conceived child.[47] However, based on the current legislation, the decision to undertake diagnostics and treatment for the conceived child depends exclusively on the woman, which raises justified doubts in the context of constitutional guarantees of equality between women and men.

The protection of the child during the prenatal period of life is also addressed in the Act of 25 February 1964, the Family and Guardianship Code.[48] The legislator allows for the possibility of acknowledging paternity before the conceived child is born[49]. This provision applies to a man who is not the husband of the mother of the conceived child. As a result of the acknowledgement of the conceived child and the confirmation of the acknowledgement of the child by the mother (the pregnant woman), a familial legal relationship is created even before the child is born. A child conceived within marriage enjoys a presumption of descent from its mother's husband[50]. However, the acknowledgement of paternity before the birth of the child becomes effective only when the child is born, at which point parental rights also take effect. The purpose of this provision is to safeguard the rights of the child, even before birth, by eliminating doubts about the child's origin. Article 751 § 1 CRiO allows the acknowledgement of paternity even before the birth of a child conceived through medically assisted reproduction using reproductive cells from an anonymous donor, an embryo created from reproductive cells, or through embryo donation. A man who has acknowledged paternity may bring an action to annul the acknowledgment within one year of learning that the child is not his. However, if paternity is acknowledged before the birth of a conceived child, the time limit does not begin until the child is born[51].

'For a child conceived but not yet born, a guardianship shall be established if it is necessary to guard the future rights of the child. The guardianship shall cease when the child is born'[52]. It should be emphasised that during the prenatal period of a child's life, its parents are not legal representatives; the parents of a conceived child will only acquire parental authority when the child is born. The *curator ventris* represents the conceived child in matters relating to rights that already exist, the subject of which is, *inter alia*, life or health, and the rights that the child will only acquire from birth.[53] It should be emphasised that one of the main objectives of the establishment of the *curator ventris* is to prevent possible

47 Sakowski, 2002, p. 44.
48 Act of 25 February 1964 Family and Guardianship Code, consolidated text Dz. U. 2020, item 1359, as amended, hereinafter: CRiO.
49 Article 75(1) of the Family and Guardianship Code.
50 Article 62(1) of the CriO.
51 Article 78(1) of the CriO.
52 Article 182 of the CriO.
53 Jędrejek, 2017, Commentary on Art. 182, point 3.

unauthorised termination of pregnancy and to prevent damage to the unborn child and other factors that may lead to a disorderly state of health.

The protection of the rights of children conceived but not yet born is affirmed by the guarantees obliging the father of a child, who is not the mother's husband, to contribute to the expenses of pregnancy and childbirth[54]. Expenses related to pregnancy and childbirth are considered expenses that arise as a result of pregnancy or childbirth, which the child's mother would not have incurred if she had not been pregnant or given birth. However, the mother can only assert these claims once the paternity of the man in question, who is not her husband, is established; that is, when the child is acknowledged or paternity is judicially established. She may assert these claims simultaneously with the establishment of paternity[55]. Similarly, Article 142 of the CRiO, stipulates that

> [I]f the paternity of a man who is not the mother's husband has been established, the mother may request that this man, even before the child is born, pay an appropriate sum of money for the mother's maintenance costs for three months during the period of childbirth and for the child's maintenance costs for the first three months after birth. The time and manner of payment of this sum shall be determined by the court.

The possibility to make such a claim is limited in time, and the mother can make such a claim up to the date of the child's birth. However, after the child is born, the mother may claim maintenance from the father of that child. The purpose of this provision is to safeguard the pregnant woman's situation and protect the interests of the conceived child. It is clear that **t**he quality of life of a pregnant woman who is unable to meet her basic needs during pregnancy has a direct impact on the health of the conceived child and, subsequently, the child's potential for development after birth.

4. Criminal law protection of the life of the unborn child

The constitutional protection of human life is reflected in a law that criminalises the killing of a human being, including a conceived child. Due to its restrictive nature, criminal law is subsidiary to other forms of legal goods protection. Viewing criminal law as a last resort measure implies that legislators should intervene in the sphere of socially unacceptable human behaviour only when milder forms of accountability are insufficient to produce the desired results. Criminal punishment

54 Article 141(1) of the CriO.
55 Article 143 of the CriO.

is undoubtedly the most severe form of state response, but is nevertheless necessary to ensure adequate legal protection against goods of particular value, such as life, health, or human dignity. The use of non-criminal legal responses in such cases would disproportionately affect these assets. Attacks on these fundamental values, which are simultaneously expressions of the greatest contempt for the essence of humanity, arouse not only social disapproval but also a justified need to stigmatise the perpetrator. Criminal repression is the most appropriate response, as alternative means of protecting these goods lack retributive elements.[56]

Given the need to protect human life, the principle of subsidiarity and consequent treatment of criminal law as *ultima ratio* lose their significance. This means that, in fundamental cases such as the protection of human life, including in the prenatal period, the *ultima ratio principle* should be replaced by the *sola ratio* or *unica ratio principle*. In such cases, a criminal law response, appropriate to the gravity of the act, seems to play a primary role.[57] The protection of life as a fundamental value prompts the adoption of an interpretative directive, assuming that any doubts regarding the protection of life should be resolved in favour of this protection - *in dubio pro vita humana*.

Despite recognising the special value of human life, its protection under criminal law varies in intensity. Human life is protected differently during the prenatal period compared to after birth. This differentiation is reflected in the provisions of the Act of 6 June 1997 of the Criminal Code (CC).[58] Pursuant to Article 157a § 1, 'Whoever causes bodily harm to the conceived child or a health disorder endangering its life, shall be subject to a fine, the penalty of restriction of liberty or deprivation of liberty for up to 2 years', while 'Whoever exposes a human being to direct danger of loss of life or a serious injury to health shall be subject to the penalty of deprivation of liberty for up to 3 years' (Article 160 § 1). The moment of delivery is the key differentiator for protection, as full protection of life and health is only afforded to the conceived child from one of the following moments: 1) the onset of natural childbirth, 2) the first medical action directly aimed at performing a caesarean section to terminate the pregnancy at the request of the pregnant woman, or 3) the occurrence medical conditions warranting a caesarean section or another necessary procedure for pregnancy termination due to medical necessity.[59] Thus, the perpetrator's conduct will lead to different legal consequences depending on whether the object of the attack was a conceived child or a human being. In criminal law, the precise moment a conceived child becomes a human being is crucial for determining criminal responsibility. It should be emphasised that, since human life has equal value and originates from the inherent dignity of

56 Gardocki, 1989, p. 65.
57 Ibid.
58 Act of 6 June 1997 Criminal Code, consolidated text Dz. U. 2022, item 1138 as amended, hereinafter: CC.
59 Order of the Supreme Court of 30 October 2008, I KZP 13/08, OSNKW 2008, No. 11, item 90.

all, the differentiation in the intensity of its protection depending on the stage of life – under the provisions of the CC – raises doubts about its compliance with the constitutional standard for the protection of life.

Such doubts are also raised by Article 157(3) of the CC, which excludes the criminalisation of the mother of a conceived child who causes bodily harm or a health disorder threatening the life of the conceived child. The automatic exclusion of criminal responsibility for a pregnant woman who *de facto* performs an abortion means that the legislator gives consent to such behaviour. This leads to the conclusion that the conceived child is deprived of legal protection. In Europe, no country with a standard of protection of life similar to or higher than that in Poland provides for the automatic exclusion of the criminalisation of pregnant women who cause the death of the conceived child. The provisions excluding the criminalisation of pregnant women for killing a conceived child are a continuation of legal solutions characteristic of the former Soviet bloc countries. The decriminalisation of abortion performed by a pregnant woman was initiated by the Presidium of the Supreme Soviet of the USSR on 5 August 1954, which abolished the criminal liability of pregnant women for undergoing an abortion. Following the USSR, Poland was one of the first countries in the world to remove the criminal liability for pregnant women for killing a conceived child. This exclusion was introduced into Polish law under the Act of 27 April 1956 on the conditions for the permissibility of pregnancy termination. In almost all countries of the former Soviet bloc, laws did not provide for the criminalisation of a woman who terminates a pregnancy herself or allows another person to perform an abortion. Only the life and health of the pregnant woman were the objects of protection, with these being considered of higher value than the right to life of the conceived child. Legislators exempted the pregnant woman from criminal liability on the basis of the "humanitarian and progressive principle" that the decision about motherhood can only be decided by the woman herself. The automatic impunity of the pregnant woman for the killing of the conceived child was presented as an 'achievement of socialist legal teaching', created in opposition to the legislation of imperialist states and the teachings of the Catholic Church.[60] Attempts on the life of the conceived child must be criminalised, although it is possible to waive the punishment of the mother if she commits such an act under pressure from others or in special circumstances. However, this should occur through the administration of justice and not by automatically excluding the criminalisation of the mother who aborts her unborn child.

Currently, criminal law protecting the life of the conceived child is strengthened by anti-abortion provisions. Pursuant to Article 152 of the CC:

60 More widely: Bogunia, 1980, p. 54.

> § 1. Whoever, with the consent of the woman, terminates her pregnancy in violation of the provisions of this Act, shall be subject to the penalty of imprisonment for up to 3 years. § 2. Whoever assists or induces a pregnant woman to terminate her pregnancy in violation of the provisions of this Act shall be subject to the same penalty. § 3. Whoever commits the act specified in § 1 or 2 when the conceived child has achieved the capacity to live independently outside the organism of the pregnant woman shall be subject to the penalty of deprivation of liberty for a term of between 6 months and 8 years.

In accordance with Article 153 of the CC:

> § 1. Whoever, by using violence against a pregnant woman or in any other manner without her consent, terminates a pregnancy or by using violence, an unlawful threat or deception leads a pregnant woman to terminate a pregnancy, shall be subject to the penalty of deprivation of liberty for a term of between 6 months and 8 years.
> § 2. Whoever commits the act specified in § 1 when the conceived child has reached the capacity for independent life outside the organism of the pregnant woman, shall be subject to the penalty of deprivation of liberty for a term of between 1 and 10 years.

Article 152 of the CC refers to the termination of pregnancy with the pregnant woman's consent but contrary to the provisions of the law, while Article 153 of the CC refers to the termination of pregnancy without the pregnant woman's consent. It should be noted that Articles 152 and 153 of the CC refer to the protection of a conceived child already developing in the woman's organism, but they do not cover a child conceived through medically assisted procreation, that is, an *in vitro* fertilised cell remaining outside the woman's organism. Such a situation is regulated by the provisions of the Act of 25 June 2015 on the treatment of infertility,[61] primarily Article 83, which states: 'Whoever destroys an embryo capable of normal development created in a medically assisted procreation procedure shall be punished with imprisonment from 6 months to 5 years', and Article 85, which states: 'Whoever creates an embryo for a purpose other than a medically assisted procreation procedure shall be punished with imprisonment from 6 months to 5 years'. In relation to the in vitro-fertilised cell, the legislator does not use the term "child conceived", but instead refers only to the embryo. Consequently, the criminal act in this context is not causing of death but the destruction of the embryo created through a medically assisted procreation procedure. The destruction of an embryo

61 Act of 25 June 2015 on infertility treatment, consolidated text Dz. U. 2020, item 442, hereinafter: uln.

created through a medical procedure, capable of normal development, does not constitute the causal act of pregnancy termination. The adopted solution leads to the dehumanisation of the human being in the prenatal period, thereby weakening the legal protection of life. By defining the final moment of the embryo's development in Article 2(1) point 28 of the Act as 'the moment of implantation in the mucous membrane of the uterus', the law removes the protection granted to such a developed being under the provisions of the Act on infertility treatment. Further, this definition determines the moment at which the conceived child is granted protection under the provisions of the CC.

Criminal law guarantees for the protection of life aim to realise constitutional standards through the tools inherent in criminal law. Nevertheless, the regulation of criminal liability for offences against human life and health, based on the stage of life and the comparison of statutory penalties, indicates unequal treatment between the prenatal and postnatal periods. The varying definitions of the object of the attack within criminal provisions dedicated to protecting life and health – such as a human being, a child, a conceived child capable of independent life outside the organism of the mother, and a conceived child – raise not only constitutional but also systemic doubts. Given this, it should be emphasised that Polish criminal law upholds principle of continuity in the protection of goods, considering the axiological foundations of the entire legal system. Consistency in protection requires extending criminalisation to behaviours that violate or endanger a legal good to a degree comparable to those already criminalised.[62] It also requires imposing similar penalties for offenses of a similar nature against comparable goods.

5. Permissibility of abortion

The existing model of life protection in Poland cannot be analysed separately from the provisions legalising abortion. Under the Act of 7 January 1993 on family planning, protection of the human foetus and the conditions for the permissibility of pregnancy termination,[63] the legislator determined that pregnancy termination may only be performed by a physician in two cases: when the pregnancy threatens the life or health of the pregnant woman, or when there is a justified suspicion that the pregnancy has resulted from a prohibited act (Article 4a, § 1, points 1 and 3). Termination of pregnancy for any other reason is considered a criminal offence. In the first case, termination is not subject to a time limit; in the second case, termination is possible only if no more than 12 weeks have elapsed since

62 Kulesza, 2014, pp. 103-104.

63 Act of 7 January 1993 on family planning, protection of the human foetus and conditions of permissibility of abortion, consolidated text Dz. U. 2022, item 1575, hereinafter: upr.

the beginning of the pregnancy. This means that an advanced pregnancy may be terminated if it endangers the life or health of the pregnant woman. Nevertheless, in cases where the conceived child has already acquired the capacity to live independently outside the mother's body, any procedure to save the life or health of the pregnant woman should also aim to save the life of the child.

The permissibility of abortion attempts to resolve the conflict of values between the welfare of the mother and that of the child. Legal doctrine emphasises that the imprecision and lack of clarity in Article 4a(1), point 1 of the Act – especially regarding to the elements of 'danger to the life and health of the pregnant woman' – and the wide margin of interpretation of abortion laws, may lead to uncertainty and unpredictability in determining the prerequisites for abortion's permissibility.[64] Under the current legislation, one may reach the unacceptable conclusion that an unwanted or unplanned pregnancy may constitute a threat to the broader health of the pregnant woman, including both physical and psychological aspects. This reasoning is supported by the World Health Organization's definition of health, which encompasses not only the complete absence of disease or infirmity but also a state of complete physical, mental, and social well-being.[65]

In the context of the permissibility of abortion, it should be emphasised that, pursuant to Article 39 of the Act, a doctor may refrain from performing health services that are against his or her conscience; that is, they may refuse to perform an abortion (the conscience clause). Thanks to this clause, the doctor will not participate in the procedure aimed at terminating the conceived child. When invoking the conscience clause, he or she must record this in their medical records and inform the pregnant woman the possibility of obtaining an abortion from another doctor or treatment facility. Nevertheless, he is obliged to provide the pregnant woman with medical assistance in cases where a delay could cause loss of life, grievous bodily harm, or serious health disorders.

The permissibility of abortion is proof that the legislator, through the provisions of the law, differentiates the value of human life depending on its stage of development, which raises doubts about its compliance with the provisions of Poland's Constitution, which guarantees legal protection for the life of every human being. Moreover, limiting the protection of the life of the conceived child can be considered acceptable only in situations of absolute necessity, specifically to protect the life of the pregnant woman as a good of equal importance. Given this, the premise that abortion is permissible because pregnancy poses a threat

64 Pluta, 2021, p. 13.

65 Constitution of the World Health Organization as adopted by the International Health Conference, New York 19 June - 22 July 1946, Official Records of the World Health Organization No. 2, June 1948, https://apps.who.int/iris/bitstream/handle/10665/85573/Official_record2_eng.pdf;jsessionid=AECA261C63ED78CA2E6F302B6EAF4B?sequ ence=1 (Accessed: 6 August 2023), p. 100.

to the health of the pregnant woman cannot justify the procedure, as these are unequal goods and, as such, are not comparable. Within the context of the constitutional standard for the protection of human life, it is impossible to limit the legal protection of life to protect the health of a pregnant woman, as health is considered a lower-value good. This implies that the condition for limiting the legal protection of life arises in situations where it is beyond doubt that the life of one human being is incompatible with that of another. This premise can be broadly defined as the requirement for symmetry between the goods sacrificed and those saved. Furthermore, any limitation on the legal protection of life must be absolutely necessary and treated as a measure of *ultima ratio*.[66] According to Poland's Constitution, the interpretative directive *in dubio pro vita humana*, any doubts about the protection of human life should be resolved in favour of this protection. Human dignity cannot truly be protected if sufficient grounds for the protection of life are not established.[67]

The equivalence of legally protected goods was the basis for the repeal of Article 4a(1), point 2 of the UPR, which allowed for the termination of a pregnancy when prenatal tests or other medical indications suggested a high probability of severe and irreversible disability in the conceived child or an incurable disease threatening its life. Termination of pregnancy under this provision (eugenic abortion) was possible until the conceived child acquired the capacity to live independently outside the pregnant woman's organism. This provision made the legal protection of the life of the conceived child dependent on its state of health, which constituted direct discrimination and legalisation of abortion without sufficient justification based on the need to protect another constitutional value, right, or freedom. Additionally, the use of unspecified criteria for the legalisation of abortion violated the constitutional guarantees of human life. The Constitutional Court held that the fact of a child's handicap or incurable disease in the prenatal period of life – linked to eugenic considerations and the possible discomfort of the child's life – could not independently prejudge the admissibility of the termination of pregnancy and, thus, the killing of the conceived child. It was impermissible by law to assume that such a child was unworthy of life. Given this, in its verdict of 22 October 2020 (case K 1/20), the Constitutional Tribunal stated that Article 4a(1) point 2 of the Act was incompatible with Article 38 (which guarantees legal protection of life for every human being), Article 30 (which emphasises the importance of human dignity as the source of human freedoms and rights, and obliges public authorities to respect and protect it), and Article 31(3) (which defines the grounds for limiting freedoms and rights) of Poland's Constitution.[68] Thus, the Court upheld

66 Judgment of the Constitutional Tribunal of 30 September 2008, K 44/07, OTK-A 2008, No. 7, item 126.

67 Judgment of the Constitutional Tribunal of 7 January 2004, K 14/03, OTK-A 2004, No. 1, item 1.

68 Judgment of the Constitutional Tribunal of 22 October 2020, K 1/20, OTK 2021, item 1.

its position expressed in the ruling of 28 May 1997, in case K 26/96, which unequivocally stated that human life is a value at every stage of development and is therefore subject to protection. The value of a constitutionally protected legal good – human life, including life development at the prenatal stage – cannot be distinguished. Indeed, there are no sufficiently precise and justified criteria that allow such differentiation, depending on the developmental stage of human life. Human life is constitutionally protected from the moment of creation. This process also occurs during the prenatal phase. The yet-to-be-born child, as a human being endowed with inherent and inalienable dignity, is a subject with the right to life. The legal system must guarantee due protection of this central good, without which this subjectivity would be negated. However, this position is weakened by the assertion that, while human life at every stage of development constitutes a constitutional value to be protected, the intensity of this protection may not be the same at every stage of life or under all circumstances. The intensity and type of legal protection are not simple consequences of the value of the protected good. The intensity and type of legal protection, in addition to the value of the protected good, are influenced by a wide range of diverse factors, which ordinary legislators must consider when deciding on the choice of legal protection and its intensity. However, from the perspective of the protected good, this protection should always be sufficient.[69] Consequently, the intensity of the protection of human life varies because of the application of different criminal sanctions for causing the death of a human being before and after birth.

With this in mind, the Act on Family Planning, Protection of the Human Foetus, and Conditions for the Permissibility of Abortion seems to balance the firm commitment to protecting life with the prudence determined by the realities of life. Tightening the provisions of the Act will not automatically change social reality. There is no evidence to suggest that banning abortions will reduce their frequency or improve the protection of the lives of conceived children. It is necessary to educate and support pregnant women, as well as society as a whole, to build awareness of the nature of abortion as the murder of a human being. These actions should have primacy over administrative bans and criminal penalties. The simultaneous effects of persuasive and punitive legislation on the protection of life are mutually exclusive due to the inherent contradiction in declaring the protection of the conceived children's lives while simultaneously threatening their mothers with imprisonment. This attitude alienates pregnant women from social institutions (including religious institutions) that want to protect them and the lives of their children, as they may perceive these institutions as aligned with the ideological forces responsible for imposing criminal sanctions on abortion.[70]

69 Judgment of the Constitutional Tribunal of 28 May 1997, K 26/96, OTK 1997, No. 2, item 19.
70 Andrzejewski, 2017, p. 21.

6. The idea of "windows of life" as a way of protecting the life of the child

The idea of "life windows", developed in Poland, is an alternative to killing or abandoning a child in random locations, thus condemning it to death. Leaving a child in a "window of life" is not considered abandonment, as abandonment involves leaving a child without providing it with care or ensuring care by other persons. Given this, a mother who leaves her child in a "window of life" cannot be held criminally responsible, as the assumption of this system is that the child will receive immediate care.[71] The premise of "life windows" is to create a safe place both for mothers in difficult life situations and for their newborn children, whom they cannot or do not wish to care for. "Windows of life" are typically created and run at religious houses, children's homes, or single mother's shelters (i.e. places where someone is present at all times). In these facilities, mothers have the opportunity to leave their child completely anonymously, without harming them or facing legal consequences. This opportunity gives them the sense that they have done nothing wrong and have chosen the "lesser of two evils" for their child's well-being. Thanks to "windows of life", the children left in these facilities have the chance to survive and, once they have gone through the adoption procedure, to gain a family that will provide them with home, warmth, a sense of security, and optimal conditions for functioning and development. The main purpose of "windows of life" is to save the lives of children in emergency situations, which their mothers perceive as situations of no return. In this sense, "windows of life" serve both mothers and their newborn children.

"Windows of life" open from the outside; when they are opened, an alarm sounds to indicate that a child has been left inside. The child remains in the "window of life" for no more than a few minutes, as it is the responsibility of the entity running the facility to respond quickly, provide ongoing care to the child, and notify the relevant authorities immediately. The child left in the "window of life" is immediately transferred to a hospital, where tests are carried out to determine its state of health. The guardians of the "window of life" inform the police[72] and the adoption centre when a child is left, which immediately notifies the family court. The court is then requested to issue guardianship orders concerning the

71 Pawlik and Glanc, 2018. Pursuant to article 210 of the Criminal Code, '§ 1. Whoever, contrary to the obligation to care for a minor under 15 years of age or a person incapacitated by reason of his mental or physical condition, abandons such a person, shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years. § 2. If the consequence of the act is the death of the person specified in § 1, the perpetrator shall be subject to the penalty of deprivation of liberty for a term of between 2 and 15 years.'

72 The police are obliged to identify the child and establish whether the child's abandonment is related to a crime; whether the child has been kidnapped or whether the person leaving the child has acted under duress.

child and assign the child a name. This is because when a child is left in a "window of life" it loses its previous identity, becoming an NN person (Non-Named person). The family court gives the child a name and surname and establishes its date of birth. The child is then given a PESEL (Universal Electronic System for Population Registration) and a birth certificate is drawn up, which enables the adoption procedure to be initiated. This procedure is quite smooth because many families awaiting adoption are specifically looking for young children. Consequently, finding an adoptive family for such a child is not difficult, and the child can be placed with his or her future parents almost immediately.

The creation of "life windows" in Poland was inspired by the ideas preached by Pope John Paul II and aimed to continue his efforts from the 1970s to save the lives of conceived children. The first "window of life" in Poland was created on 19 March 2006 in Krakow, at the Single Mother's Home on 39 Przybyszewskiego Street. This initiative was led by Caritas of the Krakow Archdiocese and Cardinal Stanislaw Dziwisz. Currently there are more than 60 "windows of life" across Poland, in which more than 160 children have been saved.[73]

It should be noted that "windows of life" remain an unregulated initiative, meaning that, in theory, anyone can establish one. Each "window of life" has its own procedures, depending on the institution managing it. However, despite the lack of legal regulations, they function efficiently and exemplify how social and legal relations can develop on their basis without being encumbered by a series of legal regulations. The activities of the "windows of life" show that the goodwill of individuals, social groups, and society as a whole can generate spontaneous action for the common good. Their functioning also confirms that wise and responsible human behaviour can achieve more in protecting the fundamental human right to than legal regulations alone.[74]

"Windows of life" serve as a means of protecting the right to life by ensuring the welfare of children. Despite this, the UN Committee on the Rights of the Child in 2015 urged Polish authorities to close these "windows of life." The Committee argued that the concept violates Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms,[75] which includes the right to know the identity of one's parents as an integral element of an individual's right to respect for his or her private and family life. Additionally, the Committee cited Article 8 of the CRC, which guarantees children the right to preserve their identity, including their biological identity. State parties are obliged to take measures to respect a child's right to preserve his or her identity, including nationality, name, lawful family relationships, and protection from unlawful interference.

73 Nartowska and Rutke, 2023.

74 Czaplicki and Kroczek-Sawicka, 2017, p. 44.

75 Convention for the Protection of Human Rights and Fundamental Freedoms drawn up in Rome on 4 November 1950, subsequently amended by Protocols No. 3, 5 and 8 and supplemented by Protocol No. 2, Dz. U. 1993, No. 61, item 284.

Identity affirms an individual's uniqueness, which distinguishes him or her from others. Provisions ensuring the newborn child's right to identity are included in Article 7(1) of the CRC, which stipulates that immediately after birth, the child's birth certificate must be issued, and the child has the right to receive a name, obtain nationality, and, if possible, the right to know and be cared for by his or her parents. However, the right to identity should not be limited to providing a child with identification data such as a name or registration number. The broader concept of identity also includes the child's entitlement to know his or her origins, including the identities of his or her biological parents. Knowledge of one's genetic background influences physical and psychological well-being. It helps avoid behaviours that could negatively affect one's health or that of others, reduces uncertainty regarding the risk of contracting certain diseases, and facilitates timely actions to safeguard life and health when necessary.[76]

It is worth emphasising that, due to the anonymity inherent in "windows of life", a child left there is deprived of knowledge about his or her biological identity. However, thanks to the new family, he or she has a chance to create a sense of belonging to a given social group. It is also crucial to note that Article 7(1) of the CRC explicitly stipulates that a child shall have the right from birth – "insofar as possible" – to know his or her parents and to remain with them. Situations in which the biological identity of the child will remain unknown are permissible in the name of the greater good or in emergency situations.[77] The most important point to consider is that the operation of "life windows" is part of the inalienable right to life, as outlined in Article 6 of the CRC. In this context, the operation of "life windows" can be seen as analogous to the concept of a state of public necessity in criminal law. According to this principle, to protect a greater good, one may need to sacrifice a lesser good. Referring to the "windows of life", it should be emphasised that in saving the life of a child one sacrifices its right to identity, but in the context of saving life it is difficult to compare these values. There is no doubt that life is a fundamental good, without which there is no point in talking about protecting any other rights, including the right to identity, without which it would never exist.

7. Summary

The standards of legal protection of life in Poland are high, despite the difficulties related to the normative definition of its beginning. The Polish legislator guarantees legal protection of life for everyone at the constitutional level; however, it legalises abortion at the statutory level. There is no consistent law in Europe protecting the

76 Haberko, 2019, p. 61.
77 Czaplicki and Kroczek-Sawicka, 2017, p. 38.

lives of conceived children. Moreover, in terms of the quality of protection of the lives of conceived children, Poland is an enclave surrounded by countries with full access to inexpensive abortions. Despite this, there is significant social approval for theses derived from eugenics, including the creation of laws that allow for the selection of those who are allowed to live while condemning the weaker to death.[78] These trends are fostered by the automatic decriminalisation of acts by mothers who have aborted their pregnancies, contributing to the lowering of the constitutional standard for the protection of human life. The weakening of respect for life, supported by the liberalisation of abortion law at the supranational level, poses a serious threat of eradicating the legal protection of conceived children from the legal system. This is fostered by the lack of uniform regulation of the status of the conceived child, normalising – in an unambiguous and non-controversial manner – the moment surrounding the legal protection of its life. This causes discrepancies in the fundamental issue determining the biological existence of a human being. Consequently, the life of the conceived child becomes a relative value, with contested limits of protection. Attempts to dehumanise the conceived child, combined with the desire to decide on its humanity, constitute a dangerous trend. This opens the door to the arbitrariness of recognising someone as a human being or denying him or her this attribute, and, consequently, recognising or denying his or her right to life. The current state of the law fails to protect the life of the conceived child while also leaving the permissibility of abortion unresolved. This creates uncertainty. Therefore, it should be unequivocally established at the normative level that human life begins at conception, that is, with the fusion of male and female germ cells. This would put an end to all speculation and eliminate the state of uncertainty from which moment human life is protected.

Human life is a supreme, unique, and irreplaceable value and must therefore be protected from the very beginning of its existence. Since life is a process beginning from the moment of conception, to which every human being **is** entitled by virtue of his or her dignity, which is a non-deregotiable and non-gradable value, it follows that one is human to the same degree before and after birth. The child conceived, although not yet born, by virtue of its humanity and inherent dignity, which is not subject to gradation according to age, must be treated as a subject with all the consequences this entails, as it objectively exists as an independent being. Admittedly, the conceived child is connected to the mother's organism and biologically dependent on it, but is not identical to the person of the mother. It lives in her body but has a life of its own. In other words, a conceived child is not a potential entity – only the making of a human being – but a real entity – a concrete human being with the same rights as other people. Therefore, it should be treated on an equal footing with everyone else. *De lege ferenda*, public authorities must strive to make the constitutional guarantee of equality more realistic

78 Andrzejewski, 2017, p. 23.

and prohibit discrimination on any grounds, primarily based on the stage of life a person is at.

The protection of the life of conceived children is not a private matter for women, but a common one, guaranteeing the replacement of generations and the rebirth of society. It is a condition for the permanence of the state organisation, which is a common good. This was aptly put by John Paul II, who clearly emphasised that a nation that kills its own children becomes a nation without a future – as confirmed by the demographic crisis in European countries. The right to life is not just a matter of worldview; it is not a religious right but a human right.[79] This is confirmed by the wording of Article 38 of the Polish Constitution, which clearly states that the intention of the legislature was to exclude any attempt to deny anyone from the category of human being based on any criteria. In the moral order, on the other hand, it is expressed by the Fifth Commandment, 'Thou shalt not kill', which is the fundamental principle and norm in the universal code of morality, inscribed in the conscience of every human being. However, the problem of an ageing population must not be overlooked. Protecting children from abortion is one way of alleviating the demographic crisis that will bring about changes in the social structure and functioning of the state. Therefore, it is in the common interest to encourage childbearing, which will help increase the fertility rate and reduce the effects of an ageing population. The state should therefore pursue a family friendly policy that favours having children and develop a network of entities where children conceived but unwanted by their parents can find refuge and be given a chance at life.

The need to protect the life of the child has led to the development of the idea of establishing and operating "life windows" as an alternative to abandoning the child. The existence of "life windows" may also influence pregnant women's decisions to terminate their pregnancies. Thanks to "life windows", mothers who cannot or do not want to take care of their child do not have to harm it, but can leave it in a safe place after birth. Following the adoption process, the child has the chance to find a home with a new family. Therefore, it is necessary to strengthen the idea of "life windows" within the childcare system and to create new ones, with the hope that children will be placed in them as little as possible. However, the legal status of "life windows" and the rules for their establishment and operation must be regulated. There is a lack of legal standards regulating the circle of entities that can set up and manage these facilities. This means that there is no obstacle to this being undertaken by people who are not competent to do so, to the detriment of the development of the concept and, consequently, the proper protection of the right to life and other rights associated with it.

79 John Paul II, 1997, p. 35.

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GYÖRGY MARINKÁS*

Some Remarks on the Recent SRM Related Case-Law of the CJEU with Special Regard to the Meroni Doctrine

ABSTRACT: *The study elaborates on the development of the Meroni doctrine, derived from the Meroni judgment of the Court of Justice of the European Coal and Steel Community under a different Founding Treaty framework and its applicability to the Banking Union under the current Treaty framework. To fulfil this aim, the author first elaborates on the Advocate General's opinion and the Judgment of the Court of Justice in the Meroni case and then briefly introduces the evolution and the literature on the issue. After a short introduction of the Banking Union's institutional order, the author introduces two cases in which issues related to the Meroni doctrine were raised before the General Court, as well as the appellate procedures before the Court of Justice in one of these cases.*

KEYWORDS: Meroni, delegation of power, Banking Union, Single Supervisory Mechanism, Single Resolution Mechanism, Banco Popular Group

1. Introduction

The right of a supranational organisation which gained its powers by transfer from Member States to delegate these powers to a third party – such as an organisation registered under private law – was an issue that arose in the 1958 Meroni judgment,[1] just six years after the *European Coal and Steel Community* (ECSC) was established. The issue emerged several more times in the following decades and the Court of Justice of the European Union (CJEU) further elaborated on it. The

1 CJEU, C-9/56, Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community, Judgment, 13 June 1958.

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case regarding EU agencies, namely the *United Kingdom v. Parliament and Council*[2] *case – a.k.a. ESMA – can be regarded as a milestone among them. In this case, Advocate General Niilo Jääskinen*[3] *summarised the underlying problem as follows:*

> [...] while the Lisbon Treaty clearly maps out the scheme for judicial review of laws and decisions made by agencies, the Treaty is more enigmatic when it comes to delimiting the powers of agencies. [...] no mention is made of agencies in either Article 290 TFEU, which provides for delegation of rule–making in legislative acts to the Commission, or Article 291 TFEU which confers implementing powers on the Member States, the Commission, and in some limited circumstances the Council.[4]

There was a Commission proposal intended to regulate the issue; however, it was withdrawn due to insufficient support.[5] It is thus the CJEU's case-law, in particular the *Meroni* and *the United Kingdom v. Parliament and Council* cases, that elaborated on the issue of the autonomous powers of EU agencies. In the latter case, the CJEU updated the Meroni doctrine and expanded the scope of powers delegable to agencies to include discretionary powers, as long as adequate controls were in place.[6] However, Chamon and De Arriba-Sellier argue that the Meroni doctrine '[has been] European administrative law's own "*Schrödinger's cat*", that may be simultaneously considered both dead and alive.'[7]

2. The Meroni doctrine: Its evolution in case-law and its evaluation in the literature

■ *2.1. The Meroni case: Opinion of Advocate General Roemer and the Court's decisions*

In its March 1955 *Decision No. 14/55*[8] 'on establishing a financial mechanism to ensure the regular supply of scrap metal to the common market', based on Article

2 C-270/12, *United Kingdom v. Parliament and Council*, Judgment, 22 January 2014.
3 C-270/12, *United Kingdom v. Parliament and Council*, Opinion of Advocate General Niilo Jääskinen, 12 September 2013.
4 C-270/12, opinion of the Advocate General, para. 75.
5 Withdrawal of obsolete Commission proposals, OJ C 71/17, 25 March 2009. See: Chamon, 2010, pp. 26–34.
6 Babis, 2014, pp. 266–270.
7 Chamon and De Arriba-sellier, 2022, p. 313.
8 Höhe Behörde, Entscheidung Nr. 14/55 über die Schaffung einer finanziellen Einrichtung zur Sicherstellung einer gleichmäßigen Schrottversorgung des gemeinsamen Marktes. Vom 26. März 1955 – The provisions were translated from German by the author. Online [Available at]: https://eur-lex.europa.eu/legal-content/de/ALL/?uri=CELEX%3A31955S0014 (Accessed: 14 July 2024)

65(2)[9] of the ECSC Treaty[10] with a view to its task under Article 3 of the ECSC Treaty meant to ensure the proper functioning of the Common Market,[11] the High Authority authorised two organisations established under Belgian private law, namely *l'Office Commun des Consommateurs de ferraille* ('Office') and the *Caisse de péréquation des ferrailles importées* ('Fund')[12] – commonly referred as 'Brussels agencies' – to decide on the amount of contributions to be paid by companies under Article 80 of the ECSC Treaty.[13] – That is those functioning in the coal and steel industry.

The Fund was designated as the responsible body for execution, while the Office primarily served as an advisory body of the Fund. However, under certain conditions, the Fund was allowed to negotiate purchase agreements.[14] The High Authority subjected the delegation to two conditions: *first*, the permanent representative or the deputy representative of the High Authority had to attend every General and Board meetings of the Brussels agencies. *Second* the Boards of the Brussels agencies had to adopt their decisions unanimously, which – if the representative or the deputy representative of the High Authority deemed necessary – was subject to the High Authority's approval. In the absence of unanimity or if the Brussels Agencies failed to hold a meeting within 10 days from the request of the permanent representative or the deputy representative, the decision was taken by the High Authority.[15]

In his opinion, Advocate General *Karl Roemer* addressed the issue whether the High Authority, as a public authority, was entitled to delegate certain powers

9 Article 65(2) of the ECSC Treaty: '[...] the High Authority shall authorise specialisation agreements or joint-buying or joint-selling agreements in respect of particular products, if it finds that:
(a) such specialisation or such joint buying or selling will make for a substantial improvement in the production or distribution of those products;
(b) the agreement in question is essential in order to achieve these results and is not more restrictive than is necessary for that purpose; and
(c) the agreement is not liable to give the undertakings concerned the power to determine the prices, or to control or restrict the production or marketing, of a substantial part of the products in question within the common market, or to shield them against effective competition from other undertakings within the common market [...]'

