LAW, IDENTITY AND VALUES

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(RE)CONSTRUCTIONS OF SOCIAL NETWORKS IN SLOVENIAN CASE LAW

Kristina ČUFAR[1]

ABSTRACT

The article explores the disruptions and puzzles that Slovenian courts encounter when dealing with contested speech on social networks. In recent years, social networks have thoroughly transformed the ways in which we communicate, relate to ourselves and others, disseminate and perceive information, as well as our understanding of privacy and limits of freedom of expression. Social networks are commercial products of private companies, which are more or less autonomous regarding the regulation and moderation of user-generated content they host. However, legal remedies may be activated when such content conflicts with legal norms. An overview of the Slovenian legislative framework and case law involving expression on social networks exposes the ways in which courts (re) construct social networks, as well as the impact and meaning of a disputed online expression. While the case law on the subject cannot be considered established, the overview reveals the strategies that Slovenian courts employ when dealing with the particularities of expression on social networks. The courts, by and large, assume that social networks are special communicative spaces where freedom of expression must be protected and evaluated according to the particularities of social networks. Such understandings may transform the bar of acceptable expression and influence public discussions' tone beyond social networks.

KEYWORDS

Slovenian legal system
case law
social networks
freedom of expression
contested speech

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1. Introduction

Social networks[2] are transforming our lives and posing novel challenges for the interpretation of human rights and fundamental freedoms. This article explores various ways in which discourses on social networks challenge the reasoning of Slovenian courts and how discourses on social networks are (re)constructed within the framework of the Slovenian legal system. To illustrate the implications of the widespread use of the Internet and social networks for judicial decision-making, let us consider a concrete example. In the middle of the Covid-19 epidemic, the Constitutional Court of the Republic of Slovenia (Constitutional Court) dealt with a petition to initiate a procedure for the review of the legality of a government decree banning certain types of movement and public gatherings during the epidemic. The court decided to hide the personal data of the petitioner *ex officio*.[3] While the reasons are not specified in the judicial decision, the separate opinions of the constitutional judges reveal their backdrop.

In their separate opinion, the judges who supported the suppression of the petitioner's personal data describe intense pressure on the Constitutional Court to reveal the petitioner's identity.[4] Social networks were bursting with such demands, with online commentators expressing severe judgments of the petitioner along with threats and insults to their person, for instance: 'Purge of these trash is a must!!!!'.[5] The judges added that the campaign against the petitioner was further intensified by publishing their alleged identity on a news site that provoked over 100 extremely offensive and vulgar comments. Considering this situation, the judges concluded that the public debate on the matter exceeded all acceptable limits, took into account the petitioner's safety, dignity, and privacy, and stressed that threats and insults against the petitioner might result in a chilling effect that stifles legitimate criticism of the authorities. If the judges in favor of the omission of the petitioner's identity provide several concrete examples of problematic speech on social networks, the judges who voted against such a decision do not engage with the content of the social network campaign against the petitioner. One dissenting judge opined that criticism of government measures indicated voluntary participation in the public debate and stressed that the petitioner did not request the omission of their personal data.[6] Another dissenting opinion invoked the public's right to information and added criticism of the unusual way of substantiating the decision of the majority who were reading Twitter posts during the session and 'somewhat peculiarly' interpreted them as threats.[7]

2 | Social networks are web-based services that permit users to open a profile or account on which they can share information and opinions, establish connections and communicate with other users. They first appeared in the late 1990s and have since become indispensable part of daily lives for millions of people around the globe. boyd and Ellison, 2007.

3 | Order U-I-83/20-10, Constitutional Court of the Republic of Slovenia, April 16, 2020, para. 15.

4 | Separate opinion of Constitutional Judges Dr. Katja Šugman Stubbs, Dr. Špelca Mežnar and Dr. Rok Čeferin regarding the Order U-I-83/20, paras. 12-15.

5 | Ibid., fn. 12.

6 | Separate opinion of Constitutional Judge Marko Šorli regarding the Order U-I-83/20, para. 6.

7 | Separate opinion of Constitutional Judge DDr. Klemen Jaklič regarding the Order U-I-83/20, para. 12.

While the controversial decision regarding the omission of the petitioner's identity was not at the core of the case before the Constitutional Court,[8] it highlights how social networks increasingly influence and disrupt all spheres of human activity, including the reasoning of the (highest) courts. The advent of social networks introduced certain particularities in comparison with other social spaces and forums of expression, and thus demands novel approaches in dealing with the limits of freedom of expression.[9] To engage with these issues, the article first briefly discusses the phenomenon of social networks and their significance for society and legal regulation. A short overview of the Slovenian legal framework establishes (sometimes fuzzy) limits between the public and private expression regulation on social networks. The 'notice and take down' approach adopted in Slovenia implies that individuals can use the legal system to demand that certain user-generated content be deleted or blocked, but no legal remedy is available to legally demand the reinstatement of user-generated content removed by the social networks.[10] The article then reviews the case law in which social networks play a decisive part, engaging with the decisions of the Slovenian Higher Courts (second instance courts deciding on appeals), the Administrative Court of the Republic of Slovenia (Administrative Court; deciding in administrative disputes), and the Supreme Court of the Republic of Slovenia (Supreme Court; third instance court deciding on extraordinary legal remedies).

The case law involving social networks is too scarce to be considered established; nevertheless, it is an interesting testament to possible legal interpretations of social networks' implications as well as the changes provoked by these networks. The reviewed cases provide juridical reconstructions of the nature of social networks and their average users, the conception of the online public, expectations of privacy in the digital age, the reach of posts on social networks, and their role in circulation of information. The implications of judges' online speech in the judicial system were also explored. Case law reveals the issues encountered by individuals and courts, as well as the strategies employed by the courts thus far. The existing case law on the subject provokes questions regarding the difference between online speech and speech in traditional communicative spaces, as well as the shifting limits of acceptable public discourse.

2. Regulation of discussion on social networks

Thanks to social networks, an unprecedented number of people around the globe have access to an outlet allowing them to connect with one another, publicly express their opinions, and exchange information. Slovenia is no exception to the global trends: 87% of Slovenians aged 16–74 use the Internet regularly[11] and 82% have at least one social network account.[12] Social networks are transforming all aspects of our relating to one another – from language and grammatical rules to the way people access, create, disseminate,

8 | For an in-depth engagement with governmental measures during the first wave of Covid-19 epidemic and the role of the Constitutional Court see: Bardutzky, 2020.
9 | Jereb, 2020.
10 | Toplak, 2020.
11 | Statistical Office of the Republic of Slovenia, 2020.
12 | Valicon, 2020.

discuss, and perceive information.[13] The illusion of anonymity online motivates people to express opinions that might otherwise be considered fringe and sometimes makes it difficult to prosecute eventual legal offenses. If the 1990s celebrated the Internet's potential to empower the masses and turn ordinary citizens from mere consumers of news and information into sovereign democratic subjects with agency and far-reaching voices of their own,[14] the widespread use of social networks also brought an array of problems that beg regulatory responses. Social networks are products of powerful corporations that use algorithms that utilize user information to identify their interests and online behavior to offer content that is assumed to grab users' attention, keep them on platforms for as long as possible, and expose them to as many targeted ads as possible.[15]

While social networks play an important role in empowering individuals and groups, they are also associated with the rapid spread of misinformation and disinformation, echo chambers, copyright abuse, hate speech, and other problematic occurrences. Accordingly, social network companies are forced to engage in content moderation to provide safer spaces for their users and comply with legal requirements.[16] Although necessary, private content moderation often results in controversial decisions, leading to discussions about the freedom of expression and its limitations.[17] The term private censorship is sometimes used to criticize the practices of social network companies that regulate and moderate content according to their own regulations and procedures. If human rights often presuppose citizens, social networks assert their sovereignty over users. Excessive removal of user-generated content by social network moderators is a serious issue, and the lack of redress procedures and democratic oversight is highly problematic.[18] Nonetheless, the debates on private censorship at times lack nuance and focus on the sanctity of the freedom of expression without fully considering its implications for the rights of others. The popular mantras about the marketplace of ideas—where one is always free to respond to the speech of another with their own—neglect that more speech does not necessarily mean better speech and that the limits of the freedom of expression exist precisely to protect the expression (and further rights and freedoms) of others.[19]

These issues are ever-present in the public debate in Slovenia and were perhaps made especially explicit during the 2015 refugee crisis. At that time, the ZLOvenija[20] Tumblr page appeared and exposed an unprecedented increase in incendiary speech on Facebook's platform. ZLOvenija published instances of hate speech against migrants expressed on public Facebook profiles and groups, along with the names and photographs

13 | E.g. Selak and Kuhar, 2020; Petrič et al., 2015; Fišer, Erjavec, and Ljubešić, 2016.
14 | Barlow, 1996.
15 | E.g.: Vaidhyanathan, 2018.
16 | Gillespie, 2018, pp. 6-24.
17 | To name just two examples: in 2016 Facebook famously removed the photograph 'Napalm Girl' featuring a naked girl fleeing a napalm attack during the Vietnam war, and in 2018 the image of the ancient fertility symbol 'Venus of Willendorf' representing a naked woman a was removed from the platform. Facebook later apologized for the removal and changed the rules regarding artistic depictions of nudity. For more troubling examples of Facebook's content moderation see: Stjernfelt and Lauritzen, 2020.
18 | Klonick, 2018.
19 | Mills Eckert, 2011.
20 | ZLOvenija is a word play on evil ('zlo') and Slovenia ('Slovenija').

of the speakers.[21] The scandal exposed the vulgarity and hatred that ordinary people expressed behind their screens and the disturbingly low levels of public online discussions.[22] Simultaneously, ZLOvenija opened the issues of privacy, honor, and reputation of those who were publicly shamed online and beyond. As social networks are becoming increasingly popular, the issue of inappropriate online speech is often discussed, and concerns about its impact on social dynamics are frequently raised. The expression on social networks futher complicates already complex issues.

Posts on social networks can swiftly reach wide (even global) audiences and allow for rapid further distribution of the original content. To add to the complexity, the expression on social networks is regulated by both state and non-state actors. Procedures available to those whose expression was silenced and those harmed by such speech were fragmented between different authorities. Therefore, when faced with a contested expression of opinions and ideas on social networks, courts cannot treat it in the same way as expression in traditional forums (physical public spaces, newspapers, etc.). Before we engage with Slovenian case law addressing these dilemmas, a brief overview of the existing regulations is in place.

3. Slovenian legal system

The freedom of expression is enshrined in Art. 10 of the European Convention on Human Rights (ECHR), Art. 11 of the Charter of Fundamental Rights of the European Union, and in Art. 39 of the Constitution of the Republic of Slovenia (Constitution).[23] The latter guarantees the freedom of expression of thought, speech and public appearance, freedom of the press, other forms of public communication and expression, and freedom to collect, receive, and disseminate information and opinions. Freedom of expression is crucial freedom in a democratic society, and it protects even expressions that may shock or offend. Nevertheless, freedom of expression is subject to limitations stemming from both the Constitution and the regional human rights instruments. Constitutional rights that are often invoked as imposing limits on expression are the right to personal dignity and safety (Art. 34), the right to privacy and personal rights (Art. 35), and the prohibition of incitement to discrimination, intolerance, violence, or war (Art. 63).

Private companies offering social network services are not bound to guarantee freedom of expression to their users the same way as states and their organizations. There is no case in Slovenian case law where a user would successfully protest a social network's decision to remove user-generated content.[24] Cases where users successfully demanded

21 | Plesničar and Šarf, 2020.

22 | Inappropriate speech on social networks is a widespread phenomenon in Slovenian (social) media-sphere. Vehovar et al., 2020.

23 | Ustava Republike Slovenije (URS, Eng. 'Slovenian Constitution'), Official Gazette RS, No. 33/91-I.

24 | Censored users usually do not have legal remedies at their disposal, though this depends on the jurisdiction. While removal of content in the United States is in the hands of social network companies, German courts hold that social networks function as public communicative spaces and must respect admissible expressions of opinion: while social networks may remove more than just expression illegal under German legislation, they ought not act arbitrarily and must provide recourse procedures. Kettemann and Tiedeke, 2020.

removals of user-generated content encroaching on their rights, however, are relatively common. Social network companies (service providers under the EU e-Commerce Directive)[25] may be legally required to expeditiously remove or disable access to user-generated content upon obtaining knowledge or awareness of its unlawfulness. At the same time, they are generally exempt from liability for such content and are not obliged to seek it out actively. The Slovenian Electronic Commerce Market Act[26] transposes this approach: service providers are exempt from the liability for user-generated content and are not obliged to monitor this content but are required to stop and prevent violations by removing or blocking user-generated content when prompted by a court order. If a service provider fails to act and such an omission results in damage, the provider may also face civil liability in accordance with the Slovenian Obligations Code.[27]

User-generated content may be deemed illegal for several reasons, as it may establish an administrative,[28] criminal,[29] or civil offense.[30] Moreover, social networks might enter judicial reasoning not only because of potentially illegal user-generated content but, as we have seen in the introductory example, might further complicate a case in other ways. The following section explores in more detail the criteria for evaluating the illegality of speech on social networks, the role social networks play in postmodern society, and the way they are (re)constructed through judicial reasoning.

4. Social networks in Slovenian case law

As discussed above, discourse on social networks cannot be equated with discourse in traditional forums of expression. The following pages trace the (re)constructions of the particularities of expressing opinions and ideas on social networks in the case-law of the Slovenian Higher Courts, the Administrative Court, and the Supreme Court. While interesting and thought provoking, the discussed cases are merely exemplary of the strategies employed by the courts when faced with issues stemming from the (ab)use of social networks. The number and relevance of cases discussed are too scarce to infer from them any cohesive narrative that could be said to be prevalent in juridical decision-making when social networks are involved. Nevertheless, the case law presented underlines possible

25 | Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (e-Commerce Directive), Arts. 14 and 15.
26 | Zakon o elektronskem poslovanju na trgu (ZEPT, Eng. 'Electronic Commerce Market Act') Official Gazette RS, No. 97/07, Arts. 8-11.
27 | Obligacijski zakonik (OZ, Eng. 'Obligations Code') Official Gazette RS, No. 97/07, Art. 131.
28 | E.g.: Encouragement of intolerance. Zakon o varstvu javnega reda in miru (ZJRM-1, Eng. 'Protection of Public Order Act') Official Gazette RS No. 70/06, 139/20, Art. 20.
29 | E.g.: Offences against honor and reputation; the prohibition of public incitement to hatred, violence, or intolerance; unlawful publication of private writings; abuse of personal information; the disclosure of classified information; the prohibition of incitement to violent change of the constitutional order; and others. Kazenski zakonik (KZ-1, Eng. 'Criminal Code'), Official Gazette RS, No. 50/12, 6/16, 54/15, 38/16, 27/17, 23/20 and 91/20, Arts. 158-165, 297, 140, 143, 260, 359.
30 | Defamation or calumny, assertion or dissemination of untrue statements on the past, knowledge, or capability of another resulting in material damage; immaterial damage in the form of physical or mental distress suffered owing to the defamation of good name or reputation, the curtailment of freedom or a personal right and fear caused. Obligations Code, Arts. 177 and 179.

approaches to the issues that will surely preoccupy courts in the future. Furthermore, the case law examined highlights some sociological facets connected to speech on social networks, as understood by the parties and courts.

4.1. The nature of social networks and their users

Slovenian courts have developed different understandings of the nature and particularities of social networks. The Higher Court of Koper, for instance, declared the freedom of expression as a 'precondition of Facebook'.[31] The case involved a coffee distribution company that claimed to have been damaged by a Facebook post by a local bar that warned against the distributor and its brand of coffee. Based on 'generally known facts about social networks',[32] the court concluded that even a public Facebook post did not necessarily reach everyone present on the social network and stressed that the defendant's account was not widely known or popular. Considering that the defendant's post was not slanderous but an expression of opinion – and that subjective statements are the standard form of expression on social networks, the court did not award damages to the plaintiff.

At other times, the courts do not seem to take the online context as relevant. The Higher Court of Ljubljana recognized an online comparison of a local major to Hitler who 'shall eat the bills in his filthy snout'[33] as an inappropriate way of expressing political discontent, exceeding the limits of the freedom of expression by encroaching on the honor and reputation of the plaintiff. The court opined that the style of the comment in question was depreciating and could not be understood as a criticism of the mayor's work. The defendant's explanation that he was merely criticizing the mayor, who ignored the incentives and protests of the citizens, was unsuccessful. The judgment does not indicate the exact online setting of the defendant's comment and does not attribute any particularity to the mode of expression.

The expression of political messages and political critique on social networks seems to arouse the cacophony of judicial responses. The same life event may lead to contrasting results, as the two civil law cases provoked by the same offensive Tweet demonstrate. The Tweet in question stated: 'Some brothel FB page offers cheap services of retired prostitutes A. A. and B. B. One for 30 EUR, the other for 35 EUR. #PimpMilan'.[34] A politician who was the leader of the largest opposition party in the Slovenian parliament posted a contentious Tweet.[35] A. A. refers to an editor-at-large and B. B. to a journalist employed at the public media house RTV Slovenija.[36] The Tweet was supposedly a response to a news segment exposing alleged links between the defendant's political party and neo-Nazi groups. The editor and the journalist sued the politician in separate civil procedures; both

31 | Judgement Cpg 213/2017, Higher Court of Koper, February 22, 2018, par. 10.
32 | Ibid, par. 9.
33 | Judgement II Cp 701/2015, Higher Court of Ljubljana, May 20, 2015.
34 | Judgement II Ips 75/2019, Supreme Court of the Republic of Slovenia, February 6, 2020, par. 34.
35 | The same politician is currently Slovenian Prime Minister and regularly upsets domestic and foreign public with his Tweets, see e.g.: Higgins, 2021.
36 | The first names of the plaintiffs and the initials of their surnames were included in the original Tweet and are anonymized in the publicly available court decision. The plaintiffs are public personalities, so the court accepted that they were identifiable. RTV Slovenija is occasionally attacked as *javna hiša* (public house) by certain members of the political class. *Javna hiša* is a Slovenian term for a brothel. The hashtag 'Pimp Milan' refers to a theory that a retired Slovenian politician is still pulling the strings in the background.

cases reached the Supreme Court, but the two judgments produced different understandings of the nature of the Twitter social network and the limits of freedom of expression thereon.[37]

Chronologically, the case involving the editor was the first decision. The Supreme Court's decision asserts that the notion of critique and the limits of legally acceptable speech on Twitter differ from those in other settings. The court described Twitter as a social network characterized by a specific style and manner of expression owing to the 280 characters limitation of a single post. According to the court, Twitter engendered a specific subculture whose communication is typified by 'expressive, very brief, fast, also bitter, sardonic, often vulgar reactions written in the vernacular without in-depth reflection.'[38] This contributes to the 'spontaneous atmosphere' on the platform where an 'average user' consumes Tweets quickly and without in-depth reflection. The average user constructed in the Supreme Court's decision differs from the concept of the average reader of traditional media. Neither average users nor average readers are unambiguous concepts. Yet, the standard of the average user seems to indicate a less attentive person who does not engage in reflection and is used to harsh vulgar tones. In contrast, the average reader is often conceived as a person of average diligence and reason, somewhere between extremely suspicious and extremely naive.

The contentious Tweet might strike an average reader as a verbal attack targeting an individual instead of criticizing their actions, but the Supreme Court opined that an average Twitter user recognized it as a political critique of the plaintiff's editorial work. By placing the message in the context of a specific social network, the court concluded that the defendant expressed his critique through satiric, sarcastic, and offensive verbal caricature without a commentary on the plaintiffs' editorial practice or journalistic reporting. The court recognized that the Tweet was offensive and hurtful to the plaintiff. Nevertheless, the Tweet was not intended to express contempt and devaluation of the plaintiff as a human being. To the contrary, argued the court, it represents a 'highly protected political declaration'.[39] In the court's opinion, the Tweet in question could be perceived as extremely offensive only when taken literally and outside of its context. Warning against the danger of chilling effect, 'even more daunting on particular social networks like Twitter,'[40] the court decided to prioritize 'the Enlightenment principle of the search for truth through free debate'[41] and dismissed the plaintiff's demand for damages.

In a separate case decided a year later, the journalist managed to obtain damages.[42] Considering that the factual basis of the two cases is identical and that the roles of editor and journalist are not grounds for differentiation between them, the Supreme Court considered its previous decision erroneous. The nature of the Twitter social network is conceptualized differently as in the previous decision: 'The use of Twitter communication channel does not grant a communicative *carte blanche* to anyone, not even an influential oppositional leader, nor can it be used as an excuse for an affective or even premeditated

37 | A criminal procedure involving the same Tweet is still ongoing at the time of writing this article.
38 | Judgement II Ips 75/2019, Supreme Court of the Republic of Slovenia, February 6, 2020, par. 30.
39 | Ibid, par. 34.
40 | Ibid., pars. 35 and 37.
41 | Ibid., par. 39.
42 | Judgement II Ips 22/2021, Supreme Court of the Republic of Slovenia, September 1, 2021.

action.'[43] The court opined that the defendant's Tweet lacked argumentation and did not engage with the news segment to which it was supposedly responding. The average reader was thus unable to decipher that the Tweet was meant as a political critique of the plaintiff's journalistic work; the Tweet was understood as an independent whole. The fact that the defendant's discourse was political does not justify the negative value judgment of the plaintiff who was devaluated as a journalist and as a woman, concluded the court.

The Supreme Court perceived the chilling effect differently as in its previous decision regarding the contested Tweet. The second time around, the court construed freedom of expression as protecting not only the political message of the defendant, but also the freedom of the press. Tweets are important means of one-way political communication but are simultaneously intermedia agenda-setting, that is, attempts to pressure traditional media.[44] While a Tweet by a member of political opposition cannot be considered to have a chilling effect, it nevertheless aimed to influence journalistic practices, opined the court. The court did not engage with the possible chilling effect on the Twitter social network, asserting that the defendant's right to expression of political critique cannot be considered superior to the plaintiff's personal rights. The court stressed that the key problem with the contested Tweet is not its offensive and politically incorrect content but the lack of a factual basis on which the defendant articulated the value judgment as well as the lack of provocation on the plaintiff's side.

4.2. Concept of the public and the expectations of privacy in the digital society

When courts deal with a contested speech on social networks, the reach of individual posts is an important consideration. Whether an account is private or public, the number of followers of an account and how long the post remained on the platform are considered.[45] As we have already seen, courts do not automatically assume that a public account open to everyone equals a universal reach. Likewise, a private account intended to connect with a selected group of friends is not considered harmless automatically.

In the case before the Higher Court of Ljubljana, the plaintiff claimed that his privacy was breached by posting photographs depicting his family life in his home on the defendant's private Facebook account.[46] The plaintiff stressed that the defendant 'is also known by young people.'[47] While the court did not see any relevance in the age group to which the defendant's Facebook friends belonged, it nevertheless agreed that even a private post might constitute a breach of privacy. The Facebook album in question, which included photographs taken and published without the plaintiff's permission, was publicly commented upon by five people whose comments were objectively offensive, and even people who were not defendants' Facebook friends might have seen the photographs. The court stressed that even the closest friends represented the public and that the plaintiff's personal rights were breached by the post.

Facebook groups, established to enable communication about shared interests with certain people, also call for nuanced deliberation. A case before the Higher Court of

43 | Ibid., par. 41.
44 | Ibid., par. 36.
45 | E.g.: Judgement II Ips 75/2019, Supreme Court of the Republic of Slovenia, February 6, 2020, par. 23; Judgement Cpg 213/2017, Higher Court of Koper, February 22, 2018, par. 9.
46 | Judgement II Cp 2066/2012, Higher Court of Ljubljana, January 30, 2013.
47 | Ibid., par. 3.

Ljubljana involved speech in a closed Facebook group of 67 members of the same municipality.[48] The defendant posted several satirical short stories indirectly mocking the director of the municipal authority, who felt that the posts breached his right to privacy, honor, and reputation. The court considered several circumstances: the plaintiff was a public personality, the posts criticized the plaintiff's conduct as the director of the municipal authority, and they were satirical and critical rather than a personal attack intended to slander. The court also examined the context of the post and established that the fact that the Facebook group was closed 'makes freedom of expression even wider'.[49] Since the group was intended for the members of the municipality to discuss municipal matters and considering its relatively small membership of citizens who are adequately informed about what goes on in their local community through various means, the court established that the reach of the posts was limited. The court ruled in favor of the defendant and his freedom of expression.

Social networks and contemporary technologies have severe implications for reasonable expectations of privacy. In the case before the Higher Court of Maribor, a high school librarian sued a student who filmed her sultry dance in a masquerade costume.[50] The defendant posted a video of the dance on his Facebook profile. The video later found its way to YouTube and provoked a slanderous online column by another defendant that was recognized as a breach of her personal rights by the court. The question of filming the plaintiff's dance and posting it on Facebook, however, produced a different decision. Given that the plaintiff was dancing during a recess in the school where she was employed in front of an audience of some 50 students, the court concluded that she exited her private sphere and ought to have expected reactions of the public. The fact that she considered both her costume and dance appropriate led the court to assume that she was not hurt by filming and the subsequent Facebook post. Even though the use of electronic devices was prohibited in the school in question, the plaintiff ought to have expected that the students would nevertheless use their devices to record such an extraordinary event: a person who has been working in the school environment for 18 years is surely aware that the students use modern technology despite the prohibition, opined the court.[51] The court thus concluded that the student's decision to film the event is completely acceptable, and its publication on social networks is predictable. Since the defendant stated that he was not involved in the subsequent publication of the video on YouTube, the court concluded that his actions did not represent a breach of the plaintiff's personal rights.

The described cases reveal that when faced with privacy issues and social media posts, the courts assess the specific circumstances and context of each publication. Generally, the courts take seriously and issue injunctive orders demanding immediate deletion of posts that breach the privacy of another, for example, by posting their private data.[52] While the cases described above are all civil law cases dealing with alleged breaches of personal rights, extreme cases also reach the criminal courts and may even result in custodial sentences. In one such case, the Supreme Court stressed that the wide accessibility of social networks and their (ab)use present unprecedented means for encroaching

48 | Judgement II Cp 577/2019, Higher Court of Ljubljana, July 10, 2019.
49 | Ibid., par. 29.
50 | Judgement and order I Cp 193/2012, Higher Court of Maribor, May 8, 2012.
51 | Ibid., par. 20.
52 | E.g.: Order I Cp 2892/2017, Higher Court of Ljubljana, January 24, 2018.

on privacy, honor, and reputation of others, and that the consequences in such cases are much graver for the victims than if the same criminal offenses were executed by means of traditional media.[53] Other criminal offenses may also be committed through (ab)use of social networks – for instance, incitement to violent change of the constitutional order, as in the case of an armed group that used social networks to recruit others to join their rebellion against the authorities.[54] The cases discussed thus far reveal that the unrivaled possibility of expressing oneself coupled with the wide reach of social networks also presents unparalleled risks for abuse.

4.3. Social networks as sources of information

The overview of case law presented thus far dealt with the (un)problematic content and the limits of freedom of expression on social networks. However, social networks are more than just communicative platforms, as they present an extremely important source of information for many people. The role of social networks as vessels of information is often discussed in the context of the problematic spread of misinformation and disinformation eroding public trust and contributing to general cynicism. However, the Slovenian legal system does not contain specific provisions dealing with these issues.[55] Since social networks host user-generated content and, despite active content moderation on many platforms, do not have editors in the traditional sense of the word, the Slovenian definition of a media organization in the Mass Media Act does not include social networks.[56] Case law reveals that the courts nevertheless acknowledge the role of social networks in public access to information, which is an important aspect of the constitutional freedom of expression.

An administrative dispute between a local mayor and the members of the municipal council was brought before the Administrative Court to decide who should control the official municipal Facebook page and the municipal newsletter.[57] The root of the dispute was the municipal council's decision to transfer control over the Facebook page and newsletter to the editorial council. The mayor disagreed with the decision, arguing that both national and municipal regulations imposed the right and duty to inform the public on the mayor. The court agreed with the plaintiff's claim that in the present era, social networks are as important for the informing of the public as traditional media and confirmed that ensuring prompt information to the citizens is an essential part of the mayor's function.

53 | Judgement, I Ips 13079/2012-183, Supreme Court of the Republic of Slovenia, September 17, 2015, par. 18.

54 | Judgement II Kp 40945/2018, Higher Court of Maribor, September 12, 2019; Judgement XI Ips 40945/2018, Supreme Court of the Republic of Slovenia, October 22, 2018.

55 | Removal of mis- and disinformation is mostly in the hands of social networks. The Code of Practice on Disinformation was agreed upon by the European Commission, platforms, leading social networks, advertisers and advertising industry. Through this self-regulatory instrument, the industry has voluntarily agreed to a set of worldwide standards to fight disinformation and committed to periodic monitoring. European Commission plans to substitute the Code with European Democracy Action Plan by 2023. The plan will be based on tree pillars: promoting free and fair elections, strengthening media freedom and pluralism, and countering disinformation. European Commission, 2017.

56 | Media organizations are defined as newspapers, magazines, radio and TV programs, electronic publications, teletext and other forms of daily or periodical publishing of edited content via text, voice, sound or image available to the public. Zakon o Medijih (ZMed, Eng. 'Mass Media Act'), Official Gazette RS No. 35/01, 62/03, Art. 2.

57 | Judgment II U 18/2016, Administrative Court of the Republic of Slovenia, February 7, 2017.

4.4. Judges on social networks

Courts, the main protagonists of this article, are human institutions. It is thus not surprising that judges, like most people, tend to use social networks. The Ethics and Integrity Commission at the Judicial Council of the Republic of Slovenia produced guidelines for public expression of judges on social networks as a response to a highly publicized case of a judge who expressed critique of the government's handling of the Covid-19 epidemic on her private Facebook profile.[58] The posts in question became public through one of the judge's Facebook friends who leaked it to a sensationalist news site. The disciplinary procedure found that the judge did not act inappropriately since judges enjoy freedom of expression and political action, albeit in a somewhat restricted form.

The judges' freedom of expression is partially limited to protect the integrity, independence, and impartiality of the judicial system. The Ethics and Integrity Commission's guidelines, based on those of the United Nations Global Judicial Integrity Network and the European Network of Councils of Judiciary, address several aspects of social network usage by the judges. The judges must refrain from investigating social networks when working on a case – for instance, browsing the profiles of witnesses. Judges ought to be careful when choosing their online friends and constantly review, delete and block potentially problematic Facebook friends. Judges must be cautious and prudent when expressing their opinions and must refrain from any discriminatory comments and insults. The Ethics and Integrity Commission also stresses that there is no difference between private and public accounts. Therefore, judges must always keep in mind that even a private post might become public and act accordingly. They must also adjust their behavior in the physical world, as they might be photographed or filmed at any time and published on social networks. Judges must also exercise caution when liking and sharing content on social networks and joining online groups.

Social networks are significant for the functioning of the legal system in a myriad of ways, not only as communicative spaces where the law might be breached but also as forums of (self-)expression that might influence the popular perception of impartiality and independence of public institutions. The judges are now dealing with another aspect of their private lives that must conform to the nature of the important public function they perform, as everyone's private lives are exposed to increasing societal control through the advancement of commercial technology.

5. Discussion

The overview of relevant case law demonstrates that the courts are vigilant when it comes to unlawful breaches of privacy, yet they also consider that we live in a world where (the means of) communication have changed, leading to lower expectations of privacy in public settings. Both ordinary individuals and judges themselves are increasingly surrounded by personal devices capable of photographing, filming, and distributing content online. Technologies such as smartphones and social networks, have already transformed our lives and our relationship with the notion of privacy, which is reflected

58 | Guidelines Su Ek 23/2020-9, Judicial Council of the Republic of Slovenia Ethics and Integrity Commission, March 2, 2021.

in the reasoning of the courts. The means of expressing oneself have also transformed, amplified the voices of individuals, and the possibilities for and consequences of abuse of the freedom of expression.[59] Social networks are relatively new communicative spaces, and the expression of ideas and opinions in this setting has certain particularities that (sometimes) influence judicial decisions. Moreover, social networks are considered a source of information, not only as communicative platforms.

Engagement with case law indicates that the courts carefully dissect the circumstances of each case when it comes to deciding whether a social network post may be considered a breach of personal rights. The courts do not rely on fixed criteria of public and private profiles and groups in assessing the nature and impact of a post; rather, they try to establish the reach and impacts of a post by placing it in a specific context. Indeed, the diverse approaches of the analyzed decisions make it rather difficult to establish a common thread or a set of criteria that courts use when confronted by a contested post on social networks. Each case is specific, and flexibility in evaluating its specific context is important. Nevertheless, decision-making seems somewhat arbitrary. Individual judges' perceptions of the nature and role of social networks seem to play an important part in how the courts respond to alleged violations of personal and other rights on social networks. The evident trend is that the courts often provide conclusions regarding the nature of social networks and their particularities, although their reconstructions are diverse.

The two cases involving the same historical event decided by the Supreme Court in two different ways illustrate the open-endedness of the courts' conceptualizations of communication on social networks and its relevance to the outcome of a case at hand.[60] In the case that was decided first, the Supreme Court recognized what might be considered an *ad personam* attack as political critique in need of protection, evoking the pursuit of the truth and Enlightenment principles and the specific manner of expressing opinions in Twitter subculture.[61] This is the most dramatic example of a lowering standard of acceptable speech on social networks in the Slovenian case law. It seems that some judges concede to the idea that the medium of expression may justify otherwise unacceptable speech – a testament to our times where in-depth reflection, research, and arguments are increasingly sidelined by name-calling and generalized claims. Offensive and vulgar speech, supposedly specific to this social network, is omnipresent and heavily influences public debate.

When the same life event was tried by a slightly different panel of the Supreme Court judges, a completely different reconstruction of communication on Twitter was produced.[62] The (chronologically) subsequent judgment does not construe Twitter as a particular subculture in which the level of acceptable expression is lower than elsewhere. Neither is the limitation of a single Tweet's length by the social network company perceived as an explanation for the lack of arguments or reference to the news segment that the defendant was supposedly criticizing. Even the concept of the average user

59 | E.g.: Judgement, I Ips 13079/2012-183, Supreme Court of the Republic of Slovenia, September 17, 2015.

60 | Judgement II Ips 75/2019, Supreme Court of the Republic of Slovenia, February 6, 2020, and Judgement II Ips 22/2021, Supreme Court of the Republic of Slovenia, September 1, 2021.

61 | Judgement II Ips 75/2019, Supreme Court of the Republic of Slovenia, February 6, 2020.

62 | Judgement II Ips 22/2021, Supreme Court of the Republic of Slovenia, September 1, 2021.

introduced in the first case is substituted by the concept of the average reader. In the subsequent decision, the average reader is not presupposed to be aware of the full context of the Tweet in question, as was the case in the (chronologically) prior decision. According to the court, the average reader does not understand the contentious Tweet as a mere disagreement with the public media house and its editorial policies. On the contrary, the Tweet is perceived as a personal attack on the journalist and is questioning her independence, impartiality, and credibility. The two plaintiffs thus obtained strikingly different outcomes, even though their lawsuits were based on the same Tweet.

The fact that the two practically identical cases were decided in two diametric ways by the third instance court is thought-provoking. In the Slovenian legal system, the Supreme Court plays an important role in the unification of jurisprudence. A single Supreme Court judgment does not constitute an established case law, and furthermore, the established case law may be bypassed if a court offers sufficient arguments for the divergence. In the subsequent decision, one of the dissenting judges finds the outcome of the two procedures unacceptable, invoking legal certainty and arguing that arriving at the same conclusion in two identical cases is more important than arriving at the right conclusion.[63] Such reasoning leaves something to be desired, as the importance of established case law lies beyond a formal guarantee of legal certainty, and is therefore open to transformation. The same dissenting judge also referred to the nature of Twitter as a counterweight to the manipulative practices of traditional media, especially the public media house.[64] Such a reconstruction is not present in either judgment of the Supreme Court. Furthermore, the question of the acceptable expression of critique cannot be avoided simply by declaring a specific social network particularly vulgar. The issues discussed in this article thus remain open and contentious. It will be interesting to observe the future strategies of the courts and eventual decision(s) by the Constitutional Court and the European Court of Human Rights. Future cases decided by Slovenian courts will also contribute to the development of established conceptualizations of social networks. Before the case law is fully established, diverse and case-specific (re)constructions of social networks are likely to remain prevalent.

6. Conclusions

The transformations of communication and societies provoked by social networks are a global phenomenon. Like all jurisdictions, the Slovenian legal system is negotiating the impacts of living in a digital society. The fact that more people can reach wider audiences has many positive effects on society, as the previously invisible stories can emerge and marginalized groups gain the possibility to connect and have a voice. At the same time, more (and louder) speech is a double-edged sword, as problematic speech also gains a platform. The consequences of such expression of opinions and ideas might cause harm to individuals, but its consequences also concern society as a whole, inducing higher levels of cynicism, desensitization, and polarization. Problematic discourse on social networks

63 | Separate opinion of Supreme Court Judge Jan Zobec regarding the Judgment II Ips 22/2021, par. 16.
64 | Ibid., par. 53.

is distributed extremely fast, gains a lot of (media) attention, sparks controversy, diverts from more important issues, lowers the standards of public debates, and causes lasting consequences that injunctive orders cannot fully prevent. Social networks are widely used in political communication, and traditional media often distribute social network posts; therefore, the reach of expression on such platforms goes far beyond the scope of their (average) users.[65] In extreme cases, problematic online expressions might spill over and materialize in the physical world.

Within this context, the article engaged with the multidimensional impact of social networks on the Slovenian judicial system. Whether judges themselves express their opinions on social networks or evaluate the context and content of such expressions of others, the rules of the game seem to be changing. The reviewed case law indicates that the courts perceive social networks as important forums of public expression and seek to avoid the chilling effect and overt restrictions of the freedom of expression online. As public debates online are becoming ever more polarized and brutal, it seems that the courts are adopting different strategies and conceptualizations of social networks and the acceptable level of communication thereon. The case law involving social networks is not established, and a reliable set of criteria guiding judicial decision-making is not in place. The relevance of (specific) social networks is thus decided arbitrarily, taking into account the specific context of each case. Surely, the courts will be dealing with more cases involving social networks in the future, and the strategies reviewed in this article will be further developed and consolidated. However, technological developments will certainly pose new challenges that will have to be accommodated by the legal system. The judicial system will have to adapt and invent responses to our changing realities. As the stakes soar, we are in for an interesting ride.

65 | This phenomenon is global and by no means novel in Slovenian media-sphere. Mance, 2014.

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'CONSTITUTIONAL UNCONSTITUTIONALITY': CONSTITUTIONAL REVIEW OF THE COVID-19 RESTRICTIONS ON FUNDAMENTAL RIGHTS IN SLOVENIA

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ABSTRACT

The article addresses some of the most important decisions of the Slovenian Constitutional Court related to the COVID-19 restrictions on fundamental rights. By taking a close look at the case law of the Constitutional Court, the author aims at presenting to the foreign readers and the international professional audience the specific features and peculiarities of the constitutional judicial discourse on the COVID-19 measures in Slovenia that has so far proved to be extremely controversial. While in the early stages of the COVID-19 crisis, the Slovenian Constitutional Court found the restriction of movement outside the municipality of one's residence in line with the Constitution, it later ruled that the government ordinances introducing the restrictions of fundamental rights were unconstitutional in several cases. In most of these cases, however, the reason for this was not the unconstitutionality of the measures themselves, but the unconstitutionality of their statutory legal basis. The overview revealed, inter alia, that since the outbreak of the epidemic, the Constitutional Court has issued certain important and groundbreaking decisions on the one hand, and made some good and less good compromises on the other.

KEYWORDS

COVID-19
restrictions
fundamental rights
constitutional review
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1. Introduction

In the spring of 2020, most European countries declared the COVID-19 pandemic.[2] To contain the transmission of COVID-19 and to protect the health and life of the citizens (especially the vulnerable), the governments responded, *inter alia*, by introducing mass restrictions on human rights and fundamental freedoms. A lengthy list of measures gradually introduced by almost all European countries[3] includes a partial or complete closure of state borders; mandatory quarantine for the infected persons; mandatory (self)isolation for those who were in contact with an infected person; mandatory testing; restriction of access to and gathering in public (urban) areas (squares, parks, playgrounds, etc.); partial or complete suspension of the public transport; restriction of non-essential economic activities; restrictions and prohibitions on cultural events, sports, competitions, etc.; restriction of access to certain health and social care services; partial or complete closure of kindergartens, schools, universities, churches, sports facilities, cinemas, theatres, opera houses, etc.; mandatory use of face masks in enclosed and—in some countries or regions—open public places; disinfection of hands and indoor facilities; restrictions and prohibitions on socialising (i.e. prohibitions on weddings, funerals, and other private events involving gathering); maintenance of interpersonal distance (also called social distancing); and introduction of special business regimes for the employees and customers in consumer goods stores, pharmacies, banks, post offices, etc., if and where their business was not prohibited by the authorities.[4] Moreover, a number of other measures to contain the spread of COVID-19 were also introduced. The governments of some countries—usually those with extremely poor epidemiological conditions—intensified the restrictions on freedom of movement by introducing a night curfew and the restriction of movement outside the municipalities, city districts, or

2 | In its report on the response to the COVID-19 pandemic, the Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe (OSCE/ODIHR) divided the countries into two groups. While some countries, by taking measures to slow the spread of infections and curb the pandemic, merely limited fundamental rights, others went further by temporarily suspending them. While some countries have declared one form or another of a state of emergency, others have not. Interestingly, the OSCE/ODIHR report notes that few countries have reported to international organisations the suspension of rights under international conventions, and that the (non)declaration of a state of emergency has not had a decisive impact on the adoption of measures and the intensity of fundamental rights restrictions. In some countries that have not declared a state of emergency, the restrictions on fundamental rights were nevertheless very intense. See OSCE human dimension commitments and state responses to the Covid-19 pandemic, pp. 25–28. See also Interim Report on the Measures Taken in the EU Member States as a Result Of the Covid-19 Crises and Their Impact on Democracy, the Rule of Law and Fundamental Rights, 2020, pp. 5–14.

3 | The frequently mentioned exception was Sweden. While imposing an entry ban on travel to the country, Sweden has not imposed strict measures and drastic restrictions on fundamental rights inside the country as did other European countries. The Swedish government has introduced precautionary measures to protect the most vulnerable and restricted mass gatherings of people, while the closure of kindergartens, schools, universities, libraries, cinemas, and theatres; a ban on economic activities; and general restrictions on the movement of people were not on the Swedish authorities' agenda. Face masks, for example, were not mandatory but recommended. The 'Swedish model' has been widely criticised for its 'too liberal' approach to tackling the pandemic.

4 | See Coronavirus Pandemic in the EU – Fundamental Rights Implications, 2020, pp. 15–24.

regions of people's residence. Further, in some places a general restriction on the movement of people outdoors has been temporarily imposed (the authorities banned people from leaving their homes). Eventually, most European countries were on lockdown and, resultantly, public life was stopped. A similar scenario was also present in the other continents.

By taking measures to slow and mitigate the spread of COVID-19, most countries managed to significantly reduce the number of new infections by the summer of 2020. Soon after easing the prohibitions and restrictions, however, the number of infections and COVID-19-related deaths began to rise again. In early autumn, with rare exceptions, countries worldwide experienced the second wave of the COVID-19 pandemic.[5] Rapidly, a sense of *déjà-vu* has gripped most countries, namely, the reintroduction of mass restrictions on human rights and liberties. In some countries, regions, and/or cities, public life was stopped for a second time. The second wave was followed by what is supposed to be a third wave in the spring of 2021, and towards the end of the summer of 2021, due to the rapid spread of new variants of SARS-CoV-2, a fourth wave. Restrictions and bans were reinforced by the authorities in most countries around the world, accompanied by high fines for the violators. Moreover, in some countries, violations of COVID-19 regulations and restrictions were sanctioned with imprisonment and unique 'corona sanctions'.

During the pandemic, it became clear that states cannot or will not ensure citizens the protection of their health and lives without temporary restrictions on or suspension of human rights and fundamental freedoms. The most affected were the rights protecting personal freedom and freedom of choice; freedom of movement and of residence; access to education; the possibility of peaceful gathering, association, and public expression; freedom of religion and belief; access to justice and judicial protection of rights; free scientific and artistic expression; the possibility of work; free economic initiative; the possibility to enjoy property; equality before the law and non-discrimination; dignity; and physical and mental health. The measures taken by the authorities also affected the rights of specific groups, including children, older persons, and persons with disabilities.[6] The paramount question posed on countries (i.e. on their authorities in general and courts in particular) was, and still is, under what constitutional and international legal conditions the proclamation of (the different types of) exceptional emergency situations is legitimate, and in such situations, to what extent the urgent need to save lives—itself a core fundamental rights obligation—justifies restrictions on fundamental rights. Due to the pandemic, states are faced with the difficult task of finding a balance between fundamental freedoms and principles of democratic decision-making on the one hand, and health policies and positive obligations to protect life and provide safety, and the necessity to effectively end the health crisis, on the other.[7]

5 | In contrast to some European countries, the larger and heterogeneous countries like the United States and Brazil, which globally lead in the number of COVID-19 related deaths, seemed to experience a mixture between the still ongoing first wave and a second wave. See Diaz and Constant Vergara, 2021, p. 1.

6 | See Coronavirus Pandemic in the EU – Fundamental Rights Implications, 2020, pp. 7 and 16. See also OSCE human dimension commitments and state responses to the Covid-19 pandemic, pp. 25–28.

7 | See Interim Report on the Measures Taken in the EU Member States as a Result Of the COVID-19 Crises and Their Impact on Democracy, the Rule of Law and Fundamental Rights, 2020, p. 4.

Peculiarities notwithstanding, the course of events in Slovenia was more or less like elsewhere. The Slovenian authorities responded to the danger of the spread of infections with measures and restrictions on fundamental rights that are comparable to those in most other European countries. Due to the COVID-19 outbreak, a public health emergency was declared by the government in March 2020. It was revoked in the summer of 2020, reintroduced in the autumn of 2020, and revoked again in spring 2021. Disruptions to daily interaction, education, and work; restrictions on freedom of movement from, into, and within the country; prohibitions on gathering in public places; mandatory use of face masks in enclosed public spaces and public transport; and other restrictions and prohibitions similar to those in other European countries were introduced and sanctions imposed for their violations. Those citizens, legal experts and oppositional politicians who opposed certain restrictions on fundamental rights considered them unnecessary, disproportionate, and excessively interfering with people's normal lives.[8] They also pointed to the irreparable harmful consequences of the disproportionate right's restrictions for human life and the economy.

Similar to many other countries, in Slovenia during the COVID-19 pandemic, protests emerged and gradually became permanent.[9] The participants in these protests argue that the current centre-right government is tackling the epidemic unsuccessfully and wrongly, i.e. forcing people to receive vaccination and discriminating those who have not been vaccinated, and by measures that unduly restrict people's freedom and other fundamental rights. They accuse the government of destroying democracy and the rule of law and attacking independent journalism. Furthermore, they also accuse the authorities of hate policies against ideological and political opponents, xenophobia and discrimination against refugees, corruption (i.e. in the purchase of COVID-19 protective and medical equipment, such as face masks, respirators, rapid antigen tests, etc.), and so on.[10] Gradually, two separate protests and groups of protesters emerged, one primarily

8 | In the early period of the epidemic, the people in Slovenia have taken certain government measures to contain COVID-19 better than others. Measures supported by almost two-thirds of the respondents were interpersonal distancing, mandatory use of face masks in enclosed public spaces, and general restrictions of gathering. Among the restrictions that most people rejected, however, were the closure of schools and distance learning, the restriction on movement at night (curfew), and the restriction of movement outside the municipality of one's residence. See COVID-19 Pandemic in Slovenia: Results of a panel on-line survey on the impact of the pandemics on life (SI-PANDA), 2021, pp. 10–11.

9 | The COVID-19 crisis has been marked by intense social protest worldwide. A comprehensive analyses of the protests in the United States and Europe can be found in Gerbaudo, 2020, pp. 61–75. The author ascertains that protests during the pandemic reveal the nature of the COVID-19 emergency as a moment of political suspension and heightened social confrontation. The return to pre-modern protest logics, he argues, highlights the depth of the crisis of authority revealed by COVID-19, during which inequalities have further intensified.

10 | Eurobarometer, a public opinion poll of the EU institutions, reveals that 55% of the Slovenian respondents believe that things in Slovenia are generally going in the wrong direction. At the European level, Slovenia ranks at the top of the EU in terms of dissatisfaction with the situation in the country (only respondents in Poland and Hungary are less satisfied than Slovenians with the general development of events in their country). Only 14% of the Slovenian respondents thought that things were going in the right direction in Slovenia in general (the Portuguese are the most satisfied among the Europeans, 45%). See Flash Eurobarometer: State of the European Union, 2021, Section 6.

directed against the current government, and the other one agitating against the COVID-19 restrictions.[11]

Throughout the COVID-19 crises, however, the legality and constitutionality of measures imposing restrictions on fundamental rights (including the restrictions on protests) have been constantly challenged in the Slovenian courts. The Constitutional Court—which, according to the Constitutional Court Act (CCA),[12] is the highest body of the judiciary in the field of constitutionality, legality, and protection of human rights and fundamental freedoms—received and still receives hundreds of petitions to review the constitutionality and legality of government ordinances and the COVID-19 restrictions on the fundamental rights therein. The petitioners also challenged the constitutionality of the provisions of the statutory law, which regulates the prevention of infectious diseases in the Slovenian legal system and determines the legal framework for the adoption of measures by the executive branch.

2. Constitutional review of COVID-19 restrictions on fundamental rights in Slovenia and beyond

Constitutional judicialisation of the COVID-19 measures restricting fundamental rights has taken place in most (if not all) European countries. The Constitutional Courts have ruled, with more or less empathy towards the measures of executive power, on a wide range of constitutional issues regarding the restrictions on fundamental rights. Before introducing and reflecting upon the decisions of the Slovenian Constitutional Court, we will briefly explore some of the rulings of the constitutional courts in several other Central and Eastern European countries.

In Austria, a neighbouring country of Slovenia, for example, the Constitutional Court found unlawful the regulation according to which the entry into public places was generally forbidden for the purpose of preventing the spread of COVID-19. The Constitutional Court ruled that the challenged regulation lacked a clear legal authorisation expressly providing for such a far-reaching interference with the right to free movement.[13] In another decision, the Austrian Constitutional Court ruled that property restrictions as provided in the COVID-19 regulation, including an entry ban on customer areas of business premises and, resultantly, a temporary closure of shops and businesses, are necessary to avoid the spread of the pandemic. It established that the legislator enjoys a wide margin of discretion when combating the economic consequences of the COVID-19 pandemic and that an entry ban for customer areas combined with economic support

11 | So far, the protests have been peaceful and non-violent, with three major exceptions: one in early November 2020, another in September 2021, and the third one in the beginning of October 2021. In these protests, Slovenia witnessed previously unseen scenes of mass violence, destruction, and the use of police force and special equipment to control the unrests (i.e. water cannon, tear gas, and rubber bullets). Following recent violent protests and the arrests of some protesters, some politicians from the opposition and experts warned that certain circumstances point to the excessive use of police force and called for an independent investigation into the events.

12 | CCA, Art.1§ 1.

13 | V 363/2020, ECLI:AT:VFGH:2020:V363.2020.

measures does not constitute a disproportionate interference with the fundamental right to property.[14]

The Czech Constitutional Court ruled in one of its decisions that an emergency measure that consists in the prevention or mitigation of the spread of the novel coronavirus disease has a legitimate aim. However, the regulation of the rights and obligations of individuals and the decision-making regarding which group of population will retain their rights and which will bear the burdens associated with the restriction must not be a mere expression of political will. According to the Czech Constitutional Court, in a modern democratic state governed by the rule of law, such a regulation must be founded on expert evidence; however, it is the government who assumes the responsibility, rather than its expert advisers. Therefore, the government must consider not only the specific expert evidence at its disposal, but also the overall context and impacts—both long and short term—of its measures on other areas of social life. The Constitutional Court stated that an effective constitutional review is not possible without a proper explanation from the government of the need to issue the emergency measure (including the evidence on which it was based) and appropriate substantiation of the extent to which restrictions on fundamental rights will be needed and clarification of the obligations imposed.[15]

In its decision of May 2020, the Slovakian Constitutional Court held that the necessity of protecting the life and health of the population during the COVID-19 pandemic justifies certain interferences with fundamental rights. However, it ruled that in adopting measures aimed at preventing further spread of the disease, the legislator must pass a legislation which is clear, unambiguous, and provides sufficient legal guarantees against the misuse of such data. The case concerned a piece of legislation, passed as a response to the COVID-19 pandemic, which amended the Law on Electronic Communications and allowed the Public Health Authority (PHA) to gather and use certain personal data for the purposes of COVID-19 tracking. The amended provisions obliged telecom providers to retain certain telecom identification and location data of their customers. They were required to do so for the duration of an extraordinary situation or a state of emergency in places where such had been declared in the healthcare system due to the occurrence of a pandemic or the spread of a dangerous infectious human disease. Subsequently, the data were to be provided to the PHA on the basis of a reasoned written request. The PHA was allowed to process and retain it for the duration of the extraordinary situation or state of emergency in healthcare, subject to an absolute time limit of 31 December 2020. The Constitutional Court recalled its previous case law and the case law of the CJEU, according to which blanket identification and location data collection constitute an especially serious interference with relevant rights; therefore, the strictest criteria must be applied in assessing the law's clarity and any legal guarantees. It did not find the provision obliging telecom providers to collect the data necessary to identify people who need to be notified by message of special measures adopted by the PHA to be unconstitutional. It did, however, suspend those provisions that allowed the PHA to have access to data upon request, as such notification could be carried out by the telecom providers themselves, and thus, there was no need to give the PHA access.[16]

14 | G 202/2020, ECLI:AT:VFGH:2020:G202.2020.
15 | Pl. ÚS 106/20.
16 | PL. ÚS 13/2020.

In one of the cases decided by the Hungarian Constitutional Court, a constitutional complaint was lodged challenging provisions in the new section of the Criminal Code. Under these provisions, the uttering or publishing of a statement one knew to be false or with a reckless disregard for its truth or falsity under the regime of a special legal order, with the intent of obstructing or preventing the effectiveness of protective measures, would be a felony, attracting the sanction of a prison sentence of between one and five years. According to the complainant, this provision violated the principle of clarity of norms (*nullumcrimen sine legecerta*) of the Fundamental Law. The Hungarian Constitutional Court rejected the applicant by ruling, *inter alia*, that although penal laws, which carry sanctions, require precise definition, the wording of the norms would only violate the principle of clarity of the norms if they were genuinely not interpretable. According to the Constitutional Court, the challenged new section of the Criminal Code had not been applied by the courts in enough cases to establish whether its wording was genuinely unclear. It was within the general courts' competence to interpret which statements fell under the regulation and which could obstruct or prevent the effectiveness of protective measures. Thus, according to the Constitutional Court, neither the words 'obstruct' or 'prevent', nor 'effectiveness' were genuinely unclear and no breach had occurred of the principles of rule of law and clarity of norms of the Fundamental Law. The Constitutional Court stated, however, that, stemming from the provisions of the freedom of expression and priciple of *nullumcrimen sine legecerta* of the Fundamental Law, the challenged section was to be applied to the statements that had the potential to obstruct or prevent the effectiveness of protective measures only if the perpetrator knew or had to know at the relevant time that their statement was false or they distorted the facts. The section would not be applied to statements which were being debated at the time they were made, or which later turned out to be false.[17]

The Croatian Constitutional Court issued several decisions concerning a wide range of COVID-19-related issues. In a decision of July 2020, it ruled that it is not constitutionally and legally unacceptable to exclude the possibility of citizens who have been diagnosed with SARS-CoV-2 or any other infectious disease and are, thus, in isolation, and citizens who are in self-isolation due to the suspicion that they have an infectious disease to come in person to a polling station. However, these citizens as well as all others who, for other prescribed reasons, do not come to polling stations but may vote outside polling stations, enjoy the right to request the granting of the equal possibility to vote. Therefore, the State Election Commission must secure the legal possibility to exercise the voting right guaranteed by the Constitution and the law for all citizens of the Republic of Croatia who are entitled to it, including those who request it and who have been diagnosed with COVID-19.[18] In a decision issued in September 2020, the Croatian Constitutional Court ruled that it is competent to review the decisions of the Civil Protection Headquarters (along with the Minister of Health), an entity authorised to take measures to prevent the spread of the virus. It also ruled that the decision on whether certain measures to combat the COVID-19 pandemic will be taken by the application of the constitutional provisions on a state of war or emergency is in the exclusive domain of the Parliament.[19] Further, the Constitutional Court ruled that a decision on the mandatory use of face masks and

17 | 15/2020. (VII. 8.) AB.
18 | U-VII-2980/2020.
19 | U-I-1372/2020.

a decision on the organisation of public transport that are proportionate to the aim to be achieved (protection of human health and life) in the context of a global pandemic outweigh the individual rights of citizens who are obliged to respect and act according to the measures taken by competent authorities to protect the life and health of the entire population.[20] Furthermore, according to the Croatian Constitutional Court ruling, the freedom of religion as provided by the Constitution is not absolute. Gatherings of believers at religious ceremonies can be restricted if there is a strong public interest and if the restriction is proportionate. The Constitutional Court pointed out that measures that restrict religious gatherings do not unduly restrict the constitutional guarantee of freedom of religion and freedom of public demonstrations of religious convictions if their scope does not jeopardise the very essence of the constitutional guarantees.[21] According to the Croatian Constitutional Court, the constitutional principles of free enterprise and free markets are also not absolute. However, the measures restricting the property rights and work for the purposes of protecting the interests and security of the state, nature, human environment, and human health must meet the requirements of proportionality as referred to in the Constitution.[22]

In Serbia, several initiatives challenging the constitutionality and legality of the Decision on Declaring a State of Emergency were submitted to the Constitutional Court. Pursuant to the provisions of the Constitution, the Decision on Declaring a State of Emergency was adopted by the President of the Republic, together with the President of the National Assembly and the Prime Minister, and confirmed by a decision of the National Assembly. Referring to the case law of the European Court of Human Rights, the Serbian Constitutional Court established that a 'public emergency' exists if the situation is actual or imminent, if its effects involve the whole nation, if the continuation of the organised life of the community is under threat, and if the crisis or danger is of such an extraordinary nature that regular measures or restrictions are not sufficient to restore public order. It found that the occurrence of the infectious disease of COVID-19 and the danger of its uncontrolled spread on the territory of the Republic of Serbia could be considered an emergency that posed a significant threat to the health of the general population and the normal course of life in the country, including the functioning of its institutions, public services, the economy, and especially the health system. Drawing from the above, the Constitutional Court held that the decision to declare a state of emergency due to the pandemic was in line with the Constitution.[23] In a later case, the Constitutional Court pointed at a special legal regime of derogation from human rights that implies a temporary suspension of certain human rights in emergency circumstances. However, it was found that the challenged measures of the Decree on Measures during a State of Emergency prohibiting the movement of certain categories of persons did not constitute deprivation of liberty, according to neither their purpose nor content. The purpose of these measures was not to deprive the persons concerned about their liberty, but to additionally and effectively protect particularly vulnerable persons, such as the elderly, from the possibility of illness, and the asylum seekers and irregular migrants accommodated in asylum centres and reception centres. According to the Constitutional Court, the purpose of the

20 | U-II-3170/2020 *et al.*
21 | U-II-5709/2020 *et al.*
22 | U-II-6087/2020 *et al.*
23 | IUo-42/2020.

temporary restriction was their effective protection and the effective protection of the general population from dangerous infectious diseases. The provision of the Decree on Measures during a State of Emergency and the Decree on Misdemeanour for Violation of the Order of the Minister of the Interior on Restriction and Prohibition of Movement of Persons on the Territory of the Republic of Serbia were also challenged in this case, stipulating that due to non-compliance with the prohibition of movement, misdemeanour proceedings may be initiated and completed. This was even the case in the event that criminal proceedings have been initiated or are in progress for a criminal offence that includes the features of that misdemeanour, notwithstanding the prohibition from the Law on Misdemeanours and the constitutional principle *ne bis in idem*. The Constitutional Court found that the disputed decrees that enabled the possibility of parallel conducting misdemeanour and criminal proceedings in relation to the same offence were neither in accordance with the Constitution nor with the European Convention on Human Rights.[24]

The Slovenian Constitutional Court issued its first important COVID-19-related decision in the summer of 2020, when the pandemic reached one of its peaks in Slovenia. It ruled by a narrow majority that an ordinance adopted by the government restricting people's movement to the territory of the municipalities of their residence was consistent with the Constitution. At the beginning of the autumn of 2020, the Constitutional Court addressed several petitions[25] for the review of the constitutionality and legality of the restriction of movement at night (e.g. a curfew). Finding these petitions admissible for further review and assessment on the merits, it rejected the petitioners' proposal to suspend the implementation of the challenged provisions of the government ordinance. Following the issuance of these two decisions, however, the Constitutional Court's attitude towards the government measures to contain the all and its restrictions on human rights and fundamental freedoms became significantly less empathetic.

In December 2020, the Constitutional Court ruled that two government orders extending closure of schools (e.g. the restriction of gathering in kindergartens, schools, and universities) and the decision of the Minister of Education on distance learning were not valid because they had not been published in the Official Gazette (the government published them on its website instead). The Constitutional Court ruled that due to an inappropriate way of publishing the government ordinance on the temporary restriction of gathering in educational institutions, it was invalid too as much as it concerns the institutions for the education of children and adolescents with special needs. The Constitutional Court gave the government three days to rectify the legal irregularities in the publication of its acts; otherwise, distant learning would have to be abandoned (e.g. classes would have to be held in schools) despite the danger COVID-19 posed. Another important decision by the Constitutional Court was issued at the end of March 2021. It found the petition admissible and started the proceedings to assess the constitutionality and legality of the government ordinances that first restricted public protests, and then limited them to a maximum of ten participants. At the same time, the Constitutional Court suspended the

24 | IUo-45/2020.

25 | In Slovenia, the proceedings for the review of the constitutionality of laws and sub-statutory general acts can be, *inter alia*, initiated by a Constitutional Court order on the acceptance of a petition to initiate a review procedure, which may be lodged by anyone—be it a natural or legal person—who demonstrates legal interest. See CCA, Art. 1 § 1.

implementation of the challenged provisions of these ordinances until its final decision in July 2021. The Constitutional Court established that due to their length and effects, the challenged provisions severely interfered with the right to peaceful assembly and freedom of association from Art. 42 of the Constitution.

Perhaps the most important decision regarding measures to contain the COVID-19 pandemic was issued by the Slovenian Constitutional Court in May 2021. At the initiative of several petitioners, it reviewed the provisions of the Communicable Diseases Act (CDA) authorising the government to restrict or prohibit movement and/or gathering of people to prevent the introduction of an infectious disease into the country or its spread within the country.[26] It also assessed the constitutionality and legality of the provisions of several government ordinances that restricted movement and prohibited gathering of people in public places from April to October 2020 (the ordinances were adopted on the basis of the challenged provisions of the CDA). The Constitutional Court ruled that the challenged provisions of the CDA are unconstitutional because they leave it to the discretion of the executive branch without any limitation to choose the methods, types, scope, and duration of restrictions with which it can intensively interfere with the constitutional rights of free movement and peaceful assembly. Consequently, the Constitutional Court found that the challenged government ordinances, in the parts in which they were adopted on the basis of the unconstitutional CDA provisions, were also inconsistent with the Constitution.

In the following subsection, the above-mentioned decisions of the Slovenian Constitutional Court will be addressed in greater detail. These decisions will be referred to, *inter alia*, in the light of the warnings of some legal experts that Slovenia, during the pandemic, has been witnessing disproportionate and harmful restrictions on the fundamental rights and the erosion of law with devastating consequences for the entire legal system. By taking a close look at the COVID-19-related case law of the Constitutional Court, we look forward to presenting to the foreign readers and the international professional audience the specific features and peculiarities of the judicial discourse on the COVID-19 measures in Slovenia that has so far proved to be extremely controversial.

2.1. Overview of the Slovenian Constitutional Court's case law

2.1.1. Order and Decision No. U-I-83/20 on the prohibition of movement outside the municipality of one's residence

In this case, the Constitutional Court reviewed the constitutionality and legality of Ordinance/38 and Ordinance/52. Finding that the petition to initiate the review procedure of the constitutionality of the ordinances raises a particularly important precedential constitutional question of a systemic nature on which the Constitutional Court had not yet had the opportunity to take a position, it carried out the review despite the fact that the ordinances ceased to be in force. The question at issue was whether the prohibition of movement outside the municipality of one's permanent or temporary residence determined by the challenged government ordinances was consistent with the first paragraph of Art. 32 of the Constitution, which guarantees freedom of movement to everyone.

The review of the constitutionality and legality of the ordinances started in March 2020 with the procedure for examining the petition. The question on the constitutional judges' table was whether the petitioner has demonstrated legal interest for their petition

26 | CDA, points 2 and 3 of Art. 39 § 1.

to be decided on merits.[27] An important circumstance in the procedure for examining the petition in this case was that the petitioner was not convicted of a minor offence for violating the government ordinances where they could exhaust the available legal remedies. For this reason, the petitioner was also not able to file, together with their petition for the review of the two ordinances, a constitutional complaint against an individual legal act, which is, as a general rule, a necessary precondition for a petition to be admissible. In Order No. U-I-83/20, dated 6 April 2020, the Constitutional Court referred to its previous decisions in similar matters and held that it is not possible to require the petitioner to violate the allegedly unconstitutional or illegal provisions of the ordinances to initiate minor offence proceedings and substantiate the legal interest for filing a petition. In the present case, the judges also assessed that the petition for the review of the constitutionality and legality of sub-statutory general acts raises a particularly important precedential constitutional question of a systemic nature on which the Constitutional Court had not yet had the opportunity to take a position. On the basis of these arguments, the Constitutional Court ruled by eight votes to one that the petitioner succeeded in demonstrating the legal interest and found the petition admissible for further review.[28]

By Order No.U-I-83/20, the Constitutional Court also decided to suspend the implementation of Art. 7 of Ordinance/38 until its final decision.[29] Pursuant to this provision, the restrictions on movement and gathering of people determined by this ordinance were in force until the government established—with an act published in the Official Gazette—that reasons for the restrictions ceased to exist. The Constitutional Court ordered that its decision on the suspension must be implemented in such a manner that the government will check weekly, taking into account the opinion of the epidemiologists, whether the measures taken to contain the spread of infections (including restriction of movement outside municipalities) are still necessary and whether they are achieving the objectives pursued. On this basis, the government should decide whether to extend, amend, or abolish the restrictions according to the ruling of the Constitutional Court.

27 | Pursuant to Arts. 22–24b of the CCA, the legal interest is deemed to be demonstrated if a law, executive regulation (i.e. an ordinance adopted by the Government), or other general act whose review has been proposed by the petitioner directly interferes with their rights, legal interests, or legal position. In its case law, the Constitutional Court has taken a position that as a general rule legal interest in filing a petition is demonstrated if the petitioner is involved in a concrete legal dispute in which they have exhausted all regular and extraordinary legal remedies and if a petition is filed together with a constitutional complaint against an individual legal act. Moreover, as a general rule, a petition must be such as to raise particularly important precedential constitutional questions of a systemic nature. See also Mavčič, 2000, pp. 172–189.

28 | Judge Jaklič voted against this decision. In a partially dissenting separate opinion, he pointed out that, as a rule, the Constitutional Court may accept the petition only after all legal remedies have been exhausted and if the petitioner has also lodged a constitutional complaint against an individual act issued on the basis of the challenged provisions of the general act. In the opinion of Jude Jaklič, in the case at hand, like any other citizen, the petitioner should first seek judicial protection before the regular courts. See Jaklič, 2020a.

29 | Pursuant to the first paragraph of Art. 39 of the CCA, a petitioner is entitled to propose to the Constitutional Court to issue a temporary injunction on and suspend the implementation of the challenged provisions until the final decision. The court issues such an injunction if the implementation of the challenged provisions could result in harmful consequences that are difficult to remedy.

The petitioner claimed that the ordinances were inconsistent with Art. 2 of the Constitution because they were unclear and ambiguous.[30] According to the petitioner, they were also inconsistent with points 2 and 3 of the first paragraph of Art. 39 of the CDA, because this provision did not give the authority to issue the restrictions on movement and gathering to the government, but to the Minister responsible for health. The measures determined in the challenged ordinances are not limited in time and go beyond the measures provided for in Art. 39 of the CDA. The challenged provisions restricted freedom of movement quite intensively that—in the petitioner's view—could and should have been allowed only in the event of a previously declared state of emergency by the National Assembly on the basis of Art. 92 of the Constitution, which did not happen in the given circumstances. The measures introduced by the ordinances were also unreasonable in view of the objectives pursued. Additionally, according to the petitioner, the ordinances granted mayors the power to further encroach on fundamental rights, for which the government, in the opinion of the petitioner, has no authority in law and the Constitution.[31]

The Constitutional Court issued its final ruling in this case in Decision No. U-I-83/20, dated 27 August 2020. It found that the challenged provisions of the two ordinances were not inconsistent with the Constitution. The decision was adopted by five votes to four. Five out of nine constitutional judges gave either consenting or dissenting separate opinions.

The challenged ordinances were reviewed by the Constitutional Court on the basis of the test of legitimacy, which entails an assessment of whether the legislature pursued a constitutionally admissible objective; and on the basis of the strict test of proportionality that comprises an assessment of whether the interference was appropriate, necessary, and proportionate in the narrower sense. Applying the test of legitimacy, the Constitutional Court assessed that by restricting movement to the municipality of one's residence, the government pursued a constitutionally admissible objective, i.e. the containment of the spread of the contagious COVID-19 and, thus, the protection of human health and life. It emphasised that striving to achieve this goal is a constitutional obligation of state authorities and that a slow and inadequate response to the emergence of a contagious disease that could put human health or even life at risk would be inconsistent with the positive obligations of the state to protect the right to life (Art. 17 of the Constitution), the right to physical and mental integrity (Art. 35 of the Constitution), and the right to health care (the first paragraph of Art. 51 of the Constitution). While the Constitutional Court stressed that particular emphasis must be placed on the positive obligations of the state in the event of a contagious disease, it also underlined the duty of every individual to protect other people's health, particularly the health of vulnerable groups, which may also justify restrictions on freedom of movement.[32]

Applying the test of proportionality, the Constitutional Court first underlined as an important circumstance of its review the fact that state authorities were inevitably faced with considerable uncertainty when introducing the measures at issue, since, particularly at the beginning of its spread, there existed almost no scientific or medical research on COVID-19. Despite such uncertainty, these measures must be based on verifiable grounds, expert opinions, and forecasts that could be taken into consideration at the time

30 | Order No. U-I-83/20.
31 | *Ibid.*
32 | Decision No. U-I-83/20.

of their adoption. In this framework, however, the deciding authorities responsible for epidemic risk management have wide discretion regarding the choice of measures.[33]

The Constitutional Court assessed that the prohibition of movement outside the municipality of one's permanent or temporary residence was an appropriate measure for achieving the pursued objective since there existed a requisite probability according to the data available at the time of the adoption of the challenged ordinances that it could have contributed towards reducing or slowing down the spread of COVID-19, primarily by reducing the number of actual contacts between persons living in areas with a higher number of infections and who are consequently at a higher risk of transmission of the infection, and persons living in areas with a lower number of infections or even no infections at all.[34]

In the review of the necessity of the interference, the Constitutional Court deemed it crucial that the previously adopted measures (i.e. closure of educational institutions, suspension of public transport, general prohibition of movement and gatherings in public places and areas) did not enable, at the time of the adoption of the challenged ordinances, the assessment that they would prevent the spread of infection to such an extent that—with regard to the actual systemic capacity—adequate health care could be provided to every patient. In such conditions, further measures to prevent the spread of infection and, thereby, the collapse of the health care system were necessary.[35]

The Constitutional Court assessed that the measure restricting movement to the municipality of one's residence was also proportionate in the narrower sense. It found that the demonstrated level of probability of a positive impact of the measure on the protection of human health and life outweighed the interference with freedom of movement. In this assessment, the Constitutional Court deemed it important that the measure included several exceptions to the prohibition of movement outside the municipality of one's residence. It also assessed the restriction on movement as regards the time and territory of its application, by estimating that the longer such a measure lasts, the more invasive the interference becomes. However, this does not entail that the challenged restrictions on the right to freedom of movement were disproportionate in the narrower sense in light of their temporal dimension. The Constitutional Court held that the regulations were in force for a relatively short period of time and that their original invasiveness could by no means have exceeded in the days of their validity. Regarding the territorial limitation of the measures, it stated that such measures can apply to the territory of the whole country if it is ascertained, on the basis of existing scientific information, that the areas where there is a risk of infection are scattered all over the country and if the constitutionally admissible objective cannot be achieved in any other manner.[36]

For these reasons, the Constitutional Court decided that the prohibition of movement outside the municipality of one's residence did not disproportionately interfere with the freedom of movement, as determined by the first paragraph of Art. 32 of the Constitution. As the remaining allegations against the ordinances stated in the petition did not raise any particularly important precedential constitutional questions and the petitioner failed to demonstrate legal interest for a constitutional review regarding these

33 | *Ibid.*
34 | *Ibid.*
35 | *Ibid.*
36 | *Ibid.*

allegations, the Constitutional Court rejected the petition in the remaining part. Last but not least, the petitioner also alleged the unconstitutionality of Art. 39 and certain other statutory provisions on which the challenged ordinances were based. In this regard, the Court explained that in the case at hand, it did not take a position on the constitutionality of the statutory bases for the adoption of the challenged ordinances.

The constitutional judges, who disagreed with the majority decision, presented their views on the challenged provisions of the government ordinances in dissenting separate opinions. Judge Mežnar, for example, argued that the position of some judges that the prohibition of movement outside the municipality of one's residence was a disproportionate measure does not mean a flat opposition to all COVID-19 measures. However, she pointed out that the government did not have the legal authority to adopt the challenged ordinances because, according to the provisions of the CDA in force at the time, the Minister of Health had such authority. In this regard, Judge Mežnar pointed to the fact that the government received the authority only after the CDA was amended. She also argued that during the review proceedings, some judges had persistently warned that the Constitutional Court could and should not assess the constitutionality and legality of executive acts (e.g. government ordinances) without prior review of Art. 39 of the CDA, because the challenged provisions of this act provide a statutory legal basis for the assessed executive measures. Regretfully, in the view of Judge Mežnar, the majority of the Constitutional Court judges decided otherwise. According to her, the prohibition of movement outside the municipality of one's permanent or temporary residence in addition to the already existing general restriction on movement and gathering in public places was not necessary and proportionate for further (stronger) prevention of contacts between individuals. According to the judge, this measure did not limit people-to-people contacts.[37]

In his dissenting separate opinion, Judge Čeferin assessed that the majority of constitutional judges were satisfied with the finding that in the context of the COVID-19 pandemic, the executive authorities should be left with an almost unlimited discretion in choosing and implementing measures. He described the majority decision as a dangerous precedent. In his opinion, the Constitutional Court failed to carry out its basic mission, i.e. the supervision over the conduct of the executive branch and its restrictions on human rights and fundamental freedoms. Judge Čeferin also pointed out that the majority of constitutional judges did not substantiate their claim that the government ban on the crossing of municipal borders was supported by the epidemiological profession. According to him, Dr Ivan Eržen, the then director of the National Institute of Public Health (NIJZ), who was later dismissed by the government, publicly expressed an opinion that the prohibition of movement outside the municipality of one's residence was an unnecessary measure. A careful examination of measures to contain the COVID-19 epidemic, according to Judge Čeferin, shows that the restriction on movement outside the municipality of one's residence could not contribute to curbing the spread of the virus. On the contrary, prohibiting people from leaving their domicile municipality could even increase the risk of infection. Lastly, Judge Čeferin wondered whether the principle of proportionality is a tool that allows proper weighing in cases where a fundamental right has to be restricted in the public interest or for the sake of other fundamental rights, or merely a means of justifying such a restriction. In his view, the proportionality test used by the constitutional courts is an empty criterion. If the constitutional judges misjudge

37 | Mežnar, 2020a.

the meaning and weight of the rights and interests on the scale, it shows the wrong result. In assessing the constitutionality of the prohibition of crossing the municipal borders, the Constitutional Court used the proportionality test in such a way that it could not show a different result than it did because it was used as a means to justify a majority decision. According to the judge, a critical, objective, and fair application of the proportionality test would lead to a different result. It would show that the measure prohibiting movement outside the municipality of one's residence was disproportionate and that the government interfered with the freedom of movement of the people, the right guaranteed in Art. 32 of the Constitution.[38]

2.1.2. Orders Nos. U-I-426/20 and U-I-427/20 on the admissibility of the petitions to review the constitutionality and legality of the prohibition of movement at night (curfew)

In October 2020, referring to the rapid increase in the number of infections,[39] the government restricted, with some exceptions, the movement of people between 9 pm and 6 am. Regarding this restriction, several petitions were submitted to the Constitutional Court to initiate review proceedings of its constitutionality and legality.

One of the petitions was filed by a well-known Slovenian human rights expert and a practising lawyer. The petitioners claimed unconstitutional several government ordinances, including Ordinance/147, which introduced a curfew. According to the petitioners, points two and three of the first paragraph of Art.39 of the CDA, which provided a statutory legal basis for the restriction by the government ordinances on the movement and gathering in public places, were also unconstitutional. With Order No. U-I-427/20, dated 21 December 2020, the Constitutional Court unanimously found that the petition was partially admissible. It assessed that the petition raises important precedential constitutional issues concerning interferences with the rights of all residents throughout the country and that the Constitutional Court has not yet had an opportunity to address them. As such, the Constitutional Court specifically pointed out the general restriction on movement between 9 pm and 6 am. Additionally, it found that legal interest was also demonstrated by the petitioners regarding the assessment of the constitutionality of Art. 39 of the CDA.[40]

The petitioners proposed to the Constitutional Court to suspend until its final decision the implementation of the challenged provisions of Art. 39 of the CDA and the provisions of the ordinance that introduced a curfew. This proposal was rejected by the Constitutional Court one and a half months prior to the decision on the admissibility of the petition by Order No. U-I-427/20, dated 5 November 2020. The order was issued by eight votes to one. All, but one, of the judges were of the opinion that the implementation of the challenged provisions of the ordinance would not lead to irreparable harmful consequences and that the condition for suspending the enforcement of the government ordinance was, therefore, not met. Judge Mežnar, who voted against the majority decision, claimed in her dissenting separate opinion that she advocated an alternative decision by which the

38 | Čeferin, 2020.
39 | In the second half of October 2020, the number of confirmed new infections exceeded two thousand for several consecutive days.
40 | Order No. U-I-427/20. The Constitutional Court rejected the remainder of the petition with an explanation that it would not open important precedent-setting constitutional issues.

Constitutional Court would properly balance the harmful consequences of the COVID-19 pandemic on the one hand and a mass interference with the people's fundamental rights on the other. In her opinion, the curfew was an unconstitutional measure because it interfered with the right to personal liberty, without a legitimate legal basis. She agreed that in the epidemiological situation, the government has had a duty to limit the spread of COVID-19; however, the curfew, in her opinion, did not contribute to limiting the harmful effects of the COVID-19 pandemic. In Judge Mežnar's opinion, the curfew determined by the challenged ordinance meant that the majority of the population in Slovenia was prevented from leaving their homes after 9 PM. Hence, people were not allowed to leave their homes for more than one third of a day, and their movement outside the municipality of their homes was prohibited in the remaining two thirds. Exceptions were defined very narrowly and did not include—in terms of the spread of infections—completely harmless walks or recreation. Referring to the criteria applied by the European Court of Human Rights, Judge Mežnar claimed that curfew was not a temporary restriction of movement, but a restriction of personal liberty. Such a restriction was, in her view, unprecedented in Slovenia's recent history, and could not be introduced on the basis of Art. 39 of the CDA, as these provisions only provided for the restriction of movement.[41]

Judge Mežnar gave the same dissenting separate opinion to Order No. U-I-426/20, dated 21 December 2020. In this decision, the Constitutional Court examined the petition in which another petitioner proposed the review of the constitutionality of the curfew provisions and their suspension. A separate opinion to this Order was also given by Judge Jaklič who agreed with the Constitutional Court's rejection of the petitioner's proposal for issuing a temporary injunction. Judge Jaklič stated that by taking measures to restrict movement at night, the government was trying to prevent the further spread of COVID-19 and prevent the development of events that we have witnessed during the peak of the epidemic in Italy. In his view, the government considered a carefully prepared advice from its expert group for COVID-19 and followed other countries where the same restriction was imposed. In Judge Jaklič's view, only partially restricted movement of persons (nine hours per day at night) in the worst period of the COVID-19 pandemic that provided for urgent exceptions could not outweigh the dangers if the court would have followed the petitioner's proposal and withheld the measure. In his opinion, there was a serious threat that if the measures were suspended, the constitutional judges themselves would cause deterioration of health and death of a large number of people. The threat to constitutional rights and values by the mass and permanent loss of human life and health is disproportionately greater than the threat to constitutional rights by the temporary and partial restriction of movement, with the exceptions provided for. According to Judge Jaklič, the petitioner's motion was, therefore, clearly unfounded.[42]

The Constitutional Court issued its final decision regarding the constitutionality and legality of the curfew provisions in Decision No. U-I-79/20, dated 13 May 2021 where it

41 | See Mežnar, 2020b.Judge Mežnar also asserted that the measures, which are usually addressed as a "curfew", are not necessarily comparable in different countries.In her opinion, a comparison of the Slovene and Austrian versions shows that the latter, in contrast to the Slovene version, is regulated by a statutory law, is less invasive and contains several exceptions that are broadly defined (for example, meeting daily needs, staying outdoors for physical or mental well-being etc.).According to the judge, in Austria, the government is not allowed to introduce curfews that prohibit residents from walking, recreation or merely sitting in public parks.
42 | Jaklič, 2020c.

also ruled on the constitutionality of the challenged provisions of Art. 39 of the CDA. This decision is addressed in Section 2.1.5.

2.1.3. Partial Decision and Order No. U-I-445/20 and Order No. U-I-473/20 on the restriction of gatherings in educational institutions

In this case, the Constitutional Court decided on the admissibility of a petition of two minor children attending primary school for children with special needs. They challenged the regulation that prohibited gatherings in educational institutions and determined that educational work for children with special needs be temporarily carried out at a distance. The measures in question were adopted by points 3 and 5 of the first paragraph of Art. 1 of Ordinance/152. Additionally, the petitioners proposed the Constitutional Court to suspend the implementation of the challenged ordinance provisions until the final decision. The petitioners also proposed to the Constitutional Court to initiate the proceedings to assess the constitutionality and legality of three orders issued by the government to extend the validity of the measures determined by the challenged provisions of the ordinance and the decision of the minister responsible for education on the temporary implementation of educational work in primary and music schools at a distance.

In Partial Decision and Order No. U-I-445/20, dated 3 December 2020, the Constitutional Court found the petition admissible by eight votes to one[43] and immediately proceeded to decide on the merits of the case. Notwithstanding the fact that Ordinance/152 ceased to be in force meanwhile, it found that conditions were met for a substantive assessment of the challenged provisions of the ordinance.[44] Furthermore, the Constitutional Court established that the government adopted Ordinance/152 on the basis of the CDA that in point 3 of the first paragraph of Art. 39 provides that the government may prohibit the gathering of people in schools, cinemas, restaurants, and other public places until the danger of a contagious disease ceases. According to the challenged provisions of the ordinance, the prohibition of gathering is also applied in institutions for the education of children and adolescents with special needs. Given that the challenged legal regulation by the ordinance may establish restrictions on the fundamental rights of children with special needs as a vulnerable group, according to the Constitutional Court, the case at hand concerned a decision on an important precedent constitutional issue for which the petitioners have demonstrated legal interest.

43 | Judge Jaklič, who voted against the majority decision, gave dissenting separate opinion. Two judges gave consenting separate opinions.

44 | In Art. 47 § 1, the CCA stipulates that if a general act that ceased to be in force when a petition is lodged is challenged by the petition, and the consequences of its unconstitutionality or unlawfulness were not remedied, the Constitutional Court decides on its constitutionality or legality. In the case at hand, the Constitutional Court found that the petitioners had not shown such consequences as they state only that the long-term closure of schools hindered their personal development, but did not claim that this is an independent consequence of the challenged provisions of the ordinance. The latter notwithstanding, it was of the opinion that there was a sufficient public interest in the substantive assessment of the challenged legal regulation. Such public interest exists, according to the Constitutional Court, if the requirement of legal predictability in a certain area of regulating social relations demands a decision of the Constitutional Court on particularly important precedent constitutional issues of a systemic nature, which may reasonably be raised in relation to acts of the same nature and comparable content in the future.

The petitioners claimed that due to the closure of schools, they were denied access to education according to the programs for children with special needs, additional professional assistance, and all other special treatments (i.e. physiotherapy, occupational therapies, pool therapies, speech therapy, and psychological treatments) provided to them at school. They alleged that the implementation of educational work at a distance means a denial of their rights to care and education, and training for active work in society. They explained that, in contrast to their peers, they need specific help in learning, an individualised approach, and special professional methods of working with more adaptations and illustrations. They stated that their parents do not have the appropriate special skills and the teaching materials needed to adapt learning to their specific needs and deficits. The petitioners also claimed that the individual treatment they receive at school is not possible at home because both of them have one healthy primary school sibling, who also needs the parents' help and supervision in school work. In the petitioners' opinion, the challenged government ordinance and orders were inconsistent with Arts. 2 (the principle of the rule of law), 14 (equality before the law and prohibition of discrimination), 52 (rights of disabled persons), 56 (rights of children), and 57 (education and schooling) of the Constitution.[45]

In their response to the petition, both the government and the minister responsible for education rejected the petition as unfounded. According to them, the opening of schools, including those for children with special needs, would be dangerous for the health of children and school staff ,and for public health in general.[46]

The Constitutional Court found in Partial Decision and Order No. U-I-445/20 that the validity of the measures determined by the challenged ordinance was limited to seven days following its publication, and that the government decided to extend their validity three times by adopting the challenged orders. Since the challenged orders were not published in the Official Gazette of the Republic of Slovenia (they were published on the government's website instead), the Constitutional Court ruled that they could not have entered into force. Consequently, this legal circumstance also affected the validity of the measures determined by the challenged provisions of the ordinance. The Constitutional Court reasoned that by adopting the challenged orders, the government regulated in an abstract manner the rights, obligations, and legal position of an indefinite number of the legal entities and natural persons to whom such measures applied (educational institutions, particularly the pupils attending them). According to the Constitutional Court, this entails that, in terms of content, the orders of the government were regulations and they should be published in the Official Gazette before they entered into force. This also applied to the order issued by the minister responsible for education which determined that, in light of the then epidemiological situation, educational work in primary and music schools was to be temporarily carried out at a distance. According to the Constitutional Court, this order was also not publicised appropriately.[47]

In view of the fact that the Constitutional Court established that the temporary prohibition of gatherings in educational institutions was extended by invalid government orders, such organisations should have been reopened immediately. However, as the Constitutional Court was aware that the epidemiological situation in the country might

45 | Partial Decision and Order No. U-I-445/20.
46 | *Ibid.*
47 | *Ibid.*

not yet permit gatherings in such large numbers and that certain guidelines and organisational adaptations might be necessary for these organisations to reopen, it determined the manner of implementation of its decision. It decided that the adopted decision would apply only after the expiry of a three-day period following its publication in the Official Gazette. By so ruling, the Constitutional Court allowed, according to its own wording, sufficient time for the competent authorities to decide on the closure of educational institutions and to order that education be carried out at a distance to reassess whether such measures are scientifically justified. Given that one of the possible decisions that the government be able to take was that schools and other educational institutions must continue to be closed, the Constitutional Court stated that in such a case, the conditions would be met for the temporary suspension of the challenged provisions of the ordinance (e.g. those related to the prohibition of the implementation of education in the institutions for children with special needs); however, it has not ruled so in its partial decision. Instead, the Constitutional Court resorted to warning and pointing at harmful consequences if the government insisted on keeping the institutions for children with special needs closed. It agreed with the petitioners that this may affect their personal development. In the Constitutional Court's view, further enforcement of a possibly unconstitutional regulation could undoubtedly have detrimental consequences for children with special needs. Taking into account their special features and needs, they need a specially adapted implementation of education, which they can usually receive only in institutions where they are dealt with by specially trained workers. According to the Constitutional Court, if continued, school closures would have had far greater harmful consequences for these children than for other children.[48]

Soon after Partial Decision and Order No. U-I-445/20 were issued, the government re-introduced almost the same legal regulation prohibiting gatherings in educational institutions and introducing the temporary implementation of educational work at a distance. The provisions of the new Ordinance/181 that applied to schools and educational institutions for children with special needs were challenged by the same petitioners as in the above mentioned case No. U-I-445/20. In Order No. U-I-473/20, dated 21 December, the Constitutional Court unanimously found that the petition is admissible[49] and that the conditions were met for a substantive assessment of the challenged provisions, despite the fact that the Ordinance/181 ceased to be in force meanwhile. Additionally, it initiated the proceedings to assess the constitutionality of Ordinance/183 on the temporary prohibition of gatherings in institutions in the field of education that was in force at the time of the issuance of the Constitutional Court's decision in this case. It found admissible the petition to initiate the review of the constitutionality and legality of the order of the minister responsible for education on the temporary implementation of educational work at a distance, insofar as it applied to schools and educational institutions for children with special needs. Finally, the Constitutional Court suspended the implementation of the challenged provisions of Ordinance/181 and the Minister's order until its final decision, while ruling that the Government must, no later than by 4 January 2021, enable the start of the implementation of programs for children with special needs.

48 | *Ibid.*

49 | Order No. U-I-473/20 was issued by eight judges of the Constitutional Court. Judge Jaklič who was the only judge who voted against Partial Decision and Order No. U-I-445/20 did not take part in the admissibility proceedings and did not vote in this case.

In his consenting separate opinion titled 'Plight teaches how to think', Judge Pavčnik drew attention to the plight of children with special needs and of their parents. According to the judge, whenever possible, the cliffs between Scylla and Charybdis should be crossed so that children with special needs receive as much assistance as possible, provided that all those implementing the program and providing them with individual assistance can be adequately protected. If the risk of infection can be avoided as much as possible, he claimed, it is natural that we need to come to the aid of a vulnerable group.[50] Judge Mežnar, who also gave consenting separate opinion, warned that the Ministry of Education and the government had been ignoring the decision of the Constitutional Court for three weeks; therefore, at the initiative of the same initiators, the Constitutional Court had to reconsider the reasons for closing schools and institutions for children with special needs. She emphasised that it was no surprise that the Constitutional Court had repeated its message from Decision U-I-445/20 and had taken it a step further and instructed the government to provide conditions for the opening of educational institutions for children with special needs by 4 January 2021 at the latest. The Constitutional Court cannot force a government to respect its decisions; however, a good government, according to Judge Mežnar, does not even think of ignoring them.[51]

2.1.4. Order and Decision No. U-I-50/21 on the prohibition of public protests

In the spring of 2021, two petitioners who wished to remain anonymous[52] filed a petition for the review of the constitutionality and legality of multiple provisions of two government ordinances in the parts that completely prohibited public protests and later limited them to up to ten participants to prevent the spread of COVID-19. By Order No. U-I-50/21 dated 15 April 2021, the Constitutional Court unanimously found the petition admissible for further consideration, although the ordinances were no longer in force. It has also initiated the procedure for assessing the constitutionality and legality of two other ordinances prohibiting protests that were still in force at the time the decision was issued. On the proposal of the petitioners, the Constitutional Court suspended the implementation of the challenged provisions of the ordinances until its final decision by five votes to four. The Court ordered the government to adopt in the case of further restriction of protests a new regulation within seven days, taking into account guidelines determined by the Constitutional Court in the reasoning of the Order. Additionally, it ruled that protests were temporarily still prohibited until 18 April 2021 (i.e. for three more days following the publication of the decision of the Constitutional Court in the Official Gazette) and that the provisions from point 14 of Art. 57 of the CDA shall also apply until the protests are still prohibited. According to this statutory provision, a fine of 400–4,000 Euros may be imposed on an individual who violates measures determined by the executive ordinances adopted on the basis of the first paragraph of Art. 39 of the CDA. Judges gave two consenting separate opinions and three dissenting separate opinions to the majority decision.

The petitioners alleged a violation of the right to peaceful assembly (Art. 42 of the Constitution) and freedom of expression (Art. 39 of the Constitution). According to them,

50 | Pavčnik, 2020.
51 | Mežnar, 2020c.
52 | The petitioners feared that because they dared to challenge its decisions, they would receive retaliatory measures from the government.

one of the key elements of democracy is the possibility of gathering in public places, especially in front of symbolic institutions of state power. They emphasised that they were banned from having a possibility to express their views on public affairs in the current political situation, including disagreement with certain policies, and their concern for the future of the country. They also claimed that the authorities had unjustifiably prohibited them from opposing certain government measures to contain the COVID-19 epidemic. The petitioners pointed out that, on the one hand, to prevent the spread of infections, the government allows various forms of association of people and determines the way they should be exercised (e.g. shopping, recreational activities, and gathering in churches). On the other hand, the government banned protests completely and for a long time. It is unacceptable in the view of the petitioners that the gathering of people for the purpose of peaceful protest and public expression of their opinion enjoys less legal protection than some permitted forms of association, because the right to peaceful protest is an important building block of political democracy.[53]

The petitioners also drew attention to the unacceptable practice of the authorities competent in the field of minor offences. According to the petitioners, they fine those who express their political views in public, even if it involves gathering of only two or three people, while it is allowed, for example, in commercial centres and other closed spaces to stand in line without an adequate interpersonal distance. The petitioners referred to the documents from which, in their opinion, it follows that the prevention of gathering in open public places does not make a significant contribution to the prevention of infections.[54]

Furthermore, the petitioners alleged that the limitation of the number of participants in the protests (and gatherings in public places in general) to a maximum of ten persons was also not proportionate and constitutionally permissible. According to them, there are milder measures by which the government could prevent the spread of infections while still allowing gatherings of more than ten people. The petitioners accused the government of equating the gathering of people within the meaning of the right of assembly from Art. 42 of the Constitution (as an important democratic mechanism) with other forms of assembly, which are protected only within the framework of general freedom of action.[55]

The petitioners proposed to the Constitutional Court to suspend the implementation of the challenged provisions of the ordinances. They were of the opinion that they would otherwise suffer irreparable damage, as participation in the ongoing protests, given the current political situation, could not be replaced later. Participation in protests, in their opinion, could not contribute to an increase in the number of infections if all the instructions and recommendations of the NIJZ were followed.[56]

Replying to the petition, the government stated that the prohibition of protests was based on point 3 of the first paragraph of Art. 39 of the CDA. According to the government, the prohibition meant the concretisation of the limitation of the right of peaceful assembly and association allowed by the third paragraph of Art. 42 of the Constitution. The government also stated that this measure was adopted in accordance with the latest findings of epidemiologists. It opposed the petitioners' proposal to suspend the implementation

53 | Order No. U-I-50/21.
54 | *Ibid.*
55 | *Ibid.*
56 | *Ibid.*

of the challenged provisions of the ordinances by arguing that the petitioners' claims about the occurrence of harmful consequences in the case of further implementation of the measure were unspecified and unfounded. The government drew attention to Decision U-I-18/20, where the Constitutional Court rejected the proposal for the temporary suspension of the measure prohibiting movement outside the municipality of residence. This, in its view, means that measures to prevent the spread of COVID-19 are necessary in a democratic society to ensure public health.[57]

The Constitutional Court found in Order No. U-I-50/21 that to conceal the identity of the petitioners, special circumstances must indicate the need to abandon the general rule of publicity of the procedure for the review of the constitutionality of general acts and its participants. In the case at hand, the Constitutional Court found that such circumstances were not demonstrated. When ruling on the existence of the legal interest for filing a petition, the Constitutional Court drew from the fact that the challenged sub-statutory regulation prohibited the petitioners from peaceful assembly under the threat of a financial sanction. It considered that the petitioners were not obliged to meet standard prerequisites for the legal interest to be demonstrated,[58] because in the given case, they could only do so by committing a minor offence (e.g. by violating the ordinances and exposing themselves to be fined). This is due to the fact that the Public Assembly Act distinguishes between the public gatherings that must be permitted by a competent authority and the so-called unorganised public gatherings. When it comes to an unorganised public gathering, a person cannot be in a position to challenge an individual act and exhaust the legal remedies unless they commit a minor offence and receive a fine. As this was the situation in the given case and, additionally, the petitioners addressed an important constitutional issue of precedent importance, the Constitutional Court found that they demonstrated the legal interest and that their petition is admissible for further consideration. Last but not least, the Constitutional Court decided to suspend the implementation of the challenged provisions of the ordinances until its final decision, because it assessed that further implementation of the prohibition of protests could cause harmful consequences that are difficult to remedy, if it would find the challenged provisions unconstitutional in its decision on the merits.[59]

In this case, a final decision was issued two months after the ruling in the admissibility procedure. Regarding the prohibition of public protests and limitation of the number of participants to a maximum of ten persons, the Constitutional Court established in Decision No. U-I-50/21 dated 17 June 2021 that due to their length and effects, they severely interfered with the right of peaceful assembly and association. The Constitutional Court explained that the challenged measures were adopted to prevent the spread of a communicable disease, which is a constitutionally admissible objective for limiting human rights. In this respect, it stressed that when balancing the right to health and life, on the one hand, and the right of peaceful assembly and public meeting, on the other, these two

57 | *Ibid.*

58 | As previously explained, the Constitutional Court has taken a position in its case law that, as a general rule, legal interest in filing a petition is demonstrated if the petitioner is involved in a concrete legal dispute in which he/she has exhausted all regular and extraordinary legal remedies and if a petition is filed together with a constitutional complaint against an individual legal act. Also, as a general rule, a petition must be such as to raise particularly important precedential constitutional questions of a systemic nature.

59 | Order No. U-I-50/21.

rights are in opposition and enjoy a high level of constitutional protection. The Constitutional Court found, however, that the challenged measures were not necessary because there exists a set of measures by which it is possible to prevent the infections at public protests and which interfere to a lesser extent with the right of peaceful assembly and association than the complete prohibition of public protests or a limitation thereof to a maximum of ten people. This includes the distribution of face masks and hand sanitisers to protesters, the closing of public spaces and roads to ensure sufficient space for maintaining an appropriate interpersonal distance between protesters, and the duty of protest organisers to present a plan regarding hygienic measures. Prior to the entry into force of the challenged measures, the government had not ascertained whether the objective of ensuring public health could be attained by such milder measures for limiting public protests. Thus, the Constitutional Court assessed that the government did not consider the positive duty of the state to ensure the exercise of the right of peaceful assembly to a reasonable degree, and the duty to cooperate with organisers of public protests.[60]

Since the challenged ordinances ceased to be in force, on the basis of the second paragraph in conjunction with the first paragraph of Art. 47 of the CCA, the Constitutional Court merely established that they were inconsistent with the Constitution in the part wherein they prohibited public protests or limited them to a maximum of ten participants. It ruled that the establishment of the inconsistency of the challenged ordinances with the third paragraph of Art. 42 of the Constitution had the effect of abrogation.

2.1.5. Decision No. U-I-79/20 on the unconstitutionality of points 2 and 3 of the first paragraph of Art.39 of the Communicable Diseases Act

Decision No. U-I-79/20 dated 13 May 2021 was described by the constitutional judges who gave separate opinions as groundbreaking.[61] Upon a petition submitted by multiple petitioners, the Constitutional Court reviewed points 2 and 3 of the first paragraph of Art. 39 of the CDA. These provisions authorise the government to prohibit or restrict the movement in infected or directly endangered areas and prohibit gathering of people in public places to prevent the introduction and spread of a communicable disease in the state if this goal cannot be reached by other measures determined by the CDA. The Constitutional Court also reviewed several ordinances that were adopted by the government on the basis of the challenged statutory provisions from April to October 2020. The Constitutional Court found by five votes to three that the challenged provisions of the CDA were unconstitutional. It ordered the National Assembly to provide a new statutory regulation within two months from the publication of its decision in the Official Gazette. However, it ruled that the challenged provisions of the CDA should continue to apply until the unconstitutionality was remedied. The Constitutional Court also found unconstitutional the challenged ordinances and unanimously rejected the petition to initiate proceedings to assess the constitutionality of certain other provisions of the CDA and the Government Act. It also unanimously rejected the petitioners' proposal to initiate proceedings to review the constitutionality of the government's order that declared COVID-19 in the territory of the Republic of Slovenia. Three judges gave consenting separate opinions to

60 | Decision No. U-I-50/21.

61 | Judge Mežnar, for example, described this decision of the Constitutional Court as groundbreaking not because of the content (which was expected in her opinion), but because of the long and difficult decision-making process.

the decision. Separate opinions were also given by the three judges who voted against the majority decision.