10 Treaty establishing the European Coal and Steel Community (Signed on 18 April 1951 – No longer in force)

11 Article 3 of the ECSC Treaty: 'The institutions of the Community shall, within the limits of their respective powers, in the common interest: (a) ensure an orderly supply to the common market, taking into account the needs of third countries; (b) ensure that all comparably placed consumers in the common market have equal access to the sources of production; [...]'

12 Article 1 of Decision No. 14/55.

13 Article 80 of the ECSC Treaty: 'For the purposes of this Treaty, "undertaking" means any undertaking engaged in production in the coal or the steel industry within the territories referred [and], any undertaking or agency regularly engaged in distribution other than sale to domestic consumers or small craft industries.'

14 Articles 4-5 of Decision No. 14/55.

15 Articles 8-9 of Decision No. 14/55.

to associations governed by private law? First, the Advocate General examined the domestic practice of the Members States in general and then the rules of the Community Law on delegation.[16] Second, the Advocate General was of the view that the delegation of administrative powers of a public authority to associations of undertakings is a well-established practice in the Member States' domestic law. In these cases, the State reserves its right of control and supervision. The reasons for delegating power include: (I) the need for technical knowledge and the existence of special installations and/or (II) a desire for decentralisation. The Advocate General took the view that, in a modern State founded on the rule of law, generally accepted conditions should be established on the delegation of the administrative powers of public authorities to private associations. *First,* the delegation must be based on law, which specifies the content of the delegation precisely and provides a sufficient level of control for the delegator. *Second,* a complete system of legal protection against the measures adopted by these associations must exist. Legal protection may be achieved by assimilating associations' decisions to those issued by the public authorities to make them subject of review according to the general rules of administrative law. [17]

Then, the Advocate General addressed the issue of delegation in Community Law, and found that the Treaty did not contain *expressiss verbis* rules on this question: Article 53 of the ECSC Treaty did not allow a conclusion that the High Authority can delegate the powers conferred on it. However, it did not seem to prohibit such a delegation either. In the Advocate General's view, it was necessary that the legal protection under the Treaty continued to exist in case of delegation as a guarantee. The guarantees should have included: the publication of the statement of the reasons on which the decision was based – so that possible complainants could elaborate on their pleas – and the possibility to apply for judicial review. According to the Advocate General, there were two possible ways of ensuring the proper judicial review: either the decisions of these associations should had been assimilated to decisions of the High Authority or the latter should adopt the final decisions; that is, only the supporting preparatory and purely technical implementing work was left to the body. However, in the case at hand, the Advocate General found that as there was no statement of the reasons on which they are based and they were only communicated to the undertakings as part of a note as to the means of payment, it was not possible to assimilate these decisions to the High Authority's decisions.[18] The Advocate General came to the conclusion that: '[...] the High Authority, has ignored important guarantees as to legal protection laid down by the Treaty. In particular, there is no sufficient statement of the reasons on which the decisions are based and there has been no proper publication of them,

16 CJEU, C-9/56, *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community,* Opinion of Advocate General Karl Roemer, 9 March 1958. paras. II/4-8.
17 CJEU, C-9/56, *Meroni,* Opinion of the Advocate General, para. II/5.
18 CJEU, C-9/56, *Meroni,* Opinion of the Advocate General, paras. II/7-8.

whereas their significance [and their general applicability] made these matters essential.'[19]

The CJEU – as then called the *Court of Justice of the European Coal and Steel Community* – came to a similar conclusion. Its main findings were that the delegating authority was not allowed to confer powers different from those conferred on the delegating authority itself under the Treaty. In the case at hand, the fact that the Brussels Agencies were allowed to take decisions exempt from meeting conditions that the decisions of the High Authority under the Treaty, gave the Brussels Agencies more extensive powers than the High Authority had. Thus, Decision No. 14/55 of the High Authority infringed the Treaty.[20]

As the CJEU elaborated on the topic, it stated that the right to delegate powers cannot be presumed, and the delegating authority should take an express decision on delegation. In CJEU's view, the right of the High Authority to authorise or to make the financial arrangements itself under Article 53 of the Treaty entailed the right to entrust certain parts of its powers to bodies such as the Brussels Agencies under conditions to be determined by the High Authority and under its supervision. However, under Article 53 of the Treaty, such delegations of powers are only legitimate if the High Authority recognised them as 'to be necessary for the performance of the tasks set out in article 3 and compatible with this treaty, and in particular with article 65'.[21]

The consequences of power delegation are very different depending on whether it involves clearly defined executive powers or discretionary powers. In the first case, the authority, which received the powers had to stick to the conditions set out by the delegating authority and the exercise of such rights may be subject to strict supervision, meaning it cannot appreciably alter the consequences of the procedure; the latter type replaces the choices of the delegator by the choices of the delegate and brings about an actual transfer of responsibility. It also enables the execution of actual economic policy. Under Article 3 of the Treaty, the objectives were binding not only on the High Authority, but on the 'institutions of the community. [...] Within the limits of their respective powers, in the common interest'. The CJEU took the view that this implied that the "balance of powers" was characteristic of the institutional structure of the community, which served as a fundamental guarantee set out in the Treaty for those on whom it applied, namely economic operators. Delegating discretionary powers to other bodies than the Treaty has established would have rendered that guarantee ineffective.[22] Contrary to this principle, the powers delegated by the High Authority implied a wide margin of discretion, while the High Authority did not retain sufficient powers to keep the delegation within the above limits. In the CJ's view, reserving the power

19 CJEU, C-9/56, *Meroni*, Opinion of the Advocate General, para. III/4.
20 CJEU, C-9/56, *Meroni*, Judgment, p. 150.
21 CJEU, C-9/56, *Meroni*, Judgment, p. 151.
22 CJEU, C-9/56, *Meroni*, Judgment, p. 152.

to refuse the approval was an insufficient guarantee under the Treaty. Thus, in the case at hand, the delegation of powers was contrary to the ECSC Treaty.[23]

■ *2.2. The Meroni-doctrine in the literature*

Before discussing the most significant result of the Meroni doctrine in the literature, namely laying down the rules of the delegation of powers by EU bodies, it is worth reiterating another aspect of the case. That is, the delegation of powers from state authorities to private bodies is a characteristic of modern states attributable to the need for special knowledge necessary to decide certain issues or to the desire of decentralisation. The current literature agrees with these findings and labels these as "technocratic" reasons. As *Merijn Chamon* elaborates on the topic, the *pros* from a technical point is that the knowledge of independent scientific experts enhances the credibility of long-term policy commitments and isolates decision-making from politics. The Commission sees this independence as the *raison d'être* of agencies. Additionally, delegation relieves overburdened institutions and allows them to focus on their core responsibilities. As for the *cons* from the technical point of view, the delegating institutions would also need the necessary expertise, otherwise their control would be *de jure* control lacking any substantial evaluation. However, if the Commission has to enhance the level of its expertise above a certain level, that would call into question the rationality of outsourcing to agencies. Furthermore, the Commission's enhanced control – including veto right – would call into question its independence from politics.[24]

The political reasons for creating agencies is that they enable a discrete deepening of political integration within the "game of powers"; that is, while Member States are typically reluctant to give new and more powers to the Commission, they are more enthusiastic about giving powers to an agency; therefore, the Commission opts for establishing agencies. Furthermore, as agencies are not concentrated in Brussels, winning the seat of an agency is a fact that can be announced as political success by governments. However, the Commission has to play a shuttlecock policy, when it creates new agencies: it has to keep control on agencies, while reassuring the Member States that it cannot control them.[25]

As for the most important feature of the Meroni-judgment, *Bálint Teleki* highlights – in line with the mainstream perception of the Meroni-doctrine – that the CJEU has, on the one hand, imposed strict limits on the delegation of powers; on the other hand, it has explicitly allowed it within certain limits. In Teleki's view, under the Meroni judgment, the delegator may delegate powers to agencies provided that: (I) the delegated powers are his own, (II) the delegated powers are clearly defined implementing tasks which does not allow wide discretion and the

23 CJEU, C-9/56, *Meroni*, Judgment, pp. 153–154.
24 Chamon 2010, pp. 16-17; Griller and Orator, 2010, pp. 3–35.
25 Chamon 2010, pp. 8–9.

delegator's control is retained, (III) the delegation is made by an explicit decision, and (IV) the delegation does not infringe the institutional balance between the European institutions.[26] Chamon identified six conditions from the Meroni-judgment: (I) the delegating authority cannot delegate more powers than itself has under the Treaties; (II) the delegating authority should keep continued scrutiny; (III) delegation cannot be implied, but must be established explicitly; (IV) the possibility of judicial supervision should be ensured; (V) the institutional balance should not be infringed; and (vi) the delegation should indeed be necessary to perform the tasks concerned.[27]

As for the further development of the Meroni doctrine, Teleki offers a thorough overview of the evolution of the doctrine in CJEU's case-law – including the Romano-case, in which the CJEU stated that the right to issue normative acts cannot be delegated[28] – a doctrine that legally froze the delegation of rulemaking powers to EU agencies. However, the need for specialised agencies to enhance internal market integration have pragmatically eroded the theoretical rigidity of the principle and EU agencies entered the domain of regulatory powers by the back door, as *Marta Simoncini* argues.[29] Additionally, the *Lisbon Treaty*,[30] which explicitly mentions EU agencies within the actors that can legitimately exercise administrative powers – including the adaption of acts with general application – within the framework of the Treaties[31] and which – compared to the ECSC Treaty – enhanced the democratic legitimacy of EU institutions[32] made necessary a revision of the principle. In the ESMA-case – after 60 years of no progress on the issue, the CJEU was asked to significantly re-evaluate its findings in Meroni and Romano in light of the changed framework of EU law. In *László Szegedi*'s view, by reverse logic, the CJEU has concluded, on the basis of the legal protection against acts issued by agencies – "bodies, offices and agencies" – that the power to issue acts of general application can also be delegated to agencies. That is, EU bodies other than the European Commission may be the recipients of a delegation of powers, provided that they are EU legal entities established by the EU legislator whose powers under delegation are limited by various criteria and conditions under EU law.[33]

26 Teleki, 2023, pp. 49–50; Kálmán, 2013, pp. 1–17.
27 Chamon, 2014, p. 382.
28 CJEU, C-98/80, *Giuseppe Romano v. Institut national d'assurance maladie-invalidité*, Judgment, 14 May 1981
29 Simoncini, pp. 1492–1493.
30 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (OJ C 306, 17.12.2007, p. 1-271).
31 TFEU Article 15: 'In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible.'
32 Simoncini, 2021, pp. 1490–1491.
33 Szegedi, 2020, p. 123.

Accordingly, the ESMA-judgment displayed a significant shift from the original Meroni doctrine, which clearly excluded the delegation of powers requiring discretionary decisions. Accordingly, Teleki summarises the updated Meroni doctrine as: (I) the delegation of powers must be clearly defined by the delegating act; (II) the exercise of powers must be under the effective – political – control of the delegating body; thus, (III) no political responsibility can be delegated and (IV) it must be subject to appeal.[34] In Szegedi's view, there are three main points that need to be highlighted regarding the Meroni doctrine in light of the ESMA judgment, namely: (I) the powers may be addressed to an EU legal entity established by the EU legislator, (II) only precisely delimited powers may be delegated, (III) and they are subject to judicial review in view of the purposes defined by the delegating authority.[35] However, the CJEU failed to classify in clearer terms the powers that can be delegated, as Szegedi remarks.[36]

Some authors spoke of 'mellowing the Meroni' in the context of the judgment.[37]. In Teleki's view, the doctrine has been modified to the extent that it allows agencies to have more influence, but still considers them as essentially expert actors without exclusive decision-making powers.[38] In Simoncini's view, the ruling clearly shows that the emergence of a democratically legitimated legislature is key to ensuring control over the exercise of administrative powers. Nowadays administrative actions taken by specialised bodies is necessary to discharge public functions. Simoncini argues – in line with Roemer's findings in the Meroni case – that:

> Delegation constitutes an inevitable aspect of modern administrative law, as those who in constitutional terms are nominally entrusted with the exercise of a particular public function are often not in a position, for a variety of reasons, to discharge their responsibilities fully without supplementary action by others. [39]

Chamon introduces several possibilities to classify the agencies and, as a conclusion, he finds the classification established by Griller and Orator[40] as the most suitable. According to this classification there are: (I) "ordinary" agencies without decision-making powers – if decisions need to be taken this is done by the Commission –; (II) "pre-decision-making" agencies, enjoying a considerable influence over the adoption of the final decision – which is again taken by the Commission –;

34 Teleki, 2019, p. 41; Repasi, 2014, p.7; Pelkmans and Simoncini, 2014. pp. 4–5.
35 Szegedi, 2020, p. 124.
36 Ibid.
37 Pelkmans and Simoncini, 2014.
38 Teleki, 2023, pp. 52–53.
39 Simoncini, 2021, pp. 1492–1493.
40 Griller and Orator, 2010, pp. 3–35.

and (III) genuine decision-making agency, having the capacity to enact legal instruments binding upon third parties. As Chamon notes, the major difference is that agencies of the third type do not require the rubberstamp of the Commission, unlike those of the second type. However, it is important to realise that even the latter hold considerable power, as the Commission generally lacks the expertise to assess their advice properly. The last type are (IV) "regulatory" or rule-making agency holding discretionary power to translate broad legislative guidelines into concrete instruments.[41] The author of the current article finds this type of classification suitable, as the T–510/17 *Antonio Del Valle Ruíz* case of the CJEU – to be introduced in Section 3 – revolved around the legal nature of the SRB, which may fall into the second or third type by applying the categorisation of Chamon.

However, Chamon provides a rather sceptical approach on the applicability of the Meroni doctrine to contemporary agencies, arguing that, on the one hand, the facts and contexts of the Meroni case exclude the delegation of powers; on the other hand, the true meaning of Meroni judgment is generally misunderstood in the literature. As for the first issue, Chamon reiterates that the applicability of a judgment based on the ECSC Treaty and revolving around the delegation of power to bodies established under private law to a case in which power was delegated to agencies – in essence public bodies[42] – created under the EEC Treaty is subject to academic debate.[43] Some authors argue that, in the context of the ECSC Treaty – a *traité loi* – the High Authority was endowed with important and detailed regulatory and implementing powers. The EEC Treaty – being a *traité cadre* – sets broad objectives to be achieved progressively by national administrations.[44]

As for misinterpretation, Chamon argues that the Meroni-doctrine simply excludes the possibility of delegating any discretionary powers at the first place and that the principle of institutional balance cannot directly deduced from the judgment. As Chamon argues, the CJEU did not mention institutional balance in its judgment, as it was only elaborated on in its later cases.[45] Moreover, Szegedi argues the principle of institutional balance in its original sense was not primarily intended to protect the decision-making order laid down in the Founding Treaties, but to protect the rights of individuals against abuses of power.[46] Chamon argues

41 Chamon, 2010, pp. 6–7.

42 Or to be more precise, administrative commissions, but in the light of the evolution of the law they can safely be called agencies, as they were in every respect their predecessors or early forms. – Teleki, 2023 p. 50.

43 Chamon, 2010, pp. 12–14, 24, 25.

44 Chamon, 2010, pp. 16–17.

45 It is important to note, however, that the judgment itself refers to Article 3 of the ECSC Treaty and cites that 'The institutions of the Community shall [act], within the limits of their respective powers [...]' and the CJEU concludes in the judgment that '[...] the balance of powers is characteristic of the institutional structure of the community a fundamental guarantee granted by the treaty.' – CJEU, C-9/56, Meroni, page 152.

46 Szegedi, 2020, p. 122.

that, in the Meroni judgment, the balance of powers was *originally* conceived as a substitute for the separation of powers elaborated on by *Montesquieu* – something that is missing from the institutional order of the integration[47] – the aim of which was to protect individuals against the abuse of power. Therefore, the main objection to applying the modern interpretation of the principle of "institutional balance" in Meroni is a qualitative leap from the modern-day concept. Advocate General Roemer indicated that the most important means of achieving the above-mentioned protection was to ensure the judicial review of decisions of the delegated body. The Advocate General first remarked that, in a modern constitutional state, two important conditions should apply to the delegation of powers to bodies under private law: the delegation may only be done through a legislative act, which accurately describes the content of the delegation and offers sufficient judicial protection against the acts of such organisations. In Roemer's view, the latter can be achieved by equating the acts of these bodies with acts of the High Authority or by having the High Authority take the final decision. Contrary to the opinion of the Advocate General, the CJEU took the view that the way of providing the prevalence of guarantees is that these bodies may only exercise strictly executive powers, without any discretion. In its judgment, the CJEU referred to Article 3 of the ECSC Treaty and cited that, 'The institutions of the Community shall [act], within the limits of their respective powers [...]' and the CJEU concluded in the judgment that '[...] the balance of powers is characteristic of the institutional structure of the community a fundamental guarantee granted by the treaty'.[48] By upholding the balance of powers, the CJEU safeguarded not only the decision making process envisaged by the Treaty, but also the accompanying guarantees for private individuals. Despite the different solutions worked out by the Advocate General and the CJEU in the Meroni case, the key concern for both was the way in which rights of private parties – as guaranteed by the regime of judicial protection established by the Treaty – would still be guaranteed after certain tasks have been outsourced to private bodies outside the Treaty Framework. However, this differs from the way the institutional balance is conceptualised today.[49]

47 Simoncini, 2021, p. 1489.
48 CJEU, C-9/56, *Meroni*, Judgment, p. 152.
49 Chamon, 2010, pp. 23–24.

3. The Banking Union and the Meroni-doctrine: The resolution of the Banco Popular Group

■ *3.1. A short introduction to the Banking Union*

As Chamon noted, the Commission's 2008 promise to abstain itself from proposing new agencies did – until the above discrepancies are settled – did not survive the 2007 financial and economic crisis. The EU legislator decided to create a proper supervisory system – which after early attempts – resulted in the Banking Union (BU),[50] including the *Single Rulebook*, *Single Supervisory Mechanism*[51] (SSM), *Single Resolution Mechanism*[52] (SRM) and the *European Deposit Insurance Scheme* (EDIS). – Until now, only the first three pillars have been realised, with the EDIS still under development.[53]Under the BU, *less significant credit institutions*[54] fall under the supervision of national authorities, while significant ones[55] fall under the

50 For the process, please see: Marinkás, 2020, p. 140.

51 Council Regulation (EU) 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, pp. 63–89) (SSM Regulation).

52 Regulation (EU) 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund [...] (OJ L 225, 30.7.2014, pp. 1–90) (SRM Regulation).

53 For a more detailed introduction on the topic please see: Marinkás, 2024.

54 The SSM Regulation does not contain the definition of credit institutions; instead, it refers to Article 4 (1) of Regulation (EU) No 575/2013 of the European Parliament and of the Council, which defines credit institutions as follows: 'credit institution means an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account'. – Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 Text with EEA relevance (OJ L 176, 27.6.2013, p. 1–337)

55 The delimitation is to be made as contained Article 6 (4) of the SSM Regulation: 'The significance shall be assessed based on the following criteria: (I) size; (II) importance for the economy of the Union or any participating Member State; (III) significance of cross-border activities. With respect to the first subparagraph [...], a credit institution or financial holding company or mixed financial holding company shall not be considered less significant, unless justified by particular circumstances to be specified in the methodology, if any of the following conditions is met: (I) the total value of its assets exceeds EUR 30 billion; (II) the ratio of its total assets over the GDP of the participating Member State of establishment exceeds 20 %, unless the total value of its assets is below EUR 5 billion; (III) following a notification by its national competent authority that it considers such an institution of significant relevance with regard to the domestic economy, the ECB takes a decision confirming such significance following a comprehensive assessment by the ECB, including a balance-sheet assessment, of that credit institution. The ECB may also, on its own initiative, consider an institution to be of significant relevance where it has established banking subsidiaries in more than one participating Member States and its cross-border assets or liabilities represent a significant part of its total assets or liabilities

direct supervision of the ECB.[56] The notion of credit institutions is an autonomous concept of EU law that shall prevail.[57] ECB's Framework Regulation[58] for the SSM – alongside with the *Court of Justice*'s (hereafter: CJ) case-law – further refined the rules on cooperation,[59] including (I) the methodology for determining the quantitative criteria for classifying banks as significant or less significant, (II) the exercise of powers, and (III) the relations between domestic regulators and the ECB. [60] The *General Court* (GC) also contributed to the clarification of certain definitions and the interpretation of some provisions.[61]

The SRM covers the same scope as the SSM' however, differences can occur in practice when it comes to the classification of financial institutions, as illustrated by the "Veneto-paradox", a term introduced by, Szegedi and Teleki.[62] The purpose of the SRM Regulation is to provide a framework for the resolution

subject to the conditions laid down in the methodology. Those for which public financial assistance has been requested or received directly from the EFSF or the ESM shall not be considered less significant.'

56 The decisions of the ECB can directly affect individual credit institutions, which are subject to a two-fold review system: an internal administrative review and an external judicial review. See: Chiarella, 2016, p. 70.

57 Ibid, p. 48.

58 Regulation (EU) 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation).

59 C–450/17 P, *Landeskreditbank Baden–Württemberg v. ECB, Judgment of the CJ*, 8 May 2019; C–52/17, *VTB Bank (Austria) AG v. Finanzmarktaufsichtsbehörde*, Judgment of the CJ, 19 December 2018; C–219/17, *Berlusconi and Fininvest v. Banca d'Italia and IVASS*, Judgment of the CJ, 19 December 2018; C–594/16, *Buccioni v. Banca d'Italia*, Judgment of the CJ, 13 September 2018.

60 For a more detailed analysis, see: Marinkás, 2018, pp. 437–471.

61 T–122/15, *Landeskreditbank Baden–Württemberg – Förderbank v. ECB*, Judgment of the GC, 16 May 2017; T–712/15, *Crédit Mutuel Arkéa v. ECB*, Judgment of the GC, 13 December 2017; T–133/16, *Caisse régionale de crédit agricole mutuel Alpes Provence v. ECB*, Judgment of the GC, 24 April 2018; T–751/16, *Confédération nationale du Crédit mutuel v. ECB*, Judgment of the GC, 13 July; T–745/16, *BPCE v. ECB*, Judgment of the GC, 13 July 2018; T–757/16, *Société générale v. ECB*, Judgment of the GC, 13 July 2018; T–758/16, *Crédit agricole SA v. ECB*, Judgment of the GC, 13 July 2018; T–768/16, *BNP Paribas v. ECB*, Judgment of the GC, 13 July 2018.

62 In mid-2017, the SRB decided to resolve the *Banco Español S.A.* – a systemically important bank supervised by the ECB – under a resolution scheme adopted by the SRB, while the *Banco Popolare di Vicenza* and *Veneto Banca* in Italy remained under the jurisdiction of the National Resolution Authority, thus allowing the domestic resolution authority to act under much more favourable national rules. The co-authors argue that different ratings of EU-level players could be detrimental to the functioning of the Single Market in a broader sense. See: Szegedi and Teleki, 2024.

of failing systemically important institutions[63] within the BU to avoid systematic risks and to minimise the costs for taxpayers and the real economy. The banking sector finances this resolution procedure through a single resolution fund. The regulatory level is two-tiered: it consists of the *Single Resolution Board* (SRB) – a new EU agency that started functioning in 2015 – and *national resolution authorities*[64] (NRAs). If a financial institution falls within the competence of the SRB, it adopts the resolution scheme under Article 18(1) of the SRM regulation – either on a communication pursuant to Article 7(4)b, or on its own initiative – provided that the following conditions are met: (I) 'the entity is failing or is likely to fail;[65] (II) having regard to timing and other relevant circumstances, there is no reasonable prospect that any alternative private sector measures [...] would prevent its failure within a reasonable timeframe.' and (III) 'a resolution action is necessary in the public interest pursuant to Article 18(5)'.[66]

63 According to Article 131(3) of Directive (EU) 2013/36/EU, systemic importance shall be assessed on the basis of at least any of the following criteria: (I) size, (II) importance for the economy of the Union or of the relevant Member State, (III) significance of cross-border activities, and (IV) interconnectedness. – Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338–436)

64 For details on the Hungarian regulation and domestic supervision system, please see: Nagy and Csiszár, 2016, pp. 157–163.

65 SRM Regulation Article 18(4) elaborates on the notion of "failing or to be likely to fail", that is. when an entity shall be deemed to be failing or to be likely to fail, namely the following cases:
(a) the entity infringes, or there are objective elements to support the determination that the institution will, in the near future, infringe the requirements for continuing authorisation in a way that would justify the withdrawal of the authorisation by the ECB, including but not limited to the fact that the institution has incurred or is likely to incur losses that will deplete all or a significant amount of its funds;
(b) the assets of the entity are or there are objective elements to support a determination that the assets of the entity will, in the near future, be less than its liabilities;
(c) the entity is or there are objective elements to support a determination that the entity will, in the near future, be unable to pay its debts or other liabilities as they fall due;
(d) extraordinary public financial support is required except where, to remedy a serious disturbance in the economy of a Member State and preserve financial stability, that extraordinary public financial support takes any of the following forms: (I) State guarantee to back liquidity facilities provided by central banks in accordance with the central banks' conditions; (II) State guarantee of newly issued liabilities; or (III) an injection of own funds or purchase of capital instruments at prices and on terms that do not confer an advantage upon the entity, where neither the circumstances referred to in points (a), (b), and (c) of this paragraph nor the circumstances referred to in Article 21(1) are present at the time the public support is granted.

66 SRM Regulation, Article 18(5): '5. For the purposes of point (c) of paragraph 1 of this Article, a resolution action shall be treated as in the public interest if it is necessary for the achievement of, and is proportionate to one or more of the resolution objectives referred to in Article 14 and winding up of the entity under normal insolvency proceedings would not meet those resolution objectives to the same extent.'

Under Article 18(6) of the SRM Regulation,

> If the conditions laid down in paragraph 1 are met, the Board shall adopt a resolution scheme. The resolution scheme shall: (I) place the entity under resolution; (II) determine the application of the resolution tools to the institution under resolution referred to in Article 22(2)[67], in particular any exclusions from the application of the bail-in in accordance with Article 27(5) and (14); (III) determine the use of the Fund to support the resolution action in accordance with Article 76 and in accordance with a Commission decision taken in accordance with Article 19.

Article 18(7) states,

> Immediately after the adoption of the resolution scheme, the Board shall transmit it to the Commission. Within 24 hours from the transmission of the resolution scheme by the Board, the Commission shall either endorse the resolution scheme, or object to it with regard to the discretionary aspects of the resolution scheme [...].

Within 12 hours from the transmission of the resolution scheme by the Board, the Commission may propose to the Council: (I) 'to object to the resolution scheme on the ground that the resolution scheme adopted by the Board does not fulfil the criterion of public interest referred to in paragraph 1(c)', or (II) 'to approve or object to a material modification of the amount of the Fund provided for in the resolution scheme of the Board.' Based on this regulation, the Council acts according to simple majority. The regulation requires the Council or Commission to provide reasons for exercising its power of objection. If no objection has been expressed by the Council or the Commission within 24 hours after its transmission by the Board, the resolution scheme enters into force.

According to Article 29(1) of the SRM Regulation: 'National resolution authorities shall take the necessary action to implement decisions referred to in this Regulation, [...] National resolution authorities shall implement all decisions addressed to them by the Board.' Under Article 29(2),

> Where a national resolution authority has not applied or has not complied with a decision by the Board pursuant to this Regulation or has applied it in a way which poses a threat to any of the resolution objectives under Article 14 or to the efficient implementation of the resolution scheme, the Board may order an institution under

67 Article 22(2) of the SRM Regulation: 'The resolution tools referred to in point (b) of Article 18(6) are the following: (a) the sale of business tool; (b) the bridge institution tool; (c) the asset separation tool; (d) the bail-in tool.'

> resolution: [...] to adopt any other necessary action to comply with the decision in question. [...] Before deciding to impose any measure the Board shall notify the national resolution authorities concerned and the Commission of the measure it intends to take.

The word "notify" implies that the SRB has a wide margin of appreciation in this case.

One may ask, does the delegation of powers to the European Supervisory Authorities fit the principle of delegation of powers? Szegedi examined this issue by using the so-called "flexible Meroni model", originally created by Griller and Orator. Szegedi argues that the basic tenets of the doctrine can be preserved only if the overall result of steering and control reaches an adequate level of input-oriented legitimacy – democratic exercise of public authority – and output-oriented legitimacy – efficiency-based approach with reliance on expertise of the independent agencies – as well as institutional balance. Szegedi concluded that the European Supervisory Authorities essentially meet the criteria of the flexible model, as the relevant Lisbon primary law, that is, Articles 290 and 291 of the TFEU, cannot be interpreted in an absolutely restrictive way regarding the delegation of powers. He concludes, that the delegation of the power to issue legally binding individual decisions will need to be further assessed, in particular in the light of the specific legal acts that the agencies will issue in the future.[68]

■ *3.2. The recent case-law: Procedures before the General Court*

Two novel judgments, both delivered on 1 June 2022, revolving around the resolution of the *Banco Popular Group* – the sixth-largest banking group in Spain at the time of the resolution – also show clarity issues many years after the SRB was implemented, such as who should be notified in case a resolution scheme is to be adopted. In the T–510/17 *Antonio Del Valle Ruíz v. European Commission and Single Resolution Board* case,[69] in their first plea-in-law,[70] the applicants claimed that SRB's procedure under Article 18 of the SRM Regulation contradicted Articles 41 and 47 of the *Charter of Fundamental Rights of the EU* (Charter).[71] Emphasis was placed on the right to an effective remedy and a fair trial under Article 47 of the Charter, as in their view, the fact that shareholders and creditors are not heard during the procedure infringes on this right.[72] The GC reiterated that, while no provision of the SRM Regulation expressly excludes or restricts the rights of shareholders and

68 Szegedi, 2012, pp. 351–354.
69 T–510/17, Antonio Del Valle Ruíz v. European Commission Single Resolution Board, Judgment of the GC, 1 June 2022.
70 The applicants submitted nine pleas-in-law. The author introduces here only the first and the ninth as the most relevant ones.
71 Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012, 391–407).
72 CJEU, T–510/17, judgment, para. 113.

creditors of the entity concerned to be heard during the resolution procedure, such a hearing procedure, which would be lengthy in the case of thousands of shareholders and creditors, is contrary to the purpose of the procedure and may jeopardise its effectiveness,[73] as the decision procedure under Article 18 of the SRM Regulation is aimed at:

> [...] ensuring the continuity of the critical functions of the entity concerned and [...] protecting the stability of the financial system of that Member State and, therefore, preventing contagion to other Member States of the euro area would have been exposed to serious risks.[74]

This risk is real, as the background of the case proves: on 31 May 2017, *Reuters* published an article titled 'EU warned of wind–down risk for Spain's Banco Popular'; the publication was based on the allegations of an EU official, whose identity remains unknown. As a result, Banco Popular faced massive liquidity outflows during the first few days of June 2017.[75] Regarding the infringement of Article 47 of the Charter, the GC stated:

> It is sufficient to note that the applicants' argument is based on a misinterpretation of the scope of the right to an effective remedy enshrined in Article 47 of the Charter, which guarantees a right to an effective remedy against an act which adversely affects a person and not before the adoption of the act.[76]

Therefore, the GC rejected the first plea-in-law as unfounded.[77]

In the ninth plea, the applicants claimed under Article 277 of the TFEU that Articles 18 and 22 of the SRM Regulation contradict the principles relating to the delegation of power set out by the CJEU in its 1958 *Meroni* v. *High Authority* judgment.[78] In the applicants' view, '[...] the provisions of Article 18(7) of [the SRM Regulation], according to which the Commission is to endorse the resolution scheme within 24 hours [...] it is the SRB which decides on the resolution policy, with the Commission simply carrying out a 'rubber–stamp' function'.[79] The GC first reiterated that the Founding Treaties do not elaborate on the issue of conferring powers on an EU body, office, or agency as highlighted by the statements of Advocate General Niilo Jääskinen cited above.

73 CJEU, T–510/17, judgment, paras. 124, 151, 165.
74 CJEU, T–510/17, judgment, paras. 152, 161.
75 CJEU, T–510/17, judgment, paras. 42–44.
76 CJEU, T–510/17, judgment, para. 190.
77 CJEU, T–510/17, judgment, para. 203.
78 CJEU, C–9/56, *Meroni v High Authority*, Judgment. On the issue of the applicability of the Meroni case in the current institutional context, see Ferran, 2012, p. 110.
79 CJEU, T–510/17, judgment, paras. 204–205.

It is thus the case-law – in particular, *Meroni and the United Kingdom v. Parliament and Council* – that elaborated on the issue of the autonomous powers of EU agencies. In the latter case, the CJEU updated the Meroni doctrine and expanded the scope of powers delegable to agencies to include discretionary powers as long as adequate controls were in place.[80]

In the GC's view, the EU legislator avoided an "actual transfer of responsibility" under the Meroni judgment. First, the SRM Regulation states that the resolution scheme may enter into force only if no objection has been expressed regarding the discretionary aspects of the scheme by the Council or the Commission within 24 hours of its transmission. Therefore, to produce legal effects for the resolution scheme, it is necessary for an EU institution to approve it. This finding is supported by Preambulars 24 and 26 of the SRM Regulation.[81] Second, under Article 14 of the SRM Regulation, the Commission is also obliged to make the assessment under Article 18 when it has to endorse the choice of a resolution tool and comply with the public interest criterion. Under Article 43(3), the Commission is entitled to designate a permanent observer, who has the right to participate in the meetings of executive and plenary sessions of the SRB, as well as the debates, and who has access to all documents; consequently, the Commission becomes aware of the resolution scheme before it is transferred by the SRB and has sufficient time to assess its discretionary aspects during the preparation of the scheme. Therefore, in GC's view, the SRB does not have the autonomous power to decide on the resolution of an entity or the resolution tool pursuant to Article 22 of the SRM Regulation.[82] Accordingly, the GC rejected the ninth plea-in-law as unfounded.[83]

The legal nature of the resolution scheme was also one of the core issues in the T–481/17 *Fundación Tatiana Pérez [...] v. SRB* case.[84] In its intervention[85], the Commission claimed that the action was inadmissible because the resolution scheme was an intermediate measure, which did not produce legal effects. By its decision, it approved the resolution program, made its own,[86] attributed binding legal effects to it and that the action brought solely against the resolution program was inadmissible. In the GC's view, while there is no doubt that – as the Commission argued at the hearing – the resolution program will only enter into force with its support, this does not mean that the Commission's support extinguishes the autonomous legal effects of the resolution scheme, something that the GC denied

80 Babis, 2014, pp. 266–270.
81 CJEU, T–510/17, Judgment, paras. 215–219.
82 CJEU, T–510/17, Judgment, paras. 227–228, 230–232.
83 CJEU, T–510/17, Judgment, para. 234.
84 CJEU, T–481/17, Fundación Tatiana Pérez de Guzmán el Bueno and Stiftung für Forschung und Lehre (SFL) v. SRB, Judgment of the GC, 1 June 2022.
85 The applicants submitted ten pleas-in-law. The author dispenses with them and focuses on the intervention of the Commission.
86 It is worth reiterating the thoughts of Advocate General Roemer in the Meroni case.

in the above introduced ruling, which was delivered the same day. The GC took the view that, contrary to the Commission's assertion, respect for the principles laid down in the Meroni judgment concerning the delegation of powers does not mean that only the decision adopted by the Commission produces legal effects.[87] As Preambular (26) of the SRM Regulation states,

> [...] The procedure relating to the adoption of the resolution scheme, which involves the Commission and the Council, strengthens the necessary operational independence of the Board while respecting the principle of delegation of powers to agencies, as interpreted by the Court of Justice of the European Union.

As the GC reiterated, the division of competencies between the SRB and the Commission – as set out in the SRM Regulation – does not support the Commission's argument that it makes the resolution program its own by endorsing it. The Commission has its own power to assess the discretionary aspects of the resolution program and can decide whether to endorse or object to it. However, it has no power to exercise the powers reserved for the SRB or to amend the resolution programme or its effects; that is, the Commission cannot object to or alter the technical aspects of the resolution scheme. Furthermore, Article 86 of the SRM Regulation provides that all decisions of the SRB – except for decisions which may called into question before an appeal body – may be challenged before the CJEU by means of an action under Article 263 of the TFEU. In GC's view, the resolution programme falls conceptually within this category of decisions, and no reservation in that Article or any other provision of the [SRM Regulation] allows its exclusion.[88] Therefore, it follows from the wording of Article 86 of the SRM Regulation, as well as from other provisions of the Regulation, that the resolution scheme adopted by the SRB may be challenged individually without requiring the launching of a procedure against the Commission's decision to endorse it.[89]

■ *3.3. The recent case-law: Procedures before the Court of Justice*

An appeal was submitted against T–510/17 *Antonio Del Valle Ruíz v. European Commission and Single Resolution Board*, which the Court rejected.[90] Conversely, the CJ proceeded and delivered a judgment in the C-551/22 P case, the appeal against T–481/17 *Fundación Tatiana Pérez [...] v. SRB*.[91] *Advocate General Tamara Ćapeta* in her

87 CJEU, T–481/17, paras. 107, 127.
88 CJEU, T–481/17, paras. 132, 140.
89 CJEU, T–481/17, paras. 143–144.
90 CJEU, C-539/22 P, Order of the President of the Court, 6 September 2023.
91 CJEU, C-551/22 P, Judgment of the Court, 18 June 2024.

opinion[92] summarised the three grounds of appeal of the Commission[93] into one single question, namely: was the GC correct in finding that an action challenging the resolution scheme of Banco Popular can be brought against the SRB under Article 263 of the TFEU?

Although the Advocate General refuted the Commission's assertions that the Meroni doctrine is decisive in the case at hand – the AG argued that it is the legislative choices regarding the SRM Regulation that are important[94] and provided an analysis on the Meroni doctrine and two judgments she deemed important in the development of the doctrine, namely the Romano and the ESMA cases. The Advocate General again, refuted the Commission's allegations and acknowledged that the Meroni doctrine is widely perceived as prohibiting the delegation of discretionary powers by union bodies. Citing a 2023 study of Simoncini,[95] she was of the view that, a general prohibition of delegating discretionary powers to any other body except for the Commission does not fit today's reality.[96]

She reiterated that, on the one hand, in the Romano case, the CJ found that a body such as the Administrative Commission could not have been empowered to adopt 'acts having the force of law' since Articles 173 and 177 of the EEC Treaty [Articles 263 of 267 the TFEU], were silent on judicial review against decisions of bodies such as the Administrative Commission.[97] However, in the ESMA case, the Court addressed the requirements of Meroni with a view to the changes brought by the Lisbon Treaty, and concluded that it is the delegation of "wide margin of discretion" to an agency what remains prohibited. She concluded that the powers granted to ESMA are precisely delineated and the judicial review is allowed.[98]

Therefore, the Advocate General concluded that 'delegating discretion to agencies in individual decision-making is permissible, as long as it is subject to judicial review.'[99] Therefore, under the Meroni doctrine, the legislator would have been allowed to grant the SRB the power to decide on a resolution scheme without the Commission's endorsement, since the SRB's powers are precisely limited under the SRM Regulation. However, the legislator decided the other way; therefore, the Advocate General concluded that the legislative choices reflected in the SRM Regulation, rather than the Meroni doctrine, are relevant for deciding the present

92 CJEU, C-551/22 P, Opinion of Advocate General *Tamara Ćapeta,* 9 November 2023.

93 'The Commission raises three grounds of appeal. First, it argues that the General Court erred in law by concluding that the resolution scheme, as adopted by SRB, produces binding legal effects. Second, the Commission argues that the General Court allowed an action against the wrong defendant, thus breaching the Commission's rights of defence. Finally, the Commission argues that the General Court's reasoning is contradictory.' – CJEU, C-551/22 P, Opinion of the Advocate General, para. 27.

94 CJEU C-551/22 P, Opinion of the Advocate General, para. 97

95 See endnote No. 60 of the Advocate General's Opinion.

96 CJEU, C-551/22 P, Opinion of Advocate General, para. 78.

97 CJEU, C-551/22 P, Opinion of Advocate General, para. 85.

98 CJEU, C-551/22 P, Opinion of Advocate General, para. 89.

99 CJEU, C-551/22 P, Opinion of Advocate General, para. 92.

appeal.[100] She held that, based on the SRM Regulation, the resolution scheme is not legally binding without the Commission's – or in certain cases the Council's – approval. Moreover, the Commission's half a page long approval is not an independent act: it is related to the resolution scheme of the SRB – an integral part of the Commission's decision – and could not exist on its own. Thus, in the Advocate General's view, the subject of the judicial review can only be the resolution scheme as endorsed by the Commission.[101]

The question remains, who is the author of these – in the Advocate General's view–, inseparable acts. Referring to CJEU's case-law on the so called "composite procedures"[102] – in the CJ's word-pick "complex procedures"[103] – which according to the Commission's assertions are applicable to the horizontal composite procedures as well[104] – only the act that puts an end to the entire procedure can exert legal effects. In case of the resolution procedure, it is the Commission, which ends the procedure with its approval on the Commission approves the technical and discretionary aspects of the resolution scheme. In that regard, the Advocate General argued that the wording of the SRM Regulation does not suggests that the Commission approves only the discretionary parts of the resolution scheme. Instead, the SRM Regulation states that, 'the Commission shall either endorse the resolution scheme, or object to it with regard to the discretionary aspects of the resolution scheme (...)'.[105] Accordingly, an endorsement concerns the resolution scheme in its entirety, unlike an objection, which is directed only against its discretionary aspects.[106]

The only question left and deemed relevant by the author in the context of the current study is the existence of an effective judicial review. To ensure effective judicial review by the CJEU the legally binding measures must contain a statement of reasons; without knowing the reasons, it is difficult for the person affected by a measure to construe a meaningful challenge, an issue raised in the Meroni case as well.[107]

As the Advocate General endorsed the resolution scheme, the Commission also endorses the statement of reasons and is good aware of their content, since according to SRM Regulation[108] the Commission (and the ECB) have a representative entitled to participate in the meetings of executive and plenary sessions of the SRB as a permanent observer, who participates in debates, and has access

100 CJEU, C-551/22 P, Opinion of Advocate General, para. 92-94, 96-97.
101 CJEU, C-551/22 P, Opinion of Advocate General, para. 101, 106, 108.
102 See the case-law cited in footnote No. 87 of the Advocate General's opinion.
103 CJEU, C-551/22, Judgment, para. 92.
104 The vertical one are, when the EU and domestic bodies are involved.
105 Article 18(7) of the SRM Regulation.
106 CJEU, C-551/22 P, Opinion of Advocate General, paras. 110-113.
107 CJEU, C-9/56, Meroni, Opinion of Advocate General, II/7; CJEU, C-9/56, Meroni, Judgment, paras. 142-143.
108 Article 43(3) of the SRM Regulation.

to all documents.[109] Thus, as the Advocate General stated in accordance with the findings of the General Court in the T–510/17 case – another Banco Popular-related case introduced above – that the Commission's approval of the resolution scheme does not seem to be a "mere rubber-stamping". – Regarding this, the author deems necessary to point that according to the case files, it took less than one and a half hour for the Commission to adopt the resolution scheme.[110] – In the Advocate General's view, the Commission endorsed the content of the resolution scheme, having regarded its above participatory role.[111] Therefore the question is: why the Commission in its practice dispenses with publishing it alongside with the resolution scheme[112] preventing individuals, who would like to bring a direct action under Article 263 TFEU to know the reasons on which the Commission based its approval from the very decision of approval?[113] The Commission replied that as the resolution scheme contains confidential information, it does not deem it fortunate to publish it alongside with its decision. It added that the scheme was nevertheless published by the SRB on its website;[114] therefore, it is publicly available. In this regard the Advocate General recommended that the Commission change its practice to make it possible for the potential applicants to learn the statement of facts.[115]

As the final conclusion, the Advocate General stated, '[...] the resolution scheme has no independent legal existence, and thus cannot be challenged independently of the Commission's endorsement. A direct action should challenge the Commission's endorsement of the SRB's resolution scheme. Therefore, there is a single challengeable act with the Commission as its author.' [116]

The CJ came to the same conclusion through a similar – though a bit differing – train of thought.[117] The CJ provided an overview of the Meroni doctrine and its evolution, taking a similar stance regarding its applicability as the Advocate General. When addressing the wording of the SRM legislation on the discretionary power granted to the SRB and to its limits, the GC devoted more attention to this issue than the Advocate General. The CJ also addressed the issue of complex procedures – called composite procedures – to find that it is the Commission's

109 CJEU, C-551/22 P, Opinion of Advocate General, paras. 124, 126.
110 See CJEU, T-481/17, Judgment, paras. 77-78; CJEU, C-551/22 P, Opinion of Advocate General, para. 14.
111 CJEU, C-551/22 P, Opinion of Advocate General, para. 128.
112 As end note 103 of the Advocate General's opinion highlights, the Commission still continues that practice.
113 It is worth reiterating that the publication of the reasoning – that is the possibility for the possible applicants to learn the grounds of the decision – was also an issue in the Meroni-case.
114 The non-confidential files are available online at: https://www.srb.europa.eu/en/content/banco-popular (Accessed: 28 August 2024).
115 CJEU, C-551/22 P, Opinion of Advocate General, paras.130-132.
116 CJEU, C-551/22 P, Opinion of Advocate General, paras, 133.
117 CJEU, C-551/22 P, Judgment, paras. 64-97.

approval, which provides the binding force, thus making the decision on the resolution subject to judicial review under Article 263 of TFEU. The Court of Justice did not address the issue of publishing the scheme alongside with the approval.

4. Concluding remarks

As shown by the recent BU related case-law of the CJEU, the meaning of Meroni-doctrine and its relevance is still an actual issue. In the T–510/17 *Antonio Del Valle Ruíz* case the GC, stated that the Commission has the final say and the SRB only provides a professional opinion. The GC also stated that the resolution scheme only produces legal effect if an EU institution approves it. This is in line with the thoughts of AG Roemer in the Meroni-case that is the real decision is made by the delegating authority and only the preparatory work is left to the "agency". Thus, in the GC's view, the EU legislator avoided an "actual transfer of responsibility" within the Meroni doctrine, since the Commission's approval – which has to be given within 24 hours – is not a mere rubber stamping, as the Commission becomes aware of the resolution scheme before it is transferred by the SRB and has sufficient time to assess its discretionary aspects during the preparation of the scheme. Therefore, in the GC's view, the SRB does not have the autonomous power to decide on the resolution of an entity or the resolution tool pursuant to Article 22 of the SRM Regulation.

In the T–481/17 *Fundación Tatiana Pérez* case, the GC concluded that the resolutions scheme of the SRB can be challenged directly before the CJEU under Article 263 of the TFEU. In the appellate proceedings before the CJ, the Advocate General as well as the CJ took the view that this conclusion was contrary to the CJEU's well-established case-law on the delegation of powers and the so called "composite/complex procedures", including the statements of the GC in the above-mentioned ruling, which was delivered the same day. ––As for the delegation of powers, both the Advocate General and the CJ held that the delegation of powers to the SRB conformed the Meroni-doctrine.

As a novelty however, both the Advocate General and the CJ somehow 'transcended' the Meroni-doctrine, when they found that the said doctrine is not the decisive factor in the case. Instead, it is the choice of the legislator, not to vest the SRB with the right to have the final say. – Despite the legislator could have decided so under the Meroni-doctrine. – That is, without the Commission's approval, the resolution scheme cannot produce any legal effect, since in 'composite/complex procedures' only the act that puts an end to the entire procedure can exert legal effects and therefore be a subject of judicial review under Article 263 of the TFEU. However, old habits die hard. In the recent case, Advocate General Ćapeta paid special attention to the lack of proper publication of the statements of the reason

by the Commission, just like Advocate General Roemer did in the Meroni -case regarding the High Authority.

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Is the Economic and Monetary Union Headed to Becoming a Fiscal Federation?

ABSTRACT: *Since the financial and Eurozone crises, the rules on the functioning of the Economic and Monetary Union (EMU) have changed fundamentally. In this article, I argue that these changes are moving the balance from national to supranational institutions and lead the EMU in a direction frequently referred to as 'fiscal federation'. At the same time, I contend that these changes are not fully in line with European Union's primary law, as it stands today. Without contradicting the necessity and effectiveness of these measures on economic terms, I put forward that, to accommodate this substantially modified architecture of the EMU, it would be beneficial to change the primary law in order to clarify the EMU rules. This argument will be made upon an example of three specific policy changes: creation of the European Stability Mechanism, enabling the EU to bail-out states in financial difficulties, introduction of the European Semester, granting the EU the capacity to extensively coordinate the budgetary policies of the Member States, and establishment of the EU Recovery Instrument, empowering the EU to take on itself debt and to redistribute the money across the Member States. For each of these instruments, their legal basis will be thoroughly discussed. I will underline the fact that they were established outside of the regular legal architecture, outlined in the Treaty on the Functioning of the European Union, and suggest specific ways in which the primary law could be modified in order to accommodate these instruments. In conclusion, their combined effect on the operation of the EMU will be analysed and assessed.*

KEYWORDS: Eurozone, European Semester, European Stability Mechanism, fiscal federation, Next Generation EU

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1. Introduction

The legal and institutional architecture of the European Union (EU) is not yet settled, and as reflected in many EU policies, the forces of supranationalism struggle with intergovernmentalism.[1] The Economic and Monetary Union (EMU) stands as an example. Originally, the monetary policy was dedicated exclusively to EU institutions, while national fiscal and economic policy remained in principle the competence of the Member States.

Following the global financial crises of 2007–2009 and the subsequent economic difficulties of several members in the Euro area, the architecture of the EMU has been significantly modified and changes are still ongoing. In this article, I concentrate on three of them: the creation of the European Stability Mechanism, the introduction of the European Semester, and new ways of financing the Member States through the EU Recovery Instrument. As these instruments have been repeatedly discussed in detail in the literature, I only concentrate on their implications for the balance between supranationalism and intergovernmentalism. I propose that, cumulatively, they can significantly increase EU's powers over national fiscal and economic policy. Yet as consequential as these changes are, they are based on a questionable legal basis and are arguably not fully aligned with the current EU law.

Generally, I also argue that the newly acquired powers of the EU in fiscal measures start to resemble those of a federation,[2] in that it extensively coordinates the budgetary policies of the Member States (the European Semester), it may, in principle, bail-out Member States in financial difficulties (the European Stability Mechanism), and it executes an extensive redistribution of wealth, eclipsing the cohesion policy as we know it (the EU Recovery Instrument).

The next section describes the architecture of EMU, as it was originally conceived. Section 3 analyses the impact of the three fundamental changes on EMU's architecture, which enables me to reflect on EMU's trajectory and on the compatibility of these measures with the existing Treaties. Finally, Section 4 draws conclusions to this paper.

1 Whereas supranationalism may be characterised as a design feature whereby international organisations grow governmental structures by possessing full jurisdiction over a policy domain (Sweet and Sandholtz, 1997, p. 304), intergovernmentalism is characterised as a design whereby international organisations maintain governmental structures in which decisions are taken by member states whose autonomy is not pre-empted (Tsebelis and Garrett, 2001, p. 386).

2 Hinajeros, 2013.

2. Basic characteristics of the Economic and Monetary Union

The overall design of the EMU was laid down already by the Treaty of Maastricht. Its rules differentiate between competencies regarding monetary policies and economic policies. While the former are of the exclusive competences of the EU,[3] the latter remain predominantly the domain of the Member States, as EU institutions should only assume a coordinating role.[4] The Treaty on the Functioning of the European Union (TFEU) thus foresees a '*single monetary policy*'[5] and '*close coordination of Member States' economic policies*'.[6]

However, the extent of this 'close coordination' is still disputed. The discussions leading to the adoption of relevant rules on EMU have already been extensively discussed in the literature.[7] As such, in this article, it suffices to say that the different proponents of the Euro had different ideas about the functioning of the EMU. Most prominent among them were the visions of France and Germany, the former arguing for some form of common economic governance under EMU and the latter stressing the need of price stability and sound public finances. As a result, the architecture of the EMU is based on two pillars, a 'German' one and a 'French' one.[8]

The first pillar was constructed around a concept of 'stability union' (the stability pillar). Under this understanding, the principal goal of EMU is to ensure fair and stable conditions for efficient free-market competition by maintaining a currency that is solid both internally (i.e. low inflation), and externally (i.e. stable exchange rates). In this context, an interventionist fiscal policy (financial stimuli) needs to be avoided, because it ultimately leads to inflation and devaluation.[9] Government deficits are, thus, the only area in which the co-ordination among members of a monetary union is needed, because excessive deficits may lead to a debt crisis and ultimately to a bailout demand.[10] That would be totally unacceptable, as there needs to be a clear liability for fiscal decisions.[11] Therefore, the EMU should be centred on two principles: an independent central bank and the fiscal discipline of its member states.[12] These principles are strongly enshrined in the

3 Art. 3 (1) (a) TFEU.
4 Art. 5 (1) TFEU states: 'The Member States shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies'.
5 Art. 119 (2) TFEU.
6 Art. 119 (1) TFEU.
7 Dyson and Featherstone, 1999.
8 Pisani-Ferry, 2006, p. 827.
9 Hacker and Koch, 2017, p. 11.
10 Dullien and Guérot, 2012, p. 3.
11 Feld et al., 2016, p. 48.
12 Wyplosz, 2017, p. 149.

Treaties. In particular, Article 126 (1) TFEU states unambiguously that Member States shall avoid excessive government deficits. At the same time, according to Article 125, the EU and the Member States shall not be liable for or assume the commitments of other Member States (the 'no-bailout clause').

The second pillar connects with the concept of 'fiscal union' (the governance pillar). Under this understanding, the EMU cannot work properly without being supported by some form of an economic union.[13] The demand side of the economy needs to be stimulated by public authorities (and public finances) to prevent cyclical crises and contain regional asymmetric shocks. Extensive spending capacity on the EU side is thus necessary for the EMU to function,[14] as well as the close coordination of economic policies of Member States. Therefore, the proponents of this approach call for introduction of specific stabilisation funds[15] and a significantly increased fiscal capacity at the EU level.[16]

Whereas TFEU's provisions on the stability union are relatively specific and clear, those on fiscal union are either general or contradictory. As such, Article 121 TFEU merely proclaims that Member States shall regard their economic policies as a matter of common concern and shall coordinate them within the Council. Expansive fiscal stimuli seem to be prevented by the 'no-bailout' clause[17] and by the requirement of a balanced EU budget.[18] Indeed, while the stability pillar includes a specified objective, numerical targets and a detailed excessive deficit procedure,[19] the governance pillar 'is a general-purpose provision with no corresponding policy rule or teeth'.[20]

In 1997, even before the provisions on the Euro entered fully into force, both pillars were strengthened. Concerning the stability pillar, the Stability and Growth Pact (SGP) was adopted to reinforce the procedures concerning budgetary discipline.[21] On side of the governance pillar, the creation of the Eurogroup, an informal meeting of the ministers of finance of Euro-countries, was endorsed by the European Council in Luxembourg.[22]

As argued in the literature,[23] these additions only strengthened the emphasise on budgetary discipline:

13 Pisani-Ferry, 2006, p. 841.
14 De Grauwe, 2006, p. 727.
15 De Grauwe and Ji, 2016, p. 144.
16 Pisani-Ferry, Vihriala, and Wolff, 2013, p. 3.
17 Art. 125 TFEU.
18 Art. 310 (1) TFEU.
19 Art. 126 TFEU and protocol No. 12 on the excessive deficit procedure.
20 Pisani-Ferry, 2006, p. 827.
21 Amtenbrink, de Haan, and Sleijpen, 1997.
22 Luxembourg European Council 12 and 13 December 1997. Presidency Conclusions.
23 Pisani-Ferry, 2006, p. 828.

> Those additions [...] reinforced the already existing imbalance between the two pillars: with the adoption of the Pact, some more bricks and mortar were added to the first, strong one; [...] and through the creation of that new institution, the Eurogroup, another seemingly plaster decoration was added to the second, weak one.

Interestingly, although the rules on the stability pillar appeared significantly stronger, they nonetheless failed in practice.[24] The country that stood behind its adoption – Germany – was the one to first break the rules, alongside France. Because of the development of their public finances, excessive deficit procedures were initiated against Germany in 2002 and against France in 2003. At the end of 2003, the Commission recommended the Council to adopt a decision on the basis of the Article 126 (8) and (9) TFEU, declaring that the measures adopted so far by both France and Germany were inappropriate; it also issued a formal notice to these two Member States, obliging them to adopt specific measures within a specific timeframe. However, these decisions were not adopted, as the Council failed to establish the required majority. Instead, the Council adopted conclusions, noting that it decided not to act upon the Commission's recommendations and that it agrees 'to hold the Excessive Deficit Procedure in abeyance for the time being'.[25] The Council then sent recommendations to both the countries. These recommendations significantly differed from those proposed by the Commission.[26]

The Commission challenged the Council's proceedings before the Court of Justice of the European Union (CJEU). Unsurprisingly, the CJEU concluded that an action for annulment is inadmissible insofar as it seeks annulment of the Council's failure to adopt the formal instruments contained in the Commission's recommendations.[27] Conversely, the action against the Council's conclusions was admissible.[28] On the merits, the CJEU declared that the Council's decision to hold the excessive deficit procedure in abeyance was illegal.[29] Similarly, it held that it was not possible for the Council to adopt recommendations different from those put forward by the Commission.[30] In any event, the fact that the Council had not followed the Commission's recommendations sparked a debate concerning the effectiveness of the SGP,[31] as well as the equality of the Member States bound by its rules. Were "big" countries in a more favourable position?

Even before the economic crises, many scholars argued that EMU's architecture is not fit for its purpose and that further steps towards fiscal union would

24 De Haan, Berger, and Jansen, 2004.
25 CJEU, C-27/04, 13 July 2004, para 20.
26 Ibid., para 19.
27 Ibid., para 36.
28 Ibid., para 51.
29 Ibid., para 89.
30 Ibid., para 96.
31 Bekker, 2020, p. 71.

be needed.[32] Some outlined the reforms to be adopted, including far-reaching amendments of the TFEU.[33] The next decade proved them right, although the reforms (still not living up to all the proposed changes) were adopted without a change of primary law.

3. Crucial modifications to the EMU's architecture

In this section, the three arguably most consequential modifications of the EMU's architecture will be discussed. Specifically, the ability of the EU to bail-out Member States in financial difficulties (the European Stability Mechanism), the capacity of the EU to extensively coordinate the budgetary policies of the Member States (the European Semester) and the EU's redistributive powers (the EU Recovery Instrument).

■ *3.1. European Stability Mechanism*

As discussed in the previous section, the budgetary discipline of the Euro Area Member States constitutes a fundamental principle of the functioning of EMU. In this regard, the Member States need to be aware that they are solely responsible for their obligations.[34] Indeed, the economic governance of the EMU is built on two principles: budgetary self-restraint and market discipline of the Member States.[35] This is why the TFEU explicitly prohibits any type of credit facility with the European Central Bank or national central banks in favour of the Member States.[36] Any privileged access not based on prudential consideration to financial institutions is also prohibited.[37] Most prominently,, the TFEU proclaims in its 'no-bailout clause' that the EU shall not be liable for or assume the commitments of the Member States and that a Member State shall not be liable for or assume the commitments of other Member States.[38] EU financial assistance may be granted only to Member States in difficulties, caused by natural disasters or exceptional occurrences beyond their control.[39]

32 See, for example, De Grauwe, 2013, p. 29: '[I]n the long run the monetary union will have to be embedded in a significant fiscal union. [...] Without significant steps towards a fiscal union there is no future for the euro'.

33 See, for example, De Grauwe, 2013; Münchau, 2013.

34 Van Malleghem, 2013, p. 161 stated:
'Through the "no bailout" clause the Member States were thought to have irrevocably committed themselves to not helping other members of the monetary union, thereby reinforcing the fiscal discipline of all of its members. That prohibition was at the core of the design of the monetary constitution implemented in the Maastricht Treaty'.

35 Borger, 2013, p. 118.

36 Art. 123 (1) TFEU.

37 Art. 124 TFEU.

38 Art. 125 TFEU.

39 Art. 122 (2) TFEU.

Yet, when several Member States were severely hit by the financial crises, financial assistance was provided to them. Initially, the European Financial Stability Mechanism, which issued EUR 60 billion of its own bonds, guaranteed by the EU Member States, was established in 2010 on the basis of Article 122 (2) TFEU.[40] However, these funds were insufficient. Therefore, later that year, the European Financial Stability Facility was established, bundling EUR 440 billion worth of securities of the Euro area Member States.[41] This 'facility' was created as a public limited company governed by the laws of Luxembourg,[42] outside of the architecture of EU law.

Finally, as a permanent rescue facility, the European Stability Mechanism (ESM) was established in 2012. The legal basis for its creation is Article 136 (3) TFEU, which was newly added to the TFEU by a decision of the European Council in March 2011.[43] This amendment entered into force only in May 2013, after being ratified by the last Member State – the Czech Republic.[44] The ESM itself was not established by any measure of EU law, but by an international treaty, the Treaty Establishing the European Stability Mechanism (TESM), originally concluded in July 2011 (and later amended to its final version in February 2012) and in force since September 2012[45] (i.e. almost a year before the TFEU had been amended). This gave rise to serious speculations concerning the legality of the ESM itself.

The questions surrounding the establishment of the ESM may be divided into three broad categories: (I) the compatibility of such a rescue mechanism with the EU law, (II) the establishment of the ESM itself 'outside' EU law, and (III) the fact that it was established months before the amendment of the TFEU, which was meant to enable its creation, entered into force. The TESM was challenged in several jurisdictions.[46] In addition, an Irish court addressed the CJEU with a request for preliminary ruling concerning these questions. CJEU's answer in the

40 Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism.

41 Ruffert, 2011, p. 1779.

42 Tomkin, 2013, p. 171.

43 European Council Decision 2011/199/EU. The CJEU concluded in C-370/12, 27 November 2012, para 65, that Article 122 (2) TFEU would not constitute an appropriate legal basis, as the ESM '*is to be permanent and (...) its objectives are to safeguard the financial stability of the euro area as a whole*', whereas Article 122 (2) TFEU is aimed at provision of specific *ad hoc* financial assistance to specific Member States.

44 European Council Decision amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro.

45 Treaty establishing the European Stability Mechanism. Factsheet.

46 Next to Ireland, whose Supreme Court addressed the CJEU with a request for preliminary reference, the TESM was also reviewed by the courts in Estonia and in particular Germany (Tomkin (2013), p. 172).

Pringle case[47] will be discussed below briefly, as the judgment has been thoroughly analysed elsewhere.[48]

As underlined above, EU law is very much biased against bailouts and any form of financial assistance to Member States running excessive deficits. Therefore, the main question for the CJEU was, to what extent is the ESM in essence a bailout fund,[49] established by the Member States to rescue other Member States in financial trouble, and to what extent would that be compatible with EU law. In answering, the CJEU first concluded that the principle objective of ESM, which is to grant financial assistance to Member States, does not fall within monetary policy,[50] which belongs to exclusive competences of the EU. Instead, it complements the new regulatory framework for strengthened economic governance of the EU, which establishes a closer coordination and surveillance of the economic and budgetary policies conducted by the Member States and is intended to consolidate macroeconomic stability and the sustainability of public finances.[51] It is not the purpose of the ESM to maintain price stability, but rather to meet the financing requirements of ESM Members, namely the Member States whose currency is the Euro, who are experiencing or are threatened by severe financing problems, if it is indispensable to safeguard the financial stability of the euro area as a whole and of its Member States.[52] The establishment of the ESM thus falls within economic policy,[53] principally reserved for Member States. However, the ESM is not an instrument of economic coordination, but merely a financing mechanism.[54] The CJEU thus concluded that 'the Member States remain free to establish a stability mechanism such as the ESM, provided however that, in its operation, that mechanism complies with European Union law'.[55]

Concerning the specific provision of the Treaties on the functioning of EMU, the CJEU declared, unsurprisingly, that Article 123 TFEU is addressed specifically to the European Central Bank and the central banks of the Member States, whereas the grant of financial assistance by one Member State or by a group of Member States to another Member State is not covered by that prohibition.[56]

The most consequential was the interpretation of the 'no-bailout clause'.[57] The CJEU recalled that the aim of that provision was to prompt the Member

47 CJEU, C-370/12, 27 November 2012.
48 Adam and Mena Parras, 2011; Borger, 2013; Tomkin, 2013.
49 Tomkin, 2013, p. 173.
50 CJEU C-370/12, 27 November 2012, para 57.
51 Ibid., para 58.
52 Ibid., para 96.
53 Ibid., para 60.
54 Ibid., para 110.
55 Ibid., para 121.
56 Ibid., para 125.
57 Art. 125 TFEU.

States to maintain budgetary discipline,[58] not to prohibit 'any financial assistance whatever to a Member State'.[59] Under this interpretation, Article 125 TFEU only prohibits the EU and the Member States from 'granting financial assistance as a result of which the incentive of the recipient Member State to conduct a sound budgetary policy is diminished'.[60] According to the CJEU, Article 125 TFEU specifically prohibits only situations when the EU or a Member State might become liable for the commitments of another Member State or assume such commitments;[61] the court concluded that this does not happen with the ESM.[62]

Based on these considerations, it was easy for the CJEU to deal with the remaining questions. As the creation of a financial stability mechanism did not belong to the exclusive competence of the EU, the Member States were free to base their cooperation on an international treaty. At the same time, there were entitled to entrust existing EU institutions with specific tasks on the basis of it.[63] Finally, as the Member States already enjoyed the power to create a rescue facility before the TFEU was amended, it was immaterial that the TESM was concluded before te new Article 136 (3) TFEU entered into force.[64]

CJEU's reasoning concerning the 'no bail-out' clause was both welcomed as '*particularly well-articulated*'[65] and criticised for containing contradictions and performing 'conceptual gymnastics'.[66] While the CJEU is the supreme guarantor of legality within the EU and its conclusions cannot be legally challenged, they may nonetheless give rise to doubts as to how persuasive they are. This is a concerning issue.

First, the ESM, an institution created outside the EU law architecture, is doing exactly what the central banks are expressly prohibited from doing, that is, providing loans to Member States and purchasing their debt instruments. It may well be argued that this 'constitutes a circumvention of the spirit of the prohibition contained in Article 123 TFEU'.[67] Similarly, despite the 'no bailout' clause, to bail out Member States in financial difficulty is exactly the aim of the ESM.[68]

This is not to challenge the necessity of the ESM from a macroeconomic viewpoint. Indeed, if the funds were not provided to the Member States in need, the entire Eurozone would have been destabilised and possibly the single currency

58 Ibid., para 135.
59 Ibid., para 132.
60 Ibid., para 136.
61 Ibid., para 130.
62 Ibid., paras 138–141.
63 Ibid., para 158.
64 Ibid., para 184.
65 Adam and Mena Parras, 2011, p. 862.
66 Tomkin, 2013.
67 Tomkin, 2013, p. 181.
68 Ibid.

itself threatened.[69] What I question are the legal means employed to achieve this goal. If there had been agreement among the Member States on the need to establish a rescue fund and if there had been an unanimity needed to amend the TFEU, it would have been possible to create the ESM within the EU law, not outside of it, and to define its relationship with the 'no bailout' clause. It would have had the same effect, but its legality would not have been questioned.

In any event, the establishment of the ESM constituted a paradigm shift in EU's economic constitution.[70] Together with the instruments discussed below, this was arguably the first step to transform the EMU from a stability union to a fiscal union, as discussed in Section 2.

■ *3.2. The European Semester*

The Eurozone crisis showed clearly the inadequacies of the fiscal and economic governance, based on the SGP. A series of far-reaching modifications was thus adopted, in particular the so-called 'Six-Pack' in 2011 and 'Two-Pack' with the 'Fiscal Compact' in 2013.[71] One of the regulations contained in the 'Six-Pack' introduced the European Semester,[72] which, in essence, is 'nothing more than a period of about nine months in which all EU socio-economic coordination activities occur'.[73] At the same time, it is a major step in the development of the architecture of EU governance.[74] It incorporates into a single procedure the employment and social policy coordination, including the European Employment Strategy and the Social Open method of Coordination, with the fiscal and economic procedures of coordination, in particular the Broad Economic Policy Guidelines, SGP, and the Macroeconomic Imbalance Procedure, also newly introduced by the 'Six-Pack'.[75]

The processes of the European Semester are relatively clear and there is no need to discuss them in detail here.[76] What is important for this study is where the European Semester shifts the balance between supranationalism and

69 Adam and Mena Parras, 2011, p. 863.
70 Van Malleghem, 2013.
71 In this article, these measures will not be discussed in detail. For a complete analysis, see, for example, Hinajeros, 2013.
72 Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, Section 1-A. These provisions on the European Semester were redrafted in 2024 by Regulation (EU) 2024/1263 of the European Parliament and of the Council of 29 April 2024 on the effective coordination of economic policies and on multilateral budgetary surveillance and repealing Council Regulation (EC) No 1466/97.
73 Bekker, 2020, p. 67.
74 Verdun and Zeitlin, 2018, p. 137.
75 Ibid., p. 138.
76 For a detailed discussion, see, for example, Bekker, 2020; Verdun and Zeitlin, 2018.

intergovernmentalism. There is no simple answer, as the boundaries between these two approaches have become blurred and, some argue, even irrelevant.[77]

Two points need to be highlighted. First, it is true that all significant measures foreseen within the European Semester are still adopted by the Council. However, the Council acts on the recommendation of the Commission and decides by qualified majority; the Member States concerned do not get to vote at all in the most serious cases.[78] Even more consequentially, the voting procedure has been transformed to reverse qualified majority voting in such cases, which shifted the institutional balance in favour of the Commission as, under this procedure, the Commission's proposal is deemed to be adopted unless a qualified majority votes against it.[79]

Second, the major economic reforms and budgetary decisions of the Member States are to be executed under the auspices of the Commission. The national medium-term fiscal-structural plans are proposed by the Member States, but finally adopted by the Council on the Commission's recommendation.[80] Implementation of the plan is monitored by the Commission.[81] This significantly limits the manoeuvre space for Member States' economic policies because the national budgets need to be *ex ante* reviewed by the EU institutions.[82] Ultimately, the role of national parliaments over budgetary affairs is marginalised.[83]

At the same time, it cannot be said that the role of Member States has diminished in all practical terms. The cases of Spain and Portugal, where the Council decided not to impose any sanction in 2016, despite the fact that it found that they did not adopt any effective measures within the Excessive Deficit Procedure, stand as examples. This strongly reminds us of the situation before the reforms even started, the case of France and Germany, and questions the efficiency of the new system.[84]

The experience so far seems to suggest that despite the reform, the bargaining power of individual Member States is crucial.[85] Some authors even warn of the

77 Verdun and Zeitlin, 2018, p. 145.

78 That is the case when the economic policies of a Member State are not consistent with the Broad Economic Policy Guidelines or risk jeopardising the proper functioning of the EMU (Art. 1421 (4) TFEU) or in case of the excessive deficit procedure (Art. 126 (13) TFEU).

79 Van Aken and Artige, 2013.

80 Regulation (EU) 2024/1263, Chapter IV.

81 Regulation (EU) 2024/1263, Chapter V.

82 Papadopoulos and Piattoni, 2019, p. 70.

83 Ibid,, p. 63. As argued by Crum, 2018, p. 269: '*Although the eventual right to adopt the budget is preserved at the national level, governments' economic decisions are increasingly constrained and parliaments thus find themselves at the losing side of a reinforced two-level game*.

84 Begg, 2017, p. 12.

85 As argued by Papadopoulos and Piattoni, 2019, p. 65: '*rather than being an exercise at economic policy coordination through mutual learning, the [European Semester] results in complex intergovernmental bargains and in several rounds of negotiations between individual member governments and the Commission*'.

'new intergovernmentalism', characterised by 'asymmetric negotiations'.[86] Arguably, as a result, the rules on fiscal coordination are not necessarily clearer, but have '*led to further institutional complexity and the absence of clarity in the allocation of responsibilities*'.[87]

From a purely legalistic viewpoint, the actual functioning of the European Semester is questionable. This needs to be seen in a wider context. I have argued above that the creation of ESM outside of the EU law architecture was questionable as well. So are other measures, employed for fiscal coordination. The Treaty on Stability, Coordination and Governance (TSCG),[88] known also as 'Fiscal Compact' according to its chapter devoted to budgetary rules, stands out in this regard. These rules were originally prepared as a 'standard' part of EU law, but because of the United Kingdom's opposition, they were ultimately adopted in the form of an international treaty.[89] The TSCG was meant to be subsequently incorporated in EU law,[90] but nothing has happened in this regard until now. As argued by professor Craig:

> Whatever one believes about its desirability or not, this new treaty does raise an issue of principle, which you can call a rule-of-law issue of principle, that is concerned with whether we should bear with equanimity the idea of those decision making rules being circumvented by a treaty outside the fabric of the Lisbon Treaty in circumstances where the rules as to how change should be undertaken within the Lisbon Treaty are not capable of being met.[91]

Professor Craig is not the only one to criticise the form of TSCG.[92] The procedures of the European Semester are scattered across a number of instruments of secondary and international law. It is difficult to get a complex picture of how it actually works. Its impact on the institutional balance within the EU and on the forces of supranationalism and intergovernmentalism are unclear. Again, a clear endorsement of these procedures in the TFEU would have removed the questions about their legality.

86 As argued by Papadopoulos and Piattoni, 2019, p. 69: '*Although the Commission launched proposals and initiatives, they were only successful if in line with German preferences*'.

87 Papadopoulos and Piattoni, 2019, p. 69.

88 The full text of the TSCG is available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A42012A0302%2801%29 (Accessed: 1 July 2024).