The petitioners alleged, *inter alia*, that the challenged statutory regulation grants the government the authority to restrict, at its own discretion, the fundamental rights of individuals without any statutory limitations or criteria. In their view, the CDA does not determine in what way and to what extent the movement can be restricted by an executive act issued on its basis, nor does it determine the criteria for these restrictions. The challenged provisions are inconsistent with the Constitution, according to the petitioners, because they do not determine the time limit for the measures, which professional bodies make decisions on whether the conditions for declaring a pandemic are met, and which measures should be implemented.[62]

According to one of the petitioners, the challenged provisions of the CDA are also inconsistent with the Constitution because they do not provide for informing the public. He claimed that the public had the right to know the exact data about the COVID-19 pandemic to be able to check whether the measures were lawful, proportionate, and necessary. Residents also had the right to know what the real dangers are and whether there are also different scientific and professional opinions beside the official ones. In practice, however, according to the petitioner, the measures to contain COVID-19 were adopted on the basis of selective and incomplete information, and the government did not inform the public objectively and transparently.[63]

As previously pointed out, the petitioners also challenged several government ordinances that determined the prohibitions and restrictions of movement and gathering in public places as well as certain protective measures on the basis of the challenged statutory provisions. Regarding the restriction of movement at night (e.g. the curfew), they considered that this measure infringed so intensely on human rights and fundamental freedoms that it could only be imposed in the event of a previously declared state of war or state of emergency on the basis of Arts. 16 and 92 of the Constitution. They argued that this measure could not be based on Art. 39 of the CDA, which, according to them, was also inconsistent with the Constitution. Regarding the prohibition of movement outside the municipality of one's residence, the petitioners considered that it was not reasonable, necessary, proportional, and constitutionally legitimate; and that it was not supported by professional reasons. Regarding the prohibitions and restrictions of movement and assembly in public places, the petitioners considered that this measure severely reduced the possibility for people to socialise. In their view, these prohibitions and restrictions violated the freedom of movement and the right of peaceful assembly and association as well as the personal rights of citizens and other residents.[64]

According to the petitioners, certain COVID-19 measures were also disproportionate because they caused enormous economic damage and had negative consequences for people's mental health and treatment of other diseases. The petitioners argued that the competent authorities did not analyse the harmful consequences of the measures. If the authorities would adequately protect the elderly population, according to the petitioners,

62 | Decision No. U-I-79/20.

63 | The petitioner asserted that most of the measures were based on untrue data on the number of deaths due to COVID-19-19, because these data do not differentiate between deaths due to SARS-CoV-2 infection and cases where an infected person died from another cause.

64 | Decision No. U-I-79/20.

all other measures would be meaningless, unnecessary, and counterproductive. As in case No. U-I-83/20, the petitioners claimed in this case too that the ordinances had not been adopted by the competent authority, because the restrictions, pursuant to the then provisions of the CDA, could only be adopted by the minister responsible for health, not the government.[65]

The Constitutional Court assessed these allegations from the viewpoint of the constitutional provisions which expressly determine that freedom of movement and the right of peaceful assembly and association may be limited by law, in conjunction with the principle of legality determined by the second paragraph of Art. 120 of the Constitution. This principle requires that the executive branch of power perform its work on the basis and within the framework of statutory laws.

The Constitutional Court referred to its hitherto case law in accordance with which the executive branch of power must not regulate matters falling within the domain of legislative decision-making without a statutory authorisation. Whenever the legislature authorises the executive branch of power to adopt an implementing regulation (i.e. by adopting sub-statutory acts), it must first by itself regulate the foundations of the content that is to be the subject of the implementing regulation, and determine the framework and guidelines for regulating the content in more detail by the implementing regulation. A blank authorisation granted to the executive branch of power (i.e. an authorisation not containing substantive criteria) entails, according to the Constitutional Court, the legislature's failure to legislate statutory subject matter. A general act that directly interferes with the human rights or fundamental freedoms of an indeterminate number of individuals can, as a general rule, only be a (statutory) law. However, according to the Constitutional Court, it is not inconsistent with the Constitution if the legislature—to effectively protect human rights and fundamental freedoms, and ensure fulfilment of the positive obligations that stem from the Constitution—exceptionally leaves it to the executive branch of power to prescribe measures by which the freedom of movement and right of assembly and association of an indeterminate number of individuals are directly interfered with. However, a statutory law must determine the purpose of these measures, or their purpose must be clearly evident therefrom. Furthermore, according to the Constitutional Court, pursuant to the requirement of Art. 2 of the Constitution (the principle of the rule of law), a statutory law must determine with sufficient precision the admissible types, scope, and conditions regarding the restriction of the freedom of movement and the right of assembly and association, as well as other appropriate safeguards against the arbitrary restriction of human rights and fundamental freedoms.[66]

The Constitutional Court concluded that the challenged statutory regulation in the CDA does not fulfil this constitutional requirement, as it allows the government to choose, upon its own discretion, the types, scope, and duration of restrictions, which interfere—possibly very intensely—with the freedom of movement of—possibly all—residents on the territory of the Republic of Slovenia. The challenged statutory regulation also leaves it to the government to freely assess, throughout the entire period while the threat of the spread of the communicable disease lasts, in which instances, for how long, and in how extensive an area in the state will it prohibit the gathering of people in those public places where, according to the Government's assessment, there exists a heightened risk

65 | *Ibid.*
66 | *Ibid.*

of spreading the communicable disease. The regulation also lacks safeguards that could limit the discretion of the government, such as the duty to consult or cooperate with the experts and to inform the public of the circumstances and opinions of experts that are important for deciding on such measures.[67]

In view of the above, the Constitutional Court concluded that points 2 and 3 of the first paragraph of Art. 39 of the CDA are inconsistent with the constitutional provisions on the freedom of movement and the right of peaceful assembly and association. It decided that the National Assembly must remedy the established inconsistency within two months of the publication of the Decision in the Official Gazette and that until the inconsistency is remedied, points 2 and 3 of the first paragraph of Art. 39 of the CDA shall still apply. The Court explained in the reasoning of the decision that it so decided to protect the health and lives of people that could be at risk in the future due to the absence of a statutory basis for the measures, and thus prevented the occurrence of an even graver unconstitutional situation.[68]

The Constitutional Court also established that in the part where they were adopted on the basis of an unconstitutional statutory regulation, the challenged ordinances adopted by the government were inconsistent with the Constitution. It decided that the establishment of such inconsistencies shall have the effect of (immediate) abrogation.

Judge Knez, the president of the Constitutional Court, who voted against the abrogation of Art. 39 of the CDA, emphasised in his separate opinion that the Constitutional Court was faced with difficult constitutional questions in a changing epidemiological situation in this case. How specific the statutory provisions must be for the executive branch to set limits within which it can operate depends, according to Judge Knez, on the field of regulation and issues that are regulated. Whether the statutory law regulates situations that are difficult to predict in advance and, therefore, cannot be precise in anticipating measures; and whether the different constitutional rights and fundamental freedoms collide, which these rights are, and how strong a collision can be are also relevant. Judge Knez emphasised that the CDA does not introduce punitive measures (these require stricter criteria in terms of limiting the executive branch), but measures arising from the clash of different human rights, which are at the same time rights with different statuses. On the one hand, there was a positive duty of the state to protect people's lives and health and the functioning of the health care system, and on the other hand, there was a question of the intensity of interference with the right of freedom of movement and association. In this respect, the majority decision of the Constitutional Court, in his opinion, refers to inadequate reasons for establishing the unconstitutionality of the challenged executive clause in the CDA.

In this regard, Judge Knez pointed out that the expectations and demands that the Constitutional Court addressed to the legislator were not realistic.[69] In contrast to the president of the Constitutional Court, Judge Mežnar described—in her consenting separate opinion—the decision as groundbreaking and emphasised that the Constitutional Court has had good reasons for the ruling that the challenged provisions of the CDA are not consistent with the Constitution.[70]

67 | *Ibid.*
68 | *Ibid.*
69 | Knez, 2021.
70 | Mežnar, 2021.

3. Discussion and conclusion

A common characteristic of measures to contain the COVID-19 pandemic in most countries, including Slovenia, the restrictions are imposed by the executive branch of power, without public debate and the involvement of the legislator.[71] Since the declaration of the pandemic in March 2020, the Slovenian government has taken a wide range of reasonable, urgent, and justified mandatory and recommended measures to reduce human contact and slow the spread of infections. In addition, some controversial prohibitive measures and mass restrictions of fundamental rights were deployed, and eventually most of them ended on the tables of the Constitutional Court's judges.

While in the early stages of the COVID-19 crisis, the Slovenian Constitutional Court found the restriction of movement outside the municipality of one's residence in line with the Constitution, it later ruled that the government ordinances introducing the restrictions of fundamental rights were unconstitutional in several cases. In most of these cases, however, the reason for this was not the unconstitutionality of the measures themselves, but the unconstitutionality of their statutory legal basis. The overview in this article reveals, *inter alia*, that while assessing the constitutionality of the restrictions of fundamental rights, the Constitutional Court issued certain important and even groundbreaking decisions on the one side, and made some good and less good compromises on the other.

In the Constitutional Court's review of the constitutionality and legality of the restriction of movement outside the municipality of one's residence (Decision No. U-I-83/20), judges who voted for the decision and gave consenting opinion and those who opposed the decision and gave dissenting opinion had 'good' reasons and arguments in support of their positions. Figuratively speaking, in this 'hard case', there was no 'correct' decision of the Constitutional Court. In some way, the proportionality test ceased to be an instrument that would lead to an exclusive legally 'correct' balance between conflicting constitutional rights or between a right that is restricted (i.e. the freedom of movement) and public interest (i.e. the state's positive obligation to protect human lives and public health). Instead, it became substantively hollow and, as Judge Čeferin pointed out in his separate opinion, served as a tool to justify the vote of the majority of the Constitutional Court's judges.

It follows from the above that the Constitutional Court ruling whether the restriction of movement outside the municipality of one's residence was consistent with the Constitution was in a way dictated by the personal characteristics and preferences of the constitutional judges, rather than by their legal expertise. What really decided whether the measure was constitutional or not were the values that took precedence over other values on the judges' value scale[72], the 'conservatism' and 'liberality' of judges, their sensitivity to the conflicting findings in epidemiological research, and perhaps even their age and their personal health. Exaggerating a little bit, in our view, the legal arguments 'pro' and 'contra' the decision, which in this case was reached by a narrow majority of the constitutional judges, can be compared with the selling items on the supermarket shelves. The constitutional judges picked items (i.e. legal arguments) that correspond to their personal

71 | Tzevelekos, 2020. See also Mežnar, 2020a.

72 | Here the key question was, in our view, whether (the illusion of) liberty intimately means more to the constitutional judge than (the illusion of) security (or vice versa).

(moral, aesthetic, etc.) preferences. In the end, at one of the peaks of the pandemic, the majority of judges passed a vote that the restriction of movement to the municipality of one's residence was consistent with the Constitution. The Constitutional Court's ruling on this controversial constitutional issue became *res iudicata* and it is legally legitimate, whether or not one agrees with it.

Convincing arguments were given by the five judges who voted for the majority decision and the four judges who did not. The judges who opposed the majority decision pointed out, *inter alia*, that the government did not have the legal authority to adopt the challenged ordinances (according to the provisions of the CDA in force at the time, the Minister of Health had such authority). These judges alleged that the provisions of points 2 and 3 of the first paragraph of Art. 39 of the CDA were not consistent with the Constitution, because they gave too much power to the executive branch to restrict freedom of movement without determining the limits of such restrictions. They argued that the Constitutional Court should have first ruled on the constitutionality of the statutory basis for restricting freedom of movement and then proceeded to the assessment of the constitutionality of the government ordinances, but the majority of judges were of a different opinion. Furthermore, those judges who voted for the majority decision did not substantiate their claim that the restriction on crossing municipal borders was supported by the epidemiological expertise. The then director of the National Institute for Public Health, who is an epidemiologist, publicly assessed this measure as unnecessary (he was later removed by the government from his position). Finally, according to the judges who opposed the majority decision, the restriction on crossing the municipal borders—in addition to the already existing general restriction of movement and gathering in public spaces—was not necessary for further (stronger) prevention of contact between people. These judges claimed that the only effect of the measure was the reduction of the area through which the citizens and other inhabitants of Slovenia were allowed to move. As a result, this could not decrease but increase the risk of spreading COVID-19.

The author of this article publicly stated his position on the restriction of movement outside the municipality of one's residence shortly after the introduction of this measure in an article published by one of the largest newspapers in the country.[73] The article set out the reasons why I believe the prohibition was illegal and unconstitutional. The restriction of fundamental rights by the executive branch of power by an executive (sub-statutory) act is permitted if the statutory law provides authority to the executive power, and determines the criteria and limits for the restriction of the fundamental right. According to the established Constitutional Court practice, the legislator may neither abandon the determination of these criteria nor leave it to the executive branch. I pointed to the fact that the Constitutional Court decided on this in the past when assessing the constitutionality of the Defense Act and the Natural Disasters Protection Act. In my view, Art. 39 of the CDA that gives the statutory basis to the executive ordinances prohibiting movement across the municipal borders is inconsistent with the Constitution because it does not stipulate such criteria. In the article, I expressed the view that SARS-CoV-2 was not a reason for the police in Slovenia to watch over the illegal crossing of municipal borders, for Slovenes to start attacking cyclists from 'foreign' municipalities, and for intruding on each other. The true reason for these unfortunate practices was a measure that unnecessarily disproportionately restricted people from moving outside the municipality of

73 | Flander, 2020.

their residence. Nevertheless, I concluded the article with false optimism, assuming that a curfew, as an even stricter measure, will not be introduced in Slovenia. I felt that the government was quite successful in containing the pandemic at the time, and for this reason, unlike the governments of some other countries, it was not planning excessive and humiliating measures.

When imposing a night curfew, the Minister of the Interior explained in a statement to the media that this measure was based on the experience of curbing COVID-19 in other countries. He also stated that many cases of the spread of infections were due to private socialising at night, private parties in pubs, restaurants, etc.[74] When a curfew was introduced, only a few lawyers publicly expressed their opinion. Blaž Kovačič Mlinar, a renowned practising lawyer, for example, pointed out that the state would act in accordance with the Constitution when introducing this measure if it had previously declared a state of emergency, as some other European countries did; however, he doubted that declaring a state of emergency would increase citizens' legal security.[75] Janez Pogorelec, the former acting director of the governmental legislative service, expressed the view that the curfew and other government measures to limit the spread of infections were indisputable and that their statutory basis in the CDA was also consistent with the Constitution. According to him, this was confirmed by the Constitutional Court when deciding on the prohibition of movement outside the municipality of one's residence.[76] A different position was taken by the constitutional law expert Andraž Teršek, who, together with Damijan Pavlin, a practising lawyer, addressed a petition to the Constitutional Court to review the constitutionality of the curfew and some other government measures. Teršek expressed the opinion that the government acts unconstitutionally if it prohibits movement throughout the country (e.g. if a curfew is introduced), without a prior declaration of a state of emergency. Although the Constitution gives the state the power to restrict the right to free movement, in Teršek's view, it must provide convincing reasons that this is necessary, appropriate, and proportionate to achieve a legitimate aim in the public interest. If a different measure with less interference with constitutional rights and freedoms is available to prevent and contain the spread of an infectious disease, the milder measure should be taken. Teršek sees no connection between the restriction on a citizen to walk outside after 9 PM and the danger of spreading a contagious disease. He sees this restriction neither as an appropriate and effective legal, health, and social policy nor as a measure protecting people.[77]

In a press statement, I expressed a view that is very similar to that of Teršek. I pointed out that a general prohibition of movement from 9 PM to 6 AM across the whole country for all legal addressees (with rare exceptions, which included, for example, coming to and returning from workplace) suspends the constitutional right to freedom of movement. The government and legislator cannot and must not base this measure on either Art. 32 of the Constitution or Art. 39 of the CDA. On the basis of these provisions, the government may restrict a fundamental right by an executive regulation, but it cannot and must not permanently or temporarily annul or suspend it. In my opinion, the basis for such a measure is in Art. 16 of the Constitution, which allows the temporary suspension of the

74 | Cerar, 2020.
75 | Lebar, 2020.
76 | *Ibid.*
77 | Teršek, 2020a and 2020b. See also Cerar, 2020.

so-called relative constitutional rights in a state of war or emergency, which may be declared by the National Assembly on the basis of Art. 92 of the Constitution whenever a great and general danger threatens the existence of the state. Eventually, the government did not propose the introduction of this special measure formally and the parliament did not deploy it.[78]

By Orders Nos. U-I-426/20 and U-I-427/20, the Constitutional Court has not yet issued its final decision on the curfew. It decided in a preparatory procedure on the legal interest of the petitioners and on the proposals for the temporary suspension of the measure. Nevertheless, this decision of the Constitutional Court was clearly of a substantive nature, thanks to judges who gave separate opinions. In this case, too, the constitutional judges had 'good' reasons and arguments for both the decision that the implementation of the challenged provisions should be suspended, and the opposite decision. The tab on the Constitutional Court's scales were the personal and human preferences of the nine constitutional judges, their vision of 'good society', their 'conservatism' and 'liberality', their personal view on and perception of the epidemic, and their attitude towards the measures imposed by other countries. Whether a judge is also willing to pay attention to scientifically credible alternative views of smaller expert groups and individual epidemiologists (who are too often silenced) was also relevant while making the decision.

In any case, Judge Mežnar highlighted some important nuances in her dissenting separate opinion. She noted that making the decision to suspend the provisions on the curfew was a matter of weighing. On the one hand, the Constitutional Court weighed the damage caused to all residents of Slovenia due to the restrictions on freedom of movement and personal liberty, and the damage caused to those who were unable to receive medical care due to the potentially unmanageable conditions in hospitals. The judge pointed out that in the circumstances at the time, this kind of weighing was extremely difficult and ungrateful work. There were many infections on a daily basis, hospitals were overcrowded with patients, and medical staff performed their work in demanding conditions. Therefore, in her opinion, it is not surprising that the majority of constitutional judges estimated that if the curfew was suspended, some (vulnerable) individuals and public health in general would be significantly more affected than the population if their freedom of movement at night was further restricted. However, the judge pointed out that the regulation of this measure, as it was, was not the only possible choice. As in some other countries where they have introduced a curfew, in Slovenia too, either the government or the Constitutional Court could provide exceptions to the general prohibition of movement that would provide residents with the opportunity to carry out non-problematic activities such as recreation and walks at any time of the day (even at night). Such an exception would significantly limit the harmful consequences of the measure annulled by the courts in some countries.[79]

The Constitutional Court considered in Partial Decision and Order No. U-I-445/20 and Order No. U-I-473/20 a petition of two minor children attending primary school for children with special needs admissible and found invalid the challenged provisions of the government ordinance that prohibited gatherings in educational institutions because the validity of the ordinance was extended several times by the government orders that were not published in the Official Gazette of the Republic of Slovenia (they were published on

78 | Cerar, 2020.
79 | See Mežnar, 2020b.

the government's website instead). However, the Constitutional Court decided that the adopted decision would apply only after a three-day period following its publication in the Official Gazette. With this decision, it wanted to ensure the government sufficient time to reassess whether the closure of educational institutions and the decision that education be carried out at a distance were scientifically justified. According to its own words, the Constitutional Court had an alternative to this decision, namely the possibility of suspending the implementation of the challenged provisions of the government ordinance until its final decision. If so ruled, the Constitutional Court would efficiently ban the government from further prohibition of gatherings in educational institutions denying the petitioners (and other children with special needs who form a very small group among the schoolchildren) access to education according to programs for children with special needs, additional professional assistance, and all other special treatments. Somewhat surprisingly, the Constitutional Court did not issue a temporary injunction; instead, it resorted to warning and pointing out the harmful consequences if the government insisted on keeping the institutions for children with special needs closed.

The ruling of the Constitutional Court in this case turned out to be a bad compromise, since the government reintroduced almost the same prohibition of gatherings in educational institutions with a new ordinance that was immediately challenged by the same petitioners. Thus, the Constitutional Court was given a second opportunity to rule according to what it previously considered to be an alternative. It was significantly less hesitant in case No. U-I-50/21, where it suspended the implementation of the challenged provisions of the ordinances that first prohibited public protests and later limited them to up to ten participants until its final decision. In its final decision in this case, the Constitutional Court established that due to their length and effects, these two measures severely interfered with the right of peaceful assembly and association.

As previously pointed out, in Slovenia, Decision No. U-I-79/20 on the (un)constitutionality of points 2 and 3 of the first paragraph of Art. 39 of the CDA was probably the most important among the Constitutional Court's decisions related to the COVID-19 restrictions of fundamental rights. Similar to Judge Mežnar, Judge Šugman-Stubbs in her consenting separate opinion described the decision in this case groundbreaking and perhaps the most important one this year. However, she emphasised that the ruling in this case was not without flaws and shortcomings that should be overlooked.[80]

Judge Šugman-Stubbs drew attention to the fact that the Constitutional Court established that the challenged provisions of Art. 39 are inconsistent with the Constitution with a delayed effect of abrogation.[81] In our view, by so ruling, the Constitutional Court established a strange situation of—one could say—'constitutional unconstitutionality' of Art. 39 of the CDA as the challenged provisions of this article were simultaneously declared unconstitutional and retained valid until remedied. The fact that the ordinances that were adopted on the basis of the provisions of Art. 39 of the CDA (before decision No. U-I-79/20 was issued) were found by the Constitutional Court unconstitutional with an effect of abrogation (*ex nunc*), and not an effect of annulment (*ex tunc*) is also problematic. Consequently, the decision in this case introduces a distinction (inequality?) between

80 | Šugman-Stubbs, 2021.Her separate opinion was joint by Judge Čeferin.

81 | The ordinances that were adopted on the basis of the provisions of Art. 39 of the CDA were found by the Constitutional Court unconstitutional with an effect of abrogation (*ex nunc*), not by an effect of annulment (*ex tunc*).

those violators of the ordinances who have paid fines on the basis of unconstitutional ordinances and whose cases have become final, and those whose minor offence cases have not yet become final for various reasons because the ordinances that were found unconstitutional with an effect of abrogation (*ex nunc*) may not be used in pending proceedings and sanctions (i.e. fines) may not be imposed on the violators. The latter notwithstanding, Judge Šugman-Stubbs considers that there are good substantive reasons for this distinction.

Moreover, according to Judge Šugman-Stubbs, by the decision in this case, the Constitutional Court enabled Art. 39 of the CDA to be applied in the future, despite its unconstitutionality, until the established unconstitutionality is eliminated by the legislator. In other words, it enabled the issuance of new executive ordinances on an unconstitutional basis. Thus, the Constitutional Court ensured the validity of these ordinances, although they would be essentially unconstitutional. The judge considers that there are good substantive reasons for this. The Constitutional Court could not derogate the challenged provisions of Art. 39 of the CDA without such a method of the implementation of the derogation, as the absence of any legal basis in the future would lead to an even more serious unconstitutional situation. The pandemic is still ongoing, stated Judge Šugman-Stubbs, and the state has a positive obligation to protect people's health and lives.[82]

However, it seems devastating that the Constitutional Court decided so late in this case. The decision was published almost 15 months after the first petition was filed, after the end of the third wave of the pandemic, after dozens of ordinances had been issued on an unconstitutional basis, and after fines for several million Euros were issued to the citizens. According to Judge Šugman-Stubbs, the Constitutional Court should not allow this. However, she believes that despite these and other weaknesses of the decision in this case, the Constitutional Court ruled independently, logically, convincingly, and wisely, in a legally consistent and theoretically acceptable way, and in accordance with the established judicial practice.[83]

An even stronger and alarming message was sent by Judge Mežnar who, after a long time, again felt that the Constitutional Court has enforced the Constitution without fear and bad compromises. She acknowledged that she was proud to be among the five judges who outvoted other judges and warned that mass and intense encroachments on basic human rights in the last year and a half have become more acceptable than ever after World War II. While this turnaround came suddenly, the disintegration of fundamental rights is not primarily driven by ideological and political reasons, but with a universal fear of an unknown disease. The constitution, international conventions, and content of fundamental human rights have not changed. The psychological attitude of people towards their own freedom has changed. We are easily willing to give it up just 'to be healthy and alive'. Sooner or later, according to Judge Mežnar, this trend will also be reflected in constitutional courts.[84]

82 | Šugman-Stubbs, 2021.
83 | *Ibid.*
84 | Mežnar, 2021.

Postscript

In Slovenia, in addition to the rulings of the Constitutional Court, the courts of general jurisdiction also issued important decisions on COVID-19 measures. Recently, the Supreme Court ruled that there was no adequate statutory basis for considering the failure to wear a face mask in enclosed public spaces as a minor offence and for imposing penal sanctions thereon.[85] The Supreme Court ruled on the request for the protection of legality against the final judgement of the district court, by which the perpetrator was reprimanded for a minor offence under the CDA (point 14 of Art. 57, in connection with point 2 of the first paragraph of Art. 39 of the CDA). The Supreme Court stated that pursuant to point 2 of the first paragraph of Art. 39 of the CDA, the executive branch is entitled to 'prohibit or restrict the movement of the population in infected or directly endangered areas'. Since the failure to wear a face mask cannot and may not be considered 'prohibition or restriction of movement', the Supreme Court held that it might not have been determined a minor offence and sanctioned as such by the government ordinance, as the latter cannot be considered a regulation by which minor offences may be determined. In other words, according to the Supreme Court, the legal obligation[86] to wear a face mask cannot be understood as a 'prohibition or restriction of people's movement in certain areas', but as an independent interference with the individual's freedom of action (Art. 35 of the Constitution) that requires an independent statutory basis.[87] The case was decided by a panel of three judges; while two of them voted in favour of the decision, one voted against it.[88]

Currently, Slovenia is in the midst of the fourth wave of the COVID-19 pandemic. Meanwhile, the government has dropped most of the previous restrictions (with the exception of the mandatory use of face masks in enclosed public spaces and public transport, hand disinfection, and personal distancing) and introduced the PCT condition. According to this measure, employees in the public and private sectors and users of services must present a certificate of vaccination, recovery, or a negative result of a rapid antigen test or PCR test for SARS-CoV-2. In practice, this means that without the PCT certificate, with some exceptions, nobody may work at the premises of the employer and visit shops (with the exception of small supermarkets selling food and other basic necessities), restaurants, cinemas, and theatres. Soon after introducing the PCT, the government took another step towards—in its own wording—an even stronger care for the health and lives of the citizens. The ordinances that came into force at the beginning of October stipulated that the employees in the state administration (i.e. in ministries and administrative units, government offices, directorates and services, the police, army, penitentiary institutions, etc.) shall be fully vaccinated against or recovered from COVID-19 if they wish to perform work at the employer's premises. Thus, the government abolished the possibility

85 | Judgement No. IV Ips 10/2021 dated 21 September 2021.
86 | *Ibid*. The Supreme Court emphasised that it did not rule on the issue of the legal obligation to wear a face mask as such. It assessed whether, in the light of the wording of Art. 39 of the CDA and the fundamental principles of penal law, the failure to wear a facemask can be sanctioned as a minor offense.
87 | *Ibid*.
88 | The judge who voted against the decision gave dissenting separate opinion.

of testing and submitting a negative test on COVID-19 as evidence that a person is not infected. Some trade unions, independent legal experts, and other individuals were very critical of this manoeuvre. According to them, the government wants to force employees in the state administration to undergo vaccination under the threat of losing their jobs. They see an indirect introduction of compulsory vaccination in an unconstitutional and illegal way in the new PC condition that replaced the PCT condition. Dissatisfied with the *modus operandi* of the authorities, the trade union of police employees filed a petition with the Constitutional Court to review the constitutionality and legality of the ordinances. A proposal was also made to suspend the implementation of the ordinances and ensure priority consideration for the petition. A petition was also filed by the trade union of employees in the Slovenian Army, the trade union of the Ministry of Defense, and some other trade unions of employees in the state administration. The petitioners assessed that the restriction on performing work due to non-compliance with the condition of vaccination or recovery would endanger the basic existential security of and cause irreparable damage to the employees who have not been fully vaccinated and have not recovered from COVID-19. The fact that the existential security of their families would also be endangered is, according to the Trade Union, unacceptable and in complete contradiction with the European standards. The petitioners' claim that the government should repeal the ordinances was heard by the Constitutional Court (if not by the government itself). In the preparatory procedure, the Constitutional Court found the petition admissible and suspended the implementation of the ordinances until its final decision.[89]

Despite Resolution 2361 of the Council of Europe[90] stating that vaccines against COVID-19 shall not be forced upon an individual and prohibiting discrimination on the basis of vaccination, the Slovenian government has recently informed the public that it considers the possibility of introducing mandatory vaccination of all residents or at least certain occupational groups. If crossing the Rubicon, it would most likely trigger new opposition and petitions by citizens for the review of the constitutionality of yet another government measure. The hard times for the fundamental rights and the constitutional courts do not seem to end soon...

89 | Order No. U-I-210/21 dated 30 September 2021.

90 | See Resolution 2361, Section 4.3. Pleading for a safe and efficient deployment of vaccines against COVID-19, the Resolution emphasises the need for a human rights-based approach. According to the Resolution, member states have a responsibility to ensure good public health and high immunisation coverage by COVID-19 vaccines; however, the measures must not violate the right and liberty of an individual to bodily autonomy and informed consent. In point 60 of Section 4.3, the Resolution states that vaccines shall not be forced upon an individual.

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SURROGATE MOTHERHOOD – THE EUROPEAN LEGAL LANDSCAPE

Lilla GARAYOVÁ[1]

ABSTRACT

Surrogate motherhood is a fascinating topic that has been part of human history since time immemorial and still provides kindling for discussion in the twenty-first century. Despite its ancient origin and current topicality, in many ways, surrogacy remains under-discussed. There is no clear consensus on how to deal with it: some important values will be jeopardized regardless of the route we take. Recent developments and research in the area of human reproductive medicine have resulted in a continuous increase in surrogacies each year, so it is paramount to consider the moral, ethical, and legal implications of the practice. This article examines the history of surrogacy laws, the enforceability of surrogacy agreements, and the current legal landscape of surrogacy in Europe.

KEYWORDS

assisted reproduction
family law
gestational surrogacy
marriage
matrimony
protection of families
reproductive medicine
surrogate
traditional surrogacy

1. Introduction

Infertility is a serious problem that affects the social and marital lives of many couples in the twenty-first century. Until recently, couples faced with infertility issues could only decide between remaining childless or adoption. This has changed significantly with the advancement of assisted reproductive technologies. Infertile couples can now also choose between artificial insemination, in vitro fertilization, or surrogacy.

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From a medical perspective, surrogacy is a process that begins with the conception, followed by childbearing, and childbirth by a woman who does so for the benefit of another woman who is unable to become pregnant or, for various medical indications, to bear a fetus. The culmination of this surrogacy process is the 'handing over' of the child, which, in the context of the legal options, usually involves the adoption of the child by the infertile mother (if the husband/partner of this mother is also the biological father), or adoption by the couple from the surrogate mother (if neither partner is the biological parent).[2] A surrogate is a woman who becomes pregnant on behalf of someone else, usually a couple who are referred to as intended parents, or, sometimes, commissioning parents. There are several types of surrogates.

In traditional (or partial) surrogacy, the surrogate mother has a genetic link to the child through the provision of the egg (oocyte). Sperm originates from the intended father or sperm donation. In this case, the surrogate is the natural, biological, gestational, and genetic mother of the child, who relinquishes her parental rights upon childbirth. Traditional surrogacy can be accomplished via artificial insemination, which has a significantly lower cost than in vitro fertilization. However, this type of surrogacy incurs a greater risk of legal complications than gestational surrogacy.

In the case of gestational surrogacy (or full surrogacy), the surrogate mother has no genetic link to the child; the genetic material is provided by the intended parents or donors. This means that the child will have no genetic or biological link to the surrogate, and it will be genetically linked to one, both, or neither of the commissioning parents. In essence, the surrogate here only provides a 'womb to rent'. The surrogate is only the gestational mother, carrying the child to term, but she is not the genetic or biological mother. Upon childbirth, she surrenders her parental rights to her child. Gestational surrogacy is achieved through more expensive in vitro fertilization. Of the two models, this is closer to adoption itself and is much more advantageous for the intended mother. In some places, contracts for this type of surrogacy are constructed so that in the third trimester of pregnancy, an application is made for the names of the commissioning couple to be entered as parents on the child's birth certificate.

Surrogacy is an increasingly common form of reproduction for several reasons. The primary reason is the rising rate of infertility among couples.[3] Meanwhile, the field of assisted reproduction has been one of the most dynamically developing branches of medicine in recent years, pushing the boundaries of biological parenthood beyond previously unprecedented horizons. Developments in the procedures of in vitro fertilization and artificial insemination have made surrogacy a viable method of reproduction for infertile couples.[4]

There are essentially two methods that can be used to find surrogate mothers. Either someone in the family, usually a close relative, takes on the role of the surrogate mother, which is accepted despite the genetic relationship; or in some countries, there are so-called intermediary agencies that keep lists of potential surrogate mothers and couples who wish to use this method.

Naturally, scientific opinions differ regarding the key motivating factors for this increasing number of pregnancies. Most authors differentiate between three common

2 | Erdősová, 2014, p. 1474.
3 | Dunson, Baird and Colombo, 2004, p. 51.
4 | Behm, 1999, p. 557.

key motivators.[5] The first is the gradual increase in reproductive options for couples, who are no longer forced to relinquish the idea of becoming parents because of their infertility. The second is the shift away from conventional thinking regarding issues of sexuality and family, in the broadest sense. The third and probably most important factor is the acute shortage of children available for adoption in certain countries.[6] It should also be mentioned that the number of babies available for adoption must be considered in two ways—wholistically, but also practically—as statistics show that certain countries do not experience a shortage of children for adoption, but in some of these countries, many couples do not consider older children, children with disabilities, or children of a certain race to be 'adoption-worthy'— which inevitably opens up an increasingly debated topic that is usually summarized as the 'black market in white babies'.[7] If it were not for this phenomenon, the need for surrogacy would probably also be much lower, especially in cases where neither of the adoptive parents of the child born to the surrogate mother is the biological parent. It can therefore be argued that one of the reasons for the growing trend in the use of surrogacy today is the 'adoption trade'.[8]

2. Surrogacy: A History

When we think about surrogacy, we often imagine a new phenomenon—a modern, alternate way of becoming a parent. In some respects, this is true: modern surrogacy as we know it today has only been around for the last forty-something years. However, the concept of surrogacy has existed since time immemorial and can be traced to biblical times. Understanding the history of traditional and modern surrogacy and using the relevant terminology is crucial for comprehending this issue and analyzing it from a legal perspective.

The first account of surrogacy can be found in the first book of the Old Testament, Genesis, in the story of Abraham. Abraham was married to a beautiful and sharp-witted woman, Sarah. She respected her husband above all else but could not conceive her own child. In order to secure an offspring and ensure succession, she turned to her servant, Hagar, and asked her to conceive and carry the child of Abraham with the understanding that Sarah would be considered the mother of the child, even though she was not biologically related. The child born from this union was named Ishmael. Over time, however, a considerable conflict arose between the women stemming from Sarah's jealousy and Hagar's inability to relinquish her claim to her child. These and similar emotions hinted at in this story are often highlighted as natural consequences when discussing the moral permissibility of surrogacy. The animosity between the two women in the biblical narrative culminates in Sarah's expulsion of Hagar and her son Ishmael after she gives birth to her own biological son, Isaac (Sarah is said to have been almost 90 years old at the time). Outside of the Bible, tales of women bearing children for rulers whose wives could not are common throughout history. Until the 1980s, these traditional types of surrogacies

5 | Posner, 1989, p. 21.
6 | Skidmore, Anderson and Eiswerth, 2012, p. 44.
7 | Solinger, 2000, p. 362.
8 | Erdősová, 2016, p. 50.

were the only form of the practice. The topic itself was considered taboo in many cultures because of the stigma associated with infertility and illegitimacy.

Unofficial history indicates that the first artificial insemination was conducted in 1455 by Henry IV of Castilla (nicknamed the Impotent). He married Juana of Portugal, the sister of Alfonso V in Portugal.[9] Six years after her marriage, she gave birth to Joanna. Many contemporary chroniclers assumed Henry to be infertile and some claimed that his wife underwent artificial insemination with the monarch's semen because of his complete erectile dysfunction. His rumored impotence was used by his enemies to deny the right of succession to his daughter Joanna, also called 'La Beltraneja'.[10] Later, his paternity was also questioned. Modern-day scientists tried to resolve the enigma of this medieval insemination and, while most agree that the King was, in fact, impotent, the question of insemination has not yet been credibly verified.

Human reproductive research has always been fraught with scientific, ethical, and legal challenges that hinder the creation of infertility treatments. The first verified attempts at artificial insemination in humans were made in the nineteenth century and are linked to the physician J. Marion Sims, who conducted fifty-five postcoital inseminations using highly controversial methods, mostly on slaves, without their consent.[11] Only one insemination resulted in pregnancy, which ended with a miscarriage. The low success rate of his attempts can be explained by the fact that he believed that ovulation occurred during menstruation.[12]

The first child conceived through artificial insemination was linked to the 1884 experiment of an American surgeon, William Pancoast. He performed a modified insemination procedure during which he injected the sperm of a donor into a female patient who was under anesthesia and not aware of the impregnation. Nine months later, she gave birth to a baby. While it was morally questionable, this experiment paved the way for future medical developments. Artificial insemination is now a crucial aspect of modern surrogacy.

Similar to artificial insemination, in vitro fertilization has been linked with many ethical dilemmas. Understanding the human body and medical development in the 1970s made the in vitro fertilization of human oocytes possible. This led to the birth of the first 'test-tube baby' in 1978.[13]

All of these developments in human reproduction research led society to revisit the dilemma of surrogacy in the 1970s. The first formal surrogacy contract was drafted by the attorney Noel Keane in 1976.[14] Keane is considered to be the father of surrogacy law. The agreement in 1976 was a case of traditional surrogacy without monetary compensation. Only four years later, in 1980, Keane arranged the first commercial compensated surrogacy agreement in a traditional surrogacy case. The surrogate mother received a payment of $10,000.[15] She eventually regretted the process and disclosed her experiences in a book called *Birth Mother*. The lawyer, Noel Keane, went on to establish the Infertility

9 | Ombelet and Robays, 2015, p. 138.
10 | Maganto Pavón, 2003, p. 3.
11 | Sartin, 2004, p. 97.
12 | Ombelet and Robays, 2015, p. 140.
13 | Steptoe and Edwards, 1978, p. 366.
14 | Patel and Jadeja, 2018, p. 11.
15 | Lasker, 2016.

Center, which arranged hundreds of surrogacies annually and became the focus of deep scrutiny and debate in 1986 because of the Baby M case. In the years ensuing, amid courtroom battles and ethical, philosophical, religious, moral, and legislative debates, Keane remained a strong supporter of surrogacy.

The Baby M case was the first American court ruling on the validity of surrogacy.[16] In the case, the Court was asked to determine the validity of a surrogacy contract involving traditional surrogacy. In 1984, Mary Beth Whitehead responded to an advertisement in the Ashbury Park Press that had been placed by the Infertility Center established by Noel Keane. The Center was looking for fertile women willing to become surrogate mothers to help infertile couples that wanted to have children. William and Elizabeth Stern sought a surrogate mother for their child. Elizabeth was not infertile, but she had serious health issues, including multiple sclerosis. They were concerned about the health implications of pregnancy on Elizabeth and their future child, and therefore decided to find a surrogate mother. The parties to the contract were William and Mary Beth, with the understanding that Mary Beth would be inseminated with William's sperm, carry the pregnancy to term, hand over the baby, and forgo her parental rights in favor of Elizabeth Stern, who was to adopt the child. Mary Beth's eggs were used in the insemination, making her the biological mother of the child; thus, this was a case of traditional as opposed to gestational surrogacy. The monetary compensation for the surrogacy procedure was $10,000. After the completion of the procedure, William and Elizabeth Stern were regarded as the parents of the child for all purposes. After giving birth, Mary Beth handed over the child (Baby M) to the Sterns as agreed upon, but a few days later she had a change of heart and decided to kidnap the child. The Sterns then decided to sue Mary Beth and her husband in order to be recognized as the child's legal parents. This started a lengthy custody battle that culminated in the creation of stricter surrogacy laws in several states in the United States[17] and had a global impact on surrogacy laws. It was decided that William Stern, the plaintiff, had the right to procreate and the right of a biological father to his child, while Mary Beth, the defendant, had the right of a biological mother to the child. This led to the development of public policy embodied in adoption laws against buying and selling babies and making them the subjects of ordinary contracts.

The New Jersey Supreme Court held that the surrogacy contract between Mary Beth and the Sterns was illegal and, therefore, restored Mary Beth's parental rights. William Stern was granted full custody, being the biological father of Baby M, while Mary Beth was granted visitation rights. The New Jersey Supreme Court held the following:

"We invalidate the surrogacy contract because it conflicts with the law and public policy of this State. While we recognize the depth of the yearning of infertile couples to have their own children, we find the payment of money to a 'surrogate' mother illegal, perhaps criminal, and potentially degrading to women. Although in this case, we grant custody to the natural father, the evidence clearly proving such custody to be in the best interests of the infant, we void both the termination of the surrogate mother's parental rights and the adoption of the child by the wife/stepparent. We thus restore the 'surrogate' as the mother of the child."[18]

16 | New Jersey Supreme Court in the Matter of Baby M. – In re Baby M. 537 A.2d 1227, 109 N.J. 396 (N.J. 02/03/1988).

17 | Allen, 1988, p. 808.

18 | New Jersey Supreme Court in the Matter of Baby M. – In re Baby M. 537 A.2d 1227, 109 N.J. 396 (N.J. 02/03/1988).

The Baby M case undeniably marked a significant turning point in the history of surrogacy. After the judgment of the New Jersey Supreme Court, many surrogacy professionals stopped the use of traditional surrogacy and moved toward the use of gestational surrogacy. Ensuring a lack of genetic ties between the surrogate mother and the child can preemptively avoid complicated legal entanglements.

Today, thirty-five years after the Baby M case, people around the world, regardless of their marital status or sexual orientation, look to surrogacy as a viable option to have a family. However, it is clear that surrogacy remains in a moral and legal grey area. Just like abortion or euthanasia, it is a moral quandary that has no universally satisfactory solution. Regardless of how it is performed, certain values will be compromised. The supporters of surrogacy refer to it as 'giving life' or 'solving infertility', while the opponents consider it buying and selling babies. These ethical dilemmas combined with the varying laws and regulations governing surrogacy around the world make surrogacy an uncharted territory that is often difficult to navigate.

3. Surrogacy Laws from an International Perspective

Dividing the world into countries that allow surrogacy and countries that do not would be an easy way to analyze surrogacy from a legal perspective. However, the reality is much more complex: surrogacy laws vary greatly from one jurisdiction to another.

From a global perspective, it is impossible to find comparable moral or legal grounds between countries in this area. Because of this, creating common legal standards or moving forward with widespread international unification of substantive laws or rules regarding the recognition of the effects of foreign laws seems unrealistic.[19]

In most legal systems around the world, the principle of *the mater semper certa est*[20] is still valid because maternity in the legal sense of the word is connected with the woman who gave birth to the child. However, in some legal systems, biology has been rejected as the foundation for family law.[21]

When examining surrogacy laws by country, we need to look at several key factors. First, are surrogacy contracts allowed, enforceable, prohibited, or void? Can a child become the subject of a contract? Does the country differentiate between traditional and gestational surrogacy? Does the jurisdiction differentiate between a commercial surrogacy contract and altruistic (or unpaid) surrogacy? Is there a formalized recognition process for the intended parents as legal parents (i.e., adoption post-birth)?

The first case to consider the validity of surrogacy contracts was the aforementioned Baby M case, in which the court held that such a contract was invalid. According to the New Jersey Supreme Court, the surrogacy contract by its very nature conflicts with laws prohibiting the use of money in adoption cases as well as laws requiring proof of parental

19 | Mostowik, 2019.
20 | The Code of Justinian (Corpus Iuris Civilis): "Mater semper certa est, etiamsi uolgo conceperit, pater uero is est, quem nuptiae demonstrant".
21 | Mostowik, 2019.

unfitness before the termination of parental rights.[22] The Baby M case still holds its status as a precedent. The New Jersey Supreme Court ruled that the Baby M judgment also applied to traditional and gestational surrogacy cases in the 2009 case of Robinson v. Hollingsworth (also known as A.G.R. v. D.R.H & S.H.).[23] The ruling was handed down by Judge Francis Schultz, who expanded the ruling in Baby M to recognize the gestational mother as the child's legal mother in a case involving a homosexual couple. The case involved an embryo created from an anonymous egg donor in vitro fertilized by one of the husbands' sperm. The sister of the other husband became the gestational mother and had no genetic link to the baby. Before the embryo was implanted, she signed a surrogacy contract with the understanding that upon childbirth, she would relinquish her legal rights to the child. The surrogacy resulted in a twin pregnancy. The surrogate mother carried the twins to full term and handed over the children to the couple. A year later, she asserted her parental rights despite her lack of genetic links to the children. Judge Schultz recognized her as the legal mother of the children by relying on the Baby M ruling. However, this ruling was somewhat controversial: some praised it for protecting the woman's right to the children she carried and birthed, stating that surrogacy contracts inherently exploit women. Many, however, criticized the ruling for being oblivious to the circumstantial differences of the Baby M case, in which the surrogate mother was the biological mother and this case, in which the surrogate mother was merely the vessel for carrying the children. This was especially important because over two decades had passed since the Baby M verdict, during which the practice of surrogacy had become more socially accepted.

Although surrogacy has transformed from a societal taboo to a widespread reproductive practice in many countries, many jurisdictions are hesitant to consider the validity of surrogacy contracts. It is clear, however, that as surrogacy becomes more widespread worldwide, the validity and enforceability of surrogacy agreements must be discussed. Classical contract law is not able to deal with the unequal power dynamics between the contracting parties, changing circumstances, or changes of heart. Modern contract law, however, should be able to provide a strong framework to regulate these issues.

Besides questions of validity and enforceability, we must also examine whether jurisdictions differentiate between commercial and altruistic surrogacy. Commercial surrogacy is a surrogacy practice in which the surrogate mother is monetarily reimbursed for her services. Altruistic surrogacy involves no monetary compensation for the surrogate for her services beyond reimbursement for medical costs and other reasonable expenses related to pregnancy. Most altruistic surrogacies occur among family members.

Article 3 (Right to the Integrity of the Person) of the Charter of Fundamental Rights of the European Union states that:

1. *"Everyone has the right to respect for his or her physical and mental integrity.*
2. *In the fields of medicine and biology, the following must be respected:*
   a. Free and informed consent of the person concerned, according to the procedures laid down by law.

22 | New Jersey Supreme Court in the Matter of Baby M. – In re Baby M. 537 A.2d 1227, 109 N.J. 396 (N.J. 02/03/1988).

23 | Superior Court of New Jersey – Robinson v. Hollingsworth, Docket #FD-09-1838-07, New Jersey 2009.

b. the prohibition of eugenic practices, in particular those aiming at the selection of persons, the prohibition on making the human body and its parts as such a source of financial gain,
c. the prohibition of the reproductive cloning of human beings."[24]

Based on this, we can clearly conclude that commercial surrogacy is not an option in the European Union because monetary compensation for the time and energy of the surrogate would constitute 'financial gain' according to Article 3. In addition to Article 3, we can refer to Article 24, which protects the best interests of the child and provides guidance in this matter. Further, the European Parliament has discussed the question of surrogacy in recent years: in 2015, it condemned this reproductive practice, stating that surrogacy constitutes an offense against human dignity and purports the instrumentalization of the surrogate's body by treating her as an object of trade. Women in vulnerable situations are more likely to fall victim to exploitation through surrogacy. The European Parliament stated that it:

"Condemns the practice of surrogacy, which undermines the human dignity of the woman since her body and its reproductive functions are used as a commodity; considers that the practice of gestational surrogacy which involves reproductive exploitation and use of the human body for financial or other gains, in particular in the case of vulnerable women in developing countries, shall be prohibited and treated as a matter of urgency in human rights instruments."[25]

The same verbiage was used in annual reports, until the 2019 Annual Report presented a drastic change in this matter compared to the Parliament's approach in 2015–2018. Just a few years after the 2015 Annual Report explicitly condemned surrogacy, the European Parliament came to drastically different conclusions in January 2021, when voting on the Annual Report on Human Rights and Democracy in the World and the EU in 2019. One amendment touched on the topic of surrogacy and when asked to vote, 429 members of the European Parliament voted against condemning surrogacy on January 20, 2021, which is a clear majority. Eighty-seven Members of the European Parliament were undecided, and merely 142 members of the European Parliament concluded that the practice of surrogacy must be condemned. How did the same body arrive at such drastically different conclusions just a few years apart? One of the reasons for this change can be found in the Motion for a Resolution to the Annual Report for 2019–Human rights and democracy in the world and the EU policy on the matter.[26] The drafted amendment was very controversial, and the language used was much harsher than that used in 2015. This may be the reason why so many members of the European Parliament disagreed with the amendment. The amendment stated that the European Parliament:

"Stresses the need to protect the dignity of every human being; condemns surrogacy as a universal crime that compromises the physical integrity of women and the rights of the child,

24 | European Union: Council of the European Union, Charter of Fundamental Rights of the European Union (2007/C 303/01), 14 December 2007, C 303/1, available at: https://www.refworld.org/docid/50ed4f582.html [Accessed: 9 October 2021].
25 | European Parliament resolution of 17 December 2015 on the Annual Report on Human Rights And Democracy in the World 2014 and the European Union's policy on the matter (2015/2229(INI)).
26 | Human rights and democracy in the world and the EU policy on the matter – annual report 2019 (2020/2208(INI)).

increasing the commercial exploitation of women's bodies and reducing the person to a commodity; rejects any improper use of the human body that involves reproductive exploitation for a mere economic or other type of return and calls for greater safeguards for the rights of women, especially for vulnerable women living in developing countries; believes that the practice of gestation for others should be addressed through international legislative instruments for the protection of human rights."[27]

After the vote was held among the Members of the European Parliament, the text of the amendment was not modified or rewritten; it was completely left out of the annual report for 2019. Thus, whereas in years prior, the stance of the European Parliament was a clear condemnation of commercial surrogacy practices, the general consensus is now silent. Practically, this means that the European Parliament went from extended protection from surrogacy to zero protection. This suggests that the European Union no longer has a unified approach to surrogacy, which could have serious human rights implications.

A similar approach was adopted by the Council of Europe, which ultimately condemned commercial surrogacy. The Committee on Social Affairs, Health, and Sustainable Development of the Parliamentary Assembly of the Council of Europe approved a draft recommendation related to surrogacy and the best interest of the child in 2016.[28] The rapporteur of the draft recommendation was Professor Petra de Sutter, who aimed to raise sensitivity and awareness toward the exploitation of women and children. The draft recommendation stated that the Committee of Ministers should consider the feasibility of creating unified European guidelines to protect children's rights concerning surrogacy arrangements. The draft recommendation also suggested that the Committee of Ministers should collaborate closely with the Hague Conference on Private International Law regarding the status of children, including issues that might surface as a result of international surrogacy agreements. The Parliamentary Assembly of the Council of Europe voted to reject drafts 83 to 77. This was not the first time that the Council refused to draw up surrogacy guidelines. The rapporteur stated that she thought the Committee was too divided on human rights questions related to surrogacy and that no agreement could exist between committee members on whether altruistic surrogacy should be admissible.

In the domain of the Court of Justice of the European Union, surrogacy issues are primarily related to the social rights of the commissioning parents. These social rights include questions of a practical nature—whether maternity or paternity leave should apply to the intended parents, whether a parental contribution should be awarded to the intended parents, and whether measures to safeguard the health of pregnant workers and workers who have recently given birth or are breastfeeding at the workplace should be applicable. Would the failure to grant these constitute discrimination? For this, one needs to refer to the judgment in Case C-363/12.[29] Would it be a violation of the principle of

27 | Motion for a resolution Paragraph 27 a (new) – Human rights and democracy in the world and the EU policy on the matter – annual report 2019 (2020/2208(INI)).
28 | De Sutter, 2016.
29 | Court of Justice of the European Union, Judgment of the Court (Grand Chamber), 18 March 2014 (Request for a preliminary ruling from The Equality Tribunal – Ireland) – Z/A Government Department, the Board of Management of a Community School(Case C-363/12).

equality? This was explored in Case C-167/12.[30] Would it be a breach of Directive 2006/54/EC[31] of the European Parliament and of the Council of July 5, 2006, on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation?[32] The Court concludes in the judgments mentioned above that the social rights that are present in EU legislation are not directly applicable to the intended parents in the case of surrogacy. These rights should instead be regulated at the national level of the Member States, meaning that the Member States that do allow surrogacy should ensure that the rights of the intended parents are established correctly, and social rights become applicable to the intended parents in these Member States.

Thus, it is clear that there is no unified European approach to surrogacy, and the question remains regulated at the national level. Individual member states naturally have varying positions on surrogacy. Some member states prohibit the practice for moral reasons. They consider it a violation of human dignity, of both the surrogate mother and the child. Other member states, however, have a different stance on the topic and view surrogacy as part of the right to constitute a family, the freedom of disposition over one's own person, and bodily autonomy, among others. Global statistics show a constantly rising number of surrogacy cases, including a growing number of cross-border surrogacies.[33] It bears mentioning that this trend was halted in 2020 by the global coronavirus pandemic, mainly due to travel restrictions, and this change of pace is anticipated to continue until the end of the pandemic. Many infertile European couples are now seeking a way to enter into a surrogacy agreement in their own jurisdiction, or if that is not an option, they often opt for reproductive tourism. It may thus be time to apply a unified approach to regulate this uncharted territory at the European level, as there is currently no unified legal instrument that addresses the issue of surrogacy. Some fragmentary regulations are provided by universal and regional international legal instruments, but the matter of surrogacy is still mostly regulated at the national level.

3.1. National Surrogacy Legislation in Europe

National legislation is incredibly diverse in this area. Among European countries, there are forbidding states, permitting states, and non-regulating states concerning the question of surrogacy. Further, some countries differentiate between traditional and gestational surrogacy and allow one, but not the other. Some countries also have citizenship requirements for commissioning parents and/or surrogates as an attempt to curb fertility tourism.

3.1.1. States prohibiting surrogacy

Most European countries prohibit surrogacy. France is one of the most notable examples here, banning all commercial and altruistic surrogacy agreements since the

30 | Court of Justice of the European Union, Judgment of the Court (Grand Chamber), 18 March 2014 (Request for a preliminary ruling from the Employment Tribunal, Newcastle upon Tyne — United Kingdom) — C. D./S. T. (Case C-167/12).
31 | Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.
32 | Karpat, 2018, pp. 91–106.
33 | Davletshina, Karmanov, 2020, p. 180.

1990s. In 1991, the Court of Cassation held that only merchandise could be the object of contracts :

"The Court condemns maternity by substitution and related contracts, reaffirming in so doing the terms the court had used in a judgment of December 13, 1989 (Civ.1, Bull. no. 387) in approving the dissolution of an association whose objectives were to facilitate the signature and performance of contracts of that type. This judgment also clarifies that of 1991 in relation to the fact that such contracts impinge upon not only the unsaleable nature of the human body but also upon the status of persons, since, according to the judgment of 1989, they have as their objective 'to cause to come into the world a child whose status will not correspond with his real lineage'."[34]

The Court further examined the question in 1994 and held that all contracts concerning procreation or gestation on behalf of a third party are null and void. This prohibition was codified in Article 16 of the French Civil Code.[35] French legislation goes as far as making it a criminal offense to serve as an intermediary in a surrogacy procedure, punishable by imprisonment. The country is very clear about its stance on surrogacy; however, children of French citizens can still be born as a result of surrogacy tourism.

Italy is also on the list of forbidding states, banning both altruistic and commercial surrogacy on constitutional grounds. The Italian Constitution[36] declares the irreplaceable duties and responsibilities of genetic progenitors toward their children, the right of children to be raised by their parents. This provision led Italy to enact a new law in 2004, the Act on Law on Assisted Reproductive Technologies n. 40 of 2004. Italy was one of the last countries that had no regulations on the assisted fertilization process. This was especially problematic because there had been over a hundred private clinics that were offering medically assisted reproductive procedures somewhere in a grey area of law. Law 40/2004 filled this legislative gap, although it did so in a restrictive manner. Surrogacy is further prohibited by the Italian Civil Code, which considers all surrogacy agreements null and void because they are against public policy.[37]

Germany is also in the forbidding state category. Germany considers surrogacy to be a violation of human dignity, which is enshrined in the first article of the German Constitution.[38] The expansion of this concept led to the Act on the Protection of Embryos[39] in 1991, which severely restricts reproductive medicine in Germany based on human dignity. This act criminalizes surrogacy techniques and anyone who has any role in the surrogacy process. The act also limits in vitro fertilization and only allows a woman to give birth to her own child. Thus, in vitro fertilization is only an option using the woman's own egg, which does not resolve the increasing issue of female infertility. Regarding surrogacy, the

34 | Case Procureur-général v. Cassation, D.1991.417.
35 | Code civil [Civil Code] art. 16 (Fr.).
36 | Costituzione della Repubblica Italiana, entrata in vigore il 1º gennaio 1948, era stata eletta il 2 giugno 1946. Italian Constitution (1947) Adopted on 22 December 1947 (published in Gazzetta Ufficiale, 27 December 1947, n.298).
37 | Italian Civil Code (1942) Adopted with Royal Decree n.262 (March 16, 1942) – Art. 1325.
38 | Basic Law for the Federal Republic of Germany (as amended July 2002) [Germany], 23 May 1949.
39 | Act 745/90, on the Protection of Embryos (Gesetzzum Schutz von Embryonen (Embryonenschutzgesetz – ESchG) – Federal Law Gazette, Part I, No. 69, issued in Bonn, 19th December 1990, p. 2746.

German Civil Code (Bürgerliches Gesetzbuch)[40] declares that the legal parents of the child will always be the gestating mother and her legal partner (or the man who recognizes his fatherhood), thus ruling out the ability of intended parents to become legal parents. Furthermore, the German Adoption Placement Act (Adoptionsvermittlungsgesetz)[41] also excludes surrogacy cases from its procedures.

Further forbidding countries include Denmark, Sweden, Austria, and Poland.

3.1.2. States allowing surrogacy

Countries that allow surrogacy in Europe are exceptions to the regular normative framework. One of these countries is Portugal, which has traditionally been an opponent of surrogacy. Surrogacy contracts were banned in Portuguese legal order, and surrogacy has even been criminalized in Portugal. Act no. 32/2006 on medically assisted reproduction was enacted to regulate fertilization techniques and it expressly banned surrogacy contracts. Under this law, all surrogacy agreements were null and void. The law was heavily criticized because it recognized the gestational mother as the legal parent of the child, even if she had no genetic link to the baby and all genetic material came from the intended parents. This deprived the intended parents of their right to a family, and also imposed motherhood on the gestational mother even if she did not wish to parent the child. The prohibition was supported by a public order argument based on the Civil Code. Legal scholars have traditionally been more conservative in Portugal, and this was reflected in the legal position on surrogacy until 2016, when Act. N. 25/2016 was introduced to regulate surrogate motherhood. The 2016 law allows surrogacy in certain scenarios, that is, for women born without a uterus or with a serious disease of the uterus that would prevent them from carrying a child.[42] Single men or gay couples were not able to become parties to a surrogacy contract, meaning that only heterosexual couples are allowed to become intended parents in a surrogacy procedure. This was later amended to allow any woman to enter a surrogacy contract regardless of her marital status or sexual orientation. Single gay men and male gay couples are still not permitted to use artificial reproductive technologies; men can only have access to reproductive technology if they are in a heterosexual relationship. This approach of the 2016 law is criticized by some as being discriminatory based on gender and sexual orientation. Another heavily criticized aspect of Portuguese surrogacy law is that it does not allow for changes of heart. There is no possibility of withdrawing from a surrogacy contract. While we can clearly observe the immense change in the Portuguese legislators' stance on surrogacy in the past fifteen years, commercial surrogacy is still fully prohibited and any monetary compensation for the services of the surrogate is criminalized. The only money that can be exchange is to cover the documented medical expenses related to the surrogate's pregnancy. To ensure that surrogacies were in line with legislation, the Medically Assisted Procreation National Council was established to supervise and review every surrogacy agreement.[43]

40 | Civil Code in the version promulgated on 2 January 2002 (Federal Law Gazette [Bundesgesetzblatt] I page 42, 2909; 2003 I page 738), last amended by Article 4 para. 5 of the Act of 1 October 2013 (Federal Law Gazette I page 3719).

41 | Adoption Placement Implementation Act of 5 November 2001 (German Federal Law Gazette I, p. 2950).

42 | Raposo, 2017, pp. 230–239.

43 | Ferreira and Almeida, 2020.

Greece is also on the list of countries that allow surrogacy. Altruistic gestational surrogacy became legal in Greece, but traditional and commercial surrogacy is still fully prohibited. In 2002, Greece enacted Law 3089/2002, which modified Articles 1455 to 1464 of the Greek Civil Code. This was later expanded by Act 3305/2005 on the Enforcement of Medically Assisted Reproduction. The Greek Civil Code is very clear regarding the regulation of surrogacy. It states, that:

"The transfer of a fertilized ova into the body of another woman (the ova should not be hers) and the pregnancy by her is allowed by a court authorization granted before the transfer, given that there is a written and, without any financial benefit, agreement between the persons wishing to have a child and the surrogate mother and in case that the latter is married of her spouse, as well. The court authorization is issued after an application of the woman who wants to have a child, provided that evidence is adduced not only in regard to the fact that she is medically unable to carry the pregnancy to term but also to the fact that the surrogate mother is in good health and is able to conceive."[44]

Three years after the amendment of the Greek Civil Code, Act 3305/2005 on the Enforcement of Medically Assisted Reproduction was enacted. This contains further regulations regarding the conditions of legal surrogacy. It bans traditional surrogacy, explicitly stating that the surrogate mother cannot contribute her own genetic material, prohibiting commercial surrogacy, and explicitly states that the only monetary compensation that can occur is for the medical expenses related to the pregnancy and the loss of profit. It also limits the valid reasons for surrogacy to medical issues faced by the intended mother, including infertility or the potential of genetic hereditary diseases. As in Portugal, the intended parents can only be single women or heterosexual couples. The surrogate has to undergo an extensive medical check, be healthy, and be under the age of 50. All involved parties must be Greek citizens or permanent residents of Greece. To ensure that all of these legal requirements are met, all surrogacy agreements are subject to judicial review. This process is not without its critics, especially because this type of judicial control is very vague and, in most cases, reduced to a mere bureaucratic procedure. The surrogacy process can only start after a judicial decision is issued by the district court in the commissioning parents' district of residence. The intended mother must apply to the court and fertilization can only happen after the judicial decision has been published. The biggest problem with the Greek system is that even though it is legally forbidden, commercial surrogacy is thriving. In many cases, judges agree to surrogacy even when there is no prior relationship between the commissioning parents and the surrogate.[45] Judgments in these cases are more akin to administrative decisions and often purely formal. This is also evident from the number of private clinics in Greece advertising commercial surrogacy.[46]

Other countries that allow surrogacy in the European Union include Cyprus, Belgium, and the Netherlands. It is important to note that while Ukraine is not a European Union member state, it is an example of a country with very liberal surrogacy laws. The Ukrainian Family Code permits all forms of surrogacy in Article 123 but balances that with somewhat more restrictive requirements for the intended parents (heterosexual couples or single adults with medical conditions) and the surrogate (a woman who has already

44 | Article 1458 of the Greek Civil Code.
45 | Hatzis, 2010.
46 | Davaki, 2017, p. 8.

given birth to her own child). All surrogacy contracts are made in front of a notary, with a notable difference compared to permissive European Union member states: monetary compensation is allowed with no cap limit. Ukraine also recognizes the right to regret, that is, the surrogate mother's right to change her mind and withdraw from the contract before the transfer. These relatively liberal regulations make Ukraine one of the most popular destinations for reproductive tourism. The main issue surrounding surrogacy maternity in Ukraine is the lack of a clear mechanism of action when citizens of countries where such procedures are prohibited plan to participate in the program.[47]

3.1.3. States not fully regulating surrogacy

As of 2021, some European countries still have no restrictive or permissive surrogacy laws. However, this does not make them exempt from dealing with the legal consequences of surrogacy in some way.

In some countries, a lack of regulation means implied permission. This is the case in Romania, for example, where there are no laws governing surrogacy, making it technically legal even though no laws regulate or explicitly allow it. In Romania, commissioning parents could reach an agreement with the surrogate, sign the contract in front of a notary, and, after birth, complete the process through adoption. There is a historical reason for this significant legislative gap: during the era of state socialism, abortions were prohibited, which resulted in the death of over ten thousand women due to illegal abortions. Thousands of women were imprisoned. After the fall of socialism and decades of state invasion in the private lives of citizens, the legislators of the new era were reluctant to intervene in issues related to assisted reproduction. Several attempts have been made to introduce a comprehensive legal framework, none of which have been successful. The current state of things is fragmented, with only partial provisions in the Healthcare Act and the Civil Code, which could be somewhat applicable to the question of surrogacy.

The question of surrogacy was also discussed by Romanian courts, including the Romanian Constitutional Court, which debated questions related to surrogacy when a draft law was presented in the Romanian Parliament on assisted reproduction.[48] The President of Romania challenged the draft law and the Constitutional Court had to examine its alignment with the Constitution and human rights standards. This draft required that the intended parents and surrogate become parties to an agreement, according to which the surrogate needed her husband's permission to carry a baby. This would have violated the surrogate's freedom of disposition over her own person and bodily integrity.[49] The Court deemed the draft law unconstitutional and stated that *"the life and health of a person and of the conceived child, but not yet born, cannot be objects to transactions."*[50] It is important to note, however, that surrogacy still exists in Romania due to the grey areas of Romanian law, and courts are frequently confronted with the children's filiation with genetic vs. gestational parents.

47 | Mostowik, 2019.
48 | Brodeala, 2016, pp. 56–74.
49 | Article 26(2) of the Romanian Constitution.
50 | Decision 418 of 18 June 2005 on the complaint of unconstitutionality of the law on reproductive health and medically assisted human reproduction, published in Official Gazette no 664 of 26 July 2005, 3 b) (Constitutional Court of Romania 2005).

Unlike Romania, some countries with a legislative gap regarding surrogacy deal with the issue with an implicit prohibition of the practice. An example of this is Poland, a country that has no explicit ban on surrogacy. We can arrive at an implicit ban by analyzing the Family and Guardianship Code of Poland, which states that the legal mother of a child is the woman who gave birth to the child.[51] This provision was added to the Family and Guardianship Code in 2009, and in the explanation of the draft law, the specific definition of the term 'mother' was necessary in light of ever-evolving medical technologies. They backed up their definition by arguing that it is in line with the European Convention on the Legal Status of Children Born out of Wedlock. Article 2 of the Convention states that: *"Maternal affiliation of every child born out of wedlock shall be based solely on the fact of the birth of the child."*[52] According to Polish legal scholars,[53] this means that any surrogacy agreements are null and void, and the surrogate mother will always be considered the legal parent of the child, even if she has no genetic ties to the child.

The highest-level source of law in Hungary is the Fundamental Law of Hungary, which protects the institution of marriage as a union between a man and a woman and encourages them to commit to having children. Surrogacy agreements are not recognized or enforceable in Hungary, and the Health Act implicitly bans them by excluding surrogacy from the list of reproductive procedures that can be legally performed. The Hungarian Criminal Code also prohibits commerce with the human body, but surrogacy itself is not a criminal offense, even though opinions differ regarding its legality. However, some loopholes are present: surrogacy procedures cannot be conducted legally in Hungary, but children born through altruistic surrogacy abroad can be adopted. To get around this, many couples travel with their surrogates to a country in which human reproductive procedures can be legally performed.

In the Czech Republic, there is a prohibition on commercial surrogacy based on the general principle that the use of human body parts may not be a source of financial gain or other benefits for the person from whose body the parts are to be taken, or for anyone else, including the medical institution that performed the procedure. *"The human body cannot be sold, donated, exchanged, borrowed, or rented. Nothing of this kind is permitted by law. The human body can be classified in the category of so-called material objects, which, however, cannot be qualified as a thing (...); it is, therefore, res extra commercium, which does not have the nature of a thing."*[54] The first case of surrogacy was recorded in the Czech Republic in 1993 at the Clinic of Reproductive Medicine and Gynecology in Zlín, involving an adoptive mother whose uterus had been surgically removed and who was, therefore, unable to carry a child to term. The entire course of this action was conducted in secret until 2004. At the above-mentioned clinic, however, surrogacy was not only openly discussed but also offered to those interested in this type of reproduction. However, legislation is still lagging behind, and surrogacy is not expressly forbidden or expressly allowed. For a long time, the legislator simply pretended that there was no such thing as surrogate motherhood. This changed in 2012 with the new Civil Code, which was considered a major letdown due to its lack of an in-depth consideration of the matter of

51 | Art. 61[9] of the Family and Guardianship Code.
52 | European Convention on the Legal Status of Children born out of Wedlock CETS No. 085, adopted on 15 November 1975.
53 | Jędrejek, 2014, p. 102.
54 | Tesinova, Ždarek, Policar, 2011, p. 185.

surrogacy. It does, however, at least mention surrogacy once,[55] which is a sign that the legislator has acknowledged the existence of surrogacy. Czech law defines the mother as a woman who gave birth to her child.[56] Determining fatherhood is more complex, and fatherhood is linked to the genetic connection to the child. The regulation of surrogacy in the Czech Republic currently lacks a more precise legislative framework.

In Slovakia, the first legal analysis of surrogate motherhood was published over 35 years ago.[57] After the 2004 reveal of the Czech clinic conducting surrogacy procedures since the 1990s, a renewed interest in surrogacy emerged in Slovakia as well. Like our partnering countries in V4, Slovakia is just as lacking when it comes to a comprehensive regulatory framework on surrogacy issues. Article 82 (2) of the Family Act is the only provision that can be applied to surrogacy.[58] This provision makes all surrogacy contracts null and void. Article 82 of the Family Act states the following:

(1) The mother of the child was a woman who gave birth to the child.

(2) Agreements and contracts that are contrary to paragraph (1) shall be null and void.

The explanatory report for this provision refers to the state of medical science and its rapid progress. As with many other European states, it became necessary to define the term 'mother' for the sake of clarity and to reduce maternity establishment disputes. It is worth mentioning, however, that with in vitro fertilization, the woman who gives birth to a child (gestational mother) is not necessarily the biological or genetic mother of the child, and has no common DNA with the child. This is a fact that most jurisdictions seem to overlook and focus solely on the circumstances of the birth of the child to determine maternity. Section 2 of Article 82 of the Family Act explicitly warns that any agreements contrary to Section 1 are void. This seems to be a direct response to surrogacy and thus voids all surrogacy contracts. In addition to family act reasoning, we can also conclude that surrogacy contracts are *contra bonos mores* in our legal environment; therefore, they would not have any legal protection in Slovak jurisdiction.[59]

4. Conclusion

We can conclude that there is immense jurisdictional diversity across Europe when it comes to matters related to surrogacy. To prevent legal obscurity and grey areas that could ultimately result in the failure of the mutual trust principle, it is not sufficient to deal with surrogacy at the national level. Surrogacy is a cross-border issue that requires a cross-border solution; therefore, it is time to take action at a European level. The need for a unified legal framework addressing international surrogacy cases has been the focus of the Hague Conference on Private International Law for the past 20 years. The Hague Conference is currently researching private international law issues related to the legal parentage of children, as well as international surrogacy contracts. The work was set to conclude with a protocol by 2023.

55 | Art. 804 of Act no. 89/2012 Coll., Civil Code.
56 | Art. 775 of Act no. 89/2012 Coll., Civil Code.
57 | Haderka, 1986, pp. 917–934.
58 | Act No. 36/2005 on Family and on amendment of some other acts.
59 | Júdová, Píry, 2019, p. 794.

Some experts in the field suggest that due to the progressively growing differences between domestic laws and legal principles (such as the concepts of maternity, paternity, the interpretation of prohibition of human trafficking and exploitation) and because of the lack of competence of international bodies in this field, no universal approach will be possible in the future, but rather co-operations within different states representing similar values are likely to occur.[60] This is why tighter collaboration and legal research on the identities of national legal systems are crucial when discussing the future of surrogacy in law—one of the reasons organizations like the Central European Professors' Network provide invaluable insight into these domestic laws and principles and contribute to solving many issues related to surrogacy.

If we want to pursue a unified European framework, we have two options. First, the abolitionist path—this would mean banning surrogacy across the continent on the grounds that surrogacy violates human dignity. This being a fundamental right deserves protection and thwarts the human body from becoming an article of commerce. The complete abolition of surrogacy could lead to further legal issues, especially in countries that have historically allowed surrogacy procedures. Moreover, we can assume that the ban on surrogacies would not necessarily lead to the eradication of the practice in Europe; it would most likely continue in secret and lead to legal evasion and the potential exploitation of women in vulnerable positions.

The second option is the regulatory path. This would require legislators to catch up with societal changes and accept that surrogacy exists, even in countries that explicitly or implicitly prohibit it. By acknowledging the reality of surrogate motherhood and harmonizing the various national jurisdictions of Europe, we could achieve a minimum level of protection for the fundamental rights involved.

Irrespective of which path we choose for the future regulation of surrogacy, it is crucial that legislators shape legal instruments regarding surrogacy in compatibility with human dignity, fundamental moral principles, the best interest of the child, and the protection of families and humanity at large.

60 | Mostowik, 2017.

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ECTHR JUDGEMENTS IN THE DECISIONS OF THE HUNGARIAN CONSTITUTIONAL COURT

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ABSTRACT

The aim of this study is to explore the influence of the judgements of the European Court of Human Rights (ECtHR) on the case law of the Hungarian Constitutional Court on the basis of the analysis of thirty selected decisions. The Constitutional Court has a rather ambivalent attitude (to the references) to the ECtHR judgements. One of the approaches is that, based on the principle of pacta sunt servanda, the Constitutional Court should follow the Strasbourg case law and the level of protection of fundamental rights, even where this would not necessarily stem from its 'precedent decisions'. In other decisions one can come across with arbitrary selection of ECtHR judgments or silent disregard of the Strasbourg case law. The Constitutional Court uses the ECtHR jurisprudence in its constitutional reasoning in a quite multicoloured and flexible way. Even when the ECtHR judgements have a very loose connection with the subject matter of the case before the Constitutional Court, it is not reluctant to rely on them. However, in the so-called common cases the Court not necessarily makes much use of the relevant ECtHR judgement or it is not decisive in itself. A large body of dogmatic considerations elaborated in the Strasbourg case law has become a part of the Hungarian constitutional law, which is reaffirmed case by case by the Constitutional Court. Nevertheless, it cannot be identified precisely what weight the Constitutional Court attributes to the ECtHR judgments.

KEYWORDS

constitutional reasoning
Hungarian Constitutional Court
minimum standard requirement
reception of dogmatic considerations
Strasbourg case law

1. Introduction

The aim of this study is to explore the influence of the judgements of the European Court of Human Rights (ECtHR) on the case law of the Hungarian Constitutional Court.

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The examination is based on the analysis of 30 decisions[2] of the Hungarian Constitutional Court selected for the purposes of the research project 'Interpretation of fundamental rights in Europe' carried out within the framework of the Central European Professors' Network coordinated by the Mádl Institution of Comparative Law, the Hungarian Association for Comparative Law, and the Central European Association for Comparative Law. The analysis is not suitable for providing a comprehensive picture of the effect of the case law of the ECtHR because of the selection criteria.[3] One of them was that each decision should contain a relevant/substantive reference to a judgement of the ECtHR; therefore, decisions without an explicit reference remained outside the scope of this research. Although one might think that the examination of decisions without such a reference would not add too much to the overall picture, it is worth mentioning Justice Pokol's concurring reasoning to Decision 3025/2014. (II. 17.) of the Constitutional Court[4]. He proposed to present the relevant ECtHR case law in the draft decision for in-house use only (*pro domo*) instead of including references in the final reasoning.[5] This way of thinking is not alien to other bodies either, i.e. the French Conseil constitutionnel traditionally avoided express

2 | Decision 38/2012. (XI. 14.) of the Constitutional Court, Decision 1/2013. (I. 7.) of the Constitutional Court, Decision 3/2013. (II. 14.) of the Constitutional Court, Decision 4/2013. (II. 21.) of the Constitutional Court, Decision 16/2013. (VI 20.) of the Constitutional Court, Decision 33/2013. (XI. 22.) of the Constitutional Court, Decision 7/2014. (III. 7.) of the Constitutional Court, Decision 3025/2014. (II. 17.) of the Constitutional Court, Decision 20/2014. (VII. 3.) of the Constitutional Court, Decision 28/2014. (IX. 29.) of the Constitutional Court, Decision 36/2014. (XII. 18.) of the Constitutional Court, Decision 24/2015. (VII. 7.) of the Constitutional Court, Decision 30/2015. (X. 15.) of the Constitutional Court, Decision 5/2016. (III. 1.) of the Constitutional Court, Decision 3064/2016. (IV. 11.) of the Constitutional Court, Decision 13/2016. (VII. 18.) of the Constitutional Court, Decision 14/2016. (VII. 18.) of the Constitutional Court, Decision 16/2016. (X. 20.) of the Constitutional Court, Decision 22/2016. (XII. 5.) of the Constitutional Court, Decision 2/2017. (II. 10.) of the Constitutional Court, Decision 8/2017. (IV. 18.) of the Constitutional Court, Decision 28/2017. (X. 25.) of the Constitutional Court, Decision 29/2017. (X. 31.) of the Constitutional Court, Decision 34/2017. (XII. 11.) of the Constitutional Court, Decision 6/2018. (VI. 27.) of the Constitutional Court, Decision 1/2019. (II. 3.) of the Constitutional Court, Decision 2/2019. (III. 5.) of the Constitutional Court, Decision 7/2019. (III. 22.) of the Constitutional Court, Decision 13/2019. (IV. 8.) of the Constitutional Court, Decision 13/2020. (VI. 22.) of the Constitutional Court.

3 | A criterion was that the selected cases had to be 'important' ones and that they had to be from the last 10 years (2011–2020), i.e. the decision in the given case was made in this period. I selected decisions dating back to 2012, as the Fundamental Law came into effect in this year. A further criterion was that each decision contained a substantive reference to ECJ or ECtHR decisions. I selected decisions with relevant reference to ECtHR judgments; nevertheless, one can also find references to ECJ judgments in some of the selected decisions.

4 | Repeated in concurring reasoning to Decision 8/2017. (IV. 18.) of the Constitutional Court, dissenting opinion to Decision 1/2019. (II. 13.) of the Constitutional Court, concurring reasoning to Decision 7/2019. (III. 22.) of the Constitutional Court, and concurring reasoning to Decision 13/2019. (IV. 8.) of the Constitutional Court.

5 | 'Relevant decisions of the ECtHR may play a useful role in our draft decisions as information in the constitutional court decision-making process, for internal use, but in my opinion they should not be included in the final decision, at most in individual parallel and dissenting opinions as further arguments of individual constitutional judge positions. The reference in the decision of the Constitutional Court means that, in addition to the Basic Law, we attribute normative, binding force not only to the Convention but also to the judicial practice interpreting it, thus recognizing that the ECtHR may rewrite the international obligations binding on them without the participation of States parties.' He insists that the case law of the ECtHR is not binding on the Constitutional Court in interpreting fundamental rights.

references to the ECtHR judgements; however, it used 'borrowing techniques' and, in some cases, the sources of reasoning can be traced back to the case law of the Strasbourg Court[6]. Despite the lack of express reference to the ECtHR judgements, the Constitutional Court/the justice rapporteur wording the ruling and wording the reasoning may consider and rely on them. This approach can obscure the real basis of the reasons, which is contrary to what was said in Decision 13/2013. (VI. 17.) of the Constitutional Court by invoking the rule of law principle: 'the reasoning and the sources of constitutional law must be accessible and verifiable for everyone, and the need for legal certainty requires that the considerations in decision-making be transparent and traceable'.

I have already pointed out in my study 'Interpretation of Fundamental Right is Hungary'[7] on the basis of the analysis of the selected decisions that the Constitutional Court has a rather ambivalent attitude (to the references) to the ECtHR judgements. One cannot be sure of the role the ECtHR jurisprudence of the plays in the constitutional reasoning of the Hungarian forum; the ECtHR judgements appear in various contexts and perform different functions. In the present study, first, I present the opposing approaches: the one in favour of and the other against using references to the European case law and, subsequently, make an attempt to explore how these affect the constitutional reasoning of the Constitutional Court in particular cases. I take a closer look at the substance of the reasoning of the selected decisions to determine, as far as possible, the real impact of the ECtHR judgements on the Hungarian Constitutional Court.

2. History and approaches

Szente points out that while the source of reception was concentrated mainly around the German case law (*Bundesverfassungsgericht*) and that of the US Supreme Court at the beginning of the functioning of the Constitutional Court (in the 1990s), since the 2000s the 'legal import' has shifted to the ECtHR judgements and the alignment with these judgements has become the trend rather than participating in an international constitutional law dialogue.[8] According to him, this is partly explained by the particularities of the early area. Justice Sólyom, president of the Constitutional Court from 1990 to 1998, and some other influential justices in the body were known for their 'German orientation'. Jakab and Fröhlich also highlight that talented constitutional lawyers spent several months or years in Germany (at universities or the Max Plank Institute for Comparative Public Law and International Law in Heidelberg), thanks to the generous German scholarship policy. Those who got a position at the Constitutional Court as a judge or an advisor to a judge later implemented what they had experienced in Germany.[9] The Court adopted reasoning from decisions of the German Federal Constitutional Court quite frequently even without any reference to the source thereof. The large-scale reception of the foreign arguments was understandable in a country that had no tradition of constitutional democracy and

6 | Kovács, 2013, p. 83.
7 | Köblös, 2021, p. 204.
8 | Szente, 2013a, p. 54.
9 | Jakab–Fröhlich, 2017, p. 426.

protection of human rights.[10] After about 10 years, a Hungarian body of constitutional law was elaborated; therefore, it was not necessary to rely on foreign sources so much and the reference to its own precedents became the rule.[11] The composition of the Constitutional Court also changed; the new president and members brought in new approaches concerning methods of interpretation, including more frequent references to the ECtHR judgements.

In 2010, the governing party coalition gained a two-thirds majority in the Parliament, which opened the way towards making a new constitution. Even before passing the Fundamental Law, the previous Constitution was amended with the clear purpose of restricting the power of the Court[12], derogate from its previous case law,[13] and affect its composition by increasing the number of members from 11 to 15. The Fundamental Law also introduced new rules, and the parliamentary majority adopted unusual solutions (see: transitional provisions of the Fundamental Law[14]). In those circumstances, the Constitutional Court's attention was much more drawn to international law.

In Decision 61/2011. (VII. 13.) of the Constitutional Court, the Court argued that the Hungarian Constitution had immutable parts based on the principles included in international treaties. The immutability is based not on the will of the constitutional power, but mostly on *ius cogens* and the international treaties to which the Republic of Hungary was a party. The coherence of the principles enshrined in international treaties and the national constitutional systems should be ensured. The internal law of the state—if it had any obligations in the given field of law deriving from customary or even contractual international law—should be made and interpreted in accordance with those obligations. For certain fundamental rights, the Constitution defines the essence of the fundamental rights in the same way as an international treaty (the Covenant on Civil and Political Rights and the Human Rights, European Convention on Human Rights). In these cases, the level of protection of fundamental rights provided by the Constitutional Court cannot be lower than the international (typically by the Strasbourg Court of Human Rights) level of legal protection. Based on the principle of *pacta sunt servanda* [Section 7(1) of the Constitution, Art. Q (2)–(3) of the Fundamental Law consequently], the Constitutional Court should follow the Strasbourg case law and the level of protection of fundamental rights, even where this would not necessarily stem from its 'precedent decisions'. There were no concurring reasoning or dissenting opinions attached to this decision, opposing this argumentation.

In the same year, another decision[15] was made in which the Constitutional Court annulled several provisions of the Code of Criminal Procedure, finding them contrary to the Constitution and an international treaty, namely the ECHR. The composition of the Court had changed by then, and the number of members of the Court had increased to 15. The reasoning was strongly based on the case law of the ECtHR; the reasons underpinning the unconstitutionality and those verifying the infringement of the ECHR

10 | Szente, 2013a, p. 235.
11 | Jakab–Fröhlich, 2017, p. 411.
12 | Act CXIX of 2010
13 | Modification of the Constitution of 11 August 2010, Act LXI of 2011
14 | See Decision 45/2012. (XII. 29.) of the Constitutional Court annulling several provisions of the transitional provisions of the Fundamental Law.
15 | Decision 166/2011. (XII. 20.) of the Constitutional Court.

were not separated. The Court emphasised that the meaning and interpretation of the provisions included in the ECHR, in accordance with its case law, are based on the ECtHR jurisprudence empowered by the contracting states with authentic interpretation. Two justices objected to the logic of reasoning and to relying on the precedents of the ECtHR in interpreting the Constitution; only one of them was a newly elected member of the Court. The other, Justice Bragyova, raised dogmatic objections to the solution chosen by the majority, arguing that the Constitutional Court was not bound by the ECHR in substantive constitutional law issues. Consequently, the Court could not have established its argumentation and the interpretation of the Constitution on the ECtHR's case law. This could be an important inspiration in the interpretation of the Constitution, but this jurisprudence was not binding on the Constitutional Court and not as decisive as the Constitutional Court's own precedents. Justice Bragyova also pointed out that this approach did not deny the outstanding significance of the ECtHR's judgements in the interpretation of the Constitution. He found it necessary to consider the ECtHR jurisprudence to verify the pertinence of the constitutional interpretation. If the Constitutional Court and ECtHR reached different constitutional conclusions, the Constitutional Court should reconsider those conclusions, but it was not obliged to follow the case law of the ECtHR. Justice Dienes-Oehm, a newly elected judge, joined Justice Bragyova's concurring reasoning.

After the Fundamental Law had come into effect, the above-mentioned requirements elaborated in Decision 61/2011. (VII. 13.) of the Constitutional Court were taken over from the 'old' case law.[16] In Decision 32/2012. (VII. 4.) of the Constitutional Court, it was used with respect to EU law.[17] In Decision 4/2013. (II. 21.) of the Constitutional Court, the Court emphasises that although the ECtHR judgements have a declarative effect[18], its case law can help in the interpretation of constitutional rights declared in the Fundamental Law or international treaties and in the assessment of their scope and content. As the essence of the fundamental rights is embodied in judgements given in particular cases, the European jurisprudence promotes the uniform interpretation of human rights. The Court further added that respecting the ECtHR case law may not lead to the limitation of fundamental rights guaranteed by the Fundamental Law or to a lower level of protection. The Strasbourg case law and the Convention provide for a minimum level of fundamental rights protection that every state party to the Convention is bound to guarantee, while the national law might foresee a different, higher set of requirements for the protection of human rights.

In Decision 7/2013. (III. 1.) of the Constitutional Court, it reaffirmed that for certain fundamental rights, the Constitution defines their essence in a way similar to that of an international treaty (the Covenant on Civil and Political Rights and the Human Rights, European Convention on Human Rights). In these cases, the level of protection of fundamental rights provided by the Constitutional Court cannot be lower than

16 | See in details: Chronowsk, 2014, p. 30–32.

17 | In relation to the right to choose work and employment freely, the Constitutional Court emphasised that the Court may not ignore the relevant rules of the European Union and the jurisprudence of the ECJ. Confirming the standard elaborated in Decision 61/2011. (VII. 13.) of the Constitutional Court, the Court pointed out that it [i.e. the level of protection of fundamental rights provided by the Constitutional Court cannot be lower than the international (typically by the Strasbourg Court of Human Rights) level of legal protection] is especially true in relation to the law of the European Union.

18 | It means that they cannot alter legal questions directly.

the international (typically by the Strasbourg Court of Human Rights) level of legal protection.[19]

In Decision 36/2013. (XII. 5.) of the Constitutional Court, the Court used the above-mentioned requirement to explain why it initiated an examination of conflicts with international treaties ex officio. In Decision 13/2014. (IV. 18.) of the Constitutional Court, the Court slightly reworded the requirement: the Constitutional Court accepts the level of legal protection provided by international legal protection mechanisms as the minimum standard for the enforcement of fundamental rights.

Eight out of the 30 decisions refer to the above-mentioned minimum requirements [i.e. the level of protection of fundamental rights provided by the Constitutional Court cannot be lower than the international level of legal protection] in one way or another.[20]

Despite the reaffirmation, reference to international agreements and the case law of the ECtHR has not become a standard and indispensable element of the reasoning of the decisions. In particular, if a case can be easily solved on the basis of the Constitutional Court's own precedents, the Court does not spend time and energy on exploring and presenting relevant ECtHR jurisprudence. It is worth mentioning, furthermore, that Justice Kovács judge rapporteur of Decision 166/2011. (XII. 20.) and 33/2013. (XI. 22.) of the Constitutional Court, remained in minority in some cases with his opinion referring to this requirement.[21]

Although there has been a significant change in the composition of the Court [i.e. all judges who participated in delivering Decision 61/2011. (VII. 13.) have already left the Court] and there are justices heavily opposing the references to the ECtHR judgements, the 'minimum standard' requirement has not yet disappeared from the case law. The ambivalent attitude of the Constitutional Court with respect to the role of the European jurisprudence might be explained by the fact that some members of the body still question the correctness of the 'minimum standard' requirement or disagree with any reference to the ECtHR judgement.

Justice Pokol has become the advocate of questioning the relevance of the ECtHR's case law in the interpretation of the Fundamental Law. His standpoint is much harsher than that of Justice Bragyova and supported partly by dogmatic/theoretical considerations and partly by foreign sources of legal literature[22]. He maintains that the ECtHR decisions are not drawn up by competent judicial councils on the basis of the European Convention on Human Rights but by an about 300-member human rights apparatus developed over the years, with the most basic lack of independence of judges. In his dissenting opinion to Decision 1/2019. (II. 13.) of the Constitutional Court, he argued in favour

19 | See also Decision 8/2013. (III. 1.) of the Constitutional Court.

20 | Decisions 4/2013 (II. 21.) [judge rapporteur: Justice Lévay), 33/2013. (XI. 22.) [judge rapporteur: Justice Balsai], 7/2014. (III. 7.) [judge rapporteur: Justice Paczolay], 3025/2014. (II. 17.) [judge rapporteur: Justice Szívós], 30/2015. (X. 15.) [judge rapporteur: Justice Sulyok, 8/2017. (IV. 18.) [judge rapporteur: Justice Szívós], 13/2019. (IV. 8.) [judge rapporteur: Justice Hörcherné Marosi], 13/2020. (VI. 22.) of the Constitutional Court [judge rapporteur: Justice Hörcherné Marosi]

21 | Justice Kovács's concurring reasoning to Decision 1/2013. (I. 7.) of the Constitutional Court and dissenting opinion to Decision 16/2013. (VI. 20.) of the Constitutional Court.

22 | He referred to an interview with a former justice of the ECtHR, David Thór Björgvinss, on criticising the Court [Utrecht Journal of International and European Law (Vol. 81.) 2015. No.31] and a study from Matilde Cohen (Judges or Hostages? In: Nicola/Davies eds.: EU Law Stories. Cambridge University Press 2017, 58–80.)

of looking at the ECtHR judgements as simple legal opinions without authenticity, or as a source of information. He also suggested presenting the relevant case law of the ECtHR in the draft decision only for in-house use (*pro domo*).

Ideological and theoretical considerations, such as the rejection of the universal claim to constitutional rights[23], priority of majority democracy and state sovereignty[24], different conceptions of how the Fundamental Law is embedded in the European and international law, personal commitments, and judicial role perception[25], also contribute to this controversial situation. It is not yet clear how the ECtHR judgements can fit into the national legal system, and what sort of binding effect they might have on the national judicial and other organs.[26]

To avoid superfluous debates in the competent body (plenary session or the council of five members), the draft and final decision might disguise the real role of the jurisprudence of the international court in the interpretation of the Fundamental Law.

3. References to the ECtHR judgements

The 'minimum standard' requirement is a relatively clear revelation of what role the Constitutional Court attributes to the ECtHR case law in its own constitutional reasoning. Nevertheless, not all selected decisions make use of this approach. In some cases, it has a logical explanation. For example, as will be discussed in detail below, the Constitutional Court makes references to the European case law even when the examination is carried out on the basis of the provisions of the Fundamental Law which do not embody human rights. In other cases, however, the statements of reasons are unfortunately not worded clearly enough to be able to explore the impact of the ECtHR judgements.

Hereinafter, I would like to outline how and in what context the Constitutional Court refers to the judgements of the European forum, beyond the above-mentioned 'minimum standard' requirement, what phrases it uses in doing so, and how much the wording of the statements of reasons facilitates the exploration of the real role of the ECtHR case law in Hungarian constitutional reasoning.

The analysis shows that the Hungarian Constitutional Court does not contrast different views in its decisions; it prefers drawing arguments from various sources pointing in the same direction and strengthening the resolution chosen to rebut weakening arguments. This might be explained, among others, by the one-sided character of the procedure before the Constitutional Court, since there are no opposing parties offering alternative solutions and argumentations to the Court. This kind of technique contributes towards hiding the importance and decisive/defining/confirming/illustrative features of the various methods of interpretation.

23 | Kovács, 2020, p. 149.
24 | Justice Pokol's main dogmatic argument against the primacy of international law stems from the principle of popular sovereignty [see his concurring reasoning to Decision 12/2013. (V. 24.) of the Constitutional Court]. Uitz, 2016, p. 179.
25 | Uitz, 2016, p. 179.
26 | See in details: Uitz, 2016, p. 187.

In a group of the selected decisions, the Court—with or without a reference to the obligation of Hungary to ensure coherence between international law and domestic law—sums up the relevant ECtHR jurisprudence in a separate section and states that the Court has taken it into account. The European case law appears among other methods of interpretation—especially, the reference to previous decisions of the Constitutional Court—but other methods are also used quite often, such as reference to other international treaties, jurisprudence of foreign courts, opinions or recommendations of the Venice Commission, etc.[27] Another similar, frequently used structure of argumentation is when various methods appear mixed in the reasoning and the Court uses the term 'takes (them) into account'. One might also come across other phrases in relation to the ECtHR's case law; e.g.: the Constitutional Court 'evaluated'[28], 'see similarly'[29], 'this view is supported by'[30], and this is 'in line with'. Neither of these words reveals the real impact of the ECtHR judgements on the Constitutional Court's decisions; nevertheless, they show that the domestic case law is in harmony with the European 'trends'. Therefore, they at least have a confirming function.

In other decisions, the Constitutional Court—apparently—does not avail itself of the European jurisprudence; it only 'overviews' or 'examines' it.[31] Only a deeper analysis of the substance of the cases and the whole contents of the reasoning can bring us closer to the actual role of this 'examination'.

Beyond the above-mentioned 'minimum standard' requirement, it is rather rare when the Constitutional Court provides more or less precise guidance on what weight it attributes to the European case law. In Decision 1/2013. (I. 7.) of the Constitutional Court, the Court maintained that the ECtHR judgement was a 'guideline'.[32] Quoting at length from the judgement delivered in the case of the Georgian Labour Party v Georgia[33] with respect to the voter registration on request, it stated that under Art. 3 of Protocol No. 1, linking the exercise of the right to vote to active registration restricts the right to free elections. The ECtHR, contrary to the Constitutional Court, did not find a violation of the fundamental right; therefore, the final outcome of the Georgian Labour Party case was irrelevant from the Constitutional Court's perspective. In another decision,[34] the Court said that it relied primarily on its own previous case law, while in a certain aspect,[35] it 'paid special attention to' that of the ECtHR. Reading the whole argumentation, one can conclude that concerning the subject matter where ECtHR judgements were invoked, there had been no specific precedent of the Constitutional Court available, while there was such a European case

27 | Decisions 7/2014. (III. 7.), 33/2013. (XI. 22.), 1/2013. (I. 7.) of the Constitutional Court.
28 | Decision 8/2017. (IV. 18.) of the Constitutional Court
29 | Decision 3/2013. (II. 14.) of the Constitutional Court
30 | Decision 3/2013. (II. 14.) of the Constitutional Court
31 | E.g. Decisions 7/2019. (II. 22.) and 5/2016. (III. 1.) of the Constitutional Court.
32 | The Court did not mention the 'minimum standard' requirement but, citing a decision from 1993 and referring to Article Q) (2) of the Fundamental Law, it emphasised the obligation to ensure that Hungarian law is in conformity with international law.
33 | Application no. 9103/04, judgement of 8 October 2008
34 | Decision 34/2017. (XII. 11.) of the Constitutional Court
35 | The question was whether the press, conveying one's statements of facts infringing others' rights, can be exempted from the obligation to control the validity of those statements before publication and, if so, under what conditions. References made to the cases Jersild v Denmark (Application no. 15890/89, judgement of 23 September 1994) and Bladet v Norway (Bladet Tromsø v Norway, Application no. 21980/93, judgement of 20 May 1999).

law. It also occurs that the Court refers to the ECtHR case law by citing its own previous decision (quotation in quotation).[36] Since there is no doubt about the primary and decisive role of the Court's own case law, this method of reference can be seen as a way of dispelling doubts about the applicability of the argumentation of the ECtHR.

4. The impact of the ECtHR case law on the constitutional reasoning

In this part of the study, I attempt to shed light on the substantive effect of the European judgements referred to in the selected decisions.

4.1. Hungarian cases

The analysis focuses first on decisions in which the ECtHR judgement referred to was delivered in a Hungarian case. Within these decisions, one can identify the so-called common cases, where the same judicial decision or statutory law (etc.) was examined by the Constitutional Court and the Strasbourg Court. These judgements, on the one hand, may be of great assistance to the Constitutional Court, given the fact that a 'constitutional' examination is already available in relation to a Hungarian legal act (i.e. court decision, act of Parliament, decree of Government, etc.). On the other hand, if the Constitutional Court takes a different position from that of the ECtHR, it might lead to a straight-out confrontation with the ECtHR case law.

4.1.1. Common cases

In Decision 4/2013. (II. 21.) of the Constitutional Court, the Court annulled the challenged provision of the Criminal Code (titled: The use of totalitarian symbols[37]) despite having declared the same rule as consistent with the Constitution in an earlier decision (dated to 2000),[38] not violating the prohibition of discrimination and the freedom of expression. The Constitutional Court considered in both decisions the judgement delivered in the case of Rekvényi v Hungary,[39] where the ECtHR—assessing whether the particular circumstances of the particular case satisfied the requirement of 'pressing social need' in a democratic society—emphasised the relevance of the specific historical background of the respondent state (Hungary was ruled by one political party between 1949 and 1989; membership of that party was, in many social spheres, expected as a manifestation of the individual's commitment to the regime; this expectation was even more pronounced within the military and police, where party membership on the part

36 | E.g. Decisions 14/2016. (VII. 18.) and 24/2015. (VII. 7.) of the Constitutional Court.
37 | '(1) A person who (a) disseminates, (b) uses in public, or (c) exhibits a swastika, an SS-badge, an arrow-cross, a symbol of the sickle and hammer or a red star, or a symbol depicting any of them, commits a misdemeanour—unless a more serious crime is committed—and shall be sentenced to a criminal fine (pénzbüntetés). (2) The conduct proscribed under paragraph 1 is not punishable, if it is done for the purposes of education, science, art or in order to provide information about history or contemporary events. (3) Paragraphs 1 and 2 do not apply to the insignia of States which are in force.'
38 | Decision 14/2000. (V. 12.) of the Constitutional Court.
39 | No. 25390/94, judgement of 20 May 1999.

of the vast majority of serving staff guaranteed that the ruling party's political will was directly implemented). Nevertheless, later on, in the case of Vajnai v Hungary,[40] the ECtHR relied again on the 'history' of Hungary and stressed that almost two decades had elapsed since Hungary's transition to pluralism, and the country had proved to be a stable democracy and become a Member State of the European Union, after its full integration into the value system of the Council of Europe and the Convention. There was no evidence to suggest that there was a real and present danger of any political movement or party restoring the communist dictatorship. In Decision 4/2013. (II. 21.) of the Constitutional Court, the Court found these arguments as legally significant new circumstances to reassess the constitutionality of the same criminal provision and it did not terminate the procedure because of so-called '*res iudicata*'.[41] The examination of the statutory rule was carried out primarily on the basis of the rule of law principle[42] and the principle of constitutional criminal law. The violation of the freedom of expression derived solely in line with the unclear wording of the criminal provision; the fundamental limitation test was not applied. Thus, in substance, the Court did not make much use of the new approach of the ECtHR.[43] Nevertheless, it emphasised that an ECtHR judgement has a direct effect only after the delivery of the final judgement in a particular case, in a revision law procedure. Therefore, domestic courts shall apply Hungarian laws first, even in cases with the same facts as in the Rekvényi case. This aggravates the controversial character of the situation.