89 Craig, 2012, p. 233.

90 TSCG, Art. 16.

91 Oral evidence by Professor Paul Craig, taken before the European Scrutiny Committee of the House of Commons on 7 February 2012.

92 For instance, Týč and Sehnálek argue in general in favour of using international treaties for the purposes of further EU integration, they nonetheless describe the TSCG as a part of '*unwelcomed trend*' (Týč and Sehnálek, 2017, p. 206).

3.3. The EU Recovery Instrument

The last tectonic shift in the EMU's architecture is arguably connected to the EU Recovery Instrument (EURI),[93] a fund of EUR 750 billion situated outside of the Multiannual Financial Framework, which for the first time created an EU-wide fiscal stabilisation instrument.[94] The disbursement of money at the national level is subject to *ex ante* approval by the Council and monitored by the Commission, under a procedure integrated to the European Semester.[95]

EURI was set up on the basis of the existing primary law, even though until 2020, there was a consensus among EU institutions that any deeper fiscal integration, in particular involving issuance of EU debt, would require an amendment of the Treaties.[96] The EURI was established on the basis of Article 122 TFEU as a debt-financed EU fund, designed to help Member States in unexpected difficulties. The distribution of the money thus accumulated can be realised through different instruments. The most significant one is the Recovery and Resilience Facility (RRF),[97] based on Article 175 (3) TFEU (i.e. as a part of the cohesion policy).

These two legal bases are difficult to reconcile.[98] The transfer of funds through RRF to Member States is no longer designed as a crisis-management mechanism. It is instead a redistribution of money from Member States with high GDP and low unemployment to those with low GDP and high unemployment.[99] Crucially, it abandons the condition of the strict conditionality of aid to Member States, required by the CJEU, as discussed in connection with the *Pringle* case above.

Several comments need to be made in this regard. First, it is doubtful to what extent Article 122 TFEU provides a legal basis for financing that is not related to an emergency, but to criteria of cohesion, based on Article 175 TFEU.[100]

Second, the funding model is based on empowering the EU to incur debt to cover its expenditures. Simultaneously, Article 310 (1) TFEU clearly requires the revenue and expenditure shown in the budget to be in balance. This provision has been consistently interpreted as prohibiting the EU from issuing public debt for the purposes of filling the gap between revenue and expenditure.[101]

Both these doubts are in line with the observations I made in the two previous sections. I do not question the economic benefit of the EURI, but I have reservations concerning its compatibility with EU law, as it stands today.

93 Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis.
94 Porras-Gómez, 2023, p. 6. For a detailed analysis of EURI, see, for example, De Witte (2021).
95 Vanhercke and Verdun, 2022.
96 Leino-Sandberg and Ruffert, 2022, p. 434.
97 Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility.
98 Porras-Gómez, 2023, p. 14.
99 Regulation 2021/241, Art. 11.
100 Leino-Sandberg and Ruffert, 2022, p. 444.
101 Ibid., p. 451.

Third, EURI was set up as a one-off program,[102] yet it is broadly understood – including by key stakeholders – as the beginning of a more permanent solution.[103] Characteristically, EURI is part of a project named 'NextGenerationEU',[104] which suggests that, in the 'next generation', the EU might return to such measures.

Finally, by creating the EURI outside of the EU budget, it circumvents the European Parliament, which has a crucial role to play in budgetary discussions. Significant budgetary powers are thus transferred from the legislature to the executive, in particular at the EU level but presumably also at the national one,[105] as the funds are ultimately distributed by national governments. This amounts to unprecedented, far-reaching institutional reforms, which have the potential to transform the founding structures and template of European integration,[106] without being foreseen by the primary law.

4. Conclusions

Over the past 10 years, the functioning of the EMU has significantly changed. The Eurozone has now practically unlimited funds to help its members in financial difficulty. The EU is empowered to create vast debt-financed funds and use them for redistributive purposes. And fiscal and economic policies of Member States, including national budgets, are to a large extent controlled by EU institutions.

It was not my intention to discuss the merits of these changes. It may well be that, from an economic viewpoint, they are beneficial or even necessary for the effective functioning of the EMU. My concern is that they are not in line with the Treaties. Financial aid is being provided to states in difficulties, despite the clear message of the no-bailout clause. The EU is incurring debt on an unprecedented scale, despite the requirement of its budget to be balanced.[107] Further, the Member States are no longer free to decide their economic policies.

The EMU is arguably moving on course toward a fiscal federation, but the rules in the Lisbon Treaty do not support it. This has broader consequences. In the

102 Regulation 2020/2094, Art. 3.

103 Leino-Sandberg and Ruffert, 2022, p. 437.

104 See the project's web page, available at: https://next-generation-eu.europa.eu/index_en (Accessed: 1 July 2024).

105 Ibid., p. 455.

106 Dermina, 2020, p. 647.

107 Admittedly, the EU budget is still very small compared to those of 'real' federations. While EU's budget remained at 1% of the EU GDP since the end of the 1980s (Buti, 2023), the federal US budget represented approximately 20% of US GDP over that period of time. See: https://www.presidency.ucsb.edu/statistics/data/federal-budget-receipts-and-outlays. However, although still relatively small, the NextGenerationEU funds almost double EU's budget (Multiannual Financial Framework) for the 2021–2026 period and overall amount to almost 5% of EU's GDP (Codogno and van den Noord (2021).

Lisbon Treaty, the Member States agreed to certain model of the EU, but they are getting something else in practice. This has a direct impact on their sovereignty.

At the same time, the balance between intergovernmental and supranational forces and the institutional balance is shifting. Legislature aims to play a significantly smaller role than the executive and so are the Member States being weakened to the benefit of the EU institutions.

I am by no means arguing against the changes to the EMU themselves. I simply put forward that the Treaties need to be changed to accommodate them and the Member States thus given a chance to express clearly their consensus. Admittedly, this would be very difficult under the current political conditions. However, at the same, a deep reform of EU's architecture is needed for EU to remain effective. The EMU should be part of such a reform.

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MARIETA SAFTA*

The Amendment of Member States' Constitutions in Relation to the EU Legal Order and Constitutional Identity, With a Special View on the Romanian Experience

ABSTRACT: *The European Union's constitutional order and identity are heavily reliant upon amending Member States' Constitutions. It is essential that these amendments be designed with careful consideration, as they have a direct impact on the functioning and stability of the European Union. This study proposes an analysis from the perspectives of both the compatibility of the European Union legal order with the Member States' Constitutions and the compatibility of the amendments of the Member States' Constitutions with the European Union order. Its primary aim is to examine whether European Union accession and the values that make up the core of the common legal order constitute an implicit limit to the amendment of national constitutions and how they interfere or integrate with national constitutionalism. By emphasising the interaction between the constitutional foundations of the Member States and the European Union itself, this study aims to create a reflective perspective on the hybrid character of the 'cornerstone' of Member States' Constitutions, which seems to have continuous and irreversible plasticity, influenced by the definition that common values acquire at various times. This plasticity is directly influenced by the way constitutional courts interpret these values, which has significant consequences for the evolution of the European Union as a structure of States.*

KEYWORDS: constitutional amendment, constitutional identity, EU legal order, constitutional review

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1. Introduction

The idea of European Union (EU) constitutionalism has gradually been established in the legal literature. However, the unique[1] nature of the EU's construction makes it difficult to fit it into the traditional paradigms of state structure. Therefore, there is a growing interest in studying the factors that shape the EU's autonomous legal system and the steps taken to achieve the goal mentioned in the Treaty on the European Union (TEU) of creating 'an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen'.[2] Understanding what these steps entail, what forces and instruments are involved, and what an 'ever closer union' actually means or can mean are important questions that encourage doctrinal analysis, which has also been challenged by an often surprising 'innovative' case law and is susceptible to controversies, of the Court of Justice of the European Union (ECJ) and of the constitutional courts of the Member States (MSs).

An expression of this uniqueness, the composite nature of the EU in terms of States with different histories, traditions, foundations, and constitutional developments ('diversity' as an inherent feature of the EU) entails special attention regarding the development of the 'genetic code'/'cornerstone' written in the MS constitutions and its articulation with the common values that establish the EU legal order. We consider the essence of constitutionalism, which is usually characterised as 'the cornerstone' of the Constitution. This comprises a set of intangible values that reflect the original constituent power to protect the established constitutional order. These values are explicitly mentioned in some constitutions as 'revision limits', or their implicit existence is inferred through interpretation in the case law of the constitutional courts. In the European context, the same courts attach to these limits the characteristic of *identity values* (concept seen in the light of art. 4 (2) of the TEU, according to which 'The Union shall respect the equality of Member States before the Treaties as well as their national identities (...)'. Alternatively, at the EU level, the values provided in art. 2 of the TEU were identified by ECJ as 'the very identity of the European Union as a common legal order'.[3] This implies that the European constitutional order is based on a set of intangible elements that must be protected using similar instruments. 'Articulation', which gives meaning to the very development of the EU as a structure of States, is mainly achieved through the judicial interpretation of the fundamental

1 Mak and Law, 2022, p. 246.
2 Art. 1 (2) of TEU.
3 ECJ, C-156/21, 16 February 2022, ACTION for annulment under art. 263 TFEU, Hungary, supported by: Republic of Poland, para. 127.

values included in the EU treaties ('the European constitutional charter'[4]) and MS constitutions.

In itself, the accession of the MSs to the EU is based on the presumption of the coherence of the system of fundamental values, namely on the idea that the acts of accession to the EU and the subsequent amendment of the founding treaties are in accordance with the explicit or implicit limits laid down in the MS constitutions. Additionally, any constitutional adaptations made by the States to achieve accession/normative compatibility must not have altered the essence of their own constitutions.[5] After joining the EU, the MSs agreed that, based on the principle of loyal cooperation, they shall take 'any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the treaties or resulting from the acts of the institutions of the Union', facilitate 'the achievement of the Union's tasks', and refrain 'from any measure which could jeopardize the attainment of the Union's objectives'. (art. 4 (3) of the TEU). As a consequence, after passing through the constitutional filter (explicit or implicit) of the 27 MSs, the legal order established by the EU Treaties appears to act as a 'filter' for them as well. Given the generality of the expression of the TEU ('*any measure*'), it can be stated that the very amendment of the MS constitutions is subject to a supranational filter.

This study aims to analyse the practical consequences of this obligation assumed by the MSs. Does it establish a new limit to the revision of MS constitutions? What would this limit consist of, and how does it interfere/integrate into national constitutionalism? Are we still talking about a 'cornerstone' of the MS constitutions or continuous and irreversible plasticity influenced by the definition that the common values acquire at various times? Does the ECJ have the exclusive right to define common values? Where is this evolution leading us, and what does 'constitutional identity' mean in this context?

To answer these questions, we first analyse the issue of constitutional revision limits within the existing constitutional framework of the MSs and then within the EU legal order. The evolving case law of the Romanian Constitutional Court (CCR) is used as a concrete example of the limits of revision within the EU context to show how the benchmarks of European constitutionalism are continuously modified. By emphasising the interplay between the analysed constitutional foundations (MSs and EU), this study intends to offer a reflection on the hybrid nature of the cornerstone of the MS constitutions and its impact on the development of the EU as a State structure.

4 See ECJ, Les Verts/Parlamentul, 294/83, EU:C:1986:166, point 23 and Opinion 2/13, para. 163.

5 See for example, the German Federal Constitutional Court, in Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009.

2. Amendments of EU Member States' constitutions and their limits

■ *2.1 General considerations*

The importance of the revision of constitutions and the issue of unconstitutional constitutional amendments are extremely topical in the field of comparative constitutional law. Prof. Richard Albert, in his book *Constitutional Amendments, Making, Breaking and Changing Constitutions*,[6] describes the constitutional amendment rules as '*the gatekeepers to a constitution*', showing that they 'open a window into the soul of a constitution, exposing its deepest vulnerabilities and revealing its greatest strengths'. Professor Yaniv Roznay, in his book *Unconstitutional Constitutional Amendment*[7], *noted the global trend is moving towards accepting the idea of limitations – explicit or implicit – on constitutional amendment power.* In addition to these reference authors, there is also a wealth of literature on the topic of constitutionalism, including a valuable initiative to provide an annual worldwide 'update' on this essential issue of constitutionalism in the *International Review of Constitutional Reform*, which brings together specialists throughout the world.[8]

Regarding the European region, the Venice Commission provides details in the *Report on Constitutional Amendment*.[9] The Report identifies '*special limitations to constitutional amendments*' in fundamental laws and distinguishes between two types of constitutions. The first type explicitly renders a limited number of provisions or principles unamendable under any circumstances, such as territorial integrity, fundamental rights, the fundamental form of government or federalism. The second type operates a distinction between different sets of constitutional provisions, making some harder to change than others through special procedures, equivalent to making the provisions unamendable (paras. 52-53). The study also highlights the role of constitutional courts in this framework (para. 57). The *Updated version of the compilation of Venice Commission opinions and reports concerning constitutional provisions for amending the Constitution*[10] offers relevant information on recent developments in this regard.

Courts of constitutional jurisdiction frequently discuss constitutional principles. For instance, during the XVIth Congress of the Conference of European Constitutional Courts, which was held by the Constitutional Court of Georgia in 2017, the topic was the 'Role of Constitutional Courts in upholding and applying Constitutional Principles'.[11] Responding to the Congress questionnaire which

6 Albert, 2019.
7 Roznai, 2017; see also Roznai, 2013.
8 See Barroso and Albert, 2021, 2022, 2023.
9 CDL-AD(2010)001-e, Report on Constitutional Amendment adopted by the Venice Commission at its 81st Plenary Session, Venice, 11–12 December 2009.
10 Venice Commission, 2023a.
11 Venice Commission, 2023b.

raised, *inter alia*, the issue of the existence of a hierarchy of these principles, some Courts[12] referred to the 'special status' or 'special protection' afforded to constitutional principles that are considered to be 'a cornerstone of the entire constitution or to principles considered to be unamendable'.[13] They also talked about the need to involve themselves in processes leading towards the application or determination of implicit constitutional principles[14] and the challenges of defining these principles in the context of EU accession. Thus, Congress acknowledged the attempts made to synchronise the legal systems during the accession process, which included the necessary revision of the constitutions for this purpose. Likewise, the national reports outlined the fact that

> 'although the general consensus therefore holds that national legal orders are open to the primacy of EU law, when it comes to taking precedence over fundamental constitutional principles, some states shall maintain the primacy of their national constitutions. For many countries, fundamental principles are seen as part of the 'reserved powers' of their national constitutions'.[15]

Not only the Courts and the Venice Commission but also various doctrinal studies have addressed the issue of revising MS constitutions in the EU context. A reference book in this regard, *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law,*[16] includes a thorough presentation of the amendments made to the constitutions in the context of the EU accession, the transfer of powers, the meaning of the concept of sovereignty in this framework, and the viewpoint of the constitutional courts of the MS.

This study aims to further explore an aspect of EU constitutionalism that has received less attention, which is the 'limits imposed on limitations' in terms of the relationship and overlap between the 'core identity' of MSs and the EU. To achieve this, it will refer to a bibliography that provides a valuable research base for the constitutional framework existing in each MS, selecting a few significant examples in terms of the volume of unamendable provisions and their interpretation in relation to the EU legal order.

12 For example, Romania.
13 See the General Report of the Congress Lali PAPIASHVILI -Vice - President of the Constitutional Court of Georgia, in the volume of the Conference, published by the Constitutional Court of Georgia, p. 31.
14 Ibid., p. 27.
15 Ibid., pp. 32–33.
16 Albi and Bardutzky, 2019, pp. 1005 et seq.

■ *2.2. Explicit and/or implicit limits of the amendment of constitutions and their use in relation to the EU legal order*

When ordering the chosen examples, specific consideration was given to the extent to which the limits of the amendment were established in MSs' constitutions or determined by constitutional courts and their relationships with the EU legal system.

Thus, the *Constitution of the Portuguese Republic*[17] is perhaps the most meaningful example of an MS in terms of the volume of explicit unamendable provisions. Art. 288 establishes in this regard the following 'matters in which revision shall be restricted':

> [n]ational independence and the unity of the state; the republican form of government; the separation between church and state; citizens' rights, freedoms and guarantees; the rights of workers, workers' committees and trade unions; the coexistence of the public, private and cooperative and social sectors in relation to the ownership of the means of production; the requirement for economic plans, which shall exist within the framework of a mixed economy; the elected appointment of the officeholders of the bodies that exercise sovereign power, of the bodies of the autonomous regions and of local government bodies by universal, direct, secret and periodic suffrage; and the proportional representation system; plural expression and political organization, including political parties, and the right to democratic opposition; the separation and interdependence of the bodies that exercise sovereign power; the subjection of legal rules to a review of their positive constitutionality and of their unconstitutionality by omission; the independence of the courts; the autonomy of local authorities; the political and administrative autonomy of the Azores and Madeira archipelagos.

These values were qualified by the doctrine as representing the 'essential core of the Constitution',[18] in that 'they provide the Portuguese constitutional system with its identity and structure'.[19] The Portuguese Constitutional Court is empowered to assess the possible violation of these limits that 'concern the Portuguese constitutional identity itself'.[20]

17 Canotilho, 2003.

18 Ibid., p. 1184.

19 The national report of the Constitutional Court in Portugal on the occasion of the XVIIth Congress of the European Constitutional Courts, Maria Clara Sottomayor and António Manuel Abrantes (2018), in the Volume of the Congress edited by the Constitutional Court of Georgia, vol. 2, p. 608.

20 Ibid., p. 620.

Regarding the constitutional changes required to adapt to EU membership status, it should be noted the revision of 2004 which introduced [by adding a new paragraph (4) to art. 8 of the Constitution] the principle of the primacy of European law into the national legal system, under the following terms:

> The provisions of the treaties that govern the European Union and the norms issued by its institutions in the exercise of their respective competences are applicable in Portuguese internal law in accordance with Union law and with respect for the fundamental principles of a democratic state based on the rule of law.[21]

In relation to these provisions, both doctrine and case law agree that the legal authority of EU law in the Portuguese legal order must be established according to the parameters laid out by the EU legal order, but this recognition must comply with the fundamental principles of a democratic rule of law. Concerning the scope of this safeguard, the doctrine expressed the idea that it is not limited to these principles but also includes the essential core of the Constitution enshrined in art. 288, which specifies the 'material limits on revision'.[22] Considering the mentioned limits, 'EU provisions cannot lead to »internal revolutions« to the point of subverting those constitutional principles that are materially unalterable, which condense the identity of the Portuguese constitutional order and which not even the constitutional legislator can revise'.[23] Or, in another viewpoint,

> this recognition does not imply a constitutional surrender. The Constitution remains the basic law that defines and protects the core values of the political community and the basic rights and liberties of individuals. This implies that the Constitutional Court is not bound to recognise the supremacy of a supranational legal order in the unlikely event of a breach of those values, rights and liberties.[24]

Thus, art. 8 (4) of the Constitution appears both as a 'bridge' and a 'limit' in the process of European integration.

Likewise, *the Constitution of Romania* contains a significant number of unamendable provisions in a separate title that establishes the rules applicable to the procedure for the revision of the Constitution. The limits of revision are

21 Ibid., p. 618.

22 Canotilho, 2003, p. 827, apud The national report of the Constitutional Court in Portugal on the occasion of the XVIIth Congress of the European Constitutional Courts, written by Maria Clara Sottomayor, Justice of the Constitutional Court of Portugal, and António Manuel Abrantes, legal adviser at the Constitutional Court of Portugal, in the Congressional Volume edited by the Constitutional Court of Georgia, 2018.

23 Ibid.

24 Pereira Coutinho and Piçarra, 2019, pp. 1005 et seq.

expressly enshrined in art. 152 of the Constitution, and have been classified in legal literature[25] as material limits (para. 1), consisting of values considered by the constituent power to be intangible ('the national, independent, unitary and indivisible character of the Romanian State, the republican form of government, territorial integrity, independence of justice, political pluralism and official language' shall not be subject to revision), the teleological limits (para. 2), in the sense of 'result of the procedure which is not desirable'[26] (no revision shall be made if it results 'in the suppression of the citizens' fundamental rights and freedoms, or of the safeguards thereof') and limits regarding exceptional situations ('The Constitution shall not be revised during a state of siege or emergency, or in wartime'). Within the procedure for the revision of the Constitution, the Constitutional Court (CCR) conducts a constitutional review of the initiatives to revise the Constitution[27] and of the laws for the revision of the Constitution adopted by the Parliament.[28] Additionally, the CCR is responsible for overseeing the procedures for holding a referendum and confirming its results.[29] The purpose of the CCR's review is to ensure that the revision process is conducted in accordance with established procedures (known as extrinsic constitutionality) and that any proposed revisions to the Constitution fall within the limits set forth in the Constitution itself (known as intrinsic constitutionality).

For EU accession, Romania amended its Constitution[30] in 2003. The CCR found that the new provisions related to Euro-Atlantic integration comply with the limits of the revision. With reference to the issue of transferring some of Romania's powers to community institutions, the CCR held that:

> The act of accession has a double consequence, namely, on the one hand, the transfer of some powers to the community institutions, and on the other hand, the joint exercise, with the other Member States, of the powers provided for in these treaties. As for the first consequence, the Court notes that, by the mere membership of a State to an international treaty, it diminishes its powers within the limits established by international regulation. (...) Through the acts of transferring certain powers to the structures of the European Union, these powers do not acquire, through bestowal, a 'supra-competence', a sovereignty of their own. In reality, the Member States of the European Union have decided to jointly carry out certain

25 For this clarification, see Dănișor, 2018.
26 Ibid.
27 Art. 146 a) second sentence of the Constitution.
28 Power introduced in 2004, being regulated by art. 23 of Law No. 47/1992 on the organization and operation of the CCR, republished (Official Gazette No. 807/3 December 2010).
29 Art. 146 i) of the Constitution.
30 Adopted in 1991.

> powers that, traditionally, belong to the field of national sovereignty. (...) Since Romania's goal to join the Euro-Atlantic structures is legitimized by the country's interest, sovereignty cannot be opposed to the goal of joining.[31]

Noting that sovereignty is not laid down among the limits of revision but falls under independence, which constitutes such a limit, the CCR concluded that it was not affected because the act of accession did not violate Romania's independence. In the same context, the CCR gave its own meaning to the normative coherence in the context of EU accession, noting that 'the acquis Communautaire – the founding treaties of the European Union and the regulations derived from them' are 'on an intermediate position between the Constitution and the other laws, when referring to binding European normative acts'.[32] According to this interpretation,[33] the new provisions regarding the priority of the binding normative acts (contained in the current wording of art. 148 (2)) were considered as not infringing the constitutional provisions regarding the limits of revision and other provisions of the Fundamental Law, but rather as 'a particular application of the provisions of the current article 11 (2) of the Constitution, according to which »Treaties ratified by Parliament, according to the law, are part of national law«'. More recently, the CCR qualified the limits of revision laid down in art. 152[34] as belonging to the national constitutional identity, a guarantee of a 'core identity of the Romanian Constitution', which 'should not be relativized in the process of European integration'. By virtue of this constitutional identity, 'the Constitutional Court is empowered to ensure the supremacy of the Fundamental Law within Romania'.[35]

If the examples of Portugal and Romania stand out as relevant in terms of the volume of unamendable provisions expressly laid down in the Constitutions for notoriety, perhaps the most relevant is the *German example*, due to the case law of the Federal Constitutional Court, which also influenced, to a great extent, the case law of other Courts,[36] including Romania. Art. 79(3) of the German Constitution governs 'unamendable provisions' by stipulating that: 'Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in articles 1 and

31 Decision No. 148/2003, Official Gazette no. 317 of 12 May 2003

32 Ibid.

33 This has been criticized in the legal literature, where it is shown that the prevalence of EU law over the entire legal system established by Art. 148 of the Constitution is 'conditioned by its own requirements' (of the Court) – see Tanasescu, 2023, p. 543.

34 Remains unchanged and constantly mentioned by the CCR in its case law (see, most recently, Decision No. 390/2021, Official Gazette No. 612 of 22 June 2021).

35 Decision No. 390/2021, Official Gazette No. 612 of 22 June 2021, para. 81.

36 See, for example, Constitutional Court of the Czech Republic, mentioned above.

20 shall be inadmissible'.[37] These provisions limited the possibility of transferring sovereign rights to international entities and were expressly regulated in 1992 through art. 23 sec. 1 sentence 3 GG for the process of European integration (the integration clause).[38] The Federal Constitutional Court of Germany (FCCG) developed the doctrine of the so-called 'eternity clauses' (*Ewigkeitsklauseln*)/'eternity guarantee', meaning substantial limits to constitutional amendments, by protecting the key principles of the German Basic Law (constitutional identity) against any constitutional revision.[39] In the Lisbon Case,[40] the Court affirmed its authority to review whether the inviolable core content of the constitutional identity of the Basic Law is respected.[41] According to the Court, the Basic Law is open to European integration,[42] but there are limits to this openness. The MS remains sovereign, and transfers of power to the EU must remain limited and, in principle, revocable.[43] Consequently, the CCFG acts as a guardian, particularly in the context of the European integration process, when it comes to violations of constitutional identity as laid down in art. 79 sec. 3 GG.[44]

Similarly, *the Constitution of France* provides in art. 89 (4) and (5) that no amendment procedure shall be commenced or continued where the integrity of national territory is placed in jeopardy, as well as the fact that the republican form of government shall not be the object of any amendment. Similarly, the French Constitutional Council[45] uses the concept of constitutional identity, which might be used against European law if necessary.[46] It concerns not only historical case law but also more recent decisions, such as the decision of 15 October 2021 (2021-940 QPC Société Air France)[47] in which the French Constitutional Council states that 'the transposition of a directive or the adaptation of national law to a regulation

37 German Constitution (1949) [Online]. Available at: http://www.bundesverfassungsgericht.de/en (Accessed: 22 December 2023).

38 See Britz and König, 2018, p. 162; Art. 23 sec. 1 GG reads as follows: With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of art. 79.

39 *German Constitution (1949)* [Online]. Available at: http://www.bundesverfassungsgericht.de/en (Accessed: 22 December 2023).

40 Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009.

41 Schönberger, 2009.

42 Ibid., paras. 219, 225.

43 Ibid., paras. 231, 233.

44 Britz and König, 2018, p. 144, with reference to BVerfGE 123, 267 (340, 344, 431) – Lisbon.

45 Even if, according to Prof. Eleonora Bottini, it has consistently refused to control constitutional amendments; Barroso and Albert, 2021, pp. 112–116.

46 Bordere and Sydoryk, 2022, pp. 89–92.

47 Decision No. 2021-940 QPC of 15 October 2021, Air France.

must not go against a rule or principle that is inherent in France's constitutional identity', as well as the fact that

> the Constitutional Council is only competent to control the compliance of the disputed provisions with rights and freedoms that are guaranteed by the Constitution in that they call into question a rule or principle that, not having found an equivalent protection in European Union law, is inherent to France's constitutional identity.[48]

The Constitution of Italy sets forth in art. 139 that the form of republic shall not be a matter for constitutional amendment. As for the relationships with EU law, a specific feature of the approach of the Italian Constitutional Court is the counter-limits doctrine, devised in the Frontini and Granital historical judgments and 'conceived of as a way to carry out an exceptional control of respect of the conditions for the constitutionality of the Italian accession to the EU'.[49]

According to the National Report presented to Congress hosted by Georgia in 2017 (mentioned above), the Constitutional Court of *Bulgaria* established by interpretation the limits within which the Legislature shall be free to amend the Constitution. Thus, by its Decision No. 3 on Constitutional Case No. 22/2002 and Decision No. 8 on Constitutional Case No. 7/2005, the Constitutional Court gave a binding interpretation of art. 153 and 158, Item 3 of the Constitution of the Republic of Bulgaria, with respect to questions pertaining to the form of state structure and the form of government. By its Decision No. 3 on Constitutional Case No. 3/2004, the Constitutional Court gave an interpretation of art. 153 of the Constitution read in combination with art. 158, Item 3 of the Constitution and vis-à-vis Bulgaria's membership in the EU.[50]

In terms of the contribution of the Constitutional Courts to the architecture of the limits of constitutional amendment, the example of *Croatia*, where the doctrine states that the Constitutional Court itself 'discovered' the broader power to strike down unconstitutional amendments, is relevant.[51] Thus, in 2013, drawing from its power to oversee the legality and constitutionality of referendums generally, the Court noted that it would intervene in all those cases where it detects such 'formal or substantive unconstitutionality of the referendum questions or such a serious procedural fault that threaten to violate the structural features of Croatian constitutional state, that is Croatia's constitutional identity'.[52] As noted,

48 Ibid., para. 13.
49 For a detailed presentation, especially on the development of this doctrine, see Martinico, Guastaferro, and Pollicino, 2019, p. 493.
50 The Constitutional Court of the Republic of Bulgaria, the volume of the Congress edited by the Constitutional Court of Georgia, 2018, volume I, P. 282.
51 Milos and Zlatic, 2022, pp. 63–64.
52 Ibid., see SuS-1/2013 of 14 November 2013, Official Gazette 138/2013-2966.

while apparently restricted to constitutional amendments through referendums, the Court's latter case law would confirm that this power extends to all constitutional amendments'.[53] Likewise, in 2015 the Court held[54] that when we speak about amending the Constitution, it is the Constitutional Court's obligation, on the basis of general control powers, not to allow any referendum

> when it determines such a formal and/or substantive unionist stationarity of the referendum question, or such a grave procedural error that threatens to undermine the structural characteristics of the Croatian constitutional state, i.e. its constitutional identity, including the highest values of the constitutional order of the Republic of Croatia (Articles 1 and 3 of the Constitution). In such cases, the Constitutional Court, in its assessment, takes into account the Constitution in its entirety.[55]

Regarding this case, it was also noticed that 'the Constitutional Court has added to the constitutional identity of the Republic of Croatia the highest values of its constitutional order by stating that they are those laid down in art. 1 and 3 of the Constitution'.[56] Regarding the relationship between the national order and that of the EU, in the same decision in 2015, the Constitutional Court explicitly held that the Constitution is, by its legal force, above EU law.[57]

Also relevant are the examples of other MSs, such as the *Czech Republic,* where the Constitution has an explicit eternity clause that prohibits 'any changes in the essential requirements for a democratic state governed by the rule of law'.[58] According to this doctrine, although there is no explicit provision concerning the role of the Constitutional Court in enforcing this eternity clause, the Court claims authority to annul constitutional laws based on the general provisions of art. 83 of the Constitution.[59] As regards EU accession, the Czech Constitutional Court 'has interpreted sovereignty and its transfer in a flexible way',[60] finding, *inter alia*, that the EU had advanced by far the furthest in the concept of shared, 'pooled' sovereignty, and at that time already formed an entity sui generis, which is difficult to classify under the categories of classical political science. A key manifestation of a state's sovereignty is its ability to continue to manage its sovereignty (or part of

53 Milos and Zlatic, 2022, pp. 63–64.
54 Decision of the CCRC No. U-VIIR-1159/2015 of 8 April 2015 (Official Gazette No. 43/15).
55 The Constitutional Court of the Republic of Croatia, the volume of the congress edited by the Constitutional Court of Georgia, 2018, volume I, P. 293.
56 Venice Commission, 2017.
57 Ibid., p. 311, p. 23.
58 Art. 9 section 2 of the Czech Constitution.
59 'The Constitutional Court is the judicial body responsible for the protection of constitutionality'; for explanations see Benak, 2022, pp. 74–75.
60 Kühn, 2019, p. 801.

it) or to cede certain powers temporarily or permanently. In the second judgment on the Lisbon Treaty,[61] the Court emphasised that in terms of the constitutional order of the Czech Republic – and within it, especially in view of the essential core of the Constitution – what is important is not only the actual text and content of the Treaty of Lisbon but also its future concrete application. The CCC, too, will function as an *ultima ratio* and may review whether any act by Union bodies has exceeded the powers that the Czech Republic transferred to the EU pursuant to art. 10a of the Constitution. However, the CCC assumes that such a situation can occur only in quite exceptional cases; these could include, in particular, abandoning the identity of values and exceeding the scope of conferred competences.[62]

Lithuania offers an interesting example of defining the '*cornerstone of the Constitution*', in the sense of establishing a more difficult amendment procedure for values/principles related to the political and constitutional regime, implicitly accepting, however, that these fundamental principles can also be amended.[63] Thus, art. 148 of the Constitution of *Lithuania* sets forth in art. 1 that 'The State of Lithuania shall be an independent democratic republic' and that the Constitution may only be amended by referendum if not less than ¾ (three-fourths) of the citizens of Lithuania with the electoral right vote in favour thereof. The Constitutional Court of Lithuania ruled[64] that art. 1 of the Constitution consolidates the fundamental constitutional values – the independence of the state, democracy, and the republic – which are inseparably interrelated and form the foundation of the State of Lithuania as the common good of the entire society consolidated in the Constitution; they must not be negated under any circumstances. In addition, the principle of recognition of the innate nature of human rights and freedoms should be regarded as a fundamental constitutional value that is inseparably related to constitutional values – independence, democracy, and the republic – so the innate nature of human rights and freedoms may not be negated either. Given the constitutional imperative to ensure that no amendments to the Constitution violate the harmony of the provisions of the Constitution or the harmony of the values consolidated by them, the Constitution does not permit any such amendment that would deny the abovementioned constitutional values, with the exception of cases in which art. 1 of the Constitution would be altered (by a referendum

61 Judgment of 3 November 2009, file No. Pl. ÚS 29/09, Lisbon Treaty II, paras. 147–148, *apud* Kühn, 2019.

62 Lisbon Treaty II, supra n. 14, para. 150, summarising Lisbon Treaty I, apud Kühn, 2019, p. 802.

63 Likewise, see art. 162 of the Constitution of the Republic of *Estonia*, 'Chapter I (General Provisions) and Chapter XV (Revision of the Constitution) of the Constitution shall only be amended by referendum'.

64 The Constitutional Court of the Republic of Lithuania, Case No. 22/2013, Ruling of 24 January 2014, [Online]. Available at: https://lrkt.lt/data/public/uploads/2015/04/2014-01-24_kt2-n1_ruling.pdf (Accessed: 22 December 2023).

with a three-fourths majority).[65] With regard to EU accession, the Constitution of Lithuania has undergone several amendments,[66] the most important of which is the Law Supplementing the Constitution with the Constitutional Act on Membership of the Republic of Lithuania in the European Union and Supplementing art. 150 of the Constitution on 13 July 2004[67] (CA), which establishes explicit constitutional provisions concerning both the transfer of part of the competences of state institutions to the supranational level (Art. 1 of the CA) and the incorporation of EU law into national law with (limited) recognition of its specific features (art. 2 of the CA). These provisions are critical in the context of ongoing discussions and disputes concerning the relationship between SM and EU order, especially the way of transposing EU law into the national legal system and its consequences, as the doctrine[68] reveals, 'after the adoption of art. 2 of the CA, the basis for the application of EU law rests, foremost, within the Constitution itself', which means that the Constitution instead of EU law by its very nature forms the basis for the application of EU law in Lithuania. As for the Constitutional Court of Lithuania, in the ruling of 24 January 2014,[69] it stated that membership in the EU is a reflection of the geopolitical choice of Lithuania, which, at the same time, is a value choice: the Preamble of the CA clearly reveals that Lithuania's accession to the EU is based on an assumption of the structural compatibility of the fundamental values established in the Constitution with those on which the EU is founded. The CC stressed that the principle of the rule of law is applicable to the procedure for amending the Constitution, and the pacta sunt servanda principle is a part of the constitutional principle of the rule of law. The Constitution establishes the constitutional imperative to observe and fulfil international obligations correctly; consequently, the Constitution does not allow amendments that go against obligations undertaken under international or EU law.

The constitutional landscape of the EU also reveals examples of constitutions which provide limits to amendments, but these limits are not discussed in relation to the EU legal order. Thus, *Greece* has a rigid Constitution where art. 110 includes an eternity clause, the form of government as a Parliamentary Republic, and certain particular provisions like separation of powers.[70] According to this

65 Martinico, Guastaferro, and Pollicino, 2019, p. 493 et seq.
66 Jarukaitis and Švedas, 2019, p. 1005.
67 Ibid., p. 1002.
68 Ibid., p. 1005.
69 The Constitutional Court of the Republic of Lithuania, Case No. 22/2013, Ruling of 24 January 2014, [Online]. Available at: https://lrkt.lt/data/public/uploads/2015/04/2014-01-24_kt2-n1_ruling.pdf (Accessed: 22 December 2023).
70 'The provisions of the Constitution shall be subject to revision with the exception of those which determine the form of government as a Parliamentary Republic and those of articles 2 paragraph 1, 4 paragraphs 1, 4 and 7, 5 paragraphs 1 and 3, 13 paragraph 1, and 26'. See Greek Constitution (2008) [Online]. Available at: https://www.constituteproject.org/constitution/Greece_2008 (Accessed: 22 December 2023).

doctrine, the constitutional review of constitutional amendments is principally bestowed on the Revisionary Parliament, with courts having no power to intervene. The only exemption derives from art. 87 (2) of the Constitution, which empowers judges not to apply provisions enacted in violation of the Constitution. It was noted that 'although never applied in practice, a judge should abstain from applying and revised constitutional provisions that amend unamendable constitutional rules. At the supranational level, any constitutional provision can be reviewed for compliance with EU law under the principle of supremacy from the ECJ.[71] In such cases, the constitutional provision is not repealed but should be set aside when conflicts with EU law arise'.[72] *Cyprus* unconditionally recognises the primacy of EU Law at the constitutional level.[73]

Conversely, constitutional developments in *Poland* and *Hungary* reveal a counter position in a specific register of the identity component, in which sense, the doctrine overflows with studies and opinions.