Decision 29/2017. (X. 31.) of the Constitutional Court deserves particular attention because the Constitutional Court was asked to examine not only the conformity of the challenged statutory provision with the Fundamental Law but also with the ECHR. A posterior norm control procedure instituted by the Commissioner for Fundamental Rights, several judicial initiatives, and a constitutional complaint procedure were joined by the Constitutional Court. The judicial initiatives were filed with the Constitutional Court after the delivery of the judgement by the Chamber of the ECtHR in the Fábián v Hungary[44] case and claimed that the impugned statutory rules violated not only the right to property and prohibition of discrimination as guaranteed by the Fundamental Law but also the right to property as guaranteed by Protocol No. 1 to the ECHR. Under the challenged provision, the disbursement of those old-age pensions whose beneficiaries were simultaneously employed in certain categories within the civil service would be suspended from 1 July 2013 onwards for the duration of their employment. No such restriction was put in place

40 | Vajnai v Hungary, No. 33629/06, judgement of 8 July 2008.

41 | Article 31(1) of the Constitutional Court Act: 'If the Constitutional Court has already ruled on the conformity of an applied legal regulation or a provision thereof with the Fundamental Law based on a constitutional complaint or judicial initiative, no constitutional complaint or judicial initiative aimed to declare a conflict with the Fundamental Law may be admitted regarding the same legal regulation or provision thereof and the same right guaranteed by the Fundamental Law, with reference to the same constitutional law context—unless the circumstances have changed fundamentally in the meantime.'

42 | The reasoning is based on the concept of constitutional criminal law which is partly composed of the principle of the rule of law (as the form) and partly of the conditions for the restriction of fundamental rights (as the content). The Court presented that the unclear wording of the criminal provision had led to controversial judicial jurisprudence.

43 | See Sándor, 2020b, p. 30.

44 | Fábián v Hungary, Application no. 78117/13, judgement of 5 September 2017

with respect to those who were in receipt of an old-age pension while being employed in the private sector. In its judgement, the Chamber first examined the applicant's complaint under Art. 14 of the Convention taken in conjunction with Art. 1 of Protocol No. 1. Having found a violation in that respect, the Chamber considered that it was not necessary to examine whether the facts of the case also constituted a violation of Art. 1 of Protocol No. 1 taken alone. The government requested the referral of the case to the Grand Chamber in accordance with Art. 43 of the Convention, and the Grand Chamber granted this request. Subsequently, the Constitutional Court suspended its procedure until the delivery of the final judgement. The Grand Chamber held that there had been no violation of Art. 1 of Protocol No. 1 taken alone, and there had been no violation of Art. 14 of the Convention taken in conjunction with Art. 1 of Protocol No. 1.

In its decision, the Constitutional Court found all petitions unfounded.

In relation to the conformity with the Fundamental Law, there is no reference to the Grand Chamber's judgement given in Fábián v Hungary or any other judgement of the ECtHR, and the 'minimum standard' requirement is not mentioned at all. As a comparative method of interpretation, the Court cited the rulings of the German Constitutional Court and emphasised that the German case law always had an important influence on Hungarian constitutional justice. The Court also cited its own case law and took into account other provisions of the Fundamental Law. Despite *formally* disregarding the Grand Chamber's judgement, the reasoning 'borrowed' some arguments therefrom. The most telling sign of this is that the Court introduced the test of reasonability in relation to public interest as a constitutionally acceptable object of the limitation of the right to property. This test did not appear in the Hungarian constitutional jurisprudence until this decision of the Constitutional Court.[45] The Court put it as follows: in assessing whether a restriction on property rights had a legitimate aim, the State enjoys the freedom to judge what is in the public interest. It is also up to the evaluation of the legislator whether the restriction of the right to property is necessary for the enforcement of public interest. However, the legislator's assessment in this respect is not entirely free: the line is drawn where there is clearly no reasonable basis for action in the public interest.[46] Focusing on the principle of social solidarity was presumably inspired also by the European judgement.

As far as the *examination of conflicts with the ECHR is concerned*, the Constitutional Court presented the Grand Chamber's judgement, including its reasoning, which declared that, on the one hand, the ECtHR did not find the suspension of the disbursement of the retirement pensions violating the ECHR in an individual case, and, on the other hand, the reasoning of this judgement did not fundamentally depart from the interpretation given by the Constitutional Court in its examination of the conflict with the Fundamental Law.

45 | Téglási, András pointed out that the Constitutional Court—in accordance with the generally accepted principles of international practice—accepted the existence of public interest without any further investigation. Téglási, 2011, p. 199. In his study published in 2012, he stated that the concept of public interest is rather broad and general and without a more precise definition, it may imply hidden private interests. He suggested a stricter constitutional test of public interest. (Téglási, 2012, p. 125.) The test of reasonability did not appear, for e. g. in Decision 20/2014. (VII. 3.) of the Constitutional Court, where dissenting reasons dealt in great details with the issue of the acceptability of goals as public interest. See Justice Bragyova's and Justice Kiss's dissenting opinions.

46 | See citations from the judgement in Béláné Nagy (Béláné Nagy v Hungary [GC], no. 53080/13, ECHR 2016) in the Fábián judgement. (§ 65)

Therefore, even in this respect, the ECtHR judgement was not decisive in itself.[47] This corresponds to what Bragyova explained in his study: national constitutional courts usually reserve the right to interpret the ECHR for themselves.[48]

Although the analysis of the two decisions provides useful information, they cannot provide a general picture of the impact of the ECtHR's case law on the interpretation of the Fundamental Law. Sándor Lénárd, on the basis of 25 cases, gives a comparative analysis of the orientation effect of the rulings of the two courts given in 'common cases'.[49] The author argues that in the same fundamental rights investigations, the Constitutional Court, acting later, did not deviate from the ECtHR's criteria on limiting fundamental rights in any case, which is in line with the requirement resulting from Art. Q) of the Fundamental Law. One of his conclusions is that the ECtHR acting later in time deviated from the previous ruling of the Constitutional Court more frequently, both as a result of the rulings and criteria for limitation for fundamental rights than the Constitutional Court does from the previous ECtHR judgement.[50]

4.1.2. Decisions relating to the freedom of expression

Freedom of expression is one of the fundamental rights with respect to which the Constitutional Court often refers to the case law of the ECtHR. Two of those decisions, among the 30 selected ones, examine criminal statutory law. One of them [Decision 4/2013. (II. 21.) of the Constitutional Court] has been dealt with above.

A few months later, in another decision [Decision 16/2013 (VI. 20.) of the Constitutional Court] dealing with the constitutionality of another but very similar criminal provision of the Criminal Code (titled criminal offence of public denial of the sins of the National Socialist or Communist regimes), the Court made a reference exclusively to the Rekvényi case to support its allegation that the ECtHR, assessing the purpose and necessity of the restriction of the freedom of expression, considers the respondent state's specific historical background and present. It remained silent as for the further development in the European case law. It was highlighted only in Justice Kovács's dissenting opinion. This decision shows the arbitrary selection of the ECtHR judgements by the Constitutional Court.

4.1.3. Reasonable time

Staying in the criminal matters, Decision 2/2017 (II. 10.) of the Constitutional Court is an example of the special adoption of the ECtHR case law. It is a longstanding problem of the Hungarian criminal justice that procedures violate the right to a fair trial, as they are not concluded within a reasonable time. Hundreds of applications have already landed before the European forum; therefore, there is a rich jurisprudence in Hungarian cases. The procedure before the Constitutional Court—in which the above-mentioned decision was made—was initiated with a constitutional complaint filed against a judicial decision. The Constitutional Court confirmed its previous case law, saying that it was not provided with effective means to repair the violation of the fundamental right deriving from the

47 | Sándor Lénárd considers this case as an example of dialogue between the Hungarian Constitutional Court and the ECtHR promoting the delivery of decisions with the same conclusion. Sándor, 2020a, p. 32.
48 | Bragyova, 2011, p. 83.
49 | Sándor, 2020a, p. 34.
50 | Sándor, 2020a, p. 36.

excessive length of procedure.[51] However, the Constitutional Court was aware of the ECtHR case law regarding Art. 34 of the ECHR. If the national court acknowledged the duration of the proceedings and held that the excessive protraction of the case was a crucial mitigating factor, the ECtHR would find whether the applicant obtained adequate redress for the alleged violation of their right under Art. 6 § 1 of the Convention to the determination within a reasonable time of the criminal charges against them. Accordingly, the applicant can no longer claim to be a victim of a violation of Art. 6 § 1 for the purposes of Art. 34 of the Convention. For obscure[52] reasons, the Constitutional Court applied Section 28(1)[53] of the Constitutional Court Act and moved on to the examination of the law applied in the criminal procedure (i.e. provision of the Criminal Procedure Act on the statements of reasons in judicial judgements). Although the base of the examination remained in the field of fair trial, it shifted to adequate reasoning for judgements which were not relied on by the complainant. Admitting the suitability of the mitigation of the sentence to remedy the violation of the right to fair trial, the Constitutional Court stipulated as a constitutional requirement that the court must state in its reasoning the fact that the proceedings were prolonged and, in this context, the mitigation of the sentence and the extent of the mitigation. Despite the fact that the ECtHR assesses whether appropriate redress has been granted in the national legal system in the scope of admissibility of the application (i.e. Art. 34 of ECHR), the Constitutional Court's decision has led to shifting this circumstance into the examination of the merits and finally resulted in a constitutional requirement in relation to proper reasoning. In the specific case, it found that there was no unconstitutionality in the reduction of the sentence, due to the excessive delay in the proceedings.

4.1.4. Freedom of assembly cases

Another fundamental right in relation to which the Constitutional Court likes availing itself of the ECtHR case law is the freedom of assembly. Three selected decisions[54] contain reference to a particular judgement of the ECtHR made in Hungarian cases[55]. In one of them, the Constitutional Court pointed out that after the case of Bukta and others v Hungary,[56] the Court concluded that spontaneous peaceful assemblies were included in the right of assembly, thus expressly admitting the direct impact of the European case law on Hungarian constitutional reasoning. Quotations from previous decisions of the Constitutional Court citing the ECtHR judgements confirm this allegation, and it seems as if the Court attributed the same decisive role to the ECtHR judgements as to its own case law.[57]

51 | The annulment of a judicial decision is not suitable to remedy the excessive length of the procedure.

52 | There were no shortcomings discovered in the challenged decisions concerning the statements of reasons.

53 | In proceedings aimed at the review of a judicial decision defined in Section 27, the Constitutional Court may also carry out the examination of the conformity of the legal regulation with the Fundamental Law as described in Section 26.

54 | Decisions 3/2013. (II. 14.), 30/2015. (X.15.), 13/2016. (VII. 18.) of the Constitutional Court.

55 | E.g. Bukta and others v Hungary, Application no. 25691/04, judgement of 17 July 2007; Sáska v Hungary, Application no. 58050/08, judgement of 27 November 2012; Patyi and others v Hungary, Application no. 5529/05, judgement of 17 January 2012.

56 | Bukta and others v Hungary, Application no. 25691/04, judgement of 17 July 2007.

57 | The judge rapporteur of the freedom of assembly cases was Justice Sulyok, the president of the Constitutional Court. He (or the legal counsel preparing the drafts) often refers to the case law of the ECtHR by quoting previous decisions of the Constitutional Court.

However, following the path set by the ECtHR is not always smooth. In Decision 13/2016. (VII. 18.) of the Constitutional Court, the Court repeated its own recent case law (without any reference to the ECtHR judgements) and argued against the correctness of the reasoning of the challenged judicial decision which upheld the police decision prohibiting a peaceful demonstration in front of particular family houses. The organisers planned a so called 'dynamic' assembly (series of demonstrations) where the participants would walk from site to site, stop there for a while (about 10 minutes), and listen to speeches. The prohibition affected only two of these places, one of which was the Prime Minister's residence. The Constitutional Court referred to its precedents under which a distinction is made between grounds for (preliminary) prohibition and grounds for dissolution of a demonstration, and a ground for dissolution may not be transformed automatically to a ground for dissolution. The grounds for prohibition can be laid down in an Act of Parliament in accordance with the fundamental right test; these grounds are exhaustively listed in the Assembly Act. In the challenged judicial decision, the Court stated that a peaceful demonstration can be banned under the general provisions of the Assembly Act[58], recognising a clash between the right of assembly and the right to privacy. The dogmatic interpretation should have led to the annulment of the judicial decision;[59] nevertheless, the Court rejected the complaint because the right to peaceful assembly was not overall disproportionately limited considering the fact that the participants could hold the assembly and set out their views in other sites.[60] This argument was entirely new, not supported by any sources, and not deliberated in greater detail. It is not clear whether the Court only wanted to solve this case with special attention to the Prime Minister's residence or whether this conclusion was a result of a deeper consideration not reflected in the reasoning. In the same decision, the Constitutional Court ruled that the Parliament should enact appropriate legislation by the end of 2016 to assist the police and courts in cases of conflict between the right of assembly and the right to privacy.[61]

4.1.5. Tacit objection to the ECtHR case law

Decision 3064/2016. (IV. 11.) of the Constitutional Court is an example of tacit resistance to the adoption of the ECtHR case law.

The facts of the underlying case are as follows. The tax authority levied additional personal income tax, tax surcharges, and interest on the petitioner. The tax estimate of the tax authority was the ground for this decision. The burden of proof laid, statutorily, with the applicant to prove, providing credible evidence, the origin of the amount. Although the complainant alleged that they received a large loan from his mother and produced the written loan contract signed by both parties and two witnesses, and his

58 | To exercise the right of assembly must not infringe the rights and freedoms of others.

59 | See Decision 14/2016. (VII. 18.) of the Constitutional Court.

60 | A summary of the case can be read in English in the website of the Constitutional Court. It says, 'The Constitutional Court held that the protestors' constitutional right to freedom of assembly was not violated but, rather, lawfully curtailed by the police, because holding the demonstration would have interfered with the rights and freedoms of others (namely the Prime Minister). The Court noted that demonstrations could be held at other sites apart from the banned premises. The Court decision in question was not unconstitutional.' The different interpretation of the same reasoning (i.e. the one published in the website and that of the author of the present paper above) might derive from the unclear wording of the reasoning.

61 | See in relation to this issue: Hajas, 2016, p. 513–515.

mother gave a testimony confirming that the loan was granted, these were not enough to rebut the estimate. On the action brought by the complainant, the court of first instance set aside the final administrative decision and obliged the tax authority to conduct a new procedure. The court held an on-site oral hearing and found the complainant's allegations convincing. In the revision in law procedure, the Curia, citing its case law and finding that the plaintiff did not provide credible evidence in accordance with the rules, set aside the first instance judgement and rejected the claim.

In the constitutional complaint, the petitioner argued that his right to a fair trial was violated because the Curia did not hold an oral hearing in the revision in law procedure. The complainant made a reference to the case of Pákozdi v Hungary.[62] This judgement was delivered in a similar manner. The ECtHR did not attach decisive importance to the fact that the applicant did not request a hearing, but proceeded to an independent evaluation of the question of overall fairness of the proceedings, having the requirements of Art. 6 as the point of reference and held that there was a violation.

Neither did the Constitutional Court follow the reasoning of the Pákozdi judgement, nor did it make an attempt to refute the correctness thereof. The Court based its argumentation on its previous decisions, the rules of the Code of Civil Procedure (the party to an action has the right to request the Curia to hold an oral hearing in a revision in law procedure and this request may not be rejected), and the general principle pervading the Hungarian legal system that no one can rely on their own fault for gains. Rejecting the constitutional complaint, the Court indicated to the Curia that it is *expedient* to hold an oral hearing in similar cases, even if the party has not requested it. This recommendation was disapproved in concurring reasoning.[63]

It is salient that there is no reference to the 'minimum standard' requirement and the ECtHR judgement does not appear in the constitutional reasoning in a case which shows so much resemblance to the one forming the base of the ECtHR judgement.[64] This solution might stem from the denial of the 'minimum standard' requirement, without the intention to convince the members of the body of the incorrectness thereof. Contrary to one of the concurring reasoning[65], the majority did not consider it necessary to distinguish the case before the Constitutional Court from the Pákozdi case.

4.2. Other ECtHR judgements in the constitutional reasoning of the Constitutional Court

Even in the Constitutional Court's decisions invoking an ECtHR judgement delivered in a Hungarian case, one can find references to other ECtHR judgements, while other decisions contain references only to non-Hungarian cases.

62 | Application no. 51269/07, judgement of 25 November 2014.

63 | Justice Sulyok found this 'indication' to the Curia unnecessary and stressed that the Curia itself decides whether it holds a hearing or not if no request has been filed by the parties, and the Curia certainly would consider the ECtHR judgement delivered in the Pákozdi case in similar cases. In his opinion, this indication was incapable of replacing the necessity to distinguish the present case from the Pákozdi case. He emphasised that under the case law of the ECtHR and the Pákozdi case, it can be judged only on case-by-case basis and on the basis of careful consideration of the circumstances whether the lack of an oral hearing leads to the violation of the right to fair hearing.

64 | The justice rapporteur of this case was Justice Pokol.

65 | See Justice Sulyok's concurring reasoning. Nevertheless, Justice Sulyok did not distinguish the present case from the Pákozdi case.

4.2.1. Dogmatic considerations

The ECtHR, on the one hand, considers the particularities of the given matter in each case and, on the other hand, often lays down general principles for future application.[66] It often occurs that what is relevant to the Constitutional Court[67] is not the final outcome of the case but these general considerations. This is reflected especially in the selection[68] of the so-called leading[69] cases or the references to not only one but several ECtHR judgements, e.g. in Decision 37/2017. (XII. 11.) of the Constitutional Court dealing with a press report on a politician's news conference (the press cited word by word what had been said in the conference), the Court put as follows: some important aspects can also be drawn from the case law of the ECtHR in cases with different facts regarding the responsibility of the press reporting on public information and public events. The Court then quoted relevant general statements from several ECtHR judgements. In Decision of 7/2014. (III. 7.) of the Constitutional Court, it first repeated the 'minimum standard' requirement and subsequently referred to several ECtHR judgements. This shows that the Court is willing to accept the European case law as a guideline, and adjusts its own to it.

Reception of the ECtHR dogmatic systems to Hungarian constitutional reasoning occurs especially in relation to the freedom of expression, freedom of assembly (but see the decisions above referring to Hungarian cases), and the ne bis in idem principle. Many dogmatic considerations had already been adopted from the ECtHR case law before the Fundamental Law entered into force. These now form a part of the Constitutional Court's own precedents.[70]

In some decisions, the Constitutional Court refers only to one ECtHR judgement to underpin its reasoning; e.g. to include the shares of a company in the term 'property'[71], to imply pouring paint on statues in the scope of freedom of expression[72], and to explore the acceptability of a preliminary voter registration[73]. The final outcome of the cases was irrelevant; only certain aspect(s) of the facts and certain conclusions of the ECtHR played a role in the argumentation.

4.2.2. When the violation of different fundamental rights is examined by the ECtHR and the Constitutional Court

The Constitutional Court appears to be open to referring to an ECtHR judgement even when the latter is based on another fundamental right than the one the violation of which is examined by the Constitutional Court.

66 | E.g. see: Gerards, 2017, p. 266.
67 | Nevertheless, one can find decisions in which the Constitutional Court concentrated on the particular circumstances and the outcome of the cases before the ECtHR to explore what violated the fundamental rights and what did not. E.g. Decision 7/2019. (III. 22.) of the Constitutional Court
68 | E.g. Decisions 38/2012. (XI. 14.), 34/2017. (XII. 11.), 7/2014. (III. 7.), 36/2014. (XII. 18.), 33/2013. (XI. 22.), 8/2017. (IV. 18.) of the Constitutional Court
69 | E.g. case of Engel and others v the Netherlands, No. 5370/72, judgement of 8 June 1976; case of Öztürk v Germany, No. 8544/79, judgement of 23 October 1984; case of A and B v Norway, No. 24130/11 and 29758/11, judgement of 15 November 2016
70 | Right to fair trial could also be mentioned in this list; however, the selected 30 decisions do not reflect it.
71 | Decision 20/2014. (VII. 3.) of the Constitutional Court
72 | Decision 1/2019. (II. 13.) of the Constitutional Court
73 | Decision 1/2013. (I. 7.) of the Constitutional Court

This is usually derived from a different list of fundamental rights in the ECHR and the Fundamental Law.

The Fundamental Law guarantees, e.g. the right to inheritance as a separate fundamental right. In Decision 5/2016. (III. 1.) of the Constitutional Court[74], the Court, 'reviewing' the case law of the ECtHR, referred to the case of Marckx v Belgium[75] in which the ECtHR examined whether Art. 1 of Protocol No. 1 was violated by the Belgian rules restricting the 'illegitimate' child's right to inheritance after their mother and the mother's right to bequeath to her 'illegitimate' child the whole or a part of her property. The ECtHR held that Art. 1 of Protocol No. 1 was not applicable to the child, while it was applicable to her mother; nevertheless, no violation of the right to property was found, taken alone. The European court also held that there was a breach of Art. 14 of the ECHT taken in conjunction with Art. 1 of Protocol No. 1 with respect to the mother. Only this latter outcome was highlighted in the Constitutional Court's decision, and no reference to the first two results was made.

The Constitutional Court paid attention to the fact that in the Fundamental Law and the constitutions of some EU member states, the right to inheritance can be found in the same provision as the right to property. It did not work out what the complainant as the beneficiary of a will was entitled to under the fundamental right to inheritance (passive side); instead, it founded its reasoning on the violation of the deceased's (testator's) rights to property (active side) and declared unconstitutional the challenged judicial decision not to acknowledge the testator's right to bequeath usufruct by his will.

The ECtHR judgement was an illustration of the close relationship between the right to inheritance and the right to property, notwithstanding that the European forum rejected the application of the daughter as successor under Art. 1 Protocol No. 1 and found no violation on the mother's side, taken alone.[76]

The ECHR does not guarantee the right to human dignity, the Fundamental Law does, and the Constitutional Court adopted the case law of the German Constitutional Court on the right to self-determination and the general personality right. Thus, the same issue relates to different fundamental rights under the European regime and the Hungarian constitutional law. For example, specific questions concerning the legal recognition of gender[77] or the publication of photos taken of persons (i.e. policemen in action) in the press[78] come under the right to privacy (Art. 8) as guaranteed by the ECHR and human dignity ensured by the Fundamental Law.[79]

The Fundamental Law guarantees the right to access and disseminate data of public interest. The right to access data of public interest has been deduced from the freedom of expression under the ECHR, as elaborated, especially in the case of Magyar Helsinki Bizottság v Hungary[80]. Although it can be qualified as a leading case of the ECtHR, the reference to this judgement in Decision 13/2019. (IV. 8.) of the Constitutional Court did not have relevance in this regard. The method of reference in the above-mentioned decision

74 | The petitioner complained that the court dismissed its claim on the ground that the testator was not entitled to bequeath usufruct to anyone, since the testator encumbered the property for a period after his death by this act; therefore, he was not the owner thereof.
75 | Marckx v Belgium, Application no. 6833/74, judgement of 13 June 1979
76 | The judge rapporteur of this decision was Justice Pokol.
77 | See Decision 6/2018. (VI. 27.) of the Constitutional Court
78 | See Decision 28/2014. (IX. 29.) of the Constitutional Court
79 | See: Zakariás, 2017, pp. 108–114.
80 | Application no. 18030/11, judgement of 8 November 2016

to several ECtHR judgements, namely using 'cf.', make an impression that the Court applied the ECtHR case law to confirm its own conclusions.

The above-mentioned cases fall formally in part outside the 'minimum standard' requirement, as the Fundamental Law defines the essence of the fundamental rights differently from the international treaty (e.g. right to inheritance). In other cases, the same fundamental right is guaranteed by the Fundamental Law and the ECHR (i.e. right to privacy); nevertheless, certain situations dogmatically belong to the scope of another right (i.e. human dignity) in the Hungarian legal system. References to the ECtHR case law have an illustrative role rather than confirming in the strict sense or being decisive, and demonstrate that the Constitutional Court is aware of the European trends.

5. Some other minor curiosities

Taking the 30 decisions of the Hungarian forum containing references to the ECtHR judgements delivered either in a Hungarian or foreign case, one can conclude that the Constitutional Court applies the European jurisprudence quite flexibly. There are three decisions in which the Constitutional Court carried out an examination on the basis of other provisions of the Fundamental Law than fundamental rights. In Decision 22/2016. (XII. 5.) of the Constitutional Court delivered in the abstract interpretation of Art. E) (2)[81], the Court stipulated that the Constitutional Court can examine whether the joint exercise of competences with the European Union infringes human dignity, other fundamental rights, the sovereignty of Hungary, or Hungary's self-identity based on its historical constitution. This decision developed the Court's fundamental rights-reservation review and ultra vires review (composed of a sovereignty review and review based on constitutional identity).[82] The resolution generally concerns fundamental rights, and the Court strengthened the reasoning by referring to the case of Matthews v the United Kingdom[83]. It is made not by citing a particular section of the statement of reasons, but by summing up what the Constitutional Court read out from the judgement as a conclusion: a member state of the EU, relying on the enforcement of the EU law, may not be absolved of responsibility before the ECtHR.

In Decision 2/2019. (III. 5.) of the Constitutional Court, interpreting the provisions of the Fundamental Law in an abstract way, the Court relied on the case of Kiss Alajos v Hungary[84] to demonstrate that the international principle of *pacta sund servanda* is capable of overriding even national constitutions and, therefore, the international legal obligations shall be complied with in all cases.

81 | 'With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences arising from the Fundamental Law jointly with other Member States, through the institutions of the European Union. Exercise of competences under this paragraph shall comply with the fundamental rights and freedoms provided for in the Fundamental Law and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure.'
82 | See: Drinóczi, 2017.
83 | Application no. 24833/94, judgement of 18 February 1999
84 | Application no. 38832/06, judgement of 20 May 2010

The Court referred to the case of Tătar v Romania[85] in Decision 28/2017. (X. 25.) of the Constitutional Court in relation to the principle of precaution. Although the posterior norm control was carried out on the basis of Art. P) of the Fundamental Law on environment protection, the Court felt necessary to emphasise that this principle was recognised not only in national, but also international law and case law.

6. Final remarks

As can be seen on the basis of the analysis of the 30 decisions, the Constitutional Court uses the ECtHR jurisprudence in its constitutional reasoning in a quite multicoloured and flexible way. Even when the ECtHR judgements have a very loose connection with the subject matter of the case before the Constitutional Court, it is not reluctant to rely on them. Although the ECtHR judgements should have an illustrative rather than confirming role in those cases, it seems that the Court strives to strengthen its reasoning by these references. Only a closer look and further investigation can reveal that the substantive relation is missing between the constitutional issue and the judgement referred to. In the statement of reasons, this remote connection might remain invisible. Nevertheless, it shows that the Constitutional Court attributes a certain level of authority to the ECtHR judgements or respects them as guidelines in the interpretation of the Fundamental Law. It considers the Strasbourg case law as a source capable of confirming the Constitutional Court's conclusions, thus persuading the readers of the correctness of those conclusions.

Reference to the ECtHR judgements in the decisions of the Constitutional Court can be seen as a revelation of the intent to be part of the European community of states. In this regard, it is usually not the particularities of a case which has significance, but the general findings of the Court. The Constitutional Court has proved to be open to adopting dogmatic considerations from the ECtHR jurisprudence. Reception had already taken place before the Fundamental Law entered into force, and it is still an ongoing process. A large body of dogmatic considerations has become a part of the Hungarian constitutional law, which is reaffirmed case by case by the Constitutional Court. Deviating from these dogmatic considerations consistently and to a large extent would result in questioning the values formulated in the ECHR.

Nevertheless, the reception does not necessarily entail the acknowledgement of the binding effect of the ECtHR judgements on the Constitutional Court.[86] Although the 'minimum standard' requirement accepts, on legal basis, the outstanding and, to some extent (i.e. no lower level of protection is permitted), definitive role of the ECtHR jurisprudence in the interpretation of the Fundamental Law, what obligation derives therefrom and what qualifies a 'level of legal protection provided by the international legal protection mechanism' have not been elaborated in detail. Moreover, it is not consistently applied or, at least, referred to, and some justices heavily object it. It would be useful to

85 | Application no. 67021/01, judgement of 27 January 2009
86 | See Uitz, 2016, p. 186.

distinguish between the particular judgements and the principles crystallised in the ECtHR case law.[87]

Looking at the selected decisions, the impression is that the Constitutional Court prefers being silent as for the reasons of deviations (avoiding any reference to the relevant ECtHR judgements or selecting the judgements arbitrarily) to openly confront the ECtHR judgements. This hides whether theoretical considerations are behind this behaviour or particular interests. As can be seen from the analyses, the Court sometimes selects the ECtHR judgements arbitrarily[88] and quotes the findings only in part; thus, relevant developments of the European case law or important aspects of cases might remain in the background. This attitude can contribute to unpredictable decisions and creates the image that the ruling stood first, and the reasons came second.

87 | Uitz, 2016, p. 187 (refers to Blutman 2009, p. 301, 303.)
88 | Chronowski Nóra points out—after Szente (Szente, 2013b, p. 1602.)—that the Constitutional Court selects the arguments from the ECtHR case law in accordance with its preconception. Chronowski, 2014, p. 34.

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JURISDICTION AND COSTS IN RECENT INTER-EU CASES OF DÉMENTI AND APOLOGY FOR FALSIFYING HISTORY

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ABSTRACT

This study covers two issues concerning the intra-EU proceedings in the cases of personality rights infringement. The core of the analyzed matters are the special (alternative) jurisdiction and the costs of the proceedings. These problems are interesting both from the theoretical and the practical standpoints. The discussed judgments concern the dissemination of statements that constitute a historical falsification that is usually caused by using the expression Polish concentration camps instead of Nazi-German concentration camps. The CJEU recently address the issue of the special (alternative) jurisdiction based on Art. 7 (2) Brussels I Recast Regulation in such cases in the judgment from June 17, 2021, for the case C-800/19. This study analyses this judgment and the exclusion of jurisdiction based on 'center of life interests' in such cases for the 'indivisible' claims (e.g. the claim for apology). The problem of the costs is discussed from the perspective of the enforcement proceedings of foreign judgments in the intra-EU cases based on the German Supreme Court's judgment from July 19, 2018 (IX ZB 10/18). The high costs of such proceedings based on the German Code of Civil Procedure were analyzed from the perspective of the access to court rule based on Article 6 (1) ECHR and the jurisprudence of ECtHR.

KEYWORDS

international civil procedure
access to court
special jurisdiction
international defamation
personality rights
enforcement of foreign judgments

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1. Introduction

The following comments cover issues related to cross-border proceedings concerning personality rights infringement. It was caused by the dissemination of statements that constitute a historical falsification that was brought about by using the expression *Polish concentration camps* instead of *Nazi-German concentration camps*[3]. The Polish Court of Appeal in Cracow issued a judgment[4] in one of these proceedings. The enforcement of this judgment in Germany was blocked by the German Supreme Court (ger. *Bundesgerichtshof,* BGH)[5]. The matter of the enforcement of another judgment by the Court of Appeal in Cracow on March 23, 2021[6], remains open. Time will show whether this judgment is not enforced in Germany with the reference to the argumentation presented a few years ago by BGH. Similar cases were also judged by Polish Appeal Court in Białystok on September 30, 2015,[7] and Polish Appeal Court in Warsaw on March 31, 2016[8]. The Polish courts in all aforementioned cases decided that they have the jurisdiction to adjudicate each of them. However, Appeal Court in Warsaw had doubts about this problem, and in a similar case, this court decided to ask a preliminary question to the Court of Justice of the European Union[9]. The Advocate General's opinion[10] and judgment of 17 June 2021 (C 800/19)[11] in the latter case have recently been issued.

As indicated in the title of this article, two matters that arise in these cases require more detailed discussion. There are no detailed comments on both aspects in the literature, yet (the literature has focused on the fundamental issue of the cross-border

3 | One of the latest examples of such situations is the article printed by Wall Street Journal about documentary "The Meaning of Hitler", see more: https://bit.ly/33fDddR (14.09.2021); see also "US daily uses 'Polish death camps' misnomer", https://bit.ly/3F6xt3f (14.09.2021).

4 | Wyrok Sądu Apelacyjnego w Krakowie z 22 grudnia 2016, I ACa 1080/16 [Court of Appeal in Cracow 22 December 2016], https://bit.ly/3ra2TkC (14.09.2021), further: 'Polish judgment of 2016', 'Polish Appeal Court in Cracow of 22nd of December 2016'. The first instance of the case was ruled by Sąd Okręgowy w Krakowie 25 kwietnia 2016 [District Court in Cracow 25 April 2016], I C 151/14, https://bit.ly/3Gcv4FP (14.09.2021).

5 | Bundesgerichtshof Beschluss IX ZB 10/18 vom 19. Juli 2018, https://bit.ly/3HK7SPi (14.09.2021), further: 'BGH judgment of 19th July 2018'.

6 | Wyrok Sądu Apelacyjnego w Krakowie z 23 marca 2021, I ACA 808/19, [Court of Appeal in Cracow 23 March 2021], https://bit.ly/3HSJoUq (14.09.2021), further: 'judgment of 23rd March 2021', 'Polish judgment of 2021', 'Polish Appeal Court in Cracow of 23rd of March 2021'.

7 | Wyrok Sądu Apelacyjnego w Białymstoku z 30 września 2015, I ACa 403/15 [Court of Appeal in Białystok 30th September 2015], https://bit.ly/3n7Qkon (14.09.2021), further: 'Polish Appeal Court in Białystok of 30th September 2015'.

8 | Wyrok Sądu Apelacyjnego w Warszawie z 31 marca 2016, I ACa 971/15 [Court of Appeal in Warsaw 31 March 2016], https://bit.ly/3HNH7ts (14.09.2021), further: 'Polish Appeal Court in Warsaw of 31st March 2016'.

9 | Request for a preliminary ruling from the Sąd Apelacyjny w Warszawie (Poland) lodged on 30 October 2019 — SM v Mittelbayerischer Verlag KG, OJ C 27, 27.1.2020, p. 22–22.

10 | Opinion of Advocate General Bobek delivered on 23 February 2021, Mittelbayerischer Verlag KG v SM, Case C-800/19, ECLI: ECLI:EU:C:2021:124, https://bit.ly/33hGiKC (14.09.2021), further: 'AG Bobek opinion'.

11 | CJEU judgment from 17 June 2021 in case C-800/19, Mittelbayerischer Verlag KG v. SM, https://bit.ly/3f4JMTe (14.09.2021), further: Case C-800/19.

enforcement of judgments[12]). This is the problem of the court's competences and understanding of the EU law that establishes special (alternative) jurisdiction, as well as the issue of the costs of proceedings that were ultimately awarded against the plaintiff. Before discussing these matters, it is necessary—as a background and a reference point for potential future events—to recall the basic issues that arise from non-enforcement in the first court case mentioned above.

2. Non-enforcement in Germany of foreign (Polish) judgment of 2016 ordering denial (*démenti*) of the false expression

2.1. The various judicial approaches of German courts

The question of enforcement is only the background for further analysis concerning jurisdiction. The issue of jurisdiction is not controlled by enforcement proceedings of the foreign judgment in other EU Member States according to Brussels I or I Recast Regulations. Therefore, the lack of jurisdiction cannot constitute a 'defense' against enforcement of the judgment in another EU Member State according to Brussels I or I Recast Regulations.[13]

In principle, judgments in the court of one Member State and enforceable in that state should be enforced in another Member State of EU.[14] The foreign judgment may not be reviewed as to its substance[15]. In this proceeding, the special jurisdiction from Art. 5 (3) Brussels I Regulation does not affect the enforcement of the judgment in another Member State. Declaration of enforcement in another Member State is usually granted almost

12 | On details of these proceedings, see more Mostowik and Figura-Góralczyk, 2021, pp. 91–115. On details of the applied public policy clause and the reasoning by BGH, see Mostowik and Figura-Góralczyk, 2022.

13 | Article 35 para. 3 of Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 12, 16.1.2001, p. 1–23, further: 'Brussels I Regulation' reads as follows: '(...) the jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in point 1 of Article 34 may not be applied to the rules relating to jurisdiction.' Similarly, Article 45 para. 3 of Regulation 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 351, 20.12.2012, p. 1–32, further: 'Brussels I Recast Regulation' reads as follows: '(...) the jurisdiction of the court of origin may not be reviewed. The test of public policy referred to in point (a) of paragraph 1 may not be applied to the rules relating to jurisdiction.'

14 | On the recognition provided for in Article 33 as the rule. See more: Wautelet, 2007, pp. 547–554. On the public order clause and refusal to recognize the foreign judgment under article 34, see Francq, 2007, pp. 565–579.

15 | See: Mankowski, 2007, pp. 625–628; Judgment of the Court (First Chamber), 6 September 2012, Trade Agency Ltd v Seramico Investments Ltd., Case C-619/10, ECLIt identifier: ECLI:EU:C:2012:531, further: 'Trade Agency' par. 50; Judgment of the Court of 28 March 2000, Krombach v Bamberski, Case C-7/98, ECLI identifier: ECLI:EU:C:2000:164, further: 'Krombach', par. 36; Judgment of the Court (Fifth Chamber) of 11 May 2000, Renault v Maxicar, Case C-38/98, ECLI identifier: ECLI:EU:C:2000:225, further: 'Renault', par. 29; Judgment of the Court (Grand Chamber) of 28 April 2009, Apostolides v Orams, Case C-420/07, ECLI identifier: ECLI:EU:C:2009:271, further: 'Apostolides', par. 58.

automatically under the Brussels I Regulation after the exequatur procedure[16]. Under Brussels I Recast Regulation, enforcement is automatic.

Polish Appeal Court in Cracow ordered the German plaintiff in its judgment on December 22, 2016, to apologize by publishing a statement that expressed regret on the use of the expression 'Polish concentration camps'[17]. The judgment of the Polish Appeal Court in Cracow on March 23, 2021, also ordered an apology for suggesting that Polish Home Army (pol. *Armia Krajowa*) was an anti-Semitic organization.

In case of the judgment by the Polish Appeal Court in Cracow on December 22, 2016, the next stages took place in Germany after filing the motion for the declaration of enforcement of foreign judgment. The German courts of lower instances approved the enforcement of this judgment. The Regional Court of Mainz (ger. *Landgericht Mainz*) in its judgment on January 27, 2017, and the Higher Regional Court of Koblenz (ger. *Oberlandesgericht Koblenz*) in its judgment on January 11, 2018, granted the enforcement clause to the judgment of the Polish Court from 2016. The Higher Regional Court of Koblenz—confirming the enforcement of the Polish judgment—stated that:

> The defendant, what he does not deny himself, confirmed that he was using the phrase 'Polish extermination camps' which is an untrue fact. An incorrect statement of fact is not subject to the protection of the fundamental right under Art. 5(1.1) GG[18].

The Higher Regional Court of Koblenz ruled that the enforcement of a Polish judgment in Germany would not imply a violation of freedom of speech because the term 'Polish extermination camps' is a false factual statement that is excluded from the protection provided by Art. 5(1) GG. Therefore, the ascertainment of the infringement of the plaintiff's personality rights—in the opinion of regional courts—does not violate the German public policy. However, Zweites Deutsches Fernsehen (ZDF) disagreed with those judgments. Finally, the German Supreme Court in its judgment on July 19, 2018 (IX ZB 10/18)—unlike the rulings of lower instance courts—dismissed the enforcement of the Polish judgment. Against this judgment, a claim has been recently filed in the European Court of Human Rights.[19]

16 | See also: Kerameus, Commentary to Article 45 of 'Brussels I' Regulation, [in:] U. Magnus, P. Mankowski (eds), Brussels I Regulation, München: Sellier, p. 667-669.

17 | By the judgment of Polish Appeal Court of December 22, 2016, the defendant – ZDF was ordered to apologize the plaintiff by publication on its Internet website for one month the following statement: 'Zweites Deutsches Fernsehen, the publisher of the Internet portal, regrets the appearance on July 15, 2013, on the www.zdf.de portal in the article (..) the expression which is the untrue and falsifying history of the Polish nation, suggesting that the death camps of Majdanek and Auschwitz were built and run by Poles, and it apologizes Karol Tendera, who was imprisoned in a German concentration camp, for violating his personality rights, in particular his national identity (sense of belonging to the Polish nation) and his national dignity'. See more: Mostowik and Figura-Góralczyk, 2021, pp. 91–115.

18 | BGH judgment of July 19, 2018, p. 7; also Bundesverfassungsgericht states that the denial of the Holocaust is not protected by freedom of thought and expression, guaranteed in Art. 5(1) of the German Constitution. Grundgesetz für die Bundesrepublik Deutschland (hereinafter referred to as 'GG'). See: BVerfG April 13, 1994, 1 BvR 23/94, openjur.de/u/183443.html. On German law – see more: Fahrner, 2020, pp. 179–191.

19 | See the press release: https://bit.ly/3F6xFzv (14.09.2021).

The German Supreme Court in its argumentation referred to an obvious violation of German public policy and 'freedom of opinion' (ger. *Meinungsfreiheit*), which is a 'constitutional right' (ger. *Grundrecht*). The *Bundesgerichtshof* states in particular that:

> The enforcement of a judgment by which the convicted television broadcaster is obliged to apologize for falsification of history contained in a statement [Majdanek and Auschwitz Polish Extermination Camps][E.F.G.&P.M.] existing in the opinion of the court of the sentencing State and for infringement of personality rights existing in this case in the opinion of the court of the sentencing State, clearly infringes the fundamental right to negative freedom of expression and German public policy.[20]

Such a decision was grounded by invoking the national public policy clause, that is, the obvious violation of German public policy by enforcement of foreign judgment. Article 34 (1) and Article 45 (1) Brussels I Regulation and 'freedom of opinion,' which is a constitutional right regulated in Art. 5 (1) GG, were proclaimed as grounds of such decision.[21]

The BGH stated that:

> On the contrary, the subject of the legal examination in the procedure of the declaration of enforcement is rather solely the declaration for which the court of the sentencing state has sentenced the defendant. The defendant is sentenced to adopt and publish as its own the opinion that the Polish court has got from the defendant's statement. This clearly infringes the fundamental right of the defendant under Article 5(1) GG.[22]

According to the BGH, the defendant was obliged to accept and submit in public the statement that is an assessment (ger. *Bewertung*) made by the Polish court as his own, which violated the fundamental right given by Art. 5(1) GG.[23]

From the perspective of BGH, the Polish judgment of 2016 violated the freedom to express an opinion as this freedom inherently involves the choice to express or not

20 | The thesis of BGH judgment in German language: 'Die Vollstreckung eines Urteils, welches der verurteilten Fernsehanstalt aufgibt, eine nach Ansicht des Gerichts des Urteilsstaats in einer Äußerung [polnischen Vernichtungslager Majdanek und Auschwitz – EFG PM] enthaltene Geschichtsverfälschung zu bedauern und sich für eine nach Ansicht des Gerichts des Urteilsstaats hierin zu sehende Persönlichkeitsrechtsverletzung zu entschuldigen, verstößt offenkundig gegen das Grundrecht auf negative Meinungsfreiheit und gegen den deutschen ordre public.' See: https://bit.ly/3F9SKt6; https://bit.ly/3qdaL5z (14.09.2021).

21 | See more: Mostowik and Figura-Góralczyk, 2021, pp. 91–115.

22 | 'Gegenstand der rechtlichen Prüfung im Rahmen der Vollstreckbarkeitserklärung ist vielmehr ausschließlich die Erklärung, zur deren Abgabe das Gericht des Urteilsstaates die Antragsgegnerin verurteilt hat. Die Antragsgegnerin ist dazu verurteilt worden, die Bewertung, die ihre Erklärung durch das polnische Gericht erfahren hat, als eigene Meinung zu übernehmen und zu veröffentlichen. Dies verstößt offenkundig gegen das Grundrecht der Antragsgegnerin aus Art. 5 Abs. 1 GG.' (BGH judgment of July 19, 2018, p. 10).
In the following part BGH de facto reviews the substance of the case (e.g. the expression 'Polish' camps did not trigger sensation in 2013 and the defendant has not repeated such a term any more, and that the wording was detached from the entire text of the announcement and the program itself; BGH judgment of July 19, 2018, p. 11-12). See the objections (because of révision au fond) presented by Nowicka, 2019, p. 364.

23 | See more: Mostowik and Figura-Góralczyk, 2021, pp. 91–115.

express one's opinion (ger. *negative Meinungsfreiheit*), that is, the right not to have one's own opinion, not pronouncing one's opinion, to silence, and not being compelled by others to express someone else's opinion as one's own. The BGH states that the impossibility of examining whether a given statement (in this case the sentence of a judgment) expresses truth or falsehood (the impossibility of falsifying a given statement) makes it an opinion (ger. *Meinungsäußerung, Werturteil*)[24]. The arguments that redirected the discourse can be considered as controversial.[25] In this argumentation, a false, factual, and historical statement is categorized as an 'opinion' (ger. *Meinung*). The freedom of speech and opinion are bound by this category, and as this freedom is protected by Art. 5 (1) GG that caused the non-execution of the Polish judgment from 2016. From the perspective of BGH, the content of the judgment expresses the opinion (ger. *Meinungsäußerung*)[26]. The BGH states that:

> The description of a—also not coherently reproduced—program announcement as a falsification of history and as a violation of the personality rights of a former concentration camp prisoner is the result of a judgmental consideration, but not a fact whose truth could be verified.[27]

The BGH also emphasizes that the defendant would have to join the aforementioned opinion and make it public as their own. The *Bundesgerichtshof* concludes that this case:

> (...) concerns the question of whether the defendant can be obliged to take over a foreign opinion. If the obligation to express one's own opinion violates the negative freedom of expression under Article 5(1) GG, that is certainly the case with the obligation to publish a described assessment as one's own opinion.[28]

One of the possible solutions of enforcement coherent with German constitutional law would be to indicate that the apology is published due to the wordings of the judgment by the Polish court from 2016, and not the own opinion of ZDF[29]. However, the BGH did not refer to such a possibility.

24 | BGH judgment of July 19, 2018, p. 10-11.
25 | Argumentation presented by BGH was not focused on the claimant's relationship with the defendant but directed de facto against the sentence of court judgment. This happened by redirecting discourse from personality rights to the sentence of the Polish judgment of 2016 and applying a highly complicated and 'sublime' interpretation of the principle of freedom of opinion, raised to the rank of 'German ordre public', as a result of which BGH refused to recognize and declare the Polish judgment enforceable in the territory of Germany as 'obviously contradictory' to this order with reference to art. 34(1) Brussels I. See more: Figura-Góralczyk and Mostowik, 2022.
26 | BGH judgment of July 19, 2018, p. 11.
27 | 'Die Umschreibung einer – zudem nicht zusammenhängend wiedergegebenen – Programmankündigung als Geschichtsverfälschung und als Verletzung des Persönlichkeitsrechts eines ehemaligen KZ-Häftlings ist das Ergebnis einer wertenden Betrachtung, nicht jedoch eine Tatsache, deren Wahrheitsgehalt überprüft werden könnte.' (BGH judgment of July 19, 2018, p. 12).
28 | 'Es geht um die Frage, ob die Antragsgegnerin zur Übernahme einer fremden Meinung verpflichtet werden kann. Wenn schon die Pflicht zur Abgabe einer eigenen Stellungnahme gegen die negative Meinungsfreiheit aus Art. 5 Abs. 1 GG verstößt, gilt dies erst recht für die Pflicht, eine vorgegebene Bewertung als eigene Meinung veröffentlichen zu müssen.' (BGH judgment of July 19, 2018, p. 13).
29 | See: Hess, 2021, p. 453. Hess suggests that it would be possible to adjust the Polish judgment. It was possible to indicate that the statement is the result of the judgment of Polish court and not the own opinion of the defendant.

In addition to the abovementioned argumentation, the BGH argues that the declaration of enforcement by the Polish judgment of 2016 violates the constitutional principle of proportionality (ger. *Verhältnismäßigkeitsgrundsatz*)[30]. The BGH states that the obligation of the press or television to make the correction public is an infringement of their rights under Art. 5 (1) GG and Article 10 ECHR[31]. According to the latter, the media decides how and what they inform.

However, the BGH did not evaluate the relation between Art. 10 (2) ECHR and Art. 17 ECHR. The presented reasoning of the BGH *de facto* paid little attention to the important problem of the scope and 'borders,' which were given by the international legislator to the notion of 'freedom of speech,' 'freedom of opinion,' and 'freedom of expression,' under Article 10 ECHR, and its relation to Art. 17 ECHR. In the jurisprudence of ECHR in cases of Holocaust denial, the application of discussed Art. 10 ECHR is excluded by Art. 17 ECHR (prohibition of abuse of rights)[32].[33] Under Art. 17, nothing in ECHR may be interpreted as implying to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms, as well as their limitation, to a greater extent than it is provided for in the Convention. Additionally, the wording of Art. 10 ECHR stresses that freedom of expression is considerably important but remains a limited and conditional right. Particularly, freedom of the press is of cardinal importance in a democratic society, but it is not unlimited. Art. 10 (2) ECHR imposes an obligation that consists of the duty to practice reliable journalism[34]. The resulting principle from those provisions is that the media should not use the opportunity to declare the false statements as legal. Publishing some expressions or statements may render the person, who is concerned civilly liable or even criminally punishable, in cases of defamation or insulting language.[35]

2.2. Judgement of 2021 in a partly comparable case

The same observations apply to the possible enforcement of the judgment of March 23, 2021. Also, in this proceeding the special jurisdiction of the Polish court based on Art. 7 (2) Brussels I Recast Regulation does not affect the enforcement of this judgment in Germany. In this recent judgment of March 23, 2021, the same defendant—ZDF and additionally UFA Fiction (both the producers of the TV series)—have been obliged by the Court of Appeal in Cracow to apologize to the World Union of Home Army Soldiers (pol. *Armia Krajowa*) for infringement of personality rights. The infringement took place in the aforementioned series, where the Polish partisan unit, which was a part of the Home Army

30 | BGH judgment of July19, 2018, p. 13.

31 | Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature in Rome on November 4, 1950, www.echr.coe.int/pages/home.aspx?p=basictexts, further as 'ECHR'.

32 | See: Lobba, 2015, pp. 240–241; Kamiński (2020, p. 83) observes that Art. 17 of ECHR (according to which certain expressions are deprived of the protection stemming from Art. 10) seems to be reserved for the statement which must be deemed as going contrary to "the underlying values of the Convention". In our opinion such a situation occurs when concentration and death camps during War II are called "Polish" ones.

33 | See more: Figura-Góralczyk and Mostowik, 2022.

34 | See more: Garlicki, 2010, pp. 599 et seq.; Garlicki, 2010, pp. 12 et seq.; Schabas, 2015, pp. 468 et seq.

35 | ECtHR, March 29, 2001, Thoma v. Luxembourg, Reports 2001-III. See: Introduction to the European Convention on Human Rights The rights guaranteed and the protection mechanism, Council of Europe, 2005, p. 22-27, https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-01(2005).pdf (14.09.2021).

(*Armia Krajowa*), is suggested to be an anti-Semitic group[36]. The apology should have been broadcast on Polish public television channels and in three German television channels, where the series was shown and presented on the internet websites of the defendants. Similar to the abovementioned judgment of 2016, this Polish judgment of 2021 was based on the infringement of personality rights and includes the duty to officially apologize for this infringement. However, in case of the judgment of 2021, Home Army was personally mentioned in the examined movie. Contrarily, in the judgment of 2016, Karol Tendera was not defamed in person. This circumstance is important from the perspective of the applicable civil law (the rules of protection of personality rights), and from the grounds of jurisdiction and interpretation of Art. 7 (2) Brussels I Recast Regulations, as discussed below.

Additionally, the proceeding concerning enforcement of the judgment of 2021 is subject to Brussels I Recast Regulation as the proceeding started in 2016. Based on Art. 39 of this Regulation, the Polish judgment of 2021 is subject to automatic enforcement in Germany, that is, without exequatur procedure. However, based on Art. 46 and 45 (1) (a) Brussels I Recast Regulation, the enforcement of the judgment may be on the application of the person against whom enforcement is sought refused in case the judgment is contrary to public policy. The near future will show the fate of the Polish judgment of 2021, in particular its enforcement in Germany

3. Issue of jurisdiction

3.1. International civil procedure aspects in the disputes

The jurisdiction of Polish courts in cases concerning violation of personality rights committed by means of a foreign online publication, which mentioned the expression 'Polish concentration camps,' was confirmed in several judgments (Polish Appeal Court in Białystok of September 30, 2015; Polish Appeal Court in Warsaw of March 31, 2016; Polish Appeal Court in Cracow of December 22, 2016). Similarly, the jurisdiction of Polish courts was confirmed in the case of judgment by the Polish Appeal Court in Cracow on March 23, 2021. However, this matter was not so obvious for Appeal Court in Warsaw that decided to ask a preliminary question to the CJEU in case C-800/19[37].

36 | The court stated that 'obliges each of the defendants to submit an apology within seven days of the judgment becoming final, between 8.00 p.m. and 8.30 p.m., in white text on a black background that is at least the same size then opening credits of the series (...) with a visible-bold title (...) and the following content: 'Producers of the film 'Our Mothers Our Fathers' i.e. Tv ZDF and the company UFA Fiction, as a result of losing a court trial, apologize World Union of Home Army Soldiers with the seat in Warsaw, for violating his personal rights by identifying the Polish partisan unit in the above-mentioned film as having detachment with (...) which gives rise to an unauthorized suggestion that this Polish military organization was anti-Semitic in nature'. See more: https://bit.ly/3zILzXz; https://bit.ly/3r0lkbm; https://bit.ly/3fagDGa (14.09.2021).

37 | For first comments see post from June 17, 2021, of T. Lutzi, Case C-800/19: CJEU Limits Scope of 'Center of Interests' Jurisdiction for Online Infringements of Personality Rights (https://bit.ly/3qbugeF); from June 18, 2021, of G. van Calster, Mittelbayerischer Verlag: the CJEU surprisingly reigns in Article 7(2) centre of interests jurisdiction in cases of online defamation, https://gavclaw.com/tag/c-800-19/; from June 29, 2021, of E. Figura-Góralczyk, CJEU Rules on Jurisdiction in Violation of Personality Rights Claim, C-800/19, https://bit.ly/3qat9vF (14.09.2021).

In this case, the plaintiff (SM) is a Polish national, who lives in Poland, and a former prisoner of Auschwitz extermination camp during World War II. He based the lawsuit on the infringement of his personality rights based on the online article that was published by Mittelbayerischer Verlag KG (the local publisher), having the title: "*Ein Kämpfer und sein zweites Leben*" (The Fighter and his Second Life) in Germany, on the website that was accessible in Poland. This article presented in the German language the pre- and post-war life of Israel Offman, a Jewish person who survived the Holocaust. This online article had the statement that Israel Offman's sister 'was murdered in the Polish extermination camp of Treblinka'[38]. SM belongs to group of former prisoners of Nazi-German extermination camps. SM claims that the words 'Polish extermination camp Treblinka' that were used in the online article, instead of 'Nazi-German extermination camp,' infringed the national identity and dignity of SM, which according to Polish material law (Art. 23 and 24 of Polish Civil Code) causes infringement of personality rights.

These case facts led to the Appeal Court in Warsaw raising two questions which could be summed up in the following way: do Polish courts have jurisdiction in such cases based on Article 7 (2) Brussels I Recast Regulation? The CJEU answered the question in the following way: Article 7(2) Brussels I Recast Regulation

> (...) must be interpreted as meaning that the courts of the place in which the center of interests of a person claiming that his or her personality rights have been infringed by content published online on a website is situated have jurisdiction to hear, in respect of the entirety of the alleged damage, an action for damages brought by that person only if that content contains objective and verifiable elements which make it possible to identify, directly or indirectly, that person as an individual[39].

3.2. Recent jurisprudence of Court of Justice of European Union

The analyzed case concerns the jurisdiction of the court of the Member State based on 'center of life interests' of the person, whose personality rights were infringed by the online publication (Article 7(2) of the Brussels I Recast Regulation)[40]. The CJEU introduced this broad interpretation of Art. 7(2) of Brussels I Recast Regulation in case eDate[41] by creating the jurisdiction ground based on 'center of life interests' of the victim. This jurisdiction ground allows the court to judge all claims arising from the violation of personality right[42]. Therefore, the broad interpretation of 'center of life interests' was confirmed by the CJEU in case C-194/16 (*Bolagsupplysningen*)[43]. However, the specificity of case C-800/19 is that the plaintiff (SM) is not personally addressed (name or surname) in the online article. Contrarily, in this case the plaintiff belongs to the group addressed

38 | AG Bobek opinion, para 13. In original language version of the article the expression was the following: 'im polnischen Vernichtungslager Treblinka ermordet worden war'.
39 | Case C-800/19, para 47.
40 | See: https://bit.ly/3F6zEDX (14.09.2021).
41 | Judgment of the Court (Grand Chamber) of October 25, 2011, – eDate Advertising GmbH v X (C-509/09) and Olivier Martinez and Robert Martinez v MGN Limited (C-161/10), Joined Cases C-509/09 and C-161/10, European Court Reports 2011 p. I-10269, https://bit.ly/3JZqKf9, further: 'case eDate'.
42 | See more: Bogdan, 2011, pp. 483–491; Reymond, 2011, pp. 493–506.
43 | Judgement of the Court (Grand Chamber) of 17 October 2017 – Bolagsupplysningen OÜ, Ingrid Ilsjan v. Svensk Handel AB, Case C-194/16, ECLI:EU:C:2017:766, https://bit.ly/3q6UO0x (14.09.2021).

in the article (the group of prisoners of Nazi-German extermination camps). SM has their center of life interests in Poland. SM has a habitual residence in Poland and is a Polish national. Therefore, SM filed the lawsuit with claims that are 'indivisible' (e.g. the claim for publishing an apology to the plaintiff for the false statement). To judge such claims, the Polish court should have the jurisdiction based on the 'center of life interests' according to Article 7 (2) Brussels I Recast Regulation in the meaning introduced by the eDate case.

According to AG Bobek[44], the jurisdiction of the courts in such cases based on the 'center of life interests' does not require that the allegedly harmful online content names a particular person. However, there should be a close connection between that court and the action at issue, and thereby, ensuring the sound administration of justice. Contrarily, the Commission argued, in essence, that a person whose personality rights, according to its claim, would be infringed, should be able to bring an action before the court that has jurisdiction in the center of life interests, if this person was mentioned by name in the online publication in question.

Moreover, AG Bobek has proposed, based on AG Cruz Villalón in eDate opinion[45], the proportionality test that should clarify the jurisdiction in online infringements of personality rights.

> The 'centre of gravity' test [proposed by AG Bobek should] to be composed of two cumulative elements, one focusing on the claimant and the other on the nature of the information at issue. The courts of a Member State would have jurisdiction only if that were the place of the claimant's centre of interests and if 'the information at issue [was] expressed in such a way that it may reasonably be predicted that that information is objectively relevant in [that Member State][46].

As a result of this test AG Bobek arrives at the following assessment:

> ...indeed [it is] difficult to suggest that it would have been wholly unforeseeable to a publisher in Germany, posting online the phrase 'the Polish extermination camp of Treblinka', that somebody in Poland could take issues with such a statement. It was thus perhaps not inconceivable that 'the place where the damage occurred' as a result of that statement could be located within that territory, especially in view of the fact that that statement was published in a language that is widely understood beyond its national territory. Within that logic, while it is ultimately for the national court to examine all those matters, it is difficult to see how jurisdiction under Article 7(2) of Regulation No 1215/2012 could be axiomatically excluded.[47]

Consequently, the center of gravity test proposed by AG Bobek allows the jurisdiction in cases concerning 'Polish extermination camps' (also for the 'indivisible' claims, e.g. the claim for apology arising from the online violation of personality right) based on 'center of life interests' from Article 7 (2) of Brussels I Recast Regulation.

44 | See: https://bit.ly/3t9HjPx (14.09.2021).
45 | Opinion of Advocate General Cruz Villalón delivered on 29 March 2011, ECLI:EU:C:2011:192, https://bit.ly/3JPVRKh (14.09.2021).
46 | AG Bobek opinion, para 64. See in detail the centre of gravity test in AG Bobek opinion, paras 65-73.
47 | AG Bobek opinion, para. 74.

However, the CJEU in the discussed judgment arrives at the different conclusion. The CJEU *de facto* excludes the jurisdiction of Polish courts in such cases of 'indivisible' claims. CJEU did not follow the proposed center of gravity test proposed by AG Bobek. The Court stated that the sound administration of justice requires such interpretation of basis of jurisdiction in Article 7(2) Brussels I Recast Regulation and that the center of life interests is located in the country foreseeable for the defendant. This requires the clarification of the previous judgments by CJEU (e.g. eDate case). The CJEU introduced this in such a way that the connection between the plaintiff and alleged online material should be based on objective and verifiable elements that allow the person to be identified, directly or indirectly, and individually. The CJEU stated in the analyzed case that SM (plaintiff) was clearly neither directly nor indirectly identified individually in the content published on the *Mittelbayerischer Verlag* website. The plaintiff bases the claim of an infringement of their personality rights on the fact that SM belongs to the Polish nation and was the prisoner of an extermination camp. The CJEU states that in such a situation, there is no particularly close connection between the court, in the area of jurisdiction, the center of the life interests of the person claiming the personality rights infringement lies, and the dispute in question[48]. Therefore, the Polish courts do not have jurisdiction to hear all 'indivisible' claims based on Article 7(2) Brussels I Recast Regulation.

In this way, the CJEU limited the interpretation of 'center of life interests' in Article 7(2) of the Brussels I Recast Regulation. To achieve this aim, the CJEU stated that the online content should contain objective and possible elements to be verified, allowing for the direct or indirect individual identification of the person infringed. However, the CJEU did not limit the possibility to sue based on the jurisdiction from Article 7(2) Brussels I Recast Regulation in case of claims that may be 'divided' between the territories of the counties (mosaic principle) —for example, the compensation claim.

This judgment seems to be 'the nod to the side' of legal certainty and predictability in cases concerning jurisdiction for online personality rights infringement. The new criteria introduced by the CJEU was forced by the specificity of this case, where the plaintiff was not directly or indirectly mentioned in the alleged online article, which is typical in cases concerning defamation by the expression *Polish concentration camps*.' However, the opinion of AG Bobek seems to propose a better solution (center of gravity test) to enhance legal certainty and predictability in such cases than the judgment of CJEU[49].

At the end of these remarks, it is worth adding that such or another interpretation of the quoted European Union's provisions on jurisdiction, as well as the last interpretation of CJEU given in judgment of 17 June 2021 (case C-800/19), is not the argument for non-enforcement of foreign judgment because of the another interpretation of Article 7 para. 2 of Brussels I Recast Regulation. In particular it does not mean that there is no obligation to enforce in Germany the judgment given in civil matter in another Member State (e.g. Polish judgements of 2016 and 2021). Under Article 45 (3) of Brussels I Recast Regulation the jurisdiction of the court of origin may not be reviewed in the state of enforcement.

48 | Case C-800/19, para 45.

49 | See more the post of Lutzi (17 June 2021); Case C-800/19: CJEU Limits Scope of 'Centre of Interests' Jurisdiction for Online Infringements of Personality Rights. Available at: https://bit.ly/3fau0X3 (14.09.2021).

Moreover, the test of public policy may not be applied in the last one to the rules relating to jurisdiction.[50]

4. The reimbursement of costs of proceedings

4.1. The particular circumstances of the cases

The cost of the trial is not regulated in EU law, in particular, neither Brussels I, nor I Recast Regulations have provisions concerning this matter. This matter is regulated in the national laws of EU Member States. In Germany, the costs of the trial in civil cases are regulated by the provisions of title 5 § 91-107 of the German Code of Civil Procedure (ger. *Zivilprozessordnung,* ZPO). Based on § 91 ZPO as a rule, the costs of the trial are borne by the losing party. The BGH in its judgment on July 19, 2018, unlike the rulings of German courts of lower instances, dismissed the enforcement of the Polish judgment of 2016 and ordered the plaintiff (applicant) to pay the amount of € 4000 as the cost of exequatur proceedings held in Germany.

The costs were set in Polish currency at circa 18500 PLN.'[51] In practice, it is a large sum for the Polish pensioner, as it is 8 times more than the average pension and 16 times more than the amount of the most frequently received pension at that time. Furthermore, this ruling also raises a theoretical issue. It seems, that the problem of high costs of the enforcement proceeding may raise concerns from the perspective of the right to a fair trial (Art. 6 ECHR)[52].

4.2. Standards of Council of Europe (jurisprudence of European Court of Human Rights)

There are several important principles derived from the decisions of the European Court of Human Rights that should be mentioned. As the matter of the costs of the trial is regulated in the national laws of the Member States, and not in Brussels I or I Recast Regulations, the problem of mutual application of the ECHR and EU law is not relevant for this analysis[53]. In this case law of ECtHR, the requirement to pay the fees and expenses is not—in principle—evaluated as a restriction of the right to a fair trial. However, the ECtHR

50 | The exceptions (policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee as the defendants, as well as exclusive jurisdiction) are not relevant to the discussed cases.

51 | In German: 'Der Antrag des Antragstellers, das Urteil des Appellationsgerichts Krakau, Polen, vom 22. Dezember 2016 – IACa 1080/16 – mit der Vollstreckungsklausel zu versehen, wird abgewiesen. Der Antragsteller trägt die Kosten des Verfahrens. Der Wert des Verfahrens wird auf 4.000 € festgesetzt.' https://bit.ly/3Gepvqn (14.09.2021).

52 | Unacceptably high court costs were raised by Netherlands' courts while applying public order clause Middelburg, 23 September 2009, Nr. 63417/HA ZA 08-306, See, B. Hess, T. Pfeiffer, Interpretation of the Public Policy. Exception as referred to in EU Instruments of Private International and Procedural Law, Commissioned by the European Parliament, Brussels 2011, PE 453.189, p. 55; B.Hess., Europäisches 2021, p. 451. See also: Hofmański and Wróbel, 2010, pp. 294–300.

53 | See about the relation of EU law and European Charter on Human Rights: Kargopoulos, 2015, pp. 96–100; Opinion 2/13 Draft Agreement on Accession of the European Union to the ECHR, para 170.

points out that the established 'financial barriers' must consider the balance (reasonable proportionality relationship) between the interest of the state in collecting court fees and the interest of the party in pursuing claims, and (defending individual rights) in court proceedings.

ECHR secures to everyone the right to have any claim relating to their civil rights and obligations brought before a court or tribunal. In this way, that provision embodies the 'right to a court.' One aspect of this right is the 'right of access' that is the right to institute proceedings before a court in civil matters. However, it is an aspect that makes it possible to benefit from the further guarantees laid down in paragraph 1 of Article 6.[54]

The ECtHR has indicated that such limitations must pursue a legitimate aim, and there must be a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved.[5556] In the decision of ECtHR of April 27, 2000, Tiemann versus France and Germany,[57] it was reiterated that it is not the ECtHR's task to substitute its own assessment of the facts and evidence for that of the national courts. Its task is to establish whether the evidence was presented such that it guarantees a fair trial. In addition, Article 6 (1) of the ECHR does not lay down any rules on the admissibility or probative value of evidence or on the burden of proof, which are essentially a matter for domestic law.

An important reasoning has been recently presented by the ECHR inter alia in its judgment of July 26, 2005, Podbielski and PPU Polpure v. Poland[58]:

> In the present case the applicant had to desist from pursuing his case before civil courts because his company was unable to pay the court fee (...); which it had been required to pay for proceeding with the appeal. It is true that no right to appeal in civil cases can be inferred from the Convention and that, given the nature of appeal proceedings and the fact that a person has already had his case heard before the first-instance court, the State would in principle be allowed to put even strict limitations on access to a court of appeal. It is also true that in the Tolstoy-Miloslavsky v. the United Kingdom case, the Court found that the requirement to secure a significant sum for the anticipated legal costs of the applicant's opponent in appellate proceedings had pursued a 'legitimate aim', especially given the poor prospects of success in the applicant's appeal. It also attached 'great weight' to the fact that the case had been heard for 40 days at first instance and, in that context, stressed that in cases where access to a court was concerned, the entirety of the proceedings had to be taken into account (para. 61-67 of this

54 | See: Golder v. the United Kingdom, judgment of 21 January 1975, Series A no. 18, p. 16-18, §§ 34 in fine and 35-36, and Kreuz v. Poland, no. 28249/95, §§ 52 et seq., ECHR 2001 VI.
55 | See the case: Brualla Gómez de la Torre v. Spain, judgment of 19 December 1997, Reports of Judgments and Decisions 1997-VIII, p. 2955, § 33, and Tolstoy Miloslavsky v. the United Kingdom, judgment of 13 July 1995, Series A no. 316-B, p. 80-81, §§ 61 et seq.
56 | The court added (point 48), that "the requirement to pay fees to civil courts in connection with claims or appeals cannot be regarded as a restriction on the right of access to a court that is incompatible per se with Article 6 § 1 of the Convention. However, the amount of the fees assessed in the light of the particular circumstances of a given case, including the applicant's ability to pay them, and the phase of the proceedings at which that restriction has been imposed, are factors which are material in determining whether or not a person enjoyed that right of access and had "a ... hearing by [a] tribunal" (see Kreuz v. Poland, no. 28249/95, §§ 52 et seq., ECHR 2001 VI, Tolstoy Miloslavsky v. the United Kingdom, judgment of 13 July 1995, Series A no. 316-B, pp. 80-81, §§ 61 et seq.).'
57 | Application no. 47457/99, 47458/99, https://bit.ly/3najx26 (14.09.2021).
58 | Application no. 39199/98; https://bit.ly/3HJY2gq (14.09.2021).

> case). However, restrictions which are of a purely financial nature and which, as in the present case, are completely unrelated to the merits of an appeal or its prospects of success, should be subject to a particularly rigorous scrutiny from the point of view of the interests of justice.[59]

The arguments presented in the ECHR judgment of May 24, 2006, Weissman and Others v. Romania,[60] are also worth recalling. Notwithstanding the margin of appreciation enjoyed by the State in this area, the Court emphasizes that a restriction on access to a court is only compatible with Article 6 § 1, if it pursues a legitimate aim, and if there is a reasonable degree of proportionality between the means used and the aim pursued. In particular, bearing in mind the principle that the Convention is intended to guarantee not rights that are theoretical or illusory, but rights that are practical and effective. The Court reiterates that the amount of the fees, assessed in consideration of the particular circumstances of a given case, including the applicant's ability to pay them and the phase of the proceedings at which that restriction has been imposed, are factors that are material in determining whether or not a person enjoyed their right of access to a court or whether, on account of the amount of fees payable, the very essence of the right of access to a court has been impaired.[61]

5. Final remarks

The issue of the court's competency and understanding of the EU law that establishes special (alternative) jurisdiction, and the problem of the costs of proceedings in cases concerning online violation of personality rights are interesting issues discussed in the recent jurisprudence. They are peripheral matters of the problem of non-enforcement of Polish judgment of 2016 in Germany because of the BGH judgment of July 19, 2018, particularly, combined with the ECJ judgment of 2021.

Under EU rules of 'judicial co-operation in civil and commercial matters,' every Member State can refuse to recognize or enforce a foreign judgment because of the fundamental principles of local public policy[62]. Such a possibility is necessary because the legal system in which such an institution would not be provided for, would be like 'a vehicle without brakes.'[63] The need for the existence of such an exceptional clause, even

59 | It should be pointed additionally the following fragment out: "66. The Court notes that, indeed, the courts at several instances heard Mr Podbielski's case and that, eventually, the fee for lodging his company's appeal of 29 November 1996 was significantly reduced (...). Yet, in contrast to the Tolstoy-Miloslavsky case, the money that the applicant was obliged to secure did not serve the interests of protecting the other party against irrecoverable legal costs. Nor did it constitute a financial barrier protecting the system of justice against an unmeritorious appeal by the applicant. Indeed, the principal aim seems to have been the State's interest in deriving income from court fees in civil cases."

60 | Application no. 63945/00; https://bit.ly/3r1pRdq (14.09.2021).

61 | See more: Guide on Article 6 of the European Convention on Human Rights, Strasbourg 2020, https://bit.ly/3tbceuV, pp. 22–33 (14.09.2021).

62 | See more: Francq, 2007, p. 568. See also: Frąckowiak-Adamska, 2015, pp. 191–218. Additional arguments are presented by Nowicka, 2019, pp. 329 et seq.

63 | See: Siehr, 2008, p. 223; Sonnenberger, 2006, pp. 29–53.

for intra-EU relations of one international organization, is justified by large differences in legal systems and the necessity to safeguard against the adverse consequences of future foreign law, specifically in a form that cannot be predicted at present. However, it is not easy to agree with the judgment of BGH, which twice recognizes the content of the given judgment of the Polish Court of 2016 for the 'opinion'. The notion of opinion, adopted twice by the BGH in the sentence and developed in further reasoning, may mean that any correction ordered by a foreign court would not be enforced in future practice (published widely, e.g. in the press or television). The general excuse for this judgment is that such information (resulting from the sentence) is not falsifiable, and consequently, it would violate the 'negative aspect of freedom of speech.' In practice, this would mean a far-reaching limitation of the effectiveness of EU judicial cooperation in civil matters, especially in cases involving the infringement of personality rights[64].

In our opinion, standards of the European Convention on Human Rights should be taken into deep consideration. Therefore, the discussed BGH judgment of 2018 can be, from our point of view, evaluated as questionable. A tool, such as the order public clause, is necessary even under automatic enforcement of the Brussels I Recast Regulation. However, the introduction of standards and limits of EU[65] and international law to the application of national public order is to be welcomed. In particular, in the discussed cases that are not only of private law character the public law standards of mass media and journalism should be taken into account.

As far as the issue of cost reimbursement is concerned, in the given particular case, the controversy may arise over the scope of cost reimbursement given the ECHR principle of fair access to court and its practical aspects. An opinion may be presented that awarding such costs by the BGH for the 'theoretically winning' case (following the principles of EU law) and—in this inter-state configuration and the life situation of the retiree—is questionable. It is standard in civil proceedings that internal law provides, in exceptional circumstances, to waive the award of costs or reduce them. Furthermore, even from a non-judicial perspective, one might wonder if the ZDF should have demanded them, but that is beyond the scope of this study. Such an approach by the BGH may additionally cause fear of the enforcement of judgments from other EU countries in Germany in the future, and thus deprive the EU law (regarding judicial cooperation in civil matters) of its practical effectiveness.

Before referring to the problem of jurisdiction, one must recall that the jurisdiction grounds adopted in the issuing state, in the discussed cases, are not controlled in enforcement proceedings of other EU Member States. In other words, the lack of jurisdiction cannot constitute a 'defense' against enforcement of the judgment in another EU Member State according to Brussels I or I Recast Regulations[66]. The CJEU in the case C-800/19, strengthened the legal certainty and predictability in cases concerning jurisdiction for online infringement of personality rights based on Art. 7 (2) Brussels I Recast Regulation. The new criteria introduced by the CJEU was forced by the specificity of the case C-800/19, where the plaintiff was neither directly nor indirectly mentioned in the alleged online article. Such a situation is typical in cases concerning defamation because of use the expression 'Polish concentration camps.' In this way, the CJEU excluded the jurisdiction

64 | See more Figura-Góralczyk and Mostowik, 2022.
65 | EU public order is discussed by Basedow, 2004, pp. 291 et seq.
66 | Article 45, para. 3 of Brussels I Recast Regulation.

of Polish courts based on 'center of life interests' in such cases of 'indivisible' claims (e.g. the claim for apology). However, the CJEU did not limit the possibility to sue based on the jurisdiction from Art. 7 (2) Brussels I Recast Regulation in case of claims that may be 'divided' between the territories of the counties (mosaic principle)—for example, the compensation claim. The opinion of AG Bobek, in this case, seems to propose a better solution (center of gravity test) to enhance legal certainty and predictability than the judgment of CJEU.However, this new interpretation of Art. 7 (2) of the Brussels I Recast Regulation presented by CJEU in 2021 does not mean a change to the general rule saying that a judgment issued in EU state should be enforced in another Member State. According to Art. 45 (3) of Brussels I Recast Regulation, the court of the state of enforcement cannot at this moment question the jurisdiction of the state where the judgment was given in civil matter.

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A CRITICAL EXAMINATION OF THE CJEU JUDGEMENT IN RENCKHOFF CASE: NEW FRONTIERS OF INTERNET CENSORSHIP

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ABSTRACT

This paper analyzes the judgment of the Court of Justice of the European Union (CJEU) in the Renckhoff case (C-161/17). First, the introductory remarks outline the background of the core issue, mainly by presenting the current line of the CJEU's case law in cases based on the same legal norm. They also highlight the distinctive character of the judgment in the Renckhoff case. Next, some relevant facts determining the law-based approach are presented, along with the key case-law theses put forward by the CJEU to justify its decision. These considerations underpin the deliberations on censorship of Internet content, based on copyright law. The observations here refer the findings to the principles of freedom of expression as featured in both national and international law. The paper ends with a summary of the author's observations on the core issue.

KEYWORDS

Court of Justice of the European Union
Renckhoff case
copyright
censorship
freedom of expression

1. Introduction

The starting point for the analysis of the issue at hand is Directive 2001/29/EC of the European Parliament and the Council of May 22, 2001 on harmonizing certain aspects of copyright and related rights in the information society[2] (Directive 2001/29/EC). This act of secondary EU law was adopted based on Articles 53, 62, and 114 of the Treaty on the Functioning of the European Union[3] (TFEU). This means that in this respect, the EU

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2 | Directive 2001/29/EC of the European Parliament and of the Council of May 22, 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167, 22.6.2001, pp. 10–19).

3 | Consolidated version of the Treaty on the Functioning of the European Union (OJ C 326, October 26, 2012, pp. 47-390).

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legislator decided to apply a method based on the harmonization of national laws of the EU member states, and not on their unification, where the proper legal form would be regulation. The application of Directive 2001/29/EC has proved in practice that its wording often requires clarification by an autonomous CJEU interpretation.[4] Art. 3(1) is one of the provisions of Directive 2001/29/EC, posing interpretation difficulties with regard to the problem that is the main point of reference here. It provides that,

> "Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them."

Of interest to us is a fragment of this wording that still poses an interpretative difficulty. It concerns the concept of 'communication to the public' of legally protected content by making it available on the Internet, which can be referred to at least two basic groups of facts in specific court cases. The first of these comprises cases where the CJEU made an autonomous interpretation of the concept of 'communication to the public' used in Art. 3(1) of Directive 2001/29/EC in a situation where some content was made available on the Internet for the first time without the consent of the copyright holder. This means that legally protected content entered the internet illegally, without the consent of the copyright holder or even against their will. Situations in this group of facts relate most often to songs or videos for free use posted on various websites, most often in violation of the copyright of their respective holders. It seems obvious that the initial communication of protected content on the Internet should be penalized. However, it is interesting to analyze how to approach this issue in the case of Internet users, often private individuals, who further make such content on the Internet available. They may not be aware that they provide links to materials that have ended up on the internet without the consent of the copyright holder. The case-law of the CJEU is relevant here, particularly the rulings that furnish the basic arguments to determine the principles and factors that determine the lawfulness of posting hyperlinks to illegal web content. These are primarily the following CJEU judgements: on February 13, 2014, in case C-466/12 Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v Retriever Sverige AB[5]; on September 8, 2016, in case C-160/15 GS Media v Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker[6]; of the CJEU of April 26, 2017, in case C-527/15 Stichting

4 | For example: Judgement of the CJEU of July 29, 2019 in case C-469/17 Funke Medien NRW GmbH v Bundesrepublik Deutschland (ECLI:EU:C:2019:623); Judgement of the CJEU of September 12, 2019 in case C-683/17 Cofemel – Sociedade de Vestuário SA v G-Star Raw CV (ECLI:EU:C:2019:721); Judgement of the CJEU of November 14, 2019 in case C-484/18 Société de perception et de distribution des droits des artistes-interprètes de la musique et de la danse (Spedidam), PG, GF v Institut national de l'audiovisuel (INA) (ECLI:EU:C:2019:970); Judgement of the CJEU of June 11, 2020 in case C-833/18 SI, Brompton Bicycle Ltd v Chedech/Get2Get (ECLI:EU:C:2020:461).

5 | Judgement of the CJEU of February 13, 2014 in case C-466/12 Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v Retriever Sverige AB (ECLI:EU:C:2014:76); See Axhamn, 2015, pp. 847–866; K. Erdem and D. Erdem, 2019, pp. 1618–1623; Minero, 2014, pp. 322–327.

6 | Judgement of the CJEU of September 8, 2016 in case C-160/15 GS Media v Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker (ECLI:EU:C:2016:644); See Radosavljev, 2017, p. 5; Rosati, 2017, pp. 1221–1230; Long, 2018, pp. 430–433.

Brein v Jack Frederik Wullems[7]; and on June 14, 2017, in case C-610/15 Stichting Brein v Ziggo BV, XS4ALL Internet BV.[8] These judgments cover a situation where a hyperlink posted links to content unlawfully published content on the Internet from a copyright point of view. It is there that one can find out how this specific legal argument originated. However, the nature of the judgment of the CJEU on August 7, 2018, in the case C-161/17 Land Nordrhein-Westfalen v Dirk Renckhoff,[9] as indicated in the title of this paper, is different. This judgment is the voice of the CJEU with regard to the second group of rulings relevant to the matters under consideration. The Renckhoff case concerns situations in which a hyperlink links to content communicated on the Internet for the first time with the consent of the copyright holder. It seems that limiting and setting out the conditions for the lawfulness of a subsequent communication (posting a hyperlink) would raise much more controversy and be more difficult to justify in terms of freedom of expression and allegations of unfounded and (therefore, going beyond what is necessary) censorship. For this reason, it is precisely this ruling that will be analyzed further in terms of consistency with the freedom of expression standard, which in practice is intended to protect against unlawful censorship. It is also not irrelevant whether the restrictions are based on the premise of the commercial purpose of communication to the public, where a distinction should be made between professional entities and ordinary Internet users. An additional reason for this decision to examine the issue at hand is the recent case law of the CJEU, which confirms that the lawfulness of posting hyperlinks to copyright-protected content available on the Internet is still valid.[10]

2. The facts of the Renckhoff case

The Renckhoff case began in Germany. On March 25, 2009, a presentation prepared by one of the students was published on a website administered by a secondary school

7 | Judgement of the CJEU of April 26, 2017 in case C-527/15 Stichting Brein v Jack Frederik Wullems (ECLI:EU:C:2017:300); see Ginsburg, 2017, pp. 4–5; Colangelo and Maggiolino, 2018, pp. 142–159.

8 | Judgement of the CJEU of June 14, 2017 in case C-610/15 Stichting Brein v Ziggo BV, XS4ALL internet BV (ECLI:EU:C:2017:456); Nordemann, 2018, pp. 744–756; Koo, 2018, pp. 542–551; Visser, 2018a, pp. 1025–1026.

9 | Judgement of the CJEU of August 7, 2018 in case C-161/17 Land Nordrhein-Westfalen v Dirk Renckhoff (ECLI:EU:C:2018:634) – the case name hereinafter abbreviated as 'Renckhoff'; Wang, 2018, pp. 61–65; Visser, 2018b, p. 183–190; Fernández-Díez, 2018, p. 2.

10 | Judgement of the CJEU of June 22, 2021 in joined cases C-682/18 and C-683/18 in Frank Peterson v Google LLC, YouTube Inc., YouTube LLC, Google Germany GmbH (C-682/18) and Elsevier Inc. v Cyando AG (C-683/18) (ECLI:EU:C:2021:503); Judgement of the CJEU of December 19, 2019 in case C-263/18 Nederlands Uitgeversverbond, Groep Algemene Uitgevers v Tom Kabinet internet BV, Tom Kabinet Holding BV, Tom Kabinet Uitgeverij BV (ECLI:EU:C:2019:1111); Judgement of the CJEU of April 2, 2020 in case C-753/18 Föreningen Svenska Tonsättares Internationella Musikbyrå u.p.a. (Stim), Svenska artisters och musikers intresseorganisation ek. för. (SAMI) v Fleetmanager Sweden AB, Nordisk Biluthyrning AB (ECLI:EU:C:2020:268); Judgement of the CJEU of October 28, 2020 in case C-637/19 BY v CX (ECLI:EU:C:2020:863); Judgement of the CJEU of 9 March 2021 in case C-392/19 VG Bild-Kunst v Stiftung Preußischer Kulturbesitz (ECLI:EU:C:2021:181); Judgement of the CJEU of June 17, 2021 in case C-597/19 Mircom International Content Management & Consulting (M.I.C.M.) Limited v Telenet BVBA (ECLI:EU:C:2021:492).

in Waltrop.[11] The presentation contained a photograph taken by Dirk Renckhoff that had been downloaded from another travel website with no restriction preventing it from being downloaded (Recital 7). Under the photograph, the student referenced the website from which she downloaded it (Recital 7). Dirk Renckhoff, seeing that as the copyright holder of his photograph, brought an action before the national court in Hamburg, suing the city of Waltrop as responsible for running the secondary school in that city and the land of North Rhine-Westphalia, which supervised that school (Recitals 6 and 7). Thus, the main proceedings of Germany began. Dirk Renckhoff indicated in his statement of claim that although he indeed had given his consent to have his photograph posted on the internet on the travel portal, his consent, as to the subject and object, did not extend to the entire internet, but only that one portal, and the fact that his photo was posted without a restriction preventing it from being downloaded did not matter (Recitals 7 and 8). Thus, Dirk Renckhoff argued that his copyrights in the context of the disputed photograph had been infringed and demanded that the Land of North Rhine-Westphalia be prohibited 'on pain of a financial penalty, from reproducing/having reproduced and/or making available/having made available to the public the photo and, in the alternative, from allowing school students to reproduce the photo for purposes of posting it on the Internet. He also claimed payment of damages from the Land of North Rhine-Westphalia of EUR 400' (Recital 8). As the claim was partially upheld at first instance, all parties to the proceedings appealed against the judgment of the Higher Regional Court in Hamburg (Recitals 9 and 10). To the extent relevant to the issue under consideration, the court decided that the disputed photograph had been protected under the copyright law and that its placement on the website had violated the right to communicate it to the public (Art. 3(1) of Directive 2001/29/EC), which in that case remained with Dirk Renckhoff (Recital 10). Interestingly, the Higher Regional Court in Hamburg pointed out that the fact that the photograph in question was available on the Internet without any restrictions was irrelevant, 'since the reproduction of the photograph on the server and the making available to the public on the school website which followed led to a 'disconnection' with the initial publication on the online travel portal' (Recital 10). This decision was appealed on the point of law to the Federal Court of Justice, which rightly noticed that the assessment of the facts, in essence, depended on the correct interpretation of Art. 3(1) of Directive 2001/29/EC (Recital 11), about which it had doubts as to one of the requirements laid down in the case law for the lawfulness of hyperlinking to copyrighted content available on the Internet (Recital 11). Under the circumstances that court stayed the main proceedings and, pursuant to Art. 267 TFEU, decided under its ruling of February 23, 2017, to refer a question to the CJEU for a preliminary ruling, which read as follows:

> "Does the inclusion of a work—which is freely accessible to all internet users on a third-party website with the consent of the copyright holder—on a person's own publicly accessible website constitute a making available of that work to the public within the meaning of Art. 3(1) of Directive 2001/29 if the work is first copied onto a server and is uploaded from there to that person's own website?" (Recital 12).

Incidentally, one should note that the Federal Court of Justice naturally associated the facts presented before it with the court cases examined by the CJEU, which concerned the

11 | Judgement of the CJEU (Renckhoff), Recitals 6 and 7.

interpretation of Art. 3(1) of Directive 2001/29/EC in the context of hyperlinking content available on the Internet without the consent of the copyright holder, so that their initial communication to the public was unlawful.[12] This association was natural and seemed to be correct at the time; however, as it will turn out later, according to the CJEU, there is a significant difference between these sets of facts. In simple terms, the difference is that, in the Renckhoff case, there is a subsequent communication to the public of protected content that was originally made available on the internet with the consent of the copyright holder.

3. The position of the Court of Justice of the European Union

It would go far beyond the scope of this paper to present the entire argument of the CJEU at this point. Therefore, it is necessary to limit the analysis to the relevant recitals selected by the author. First, the CJEU (typically) set out what the Federal Court of Justice was attempting to achieve. The CJEU assumed that the core of the question asked is

> "whether the concept of 'communication to the public', within the meaning of Art. 3(1) of Directive 2001/29, must be interpreted as meaning that it covers the posting on one website of a photograph which has been previously published without restriction and with the consent of the copyright holder on another website."[13]

The CJEU, having pointed out the conditions that the disputed photo should meet,[14] so that it could be protected by copyright, recalled that one of the objectives of Art. 3 (1) of Directive 2001/29/EC was to provide authors with the exclusive right to authorize or prohibit communication to the public of their works.[15] Other judgments of the CJEU show that the use of protected content by other persons without the prior consent of the copyright holder should be considered a copyright infringement.[16] In other words, in the opinion of the CJEU, justified by Recitals 4, 9, and 10 of Directive 2001/29/EC, the objective of the legal norm in question was to guarantee a sufficiently high level of copyright protection, which is directly related to the respect for the choices of the copyright holder in making the protected content available to the public.[17] On that basis, the CJEU concluded that the concept of 'communication to the public' must be interpreted broadly, as confirmed by Recital 23 of Directive 2001/29/EC.[18] The CJEU recalled that the concept of 'communication to the public', as used in Art. 3(1) of Directive 2001/29/EC included two cumulative criteria. First,

12 | In particular: Judgement of the CJEU of 8 September 2016 in case C-160/15...; Judgement of the CJEU of 26 April 2017 in case C-527/15...; Judgement of the CJEU of 14 June 2017 in case C-610/15...
13 | Judgement of the CJEU (Renckhoff), Recital 13.
14 | Judgement of the CJEU (Renckhoff), Recital 14; Judgement of the CJEU of December 1, 2011, Painer, C-145/10.
15 | Judgement of the CJEU (Renckhoff), Recital 15.
16 | Judgement of the CJEU (Renckhoff), Recital 15; Judgement of the CJEU of November 16, 2016, Soulier and Doke, C-301/15.
17 | Judgement of the CJEU (Renckhoff), Recital 18; Judgement of the CJEU of June 14, 2017, Stichting Brein, C-610/15.
18 | Judgement of the CJEU (Renckhoff), Recital 18.

there must be an 'act of communication' of protected content and the communication of that content to a 'public'.[19] According to the CJEU, an act of communication exists where content is made available to a public in such a way that the persons forming that public may access it, irrespective of whether or not they avail themselves of that opportunity'.[20] In the Renckhoff case, the CJEU had no doubt that it was clear from the facts that the first criterion had been met, and proceeded to analyze the second criterion.[21] The criterion that the protected work must be communicated to a 'public', in the opinion of the CJEU, was met if the communication was made to an indeterminate and fairly large number of potential recipients and was made using specific technical means, different from those used for initial 'communication to the public'.[22] On the other hand, where the technical means were identical, as in the Renckhoff case,[23] it was necessary to determine whether the subsequent communication was to a 'new public', that is, to a public that was not already taken into account by the copyright holders when they authorized the initial communication to the public of their work (Recital 24). The CJEU, based on the facts of the Renckhoff case, had no doubt that the second criterion of 'communication to Waltrip the public' was met as regards the concept of a 'new public' (Recitals 23 and 35). The main argument presented in support of this interpretation is the statement that

> "Article 3 (3) of Directive 2001/29 specifically provides that the right of communication to the public referred to in Article 3 (1) of that directive is not exhausted by any act of communication to the public or making available to the public within the meaning of that provision" (Recitals 23 and 32).

In addition, the CJEU also emphasized that the fact that the copyright holder did not limit the possibility for Internet users to use the photograph was irrelevant, as the enjoyment and the exercise of the right provided for in Art. 3(1) of Directive 2001/29/EC may not be subject to any formality (Recital 36).[24] Interestingly, to conclude its case-law argumentation, the CJEU emphasized that to recognize the activity being the essence of the Renckhoff case as not meeting the criteria of 'communication to the public' would violate the balance referred to in Recitals 3 and 31 of Directive 2001/29/ EC,

> "which must be maintained in the digital environment between, on the one hand, the interest of the holders of copyright and related rights in the protection of their intellectual property, guaranteed by Article 17 (2) of the Charter of Fundamental Rights of the European Union and,

19 | Judgement of the CJEU (Renckhoff), Recital 19; Judgement of the CJEU of March 16, 2017, AKM, C-138/16; Judgement of the CJEU of June 14, 2017, Stichting Brein, C-610/15.
20 | Judgement of the CJEU (Renckhoff), Recital 20; Judgement of the CJEU of February 13, 2014, Svensson and Others, C-466/12; Judgement of the CJEU of June 14, 2017, Stichting Brein, C-610/15.
21 | Judgement of the CJEU (Renckhoff), Recital 21.
22 | Ibid., Recitals 22 and 24; Judgement of the CJEU of 13 February 2014, Svensson and Others, C-466/12; Judgement of the CJEU of June 14, 2017, Stichting Brein, C-610/15; Judgement of the CJEU of September 8, 2016, GS Media, C-160/15.
23 | The initial communication of the photograph on the internet with the consent of the copyright holder on the travel portal and its subsequent communication on the school website were made by exactly the same technical means, that is, the internet (Judgement of the CJEU [Renckhoff], Recital 25).
24 | Also Judgement of the CJEU of November 16, 2016, Soulier and Doke, C-301/15.

on the other hand, the protection of the interests and fundamental rights of users of protected subject matter, in particular their freedom of expression and information guaranteed by Article 11 of the Charter of Fundamental Rights, as well as the public interest" (Recital 41).

This is a very interesting conclusion by the CJEU, which should be addressed later in our analysis. The CJEU, given all the arguments and the facts of the case, decided finally that 'having regard to all of the foregoing considerations, the answer to the question referred is that the concept of 'communication to the public', within the meaning of Art. 3 (1) of Directive 2001/29, must be interpreted as meaning that it covers the posting on one website of a photograph previously posted, without any restriction preventing it from being downloaded and with the consent of the copyright holder.'[25]

4. Assessment of the position of the Court of Justice of the European Union

The CJEU's approach to the Renckhoff case seems peculiar. Nothing prevented it from using the previously developed model for assessing the lawfulness of hyperlinking on the Internet, which was known from other judgments concerning subsequent communication; after all, those provided for a more extensive system of principles and criteria of liability for copyright infringement by subsequent communication of protected content originally made available on the internet without the consent of the copyright holder.[26] It was in that case law that the criteria of a for-profit nature and a subjective assessment of knowledge of copyright infringement were used. The for-profit nature criterion relied on a distinction between Internet users who make subsequent communication professionals and those who are non-professionals, using the Internet, and not seeking financial gain. This distinction is extremely important, as it entails two fundamental assumptions regarding the assessment of the subjective knowledge of infringement.[27] The first is that an Internet user making secondary communication of copyrighted content for a profit knows or can reasonably know that such content was initially published without the consent of the copyright holder. In contrast, under the second one, an Internet user making secondary communication of copyrighted content other than for a profit does not know or cannot reasonably know that such content was initially published without the consent of the copyright holder. Both of these presumptions are legally rebuttable, for example (for the latter) by indicating that the user who communicates a protected work has been instructed by the copyright holder about the infringement or the hyperlink that they communicate aims to circumvent the security of the website, which consists of deliberately restricting access to the group of subscribers on that website.[28] In the Renckhoff case, the CJEU could use that model of principles and criteria for determining

25 | Judgement of the CJEU (Renckhoff), Recital 47.
26 | Judgement of the CJEU of September 8, 2016 in case C-160/15...; Judgement of the CJEU of 26 April 2017 in case C-527/15...; Judgement of the CJEU of June 14, 2017 in case C-610/15...
27 | Judgement of the CJEU of September 8, 2016 in case C-160/15... Recital 55.
28 | Ibid., Recital 50.

the lawfulness of web hyperlinks. It was only sufficient to adjust the above presumptions to the facts of the case, where the initial communication was made with the consent of the copyright holder limited as to the subjects permitted to communicate. After such adjustment, *de lege ferenda* the presumptions in question should be worded so that an Internet user – making subsequent communication of copyrighted content for a profit – initially communicated on the Internet with the consent of the copyright holder limited as to subjects permitted to communicate – knows or can reasonably know that such content was originally published with the consent of the copyright holder so limited. The latter presumption would consistently indicate that an Internet user – making a not-for-profit subsequent communication of copyrighted content initially communicated on the Internet with the consent of the copyright holder limited as to the subjects permitted to communicate – does not know or cannot reasonably know that such content was originally published with the consent of the copyright holder so limited. Both of these assumptions are also rebuttable. The CJEU could have done this to demonstrate the logical consistency of its case law. However, as noted above, the CJEU chose a different path for autonomous interpretation. However, it is difficult to determine the reasons for this decision. The Renckhoff case was not burdened with pejorative elements as in the judgment of the CJEU of 14 June 2017 in case C-610/15 Stichting Brein v Ziggo BV, XS4ALL Internet BV. One can even say that the facts favored the decision that the criteria 'communication to the public' under Art. 3(1) of Directive 2001/29/EC had not been met. After all, the case is about a student and her presentation, so not only the freedom of expression, which should be respected but also the right to education. Admittedly, the CJEU stated that its interpretation reflected the balance

> "which must be maintained in the digital environment between, on the one hand, the interest of the holders of copyright and related rights in the protection of their intellectual property, guaranteed by Article 17 (2) of the Charter of Fundamental Rights of the European Union and, on the other hand, the protection of the interests and fundamental rights of users of protected subject matter, in particular their freedom of expression and information guaranteed by Article 11 of the Charter of Fundamental Rights, as well as the public interest."[29]

Nevertheless, the ruling lacks proof of the truthfulness of this statement, and a mere statement is not sufficient. There is no in-depth analysis of the essence of the freedom of expression or the right to education, a reference to the relevant case law, or an analytical summary that would confirm that the balance upheld by the CJEU is real. As these elements are missing in the text of the judgment in the Renckhoff case, it seems that the CJEU claims for intellectual property rights, including copyright on the Internet, to have the status of an absolute right. It seems that the CJEU's position is that the balance between the rights of the copyright holder and other legal norms is maintained only if the copyright is fully protected without any prejudice. This interpretative approach is defective and requires a negative assessment.

For this reason, one should be critical of the decision taken by the CJEU in the Renckhoff case. We can argue that the CJEU typically and indicated that the concept of 'communication to the public' was an autonomous concept and its understanding depends on the interpretation of EU law. We can say that the term has its own specific meaning in

29 | Judgement of the CJEU (Renckhoff), Recital 41.

the EU, not necessarily the same as the meaning it may have in the national law of the EU member states or what is commonly assigned to it. While this is true, the autonomous interpretation of the CJEU, like any other, may contain significant errors, implying serious consequences for the exercise of other rights of individuals. If these errors do occur, and it seems that they do occur in the Renckhoff judgment, then it is justified and necessary to point them out, and propose solutions to eliminate the irregularities in question. We can further say that in the Renckhoff case, Advocate General Manuel Campos Sánchez-Bordona[30] was also of the opinion that the CJEU should have taken a different decision. In his opinion,

> "the inclusion on a school's website of an educational work that includes a photographic image freely available to any internet user free of charge, in that the image already appeared on the internet portal of a travel magazine with no warnings regarding restrictions on use, when there is no profit motive and the source is cited, does not constitute a making available to the public within the meaning of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of May 22, 2001, on the harmonization of certain aspects of copyright and related rights in the information society."[31]

This solution is another good alternative to the conclusion given in the Renckhoff ruling. Interestingly, the Advocate General, in his opinion (precisely in Recital 21), included the disputed photograph for illustrative purposes. It seems that he did not expect, according to the later judgment of the CJEU in the Renckhoff case, that he could be held liable for copyright infringement under exactly the same line of argument. This clearly shows the deficits in the Renckhoff ruling. Another argument can be used to challenge the judgment in the Renckhoff case. In line with the established CJEU case law,[32] if the student had made a subsequent communication of copyrighted content initially made available on the internet illegally, that is, without the consent of the copyright holder, the CJEU would have applied the principles and criteria devised in the GS Media case and related rulings. Based on these, it would have concluded that the student, when making a subsequent communication of protected content, did not do so for a profit, and therefore on the presumption that she did not know or could not reasonably have known that such content was initially published without the consent of the copyright holder. This would have meant, first, that there was no infringement of copyright. One must also conclude that in light of the Renckhoff ruling, Internet users must expect a harsher reaction when they hyperlink to content legally available on the Internet, and a more lenient reaction when they hyperlink to content illegally available on the Internet. Logic seems to dictate that this relationship should be reversed. Given the above, one should emphasize that the arguments presented may be considered sufficient to conclude that the decision made in the Renckhoff case was incorrect.

30 | Opinion of Advocate General Manuel Campos Sánchez Bordona delivered on April 25, 2018 in Case C-161/17 Land Nordrhein-Westfalen v Dirk Renckhoff (ECLI:EU:C:2018:279).
31 | Ibid., Recital 129.
32 | Judgement of the CJEU of September 8, 2016 in case C-160/15...; Judgement of the CJEU of 26 April 2017 in case C-527/15...; Judgement of the CJEU of June 14, 2017 in case C-610/15...