The selected examples support the general assessment of the Venice Commission in the Report cited above,[74] according to which 'The overview of provisions for constitutional amendment illustrates the rich European constitutional heritage, which in itself is a legacy to democracy and the rule of law' (para. 59). This diversity is a reflection of the roots of European constitutionalism (para. 63), influenced 'by the domestic political context and compromises'. The Commission emphasises in this regard that also, in the case of European countries that are politically, historically, and culturally close (like Denmark, Norway and Sweden), they 'may have different constitutional cultures and very different amendment rules' (para. 65). An interesting remark concerns the debates in the countries of Central and Eastern Europe during the processes of constitution writing in the 1990s after the fall of communism, related to 'the correct threshold for future amendments'. According to the Venice Commission,

> the dominant view was that the new democracies should adopt rigid constitutions, with strict rules on amendment, in order to protect the new democratic order and constrain executive power. Others, however, argued strongly that the particular aspects of this major transition to democracy required a more flexible form of constitutionalism, with relatively easy access to amendment, in order to adjust to the fundamental changes taking place' (para. 66).

This resulted in different amendment rules (para. 67).

71 C-213/07 *Michaniki AE v. Ethniko Symvoulio radiotileorasis and Ypourgos Epikrateias*.
72 Tzemos, Margaritis, and Palioura, 2022, pp. 97–100.
73 For an overview see Paraskeva and Meleagrou, 2023, p. 103.
74 CDL-AD(2010)001-e, Report on Constitutional Amendment adopted by the Venice Commission at its 81st Plenary Session, Venice, 11–12 December 2009.

However, the review of the constitutional amendments clearly illustrates the evolution of the vision of the Constitution itself as the supreme law of the land. As noted in the legal literature, constitutions have political value and express national identity and policy goals,[75] and the constitutional nucleus appears to be more resistant to the influence of EU law. While constitutional courts allow EU law to have primacy over national law (including constitutional law) in general, they do not allow it to have primacy over the constitution's core, which they define as matters of constitutional identity, maintaining the authority to 'safeguard the inviolable constitutional identity' of their respective states.[76] How this core interacts with what the ECJ, in its capacity as the constitutional court of the EU legal order, defines as the core identity of the EU order remains debatable.

3. Core values of the EU: Limits of the revision of the EU Treaties and the role of the ECJ

Over time, through the joint action of the MSs embodied in amendments to the Founding Treaties and with the substantial contribution of the ECJ, which acted as an 'engine' of integration, the EU acquired the features of an autonomous constitutional order. Thus, according to the ECJ, in Opinion no. 2/13,

> [T]he EU has a new kind of legal order, the nature of which is peculiar to the EU, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation (paras. 157–158).

The founding treaties, as subsequently amended and supplemented, are 'the basic constitutional charter of the Union',[77] having in the centre the common values laid down in art. 2, according to which

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

75 De Visser, 2022, pp. 216–236.
76 Halmai, 2018.
77 Judgment Les Verts/Parlamentul, 294/83, EU:C:1986:166, point 23 and Opinion 2/13 para. 163.

The values are shared with all MSs, a premiss that 'implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected' (para. 168). According to the ECJ, 'at the heart of this legal structure' are

> the fundamental rights recognized by the Charter – which, under Article 6(1) TEU, has the same legal value as the Treaties –, respect for those rights being a condition of the lawfulness of EU acts, so that measures incompatible with those rights are not acceptable in the EU (para. 169).

Likewise, the importance of these values emerges in the documents of the European Commission, describing them as

> the bedrock of our societies and common identity (...). The rule of law is a well-established principle, well-defined in its core meaning. This core meaning, in spite of the different national identities and legal systems and traditions that the Union is bound to respect, is the same in all Member States.[78]

In various studies, art. 2's significance in the construction of the EU has led, in various studies,[79] to the idea that the values it sets forth can be seen as limits for revising the Treaties, noting at the same time the lack of an express qualification in this regard in the Treaties or in the case law of the ECJ.[80] However, with time, the ECJ has gradually defined the meaning of art. 2 of the TEU towards the acknowledgement of what it called the '*identity*' of the EU, leading to interesting insights for debates on European constitutionalism. Thus, in *Case C-156/21,* having as subject matter an action for annulment formulated under art. 263 TFEU, introduced on 11 March 2021, Hungary supported by the Republic of Poland, v. the European Parliament and the Council of the European Union, the ECJ stated that

> The values contained in Article 2 TEU have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties' (para. 127); 'In that regard, it must be borne in mind that Article 2 TEU is not merely a statement of policy

78 European Commission, 2019.
79 See, e.g. de Witte, 1994; or, more recently, Passchier and Stremler, 2016, p. 357.
80 Fasone, 2020, pp. 707–732.

> guidelines or intentions, but contains values which, as noted in paragraph 127 above, are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States (para. 232).

The judgment defines both the material content and 'procedural dimension' of EU constitutional identity. As Professors Pietro Faraguna and Timea Drinóczi emphasise,

> even though art. 48 TEU, which provides for the ordinary and simplified revision procedure of the Treaties, does not include any textual hints to determine a European "eternity clause", substantive constraints to the Treaty amending power may derive from theories of implicit unamendability.[81]

The cited judgment establishes a counter-limit for the affirmation of the 'distinct national identities' of the MS, to the effect that this cannot be contrary to the values enshrined in art. 2 of the TEU.

This perspective on the fundamental core of the European legal system that must be protected could lead to an explicit definition of the ECJ's role in verifying the compliance of future treaty amendments with the limits enshrined by art. 2 of the TEU.[82] Therefore, the filtering role of the constitutional courts in the MSs (verifying the compliance of the treaties with the national constitutions) is complemented by that of the ECJ in upholding common EU values, with interesting overlaps of powers as far as common values are concerned. It is, therefore, crucial to articulate the cornerstone of the EU order and those of the MS constitutions and to have the same understanding of the common components. Consequently, beyond the doctrinal debates focused on the revision of the Treaties itself and the role that the ECJ could undertake of verifying the revision acts in relation to the limits that establish the identity core of the EU as a common legal order, we consider that art. 2 (and its interpretation given by the ECJ) can also be seen as a limit on the revision of the MS constitutions, supplementing or integrating with the limits existing in these constitutions, either explicit or implicit.

The harnessing of this limit could be achieved according to the mechanism described by Prof. von Bogdandy through the formula of a 'Reverse Solange doctrine' functioning 'in exactly the opposite way as the original model'. According to Prof. von Bogdandy:

81 Faraguna and Drinóczi, 2022.
82 See Passchier and Stremler, 2016.

> with regard to EU fundamental rights, the Reverse Solange doctrine operates as follows: beyond the scope of Article 51(1) CFR, any member state remains autonomous in its fundamental rights protection as long as (Solange) the presumption holds that it respects the essence of fundamental rights enshrined in Article 2 TEU. All courts in the EU are competent to police this presumption. If the presumption is rebutted, the EU mechanisms for protecting the Union's common values apply. [83]

This reasoning can be transgressed in the constitution revision mechanism, leading to the idea that the autonomy of the states in reconfiguring their own constitutions is limited by the identity of the EU (given by art. 2 TEU). Prof. von Bogdandy also noted that 'the values enshrined in Article 2 are vague and open', which can lead to debates regarding their interpretation by the ECJ and their integration with national constitutional courts. However, the ECJ continued to define these values over time, and the EU developed mechanisms to ensure their enforcement and effectiveness, such as the Rule of Law Mechanism.[84] This mechanism supports the idea of *de facto* federalisation, which has been explored in previous studies.[85] A comprehensive study published in 2020 by Kim Lane Scheppele, Dimitry Vladimirovich Kucherov, and Barbara Geabowska-Moroz highlights the EU's power to enforce its values.[86]

To gain a complete understanding of the EU's profound constitutional structure, it is important to consider not only the visible developments at the supranational level but also the events occurring at the national level. Though less noticeable, some occurrences, such as the interpretation and application of the EU's constitutional framework by the national constitutional courts (more or less coherent), contribute to achieving an interesting harmonisation effect, including in terms of the 'cornerstone' of European constitutionalism. Developments in constitutional review in Romania serve as an interesting example in this regard.

4. Limits of amending the Romanian Constitution in the CCR case law: A hybrid 'cornerstone' of the Constitution

■ *4.1. Stages in interpreting the limits of the Constitution's revision*

With a rigid constitution, a comprehensive set of intangible values, and a Constitutional Court engaged in protecting them, including by promoting, sometimes

83 von Bogdandy and Spieker, 2019.
84 European Commission, no date.
85 Schutze, 2009.
86 Scheppele, Kucherov, and Geabowska-Moroz, 2020.

more vocally, the concept of constitutional identity,[87] Romania represents a case of analysis relevant to the topic of this study. The examination of case law shows how the CCR introduced EU law in interpreting the limits of the revision of its own Constitution, somehow attaching them to the 'core identity'.

Thus, in Romania, in the 30 years since the adoption of the Constitution, 10 initiatives to amend the Constitution have been promoted, as follows: 5 by MPs [1996, 2003, 2014, 2019 (2 initiatives)], 4 by citizens (2000, 2007, 2016, 2019), and 1 by the President of Romania on the proposal of the Government (2011). The decisions of the CCR on these initiatives illustrate an evolution towards a broader interpretation of the express limits of the revision of the Constitution established in art. 152. This evolution became noticeable in the decisions made following the 2003 revision of the Constitution.

Thus, in the *first stage* (decisions pronounced in 2011 and 2014), the interpretation of the limits of the revision took into account not only the express provisions of art. 152, but also the general principles outlined in art. 1 of the Constitution (democracy, legality, rule of law, etc.) and international treaties on human rights to which Romania is a party, as provided by art. 20 of the Constitution (referred to as the 'block of constitutionality'[88]). CCR established in this regard that

> in carrying out this power, the Constitutional Court is to rule upon the fulfilment of the constitutional requirements of form and substance regarding the revision of the Constitution, laid down in title VII – Articles 150-152 of the Fundamental Law – "Revision of the Constitution" (...) At the same time, the Court is to rule upon the observance of the provisions of international treaties in the field of human rights Romania is a party to, and, in carrying out its role as guarantor of the primacy of the Constitution, to analyse the proposed amendments in terms of the principles that ground and define the Romanian State, set forth in Article 1 of the Constitution.[89]

It appears that the identity core has become a 'block of constitutionality', incorporating both the general principles that underpin the organisation of the Romanian State and the international treaties on human rights to which Romania is a party.

87 Varga, 2022.

88 The idea of 'block of constitutionality'/'constitutional block' originates from French doctrine and the jurisprudence of the Constitutional Council of France. It refers to the possibility of including in the constitutional text other rules related to fundamental rights and freedoms that are not explicitly part of the Constitution itself. This means that all norms with constitutional significance, whether found in the text of the Constitution or in other legal acts, together form the 'constitutional block'. See Denizeau-Lahaye, 2022.

89 Decision No. 799/2011, Official Gazette No. 440 of 23 June 2011.

The effectiveness of this hybrid/composite core is evident in 'reshaping' the constitutional framework for the protection of fundamental rights. For example, through a decision[90] issued in 2014 on the initiative to amend the Constitution, the CCR recommends that Romanian fundamental law use a legal language identical to that of the European Convention on Human Rights. Thus, noting that the proposal on the revision of the Constitution contained the amendment of art. 21 (3) of the Constitution in the sense of replacing the notion of 'reasonable term' with that of 'optimal and predictable term' and that the text of art. 6 (1) of the Convention uses the term 'reasonable term', 'by unanimity, the Court recommended the removal of the proposed amendment to article 21 (3) of the Constitution' (para. 62). Similarly, the CCR recommended the removal of the proposed amendment to art. 49 of the Constitution – *Protection of children and young people* – with reference to the concepts and definitions contained in the Declaration of the Rights of the Child, adopted by the General Assembly of the United Nations Organisation on 20 November 1959 and in The Convention on the Rights of the Child, adopted by the General Assembly of the United Nations Organisation on 20 November 1989 ratified by Law No. 18/1990, republished in the Official Gazette of Romania, Part I, no. 314 of 13 June 2001.

In the *next stage* (decisions pronounced in 2019), the CCR shows an interesting nuance regarding the application of EU law in controlling initiatives to revise the Constitution. It is important to note that the Romanian Constitution capitalises on EU law based on a specific text, art. 148 of the Constitution. The inclusion of the EU Charter of Fundamental Rights is subject to these special rules, which prioritise the application of EU law in case of conflict with internal laws. This differs from the general framework of international human rights treaties to which Romania is a party, established by art. 20 of the Constitution and already implemented by the CCR in previous jurisprudence regarding the review of constitutional amendments. This nuanced approach seems to be based on the principle of human dignity outlined in art. 1 of the Constitution.

Thus, in Decisions No. 464 and 465/2019,[91] the CCR examined the initiative to amend the Constitution, intended to forbid the President of Romania from granting pardons for crimes of corruption. On this occasion, the CCR specified more clearly the way in which it proceeds to analyse the limits of the review, showing that the Court's analysis must be carried out in two steps when evaluating the suppression of fundamental rights and freedoms or their guarantees in the sense of art. 152 paragraph (2) of the Constitution, namely, the analysis of the revision initiative in relation to the general principles which guide the entire catalogue of fundamental rights and freedoms, principles that constitute their guiding guarantees, and the analysis of the review initiative in relation to an applicable fundamental right or

90 In Decision No. 80/2014, Official Gazette No. 246 of 7 April 2014.
91 Published in Official Gazette No. 646 of 5 August 2019.

freedom. Starting from the premise that 'the fundamental rights and freedoms of citizens and their guarantees cannot be considered a diffuse set of elements without any connection between them, but make up a coherent and unitary system of values, based on human dignity' and 'any violation of the named fundamental rights and freedoms represents a violation of human dignity', the CCR explained the value of human dignity in relation to the practice of the European Court of Human Rights and the European Court of Justice. According to CCR,

> taking into account, on the one hand, Article 1 (3) of the Constitution, which qualifies human dignity as the supreme value of the Romanian State, and, on the other hand, the case law of the European Court of Human Rights in conjunction with Article 20 (1) of the Constitution, placed right in title II of the Constitution – Fundamental rights, freedoms and duties, it follows that human dignity is the very source, basis and essence of fundamental rights and freedoms, therefore Article 152 (2) of the Constitution by referring to human dignity shall be analysed from two complementary perspectives: a guiding principle regarding fundamental rights and freedoms and a distinct fundamental right, and its bivalent meaning is valued as a limit to the revision of the Constitution in the sense of Article 152 (2) of the Constitution. Even if the aforementioned case law of the Court of Justice of the European Union is not valued within the framework Article 20, but of Article 148 of the Constitution [see Decision No 64 of 24 February 2015, published in the Official Gazette of Romania, Part I, no. 286 of 28 April 2015, paragraph 30], but also taking account of Article 52 (3) of the Charter of Fundamental Rights of the European Union, according to which, to the extent that this charter contains rights that correspond to rights guaranteed by European Convention for the Protection of Human Rights and Fundamental Freedoms, their meaning and scope are the same as those enshrined in the said convention, without preventing Union law from conferring wider protection [see also mutatis mutandis Decision No 216 of 9 April 2019, published in the Official Gazette of Romania, Part I, no. 548 of 3 July 2019, paragraph 24], one can only reinforce the idea that human dignity is the essence of fundamental rights and freedoms and that it represents in itself a limit to the revision of the Constitution.[92]

Therefore, it appears that there may be an interference of art. 2 of the TUE and art. 152 of the Romanian Constitution concerning fundamental rights by reference to the value of dignity as a source of human rights and the case law of the

92 Ibid., para. 52.

European Court of Justice (even *obiter dictum*). In the interpretation of these rights, the Charter and ECJ case law were attached (even *obiter dictum*) to the core of the Romanian Constitution; along with the international treaties on human rights, Romania is a party to the ECtHR case law in the interpretation of the Convention. We can see this evolution as a second stage of building the 'block of constitutionality' around art. 152, meaning human rights both in the acceptance of EU law (art. 148 of the Constitution) and other international treaties to which Romania is a party (art. 20 of the Constitution).

Thus, the CCR's interpretation causes the nucleus of the Constitution to appear in continuous remodelling influenced by the interplay of the ECHR and ECJ. In the same way as the reference to human dignity, which is a general principle enshrined in art. 1 of the Romanian Constitution, the gate is opened to the valorisation of other principles, such as the rule of law. However, the rule of law has a unique status between the identity values of the EU and its own imposition mechanism,[93] making its definition impossible in ways other than in EU terms.

■ *4.2. Challenges: The standards of protection of human rights*

Since 'the door' to shaping or reshaping the core of the Constitution is open to the regulation of fundamental rights at the European level, a challenge concerns the variation of standards in this matter. Moreover, the CCR's interpretation of the position of human rights within the limits of amendments to the Constitution is itself variable. Thus, in certain decisions, the CCR *strictly* applies the constitutional text according to which 'no revision shall be made if it results in the suppression of the citizens' fundamental rights and freedoms, or of the safeguards thereof', while in other decisions, the Court argued for *balancing* or *increased* protection of fundamental rights.

The most suggestive example where *a strict interpretation* can be identified is a decision by which the Court found the constitutionality of the initiative to revise art. 48 of the Constitution (in the sense of changing the phrase 'between spouses' referring to marriage to the phrase 'between a man and a woman'). Thus, using a grammatical interpretation of the wording of art. 152 of the Constitution, the CCR held that' according to the Explanatory Romanian Dictionary, the term 'to supress' means 'to make it disappear, to remove, to discard, to cancel'. By examining the wording of Article 48 (1) of the Constitution, proposed by the initiators of the revision, the Court found that it is not such as to cause the disappearance or removal, the elimination or cancellation of the institution of marriage. (para. 42) According to the CCR,

> the proposed amendment to Article 48 (1) of the Constitution refers only to the right to marriage and family relationships resulting from

93 European Commission, no date.

> marriage. Other fundamental rights, referred to in the amicus curiae briefs filed, are not called into question by the revision initiative and therefore cannot be subject to the review of its constitutionality. (para. 44)[94]

A similar strict approach, but also with reference to the ECtHR case law in the matter, can be found in the decision on the constitutionality of the initiative for the revision of art. 37 of the Constitution – *Right to be elected* – which proposed a new requirement for the exercise of this right, namely that the person in question had not been convicted by a final decision for crimes committed with intent, for which rehabilitation did not take place. After an extensive analysis, the CCR held the following:

> both the incidental constitutional principles, as they were developed in the case law of the Constitutional Court, as well as the international treaties in the field of human rights and the case law of the European Court of Human Rights place the regulation of the requirements for exercising the right to be elected in the responsibility of the legislator, being preferable as their regulation to be carried out at the constitutional level, by establishing clear and precise criteria/requirements. Limitations shall be allowed as long as they are not arbitrary and do not interfere with the substance of the right, a more restrictive regulation of the right to be elected compared to the right to vote being admissible, in compliance with the analysed proportionality requirements.[95]

The Court found that the proposal to revise the Constitution

> 'is in compliance with the constitutional requirements, not being likely to result in a suppression or restriction of the right to be elected in such a way as to interfere with its substance. (...) Thus, the proposal to revise the Constitution is constitutional and in relation to the provisions of Article 152 (2) of the Constitution' (paras. 46-47).

The emphasis in this decision refers to the possibility of accepting certain restrictions on rights by way of revision as long as they do not interfere with the substance of the rights.

An assessment in the sense of a *balancing* of competing interests and, in this light, the acceptance of the possibility of restricting certain rights through the

94 Decision No. 580/2016, Official Gazette No. 857 of 27 October 2016.
95 Decision No. 222/2019, Official Gazette No. 425 of 30 May 2019.

revision of the Constitution appears in a decision by which the CCR found (including with reference to the Convention) the constitutionality of the provision which increased the period of detention as a custodial measure, arguing as follows:

> the new wording of the constitutional text, regulating the maximum period of detention, through a clear norm, not being subject to interpretation, and the term provided for in this sense being likely to allow minimal interference with regard to the freedom of the person, complies with the mentioned requirements and cannot be interpreted as having the effect of suppressing the guarantees of a fundamental right, in terms of Article 152 (2) of the Constitution. The proposed amendment responds to the State's obligation to ensure a fair balance between the interest of defending the citizen's fundamental rights and the interest of defending the legal order, taking account of the issues raised in practice by the current length of the detention period, as far as the activity of the criminal prosecution bodies is concerned, with direct consequences on the way in which the achievement of the general interests of the society and the defence of the legal order are ensured.[96]

In a different argumentative manner, in other decisions, the CCR seemed to interpret the word 'suppression' in a different way, expressly stating that the revisions of the Constitution can only be in the sense of *raising the standards of protection of fundamental rights* (*upward protection of fundamental rights*). According to this vision,

> the Constitution is the one that enshrines fundamental rights/freedoms, giving them a normative wording, and therefore cannot impair/suppress them, in which sense Article 152 (2) of the Constitution is unequivocal. It follows that the constitutional protection of the citizen is upward, therefore the constitutional revisions must also grant an increasingly greater protection to the protection of fundamental rights and freedoms [in the sense of Article 152 (2) of the Constitution], the protection of the fundamental right and freedoms can only have an upward orientation.[97]

Through the formula 'impair/suppress', which puts terms with different meanings on the same level ('impair' means to harm, to jeopardise, and 'suppress' means to eliminate), the Court seems to raise the constitutional standard that expressly

96 Decision No. 799/2011, cited.
97 Decision No. 465/2019, cited, para. 29.

refers only to suppression (implicitly accepting an impairment). It is true that the CCR completes the ruling with the statement that 'the Constitution shall protect the general interest by achieving a fair balance between it and the fundamental rights/freedoms', which suggests a balancing of the fundamental rights in view of the general interest, and thus implicitly the restriction of certain rights in favour of others.

Considering the development of the 'cornerstone' of the Constitution in conjunction with international treaties on human rights and EU law, it is unclear how these rights will be interpreted in the future, given the problematic standards resulting from the interplay of the European Convention of Human Rights and EU Law (ECtHR and ECJ).[98]

5. Conclusions: Interferences and overlaps of constitutional nucleus/identities and the future of the EU

This study does not exhaustively cover the subject but raises some questions for debate on the future of the EU, namely that of the evolution of national constitutions in terms of the EU's identity.

Given the developments at the supranational level, especially the shaping of the EU's own constitutional identity, equally with reference to the EU's specific constitutional framework, the theory of constitutional revision in terms of amendment/dismemberment described by Richard Albert[99] can also be applied to the EU itself. 'A constitutional dismemberment', meaning 'a fundamental transformation of one or more of the constitution score commitments', which 'intends deliberately to disassemble one or more of constitution elemental parts', meaning the core values of the EU, should not be acceptable. In this light, any revision of the MS constitutions (so as not to have the effect of 'dismemberment' in terms of common order) must take into account EU membership and respect not only its own body of rules/principles (explicit or implicit) with special status in the set of constitutional provisions (the '*cornerstone*' of the Constitutions), but also the values laid down in art. 2 of the TEU, namely the identity of the EU as a structure of States.

The overlap of the values qualified as 'cornerstone' or 'identity' creates a continuous plasticity of identities that are constantly reconfigured and developing together. The 'key' to this development seems to be related to the interpretation of those values, as well as the delimitation of those that remain (if they

98 See Claes, 2015, p. 209: 'the Charter has the efect of harmonizing fundamental rights in the scope of EU law, and MS are not allowed under art. 53 to deviate from the common standard'.

99 Albert, 2019, p. 84.

remain) exclusively national. As mentioned,[100] considering the idea of substantive constraints on the MSs' power of Treaty revision may be especially important, moreover, at a time when constitutional democratic norms and values are under considerable pressure in certain European countries.[101] Issues can arise when various European courts disagree on the meaning of such values.

Whether conflicts arise between the EU and MSs depends on how well they cooperate with each other. It is worth remembering that both the regional and national constitutions ultimately serve the same citizens.[102] A model of constitutional 'embedding' of EU values, and thus a key to harmony, can be the approach of the CCR, which also analysed the limits of revision of the Constitution with reference to EU law/Charta. Thus, the fundamental values of the EU (human dignity, as developed in the case law of the ECJ) seem to have become an implicit limit of the revision to the Romanian Constitution, embedded into the 'block of constitutionality' of the identity core. The analysis can be further extended by referring to other countries to see if they have similar approaches to analysing the limits of constitutional amendments. Regarding Romania, it would be interesting to clarify the role of fundamental rights protection standards as limits for revising the Constitution. The issue of interpreting fundamental values in the EU, particularly fundamental rights, must be addressed. We wonder if it would be admissible to make a preliminary referral as part of the process of revising the Constitution (in constitutional review) in order to clarify the interpretation of the limits of amending the Constitution when such clarification concerns the standard of protection of human rights and the consequences of the relationship between national and supranational legal orders.

100 Passchier and Stremler, 2016, p. 357. According to von Bogdandy and Spieker, 2019, these values also represent clear constitutional limits to Member States' actions.

101 Cf. Halmai, 2014; von Bogdandy and Sonnevend, 2015; Koncewicz, 2015.

102 van der Schyff, 2021a; van der Schyff, 2021b.

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ALEKSANDER STĘPKOWSKI*

European Integration and Political Evolution of the Modern Nation-State

ABSTRACT: *This paper draw attention to the fact that the current processes of the convergence of national legal systems within the EU have their source beyond contemporary political integration of the Old Continent. Contemporary European integration is merely one stage of the processes that are launched over a longer period and develop in a way that is not accidental. The cultural choices that triggered integration processes make the process hardly manageable in political terms but rather predetermine political choices. Therefore, institutions having some primary constitutional functions appear to provide a concurrently important contribution to parallel and more important socio-political processes. First, it concerns judicial bodies providing a review of the actions taken by public authorities. The performance of those duties reveals its important function in the political subordination of national authorities to the authorities providing legal patterns for such a judicial review. In this way, administrative courts played an important role in the emergence of parliamentary states in the 20th century, whereas constitutional courts played a key role in the process of transposing sovereign competencies from nation-states to institutions operating at the supranational level. This process of the vertical transposition of sovereign powers beyond nation-states continues even when constitutional courts declare their determination to protect the sovereign position of their national constitutions, as the process is already too advanced to be stopped. Parallel political process leads to attributing the European Parliament with sovereign legislative powers, simultaneously reducing the importance of the legitimacy attributed to the EU by national governments. In this way, a postmodern supranational state is emerging. Even if this process assumes some transitional periods suggesting its lowering down or some alternative paths of the integration, the only possible endpoint seems to be a unified supranational European parliamentary state. Moreover, it seems hardly possible to prevent this process otherwise than through a radical change in intellectual culture that predetermines contingent political actions.*

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1. Introduction

European integration is often considered a virtually unprecedented process and, in many respects, it is indeed so. However, it reveals some striking parallels with the historical development of the modern nation-state. From the broadest perspective, both processes could be described in terms of the gradual transfer of the basic attributes of sovereignty (the power to set commonly bounding legal rules, that is, to legislate) to an even higher level of social life and could be regarded as different stages of the same process. Indeed, contemporary European integration exemplifies the transfer of these competencies to the level of supranational organisations. However, what is at stake here is not simply individual political decisions that mark successive stages of political integration of Europe but a process characterised by a considerable degree of autonomy from politics. More precisely, the process is not an effect of this or that course of political decisions but rather inspires those decisions.

To demonstrate these regularities, the main mechanisms of social control over political power will be described. Analysing them at the level of public law, it is possible to clearly state not only the very fact of the occurrence of these processes but also to predict the direction of its ongoing development. This paper aims to briefly present this development, focusing on the judiciary and its function in this process.

2. Modern way of conceptualising social control over political power

The process which is to be described here is intrinsically linked to the inner intellectual structure of modernity. Therefore, it reflects peculiarities of the ideas inspiring the modernisation process, which seems to be the quest for effective social control over political power. Yet again, to better understand the modern conceptualisation of social control over political power, it is necessary to briefly present the pre-modern approach.

In pre-modern culture, politics was understood as an activity of a virtuous man. Therefore, premodern politics was focused on ensuring that only virtuous men would be admitted to politics. In contrast, modern culture challenged the validity of this position by taking as an axiom the conviction of the irresistible power of human selfishness, which invariably nullifies moral efforts towards acquiring virtue. Adopting this optics, it was no longer possible to recognise virtue as a viable and

autonomous regulator of social life, ensuring the effective control of those in power. For modern social control to be real, it should be based on a criterion external to man, thus creating opportunities for objective social control. For this reason, from a modern perspective, real control of power had to be stripped of the human factor as much as possible and based on depersonalised institutional mechanisms.[1]

3. Dual perspective for modern control of power

In this context, particular importance was attached to legal control as provided by the courts. With the help of objective (i.e. expressed in statutory enactments) legal standards, its mechanisms were supposed to replace the moral evaluation of those in power, depriving the virtue of any significance in politics. This change was believed to make social control of political power possible, real, and objective. For this reason, the control exercised by the courts was considered on the grounds of modern political theory to be the most appropriate.

However, where sovereign actions involve the exercise of attributes of sovereignty, that is, legislation, it is futile to find an adequate basis for legal control exercised by the courts, and the essential mechanism of control over the exercise of sovereign power must be purely political, starting with popular elections. Thus, modern control over the government has two closely correlated dimensions: political and legal.

■ *3.1. Political dimension*

Politically, the main regularity of these processes was that bodies initially intended to provide social control, assumed real power over time, and began to exercise the attributes of sovereignty. This involved the transfer of decision-making centers to higher levels of social life. In the first instance, associated with the transition from pre-modern social reality to modern institutions, feudal corporate structures were brought under strict control by the royal administration during the period of enlightened absolutism. It was this administration that, over time, took over the functions of regulating social life hitherto performed by the dispersed corporate structures, which were first effectively marginalised and later abolished by law. Subsequently, these processes were dominated by the drive to politically subordinate the royal administration to the control of elected representative bodies. Once this was achieved at the beginning of the 20th century with the creation of a parliamentary state, the representative bodies, originally in charge of providing

1 It was well expressed by the Montesquieu in respect to judicial power, however the modern approach applies to every one branch of power. Ch. Montesquieu (1859, p. 131): '... la puissance de juger, si terrible parmi les hommes, n'étant attaché ni à un certain état, ni à une certaine profession, devient, pour ainsi dire, invisible et nulle. On n'a point continuellement des juges devant les yeux; et l'on craint la magistrature, et non pas les magistrats'.

political control, gradually dominated the administration, subordinating it using the principle of the rule of law, where law was understood as statutory enactment adopted by the representative body (parliament). This allowed the transformation of modern constitutional monarchies into parliamentary states.

However, this constitutional arrangement soon became considered as insufficient to create a just social order. The sense of this insufficiency has inspired efforts towards the creation of supranational structures intended to respond to all deficiencies in the modern parliamentary state. Although theoretically fully dependent on the decisions of the modern nation-states that created them for their existence and functioning, in practice, those supranational structures started to dominate national politics and gradually began to autonomise from member-states. The latter, despite attempts at political counteraction,[2] are increasingly becoming executors of political decisions taken by the international administration. This international administration may be subjected to the representative bodies at the supranational level.[3] These processes are thus moving inexorably toward a meta-state that emerges based on the international cooperation of the modern nation-states, which will be, over time, subjected and dominated by this superstructure.

■ *3.2. Legal dimension*

In legal terms, the process summarised above involved the creation of new judicial structures and branches of law. The new courts were to exercise control over the centers of power losing their (so far existing) dominant political position. In the period of declining feudalism, this involved the *de facto* reduction of the powers of the ordinary courts administering feudal *ius commune*. Sometimes, this occurred in a formal way, resulting in the emergence of a reserved judiciary (in France) usually originating in internal control as provided within the administrative structure (German Administrative Justiz, French Conseil Royal). Other times, ordinary courts formally empowered for the judicial review of administrative bodies declined ruling on matters involving the exercise of political power (Italy, Belgium).

2 The Lisbon Treaty has provided *ex ante* 'early warning' mechanism in the second subparagraph of Articles 5(3) and 12(b) of the TEU, which allow national parliaments to monitor compliance with the principle of subsidiarity in accordance with the procedure set out in Protocol No. 2. Based on these provisions, the national parliament (or its chamber) has eight weeks from formal information about a draft legislative act to send to the Presidents of the European Parliament, the Council, and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity, which might result in the withdrawal of the legislative proposal. To date, the procedure has been applied only three times and the proposal has been withdrawn only once. The procedure requires considerable cooperation among national parliaments; hence, it is neither simple nor efficient without a serious impact, also because of the limited scope of application of the subsidiarity principle.

3 The method of strengthening democratic legitimation for the EP is well described by Sadurski, 2006, p. 32.

As the drive to subordinate the actions of the administration to the law intensified, separate administrative courts were established. The practical application of the principle of legality within the judicial review of administrative action appeared to have an important political effect as it provided essential support for parliaments in their efforts to subordinate administration. The latter had been operating at that time by virtue of the royal authority constrained only by the law protecting individual rights. However, as the judicial review intensified, administration started to be increasingly subordinated to the will of parliament as expressed in statutory law. This process was accomplished when the practical transformation of the principle of legality took place, requiring administrative authorities to not only respect legally protected individual rights but also have a statutory basis for every administrative action. In this way, the operation of administrative courts allowed parliaments to gain full political power dominating the administration within the framework of the modern parliamentary state.

However, once the parliaments reached full political power and subordinated administrative authorities, a pressing need to bring also acts of parliaments under some legal control arose. This was provided by creating constitutional courts to administer the constitutional review of statutory law. In doing so, constitutional courts adjudicated on a very restricted textual base consisting of the relatively concise text of the national constitution. To ensure the satisfactory intensity of constitutional scrutiny, this inspired creative interpretation of the constitutional text, as well as recourse to international law and the jurisprudence of international courts. This, indeed, has considerably limited the political freedom of national parliaments. However, the side effect was gradual empowerment of the international integrative organizations and the courts operating within their framework. As the legal process was concurrent to the political process of creating the international structures of economic and political integration in Europe, inevitably (not necessarily intentionally), the constitutional courts started supporting the process of transferring sovereign powers to the supranational level. This was to help discipline national parliaments and make them implement integrative policies taken by the international administration properly.[4] This process results in the disintegration of modern nation-state sovereignty and its transfer to postmodern supranational structures.

4. Vertical transposition of the sovereignty within European integration

The transgression of modern political theory developed in the 17th and 18th centuries, which resulted in the gradual disintegration of national sovereignty, does

4 See: Stępkowski, 2010, pp. 392–394.

not deny the theoretical premise upon which the modern concept was founded. Rather, it has been its consequence. John Locke emphasised that the political communities created as a result of the social contract are mutually in the same situation in which individuals remain in the state of nature.[5] However, while the only implication of Locke's statement was the necessity of federative power in the state, its logical corollary must also be the possibility of states entering into a new meta-social contract on a supranational level. Although Locke abstracted from this possibility, it turned out to be an inevitable consequence of the development of the modern sovereign state and had a real effect in the Treaties providing the European Union's (EU) primary law.

However, the analogy between the formation of supranational postmodern political and legal order and that of modern nation-states goes beyond the question of contractual genesis and also applies to the further development of these political organisms. It is sufficient to consider that the forming supranational organisations are quite commonly and increasingly required to subordinate the way they operate to the constitutional principles, which are characteristic of modern states.[6] Meanwhile, some scholars stress that the growth of decision-making powers among supranational organisations creates the need for such organisations to review the way in which these sovereign powers are exercised. In this context, it is explicitly spoken about giving the international order constitutional forms.[7] As a result of this process, referred to as 'governance beyond the nation-state',[8] modern states are undergoing a fundamental transformation, incorporating these organisations into a system of supranational structures that make legally binding decisions for these states.

This process started in Europe with the establishment of integrative international organisations, which could be considered the two pillars of integration. On the one hand, the Council of Europe (1949) and the European Convention of Human Rights (ECHR) (1950) system, transformed European ethical and political identity according to radicalised individualistic anthropology and provided a new political and ethical identity for postmodern Europe. On the other hand, the European Steel and Coal Community (1950), the European Economic Community (1957), and the Euratom (1957) gradually integrated into one multidimensional structure and elaborated the structures for European governance and a common European economy.

5 Locke, 1824, p. 217: 'There is another power in every common-wealth, which one may call natural, because it is that which answers to the power every man naturally had before he entered into society … So that under this consideration, the whole community is one body in the state of nature, in respect of all other states or persons out of its community'. (II, 12, § 145).