5. Censorship of internet content and the Renckhoff case

For this chapter, censorship will mean control and restriction of the activities of Internet users, including their publication of content, particularly on political, moral, or legal grounds.[33] This is a key reservation, as censorship does not cease to be censorship just because it is based on generally applicable law. It then becomes lawful censorship, as opposed to unlawful censorship, which in contemporary states ruled by law should never take place, and any occurrence should be met with a sanction adequate to the seriousness of the violation. However, this does not change that both types of censorship remain, in essence, censorship. Additionally, it does not affect the need to analyze the compliance of the use of censorship with specific standards of the international system for the protection of human rights, in particular the freedom of expression. The fact that censorship is based on a generally applicable law does not mean that it is legitimate. In this context, another issue is the presumption of the consistency of legal acts with the Constitution, which can be rebutted.[34] Legal acts laying down the options for the use of censorship, as regards copyright for this paper, should be reviewed *ex ante* in terms of consistency with the principle of freedom of expression and pluralism. This is an ideal situation. According to Recital 3 of Directive 2001/29/EC, "the proposed harmonization will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellectual property, freedom of expression, and the public interest." Therefore, it seems that such a review of compliance was taken into account by the EU legislator. However, because the CJEU autonomously interpreted the concept of 'communication to the public' as used in Art. 3 (1) of Directive 2001/29/EC, which was not originally defined in Directive 2001/29/EC, it is now necessary to perform an *ex-post* assessment of compliance with the standard of the freedom of expression, taking into account the case-law arguments of the CJEU in the Renckhoff judgment. Moreover, an *ex post* review of legal acts in compliance with the standards for the protection of human rights in legal sciences is common and has positive effects. One of the most important effects of such reviews is the opportunity to detect irregularities in the normative system and propose balanced *de lege ferenda* postulates in order to eliminate these.

6. The freedom of expression standard and the Renckhoff case

It makes little sense to quote the entire freedom of the expression standard. Let it suffice to cite the key important legal bases in force in the EU, the Council of Europe, and

33 | This proposal was developed by the author in another scholarly work.
34 | For example, this presumption, along with rebuttal options, is operative in Poland. In this regard, see: Judgement of the Constitutional Court (CC) of 11 July 2012, case ref. K 8/10; Judgement of the CC of 5 May 2011, case ref. P 110/08; Judgement of the CC of 25 May 2016, case ref. Kp 2/15; Judgement of the CC of 18 March 2004, case ref. P21/02; Radziewicz, 2008, pp. 55–86.

Poland. Pursuant to Art. 11 of the Charter of Fundamental Rights of the European Union[35] (EU CFR),

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority, regardless of the frontiers. 2. The freedom and pluralism of the media shall be respected."

Pursuant to Art. 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms[36] (ECHR),

> "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority, regardless of the frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television, or cinema enterprises."

Pursuant to Art. 54 of the Constitution of the Republic of Poland,

> "1. The freedom to express opinions, acquire, and disseminate information shall be ensured to everyone. 2. Preventive censorship of the means of social communication and the licensing of the press shall be prohibited. Statutes may require the receipt of a permit for the operation of a radio or television station."

Not without significance are other provisions of the EU CFR, the ECHR or the CRP, which indirectly support the implementation of the freedom of expression, which is extremely broad. For example, these include provisions concerning the freedom of the press, freedom and protection of the secret of communication, freedom of conscience and religion, and freedom of artistic creation. The indication of the above legal bases is intended to show that the freedom of expression is guaranteed in international and EU law relevant to the issue discussed in this paper, as well as in Polish law, which in this case is an example of national law. The freedom in question covers all levels of individual activity; it is an expression of the dignity of a person's autonomy and creates opportunities for the full development of personality in the cultural and civilizational environment of the individual.[37] It should be emphasized here that Art. 10 of the ECHR concerns the freedom of all expressions, which covers not only the expression of views through speech but also in written, printed, or artistic forms.[38] Art. 11 of the EU CFR has essentially the same meaning and should be understood similarly, as the Preamble to the EU CFR itself

35 | Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012, p. 391-407).
36 | Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, subsequently amended by Protocols No. 3, 5 and 8 and supplemented by Protocol No. 2 (Journal of Laws of 1993, No. 61, item 284).
37 | In the context of freedom of speech, see Judgement of the CC of 12 May 2008, case ref. SK 43/05; Judgement of the CC of December 14, 2011, case ref. SK 42/09.
38 | Judgement of the CC of February 20, 2007, case ref. P 1/06.

suggests.[39] On the other hand, Art. 54 CRP provides for the freedom to express one's views and to source and disseminate information in verbal, written, and printed forms, including through any means of social communication.[40] This freedom is not absolute and is subject to weighting and limitations, as appropriate. For this reason, Art. 10 of the ECHR, in its paragraph 2, provides for formalities, conditions, restrictions or penalties prescribed

> "by law and are necessary in a democratic society, in the interests of national security, territorial integrity, or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, to prevent the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

In addition, for this reason, Art. 31 CRP provides that

> "Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health, or public morals, or the freedoms and rights of other persons. Such limitations do not violate the essence of freedom and rights."

The conclusion is clear: freedom of expression or its constituent elements may be subject to limitations, but only such that is legally justified. In the case of the Renckhoff judgment, it is difficult to demonstrate such a justification. Let it suffice to indicate what consequences this judgment has in the practice of the functioning of the Internet for the freedom of expression. As there is no criterion of for-profit nature was used in the Renckhoff ruling, it applies to all Internet users. Since this ruling was issued, each internet user should obtain information about copyrighted content that they make available through subsequent communication. More precisely, a user should find out whether, for example, a photograph they share has been made available to the internet with or without the copyright holder's consent. If such consent was given, then what its extent is as to the subjects permitted to communicate. Otherwise, they are putting themselves, like the student or her school in the Renckhoff case, at risk of being held liable for copyright infringement. In practice, this can lead to the paralysis of hyperlinking in any form. It seems, however, that both the proper functioning of the Internet and the realization of the above-mentioned legal norms concerning the protection of human rights on the Internet, in principle, require that posting or publishing hyperlinks be permitted. It is not entirely clear what

39 | 'This Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case law of the Court of Justice of the European Union and of the European Court of Human Rights. In this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention' (Charter of Fundamental Rights...).
40 | Judgement of the CC of February 20, 2007, case ref. P 1/06.

the Internet would look like without hyperlinking. However, it is certain that in this digital environment, hyperlinks are tools that recognize the freedom of expression both in the EU CFR, the ECHR, and the CRP. To make a definitive conclusion, one can and should discuss restrictions on the posting of hyperlinks leading to content illegally available on the Internet. In this case, there is a fair amount of pejorative implications and, at the same time, a strong need to ensure the protection of the legitimate interests of the copyright holder, who has not consented to 'communication to the public' of their content on the Internet. However, in a situation where the copyright holder has consented to the communication of their content on the Internet, they should be aware of the consequences of their choice. One of the major consequences, following from the nature of the Internet, is that a copyrighted work is 'communicated to the public' across the web, without any restrictions on permitted territories, objects, or subjects of communication. Given the unique nature of the Internet, consent of a copyright holder with a limited extent as to the subjects permitted to communicate (e.g., only to users of a selected website) should be deemed highly contrived and one that should not have legal effects, in particular given the objects of the freedom of expression. *De lege ferenda*, a legal presumption should be introduced into the normative system, according to which, when a copyright holder agrees to 'communication to the public' of their work on the internet within the meaning of Art. 3(1) of Directive 2001/29/EC, they know or should reasonably know that due to the specific nature of the internet, such consent is unlimited in terms of time, territory, subjects or objects. This presumption should be legally rebuttable, for example, by an indication by the copyright holder that they have consented to 'communication to the public' within the meaning of Art. 3(1) of Directive 2001/29/EC on a specific website with security measures that deliberately restrict access to the group of subscribers of that website (restrictions preventing the download of copyrighted content). To summarize, given the above, the decision made by the CJEU in the Renckhoff case should also be critically assessed in terms of, as shown in the above analysis, unjustified restriction of the freedom of expression on the Internet.

7. Summary

The Renckhoff ruling introduces censorship on the Internet with normative justification on copyright grounds. This censorship applies to the posting of hyperlinks to content communicated on the internet lawfully, that is, with the consent of the copyright holder. In this ruling, the CJEU failed to use the model it had developed for the admissibility of hyperlinking to content made available on the internet illegally, that is, without the copyright holder's consent. In particular, it did not use the criterion of for-profit nature of 'communication to the public, which provided and, to the extent covering the issue discussed in this paper, could provide a real balance between the standard of the freedom of expression and the legitimate claims of the copyright holder. The argumentation and interpretation of Art. 3(1) of Directive 2001/29/EC adopted in the Renckhoff case appear to be incompatible with the specific nature and content communicated principles of the Internet. The inaccuracy or even defectiveness of this ruling is one thing; its consequences for realizing the freedom of expression on the Internet in practice are another. It may paralyze hyperlinking in any form on the Internet, and thus disrupt the proper

functioning of the Internet and cause an unjustified limitation of the implementation of legal norms related to the freedom of expression in the digital environment. It should be clearly emphasized that the comprehensive analysis carried out in this paper concludes that the court decision in the Renckhoff case may be deemed to be a normatively ungrounded restriction of the freedom of expression on the Internet. Further, it is striking with its illogical disharmony in the degree of severity of the response to a subsequent 'communication to the public' within the meaning of Art. 3(1) of Directive 2001/29/EC, where Internet users must expect a harsher reaction when hyperlinking content legally available on the Internet, and a more lenient reaction when hyperlinking content is illegally available on the Internet. To conclude the scholarly analysis above, first, the judgment in the Renckhoff case should be assessed critically in accordance with the presented arguments and to the substantive extent of these arguments; second, it is proposed that all the *de lege ferenda* postulates proposed in this regard be introduced into law. The latter can be achieved either by amending Directive 2001/29/EC and using the national law to implement this Directive, or a ruling issued by the CJEU, which will depart from the construction adopted in the Renckhoff case.

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(IN)CONSISTENT PRACTICE OF THE SERBIAN CONSTITUTIONAL COURT IN SELECTED CASES OF PROTECTION OF PROPERTY (CASE STUDY)

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ABSTRACT

To illustrate the work of the Constitutional Court in the protection of the right to property, we specify a few of the decisions used as samples in this research. Accompanying them, we present and describe the ECtHR judgements referred to by the Constitutional Court. The decisions provide indication of the Constitutional Court's and the ECtHR's working styles and the impact of the international judicial practice on the Constitutional Court's legal reasoning. In the studied decisions concerning the right to property, the Constitutional Court demonstrated socially responsible behaviour on the one hand, and a degree of inconsistency, even of politicization, on the other hand.

KEYWORDS

Constitutional Court
ECtHR
right to the protection of property
human rights

1. Introduction

Seen in the European circumstances, Serbia has a long tradition of constitutional justice. In 1963, a federal constitutional court of the then SFR Yugoslavia was established—the first one in the socialist countries—with the republics (federal units) each subsequently setting up their own constitutional courts. The Constitutional Court of the Socialist Republic (SR) of Serbia was formed in the same year; however, there was no genuine guarding of the constitution or protection of constitutionality. In the existing political system with all powers vested in a single political party, an effective constitutional judicial review was not even possible. It was the political party that had actual control over the work of public authorities and their acts, thus rendering constitutional judiciary as superfluous or just one ornament of the political system. Control over political trends and legal acts and actions was virtually exercised within the Communist Party.

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The Constitutional Court, undoubtedly, had powers to protect constitutionality and legality, and assess whether general legal acts are constitutional and legal; and there also existed a constitutional complaint in some form for a certain period. The problem was that constitutional judicial review was more a matter of 'agreement' than of law. When a law was found unconstitutional, it was not to be eliminated from the legal order; rather, the parliament would be left an instructive time limit to make the law compatible with the constitution.

The foundations of the existing concept of constitutional judicial power, under which it constitutes an independent organ that protects the constitution, were laid down in the 1990 Constitution of the Republic of Serbia. The Constitutional Court, on a proposal by authorised petitioners or on self-initiative, assesses the compliance of general acts with the constitution and law. Subject to constitutionality and legality review are all general legal acts, including the acts with sub-legal force and even those of local significance (enacted within the local self-government). When found unconstitutional or unlawful, they cease to be effective, with no right of appeal. Decisions of the Constitutional Court in the constitutionality and legality review procedure are final, enforceable, and generally binding (*erga omnes*), while decisions on constitutional complaints affect *inter partes*.

In addition to its primary power to protect constitutionality and legality, the Constitutional Court also performs numerous other duties, standing out among which is deciding on constitutional complaints. The constitutional complaint system in Serbia was initially influenced the most by the German constitutional judiciary.[2] However, unlike Serbian law, German law allows constitutional complaints to be lodged against any measure issued by public authorities, including the acts amending the constitution. Another difference is that the German Constitutional Court rarely annuls court decisions,[3] whereas these are by far the most common subject of constitutional complaints in Serbia (over 90% of the cases).

Over time, human and minority rights protection has become the most important activity of the Constitutional Court in terms of scope. Citizens attach special importance to the constitutional complaint, perceiving it as a legal means (remedy) to eliminate the injustice caused to them by the acts of state bodies.[4] Constitutional complaints are lodged to protect human rights once all available legal remedies are exhausted. This means that the constitutional complaint institution is conceived as a separate and specific remedy used only in exceptional circumstances, namely, significant human rights violations. However, in practice, the constitutional complaint evolved to be a regular remedy, lodged almost always by a party who legally loses a dispute. This 'regular occurrence' of the constitutional complaint can be explained by the fact that court judgements violated some specific constitutionally guaranteed human right. Thus, the Constitutional Court became a regular last instance court (superior even to the Supreme Court of Cassation) annulling court decisions for the sake of protecting human rights. However, broadly viewed, the decision of the Constitutional Court is also not final when it comes to human rights protection. Citizens who believe that their constitutional human rights were violated can file an application to the European Court of Human Rights (ECtHR). The ECtHR decisions

2 | Stanić, 2019, p. 54.
3 | Simović, 2019, pp. 13 and 23.
4 | Manojlović Andrić, 2019, p. 136. Number of cases of constitutional complaints: 13,164 in 2020, 14,112 in 2019, 15,150 in 2018, *Pregled rada*.

are binding, which made the ECtHR practically the last instance court regarding human rights protection in Serbia.

For the Constitutional Court to fit with its powers and, in particular, the duty to protect human rights, specific preconditions must be met. First, the Constitutional Court must actually rather than just nominally enjoy constitutional guarantees of independence and autonomy, as the letter of the Constitution says (Art. 166). This means that no one, referring, first of all, to the bodies of political power or political organisations, may exert influence over the work of the Constitutional Court. Should this be the case, however, the same subject violating a human right (public authority) would also influence the decision on whether the respective human right was violated. In a rule of law system, such as Serbia, as constitutionally proclaimed, these pressures must not exist. The practice of the Constitutional Court must repeatedly confirm their absence, simply by being impartial.

For the Constitutional Court to suit the role of an authoritative human rights protector, the law requires that its judges must be reputable lawyers, who have rich knowledge of the law and act with professional and personal integrity. The Constitution increased the number of judges to 15 (formerly, there were nine), which proved to be justified given the number of cases tried by the Constitutional Court and, in particular, the abundance of constitutional complaints. For an individual to become a Constitutional Court judge, they must be a 'prominent lawyer' (a term lacking more precise determination) of at least 40 years of age and with at least 15 years of experience practising law. The assumption that judges will be independent human rights protectors is further supported by the prohibition to perform other public or professional functions or duties, except for the professorship at a law faculty in Serbia (Art. 173). This way, Constitutional Court judges avoid interactions that would cause a conflict of interest. If we add to this mix the prohibition of membership in political parties, the constitutional guarantees for judicial immunity (Arts. 55 and 173 of the Constitution), and the nine-year term of office, the Constitutional Court with such personnel meets the conditions of being an independent human rights protector. Even if their work does not 'please' the political power (the ruling party), Constitutional Court judges are protected from being replaced because the conditions for their dismissal from office are enumerated in the Constitution, and not an inferior regulation.

2. Constitutional complaint and right to property

Fundamental human rights form an indispensable part of the constitutions of modern states. Given that constitutional courts guard the constitution, that is, all its provisions, it logically follows that they also protect constitutional human rights. A legal remedy used in constitutional judicial protection procedure is the constitutional complaint,[5] and its effect is general—it protects all human rights guaranteed by the Constitution. Ordinary (regular) courts also protect human rights; however, it was found that this protection was often inadequate and that constitutionally guaranteed rights must be protected by a separate remedy apart from the already existing ordinary and extraordinary ones. A constitutional court's primary power—to protect the constitution, that is, constitutionality

5 | Elsewhere termed differently, for example, d'Amparo lawsuit (Spain, Mexico), state-law appeal (earlier in Austria).

as a legal order with the rule of law— is made complete only with the constitutional complaint. It also guarantees the constitutional legal status of citizens, who are typically an objectively weaker party in judicial disputes against the State. The right to lodge constitutional complaints remained a remedy not only in the hands of natural persons who are the subjects of all human rights but also in the hands of legal entities, for protection of the rights of which they are potential holders. One of these rights is the property right, or specifically, the protection of the right to property.

A constitutional complaint is lodged by one whose rights have been violated (it is not *actio popularis*) or another person who has received authorisation to do so on behalf of the person believing that their human rights have been violated. According to the subsidiarity principle, Serbian law requires prior exhaustion of all remedies for human rights protection before the courts (some states, like Spain, do not have this requirement). The number of lodged constitutional complaints is potentially reduced this way, although it remains too high in reality.

The effect of the decision on a constitutional complaint is limited to the concrete dispute (*inter partes* effect), with the decision not to resolve the case on the merits; rather, if a constitutional complaint is found admissible, the contested decision of the court or other authority is invalidated and the case is sent back for retrial. However, Serbian law allows the Constitutional Court to award compensation for damages within the limits of the claim (or to determine how its decision will be enforced), for example, in the property rights protection proceedings, which would, to some extent, constitute ruling on the merits. This provision further deepens the relationship between the Constitutional Court and the judicial branch of power—the one relationship that remained unspecified by the Constitution—only to take on a highly intensive form through the institution of a constitutional complaint. The Constitutional Court, here, controls the judicial branch with respect to human rights protection, although the Constitution specifies that a judicial decision can be reconsidered only by an authorised court and that it cannot be subjected to extrajudicial control (Art. 145 of the Constitution). This means that it also cannot be a subject of control by the Constitutional Court, given that the latter, according to the Constitution, does not form part of the judicial branch. However, the theory points out, and we agree with it, that a constitutional complaint is an exceptional legal remedy that makes it possible for all branches of power, including the judicial, to conform to the Constitution.[6] The practice, as we see, confirms this point.

However, human rights protection does not stop with the Constitutional Court, and with it does not end the reconsideration of judicial decisions, as there exists the right to apply to the ECtHR. There are conditions and time limits prescribed for filing an application to the ECtHR, one of which is that the specific human right in question must be protected by the ECHR.

John Locke claimed that the right to property is one of the essential rights, or specifically, that together with the rights to life and liberty, it constitutes one of the three natural rights of men.[7] This doctrine was another factor likely to have contributed to the property right finding its way in the French Declaration of the Rights of Men and Citizens (*La Déclaration des droits de l'homme et du citoyen*, 1789) as a 'sacred and inviolable' right.

6 | Simović, 2019, p. 18.
7 | Simović and Zekavica, 2020, p. 261.

Subsequently, this right found its way in the acts of international law, the UN Universal Declaration, and the ECHR.

The right to property is classified under economic human rights (a group of economic, social, and cultural rights) and guaranteed both by the Constitution of Serbia and the ECHR. Under the right to property (Art. 58), the Constitution guarantees the enjoyment of property rights, the most important of which is the ownership right, which includes the rights to use and dispose of property (*usus, fructus, abusus*).[8]

In the Constitution, the right to property reads as follows:

> 'Right to property
> Article 58
> Peaceful tenure of a person's own property and other property rights acquired by the law shall be guaranteed.
> Right of property may be revoked or restricted only in public interest established by the law and with compensation which cannot be less than market value.
> The law may restrict the manner of using the property.
> Seizure or restriction of property to collect taxes and other levies or fines shall be permitted only in accordance with the law'.

Moreover, in the further provisions (Arts. 86–88), the Constitution specifies some additional property-related issues, namely the equality of all forms of ownership (private, cooperative, and public), with separate provisions dealing with public assets and land.

The Protocol (1952) to the ECHR also protects the right to property and contains three rules. It first lays down the general principle of the peaceful enjoyment of property (first sentence of the first para.). The second rule covers expropriation (second sentence of the first para.). The third rule recognises the possibility of controlling the use of property according to the general interest (second para.):[9]

> 'Article 1:
> Protection of property
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties'.

With the right to property being protected both by the Constitution and ECHR, preconditions are set for the protectors of these regulations—the Constitutional Court and the ECtHR—to act. They enter into a legal relationship with the same goal of protecting human rights. Both acts enshrine guarantees for the peaceful enjoyment of property, but it does not mean that this right is unlimited. Both acts also provide that the right to property and the use of property may be restricted in a manner specified by law and in the general (public) interest, in accordance with the general rules of international law.

8 | Marković, 2021, p. 116.
9 | Mickonytė, 2020, p. 3.

The relationship between the Constitutional Court and the ECtHR is one in which the former accepts the latter's legal views and applies them as a source of law. This reliance on the practice of the ECtHR is especially true of the 'pilot judgements' that it uses as a means to resolve a case on the basis of which it then resolves similar 'clone cases'.[10] The practice of the ECtHR is referred to as a 'subsidiary' source of law (rather than a formal one); although its increasingly rich jurisprudence has influenced that in concrete constitutional human rights disputes, due regard is given to the standards of that court.[11] The Constitutional Court accepts the jurisprudence of the ECtHR as *res iudicata* and uses the argumentation of the ECtHR as *res interpretata*.[12] The ECtHR has gained the role of an authority figure to the Constitutional Court, primarily for opportune, practical reasons. If the Constitutional Court fails to act in observance of the ECtHR practice from previous cases with appropriate (similar) factual circumstances, its decisions on constitutional complaints have every prospect of being annulled. Sometimes, the signal to the Constitutional Court about the need to apply or harmonise practice with the ECtHR also comes from a political body, the Committee of Ministers of the Council of Europe.[13]

Nevertheless, over time, and in keeping with the social developments, even the ECtHR was changing its views on violations of some human rights and on the specific substance of those rights (e.g. the right to change sex), as did the practice of the Constitutional Court. Moreover, the examples that follow will also show that the Constitutional Court repeatedly, on a self-initiative, departed from the previous practice regarding the protection of the right to property (and the right to a fair trial), only to return to it again, although the views of the ECtHR have never changed in this respect.

This case study uses several cases to describe the practice of the Constitutional Court, which has a significant influence on Serbian social relations. This influence is more intensive and socially more severe with respect to the right to property (the peaceful enjoyment of property), referring to the outstanding and unpaid dues (salaries and social insurance benefits) to employees of social (and state) companies undergoing insolvency (liquidation) or restructuring procedure. What is essential (revolutionary) about it is that this debt, according to the ECtHR, and the decision of the Constitutional Court, should be paid by the State as the owner at that time. Put differently, the State is responsible for the debts of companies with majority socially-owned capital. This is a specific situation that arose from the collapse of the socialist socio-economic system when many companies had gone bankrupt before the process of their respective privatisation was finalised under new and still unsteady business market conditions. It is in this and similar cases that a 'positive activism' of the Constitutional Court came into play in support of broader human rights protection.[14]

The remaining three decisions of the Constitutional Court concern cases neither typical of a socio-political system nor so common in the practice of the Serbian Constitutional Court. These cases involve customs offences—a topic of potentially increasing relevance in the context of Europe—currently massively re-establishing rigid state borders. In other words, the passengers, sometimes without even being aware of the

10 | Ribičič, 2012, p. 97.
11 | Simović et al, 2018, p. 75.
12 | Krstić and Marinković, 2016, p. 266.
13 | Plavšić, 2019, p. 260.
14 | Nastić, 2019, p. 302.

customs regulations, carry money exceeding the amount of EUR 10,000 across the border without reporting it. Doing so, they commit a misdemeanour (could be a crime elsewhere) and a customs offence, which implies the imposition of a sanction and a measure to confiscate the money in the amount exceeding the allowed limit. The Constitutional Court would subsequently revoke the imposed measure and order the return of confiscated money, adhering to the views and practice of the ECtHR. Nevertheless, what makes the Constitutional Court cases described here distinctive is that within a short time span, the Constitutional Court completely changed its approach to almost identical facts by providing merely some general and more political rather than legal arguments.

In the specified cases, constitutional complaints were also lodged due to violations of the right to a fair trial; however, in these cases, it constitutes an accessory issue. Invoking violation of the right to a fair trial often 'accompanies' violation of another human right in the constitutional complaint, the protection of which is primarily sought, due to a party being dissatisfied with the decisions of previous instances, regarding them as unfair. Most frequently, previous decisions violated the right to adjudication within a reasonable time. The reasons are either the excessive length of the proceedings or the enforceable judgement execution procedure taking too long or never being conducted. The examples that follow also confirm that 'the Constitutional Court has crossed a long path to develop the substance, guarantees, criteria, and standards of human rights, in large part owing to the ECtHR'.[15]

3. Right to a fair trial and right to property

The **Constitutional Court**, in the case of **Už – 775/2009** (19.4.2012) upheld the constitutional complaint and established a violation of the complainant's rights to trial within a reasonable time and the peaceful enjoyment of property guaranteed under Art. 32 (1) and Art. 58 (1) of the Constitution of the Republic of Serbia, respectively. The Court also established the right of the complainant to the compensation for pecuniary damage in the amount determined in the writ of execution and paid from the budget.

Regarding the assessment of constitutional complaint allegations on the violation of the right to trial within a reasonable time, the Constitutional Court found that the enforcement proceedings had lasted for three years and four months and that the enforcement had not been carried out.

As the 'notion of reasonable duration of court proceedings is a relative category, dependent on a range of factors, and primarily the complexity of legal issues and the facts of a particular case, behaviour of the complainant, actions by courts in charge of the proceedings, as well as the relevance of the stated right to the complainant, the Constitutional Court examined whether and to what extent the stated criteria influenced the excessive length of the proceedings' and found that in the enforcement proceedings before the municipal court, the complainant's right to trial within a reasonable time, guaranteed by the provision of Art. 32 (1) of the Constitution, had been violated.

With respect to the second right stated in the constitutional complaint, the Constitutional Court also found a violation, since 'the omission by competent authorities

15 | Šurlan, 2019, p. 255.

to execute the final and enforceable judgment made in favour of the complainant for a period longer than three years also constitutes a violation of the complainant's right to the peaceful enjoyment of property acquired by that judgment, which right is guaranteed by the provision of Article 58 (1) of the Constitution'. Here, it is the State that omits to enforce the final judgement, thus violating the right to the peaceful enjoyment of property, which was also confirmed in the judgements of the European Court of Human Rights in the cases of *Vlahović v Serbia* of 16 December 2008 and *Kačapor and others v Serbia* of 15 January 2008. Equally important is the legal view that 'any monetary claim awarded by a final court decision becomes the property of the creditor' and that, accordingly, failure to enforce the court decision adjudicating that claim constitutes a violation of the right to the peaceful enjoyment of property'.

The major importance of this decision is practical and concerns the possibility of collecting the awarded monetary claim, that is, the exercise of the right to property by the very use of that property. The Constitutional Court has here accepted the case law of the European Court of Human Rights (judgement *Grišević and others v Serbia* of 21 July 2009, *Kačapor and others v Serbia* of 15 January 2008, *Crnišanin and others v Serbia* of 13 January 2009) and confirmed the state's liability for the debts of companies with majority social capital (social ownership). As these include companies that ceased to operate and lack sufficient assets to pay off their debts, such as this monetary claim (unpaid salaries), the state must pay those companies' debts and settle the material damage resulting from violation of the right to the peaceful enjoyment of property, also guaranteed under Art. 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Another view the Constitutional Court accepted from the European Court of Human Rights (case *Milunovic and Čekrlić v Serbia*) is that in cases where it is reasonable, the comprehensive constitutional compensation should also include a compensation for pecuniary and non-pecuniary damages. The Constitutional Court had, in this specific case where the enforcement proceedings had been instituted to settle an employment claim, ruled that the constitutional compensation also include the compensation for pecuniary damage, to be paid from the state budget, besides the established violation of rights.

This outcome is essential for a positive assessment of the effectiveness of the remedy—constitutional complaint—as it resulted in a pecuniary (monetary) payment to the complainant whose right to the peaceful enjoyment of property had been violated.

The ECtHR (Court) in the case of ***Kačapor and others v Serbia*** (15.1.2008) established a violation of the right to a fair trial (from Art. 6, para. (1) of the Convention), the right to the protection of property (guaranteed under Art. 58, para. (1) of the Constitution of the Republic of Serbia, and Art. 1 of Protocol No. 1 to the ECHR), and, importantly, that the respondent state must, from its own funds, pay the respective applicants the sums awarded in the final domestic judgements rendered in their favour.

This judgement made it possible to effectively protect the right to property in many similar cases conducted before public authorities (primarily the courts) in Serbia. This effective protection means debt collection—pecuniary and non-pecuniary damage claims—from the state (plus legal costs and interest) and, therefore, from the budget, when it is not possible to do so from the debtor, a company in bankruptcy.

The applicants were employed in the social company (with 'social capital' in the political system of 'self-governance') against which a bankruptcy proceeding was instituted. Their claims had been recognised in the final court judgement but, in the enforcement

proceedings (which is considered a 'trial', see *Hornsby v Greece*, the judgement of 19 March 1997), the debtor could not make the payment due to lack of assets.

The Court first found that the applicants did not have access to effective remedies (under Art. 35 (1) of the Convention) in the enforcement proceedings and, hence, rejected the government's objection in that respect. The Court also rejected the government's argument that it could not be held responsible for companies in social ownership.

The key view for property rights protection presented in this case is that the debtor, despite being a separate legal entity, does not enjoy 'sufficient institutional and operational independence from the State' and that it had mainly been controlled by the Privatisation Agency as a state authority. On this basis, the obligation was established of the State to pay the outstanding debts to the applicants. The Court further holds that the State cannot cite the lack of its own or the debtor's funds as an excuse for non-enforcement in the present case.

The Court concludes that the Serbian authorities had not taken the necessary measures to enforce the final judgements in question. Therefore, there had been a violation of the right to a fair trial. Omission by the State to enforce the judgements of its own bodies in the present case constitutes an unjustified interference with the applicants' right to the peaceful enjoyment of property, which means the restriction of that right (see *Burdov v. Russia*, No. 59498/00, § 40, ECHR 2002-III).

As the applicants' claims must be accepted, the government will pay each of the applicants the sums awarded in the final judgements (pecuniary damage), the sum determined by the length of the periods of non-enforcement of the final judgements in question (non-pecuniary damage), and the costs of the procedure and the default interest.

4. Right to property and right to a fair trial

(I)

The Constitutional Court, in the case of **Už – 367/2016** (7.6.2018) upheld the constitutional complaint filed for violation of the right to property (Art. 58, para. 1 of the Constitution; Art. 1 of Protocol No. 1 to the Convention) and the right to a fair trial (Art. 32, para. 1 of the Constitution).

The complainant (A. A.) committed a customs offence by failing to declare money (over EUR 10,000) when entering Serbia. The detected cash exceeding the allowed limit was temporarily seized from him (EUR 10,000) at the border crossing as an object of offence. In the first instance, the Misdemeanour Court found him guilty of the offence (under Art. 63, para. 1, item 14 of the Act on Foreign Exchange Transactions), and imposed a fine (RSD 30,000) and a protective measure of confiscation of the object of the offence—cash of a value of EUR 10,000. The first-instance judgement was affirmed by the decision of the Misdemeanour Court of Appeal.

The complainant holds that the imposed protective measure—the confiscation of EUR 10,000—exceeds the purpose of protective measures application because it is manifestly disproportionate to the substance of the offence charged. It is further stated that the confiscated money is of lawful origin and incurs no loss to the state, and that due regard had to be given to the balance between the general interest and the right to the peaceful enjoyment of property, which was grossly upset in this case.

The Constitutional Court, in keeping with the practice of the European Court of Human Rights (*Ismayilov v Russia*, no. 30352/03, 6 November 2008, *Gabrić v Croatia*, no. 9702/04, 5 February 2009, and *Grifhorst v France*, no. 28336/02, 26 February 2009), examined whether the three cumulative conditions were satisfied for the seizure of property.

Assessing the existence of the first condition—whether the deprivation of possessions is provided for by law, the Constitutional Court finds that the protective measure, that is, confiscation of the object of the offence, is recognised in the laws of the Republic of Serbia. Examining the second condition—whether there is a justified and necessary public interest to deprive the complainant of his property rights, the Constitutional Court concludes that, by law, money can be brought in or taken out of the Republic of Serbia if the sum exceeding EUR 10,000 is declared and the confirmation receipt thereof obtained, which, in the present case, had not been declared. In assessing the fulfilment of the third condition—whether, in the deprivation of property rights, a fair balance is struck between the public interest and the interest of the individual whose possessions are being confiscated, the Constitutional Court starts by referring to the ECtHR case law that the fair balance or the required proportionality between the public interest and the private interest will not be achieved if the person concerned bears an individual and excessive burden (see, among others, the judgements in the cases of *Ismayilov v Russia* of 6 November 2008, § 38; *Gabrić v Croatia* of 5 February 2009, § 39; *Grifhorst v France* of 26 February 2009, § 94; *Boljević v Croatia* of 31 January 2017, § 41).

The Constitutional Court concludes that the interference with the peaceful enjoyment of property is proportionate if it corresponds to the severity of the violation, and the sanction to the gravity of the committed offence and the consequence it produces. The Court must also be mindful of whether the commission of the offence incurs any loss to the state. The Constitutional Court holds that, in the present case, there had been a breach of proportionality between the sanctioning of the infringement of public interest and the constitutionally guaranteed right of an individual to the peaceful enjoyment of property.

The Constitutional Court further concludes that the confiscation of the object of the offence, in whole, along with the imposed fine, constitutes an excessive burden on the complainant, and that, accordingly, the protective measure—as a measure aimed at protecting the public interest—had not been proportionate to the protection of the complainant's right to the peaceful enjoyment of property. Hence, the Constitutional Court established a violation of the complainant's right to property guaranteed in Art. 58(1) of the Constitution.

In deciding on the violation of the right to a fair trial, the Constitutional Court proceeds from the guarantees of the right to a fair trial set by the European Court of Human Rights, starting from the court's duty to state the reasons for its decisions (see *Ruiz Torija v Spain* of 9 December 1994, § 29). The explanation must contain clear, precise, and understandable reasons, appropriate to the circumstances of a particular case, and cannot be of a lapidary (arbitrary) character (see *Georgiadis v Greece* of 29 May 1997, § 43, and *Higgins and others v France* of 19 February 1998, § 43).

In the present case, the Constitutional Court fails to observe that the Misdemeanour Court of Appeal used due regard in considering the motives and circumstances under which the offence had been committed, and that it applied and interpreted the said legal provision in its entirety, that is, whether the protective measure of confiscation of the object of the offence would equally fulfil its purpose through partial confiscation. The

Constitutional Court concludes that the contested misdemeanour judgement contains no constitutionally and legally acceptable explanation of the grounds on which, in the present case, it was assessed that the purpose of the protective measure would not be fulfilled by partial confiscation of the object of offence, under the applicable law.

Therefore, the Constitutional Court established a violation of the complainant's right to a reasoned judicial decision as an element of the right to a fair trial guaranteed in Art. 32(1) of the Constitution.

In **the ECtHR** (the Court) case of ***Boljević v Croatia*** (31.1.2017, Application no. 43492/11) the applicant complained under Art. 1 of Protocol No. 1 that the decision to confiscate EUR 180,000 from him for having failed to declare that sum to the customs had been excessive and, thus, in violation of his right to property. The applicant also complained of a violation of his right to a fair trial.

On 6 February and 4 March 2009, the applicant entered Croatia from Montenegro and deposited—on each occasion—the sum of EUR 90,000 with a commercial bank in Dubrovnik, without declaring these amounts to the customs authorities. On 30 March 2009, the applicant ordered a transfer of EUR 95,000 from his bank account to the account of a certain Mr S. K. in a bank in the United Arab Emirates. The Money Laundering Prevention Office stated that the funds had originated from the two above-mentioned cash deposits of EUR 90,000 each. On 2 June 2009, administrative offence proceedings were instituted against the applicant before the Administrative Offences Council of the Ministry for his failure to declare the sum of EUR 180,000 while entering Croatia, an administrative offence as defined in Section 40(1) of the Foreign Currency Act and Section 74 of the Prevention of Money Laundering and Financing of Terrorism Act. On the same day, the Administrative Offences Council ordered the bank to transfer EUR 180,000 from the applicant's account to the Ministry's account, to be kept there until the conclusion of the administrative offence proceedings.

By a decision of 19 October 2009, the Administrative Offences Council found the applicant guilty of the administrative offence in question and fined him 10,000 Croatian kunas (HRK) and imposed a protective measure, confiscating EUR 180,000. By a decision of 23 December 2009, the High Court for Administrative Offences dismissed the applicant's appeal and upheld the Administrative Offences Council's decision. By a decision of 9 December 2010, the Constitutional Court declared the applicant's constitutional complaint inadmissible on the grounds that the case did not raise a constitutional issue.

It was not disputed between the parties that the decision to confiscate EUR 180,000 from the applicant constituted an interference with his right to property. The Court initially finds that interference with the applicant's property right was provided by law.

The Court had to specifically examine whether the interference struck the requisite fair balance between the demands of the general interest of the public and the requirements for the protection of the applicant's right to property (see *Ismayilov v Russia*, no. 30352/03, § 29, 6 November 2008, § 30; *Gabrić v Croatia,* no. 9702/04, 5 February 2009, § 33; *Grifhorst v France*, no. 28336/02, §§ 85–86, 26 February 2009; and *Moon v France*, no. 39973/03, § 45, 9 July 2009). The Court considers that requisite balance will not be achieved if the applicant has had to bear an individual and excessive burden (see *Ismayilov v Russia*, cited above; *Gabrić v Croatia*, cited above).

The Court importantly notes that the act of bringing foreign currency in cash into Croatia was not illegal under Croatian law. Moreover, there was nothing to suggest that the authorities sought to forestall any criminal activities, such as money laundering, by

confiscating the money. The only illegal (but not criminal) conduct attributed to him with respect to the money was his failure to declare it to the customs authorities.

In the instant case, the confiscation measure in question was not intended to be pecuniary compensation for damage, as the State had not suffered any loss as a result of the applicant's failure to declare the foreign currency, but was deterrent and punitive in its purpose. The applicant was fined for the administrative offence of failing to declare money at customs. It has not been convincingly shown or argued by the government that the fine alone was not sufficient to achieve the desired deterrent and punitive effect, and prevent future breaches of the declaration requirement. In these circumstances, the Court concludes that the confiscation of the entire amount of money that should have been declared as an additional sanction to the fine was disproportionate in that it imposed an excessive burden on the applicant. Accordingly, there has been a violation of Art. 1 of Protocol No. 1.

Without relying on any Article of the Convention, the applicant complained of a violation of his right to a fair trial; he contended that he had not been informed of his right to be represented by counsel. The Court notes that this complaint was raised for the first time in the applicant's reply on 5 March 2015 to the government's observations, more than four years after the Constitutional Court's decision. Accordingly, the complaint had been submitted out of time and was rejected in accordance with Art. 35 §§ 1 and 4 of the Convention.

(II)

The Constitutional Court, in the case of **Už – 1202/2016** (18.11.2018) upheld the constitutional complaint alleging violation of the right to property (Art. 58(1) of the Constitution, Art. 1 of Protocol No. 1 to the Convention), while dismissing it in part claiming violation of the right to a fair trial (Art. 32(2) of the Constitution).

The complainant (E. K.) committed a customs offence by failing to declare money (over EUR 10,000) when entering Serbia. The detected money in the amount exceeding the allowed limit was temporarily seized from him (EUR 8,900) at the border crossing as an object of the offence. In the first instance proceeding, the Misdemeanour Court found him guilty of the offence (under Art. 63, para 1, item 14 of the Act on Foreign Exchange Transactions), fined him (RSD 15,000), and imposed a protective measure of confiscation of the object of the offence—cash of a value of EUR 8,900. The judgement made in the first instance was affirmed by the decision of the Misdemeanour Court of Appeal.

The complainant holds that the imposed measure—the confiscation of EUR 8,900—is dramatically disproportionate to the substance of the offence charged, that is, the very act of not declaring money. It is further stated that the imposed fine (RSD 15,000) served the purpose of punishment, of general and specific prevention, and, therefore, full protection of the public interest, that the money comes from a lawful source, that it does not incur any damage to the state, and that the court grossly upset the balance between the general interest and the right to the peaceful enjoyment of property.

Observing the case law of the European Court of Human Rights (*Ismayilov v Russia*, no. 30352/03, 6 November 2008, *Gabrić v Croatia*, no. 9702/04, 5 February 2009, and *Grifhorst v France*, no. 28336/02, 26 February 2009), the Constitutional Court examined whether the three cumulative conditions for property seizure were satisfied.

Assessing the existence of the first condition, that is, whether the deprivation of possessions is provided for by law, the Constitutional Court finds that the protective measure—confiscation of the object of the offence—is recognised in the laws of the

Republic of Serbia. Examining the second condition, that is, whether there is a reasonable and necessary public interest in depriving the complainant of his property rights, the Constitutional Court concludes that, by law, money can be brought in or taken out of the Republic of Serbia if the sum exceeding EUR 10,000 is declared and the confirmation receipt thereof obtained, which money, in the present case, had not been declared. In assessing the fulfilment of the third condition, that is, whether, in the deprivation of property rights, a fair balance is struck between the public interest and the interest of the individual whose possessions are being confiscated, the Constitutional Court concludes that interference with the peaceful enjoyment of property is proportionate if it corresponds to the severity of the violation and the sanction to the gravity of the committed offence and the consequence it produces. Additionally, the Court must be cautious of whether the commission of an offence incurs any loss to the state.

The Constitutional Court assessed that confiscation of the object of the offence in its entirety (while the law also provides for partial seizure), together with the imposed fine, posed an excessive burden on the complainant. Therefore, the imposed protective measure, as one aimed at protecting the public interest, was not proportionate to the protection of the complainant's right to the peaceful enjoyment of property. Hence, the Constitutional Court established that the complainant's right to property had been violated.

As for the part of the constitutional complaint alleging violation of the right to a fair trial due to the impossibility of using one's own language (Turkish), the Constitutional Court dismissed it because the complainant did use his native language in the proceedings with the assistance of an interpreter.

In a separate concurring opinion (a single judge), among others, it was stated that the Constitutional Court had made a shift in its reasoning relative to its first upholding decision in the matter of violation of human rights manifested in the misdemeanour courts' judgements, with respect to foreign currency offences (Už-367/2016). Although the two mentioned upholding decisions were rendered in a closely related time frame by the same judicial panel on the constitutional complaints lodged by the same lawyer invoking violation of the same human rights, they received different responses from the Constitutional Court. The first decision (Už-367/2016) found a violation of Art. 58(1) and Art. 32(1) of the Constitution, while the second found a violation of Art. 58(1) and dismissed the complaint with respect to Art. 32.

In **the ECtHR** (the Court) case of ***Gabrić v Croatia*** (5.2.2009, Application no. 9702/04), the applicant complained under Art. 1 of Protocol No. 1 that the authorities had unlawfully taken away the money she had obtained through a housing loan. Further, the applicant complained under Art. 6 § 1 of the Convention that the administrative offences proceedings were unfair and that the domestic courts involved were not impartial, and under Art. 14 that she had been discriminated against on the basis of her nationality and ethnic origin (Serbian).

When the applicant (Darinka Gabrić), on her way from Bosnia and Herzegovina to Germany, was stopped by the Croatian customs officers, they found undeclared goods and 30,500 German Marks (DEM), which she had failed to declare under the Foreign Currency Act and the Prevention of Money Laundering Act. The customs officers seized DEM 20,000 while allowing the applicant to keep the remaining DEM 10,500 as the sum she was not required to declare pursuant to the mentioned legislation. The applicant informed the customs officers that she had obtained the money through a bank loan in Germany and had been carrying it back there.

The Ministry of Finance found the applicant guilty of having committed an administrative offence and fined her HRK 6,000. At the same time, the Ministry imposed a protective measure of confiscating DEM 20,000. The High Court for Administrative Offences dismissed the applicant's appeal and upheld the Ministry's decision. Finally, the Constitutional Court dismissed her complaint.

In the explanation of its decision, the Court first reiterates its consistent approach that a confiscation measure, even though it involves a deprivation of possessions, nevertheless constitutes control of the use of property (within the meaning of the second para. of Art. 1 of Protocol No. 1, see *Riela and Others v Italy* (dec.), no. 52439/99, 4 September 2001; *Arcuri and Others v Italy* (dec.), no. 52024/99, ECHR 2001-VII; *C.M. v France* (dec.), no. 28078/95, ECHR 2001-VII, etc.).

The Court further notes that the parties were also in agreement that the interference was lawful, as the confiscation was based on Croatian law.

However, the Court had to specifically examine whether the interference struck the requisite fair balance between the demands of the general interest of the public and the requirements of the protection of the applicant's right to property. In other words, the Court examines whether the confiscation of money imposed a disproportionate and excessive burden on her.

The Court considers that, to be proportionate, the interference should correspond to the severity of the infringement and the sanction to the gravity of the offence it is designed to punish—in the instant case, the failure to comply with the declaration requirement—rather than to the gravity of any presumed infringement which has not, however, actually been established (such as an offence of money laundering or evasion of customs duties). The confiscation measure in question was not intended as pecuniary compensation for damage, as the State had not suffered any loss because of the applicant's failure to declare the money, but was deterrent and punitive in its purpose (compare *Bendenoun v France*, 24 February 1994, § 47, Series A no. 284). In the instant case, the applicant had already been fined for the administrative offence of failing to declare the money at the customs. It has not been convincingly shown or argued by the government that sanction alone was not sufficient to achieve the desired deterrent and punitive effect and prevent future breaches of the declaration requirement. In these circumstances, in the Court's view, the confiscation of the entire amount of the money that should have been declared as an additional sanction to the fine was disproportionate, in that it imposed an excessive burden on the applicant. Accordingly, there has been a violation of Art. 1 of Protocol No. 1.

Regarding other alleged violations of the Convention, the Court considers that those complaints are inadmissible under Art. 35 § 3 as manifestly ill-founded and must be rejected pursuant to Art. 35 § 4 of the Convention.

(III)

In the case of **Už – 5214/2016** (24.10.2019) **the Constitutional Court** rejected the constitutional complaint alleging violation of the right to property (Art. 58(1) of the Constitution, Art. 1 of Protocol No. 1 to the Convention), while dismissing it in part claiming violation of the right to a fair trial (Art. 32(2) of the Constitution).

The complainant (A. O.) committed a customs offence by failing to declare money (over EUR 10,000) when entering Serbia. The detected money in the amount exceeding the allowed limit was temporarily seized from him (EUR 19,000) at the border crossing as an object of the offence. In the first instance proceeding, the Misdemeanour Court found

him guilty of the offence (under Art. 63, para. 1, item 14 of the Act on Foreign Exchange Transactions), fined him (RSD 40,000), and imposed a protective measure of confiscation of the object of the offence—cash of a value of EUR 19,000. The judgement made in the first instance was affirmed by the decision of the Misdemeanour Court of Appeal.

The complainant holds that the imposed protective measure—the confiscation of EUR 19,000—is dramatically disproportionate to the substance of the offence charged, that is, the very act of not declaring money. It is further stated that the imposed fine (RSD 40,000) served the purpose of punishment, of general and specific prevention, thereby affording complete protection of the public interest, that the money comes from a lawful source, that there is no loss to the state, and that the court grossly upset the balance between the general interest and the right to the peaceful enjoyment of property.

Observing the case law of the European Court of Human Rights, the Constitutional Court examined whether the three cumulative conditions for property seizure were satisfied. Assessing the existence of the first condition, that is, whether the deprivation of possessions is provided for by law, the Constitutional Court finds that the protective measure—confiscation of the object of the offence—is recognised in the laws of the Republic of Serbia. Examining the second condition, that is, whether a reasonable and necessary public interest exists in depriving the complainant of their property rights, the Constitutional Court concludes that, in the present case, the confiscation 'facilitates the implementation of monetary and exchange rate policies and thus the provision of the financial stability of the Republic of Serbia, public order protection or prevention against its breaches, as well as influencing the offender to never commit an offence again'. Evaluating the fulfilment of the third condition, that is, whether, in the deprivation of property rights, a fair balance is struck between the public interest and the interest of the individual whose possessions are being confiscated, the Constitutional Court concluded that complete confiscation of the object of the offence does not pose an excessive burden on the complainant. The protective measure imposed, as a measure aimed at protecting the public interest, is proportional to the protection of the complainant's right to the peaceful enjoyment of property.

On these grounds, the Constitutional Court rejected this part of the complaint. In the part concerning violation of the right to a fair trial due to the lack of possibility to use own language (Turkish), the Constitutional Court dismissed the constitutional complaint because the complainant used his native language during the proceedings with the assistance of an interpreter.

The Constitutional Court particularly emphasised that, in making this decision, it recalled the decisions of the European Court of Human Rights (*Ismayilov v Russia*, no. 30352/03, 6 November 2008, *Gabrić v Croatia*, no. 9702/04, 5 February 2009, and *Grifhorst v France*, no. 28336/02, 26 February 2009), but found that circumstances of this case differed from those of the aforementioned cases in that the complainant was indisputably aware of the obligation to declare cash, that he divided the money and hid it in multiple spots, that he had been giving false statements on the amount of money in his possession, and that he failed to submit relevant proof of its lawful origin.

In a separate opinion (two judges), it is stated that, with its rejecting decision, the Constitutional Court made another shift in its approach in the matter of protection of property rights with respect to foreign currency offences: it first upheld the constitutional complaint claiming violation of the right to a fair trial and the right to property (Už – 367/2016 of 7 June 2018), in the second decision, it upheld the complaint regarding the violation of

the right to property, while dismissing it in respect of the alleged violation of the right to a fair trial (Už – 1202/2016 of 8 November 2018), and in the third instance involving this decision, it rejected the protection of property rights and dismissed the protection of the right to a fair trial. The separate opinion further stated that the Constitutional Court failed to show the property seizure as justified given the necessity imposed by the public interest and that, considering the circumstances of the case, in line with the ECtHR case law (*Gyrlyan v Russia,* of 9 October 2018), the total sum seized through the enforcement of the protective measure should have been returned.