6 Klabbers et al., 2009, pp. 59–60.

7 Cf. Klabbers et al., 2009, p. 80.

8 See: Hurrell, 2007, p. 95 *passim*.

From 1979, European communities were provided with their own democratic legitimacy. The democratic elections of the European Parliament were initially considered to be of secondary importance. However, over time, it started to be considered concurrent to the legitimacy provided by the governments of member states and resulted in attributing European Parliament power to co-legislate with the Council from 1987, and subsequently, the legislative power has been gradually extended. This inspired the European Parliament to dominate the legislative process by acquiring autonomous power to legislate, which has been clearly manifested in the proposals of the European Parliament for the amendment of the Treaties as adopted in November 2023. The proposed amendments 'aim to reshape the Union in a way that will enhance the Union's capacity to act and strengthen its democratic legitimacy and accountability'.[9] On the one hand, the project leads to the subjection of the Commission to the will of the European Parliament as its Executive[10] and to a considerable reduction of the impact the member states (Council) have on the composition of the future Executive.[11] On the other hand, the proposed amendments clearly demonstrate a tendency towards the ultimate liberation of the EU from the constraints of the principle of conferral as declared in Article 5 of the Treaty on European Union (TEU). The means to this goal seems to be the proposed amendment of Article 11, paragraph 4, subparagraph 1 of the TEU regulating European citizens' initiative. This results in introduction of a new subsection 1a to this TEU provision attributing Parliament and the Commission with new legislative powers, no longer restricted to *serving the purpose of implementing the Treaties*[12]. In this way, the Parliament and the Commission will be attributed with extremely wide discretionary legislative powers allowing them to circumvent ordinary legislative procedure as specified in Article 289(1) of the Treaty on the Functioning of the European Union (TFEU) and depriving the Council of any impact on this new legislative procedure, which potentially deprives the principle of conferral of its significance.

This political process might be justly considered as leading to the emergence of postmodern political statehood and the transgressive continuation of the modern process of the emergence of modern nation-states. Characteristic elements of this process are also well described in terms of so-called 'reflexive modernisation' in contrast with the 'first' or 'simple' modernisation that took place in the 19th century. From this perspective,

9 Explanatory statement of the report on proposals of the European Parliament for the amendment of the treaties (A9-0337/2023) as adopted on 11 of November 2023. https://www.europarl.europa.eu/doceo/document/A-9-2023-0337_EN.html#_section3.

10 See proposed Amendment 43–50 providing for changes in Article 17 of the TEU.

11 See proposed Amendments 48 and 49.

12 See proposed Amendments 17 and 18.

> the nation-state, as one of the basic institutions of the first modernity undergoes a fundamental transformation in the process of reflexive modernization... The reflexive modernization of statehood leads, firstly, to the production of a multiplicity and multiplicity of new forms of transnational 'governance beyond the nation-state. In doing so, the nation-state is not completely replaced or even supplanted, but is incorporated in various ways into new international governments and organizations, new transnational institutions, new forms of regionalism, and so on. The result of this development, to the extent that it is already becoming known, are new comprehensive systems of '(world) governance'... [13]

This process finds its institutional expression in the functioning of the EU and the Council of Europe, along with the ECHR system. The concurrent functioning of the institutions also causes us to expect their future integration initiated by the formal accession of the EU to the ECHR, as announced in Article 6(2) of the TEU.[14] Meanwhile, it should be added that these processes, taking place at the supranational level, also have their reverse expression. The latter consists of the affirmation – oftentimes provided by the supranational structures – of localism explained in terms of pluralism. However, in reality, this affirmation, in a slightly different way, also leads to the decomposition of the structures of the modern nation-state. It suffers from the disintegrative effect of the diverse forms of regionalism on the one hand and from the transfer of sovereign decision-making competencies beyond national politics on the other. The slogans of localism are to serve the affirmation of pluralism, understood in the postmodern sense, as a process bringing about a politics of radical, pluralist democracy rooted in locality.[15] As such, the process reflects the vision of postmodern politics as outlined in the 1970s by Jean-Francois Lyotard.[16] However, the postmodern vision of politics based on radical pluralism and locality is only one face of the postmodern socio-political process – the one directed towards the decomposition of the modern structures fundamental for the nation-state. The second is parallel and results in

13 Beck and Grande, 2009, p. 72.

14 Cf. Stępkowski, 2010, p. 406–408.

15 Lash, 1994, p. 113: '... reflexive modernity proffers a politics of radical, plural democracy, rooted in localism and the post-material interests of the new social movements'.

16 Jean-Francois Lyotard in his *Instructions païennes*, having acknowledged that the postmodern idea on which political decisions could be based is the idea of multiplicity or diversity, he asks how the regulatory functions of a politics so conceived could be given to be pragmatically effective and whether a politics based on the idea of multiplicity is possible at all. Lyotard admitted at the time that he was unable to propose an answer to these questions, but the notion of 'reflexive modernisation' seems to offer an attempt at a practical answer. See: Lyotard and Thébaud, 1985, p. 94. About founding the postmodern politics on the idea of pluralism localism and multiculturalism. See also: Morawski, 2001, pp. 40–41.

the establishment of supranational structures replacing the political sovereignty of modern states.

5. Judicial paths of Europeanisation

It is hard to overlook that political decisions taken at the EU level already determine the shape of the national legal systems of its member-states. In this context, national states, led by national parliaments, increasingly have the function of executing political decisions made at the community level, and one can probably speak of an emerging *de facto* tendency to shape the division of competencies between the Union and member states in such a way that the latter are assigned an executive role. The EU plays 'an increasingly important role in establishing rules' to be implemented by member states.[17] For this reason, national administrative law is already, for the most part, a means for the 'administrative implementation of Community law'.[18] Thus, a process of the transformation of sovereign nation-states into 'self-disciplined members of a cosmopolitan European Empire', also called 'cosmopolitan states', is taking place within the EU.[19] While the enthusiasm of sociologists inspired by critical theory[20] for these processes may not please everyone, it is difficult to deny the validity of their description.

Analogous properties can be attributed to the Strasbourg system of human rights protection. Although *prima facie* the European Court of Human Rights (ECtHR) has only guarantee functions, it also exerts certain constructive influence on the shape of national institutions. An example could be the Strasbourg Court's jurisprudence, according to which a member-state is legally obliged to be the ultimate guarantor of pluralism[21] understood in the (already mentioned) post-modern way. Meanwhile, based on the human rights protection argument, ECtHR jurisprudence has elaborated a method of gradually restricting the sovereignty of member-states with the notion of the margin of appreciation (*marge d'appreciation*) enjoyed by the states regulating the social matters interfering with human rights.

Prima facie, the concept reaffirms the sovereign position of state in regulating the status of individuals. However, the Strasburg Court decides whether the

17 Beck and Grande, 2009, p. 136.

18 For more, see: Tkaczyński, 2005, pp. 310–313.

19 Beck and Grande, 2009, p. 139.

20 This intellectual provenience is openly admitted by Scott Lash in: Beck et al., 1994, pp. 110–111.

21 'State must be the ultimate guarantor of pluralism' (*Manole et al. v. Moldova*, 17.09.2009, § 99; and *Informationsverein Lentia et al. v. Austria*, (24.11.1993), Serie A nr 276, § 38); 'The Court has often emphasised the role of the State as ultimate guarantor of pluralism and stated that in performing that role the State is under an obligation to adopt positive measures ...' *(Yumak & Sadak v. Turkey (8.07.2008), § 106).*

state has infringed the limits of this margin. Hence, the ECtHR decides on the scope of the state's sovereign powers. Moreover, in the last decade of the twentieth century, the margin of appreciation was no longer considered a category requiring judges to exercise judicial restraint but as the notion contingent to judicial restraint,[22] hence a concept providing flexibility to jurisprudence and not so much expression of respect to the sovereignty of a member-state.[23] Thus, a tendency to consider the Court's discretion as the sole criterion for determining the extent of this margin of appreciation emerged. However, this means that the Court started to decide on the extent of state sovereignty under the ECHR.

Therefore, without a substantial basis in the provisions of the Convention, the ECtHR has long varied the scope of this margin of state discretion depending on the issue under consideration.[24] Indeed, it is hardly imaginable that in jurisprudential practice, it could be otherwise. Therefore, it is by no means surprising that the position is gaining approval in the literature.[25] Therefore, ECtHR judges repeatedly reveal their inclination towards reducing the states' 'margin of appreciation'.[26] At the same time, upholding the ECtHR states' margin is increasingly criticised not only in the literature but also by an increasing number of members of the

22 Dissenting opinion by Judge Martens in *Cossey v. UK* (27.09.1990) Seria A nr 184: § 3.6.3 as well as the academic writings referred to there: Eissen, 1990, p. 141. Judge Martens has presented his standpoint also as an influential academic writer: Martens, 2000, p. 750.

23 Bakircioglu, 2007, p. 711.

24 See dissenting opinion by Judge Bonello in *Ždanoka v. Latvia* (17.06.2004), § 3.1: 'The case-law of the Court seems to distinguish, in descending order of amplitude, between "a wide margin of appreciation", "a certain margin of appreciation" and "a margin of appreciation"'.

25 Heine, 1995, p. 177; See also Werd, 2004, p. 94.

26 Characteristic in this respect is the position taken by Judges Wildhaber, Pastor Ridruejo, Costa, and Baka in dissenting sentences, partially distancing themselves from the judgments that were delivered on 8 July 1999 in the cases of *Karataş* v. *Turkey* and *Sürek* i *Özdemir* v. *Turkey,* where the range of the margin of appreciation was considered deliminated by the scope of the judicial restraint. Hence, ultimately, these are judges who decide on the margin of appreciation: 'In the assessment of whether restrictive measures are necessary in a democratic society, due deference will be accorded to the State's margin of appreciation; the democratic legitimacy of measures taken by democratically elected governments commands a degree of judicial self-restraint'.

panel with dissenting opinions.[27] Now, the Court makes increasingly strident calls for the restrictive use of the category of the margin of appreciation.[28] It started to find it inadmissible, basing the judgement on the margin of appreciation with regard to ideological neutrality and basing its decision on the need to preserve pluralism.[29] Thus, it turns out that the meaning given to pluralism by the ECtHR not only ceases to include the possibility of variations between states, but such national variations are even considered as a threat to pluralism. This approach well demonstrates that the modern category of national identity is considered

27 A characteristic example is provided in the case of *Chapman* v. *UK* (18.01.2001) 33 E.H.R.R. 399, held in the context of the protection of the rights of the gypsy minority, but the wording there was in the nature of general talk about minorities, sometimes vulnerable minorities considered in terms of 'diversity' precisely, of which the gypsy minority is only an exemplification. In § 93-94 we read:
The applicant urged the Court to take into account recent international developments..., in reducing the margin of appreciation accorded to States in light of the recognition of the problems of vulnerable groups, such as Gypsies. The Court observes that there may be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle (...), not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community. However, the Court is not persuaded that the consensus is sufficiently concrete for it to derive any guidance as to the conduct or standards which Contracting States consider desirable in any particular situation...
However, seven judges have submitted a joint dissenting opinion in which they emphasized (§ 3):
We cannot therefore agree with the majority's assertion that the consensus is not sufficiently concrete (...). In our view, this does not reflect the clearly recognised need of Gypsies for protection of the effective enjoyment of their rights and perpetuates their vulnerability as a minority whose needs and values differ from those of the general community.

28 See § 4 of the dissenting opinion of Judge Malinverni and a similar opinion of Judge Rozakis in the same case *UK & Hanseid v. Norway* (16.04.2009):
The Chamber has applied in the circumstances of the case the concept of the margin of appreciation with a degree of automaticity, as the Court has done many times in similar situations, although the facts of the case do not require – I would say 'allow' – such a step to be taken. Indeed, if the concept of the margin of appreciation has any meaning whatsoever in the present-day conditions of the Court's case-law, it should only be applied in cases where, after careful consideration, it establishes that national authorities were really better placed than the Court to assess the 'local' and specific conditions which existed within a particular domestic order, and, accordingly, had greater knowledge than an international court in deciding how to deal, in the most appropriate manner, with the case before them. Then, and only then, should the Court relinquish its power to examine, in depth, the facts of a case, and limit itself to a simple supervision of the national decisions, without taking the place of national authorities, but simply examining their reasonableness and the absence of arbitrariness.

29 *Lautsi v. Italy* (3.11.2009), § 47: 'Le devoir de neutralité et d'impartialité de l'Etat est incompatible avec un quelconque pouvoir d'appréciation de la part de celui-ci quant à la légitimité des convictions religieuses ou des modalités d'expression de celles-ci. Dans le contexte de l'enseignement, la neutralité devrait garantir le pluralisme'. The judgement was overturned by the Great Chamber in 2011; however, it still testifies to the existing tendency in the case law of the ECtHR.

an obstacle to be eradicated within the postmodern process! Not surprisingly, nation-states are no longer regarded as structures creating and protecting axiological and cultural pluralism (contingent on national diversity). Rather, such a function is attributed to the concept of 'international society' (whatever it is) and to supranational structures.[30]

6. Constitutional judiciary as a promoter of Europeanisation

The above-outlined process promoted at the supranational level is strengthened from within by the national courts. This demonstrates an analogy with the earlier stages of the process of modern sovereignty displacement as already described. Hence, the dislocation of political power beyond the nation-state towards the supranational level also takes place with the support of judicial bodies, specifically the constitutional courts. More interestingly, this is often done with the accompaniment of declarations affirming the sovereign status of the nation-states. However, while in the literal layer of jurisprudence, the constitutional courts are often very vocal about the constitutional sovereignty of their countries, they do much to ensure that in the factual dimension, the verbally affirmed national sovereignty does not create real difficulties in the informal widening of the Union's competences at the expenses of the member states.[31] Moreover, the loud sovereignist rhetoric used by the constitutional courts is very efficient in calming down the public, who start to be confused when learning about the effects of the postmodern process.

It might be useful to take the example of the Polish constitutional court, which insists on its position as the guardian of Polish constitutional sovereignty. These processes can be particularly seen in one of the speeches by Marek Safjan delivered in 2005 as the president of the Polish constitutional court. He bluntly stated,

> It is impossible today to decide on such rights as freedom of speech, freedom of assembly, respect for privacy, protection of freedoms, economic freedom or the right to a court, without taking into account the European standard formed in this regard, which at the same time sets limits on the interpretative freedom (of the Polish Constitutional Court – note A.S.). Thus, it is not possible to build in modern Europe

30 Hurrell, 2007, pp. 29–32, 247, 294.

31 In relation to Polish law, the process is described by Stępkowski, 2023, pp. 247–251; In relation to the decisions by the French *Conseil Constitutionel,* See: Sulikowski, 2002, pp. 76–88.

> the authority of the constitutional court ... in opposition to the established standards common to all democratic countries.[32]

In this (by no means controversial) statement, the then president of the constitutional court explicitly admitted that the real shape of national constitutional guarantees, which in the field of personal and political rights are already at the level of drafting the Constitution, was formed under the clear influence of the ECHR[33]; also, the process of their interpretation, *de facto* is determined to a great extent by the content of the Strasbourg case law.

A similar situation exists with regard to the impact of the case law of the Court of Justice of the European Union (CJEU). In the same speech, it was emphasised that

> the adoption of a European law-friendly directive of interpretation of the norms of national law, confirmed in the jurisprudence of the Constitutional Court in a series of judgments ..., is justified from the point of view of protecting Polish own interests ... For it is ... vital interest of Poland, as a state participating in the processes of European integration, to respect the norms of European law.[34]

Again, it is not only impossible to deny the substantive legitimacy of the statement, particularly when considered from a shorter perspective. In addition, they help better understand Ulrich Beck's qualification of European cosmopolitan states as 'self-disciplined members of the cosmopolitan European Empire'.[35]

A spectacular example of this approach applied in practice is the P 1/05 ruling presented by M. Safjan as proof of the affirmation of Polish constitutional sovereignty. In this case, the court ruled that European law regarding the European arrest warrant (EAW) is inconsistent with the Polish Constitution. However, in the same judgement, the Court held that the non-implementation of the EAW would be in breach of the constitutional provision requiring Poland to fulfil its

32 Safjan, 2006, p. 9.
33 Garlicki, 1998, p. 106 (§ 91).
34 Safjan, 2006, p. 13.
35 Beck and Grande, 2009, p. 139.

international obligations. Therefore, the Court clearly suggested not only the need to amend the constitution but also the way it could be done.[36]

Thus, the *prima facie* affirmation of the Polish constitutional sovereignty led to conclusions recommending adjusting the Polish constitution to EU law.[37] The Polish constitutional court clearly stated that it is the Polish *raison d'etat* to shape the content of the constitution and ensure that it does not interfere with the content of community law. Moreover, it is worth mentioning that the court considered the need to amend the constitution only to remove the constitutional prohibition of extradition of a Polish citizen abroad, whereas it seems that the conflict with the principle requiring Poland to obey international commitments might also be solved, setting the conformity with the constitution as a limit to this obligation. However, this solution was not considered by the constitutional court.

Similar confusion appears in relation to the judgement of 16 November 2011, according to which 'EU regulations, as normative acts, can be subjected to the control of their compliance with the constitution in proceedings initiated by a constitutional complaint'.[38] Despite its courageous sound, the statement could be reduced to mere rhetoric, as it was *obiter* and not the *ratio decidendi* of the judgement. Moreover, closer analysis reveals the true reason for such confusion. Such a review of EU law would require a preliminary referral from the constitutional

36 Judgement of 27 April 2005 r., Sygn. akt P 1/05, OTK ZU 4/A/2005, item 42, section 5, particularly 5.2:
The decision of the Constitutional Court declaring Article 607t § 1 of the Code of Criminal Procedure unconstitutional results in the loss of binding force of this provision. However, in the present case, this direct effect resulting from the judgment is neither equivalent to nor sufficient to ensure the compliance of the legal state with the Constitution. This objective can only be achieved through the intervention of the legislator. Indeed, taking into account Article 9 of the Constitution, which stipulates that 'the Republic of Poland shall observe international law binding upon it', and the obligations arising from Poland's membership of the European Union, it is indispensable to amend the law in force in such a way as to enable not only full, but also constitutional implementation of Council Framework Decision 2002/584/JHA ... Thus, in order for this task to be accomplished, an appropriate amendment of Article 55(1) of the Constitution cannot be ruled out, so that this provision provides for an exception to the prohibition on extradition of Polish citizens allowing their surrender on the basis of the EAW to other Member States of the European Union. If the Constitution is amended, bringing national law into conformity with EU requirements will also require the legislator to reinstate the provisions on the EAW which, as a result of the TK ruling, will be eliminated from the legal order.
See also: Sadurski, 2009, p. 21.

37 Some authors did not hesitate to state '... that in this judgment the Tribunal went further than the existing practice – it implicitly accepted the supremacy of EU law over constitutional norms'. Kowalik-Bańczyk, 2005, p. 1361.

38 Judgement of 16 November 2011, SK 45/09 OTK-A 2011, Nr 9, item. 97. The obiter is very close in its meaning to the statement by Marek Safjan attributing the constitutional court with the 'right to assess whether EU legislative bodies, in issuing a particular law, acted within the framework of the competences delegated to them and whether they exercised them in accordance with the principles of subsidiarity (subsidiarity) and proportionality'. See: Safjan, 2006, p. 16.

court to the CJEU under Article 267 of the TFEU, and such a preliminary ruling would be binding for the constitutional court.[39] Thus, it turns out that the reverse of the strong declarations of the constitutional sovereignty of a member state leads to the constatation of the *de facto* supremacy of the EU legal order over all national law, including the constitution.

For a long time, the confusion has been managed with the narrative based on the thesis about the multicentricity of contemporary law that was popular among Polish scholars.[40] According to this theory, the relationship between national law and community law should not be considered in terms of hierarchy but in a more inclusive manner that would grant precedence in application either to national or European law according to functional need (*quo ad usum*). This might be considered an attractive proposal; however, it will adequately describe only the transitional period, lasting as long as a monocentric legal system will crystallise at the supranational level. The author of the concept of multicentricity herself does not hide the fact that if the application of an EU-friendly interpretation of national law by courts does not provide full harmonisation, the same effect will be imposed upside down by decisions taken by European institutions.[41] Thus, the emphasis placed on the multicentric nature of the relationship between national and European law provides a scheme for self-disciplined gradual subordination rather than an accurate description of a long-lasting real relationship between the national and EU legal systems. It is rather useful conceptualisation of the transitional period preceding the unification of European law into a monocentric system.

In this context, constitutional courts appear to perform an implied but extremely important function of watching over the compatibility of national constitutional orders with law created by the postmodern political super-structures. Interestingly, the Polish constitutional court expressed its readiness to provide this uniformity even before Polish accession to the EU.[42] National constitutional courts are, to a much greater extent than the CJEU, interested in ensuring that

39 Wojtyczek, 2009, p. 188.

40 The concept was proposed and propagated by the (then) judge of the Polish constitutional court, E. Łętowska, 2005b, pp. 3–10. See also Łętowska, 2005a, p. 1127–1146.

41 Łętowska, 2005a, pp. 1140–1141.

42 The Polish constitutional court declared its readiness in this regard even before the final accession decision in its judgment of 28 January 2003, OTK ZU 1/2003, item. 4, Section 4.5: The postulate of using European law in the pre-accession period as an interpretative inspiration for the Constitutional Tribunal implies first and foremost the use of that law for the reconstruction of the constitutional standard when exercising control. (...) Therefore, when reconstructing the standard (norm) in accordance with which the evaluation of constitutionality is carried out, one should make use not only of the text of the Constitution itself, but - to the extent to which that text refers to terms, concepts and principles known to European law - to those very meanings.
Łętowska, 2005a, p. 1143. It must be admitted that Judge Łętowska was the judge rapporteur in this case.

there are no conflicts between constitutional norms and community law.[43] Therefore, they interpret the national constitution in accordance with European law, and if it turns out to be impossible due to the explicit wording of the constitutional provisions, the constitutional courts inspire the amendment of the constitutional text itself.[44]

Not much difference is provided in the famous judgments P 7/20[45] and K 3/21[46] of 2021, in which the Polish Constitutional Tribunal – in the context of unprecedented tension between Poland and the EU – decided on the unconstitutionality of several Treaty provisions, as construed by the CJEU in order to impose on Poland obligations relating to the organisation of the judicial system and the judicial procedure; thus, the constitutional matters where no competences were attributed to EU.[47] It is unclear what will be the exact final effect of this judgement, which appeared to be more a political issue than a legal one.[48] One consequence was clear: the unprecedented conflict between Poland and the EU resulted in extreme political and economic pressure, which provoked profound political destabilisation and the change of the government. However, the ongoing process of the Treaties revision demonstrates that the judgements did not result in any lowering-down of the process; they may even have increased its dynamism.

7. Conclusion

The paper attempted to demonstrate, that the current processes of the convergence of national legal systems within the EU have their source beyond contemporary political integration of Europe. Contemporary European integration should be considered as postmodern stage of the longer process of modernisation that started in the Enlightment. The process was launched over a longer period and developed in a way that is not accidental. Notwithstanding incidental actions taken by the

43 Ewa Łętowska openly admitted that some 20 years ago ' ... so far there has not been an open conflict between the Court of Justice and the constitutional courts, but this has been because this conflict has been carefully and skillfully avoided, rather by the efforts of the national authorities (in particular the public law courts as well as the legislature)'. Łętowska, 2005a, p. 1141.

44 Stępkowski, 2010, pp. 408–417.

45 Judgement of 14 July 2021, P 7/20, OTK ZU A/2021, item 49.

46 Judgement of 7 October 2021, K 3/21 OTK ZU A/2022, item 65.

47 Judgement P 7/20, section 6.10 (no. 229–230)
From Article 8(1) of the Constitution, stating that it is the supreme law of the Republic of Poland, derives 'the supremacy and consequently the precedence of the Constitution over the law of the European Union, especially in exceptional situations connected with the need to protect the sovereignty of the state (U 2/20). The incompatibility with Article 90(1) in conjunction with Article 4(1) of the Constitution arises from the CJEU adjudicating in the area of the system and jurisdiction of judicial authorities, i.e. in areas which the Republic of Poland has not and cannot delegate to the EU.

48 For a more detailed account on this issue see: Stępkowski, 2023, pp. 255–257.

national courts (as demonstrated by the Polish Constitutional Tribunal) or by the governments, it is still legitimate to speak of a clear tendency in contemporary European legal culture to make national legal orders actually dependent on the content of decisions made at the level of the European postmodern cosmopolitan empire. The process has been carried out in a very flexible way that presupposes a transitional period of multicentricity; however, finally, it will result in a unified and centralised legal and political system. The postmodern supranational state has been emerging in Europe.

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TUDOREL TOADER*

The Role of the Constitutional Courts in Harmonising Criminal Legislation in the EU: Romania's Experience

ABSTRACT: *The study aims to explore the role of constitutional courts in the development of European criminal law by analyzing the use of EU law within the constitutional review of criminal legislation. The case law of the Constitutional Court of Romania provides important benchmarks in this regard, expressed in ways such as: the interpretation of the "cornerstone" of the Constitution making the national normative system "accessible" to EU law, the interpretation of constitutional principles in the sense of the legislator's obligation to transpose EU law and ensuring normative coherence, the articulation of criminal policies (national and EU), the creation of a "doctrine" on the use of EU law rules within the constitutional review. The case law examination revealed the gradual opening of the CCR towards an interpretation and approach to criminal law in conjunction with the case law of the ECHR in the application of the ECHR, as well as with the standards for the protection of fundamental rights regulated/interpreted or recommended by EU bodies. The intention of the article was not to analyse how European criminal law institutions are reflected in the constitutional review, but to reveal a trend of approach and reporting which, in our opinion, can also be interpreted as a statement of the principle of the need to regulate certain criminal law institutions, even the criminalisation of certain acts, with reference to the general EU framework or objectives. Even if this study does not cover all the issues in the field, it can be a start for proceeding to a comparative law study on the role of European constitutional courts in the development of European criminal law.*

KEYWORDS: European criminal law, criminal policy, constitutional review, EU legal order, Constitutional Court of Romania

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1. Introduction

The harmonisation of legislation at the EU level is the result of various measures and methods that involve the participation of several actors, both at the national and supranational levels. This political will has been embodied in successive amendments to the founding treaties and the adoption of new regulations, which are consistently supported by their interpretations. The contributions of various courts, particularly constitutional courts, are noteworthy in this regard, as they facilitate the enforcement and development of legislative instruments.

This contribution is particularly important in fields such as criminal law and criminal procedure, which are more challenging to harmonise through legislation. This is due to the specific limits established by the rules of competence set out in Articles 82 et seq. of the Treaty on the Functioning of the EU (TFEU), the constitutional conditions applicable in certain Member States (MS), and the challenges established by the various standards for the protection of fundamental rights. When it comes to the future of the EU, it is essential for the courts of law to be involved and for criminal rules to be interpreted coherently. This is because legislative harmonisation is not an end in itself,[1] but rather a means to achieve certain policy objectives as well as an overall 'European common good'. In this light, the case law of the courts of law that contributes to this harmonisation through forms of explicit or implicit dialogue plays an important role as a building block in the areas of freedom, security, and justice. This ensures a 'high level of security' and protection for the common values of the MS and their citizens.

The aim of this study is to explain the role of constitutional courts in the development of European criminal law, with reference to an indirect form of 'constitutional dialogue', namely the use of EU law within the constitutional review of criminal legislation. The case law of the Constitutional Court of Romania (CCR) provides important benchmarks in this regard, such as the interpretation of the 'cornerstone' of the Constitution for making the national normative system 'accessible' to EU law, the interpretation of constitutional principles in the sense of the legislator's obligation to transpose EU law and to ensure normative coherence,[2] the articulation of criminal policies (national vs. EU), the creation of a 'doctrine' on the use of EU law rules within the constitutional review applicable regardless of the branch of law to which the rules belong.

Romania's experience is meaningful in terms of the specifics that marked its accession to the EU, namely, the establishment of a Cooperation and Verification Mechanism. Due to this Mechanism, from the very moment of accession, the criminal legislation 'settled' a new level, as one of the obligations undertaken

1 Schroeder, 2020.
2 See also Neagu, 2022, 2023.

by Romania was that of amending the Criminal Code and Criminal Procedure Code. Furthermore, the development of criminal legislation and the impact of new concepts of criminal law and criminal procedure have been scrutiny for the past 15 years.[3] The annual reports of the European Commission welcomed the adoption of the Criminal and Criminal Procedure Codes in 2009 and 2010[4] and their implementation in 2014[5], appreciated as '*an approach of proportions and, at the same time, tested the adaptability of the judicial system*'; this also emphasised deficiencies such as the numerous amendments and adaptations of the codes or unconstitutionalities found by the CCR.[6] A 2018 report[7] discussed this issue extensively, reaching a certain impasse owing to the amendments that constitute 'a deep revision of the 2014 codes'.

To have a complete understanding of the changes made to criminal law during this period, it is necessary to analyse not only the new codes but also the case law of the CCR. Equally relevant are the solutions pronounced on the exceptions of unconstitutionality, by which, also harnessing EU acts, the CCR sanctioned unconstitutional legislative solutions and the decisions pronounced within *a priori* review. Regarding the latter category of cases, two extensive decisions from 2018 on the laws amending the Criminal Procedure Code[8] and the Criminal Code,[9] which intertwine the Constitution and EU law, are often seen through the lens of the general binding effect of CCR decisions that had previously sanctioned breaches of the same EU law. Following these decisions, the establishment of criminal law 'in the womb of constitutionality' was often achieved by conferring constitutional relevance on European rules and with direct reference to them. EU law appears many times as a mandatory 'framework' of the legislator's actions at the national level, as well as a source of strengthening the guarantee of fundamental rights. In this light, the constitutionalisation of Romanian criminal law moved along with the development of European criminal law.

This study intends to open up a new perspective of comparative law on the above coordinates in by examining the involvement of EU constitutional courts in shaping European criminal law.

3 The CVM was closed at the end of 2023.
4 Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism {SWD(2012) 231 final}.
5 Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism {SWD(2015) 8 final}.
6 Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism {SWD(2016) 16 final}, Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism {SWD(2017) 701 final}.
7 Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism {SWD(2018) 551 final}.
8 Decision No 633/2018, Official Gazette no. 1020 of 29 November 2018.
9 Decision No 650/2018, Official Gazette no. 97 of 7 February 2019.

2. The reinterpretation of the Romanian Constitution and its influence on the development of criminal law

The accession to the EU and the 'accommodation' of the national legislation for normative coherence and the fulfilment of Romania's obligations as an EU MS determined the adaptation of the Constitution, both through its amendment before the accession (in 2003) and after this moment, based on its interpretation by the CCR. This article considers the reinterpretation of the constitutional guarantees of fundamental rights, which belong to the very core of the Constitution (revision limits), as to provide support for the amendment of criminal legislation in harmony with European regulations in the matter. A significant example is the reinterpretation of the presumption of lawful acquisition of wealth in Article 44, paragraph 8 of the Constitution ('Legally acquired assets shall not be confiscated. Legality of acquirement shall be presumed').

Therefore, over time, and long before the moment of accession to the EU, there were initiatives to revise the Constitution that tried to eliminate this presumption, which was seen as an obstacle to the confiscation of unlawfully acquired assets. However, each time the CCR found the proposals to be unconstitutional on the grounds that they violated the limits of the revision of the Constitution.[10] Thus, by Decision No 85/1996[11], referring to the debates that accompanied the adoption of the 1991 Constitution, the CCR held that:

> The legal certainty of the right of property over the assets that make up a person's assets is [...] inextricably related to the presumption of lawful acquisition of assets. Therefore, the removal of this presumption has the significance of suppressing a constitutional guarantee of the right of property.

Likewise, by Decision No 148/2003[12] on the unconstitutionality of the wording proposed to be introduced in the Constitution, wording that exemplified the presumption in question was used, establishing that it does not apply 'to the assets acquired as a result of the capitalization of proceeds from criminal offences'. The Court noted that, from this wording, the aim is to overturn the burden of proof regarding the lawful nature of the assets, providing for the unlawful nature of the assets acquired through the capitalisation of the proceeds from criminal offences; this wording essentially aims at the same objective, namely the removal of the presumption on the lawful acquisition of assets.

10 See Article 152 of the Constitution.
11 Official Gazette of Romania, Part I, no. 211 of 6 September 1996.
12 Official Gazette of Romania, Part I, no. 317 of 16 April 2003.

Romania's accession to the EU in 2007 brought back into question the guarantee laid down in Article 44 (8) of the Romanian Constitution under the Council Framework Decision 2005/212/JHA of 24 February 2005 on the Confiscation of Crime-Related Proceeds, Instrumentalities, and Property.[13] The adoption of this Framework Decision was determined by the need for an instrument that considers the best practices in the MS with due respect for the principles of law and provides for the possibility of introducing into criminal, civil, or fiscal law, as the case may be, of a reduction in the burden of proof as regards the source of the assets owned:

> Each Member States shall take the necessary measures to enable it to confiscate, either wholly or in part, instrumentalities and proceeds from criminal offences punishable by deprivation of liberty form more than one year, or property the value of which corresponds to such proceeds.[14]

In relation to these obligations, a new revision of the Constitution, initiated in 2011 by the President of Romania at the proposal of the Government, once again regulated the removal of the presumption of lawful acquisition of assets. Consistent with the interpretation of the limits of revision of the Constitution,[15] the CCR determined the unconstitutionality of this proposal, holding that:

> in the absence of such a presumption, the owner of an asset would be subject to continuous insecurity since, whenever the unlawful acquisition of the respective asset would be invoked, the burden of proof would not be on the person making the claim, but on the owner of the asset.

However, Decision No 799/2011[16] marks a new approach of the CCR, which held that:

> the regulation of this presumption does not prevent the primary or delegated legislator, in applying the provisions of Article 148 of the Constitution - Integration into the European Union, to adopt regulations that allow full compliance with Union law in the fight against crime.

13 Published in the Official Journal of the European Union Law 68 of 15 March 2005, pp. 49–51.
14 See Article 3 of the said act, with the marginal title *Enhanced Confiscation Powers.*
15 See Article 152 of the Constitution of Romania.
16 Official Gazette no. 440 of 23 June 2011.

Even if it did so through an *obiter dictum* reason, the CCR expressly mentioned the Council Framework Decision 2005/212/JHA of 24 February 2005 on the Confiscation of Crime-Related Proceeds, Instrumentalities, and Property, thus integrating for the first time an EU act within the constitutional review of initiatives for the revision of the Romanian Constitution.

This decision by the CCR was decisive for the amendment of criminal law in accordance with EU law. One year after the pronouncement of the CCR, the measure of extended confiscation was introduced into Romanian legislation by Law. 63/2012, amending and supplementing the Criminal Code of Romania and Law 286/2009 on the Criminal Code, which transposes Council Framework Decision 2005/212/JHA of the European Union. Currently, the concept of extended confiscation is regulated by Article 112[1] of the Criminal Code, and mostly takes over the provisions of Article 118[2] of the 1969 Criminal Code. Investing in the constitutional review of the newly introduced provisions,[17] the CCR determined compliance with the measure of extended confiscation with the presumption of the lawful nature of the acquisition of assets enshrined in Article 44 (8) of the Constitution. This interpretation was made in the light of the 'living law',[18] applied equally by the European Court of Human Rights (ECtHR)[19] and also used by CCR in significant cases that shaped the limits of its competence.[20] According to the CCR, property rights are not absolute, because they may have certain limitations. Therefore, it cannot be claimed that a guarantee of this right has an absolute nature. This presumption does not reverse the burden of proof and the principle of *actori incumbit probatio* remains fully applicable. Beyond all reasoning, there is a shift in the interpretation of a constitutional presumption to identify a modus operandi within legal pluralism.

17 Decision no. 356/2014, Official Gazette no. 691 of 22 September 2014; Decision no. 11/2015, Official Gazette, no.102 of 9 February 2015.

18 See also Murphy, 2012; Nelken, 2008; Maziau, 2011; Ehrilch, 1936, cited in O'Day, 1966 stated that 'the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself'.

19 For example, the judgment of 7 July 1989 pronounced in the *Soering Case* against the United Kingdom: 'The Convention is a living instrument, which must be interpreted in the light of the current conditions'; The judgment of 29 April 2002 pronounced in the Case of *Pretty v. the United Kingdom*: 'The Court must take a dynamic and flexible approach to the interpretation of the Convention, which is a living instrument, any interpretation having to be consistent with its fundamental objectives and its coherence as a system of human rights protection'.

20 For example, in Decision No 766/2011, the CCR reinterpreted the phrase "in force" in Law No 47/1992 on organizing and functioning of the CCR in a manner likely to widen the access to the constitutional justice through the possibility of having the repealed rules subject to constitutional review, to the extent that they are applicable to the litigation in which the exception of unconstitutionality was raised.

3. Compatibility of the national legislation with relevant EU regulations: Applying the rules of legislative technique, in the light of legal certainty and rule of law

Although not exclusively related to criminal legislation, it is worth noting an important aspect to interpreting the principles enshrined in the Romanian Constitution, which is an approach that supports normative coherence at the intersection of national and supranational plans.

Therefore, taking as grounds the provisions of Articles 1 (3) and (5) of the Constitution which enshrine the principles of the rule of law and legality in conjunction with Article 20, which compels the interpretation of the constitutional provisions in line with international treaties in the field of human rights, Romania is party to and incorporates the case law of the ECtHR regarding the quality standards of the law; the CCR jurisprudentially advanced *the principle of legal certainty.*[21] The objective criteria for assessing the fulfilment of this principle were identified in Law 24/2000 on the rules of legislative techniques for the elaboration of normative acts.[22] The CCR held that, although the rules of legislative technique,

> do not have constitutional value, by regulating them the legislator imposed a series of mandatory criteria for the adoption of any normative act, the observance of which is necessary to ensure the systematization, unification and coordination of the legislation, as well as the content and the appropriate legal form for each normative act. Thus, the observance of these rules contributes to ensuring a legislation that complies with the principle of certainty of legal relationships, having the necessary clarity and predictability.[23]

According to Law 24/2000, any proposed legislative solution must consider the relevant regulations of the European Union to ensure compatibility (Article 22). In addition, any motivational instrument must include its impact on the legal system:

> the implications that the new regulation has on the legislation in force; compatibility with the relevant Community regulations, their exact determination and, where appropriate, future measures harmonization that is required; decisions of the Court of Justice of the European Union and other relevant documents for the transposition

21 For a comparative perspective, see Ficsor, 2018.
22 Official Gazette no. 260 of 21 April 2000.
23 Decision no. 681/2012, Official Gazette no. 477 of 12 July 2012).

> or implementation of the respective legal provisions; implications for domestic law, in case of ratification or approval of some treaties or international agreements, as well as the necessary adaptation measures; the legislative harmonisation concerns.[24]

The harnessing of these legal obligations within the constitutional review determines that the reception/transposition/coherence with EU Law is not only a specific obligation enforced by Article 148 of the Romanian Constitution (as it governs the relationships with EU Law), but also a requirement of the rule of law, enshrined in Article 1(3). From this perspective, the incidence of standards set forth by the rule-of-law mechanism is currently in operation within the EU. This mechanism places special emphasis on the legislative process and the quality of laws at the MS level.[25]

There are numerous relevant decisions regarding criminal matters in which the CCR has sanctioned the lack of quality of the regulations in relation to the requirements of the rule of law.[26] An example is related to the reception of the EU Act in the national order. Therefore, in underlining the obligations of the national legislature through the lens of the requirements of the rule of law and quality of the law, the CCR found that:

> the transposition of the European Directives into national law may lead to legislative inconsistencies in the situation where the national legislator carries out its powers in violation of the legislative technical norms that require, inter alia, making the necessary correlations.

Such a situation was sanctioned by the Court, for example, when it was referred to as a legislative mismatch determined by the transposition of Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences.[27] In that case, as a result of the redefinition in legislation of the concept of 'motor vehicle' and the express exclusion of 'agricultural and forestry tractors' from the category of motor vehicles in accordance with the provisions of the mentioned Directive, the act of driving an agricultural or forestry tractor on public roads, without having a driving licence, remained in Romanian legislation outside of any criminal sanction. Being referred with an exception of unconstitutionality,

24 Article 31(a).

25 *2023 Rule of Law Report* [Online] Available at: https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2023-rule-law-report_en?prefLang=ro (Accessed: 1 February 2024).

26 See, for example, Decision no 51/2016, Official Gazette no 190 of 14 March 2016, where the Court upheld the exception of unconstitutionality and found that the phrase "or other specialized organs of the state" from the provisions of Article 142 (1) of the Criminal Procedure Code is unconstitutional.

27 OJ UE L, no. 403 of 30 December 2006, subsequently amended and supplemented.

the CCR found that the legislative solution provided by Article 335(1) of the Criminal Code, which does not criminalise the act of driving an agricultural or forestry tractor on public roads without a driving licence, was unconstitutional.[28] To reach this solution, the CCR examined both the relevant internal legislation, the way in which it was amended, as well as Directive 2006/126/EC, concluding that they did not aim to decriminalise such an act, and this regulatory deficiency generates a state of unconstitutionality in relation to Article 1 paragraphs (3) and (5) of the Constitution. The resonance of the CCR raises an aspect of criminal policy that we will approach separately.

4. The architecture of the national criminal policy and its articulation with the EU criminal policy

In light of the example mentioned, legislative correlation can be examined in terms of harmoniously integrating EU regulations into national legislation and establishing criminalisation norms (criminal policy).

Therefore, regarding 'accidental' decriminalisation, as a result of the transposition of the Directive mentioned above, the CCR reminded that: 'the legislator cannot carry out the power to incriminate and decriminalize some anti-social acts except in compliance with the norms and principles enshrined in the Constitution' and that 'the legislator cannot can proceed to remove the criminal legal protection of values with constitutional status'. These engage the scope of criminal policy, understood as a set of political choices made by the State to determine, guide and implement the 'power to punish', over which it has monopoly.[29] Therefore, a field that seemed to be the monopoly of the legislator gradually became shared with the constitutional courts, in the context of the general evolution of these courts from the status of 'negative legislator' to that of quasi-positive one. Joining these trends,[30] the CCR has stated in numerous decisions that, although it does not have the power to undertake itself the criminal policy of the State,[31] it has the power 'to censor the legislator's option if it violates the principles and constitutional

28 Decision No 224/2017, Official Gazette no. 427 of 9 June 2017.

29 Fortis, 2012, p. 707.

30 Other constitutional courts have also undertaken the role of control/interpreter of criminal policy; for example, the doctrine mentions the French Constitutional Council, which issued "genuine criminal policy directives addressed to the judicial authority" within the constitutional review of some laws in 2004, see Lazerges, 2004, as cited by Fortis, 2012.

31 Decision no. 650/2018, cited above.

requirements'.[32] Thus, according to the CCR, 'the Court's intervention is legitimate only to the extent that the State's ability to fight against the criminal phenomenon is affected or when fundamental rights and freedoms are not respected'.[33]

In this regard, the most spectacular developments regarding the constitutional review of criminal norms concern the configuration of the legislator's discretion on the incrimination/decriminalisation of certain facts,[34] regarding which the CCR emphasised that:

> it is not and it cannot be absolute. Thus, [the legislator] must, by its option, on the one hand, bring a proportional infringement on the individual freedom of the criminal, taking into account the social relationships disregarded by him, and, on the other hand, to protect public order and safety, as well as the rights and the fundamental freedoms of the other persons, taking account of the dangerousness of the criminal. Therefore, the State's criminal policy must be designed in such a way as to strike a fair balance competing interests; such a balance is a guarantee associated with the rule of law.[35]

Defining the discretion of the legislator's appreciation, the CCR issued both decisions by which it found the criminalisation rules unconstitutional and decisions by which it found the rules of decriminalisation or relaxation of the sanctioning treatment unconstitutional, sometimes referring to its analysis of EU policies or the case law of the CJEU on the matter.

Therefore, as far as the first category of decisions is concerned, an interesting development, which also capitalises on EU law, is the enshrinement of the *ultima ratio* principle. The significance of the mentioned principle was explained by a series of decisions, the first of which was pronounced regarding the rules for criminalising the abuse of office (including the abuse of office against the interests of individuals, criminalised in the Criminal Code of 1969).[36] By this decision, the Court upheld the exception of unconstitutionality and found that the provisions of Article 246 of the Criminal Code of 1969 and of Article 297 (1) of the Criminal Code are constitutional in so far as the phrase 'carries out in a defective manner'

32 In this regard, see Decision No 824/2015, Official Gazette, Part I, no. 122 of 17 February 2016, Decision no. 62 of 18 January 2007, published in the Official Gazette, Part I, no. 104 of 12 February 2007, or Decision no. 363 of 7 May 2015, published in the Official Gazette, Part I, no. 495 of 6 July 2015, Decision No 392 of 6 June 2017, published in the Official Gazette, Part I, no. 504 of 30 June 2017).

33 Decision No 650/2018, cited above.

34 See, for details, Forms and Limits of Judicial Deference: The Case of Constitutional Courts, Available at: https://cecc.constcourt.md/pages/congress/en/national-reports.html.

35 Decision No 650/2018, cited above.

36 Decision No 405/2016, Official Gazette, Part I, no. 517 of 8 July 2016.

in their content means 'carries out in violation of the law'.[37] Given that, in the basic version, both the crime of abuse of office and the crime of negligence in office provide, as an identical normative method, the '*defective carrying out*' of an official duty, the Court found that both the solution and the recitals of the mentioned decisions regarding the way of interpreting the phrase '*carries out in a defective manner*' are applicable *mutatis mutandis* with regard to the crime of negligence in office.[38] Later, ruling in an *a priori* review over the amended to bring it in line with the decisions of the CCR, the Court found that the legislator did not achieve this compliance, noting that:

> in the application of Decision No 405 of 15 June 2016 the legislator should have been mainly concerned with defining the intensity of the injury, with reference to the rights or legitimate interests of a natural or legal person, and not with establishing a derisory value threshold in itself, which, in fact, does not settle the issue of the *ultima ratio* nature of the criminal sanction. Practically, through the regulation of the analysed text, the same issue will persist regarding the difficulty of delimiting the various forms of liability, compared to the criminal one[39].

To define the *ultima ratio* principle (and the involvement in this way in the criminal policy of the Romanian State), the CCR also made the argument of the criminal policy of the EU, in that:

> in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions towards an EU Criminal Policy: ensuring the effective implementation of EU policies through criminal law, COM/2011/0573, at point 2.2.1 - Necessity and Proportionality - Criminal law as a means of last resort (ultima ratio) - it is specified that 'criminal investigations and sanctions may have a significant impact on citizens' rights and include a stigmatizing effect. Therefore, criminal law must always remain a measure of last resort. Therefore, the legislator needs to analyse whether measures other than criminal law measures, e.g. sanction regimes of administrative or civil nature,

37 Decision No 392/2017, Official Gazette no. 504 of 30 June 2017.
38 Decision No 518/2017, Official Gazette no. 765 of 26 September 2017.
39 Decision No 650/2018, cited above.

> could not sufficiently ensure the policy implementation and whether criminal law could address the problems more effectively.[40]

Moreover, it is not the first or only decision in which the CCR refers to the EU policy in criminal matters. Similarly, in Decision 356/2014[41] or Decision 11/2015,[42] the CCR referred to the recitals of the decision on the EU policies in the matter, quoting the Communication of the Commission to the European Parliament and the Council, COM (2008) 766 final, aiming at the need for tools to discourage organised crime activities, such as the confiscation and recovery of assets held by offenders.

More recently, examining in the *a priori* review the law amending Article 369 of Law No 286/2009 regarding the Criminal Code, regarding the crime of incitement to violence, hatred or discrimination,[43] the Court found their unconstitutionality, holding, *inter alia*, that the obligation to legislate respecting the requirements of necessity and proportionality of the criminal measures that the law requires, in the light of the *ultima ratio* principle, is not fulfilled, nor the constitutional requirements regarding the quality of the law. Referring to the criteria that can constitute grounds for the existence of the offence, the CCR invoked Article 1, titled 'Offences concerning racism and xenophobia', from Council Framework Decision 2008/913/JHI of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law. Similarly, the CCR resumed the reference to the Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions towards a policy of the European Union in criminal matters: ensuring the effective implementation of European Union policies through criminal law, COM(2011) 0573, at point 2.2.1 – Necessity and proportionality – criminal law as a measure of last resort (*ultima ratio*), also invoked in the previous decisions.

In another case, in which it examined the exception of unconstitutionality of the provisions of Article 22 (1) (c) in conjunction with those of Article 21 (1) (a) of Law No 211/2004 on some measures to ensure the information, support, and protection of victims of crimes,44 the CCR held, inter alia, that:

> at the EU level, the concern to ensure the protection of victims in a common area of freedom, security and justice is reflected in the Communication from the Commission 'Victims of crime in the European Union - reflections on standards and action' (14 July 1999),

40 Decision 392/2017, paragraph 44, See also Decision No 858/2017 regarding the exception of unconstitutionality of the provisions of Article 297 (1) of the Criminal Code, Official Gazette no. 340 of 18 April 2018.
41 Official Gazette no. 691 of 22 September 2014.
42 Official Gazette no. 102 of 9 February 2015.
43 Decision no. 561/2021, Official Gazette no. 1076 of 10 November 2021.
44 Decision No 312/2022, Official Gazette no. 940 of 26 September 2022.

> in the Council Framework Decision on the standing of victims in criminal proceedings (15 March 2001) and in the Green Paper 'Compensation of victims of crime' of the European Commission (28 September 2001).

Even if the CCR does not clearly state the 'weight' of the European policy documents in the formation of its conviction regarding the unconstitutionality of the aforementioned regulations, their use in the structure in the recitals can support the idea of 'pleading' or 'orientation' of the legislator towards the articulation of national criminal policies with European ones.

5. European law within constitutional review in Romania: The theory of 'interposed norms' and the use of EU law in the constitutional review of criminal legislation

■ *5.1. General characterisation*

Whereas we referred, in the previous sections, to the development of the criminal legislation as a whole, in terms of the constitutional foundation and the requirements of the rule of law, we will further provide some specific examples of 'sanctioning' as unconstitutional the criminal rules adopted in violation of the EU legislation in the same field.

Remarkable is the legal mechanism through which the CCR introduced EU law into the constitutional review, by establishing the so-called doctrine of 'interposed norms'. Therefore, by Decision No 668/2011[45], the CCR ruled upon 'the use of a rule of European law within the constitutional review as a rule interposed to the reference rule' stating that it:

> implies, pursuant to Article 148 (2) and (4) of the Romanian Constitution, a cumulative conditionality: on the one hand, this rule must be sufficiently clear, precise and unequivocal by itself or its meaning has been established clearly, precisely and unequivocally by the Court of Justice of the European Union and, on the other hand, the rule must be subject to a certain level of constitutional relevance, so that its normative content supports the possible violation by the national law of the Constitution - the only direct rule of reference within the constitutional review. In such a hypothesis, the approach of the Constitutional Court is distinct from the simple application and interpretation of the law, a power that belongs to the courts and

45 Official Gazette no. 487 of 8 July 2011.

> administrative authorities, or from any issues related to the legislative policy promoted by the Parliament or the Government, as the case may be.

The Court further stated that:

> through the stated cumulative conditionality, it falls within the discretion of the Constitutional Court to enforce within the constitutional review the judgments of the Court of Justice of the European Union or to formulate preliminary questions by itself in order to establish the content of the European rule. Such an attitude is related to the cooperation between the national and the European constitutional court, as well as to the judicial dialogue between them, without bringing into the account the aspects related to the establishment of hierarchies between these courts.

This 'doctrine' reconciles the viewpoint of the CCR regarding the primacy of the Constitution and Romania's obligations as an EU MS, which also the Constitution itself (Article 148 – *Integration into the European Union*) establishes.

However, by examining CCR jurisprudence, we believe that there is currently no clear methodology for using the doctrine of interposed norms. Often, the Constitutional Court simply refers to European regulations in their reasoning without explicitly stating that it is using them within the framework of the interposed norm doctrine. Nevertheless, these references are helpful in demonstrating a common approach at the EU level to the regulatory areas being analysed. This approach should not be viewed as controlling internal legislation compared to EU norms. According to the theory of interposed norms, the Constitution is the only direct rule of reference in constitutional reviews. To illustrate this approach, we briefly present below some examples of important decisions in which the Constitutional Court referred to EU law.

■ *5.2. The reference to EU law in the constitutional review of criminal and criminal procedural rules*

5.2.1. The constitutional relevance of Directive 2012/13/EU of the European Parliament and of the Council

The Court found the unconstitutionality of the legislative solution according to which access/refusal of access to essential information for the settlement of the criminal case is ordered by an administrative authority and the refusal cannot be subject to judicial review[46], mentioning, in its reasoning, also the Directive

46 Decision No 21/2018, Official Gazette no. 175 of 23 February 2018.

2012/13/EU of the European Parliament and of the Council, on the right to information in criminal proceedings.[47]

Thus, the CCR was requested to rule in cases with the exception of the unconstitutionality of Articles 352 (11) and (12) of the Criminal Procedure Code, according to which:

> (11) If the classified information is essential for the settlement of the case, the court urgently requests, as the case may be, the total declassification, partial declassification or the transition to another level of classification or allowing access to the classified information by the defendant's counsel.
> (12) If the issuing authority does not allow the defendant's counsel access to the classified information, it cannot be used in order to issue a decision to convict, to waive the application of the punishment or to postpone the application of the punishment in question.

First, the Court proceeded to examine the '*normative and jurisprudential context, national and European, on the right to information in the criminal proceedings*', in which sense it consistently referred to Directive 2012/13/EU of the European Parliament and of the Council (Article 6 – Right to information about the accusation, paragraph 28 of the preamble of the Directive, regarding the State's obligation to provide information about the accusation, Article 7 – Right of access to the materials of the case, Article 10 – Maintaining the level of protection).

As for the examined context, including the provisions of the cited Directive, the CCR held that such a legislative solution, which constrains the use of classified information, qualified by the judge as essential for the settlement of the criminal trial and regarding which it assesses the incidence of the defendant's right to information; the judge qualifies as evidence in the case file, with the permission of the issuing administrative public authority to access them:

> is likely to impede the judicial bodies from fulfilling their obligation laid down in Article 5 (1) of the Code of Criminal Procedure, that of 'ensuring the finding of the truth about the facts and circumstances of the case, based on evidence, and about the person of the suspect or defendant'. Moreover, the provisions of Article 352 (11) and (12) of the Code of Criminal Procedure also impair the legal effects of the provisions of Article 1 (2) of the Code, according to which 'The criminal procedure rules are intended to provide effective exercise of the judicial bodies' responsibilities and guarantee the rights of

47 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.

> the parties and the other participants in the criminal proceedings so as to comply with the Constitution, the European Union constitutive Treaties, the other European Union regulations in criminal procedure matters and of the pacts and agreements on fundamental human rights that Romania is a party to. (para. 62)

Similarly, the CCR held that access to certain information/materials/documents may be refused if such access may lead to a serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest, such as in cases where access could prejudice an ongoing investigation or seriously harm the national security, mentioning that:

> for this hypothesis, Directive 2012/13/EU on the right to information in criminal proceedings provided in Article 7 (4), a provision that has not yet been transposed into national legislation, that »Member States shall ensure that, in accordance with procedures in national law, a decision to refuse access to certain materials in accordance with this paragraph is taken by a judicial authority or is at least subject to judicial review«.

As a conclusion, the CCR considered that

> the impugned legislative solution provides the opposite of what is stipulated in European law, to the effect that access/refusal of access to essential information for the settlement of the criminal case is ordered by an administrative authority, and the refusal cannot be subject to judicial review. (para. 65)

The CCR also invoked in this regard also the case law of the CJEU, namely the obligation of conforming interpretation, noting that it:

> requires that national courts do everything within their powers, taking into consideration the national law as a whole and applying the methods of interpretation recognized by it in order to guarantee the full effectiveness of the directive in question and to identify a solution in accordance with the purpose pursued by it.(para. 72)[48]

48 See the Decision of the Grand Chamber of 24 January 2012, pronounced in Case C-282/10, *Maribel Dominguez v. Center informatique du Center Ouest Atlantique and Prefet de la Region Centre*, paragraph 27.

Having examined the structure of the CCR decision recitals, this represents a clear application of the doctrine of interposed norms in the sense of assigning constitutional relevance to Directive 2012/13/EU of the European Parliament and Council. The mentioned European act is integrated into the constitutional review through the established reference and specific relevance given to both the preamble and the express provisions of the Directive, to substantiate the unconstitutional solution of the phrase 'the court shall request' in connection to the phrase 'allowing access to that classified level by the defendant's counsel' contained in Article 352 (11) of the Criminal Procedure Code, as well as of the phrase 'issuing authority' contained in Article 352 (12) of the Criminal Procedure Code.

With reference to the effects of the CCR decisions laid down in Article 147 of the Constitution, bringing the impugned rules in line with the provisions of the Constitution implicitly means an agreement with the meaning of the regulation and protection of fundamental rights in the criminal proceedings imposed by it. Thos idea follows explicitly from the subsequent decision[49] CCR found in an *a priori* review the constitutionality of the provisions that gave effect to the solution of unconstitutionality, noting that the legislative solution:

> is in accordance with the provisions of Decision No 21 of 18 January 2018 and also transposes into national law the provisions of Article 7 (4) of Directive 2012/13/EU of the European Parliament and the Council of 22 May 2012 on the right to information in criminal proceedings, published in the Official Journal of the European Union, series L, no. 142 of 1 June 2012.

The same Directive mentioned above[50] was integrated into the constitutional review of Article 386 (1) of the Criminal Procedure Code, according to which:

> When during the court proceedings, it deems that the legal charges for the crime in the bill of indictment are about to be changed, the court is under an obligation to discuss the new legal charges and to draw the defendant's attention that he has the right to ask for the case to be adjourned for later during the same court session or to be postponed, to prepare his defence.

This case did not raise the issue of unconstitutionality *per se* of the impugned text, but one of the unconstitutionalities that resulted from its interpretation by the court of law. Likewise, this case is about the development (which can be

49 Later, by Decision No 284/2023, Official Gazette no. 490 of 6 June 2023.

50 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.

addressed in the activism key) of the powers of the CCR, which also undertook the sanctioning of the unconstitutional interpretations when they resulted from an established practice of the courts of law. The CCR justifies its power to intervene in such situations by stating:

> the diversion of the legal regulations from their legitimate purpose, through a systematic interpretation and their inaccurate application by the courts of law or by the other subjects called to apply the provisions of the law, may lead to the unconstitutionality of that regulation. In this case, the Constitutional Court is entrusted with the removal of the flows of unconstitutionality thus established and ensuring respect for the rights and freedoms of individuals, as well as the primacy of the Constitution, being crucial is such situations (para.48)[51].

The CCR considered the grounds of unconstitutionality formulated by the author and the answers formulated by the courts of law, which the CCR required to communicate the jurisprudential orientation regarding the procedural moment and the type of decision interlocutory order/sentence/criminal judgment by which the court ordered the change of the legal charges for the crime in the bill of indictment. Based on these findings, the CCR noted that, as a rule, regarding the change of the legal charges for the crime in the bill of indictment, the court of law shall adjudicate at the end of the trial, by judgment, sentence, or decision, depending on the procedural stage and respecting the obligations to discuss the new legal charges with the parties and to inform the defendant that he has the right to ask for the case to be adjourned later during the same court session or to be postponed to prepare his defence. With regard to this practice, the Court held that, according to Directive 2012/13/EU of the European Parliament and Council, on the right to information in criminal proceedings, where, in the course of the criminal proceedings, the details of the accusation change to the extent that the position of suspects or accused persons is substantially affected, which should be communicated to them where necessary to safeguard the fairness of the proceedings and in due time to allow for an effective exercise of the right of defence (paragraph 29). At the same time, Article 6 (4) of the same Directive establishes that: 'Member States shall ensure that suspects or accused persons are informed promptly of any changes in the information given in accordance with this Article [A/N information on accusation], where this is necessary to safeguard the fairness of the proceedings'.

51 In this regard, Decision No 448/2013, Official Gazette no. 5 of 7 January 2014, and Decision No 336/ 2015, Official Gazette no. 342 of 19 May 2015, paragraph 30.

As a reasoning structure of the CCR's decision, it is worth noting also the acceptance of the mentioned Directive in conjunction with the Convention for the Protection of Fundamental Rights and Freedoms, the CCR noting that

> in the application of the guarantee regulated in Article 6 (3) a) of the Convention, specific to a fair trial, in criminal matters, the European Parliament and the Council of the European Union issued Directive 2012/13/EU on the right to information in criminal proceedings.

Under these conditions and also referring to the rich case law of the ECtHR, the Court found that only by ordering the change of the legal charges for the crime by a judgment that does not settle the merits of the case after allowing the parties to express their opinion on the new legal charges, but prior to the settlement of the case, ensures the fairness of the proceedings and the possibility of continuing to exercise an effective defence, where it is only in relation to a definitively established legal classification, during the criminal proceedings, and not at the end of it, that the defendant can provide an actual defence. As a result, to ensure the fairness of the proceedings and to effectively exercise the right to defence, the only interpretation that ensures the impugned text – Article 386 (1) of the Code of Criminal Procedure – compliance with the provisions of the Constitution and the Convention for the Protection of Human Rights and Fundamental Freedoms is the one that requires that the change in the legal charges for the crime in the bill of indictment be carried out by the court of law through a judgment that does not settle the merits of the case after allowing the parties to express their opinion on the new legal charges, but prior to the settlement of the case.[52]

5.2.2. The constitutional relevance of Directive 2012/29/EU of the European Parliament and of the Council

The Court found the constitutional relevance of the 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[53] by Decision No 633/2018,[54] issued in *a priori* review of the provisions of Article I point 41 of the law amending and supplementing Law 135/2010 regarding the Code of Criminal Procedure, as well as amending and supplementing Law 304/2004 on judicial organisation, according to which

52 Decision No. 250/2019, Official Gazette no. 500 of 20 June 2019.
53 Published in the Official Journal of the European Union, No. 315 of 14 November 2012.
54 Official Gazette No.1020 of 29 November 2018.

> In Article 83, after letter b) a new letter is inserted, letter b[1]), with the following wording: b[1]) the right to be notified of the date and time of the criminal prosecution act or of the hearing conducted by the Judge of Rights and Freedoms. Notification shall be made by telephone, fax, e-mail or other similar means, concluding a protocol in this regard. Its absence shall not prevent the performance of the act.

The CCR considered that the legislative solution indicated by the legislator ignored the provisions of Directive 2012/29/EU of the European Parliament and the Council of 25 October 2012 whose transposition into national law shall be mandatory, according to Article 148 of the Constitution.

According to the CCR, the Directive establishes the obligation for Member States to regulate criminal procedures to '*avoid contact between the victim and its family members, on the one hand, and the offender, on the other hand*'. Regarding the enforcement of this provision, the European regulation exemplifies the most frequent situation that may be encountered in practice and provides the solution in compliance with the proposed goal, namely 'summoning the victim and the offender at hearings at different times'.

The CCR further cited paragraphs 53 and 57 of the preamble of the Directive, and, in applying the principles stated in the preamble, the provisions of Article 18, entitled Right to protection, stipulating that:

> Without prejudice to the rights of the defence, Member States shall ensure that measures are available to protect victims and their family members from secondary and repeat victimisation, from intimidation and from retaliation, including against the risk of emotional or psychological harm, and to protect the dignity of victims during questioning and when testifying. When necessary, such measures shall also include procedures established under national law for the physical protection of victims and their family members.

The CCR considered that, by enshrining the right to protection, the European legislator established a presumption of the victim's state of vulnerability, the result of post-traumatic stress, of the relationship of dependence, subordination, or even fear related to the power, control, or threat exercised by the offender or result of other causes, including self-blame (even in the absence of any contribution to what happened to him/her). The victim sometimes cannot even be aware of his/her status as a victim, he/she does not have the ability to understand the objective content of his/her rights and their practical effect, nor the concrete procedural steps that must be taken or their role, he/she cannot detect the reasons for fear in the affective complex in which they For this reason, the obligation to assess the risk of secondary victimisation rests with the state bodies and, first of all,

with the legislator, who must adopt appropriate measures, including 'procedures established under national law for the physical protection of victims and their family members'. In this regard, the provisions of Article 19 are titled *Right to avoid contact between victim and offender.*

Under these conditions, '*taking account of the provisions of European law contained in the Directive, which Romania must transpose and enforce*'; the Court found that the legislator not only ignored these, but regulated on the contrary, granting an additional procedural right to the defendant, to the extent that his right to defence shall be ensured by the provisions of Article 92 (1) of the Code of Criminal Procedure, in force, which establishes the right of the suspect's or defendant's counsel to assist in carrying out any act of criminal prosecution. Granting this right to the defendant, the legislator ignores the effects of his presence during the performance of any act of criminal prosecution, including hearings, on the criminal investigation. Therefore, his presence, for example, at the hearing of witnesses or injured persons, may have an intimidating nature, such that they are restrained in their statements and do not declare everything they know about the crime under investigation, destabilising the fairness of the criminal proceedings.

Pursuing the same line of case law and with reference to the same constitutional and legal framework of the EU, the CCR also issued Decision 121 of 2 March 2021,[55] by which it rejected, as unfounded, the exception of unconstitutionality, and found that the provisions of Article 83 read in conjunction with Article 81 (1) g) of the Criminal Procedure Code, of Article 306 read in conjunction with Article 81 (1) f) of the Criminal Procedure Code, as well as of Article 346 (3) in conjunction with Article 342, which is in turn related to Article 8 of the Code of Criminal Procedure are constitutional in relation to the criticisms formulated.

Likewise, in Decision 108/2022, the Court found that the previously mentioned grounds are also applicable mutatis mutandis to the suspect's or defendant's counsel, who has the right to witness the performance of any criminal investigation act, except for those provided by criminal procedural law. In this regard, the Court notes that, having the right to participate in the hearing of any person by the Judge for Rights and Liberties, to formulate complaints, requests, and memoranda (Article 92 (4) of the Code of Criminal Procedure), the suspect's or defendant's counsel may request to be informed of the date and time when a criminal investigation act is performed or of the hearing conducted by the Judge for Rights and Liberties, benefiting, at the same time, from the time and facilities necessary for the preparation and implementation of an effective defence (Article 92 (8) of the Code of Criminal Procedure). The court noted that this was the first criminal investigation stage.

55 Official Gazette No. 715 of 20 July 2021.

5.2.3. The constitutional relevance of Directive (EU) 2016/343 of the European Parliament and of the Council

The Court found the unconstitutionality of the legislative solution which does not regulate the witness's right to silence and non-self-incrimination,[56] also taking into account the constitutional relevance of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

Thus, invested with the settlement of the exception of unconstitutionality of several provisions, including Article 118 of the Criminal Procedure Code, according to which

> *A witness statement given by a person who had the capacity as suspect or defendant before such testimony or subsequently acquired the capacity of suspect or defendant in the same case, may not be used against them. At the moment when they record the statement, judicial bodies are under an obligation to mention their previous capacity,*

the CCR applied not only the provisions of the Convention and ECtHR case law regarding the right against self-incrimination and the right of the 'accused' to silence, but also Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

Specifying, as in other cases, the European context of analysis, the CCR cited the provisions regulating the right to silence and non-self-incrimination included in Article 7 (1) and (2) of the Directive, the preamble of the Directive, regarding its applicability 'to natural persons who are suspects or accused persons in criminal proceedings' and 'at all stages of the criminal proceedings until the decision on the final determination of whether the suspect or accused person has committed the criminal offence has become definitive', its provisions regarding the obligation of the States to inform suspects or accused persons, as well as the specification contained in point 45 of the preamble of Directive (EU) 2016/343, in the sense that the Directive:

> establishes minimum rules, Member States should be able to extend the rights laid down in this Directive in order to provide a higher level of protection. The level of protection provided for by Member States should never fall below the standards provided for by the Charter or by the ECHR, as interpreted by the Court of Justice and by the European Court of Human Rights.

56 Decision No. 236 of 2 June 2020.

The CCR stated that this goal, reiterated in the preamble of numerous directives,

> results from the need to create minimum standards for the protection of human rights and the development of a common system of fundamental rights and freedoms, through the regulation at European level of a system of protection of human rights, an integral part of the general principles of European law – ius communae.

As a result of the analysis, the CCR found that, at the European level, both suspects/accused persons of committing acts provided for by criminal law (*de jure* suspects) and witnesses (*de facto* suspects; persons suspected prior to an official notification, who later acquire the quality of *de jure* suspect) benefit from identical protection in terms of the right to silence and non-self-incrimination. Finding that, regarding the witness 'Article 118 of the Code of Criminal Procedure does not allow the application of the right to non-self-incrimination similar to the suspect or defendant', the CCR upheld the exception of unconstitutionality and found that the legislative solution contained in Article 118 of the Code of Criminal Procedure, which does not regulate the witness's right to silence and non-self-incrimination, was unconstitutional.

This decision constitutes a jurisprudential upturn, grounded by the CCR by referring to the same doctrine of 'living law'. Similarly, this decision illustrates the way in which national courts may directly enforce the constitution in the case of a legislative vacuum, a possibility that constitutes, in itself, a strong guarantee of fundamental rights and freedoms. In this regard, the CCR held that:

> until the adoption of the appropriate legislative solution, as a consequence of the present decision to uphold the exception of unconstitutionality (...) in order to ensure the witness's right to silence and non-self-incrimination, the judicial bodies should directly enforce the provisions of Article 21 (3), Article 24 (1) and Article 23 (11) of the Constitution. (para. 84)[57]

In another case, called to decide whether, in the event of not concluding the plea bargain or its rejection by a final court judgment, the statement given by the defendant, according to Article 482 g) of the Code of Criminal Procedure to conclude the plea bargain, it can be used in the common law criminal proceedings

57 Regarding the direct application of the Constitution, see Decision No 486/1997, Official Gazette no. 105 of 6 March 1998, Decision No 186/1999, Official Gazette no. 213 of 16 May 2000, Decision No 774/ 2015, Official Gazette no. 8 of 6 January 2016, Decision No 895/2015, Official Gazette no. 84 of 4 February 2016, Decision No 24/2016, Official Gazette no. 276 of 12 April 2016, par.34, Decision No 794/2016, Official Gazette no. 1.029 of 21 December 2016, par. 37, Decision No 321/2017, published in the Official Gazette

by which the criminal case will be settled, the CCR decided that such use would be unconstitutional.

The CCR analysed the right to silence, finding, also with reference to the case law of the ECtHR, that it is a procedural right, limited to the criminal procedural guarantees established by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (see the Constitutional Court Decision 236 of 2 June 2020, paragraph 46). In this context, the CCR invoked the preamble of Directive (EU) 2016/343 (points 12, 24, 25, 27, 31 and 48), emphasising again the reason according to which:

> the analysed Directive establishes minimum rules, Member States should be able to extend the rights laid down therein in order to provide a higher level of protection; it is also stipulated that the level of protection provided for by Member States should never fall below the standards provided for by the Charter of Fundamental Rights of the European Union or the Convention, as interpreted by the Court of Justice of the European Union and the European Court of Human Rights. (para. 49)

Noting that the initiation of the plea bargain, followed by the non-conclusion of this bargain or its rejection through final court judgment, has the consequence of returning the defendant to the procedural situation prior to the initiation of the special proceedings under consideration, conditions in which he/she benefits from all the specific guarantees of the right to defence and of the presumption of innocence, the CCR considered that:

> taking into account the requirements of the right to silence and non-self-incrimination, analysed above, (...) the administration, as evidence, contrary to the will of the defendant, in ordinary criminal proceedings, of the statement given by her/him under Article 482 (g) of the Code of Criminal Procedure, in case of non-conclusion or rejection of the plea bargain, it is tantamount not only to a violation of the right to defence, but also to a violation of the presumption of innocence, regulated in Article 23 (11) of the Constitution. (para. 51)[58]

5.2.4. The constitutional relevance of the Directive (EU) 2016/800 of the European Parliament and of the Council

The Court found the unconstitutionality of the provisions of art. 505 paragraph (2) of The Code of Criminal Procedure, as well as the phrase 'who has not reached the age of 16' contained in art. 505 paragraph (1) of the Code of Procedure. In the

58 Decision No 490/2022, Official Gazette no. 1240 of 22 December 2022.

context, the Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings[59] was also taken into account.

Through this decision,[60] the CCR has eliminated the discrimination present in the Code of Criminal Procedure regarding juvenile offenders based on their age. Previously, it was mandatory to summon the parents, guardian, or person responsible for the minor, as well as the social assistance and child protection authorities, for any legal proceedings involving a minor under the age of 16. However, for minors aged 16 and above, summoning these individuals was only required if deemed necessary by the investigating authorities. The Court ruled that this differentiated regulation for minors aged 16 and above is not justified, especially as all minors between the ages of 14 and 18 are subject to educational measures according to the Criminal Code. The Court found this discrimination to be unconstitutional, granting minors access to the same legal protections regardless of their age. The CCR referenced Directive (EU) 2016/800 of the Council of the European Union, which focuses on procedural guarantees for children involved in criminal proceedings. The directive aims to establish minimum standards to ensure that all children under the age of 18 suspected or accused in criminal cases can understand the procedures and exercise their right to a fair trial. The CCR highlighted that new complementary guarantees have been put in place to address the specific needs and vulnerabilities of children. These guarantees include providing information to both children and their parents or guardians. The directive also ensures that a child's parent or guardian is informed as soon as possible about the information the child is entitled to receive.

Additionally, the directive grants children the right to be accompanied by their parent or guardian during various stages of the procedure, excluding court hearings. It also allows children to have the support of their parent or guardian during other stages of the procedure, such as police questioning.

5.2.5. The constitutional relevance of the Directive (EU) 2016/800 of the European Parliament and of the Council

The unconstitutionality of the provisions of art. 505 paragraph (2) of The Code of Criminal Procedure, as well as the phrase 'who has not reached the age of 16' contained in art. 505 paragraph (1) of the Code of Procedure. The constitutional relevance of the Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings[61] is examined in the following.

59 Official Journal nr. L132 of 21 May 2016.
60 Decision No.102/2018, Official Gazette no. 400 of 10 May 2018.
61 Official Journal nr. L132 of 21 May 2016.

Through this decision,[62] the CCR has eliminated the discrimination present in the Code of Criminal Procedure regarding juvenile offenders based on their age. Previously, it was mandatory to summon the parents, guardian, or person responsible for the minor, as well as the social assistance and child protection authorities, for any legal proceedings involving a minor under the age of 16. However, for minors aged 16 and above, summoning these individuals was only required if deemed necessary by the investigating authorities. The Court ruled that this differentiated regulation for minors aged 16 and above is not justified, especially as all minors between the ages of 14 and 18 are subject to educational measures according to the Criminal Code. The Court found this discrimination to be unconstitutional, granting minors access to the same legal protections regardless of their age. The CCR referenced Directive (EU) 2016/800 of the Council of the European Union, which focuses on procedural guarantees for children involved in criminal proceedings. The directive aims to establish minimum standards to ensure that all children under the age of 18 suspected or accused in criminal cases can understand the procedures and exercise their right to a fair trial. The CCR highlighted that new complementary guarantees have been put in place to address the specific needs and vulnerabilities of children. These guarantees include providing information to both children and their parents or guardians. The directive also ensures that a child's parent or guardian is informed as soon as possible about the information the child is entitled to receive.

Additionally, the directive grants children the right to be accompanied by their parent or guardian during various stages of the procedure, excluding court hearings. It also allows children to have the support of their parent or guardian during other stages of the procedure, such as police questioning.

5.2.6. The constitutional relevance of Directive (EU) 2016/343 of the European Parliament and of the Council

The constitutionality of the provisions of the Code of Criminal Procedure to the extent that the statement given by the defendant in order to conclude the plea bargain cannot be used, against the will of the defendant, as evidence in the criminal trial, aimed at settling the case according to the common law criminal proceedings. The constitutional relevance of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings is examined in the following.

Called to decide whether, in the event of not concluding the plea bargain or its rejection by a final court judgment, the statement given by the defendant, according to Article 482 g) of the Code of Criminal Procedure to conclude the plea bargain, it can be used in the common law criminal proceedings by which

62 Decision No.102/2018, Official Gazette no..400 of 10 May 2018.

the criminal case will be settled, the CCR decided that such use would be unconstitutional.

The CCR analysed the right to silence, finding, also with reference to the case law of the ECtHR, that it is a procedural right, limited to the criminal procedural guarantees established by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (see the Constitutional Court Decision 236 of 2 June 2020, paragraph 46). In this context, the CCR invoked the preamble of Directive (EU) 2016/343 (points 12, 24, 25, 27, 31 and 48), emphasising again the reason according to which:

> the analysed Directive establishes minimum rules, Member States should be able to extend the rights laid down therein in order to provide a higher level of protection; it is also stipulated that the level of protection provided for by Member States should never fall below the standards provided for by the Charter of Fundamental Rights of the European Union or the Convention, as interpreted by the Court of Justice of the European Union and the European Court of Human Rights. (para. 49)

Noting that the initiation of the plea bargain, followed by the non-conclusion of this bargain or its rejection through final court judgment, has the consequence of returning the defendant to the procedural situation prior to the initiation of the special proceedings under consideration, conditions in which he/she benefits from all the specific guarantees of the right to defence and of the presumption of innocence, the CCR considered that:

> taking into account the requirements of the right to silence and non-self-incrimination, analysed above, (...) the administration, as evidence, contrary to the will of the defendant, in ordinary criminal proceedings, of the statement given by her/him under Article 482 (g) of the Code of Criminal Procedure, in case of non-conclusion or rejection of the plea bargain, it is tantamount not only to a violation of the right to defence, but also to a violation of the presumption of innocence, regulated in Article 23 (11) of the Constitution. (para. 51)[63]

6. Conclusions

While this study may not cover all aspects of CCR's impact on the development of European criminal law, it serves as a starting point for comparative legal research

63 Decision No 490/2022, Official Gazette no. 1240 of 22 December 2022.

on the role of European constitutional courts in shaping European criminal law. The degree to which constitutional courts use EU law in their decisions on criminal legislation, the structure of legal argumentation, and the types of cases in which EU law affects the constitutional review of criminal law rules are all indicators of the relationship between the constitutionalisation and Europeanisation of criminal law.

As far as the case law of the CCR is concerned, it can be argued that the development of EU law and its increasing involvement with national law has led to a 'theorisation' of constitutional interpretation. This resulted in the establishment of a doctrine of EU rules with constitutional relevance used in constitutional reviews. In the context of criminal law, EU rules have been used to analyse new concepts of criminal law and criminal procedures. These concepts (e.g. plea bargain) have no tradition in Romanian legislation. As a model of argumentation, those decisions seem to be anchored in the provisions of the ECHR and ECtHR case law, to which EU law (e.g. Directives) is added for establishing what CCR calls a 'European context' of analysis. Moreover, the CCR is based on ECtHR case law when, invoking the 'living law' theory, it reconsiders the interpretation of some legal institutions, including the Constitution, to allow a harmonious connection to EU law. For example, in the jurisprudential upturn by which it practically introduced, in Romanian legislation, the witness's right to remain silent, the CCR held that this type of interpretation '*shall take direct effects regarding the establishing of the normative content of the reference rule, namely the Constitution, and in this regard the Court is the only jurisdictional authority that has the power to give such an interpretation*' (para. 82).[64] The use of the 'doctrine of the living law' appears as substantiating the interpretation of the reference rules in carrying out the constitutional review so as to '*provide an increased legal protection for the subjects of law*' (para. 83). According to the CCR, '*the upward development of this protection is noticeable in the case law of the Constitutional Court, an aspect that allows it to establish new requirements for the legislator or to adapt the existing constitutional requirements in various fields of law.*'[65]

The case law examination revealed the gradual opening of the CCR towards an interpretation and approach to criminal law in conjunction with the case law of the ECHR in the application of the ECHR, as well as with the standards for the protection of fundamental rights regulated/interpreted or recommended by EU bodies. Similarly, by calling into question the limits of legislation on criminal matters on the border of criminal policy, the CCR guides the legislator's actions towards the meaning and objectives of EU policy. However, as we can see from the examples above, there currently needs to be a clear methodology for using the

64 Ad similis, Decision No 276/2016, Official Gazette no. 572 of 28 July 2016, par. 19, namely Decision No 369/2017, Official Gazette no. 582 of 20 July 2017, paragraph 19.

65 For example, Decision No. 308/2016, Official Gazette no. 585 of 2 August 2016, Paragraph 31.

recent doctrine of the interposed (EU) in constitutional review. It is thus necessary to clarify and refine the instrument by explaining the relationship between norms and their effects on court decisions.

This intention of this article was not to analyse how European criminal law institutions are reflected in the constitutional review, but to reveal a trend of approach and reporting which, in our opinion, can also be interpreted as a statement of the principle of the need to regulate certain criminal law institutions, even the criminalisation of certain acts, with reference to the general EU framework or objectives. In any case, the aforementioned case law still indicates a period of experimentation based on the steps the Court took in its argumentation and accommodating constitutional plans. However, establishing the approach in the constitutional review of criminal law supports the idea that establishing European criminal law must not appear as a reaction to crisis situations, such as the escalation of terrorism or organised crime, but, above all, as a will for common regulation to achieve a common criminal policy to protect the same shared values.

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Human Rights Protection in the European Union

ABSTRACT: *This article aims to describe the current status of human rights in the European Union (EU) legal system. Although it is an important issue in the EU, there was no primary focus although this organization is not primarily focused on it previously. In other words, the European Communities had not paid as much attention to this issue as they should have. However, eventually, as the EU evolved, it established strong mechanisms for the protection of human rights. An important step in this direction was the adoption of the EU Charter on Human Rights, with binding effect on Member States. The rights envisaged in the Charter have been protected in the jurisprudence of the European Court of Justice (ECJ) through procedures for preliminary rulings and actions for annulment. The Lisbon Treaty confirmed the position of this act and human rights in general in the legal system of the EU. The ECJ considers the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights, although they belong to another European system of human rights protection. Together, they provide significant protection to individual human rights. The recent jurisprudence of the ECJ indicates that this protection will remain in the focus of the EU.*

KEYWORDS: human rights, European Union, EU Charter on Human Rights, ECJ, case law,

1. Introduction

Until the end of World War II, human rights remained strictly a national concern. Some international documents regulated human rights in a way, but no systematic international regulation of human rights prevailed covering all categories of human rights. Minority rights were addressed by the Permanent Court of

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International Justice. Further, prohibition of slavery was another aspect that received attention during this period. However, comprehensive international regulation of human rights began only after World War II.

The European Communities and, later, the European Union were created as primarily economic organisations and had nothing much to do with human rights. When the EU integrations began with the creation of the European Coal and Steel Community in 1951, another European organisation had already been founded – the Council of Europe – with human rights protection in Europe as its chief goal, which was confirmed by adoption of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[1] in 1950.

However, in the jurisprudence of the Court of Justice of the European Communities, and especially with the creation of the European Union in 1992, the issue of human rights has appeared on the agenda of the EU. This article presents the initial human rights cases that appeared before the European Court of Justice, followed by several important cases concerning human rights that were brought before this Court. Another aspect that will be addressed here is the non-judicial means of protection of human rights.

2. Development of human rights protection in the European Union

According to the positive legal norms, the EU is founded on values of respect for human dignity, freedom, democracy, equality, the rule of law,[2] and respect for human rights. This is stated in art. 2 of the Treaty on the EU.[3] However, human rights were not the focus on the agenda of the European Economic Community (EEC), and the Treaty on establishing this Community did not contain provisions that could be considered a bill of rights. Nevertheless, some specific individual rights such as freedom of movement and gender equality with respect to equal pay for male and female workers were protected by this Treaty.[4]

However, in the cases that were brought before the Court of Justice of the European Communities, the EEC was given the power to address issues regarding fundamental rights. In its jurisprudence, the Court confirmed its own competence in ensuring respect for fundamental rights as general principles of law in the case of *Internationale Handelsgesellschaft*.[5]

1 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol Nos. 11 and 14, 4 November 1950, ETS 5.
2 Coli, 2018, p. 275.
3 Consolidated versions of the Treaty on European Union and The Treaty on the Functioning of the European Union, Official Journal of the European Union, vol. 51, 2008/C 115/01, art. 6(2).
4 Defeis, 2007, p. 1106.
5 Case 11/70 Internationale Handelsgesellschaft, Judgment of 17 December 1970, para 4.

The Court, in its jurisprudence, stated that it was bound to draw inspiration from the constitutional traditions common to Member States. It referred to international treaties, of which Member States are signatories, as a source of guidelines for the protection of human rights.[6]

Over time, changes were introduced in the Community law to human rights in its legal instruments. In the preamble to the Maastricht Treaty, it was declared that the EU shall respect human rights as general principles of Community law because they are guaranteed by the ECHR and they result from the constitutional traditions of Member States. In this way, the jurisprudence of the ECJ was explicitly accepted.[7]

The terms 'fundamental rights' and 'human rights' are used in the founding Treaties. The former is used in the context of protection of fundamental rights within the EU and the latter in the external relations of the EU with international organisations and non-Member States.

The EU institutions and bodies are expected to act in accordance with the EU fundamental rights in performing their activities. Acts adopted by the EU institutions must comply with the requirements of fundamental rights protection. Further, EU Member States must respect EU fundamental rights and promote their application when they are acting within the scope of EU law.

Any act contrary to the fundamental rights can be challenged for annulment or declared invalid by a preliminary ruling of the ECJ. Thus, human rights are effectively protected in the European Union, because any act of the EU violating certain human rights or freedoms can be declared null and void, or it can be submitted to indirect control of legality.

■ *2.1. The EU Charter on Human Rights and fundamental freedoms*

The EU Charter on Human Rights and Fundamental Freedoms[8] was adopted in Nice in 2000. It consists of 54 articles organised into seven titles. This international convention created possibilities for a new regime of human rights in the EU.[9] It included more rights and freedoms than the ECHR, because social and economic rights were also included in the text.[10]

The Treaty of Lisbon provides that this EU Charter becomes a binding legal document, with the same legal value as the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

6 Case 4-73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, Judgment of the Court of 14 May 1974, para. 13.
7 Shelton, 2003.
8 Charter on Human Rights and Fundamental Freedoms, Official Journal of the European Union 2012/C 326/02.
9 Landau, 2008, p. 561.
10 Pillay, 2021, p. 6.

Although human rights are prescribed in numerous conventions in the framework of the United Nations, and especially in the European Convention on Human Rights and the European Social Charter of the Council of Europe, the Charter ensures a legal certainty regarding human rights in the EU, affording greater visibility and clarity.

3. Relations between the two European courts

The Court has, in its jurisprudence, emphasised that the ECHR is particularly relevant for human rights protection in the EU. This is confirmed in the Treaty of Lisbon, namely, in the current version of the TEU, where it is stated that fundamental rights, as guaranteed by the ECHR and as derived from the constitutional traditions common to Member States, shall constitute the general principles of EU law.[11] However, the possibility of the EU joining the ECHR is presently remote, based on Opinion 2/13, from 2014, in which the ECJ ruled that the draft accession agreement was incompatible with the EU legal order.[12] Nevertheless, this position could change in the future, although the EU has not yet acceded to any of the international human rights treaties.[13]

The relation between the ECJ and the European Court of Human Rights (ECtHR) has been debated in the legal doctrine.[14] In its jurisprudence, the ECtHR cited the EU Charter. For example, in the case of *Scoppola v. Italy* (No. 2), the Court referred inter alia to the explicit provision in art. 49(1) of the EU Charter, which relates to the principles of legality and proportionality of criminal offences and penalties.[15]

There is mutual respect and mutual trust between the two European courts. However, this does not imply absolute trust, and in cases of grave violations of fundamental rights in a Member State, the other can refuse to transfer a person to it. There are several areas of EU law, such as asylum, recognition, and enforcement of civil judgments and the European arrest warrant, where such problems may arise. An example of this is the case of *Aranyosi and Căldăraru*,[16] where the requests for a preliminary ruling concerned the interpretation of arts. 1(3), 5, and 6(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States as amended by Council Framework Decision 2009/299/JHA of 26 February 2009. The requests

11 Consolidated versions of the Treaty on European Union, Official Journal of the European Union, vol. 51, 2008/C 115/01, art. 6(3).

12 Case Opinion 2/13, Opinion of the Court of 18 December 2014. See Gragl, 2013.

13 Ahmed and Jesus Butler, 2006, p. 801.

14 Kuhnert, 2006; Phelps, 2006; De Schutter, 2008; Cherubini, 2015.

15 Application No. 10249/03 Case of *Scoppola v. Italy* (No. 2), Judgment of 17 September 2009.

16 Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, Judgment of the Court (Grand Chamber) of 5 April 2016.

were made in the context of the execution, in Germany, of two European arrest warrants issued for Mr Aranyosi on 4 November and 31 December 2014, respectively, by the examining magistrate at the District Court of Miskolc, Hungary, and of a European arrest warrant issued for Mr Căldăraru on 29 October 2015 by the Court of first instance of Fagaras, Romania.

The Court held that the mentioned articles of Council Framework Decision 2002/584/JHA, as amended by Council Framework Decision 2009/299/JHA, must be interpreted to mean that, where reliable evidence is found with respect to deficiencies in detention conditions in the issuing Member State, which may be systemic, or which may affect certain groups of people, the executing judicial authority must determine, specifically and precisely, whether substantial grounds exist to believe that the individual named in the European arrest warrant will be exposed, owing to the conditions of detention in the issuing Member State, to any real risk of inhuman or degrading treatment, within the meaning of art. 4 of the Charter in the event of his surrender to that Member State. To this end, the executing judicial authority must ask for supplementary information to be provided by the issuing judicial authority, which, after seeking, if necessary, the assistance of the central authority or one of the central authorities of the issuing Member State, under art. 7 of the Framework Decision, must send that information within the time limit specified in the request. The executing judicial authority must postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the existence of such a risk. If the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be ended.[17]

A similar situation happened in Case C-216/18 *PPU*,[18] wherein request for a preliminary ruling concerned interpretation of art. 1(3) of the same Council Framework Decision 2002/584/JHA. The request was made in connection with the execution, in Ireland, of European arrest warrants issued by Polish courts against LM, the person concerned. The Court held that art. 1(3) of the Framework Decision 2002/584/JHA must be interpreted to mean that, where the executing judicial authority has material indicating a real risk of breach of the fundamental right to a fair trial guaranteed by para. 2, art. 47 of the Charter of Fundamental Rights of the European Union, on account of systemic or generalised deficiencies of the issuing Member State's judiciary, then the executing judicial authority must determine, whether, considering his personal situation, as well as the nature of the offence for which he is being prosecuted and the factual context that forms the basis of the European arrest warrant, and in the light of the information provided by the

17 Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, Judgment of the Court (Grand Chamber) of 5 April 2016. para 105.

18 Case C-216/18 *PPU LM,* Judgment of the Court (Grand Chamber) of 25 July 2018.

issuing Member State pursuant to art. 15(2) of Framework Decision 2002/584, as amended, substantial grounds exist for believing that the person will run such a risk if he is surrendered to that State.[19]

4. ECJ jurisprudence in human rights cases

In its jurisprudence, the ECJ has discussed issues related to different human rights and freedoms, such as non-discrimination, freedom of expression, and, in the recent past, it has dealt with some new controversies over human rights in the EU, such as the 'right to be forgotten'.

One of the cases regarding human rights was that of *Dansk Industri*.[20] The proceedings were between Dansk Industri on behalf of Ajos A/S and the legal heirs of Mr Rasmussen, concerning Ajos's refusal to pay Mr Rasmussen a severance allowance. The request for a preliminary ruling was regarding the interpretation of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. Further, the request concerned the principle prohibiting discrimination on grounds of age and the principles of legal certainty and protection of legitimate expectations.

The Court decided that the general principle prohibiting discrimination on grounds of age must be interpreted as precluding national legislation. EU law is to be interpreted to mean that a national court adjudicating a dispute between private persons falling within the scope of Directive 2000/78 must interpret those provisions in such a way that they may be applied in a manner that is consistent with the directive. In case such an interpretation is not possible, provisions would disapply, where necessary, any provision of national law that is contrary to the general principle prohibiting discrimination on grounds of age. Neither the principles of legal certainty nor the protection of legitimate expectations can alter that obligation.[21]

Another case referred to was between a Mrs Chatzi and her employer, the Ipourgos Ikonomikon (Minister for Finance), concerning a decision by the Head of State Tax Office I, Thessaloniki (Greece), refusing her additional parental leave after the birth of her twins.[22] The Greek court asked the Court of Justice to clarify the meaning of art. 2(2) of the Framework Agreement on Parental Leave (set out in Directive 96/34/EC) in the light of art. 24 of the Charter (the rights of the child). The referring court doubted the compatibility of the national legislation implementing

19 Ibid., para 80.

20 Case C-441/14 *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen*, Judgment of the Court (Grand Chamber) of 19 April 2016.

21 Case C-441/14 *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen*, Judgment of the Court (Grand Chamber) of 19 April 2016, para 44.

22 Case C-149/10, *Zoi Chatzi v Ipourgos Ikonomikon*, Judgment of the Court of 16 September 2010.

the Agreement with the Charter, insofar as it granted mothers of twins a single period of parental leave. The Court of Justice held that the national measure was not in conflict with art. 24 of the Charter. However, it stated that, to ensure respect for the principle of equality before the law, granted by art. 20 of the Charter, the Member States must take the necessary measures to consider the specific situation of parents of twins. Accordingly, the Court of Justice answered the question raised by the Greek court as follows:

> The Framework [Agreement], read in the light of the principle of equal treatment ... obliges the national legislature to establish a parental leave regime, which, according to the situation in the Member State concerned, ensures that parents of twins receive treatment that gives due consideration to their particular needs. It is incumbent upon national courts to determine whether the national rules meet that requirement and, if necessary, to interpret the national rules, as far as possible, in conformity with European Union law.[23]

In the *Kücükdeveci case*,[24] reference was made for a preliminary ruling concerning the interpretation of the principle of non-discrimination on grounds of age and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. The reference was made in the proceedings between a Ms Kücükdeveci and her former employer, Swedex GmbH & Co. KG, concerning the calculation of the notice period applicable to her dismissal. The Court held that the European Union law, more particularly the principle of non-discrimination on grounds of age, as expressed in Council Directive 2000/78/EC, must be interpreted as precluding national legislation, such as the issue in the main proceedings, which provides that periods of employment completed by an employee before reaching the age of 25 are not considered in calculating the notice period for dismissal. The national court should ensure compliance with the principle of non-discrimination on grounds of age, as expressed in Directive 2000/78. Any contrary provision of national legislation should be disapplied independently, regardless of whether it makes use of its entitlement, in the cases referred to in the para. 2, art. 267 TFEU, to ask the Court of Justice of the European Union for a preliminary ruling on the interpretation of that principle.[25]

23 Ibid., para 75.

24 Case C-555/07 *Seda Kücükdeveci v Swedex GmbH & Co. KG*, Judgment of the Court (Grand Chamber) of 19 January 2010.

25 Case C-555/07, *Seda Kücükdeveci v Swedex GmbH & Co. KG*, Judgment of the Court (Grand Chamber) of 19 January 2010, para 56.

In Case C-176/12 *Association de médiation sociale* (*AMS*),[26] the request concerned interpretation of art. 27 of the Charter of Fundamental Rights of the European Union and Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community. The request was made in the course of proceedings between, on the one hand, the Association de médiation sociale and, on the other, the Union locale des syndicats CGT, Mr Laboubi, the Union départementale CGT des Bouches-du-Rhône, and the Confédération générale du travail regarding the setting up of bodies representing staff within the AMS by the trade union with jurisdiction for the district.

The Court cited case *Kukuveci* and the principle of non-discrimination on grounds of age at issue in that case, laid down in art. 21(1) of the Charter. This article is sufficient in itself to confer on individuals an individual right that they may invoke as such.[27] However, in the *AMS case*, the Court found that art. 27 of the Charter, by itself or in conjunction with the provisions of Directive 2002/14, must be interpreted to the effect that, where a national provision implementing this directive, such as art. L. 1111-3 of the Labour Code, is incompatible with European Union law, the said article of the Charter cannot be invoked in a dispute between individuals to disapply the national provision.[28] The Court stated that the Charter could have a horizontal direct effect in certain circumstances. It held that the principle of non-discrimination on the grounds of age enshrined in art. 21(1) of the Charter had horizontal direct effect and could be relied on directly to disapply a conflicting national provision, because it is 'sufficient in itself to confer on individuals an individual right which they may invoke as such'.[29]

In the Case C-279/09 *DEB*,[30] reference for a preliminary ruling concerned the interpretation of the principle of effectiveness, as enshrined in the case law of the Court of Justice of the European Union, to ascertain whether that principle requires legal aid to be granted to legal persons The reference was made in the course of proceedings between DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH (DEB) and the Bundesrepublik Deutschland regarding an application for legal aid submitted by that company to the German courts. The Court concluded that the principle of effective judicial protection, as enshrined in art. 47 of the Charter of Fundamental Rights of the European Union, must be interpreted to mean that it is not impossible for legal persons to rely on that principle and that aid granted pursuant to that principle may cover, inter alia, dispensation from

26 Case C-176/12, *Association de médiation sociale v Union locale des syndicats CGT and Others*, Judgment of the Court (Grand Chamber), 15 January 2014.

27 Ibid., para 47.

28 Ibid., para 51.

29 Ibid., para 47.

30 Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, Judgment of the Court (Second Chamber) of 22 December 2010.

advance payment of the costs of proceedings and/or the assistance of a lawyer. In this connection, the national court needs to ascertain whether (a) the conditions for granting legal aid constitute a limitation on the right of access to the courts, which undermines the very core of that right; (b) they pursue a legitimate aim; and (c) a reasonable relationship of proportionality exists between the means employed and the legitimate aim that it seeks to achieve.[31]

Contrary to the *DEB case*, the Court lacked jurisdiction in the case between Sociedade Agrícola e Imobiliária da Quinta de S. Paio Lda and Instituto da Segurança Social IP.[32] The case involved a request for a preliminary ruling concerning the interpretation of art. 47 of the Charter of Fundamental Rights of the European Union. The *Instituto* had refused to grant legal aid to the *Sociedade*. The Court held that when a legal situation does not fall within the scope of Union law, the Court has no jurisdiction to rule on it, and any Charter provisions relied upon cannot, by themselves, form the basis for such jurisdiction. It stated that there was no evidence in the order for reference to indicate that the objective of the main proceedings concerns the interpretation or application of a rule of Union law other than those set out in the Charter. Given that Directive 2003/8 does not envisage the grant of legal aid to legal persons, the Court held that that it does not apply to the main proceedings. Unlike the case giving rise to the judgement in DEB in which the Court interpreted art. 47 of the Charter in an action for State liability brought under Union law, there is no concrete evidence in the order for reference to indicate that Sociedade Agrícola submitted a request for legal aid for a legal action seeking to protect the rights conferred on it by Union law.[33] The Court concluded that it had no jurisdiction to rule on the questions raised in the request for preliminary ruling.[34] This shows that there were cases in which the Court lacked jurisdiction to decide on the issues of EU law.

There were other cases in which the Court decided human rights issues. In *Case Zambrano*,[35] the reference for a preliminary ruling concerned interpretation of arts. 12 EC, 17 EC, and 18 EC, as well as arts. 21, 24, and 34 of the Charter of Fundamental Rights of the European Union. The reference was made in the context of proceedings between Mr Ruiz Zambrano, a Columbian national, and the National Employment Office concerning refusal by the latter to grant him unemployment benefits under Belgian legislation.

In other words, the referring court asked essentially, whether the provisions of the TFEU on European Union citizenship should be interpreted to mean

31 Ibid., para 63.
32 Case C-258/13 *Sociedade Agrícola e Imobiliária da Quinta de S. Paio Lda v Instituto da Segurança Social IP*. Order of the Court (Second Chamber), 28 November 2013.
33 Ibid., para 23.
34 Ibid., para 24.
35 Case 34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm*), Judgment of the Court (Grand Chamber) of 8 March 2011.

that they confer on a relative in the ascending line who is a third-country national, upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of which they are nationals and in which they reside, and exempt him as well from having to obtain a work permit in that Member State.

It must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Likewise, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In such circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.

The Court held that art. 20 TFEU is to be interpreted to mean that it precludes a Member State from refusing a third-country national upon whom his minor children, who are European Union citizens, are dependent, right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third-country national, insofar as such decisions deprive those children of the genuine enjoyment of the substance of the rights attached to their status as European Union citizens.[36]

In another case before the Court,[37] Mrs McCarthy, a national of the United Kingdom and Ireland, was born and has always lived in the United Kingdom and has never claimed that she is or has been a worker, self-employed person, or self-sufficient person. She was in receipt of State benefits.

The reference for a preliminary ruling concerned interpretation of art. 3(1) and art. 16 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. The reference was made in the course of proceedings between Mrs McCarthy and the Secretary of State for the Home Department concerning an application for a residence permit made by Mrs McCarthy.

The court held that art. 3(1) of Directive 2004/38 must be interpreted to mean that the said directive is not applicable to a Union citizen who has never exercised his or her right of free movement, who has always resided in a Member State of which he is a national, and who is also a national of another Member State. Further, it stated that art. 21 TFEU is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national, and who is also a national of another Member

36 Ibid., para 46.

37 Case C-434/09, *Shirley McCarthy v Secretary of State for the Home Department*, Judgment of the Court (Third Chamber) of 5 May 2011.

State, provided that the situation of that citizen does not include the application of measures by the Member State that could deprive him of genuine enjoyment of the substance of the rights conferred on him by virtue of his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member State.[38]

In the case of *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*,[39] the request for a preliminary ruling concerned the validity of Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC. The request made by the High Court concerned proceedings between Digital Rights Ireland Ltd. and the Minister for Communications, Marine and Natural Resources, the Minister for Justice, Equality and Law Reform, the Commissioner of the Garda Síochána, Ireland, and the Attorney General, regarding the legality of national legislative and administrative measures concerning retention of data relating to electronic communications.

The object of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on protection of individuals with regard to the processing of personal data and on the free movement of such data, according to art. 1(1) thereof, is to protect the fundamental rights and freedoms of natural persons, particularly their right to privacy with regard to the processing of personal data. Art. 17(1) states:

> Member States shall provide that the controller must implement appropriate technical and organisational measures to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access, particularly where processing involves transmission of data over a network, and against all other unlawful forms of processing. Such measures should ensure a level of security appropriate to the risks represented by the processing and the nature of the data to be protected.[40]

The aim of Directive 2002/58/EC on privacy and electronic communications, as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009, according to art. 1(1) thereof, is to harmonise the provisions of the Member States required to ensure an equivalent level of protection

38 Ibid., para 57.

39 Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*, Judgment of the Court (Grand Chamber), 8 April 2014.

40 Ibid., para 5.

of fundamental rights and freedoms, particularly the right to privacy and to confidentiality, with respect to the processing of personal data in the electronic communication sector and to ensure free movement of such data and of electronic communication equipment and services in the European Union. According to art. 1(2), the provisions of this directive particularise and complement Directive 95/46 for the purposes mentioned in art. 1(1).

The Court held that Directive 2006/24 does not lay down clear and precise rules governing the extent of interference with the fundamental rights enshrined in arts. 7 and 8 of the Charter. It must therefore be held that Directive 2006/24 entails a wide-ranging and particularly serious interference with those fundamental rights in the legal order of the EU, without such an interference being precisely circumscribed by provisions to ensure that it is actually limited to what is strictly necessary. It must be held that Directive 2006/24 does not provide for sufficient safeguards, as required by art. 8 of the Charter, to ensure effective protection of the data retained against the risk of abuse and against any unlawful access and use. In the first place, art. 7 of Directive 2006/24 does not lay down rules that are specific and adapted to (a) the vast quantity of data whose retention is required by that directive, (b) the sensitive nature of that data, and (c) the risk of unlawful access to that data, rules that would serve, in particular, to govern the protection and security of the data in question in a clear and strict manner to ensure their full integrity and confidentiality. Furthermore, a specific obligation on Member States to establish such rules has also not been laid down.[41]

The Court also held that art. 7 of Directive 2006/24, read in conjunction with art. 4(1) of Directive 2002/58 and the second subparagraph of art. 17(1) of Directive 95/46, does not ensure that a particularly high level of protection and security is applied by those providers through technical and organisational measures, but allows those providers to bear economic considerations in mind, such as the costs of implementing security measures, when determining the level of security they must apply. In particular, Directive 2006/24 does not guarantee irreversible destruction of data at the end of the data retention period.[42]

Further, it should be added that the directive does not require the data in question to be retained within the European Union, and therefore, it cannot be assumed that the control, explicitly required by art. 8(3) of the Charter, by an independent authority, to comply with the requirements of protection and security, as referred to in the two previous paragraphs, is fully ensured. Such a control, carried out on the basis of EU law, is an essential component in the protection of individuals with regard to the processing of personal data.[43]

41 Ibid., para 66.
42 Ibid., para 67.
43 Ibid., para 68.

On the basis of the alleged, the Court concluded that by adopting Directive 2006/24, the EU legislature has exceeded the limits imposed by compliance with the principle of proportionality in the light of arts. 7, 8, and 52(1) of the Charter. Therefore, it declared Directive 2006/24 invalid. This is one of the cases in which the Court declared an EU act invalid due to violation of certain human rights principles. These procedures are also efficient in human rights protection besides the references for preliminary rulings.

One of the most important recent human rights cases before the ECJ was the case of *Google Spain*.[44] The request for a preliminary ruling concerned interpretation of arts. 2(b) and (d), arts. 4(1)(a) and (c), art. 12(b) and subparagraph (a) of the first paragraph of art. 14 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals in terms of processing of personal data and on the free movement of such data and of art. 8 of the Charter of Fundamental Rights of the European Union. The request was made in the proceedings between, on the one hand, Google Spain SL and Google Inc. and, on the other, the Spanish Data Protection Agency and Mr Costeja González, concerning a decision by the Agencia Española de Protección de Datos (AEPD) upholding the complaint lodged by Mr Costeja González against the two companies and ordering Google Inc. to adopt the necessary measures to withdraw personal data relating to Mr Costeja González from its index and to prevent access to that data in the future.

The Court held that arts. 2(b) and (d) of Directive 95/46/EC must be interpreted to mean that, first, the activity of a search engine involves finding information published or placed on the Internet by third parties, indexing it automatically, storing it temporarily and, finally, making it available to Internet users according to a particular order of preference, and classified as 'processing of personal data' within the meaning of art. 2(b) when that information contains personal data. Further, the operator of the search engine must be regarded as the 'controller' in that processing, within the meaning of art. 2(d).

Furthermore, the operator of the search engine is obliged to remove from the list of results displayed the links to web pages published by third parties containing information relating to that person following a search made on the basis of that person's name; the same must be done in cases where that name or information is not erased beforehand or simultaneously from the web pages, and even, as the case may be, if its publication in itself on those pages is lawful.

Moreover, it should inter alia be examined whether the data subject has the right that the information in question relating to him personally should, at this point in time, no longer be linked to his name by a list of results displayed following a search made on the basis of his name, without it being necessary to find such

44 Case C-131/12 *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, Judgment of the Court (Grand Chamber), 13 May 2014.

a right that the inclusion of the information in question in that list causes prejudice to the data subject. As the data subject may, in the light of his fundamental rights under arts. 7 and 8 of the Charter, request that the information in question may no longer be made available to the general public on account of its inclusion in such a list of results, those rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject's name. However, this would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that interference with his fundamental rights is justified by the preponderant interest of the general public in having, because of its inclusion in the list of results, access to the information in question.[45]

These examples of case law indicate that the ECJ has had a significant impact on human rights protection in the European Union. Its creative and advanced approach has helped 'EU lawmakers' enact the relevant legal norms in the secondary legislation of the EU. Moreover, the interpretation and protection of human rights from the EU Charter of Fundamental Rights of the European Union are extremely important, giving this act a significant place in the legal system of the EU.

5. Human rights protection by non-judicial means

Individuals can seek protection of fundamental rights through non-judicial means as well. One such method is to file a petition with the European Parliament, as enshrined in art. 44 of the EU Charter[46] and in arts. 20, 24(2), and 227 of the TFEU.[47] EU citizens and residents in the EU can draw the European Parliament's attention to a subject that falls within the competences of the EU and concerns the petitioner directly.

Moreover, they have the right to refer to the European Ombudsman cases of maladministration in the activities of the institutions, bodies, offices, or agencies of the Union, with the exception of the ECJ acting in its judicial role.[48] The Ombudsman examines such complaints and reports on them. Further, he or she submits an annual report to the European Parliament on the outcome of the inquiries he or she conducts.

The other means is to raise a complaint to the European Data Protection Supervisor, which was established by Regulation (EC) 45/2001 and designated to be the independent data protection authority supervising how European institutions

45 Ibid., para 100.
46 EU Charter, art. 44.
47 Consolidated version of the TFEU, arts. 20, 24(2), and 227.
48 Consolidated version of the TFEU, arts. 20, 24(3), and 228; EU Charter, art. 43.

process personal data. Anyone who considers that his or her rights have been infringed when an EU institution, body, office, or agency has processed data relating to him or her can lodge a complaint with the European Data Protection Supervisor.[49]

When a fundamental right has been breached by national authority, acting within the scope of EU law, an individual can file a complaint to the European Commission.

Although these non-judicial means can provide human rights protection, the individuals mainly choose procedures before the ECJ owing to the developed jurisprudence and the obligatory effects of its judgements.

6. Conclusion

Human rights protection is a significant aspect of the European Union, especially after the Lisbon Treaty and the new status of the EU Charter on Human Rights. Having strong relations with the European Convention on Human Rights and the European Court of Human Rights, the EU, together with them, creates an important human rights framework in Europe.

The EU legal system has means and mechanisms for obtaining protection in the case of breach of EU fundamental rights. This protection could be provided by different judicial and non-judicial bodies. The judicial protection of fundamental rights under the Charter is provided by the ECJ and by the national courts of the Member States.

If the violation of fundamental rights derives from an EU measure, only the ECJ can annul the act that gave rise to the breach. This can be done through an action for annulment before the courts and also through a reference to the Court for a preliminary ruling submitted by the national court.

In the jurisprudence of the ECJ several interesting issues have arisen, such as the case of Google Spain, in which the Court interpreted Directive 95/46/EC on the protection of individuals in relation to the processing of personal data in the light of the right to respect for private life and the right to protection of personal data. The Court held that it must be interpreted as confirming 'the right to be forgotten', which implies the right of a person to get the operator of a search engine to remove information related to him or her. This case confirmed the creative approach adopted by the ECJ in the issue of human rights protection.

49 Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, *OJ L 8, 12.1.2001, pp. 1–22,* art. 32.

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