In **the ECtHR** (the Court) case of ***Ismayilov v Russia*** (6.11.2008, Application no. 30352/03) the applicant complained under Art. 1 of Protocol No. 1 that the authorities had unlawfully taken away the money he had obtained from the sale of his inherited flat. The applicant further complained under Art. 6 §§ 1 and 3 of the Convention that his right to a fair trial within a reasonable time and his right to question witnesses for the defence had been breached. Relying on Art. 8 § 2 of the Convention, he maintained that his offence had not impaired any interests of the State or public.

When the applicant (Ismailov) arrived in Moscow from Baku, he only reported 48 US dollars on the customs declaration, while he was carrying USD 21,348 (representing the proceeds from the sale of his ancestral flat in Baku). Russian law required that any amount exceeding USD 10,000 be declared to the customs. A customs inspection uncovered the remaining amount in his luggage, and the applicant was charged with smuggling, a criminal offence (Art. 188 § 1 of the Criminal Code). The applicant's money was appended to the criminal case as physical evidence.

The applicant was punished with a criminal conviction and a suspended sentence of imprisonment. The applicant submitted that the confiscation measure had been unlawful because, on the one hand, Art. 188 of the Criminal Code did not provide for confiscation as a sanction for smuggling and, on the other hand, Art. 81 of the Code of Criminal Procedure allowed the authorities to confiscate only criminally acquired money. The money taken from him was not criminally acquired, and was the lawful proceeds from the sale of his late mother's flat in Baku.

It was not in dispute between the parties that the confiscation order amounted to an interference with the applicant's right to peaceful enjoyment of his possessions and that Art. 1 of Protocol No. 1 was, therefore, applicable. It remained to be determined whether the measure was covered by the first para. (any interference by a public authority with the peaceful enjoyment of possessions should be 'lawful') or second para. (the States have the right to control the use of property by enforcing 'laws') of that Convention provision.

In general, the Court finds that the measure (confiscation of money) had a basis in domestic law and was sufficiently foreseeable in its application and that this measure conformed to the general interest of the community.

It is important to note that the act of bringing foreign currency in cash into Russia was not illegal under Russian law, and the lawful origin of the confiscated cash was not contested. It followed that the only criminal conduct which could be attributed to him was the failure to make a declaration to that effect to the customs authorities.

The Court considers that it has not been convincingly shown or argued by the government that sanction alone was not sufficient to achieve the desired deterrent and punitive effect and prevent violations of the declaration requirement. Nevertheless, the applicant had not avoided customs duties or any other levies or caused any other pecuniary damage to the State.

In these circumstances, the imposition of a confiscation measure as an additional sanction was, in the Court's assessment, disproportionate, in that it imposed an 'individual and excessive burden' on the applicant. Therefore, there has been a violation of Art. 1 of Protocol No. 1.

Regarding other alleged violations of the Convention, the Court considers that these complaints have not been made out and rejects them as manifestly ill-founded.

5. Conclusion

A uniform conclusion drawn on the basis of these cases is that the ECtHR acts as a precedent court to the Constitutional Court regarding the protection of human rights or, more specifically, the right to property. Methodologically, this means that the ECtHR's legal views are crucial to the application of the law by the Constitutional Court in a concrete case. Essentially, the ECtHR's views constitute decisive arguments for the Constitutional Court. Even when it changes its practice, as was evident in the three sample cases related to customs offences, the Constitutional Court cites the ECtHR decisions. The practice of the ECtHR did not have a decisive impact on the Constitutional Court decision in all three cases; rather, it served as a legal façade. As for the ruling on the merits, which is distinct, it is logical for decisive arguments to be different; however, the problem is that they are more (daily) political than legal.

Examining the first case, we conclude that the Constitutional Court fully protected the right to property (the peaceful enjoyment of property), aware of the social responsibility of a decision of this type. It concerns a substantial number (thousands) of similar cases when masses of employees were left without salaries and other benefits they were owed from social companies during the transition period.

A basis for making the State liable for that property of (former) employees was found and with it the problem of enforcement or, specifically, the collection of those claims resolved. Instead of being settled from the bankruptcy or liquidation estate—with some even being suspended in full (in companies in restructuring)—these claims have easily been settled from the state budget. The ECtHR's views constituted a crucial factor influencing these decisions of the Constitutional Court. Further, this practice usually confirmed that until the decision of the Constitutional Court has been passed, the courts have been violating the right to a fair trial, primarily in that they delayed the enforcement procedure.

The remaining three decisions of the Constitutional Court show somewhat unethical and even legally illogical behaviour. In the first case, **Už – 367/2016,** the Constitutional Court, complying with the rule of international law (the practice of the ECtHR) requiring that due regard must be taken of the balance between the general interest of the public and the right to the peaceful enjoyment of property,[16] concludes that the confiscation of the object of the offence in its entirety (EUR 10,000), along with the imposed fine, poses an excessive burden on the complainant. Therefore, this measure imposed to protect public interest is disproportionate to the protection of the right to the peaceful enjoyment of

16 | See Kizlova, 2019, p. 78., Kriebaum and Reinisch, 2009, p. 10.

property. It was also found that the actions taken by misdemeanour courts violated the right to a fair trial.

In the second case, **Už– 1202/2016**, the Constitutional Court starts from the same rule of international law (the practice of the ECtHR) that a balance must be struck between the general interest and the right to the peaceful enjoyment of property and, thus, like in the first case, decides that the right to the peaceful enjoyment of property was violated. However, although the misdemeanour courts previously acted in an analogous way, the Constitutional Court makes a completely different decision with respect to violation of the right to a fair trial, dismissing the complaint in that part on account that the complainant 'only formally invokes a violation of a constitutional right'.

In the third case with similar factual circumstances, **Už– 5214/2016,** the Constitutional Court once again starts from the required balance between the public interest and the right to the peaceful enjoyment of property; however, it makes a contradictory decision. This time, it notes that it considered the decisions of the ECtHR, but that the circumstances differ. Here, it takes the view that confiscation of the object of the offence (EUR 19.000), as a measure to protect the public interest, is proportionate to the protection of the right to the peaceful enjoyment of property. This confiscation had the primary purpose of dissuasion and protection rather than compensation for damages sustained by society. Together with prevention, the Constitutional Court reasons this decision by political views that are not easily defendable: 'facilitating the implementation of monetary and exchange rate policies, providing financial stability of the Republic of Serbia, public order protection or prevention against its breaches (...)'. With respect to the protection of the right to a fair trial, the constitutional complaint was, once again, dismissed.

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DIGITAL MEDIA ETHICS

Aleš ROZEHNAL[1]

ABSTRACT

This paper provides an understanding of immediate and interactive standards of media ethics that should be applied to digital media. Digital media are partly based on amateur journalism, and most principles of media ethics were developed over the last century. The question then is whether it is possible to create media ethics whose standards apply to social and traditional media platforms or whether we will have different standards for different media platforms.

KEYWORDS

digital media
media ethics
freedom of speech
protection of personality
proof of truth

1. Introduction

The media is an indispensable part of a democratic society. Protecting freedom of expression creates a marketplace for ideas and allows citizens to hold public officials and public figures accountable for their actions.

However, protecting the freedom of expression does not automatically imply the media's credibility, which depends largely on strict adherence to ethical practices.

The media revolution is fundamentally and irreversibly changing the nature of journalism and ethics. The means of publishing are now in the hands of citizens, and the Internet is supporting new forms of journalism that are interactive and immediate.

The main question is to what extent the existing media ethics are appropriate for the current form of news, which is immediate and interactive. Moreover, this is amateur journalism. However, most of the principles of media ethics have developed over the last century.

One of the media ethics issues mentioned above is whether ethical standards should apply to all media types, for example, whether social media should be balanced and impartial.

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The media are increasingly able to engage with citizens in reporting social events. This raises related questions about how sources should be identified, how much verification is necessary for different types of news, or whether citizen contributors should be made aware of editorial standards.

The question then is whether it is possible to create media ethics whose standards apply to social and traditional media platforms or whether we will have different standards for different media platforms.

2. Media landscape

Media's words are moving toward a mixed type of media: citizen and professional journalism across many media platforms. Tension exists between traditional media and citizen journalism. The traditional journalism values are accuracy, verification, and impartiality, whereas citizen journalism (social media) values are immediacy, transparency, and strong opinions.

News and images circulate the world at a tremendous speed via Twitter, YouTube, Facebook, blogs, and emails. The speed puts pressure on media to publish news before it is sufficiently verified, which often leads to picking up news from social media.

Activist journalism likes to comment on events and issues without verification. Traditional media are increasingly being forced to move towards a more opinionated approach to news and commentary. This is because being impartial is boring for the recipients of media content, as they are attracted to strong opinions and clashes of opinion.

3. The objectivity of the media

By their very nature, the media and journalists are not only mediators of information between the world of politics and the public, but they also interpret and rank events and disseminate their opinions, thereby influencing the political agenda and public opinion.

The fact is not in itself contrary to the requirement of objectivity and balance but is immanent to the media. It is through editorial policy that the media establish themselves in the media market and position themselves among a certain political segment of the public[2].

The objectivity and balance are not unbiased. The objectivity and balance of the media and journalists cannot simply present opposing views because such an approach would lead to imbalance[3].

For example, the views of both the lawbreaker and the victim of the lawbreaking, or the supporter of freedom and democracy and the one who wants to destroy freedom and democracy, would be presented as equal. However, such a conclusion is unacceptable because it would lead to a trampling of the values on which our society is based.

2 | Burton and Jirák, 2001.
3 | Rozehnal, 2015.

Therefore, the media's task is not to provide coverage that is free of any opinion but to ensure that those opinions are as diverse as possible if they are in the field of the values that underpin the political, legal, and social structures of democratic societies: respect for human rights, culture, and political pluralism[4].

A form of journalism in which the journalist tries to balance two opposing sides often leads to an inaccurate result because one side may be right and the other may not. Journalism is either good or bad, regardless of whether it is opinionated. The real test of the quality of journalism is not whether a journalist has an opinion but whether the reporting is supported by a correct assessment of the facts.

Many media platforms require their journalists to use social media to gather information on social media and start their own blogs, Facebook pages, or Twitter accounts. However, the media have the responsibility not to contribute to the amount of fake news circulating in cyberspace. By forwarding or publishing information of someone else, the media are a guarantor of the truth of that information.

At a time when media are often accused of spreading fake news, it is crucial that when journalists use platforms such as social media, chat rooms, and forums for their reporting, they verify their sources and information from these sites.

It is in the interest of freedom of political debate for a journalist to express critical and provocative views and not just make neutral rejoinder recordings. The media are not obliged to be morally or politically neutral.

Nevertheless, the goal of all media, even digital media, should be impartiality and objectivity. Impartiality refers to accuracy, fairness, respect for the truth and cannot be equated with mere mathematical time budgeting.

News and criticism, that is, evaluative comments, are often mixed. Information in articles, headlines, and news is usually assertions, while opinions published in materials that are evaluative or subjective are usually criticized.

Criticism is less likely to affect a person's honor and dignity because its recipients do not take it as the sacred truth. However, even criticism must have a factual basis. This factual basis must be discernible to the recipient, even though all the facts may not be mentioned in the article or post. However, no criticism is defensible without the truth of the allegations.

Balance and equal access to the media cannot be understood mechanically as the absolute equality of subjects but in terms of graded equality. This means that each person must be given at least a minimum level of opportunity to present themselves in such a way as to meet the requirement of a plurality. However, beyond this minimum level, the representation of the subjects in the media must be commensurate with their political and social importance[5].

The media would be violating the principle of balance and objectivity if they are found to commit the following:

- If a news report contains information out of context
- If a news report arranges the information in order of purpose and in a way that makes it sound entirely purposeful according to the commentary on the report
- If the media do not give the reported person the opportunity to express their views
- If such a statement is inadequate

4 | Drgonec, 2013.
5 | Decision of High Administrative Court, SJS 946/2006, Vol. 15/2006.

The legal concept of objectivity must be seen through the lens of the thesis *"audiatur et altera pars"* (let the other side be heard) for the assessment of disputes and the sense of objectivity on the parties[6].

Of course, the principles given to judicial proceedings cannot be entirely copied in the media, but this principle must be applied. However, it is not possible to publish two contradictory opinions without further comments or explanations.

The principle of objectivity and balance must not be interpreted as a command to present only colorless, cautious, and hyper-correct opinions.

Therefore, the content of the media should be organized in such a way that individual contributions are often engaged, critical, and opinionated, while maintaining objectivity and truthfulness in the reporting of facts, but in their totality, forming a varied and representative mix of the spectrum of opinion in society, encouraging the widest and most open discussion of socially relevant topics[7].

Objectivity can be characterized as neutrality in relation to the subject matter of the news, impartiality, truthfulness, and relevance. Balance can then be characterized as a balance in the proportions of the news or information conveyed.

The notion of objectivity, therefore, includes accuracy (precision), transparency (citation of sources), and factuality (absence of self-assessment). Balance is then impartiality, where some views are not suppressed in favor of others. It is questionable whether this quality can be conceptually attributed to information.

Only relevant information to the event being reported, including consideration of the context of the event, is objective and balanced. Therefore, it can be concluded that objective and balanced information is relevant information[8].

The obligation to provide objective information necessary for the free formation of opinions must therefore be interpreted as an obligation to respect the principles of objectivity.

Certain media fall outside the objective and balanced criteria, such as entertainment, sports, children, and similar media. The role of the media is not to provide sterile information but to reflect reality, including the controversies, ambiguities, layers, and emotions it contains, as well as to provoke society-wide discussions on topical issues.

If the media is to meet the requirements of objectivity and balance, the relevant information must be presented in an unbiased form within that part of the media that forms a separate and separable entity from the other parts of the media dealing with a particular topic[9].

The objectivity and balance of the media content must be seen as a whole since it also has an impact on the public as a whole[10]. Similarly, it is irrelevant that information on the matter was subsequently published, which contained the other party's views or supplemented the original communication. A later publication necessarily reaches a different type of recipient than the original information and is not capable of setting the record straight.

6 | Rozehnal, 2015.
7 | Decision of High Administrative Court, dated 5. 5. 2010, č.j. 7 As 23/2010-73.
8 | Decision of High Administrative Court dated 9. 9. 2011, čj. 7 As 2/2010-126.
9 | Decision of High Administrative Court dated 30. 5. 2008, č. j. 7 As 38/2007 – 78.
10 | Decision of High Administrative Court dated 27. 1. 2010, č.j. 8 As 61/2009 – 61.

No format allows a detailed description of the subject matter in a small space, but it is not possible to depart from the requirement that basic objective information be included in the media to form at least a basic idea of the position of the various bodies concerned[11].

Therefore, it is not possible to publish a contribution, which is not based on the principle of objectivity and balance, on the grounds that this principle has been fulfilled by the subsequent publication of a similar contribution elsewhere. Such reporting is based on the choice. The time for a news report is limited, as is the space for news, even in digital media. By selecting only the (from their standpoint) important or interesting news from the daily portion of the world, domestic, and local news, the editorial staff makes such news biased.

However, objectivity, in this case, cannot be considered a philosophical term. This selection should be balanced, impartial, informed, and fair to be considered objective. This can be summarized as follows:

- objectivity of the separation of facts from opinions
- a balanced record and description of the debate
- confirmation of journalistic statements by reference to relevant authorities

The separation of facts from opinions cannot be understood as a demand to discard the journalist's own opinions. When they are expected to do so (columns, commentaries), journalists can express their opinions and feelings. However, it must be clear briefly that it is an opinion rather than a fact.

A balanced record can only be achieved through a kind of disembodiment of journalists. There must be no favor of their own assessment of the situation or the protagonists involved. The ability to let the representatives of the parties to the dispute speak and to give them equal space to express themselves, if possible, is also essential. All statements must be based on facts that are demonstrably independent of the media. In no case, can fabricated facts and evidence be accepted.

These rules can be applied to the so-called pyramid structure of a classic journalistic narrative. The point is that the news is sought out, reported, and interpreted. Under the term impartiality, a set of activities can be found, leading to the fact that no one current of opinion, thought, or art is favored over others.

4. Social media manipulation

Digital media use traffic as the only measure of quality. Unfortunately, this trend often leads to the creation of artificially exaggerated facts, where reality is altered to make the resulting message as sensational as possible, that is, to appeal to the widest possible audience. Journalists also make cultural assumptions about their work and use them to assess the credibility of their sources. The point is that whoever belongs to the elite (financial or political) is often judged as a more reliable source.

In the media, we encounter different types of manipulation. A common one is the manipulation of incomprehensibility. Information is full of incomprehensible and technical terms; sentences are usually very long.

11 | Decision of Municipal court in Prague, sp. zn. 10 Ca 242/20007.

Often, the author has nothing to say but does not want the readers or viewers to know it, or they are just communicating banalities wrapped in technical language. Commercial media often use manipulation by overwhelming meaninglessness or manipulating emotions. Unfortunately, serious media do not avoid manipulation by selecting or ignoring news, ranking news, or choosing commentators.

We also often encounter the technique of argumentation and apparent logic, which presents logic on the recipient's side. The recipient then has the impression that they are the originator of the judgments, attitudes, and conclusions, without realizing that they are the tool of the real originator — the manipulator.

The technique of argumentation and apparent logic can make use of black and white argumentation. Manipulation and misinformation are sometimes based on argumentation by the absence of evidence ("nothing else has been proved"), argumentation by the crowd ("millions of people agree with this view") or argumentation by authority.

5. Protection of personality

Among the methods by which at least an approximate balance can be achieved are accuracy, clarity, and completeness of reporting, distance from the subject matter, discrimination-free access to sources of information, conscious neutrality in a multi-group dispute, the plurality of published opinions, exclusion of ulterior motives even in the absence of bona fide bias against large advertisers, an unequivocal prohibition on interfering with the fact being reported, and strict adherence to terminological neutrality.

Failure to comply with the principles of objectivity, balance, and impartiality may interfere with the right to protect personality. The right to the protection of personality is a general personality right since it belongs to every natural person as an individual. Its object is the intangible value of the human personality. Within this general personality right, there are an unlimited number of sub-rights of personality, such as the right to honor and human dignity, the right to personal privacy, the right to reputation, and the right to self-image.

Personality manifests itself as a dynamic system whose traits change with age, reaching relatively greater stability in adulthood. Personality is, among other things, a product of its time and its conditions, and at the same time, it shapes and reshapes its environment to one degree or another.

The physical components of a natural person's personality, such as his or her level of health, the peculiarities resulting from his or her individual appearance and physique, membership of the male or female population, a particular human race, etc., cannot be overlooked.

Despite the multiplicity of individual components and aspects of personality, the personality of a natural person must always be perceived in its integrity and indivisibility. The diversity of manifestations of the individual aspects of a natural person's human personality corresponds to the conceivably wide range of possible unjustified interference against any of these personality components.

Nevertheless, it is always the personality of the natural person as a totality of the characteristics and qualities that will be directly affected by such interference. Since it is the most private, innermost, and most intimate sphere of the human person, whose

external interference is very often felt by a natural person with considerable adverse intensity, it is undoubtedly a matter for the law to provide appropriate legal protection to this personality sphere.

Within this unified framework of the right to the protection of personality, there are individual sub-rights that ensure the civil protection of individual values (aspects) of the personality of the natural person as an inseparable part of the overall physical and psychological-moral integrity of the personality.

The enumeration of these individual rights can be set as merely demonstrative. To establish a violation of the right to the protection of personality does not require a harmful consequence, but a mere threat to the rights of the person. Interference with the right to protection of personality may also occur without faults, that is, objectively, where the fault of the infringer is not required.

However, there must be a causal link between the interference with the right to the protection of personality and the violation of personality rights. The interference must exceed a certain level of intensity that can no longer be tolerated in a democratic society.

It is within the scope of the right to honor and dignity to prevent conduct that is objectively capable of causing harm by lowering the honor or dignity of a natural person in the eyes of others and thereby jeopardizing the esteem of his position and position in society.

Violations of the right to honor are generally committed by false factual allegations. However, the right to honor may also be infringed by true statements of fact if they are made in such a form or such a context or under such circumstances regarded as defamatory. A more difficult question is the admissibility of false statements where they are satire or parody, which serve to ridicule or ironize certain personal characteristics of public figures.

In this case, a reasonable recipient must recognize that these are fictitious and frivolous claims. If such a fact is apparent to the average reasonable citizen, there is no violation of the right to the protection of personality.

The reputation of an individual is a part of their personal and psychological identity. Reputation is what others think of the individual and not what the individual thinks of themselves. The law must protect reputation against extensive criticism, even if it is of public interest.

It is also not possible to justify a particular (albeit true) statement by false, misrepresentative, defamatory, or disparaging statements. It is not required that the person attacked be named in the offensive speech; identifying features that are sufficient to establish the identity of the person are sufficient.

However, if the statements are true and have a defamatory effect, but the person concerned has brought about the lowering of their honor and dignity by their own conduct, which is contrary to legal, moral, professional, or other generally accepted norms, this constitutes a permissible interference with personality rights.

The truth of such allegations must be proved by the person who has infringed on the honor of another by making the defamatory allegation. This reversal of the burden of proof is called proof of truth. The proof of truth needs not be complete, and may be only a partial truth[12].

12 | Rozehnal, 2015.

The mere publication of a false statement affecting the personality of a natural person generally constitutes an unjustified interference with the right to the protection of their personality. The use of criticism, irony, condemnation, and repudiation of a natural person's actions or activities based on the circumstances in which false information is communicated generally constitutes a tangible unjustified interference with the natural person's right to protect their personality. The intensity of unjustified interference is considerable and will usually have adverse consequences for the person concerned in terms of their position in the family and society.

The proof of truth does not apply to allegations concerning private life. It is irrelevant whether such allegations are true or false, and it is even irrelevant whether they are defamatory. Such an interference is generally prohibited. It is also irrelevant whether the intruder intended to interfere with their honor and dignity.

What is decisive is whether the conduct in question is objectively capable of lowering honor and human dignity. Given that culpability in this offense is based on an objective principle, it is also irrelevant whether the person who violated the honor and dignity of a natural person had a good faith belief that the allegations were true. Thus, it is not possible, for example, to exclude the liability of a media outlet that has received certain false statements from a news agency.

Given the absolute responsibility for their content, the media may unjustifiably infringe the honor and dignity of a natural person by publishing defamatory factual statements (in particular, by publishing false facts).

The media cannot absolve themselves of their responsibility for interference with the right to protect a citizen's personality by pointing out that the author of the defamatory statements who published them in the media is a person different from the media and their editor – the author of the report.

The media's liability is not excluded if the report (article) contains a quotation from a third party, which is defamatory. It is irrelevant that the publisher, when publishing any defamatory information or unjustified criticism, also states that it does not express the opinion of the editorial staff or that it uses direct speech by the author of the defamatory information or unjustified criticism. However, this distinction can only be decisive in determining the amount or level of appropriate compensation.

Where a published interview is liable to interfere with the personality of a natural person, it cannot be held that, if the publisher has accurately reproduced the statements of the interviewee, they are only fulfilling their duty to inform the public and cannot be held liable for them. In the course of an interview, questions are deliberately asked about the interests of the media's journalistic purpose arising from the subject matter.

It cannot, therefore, be assumed that, without more, such cases are merely a reproduction of a person's statements. However, the fact of the journalistic cooperation of the media outlet or its staff and their contribution to the content and tone of the interview, or their influence on whether the interview is published must also be considered.

The degree of responsibility of the media depends on the source of the statement. Thus, a different degree of liability is imposed if the statement is made by a news agency or a spokesperson for a public authority, and a different degree of liability will be imposed if it is the opinion of a third party.

Another exception is so-called 'neutral reporting,' where the media merely repeat defamations made in a debate unless they accept them as truth.

Similarly, it is not possible to relieve oneself of liability by introducing a statement with the phrase that such a fact is 'common knowledge,' 'widely reported,' 'it has long been circulating on an unofficial list,' and 'such reports are circulating from all quarters.' Again, it depends entirely on whether the allegation is true.

It is also undecidable as to the circle of persons into whose sphere the allegation has been made, by which, for example, dishonest conduct is alleged against a citizen. It is an allegation that is objectively capable of causing harm to citizens' rights to honor and dignity. An allegation that is said to have infringed a person's right to honor, and dignity must be examined as a whole, without being satisfied merely with an examination of whether individual sections, sentences, or words of the report are offensive. It is not sufficient to examine whether the offensive nature of the allegations is found in the individual sections or sentences of the report, or even in the individual words.

Words or phrases that are prima facie offensive may, when viewed in light of the content and meaning of the message as a whole, be devoid of that offensive character. However, words or phrases that are not offensive in themselves, when viewed in the light of the content and meaning of the message as a whole, may constitute the most serious and tangible infringement of personality rights[13].

The honor of a natural person may be unjustifiably affected not only by publishing defamatory factual statements (in particular by publishing false facts) concerning the natural person but also by publishing inadmissible evaluative judgments about the natural person (inadmissible criticism of the citizen or his actions).

As a rule, criticism of a natural person's actions based on circumstances in which a true statement is made (unless the statement concerns an intimate aspect of the natural person's life) cannot be regarded as a violation of personality rights, even if the criticism uses a corresponding degree of irony, condemnation, and rejection of the criticized action of the natural person.

Legitimate criticism must first be based on true initial premises and logically derive the corresponding evaluative judgments from them. At the same time, the criticism must be specific and must not contain only general judgments (e.g., stating that a certain entrepreneur is incompetent, a certain decision is incompetent, etc.).

If the criticism uses expressions to characterize certain phenomena and persons (their actions and characteristics), the degree of expressiveness of which is out of proportion to the aim of the criticism, and this aim could have been achieved without such expressions, which implies an intention to offend the person criticized, it is disproportionate criticism that is capable of interfering with the right to protect the personality of the individual (sometimes termed 'intense excess').

The specificity of the interference with the right to honor by inadmissible criticism is that criticism, as a certain sum of evaluative judgments, always expresses the opinion of the person making such judgments. All criticisms are therefore subjective in nature and cannot be subjected to standards of truth or objective correctness. Proving the truth of an evaluative judgment undermines the freedom of expression[14].

Criticism may be exaggerated, unreasonable and biased, provided that it is not motivated by malice. Unjustified criticism that does not go beyond the limits of criticism on the merits, based on the true facts and the conclusions drawn from them that justify

13 | Weiler, 2002.
14 | ECHR, Grinberg v. Russia, Application Nr. 23472/03 from 21. October 2005.

those facts, and which is appropriate in content and form (it therefore also depends on the description of the individual phenomena, the form of the description of the citizen's conduct and the form of the characterization of its nature and characteristics) is permitted. Regarding the form of criticism (in particular, the terms and wording used), it cannot be considered in isolation or in the abstract from the content of the critical work.

From the standpoint of the adequacy of the criticism, it is, therefore, necessary to examine the proportion between the formal expressions contained in it, that is to say, the proportion of the means of criticism and the aim of the criticism, which is the socially approvable aim that the critic wishes to achieve by his assessment. Sometimes, to achieve the purpose of the criticism, for example, to arouse public interest in a particular serious social phenomenon, it is appropriate to use relatively "harsher" expressions, that might otherwise be considered offensive (e.g., in ordinary conversation).

Requiring that all terms used to describe specific phenomena or persons be moderate would, to the detriment of the cause, deprive criticism of a certain emotional charge that is often justified. In the case of criticism, proof of truth is excluded from the logic of the matter[15]. Legitimate criticism does not serve to insult or defame a person but to evaluate him, even if subjectively. Nor is it permissible for unjustified interference with honor and human dignity by insulting and disparaging statements to be justified on the grounds that certain statements are merely retaliation for previous statements made by the victim. Such a fact does not justify or outweigh the fact that the allegations are insulting and dehumanizing to another person. The right to express an opinion on allegations that are deemed to be false cannot be exercised in a manner that manifestly exceeds the bounds of decency[16].

6. Freedom of expression

One of the limits of freedom of expression is the conflict between the right and the right to protect general personality rights. In media law, it is said with some exaggeration that the greater the truth that is published, the greater the defamation. Reporting in all forms of media involves the acquisition, classification, and presentation of current events in the form of news and involves a critical evaluation of the news[17].

The goal of the media is, among other things, to inform the public about matters of legitimate public interest and to critically evaluate them, which is one of the main features of freedom of expression and the right to information, and therefore of the development of democracy and the control of political power[18].

The media will always stand at the opposite pole of the protection of personality since much of the news media reports critically on certain individuals whose personality rights are thereby infringed. Given this antagonism, it is important to strike a balance between the opposite poles.

15 | ECHR, Lingens, 8. 7. 1986, 1 – 103, Oberschlick, 26. 4. 1995, A – 313.
16 | Decision of Constitutional Court dated 1. 12. 2005 II. ÚS 94/05.
17 | Crone, 2002.
18 | McLuhan, 2003.

When the fundamental political right to information and its dissemination clashes with the right to protection of personality and private life, fundamental rights that are on the same footing, it will always be for the independent courts to consider carefully, taking into account the circumstances of each case, whether one right has been unjustifiably given priority over the other.

The form of the interference with personality rights, its scope, and its method, must always be appropriate to the purpose and, in any such application, the human dignity of the natural person concerned must always be respected; otherwise, it constitutes an unjustified interference with the personality of the natural person.

Another source of problems is the constant acceleration of the movement of information and its high demand. The basic criterion of news should be its truthfulness, objectivity, and balance, but at the same time, its timeliness, that is, the speed with which news is transmitted from the media to its recipients.

Certain features of the mainstream media intended to inform the general public (as opposed to, for example, specialist publications) must be respected. In certain cases, particularly given the scale of individual contributions and the interest of the readership, certain simplifications must be made.

Therefore, it cannot be argued without further ado that any simplification (or distortion) must necessarily lead to an infringement of the personality rights of the persons concerned. It is difficult to insist on the absolute accuracy of factual allegations and make demands on journalists that are—in their consequences—impossible to meet. Thus, the overall message of the information in question must correspond to the truth.

To assess whether the right to honor and human dignity have been violated, the information in question should be examined in the following ten aspects:

(1) The seriousness of the attack, bearing in mind that the more serious the untruthful attack on honor and dignity, the more the public is misinformed.
(2) The nature of the information and the extent to which it is a matter of public interest.
(3) The source of the information, particularly regarding whether the sources have direct knowledge of the matter and whether it is not merely a matter of settling personal scores or an attempt to gain some advantage. Such information may be true, but if its disclosure is motivated by human animosity, journalists have a greater duty to verify the information. Sometimes the media also have to trust a source which is unknown because they fear their lives, for example, because they live in a country with a repressive regime.
(4) The status of the information, especially regarding whether it is provided by a bearer of public power or authority,
(5) The steps taken to verify the information,
(6) The urgency of the matter,
(7) The address of the person being referred to (such an approach may not always be slavishly required, as the person may avoid comment, or it may be obvious that they have nothing to add to the matter. It is, therefore, a question of the fairness of the journalists' approach to The persons they report on).
(8) The presentation of the opinion of the person being reported on,
(9) The overall tone of the report, particularly since information should not be exaggerated or artificially sensationalized in the news, that speculation and rumor should not be passed off as fact, and that guilt should not be presumed.
(10) The circumstances of the publication of the report, including the timing.

The actions of journalists must also be considered in the context of their post-publication actions, that is, whether they correct an error, explain the matter, or apologize[19].

7. Conclusion

For a long time, the idea has been that the Internet is an extra-legem environment and that it is, therefore, a kind of shield against legal and ethical regulations. However, acting in cyberspace is not different from acting in other media. There is no reason why cyberspace should be immunized from traditional regulations. However, the difference from other media is obvious and undeniable.

Digital media can then be defined as search engines, news and discussion sites, and other portals. Their special legal regulations do not stem from the uniqueness of these media, but only from the particularity of information transmission technology. It would be fair to impose the same requirements on traditional media.

Reporting on social media cannot be a purely neutral process because it is not in human power to eliminate certain biases and prejudices. Therefore, absolute objectivity cannot be achieved because the selection of the facts to be reported is itself a biased process. That is why today, balance, conscious disinterest, and healthy skepticism are emphasized[20].

The speed of social media places great demands on media, which often cannot even verify the information disseminated in terms of its truthfulness, completeness, objectivity, and balance. Indeed, the news is a perishable commodity, and delays in publication can reduce its value and interest. Therefore, a certain amount of misrepresentation caused by the speed of news must be allowed, and some exaggeration or provocation is permissible.

However, the aforemntioned ethical standards must be enforced to prevent digital media from becoming a digital sewer.

19 | Pember, 2001.
20 | Rozehnal, 2015.

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THE LEGAL BACKGROUND OF KINSHIP AS A BASIS OF FAMILY RELATIONSHIPS, WITH SPECIAL REGARD FOR THE REGULATION ON ADOPTION IN CENTRAL EUROPEAN COUNTRIES

Edit SÁPI[1]

ABSTRACT

The article aims to give an overview of the most significant features of legal regulation on adoption in certain Central European countries. The research was carried out with regard to four countries, namely the Czech Republic, Hungary, Poland, and Slovenia. The article, on the one hand, summarises the legal background, and, on the other hand, presents the relevant constitutional provisions of the given countries. It sheds light on current legal solutions to the relationship between kinship and adoption, then it analyses the requirements of adoption in the four above-mentioned countries. It can be found that the main aim and consequences are the same in all analyzed countries, but there are some national characteristics regarding the types and conditions of adoption. The article shows that one of the most significant principles, the best interest of the child is of utmost importance beside the different national traits of Hungarian, Slovenian, the Czech, and Polish family law.

KEYWORDS

adoption
kinship
family relations in Central Europe
best interest of child
comparative analysis of adoption
family law

1. Introduction

In this article, we provide an overview of the legal regulations of a special kinship relationship, adoption. The article adopts a synthetic analysis and comparison of other countries' legal regulations and solutions.

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Based on this, we intend to compare the Hungarian, Slovenian, Polish, and Czech legal regulations on the most important issues of adoption. In this article, we place primary emphasis on the overview of the relevant Hungarian rules as a basis and attempt to show the differences and similarities of the other three countries' regulations compared to those of Hungary.

The article is based on the manuscripts[2] of a future volume about the legal protection of family in Central European Countries; consequently, we use the manuscripts as sources of our work.

The structure of the article follows some main points, such as the relevant legal basis of the countries, the main aim of adoption, and finally the detailed rules of the analyzed countries' legal solutions in line with the given legal institution.

First, it is important to examine the relevant legal environment of the given Central European countries. Approaching the topic from a slightly farther perspective, we can see that the given countries' constitutions also deal with constitution-related issues of family protection as a basis.

The Fundamental Law of Hungary[3] stipulates that "Hungary shall protect the institution of marriage, the conjugal union of a man and a woman based on voluntary and mutual consent; Hungary shall also protect the institution of the family, which it recognizes as the basis for survival of the nation." [4]

The concrete protection of family and parenthood can be found in the Czech Charter of Fundamental Rights and Freedoms,[5] which declares that "Parenthood and the family are under the protection of the law."[6]

Similarly, according to Article 53(2) of the Slovenian Constitution,[7] legal relations within the family shall be regulated by law and marriage shall be based on the equality of the spouses.[8]

The Constitution of the Republic of Poland[9] only contains a few provisions on family, such as the privacy of family life and the right to make decisions about personal life. In addition to the privacy of family life, the protection of children is of great importance, especially in two aspects: on the one hand, the children's right to a hearing in proceedings and taking into account their views and, on the other hand, the protection of children deprived of parental care.

The abovementioned points indicate that the given constitutions put emphasis on the legal protection of family, and on the fact that family law and family protection issues shall be governed by law. Generally, it can be stated that the legal regulation of adoption is incorporated into the field of family law in all analyzed countries.

2 | Králíčková, 2021, pp. 77–110., Andrzejewski, 2021, pp. 151–190., Kraljić, 2021, pp. 255–286.
3 | Fundamental Law of Hungary (25 April 2011).
4 | Art. L (1) Fundamental Law of Hungary.
5 | Act No. 2/1993 Coll.
6 | Czech Charter of Fundamental Rights and Freedoms, Art. 32 (2).
7 | Constitution of the Republic of Slovenia. Official Gazette of the Republic of Slovenia Nos. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.
8 | Slovenian Constitution, Article 53(1).
9 | The Constitution of the Republic of Poland of 2 April, 1997. In original language: Konstytucja Rzeczypospolitej Polskiej.

Examining the Hungarian system from a historical perspective, it is worth mentioning that family law was regulated by a separate act—the former Family Law Act[10]—for a long time, but when the current Civil Code[11] was accepted in 2013, the family law rules also became an integral part of the 'new' Civil Code in the so-called Family Law Book (the Book V of the Civil Code). Thus, in today's Hungary, family law is part of the Civil Code, but there are several acts and legal sources that can supplement the overall system. Part Four of the Family Law Book of the Civil Code addresses the establishment and termination of *kinship* and its legal consequences, such as parental responsibility, custody, and child support. This includes family relationships established by adoption, as adoption provides the adopted child with full family status in the family of the adopter. It should be mentioned that the legal sources on adoption are very diverse, since in addition to the Family Law Book of the Civil Code, the Succession Law Book also contains the inheritance effects of adoption. Furthermore, the Act on the Protection of Children (Act XXXI, 1997). Gyvt.) and part of the Guardianship Order (149/1997). (IX. 10.) Order) also contain regulations.

We can observe a similar systematic approach in the Czech legal system as well, where the new Civil Code was adopted in 2012[12] and Family Law was integrated into the Civil Code: Book Two. The basic principles, values, starting points, interpretation, and application rules can be found in Book One: General Part. Given that the Civil Code—like that of Hungary— emphasizes the autonomy of will, it is also fully manifested in Family Law, especially in the area of marital property law.[13]

In the two other Central European countries, the area of family law is regulated by a separate act. In Poland, the Family and Guardianship Code (Act of February 25, 1964)[14] provides the legal environment for family law affairs, as well as the rules of adoption. The Family and Guardianship Code contains rules on adoption in Section II of Title III,[15] between Articles 114–127.

We can find a new legal source in Slovenia, since the new Family Code[16] came into force in April 2019, replacing the more than forty-year-old Marriage and Family Relations Act.[17] Similar to the Hungarian sample, there are other important additional sources[18] of family law in the Slovenian system, but the rules of adoption can be found in the Family Code.

2. The relationship between kinship and adoption

Regarding the regulation of kinship in the Hungarian system, it can be ascertained that in addition to the biological fact of descent and adoption based on an act of public authority,

10 | Act IV of 1952 on Marriage, Family and Custody .
11 | Act V of 2013 on the Civil Code.
12 | See the Act No. 89/2012 Coll., Civil Code.
13 | Králíčková, 2021, p. 81.
14 | Original Language Title: USTAWA z dnia 25 lutego 1964 r. Kodeks rodzinny i opiekuńczy (Henceforward: Family and Guardianship Code).
15 | Article II. Adoption (Przysposobienie) of the Title III. Consanguinity and Affinity (Pokrewieństwo i powinowactwo).
16 | Family Act of 21 March 2017 (Text No. 729). Original title: Družinski zakonik.
17 | Kraljić, 2020, p. 158.
18 | Such as Civil Unions Act and Non-Contentious Civil Procedure Act have.

there are also *actual family relationships*, such as the relationship between a stepparent and stepchild, foster parents and foster children, or the child's placement with a family. These relationships are closely aligned with the laws governing kinship. Although the Hungarian Civil Code does not define the concept of 'kinship', it mentions two equivalent institutions, namely *blood descent* and *adoption* in connection with the kinship relationship. The Civil Code states that an *adoptee receives legal status as the adoptive parent's child*.[19] From the perspective of the child, therefore, no distinction can be observed in the mode of descent, that is, by blood or adoption. It is of utmost importance that a *child cannot be discriminated* against based on how their parental status was established, that is, whether the child was born out of marriage, cohabitation, or occasional sexual intercourse, or whether they were raised and cared for by biological or adoptive parents. This applies to the family law consequences of the parent-child relationship and to all other legal effects.

In addition, the Czech Civil Code expressly states that family relationships are those between persons based on kinship or adoption.[20] Thanks to a number of international human rights conventions, the Czech legal order has broadened the protection of a child's natural family.[21] Similarly, the Czech Civil Code stipulates that kinship is a relationship based on blood ties or adoption[22] and emphasizes that adoption is a status change.[23] It is also worth mentioning that the Czech legal literature stresses that the rules on the *adoption of minors* are in harmony with the international standards established mainly by international covenants and the case law of *the European Court of Human Rights*.[24] Polish legal literature interprets adoption as one of the basic family legal relations among marriage and blood kinship, which also constitutes other relationships.[25]

The Family and Guardianship Code of Poland approaches the issues of kinship from the viewpoint of the concept of family. It stresses that the functioning of a family can be understood as a marriage and a two-generation family. It is also worth mentioning that in Polish family law, only the provisions regarding maintenance are applied to all relatives in lineal descent.[26]

In Slovenia, we find a detailed system of adoption. The Slovenian legal system emphasizes that during adoption, the child's ethnic, religious, cultural, and linguistic background should be considered and attempts should be made to ensure the continuity of the child's upbringing in a family environment.[27]

3. The main aim and consequences of adoption

Looking at the history of mankind, we can see that adoption has taken many forms, and its purpose and conditions demonstrate a varied picture. If we trace its legal history,

19 | Hungarian Civil Code, Article 4:119 (1) and Article 4:132 (1) .
20 | Czech Civil Code, Article 771.
21 | See in details: Králíčková, 2003, pp. 125–142.
22 | Czech Civil Code, Article 771.
23 | Czech Civil Code, Article 794 ff.
24 | Králíčková, 2021, p. 97.
25 | Kosior, Łukasiewicz, 2018, p. 12.
26 | Andrzejewski, 2021, p. 182.
27 | Kraljić, 2021, p. 279.

we can see that the purpose of adoption showed the characteristics of a certain age. For example, adoption was a special form of slave liberation in Roman law, and at that time, only adults could be adopted primarily because of succession rights. Feudal society was based on blood kinship; consequently, adoption lost its significance in the Middle Ages. In the New Age, the adoption of minors and adults was already established, and it could also have served to legalize a child born out of wedlock.[28]

As a general feature, we can establish that the main purpose of adoption is the same in all the analyzed Central European countries. In this sense, the aim of adoption is to ensure that minors can be raised in a family in case their biological parents are unable to provide such an environment. This is why all the examined countries regulate adoption in a similar manner.

As its main purpose, the Hungarian[29] Civil Code highlights that adoption should be considered to establish a family relationship between the adoptive parent, their relatives, and the adopted child in order to allow the child to be raised in a family.[30] If we would like to provide a definition for adoption from the viewpoint of the main aim of the legal institution, then it can be said that adoption is the admission of a person outside the family as a full member of the family.[31] In accordance with the Civil Code, the main purpose of adoption is to ensure that minors are raised in a family in case their biological parents are unable to raise them. Adoption can also be briefly defined as the admission of a person outside the family as a full member of the family. Of course, the purpose of the adoption is different in the case of spousal and kinship adoption than in other cases of adoption in which the child is actually adopted by a person outside the family.[32] Adoption has two main objectives: on the one hand, to establish a family, kinship relationships between the adopter(s) and their relatives, and between the adoptee and its descendants; on the other hand, to ensure the raising of the minor in a family where their physical, moral, and intellectual needs are secured.[33]

The Slovenian Family Code stipulates that adoption is a special form of protection for children that establishes a legal relationship between the adoptive parent and the child equal to the relationship between parents and their children.[34] The Slovenian legal literature stresses the approach that adoption shall have a so-called ultima ratio nature, since it is a replacement for the original birth family and adoption shall be the last solution. However, in cases the biological family of the child cannot raise the child and protect their best interests, the state is obliged to guarantee and provide this kind of protective environment to the child.[35]

As mentioned above, in Czechia, a new Civil Code was adopted in which new rules affect the consequences of adoption. One rule affects the *surname of an adopted child*. The Czech legal literature emphasizes that the former rigid rule strictly ordered the change in the child's original surname for the adopters' surname, and this rule was modified.[36]

28 | Hegedűs, 2020, p. 288.
29 | See in details: Rékasiné Adamkó, 2019, p. 23.
30 | Hungarian Civil Code, Article 4:119 (1).
31 | Barzó, 2017, p. 324.
32 | Katonáné Pehr, 2007, pp. 447–450.
33 | Kőrös, 2008, pp. 2–3.
34 | Slovenian Family Code, Article 9.
35 | Kraljic, 2006, p. 396.
36 | Králíčková, 2021, p. 98.

According to the new rule, the court is entitled to allow *the adoptee to use both surnames together*: their original as well as that of the adopters.[37]

Besides concrete legal regulations, the legal environment of the given countries also emphasizes that adoption is the best option when there is a need for the permanent replacement of the absent parents or their care as part of parental care. This is why adoption can be the best alternative form of care for children who cannot be cared for by their parents. The purpose of adoption is to provide a stable, secure, and caring environment in which the child can grow and develop harmoniously. Consequently, the legal institution is used to replace the family environment and creates a kinship relationship. The main consequence of adoption is similar in the analyzed countries; it changes the legal status of the given child by making the adoptive parents the child's parents who exercise parental control over the child. This approach can also be reflected in the legal regulations mentioned above.

It is also worth mentioning that because of the created kinship, adoption has succession consequences.

According to the Hungarian Civil Code, the adopted child shall be regarded as the parent's child and will not only inherit the adoptive parent's estate but also that of the relatives of the adoptive parents. Adoption shall not affect the adopted person's legal right to inherit from their blood relatives, if adoption was implemented by the adopted person's relative in the ascending line, sibling, or a descendant of such relative in the ascending line.[38] However, primarily one's own descendants, spouses, and adoptive relatives are entitled to inheritance. The blood relatives of the adopted can inherit only if neither the adoptive nor the relatives can inherit after adoption.[39] In addition, the Polish Family and Guardianship Code rules that because full adoption modifies the child's legal status, making the adoptive parents his parents, it entitles the parties in the adoption relationship to inherit after each other.[40]

For the same reason—adoption creates kinship—adoption is also a marriage impediment in all examined countries' legal systems, because marriage between an adoptive parent and the adoptee results in the nullity of the marriage.

4. Types of adoption

It can be observed that the examined countries regulate various forms of adoption at the domestic level. In addition to national solutions, all of these countries also permit international adoption.[41] In the following sections, we provide an overview of the domestic features.

The Hungarian Civil Code acknowledges two types of adoption: open adoption and confidential adoption. These forms of adoption were also known and regulated in former

37 | Czech Civil Code, Article 835
38 | Hungarian Civil Code, Article 7:72.
39 | Hungarian Civil Code, Article 7:72. See in details: Fábián, 2020, p. 71.
40 | Family and Guardianship Code Article 125.; See also: Kalus, Habdas, 2020, p. 254.
41 | Rékasiné Adamkó, 2019, p. 29.

civil law legislation.[42] The Hungarian legislator approaches these two forms from the viewpoint of parental consent.

According to the Civil Code, open adoption means when the biological parent approves the adoption of an adoptive parent known to them. In this case, the parent may withdraw their statement of consent within a period of six weeks following the birth of the child for the benefit of caring for and raising of the child by the parent or another relative of the child. The parents will be informed of the possibility of withdrawal.

On the contrary, confidential adoption occurs when the biological parent agrees with the adoption of their child in a manner that maintains the confidentiality of the person and the identifying information of the adoptive parents, or where the parent's consent is not required in accordance with this act. A statement of consent can be made before the birth of the child. The parent may withdraw their statement of consent within a period of six weeks following the birth of the child for the benefit of caring for and raising of the child by the parent or another relative of the child. The parents will be informed of the possibility of withdrawal. If the child is over six years of age or suffers from any mental disorder, the approval of the guardian is required for the validity of the statement of consent. In the process of confidential adoption, the parent is not notified of the adoption and does not seek remedy against the decision on adoption. In the process of confidential adoption, the natural identification data of the biological parent and the adoptive parent shall not be disclosed to either party.

Three types of adoption can be distinguished in the Polish legal literature: Full adoption, which modifies the child's legal status, making adoptive parents' parents and making them exercise parental custody over the child, and as mentioned above, it affects the rules of succession law and provides maintenance.[43]

There is also complete, or insoluble, or anonymous adoption, which is similar to full adoption and occurs with the so-called permission of a blank mother for adoption. According to the Family and Guardianship Code, complete adoption is adjudicated in the event of the parents' death or their consent to adopt a child without indication of the adopter, is additionally irresolvable.[44] Thus, we can regard this as similar to Hungarian confidential adoption. Third, the Polish system also recognizes incomplete adoption. The legal literature explains this as when only the relationship between the adopter and the adoptee is created.[45]

The Czech Civil Code also interprets secret adoption when it establishes the option of adoption and the circumstances in which it is to be kept secret from the child's original family. The option of secrecy applies to the children's parents and their consent to adoption.[46] However, it should be mentioned that when the child reaches the age of eighteen and obtains legal capacity, they are entitled to know the details of the adoption file.[47] According to the new rules mentioned above, the Czech Civil Code allows the so-called re-adoption, which means the adoption of an already adopted child. In line with the Act, an adopted child may be re-adopted only if:

42 | Barzó, 2017, p. 342.
43 | Andrzejewski, 2021, p. 183.
44 | Family and Guardianship Code, Article 125
45 | Kosior, Łukasiewicz, 2018, p. 60.
46 | Czech Civil Code, Article 837
47 | Czech Civil Code, Article 838.

a) an earlier adoption has been cancelled,
b) (s)he is to be adopted by a subsequent spouse of the adoptive parent after the previous spouse who was a joint adoptive parent died, or
c) the person who was the only adoptive parent or the person who was a joint adoptive parent died. [48]

5. Conditions of adoption

The Hungarian legal literature highlights that many legal rules emphasize the permanent nature of adoption, such as the examination of the suitability for adoption, the limited time for the withdrawal of the parents' consent, or the eligibility for adoption. The aim of these guaranteed nature rules is to avoid the injuring of children and to prepare adoptive parents for the tasks necessary in adoption.[49]

5.1. Requirements regarding the adopted child

The Hungarian legal system stipulates some general conditions as a requirement for adoption, such as the adoption of only minors.[50] We will see that the same is true in Poland and Slovenia, but not in Czech Republic, where not only minors, but adult persons can be adopted as well.

As a general rule, the Hungarian Civil Code stresses that apart from the adoption of the minor child of the spouse, a child can be adopted if their parents are not alive, or if they are unable to raise the child properly. The act also adds that an adopted child may be adopted by the spouse of the adoptive parent or by others after the adoptive parent's death. If an adopted child is adopted after the adoptive parent's death, the previous adoption ceases. Because of these abovementioned factors, the relevant part of the Hungarian Civil Code tries to create a balance between the interests of the child and those of the adoptive or biological parents.[51]

Similar to the Hungarian law, the Polish family law also prescribes that only a minor can be adopted and only for their good, which means that the best interest of the child shall be taken into account during the whole process of adoption.[52]

Similarly, in Slovenia, only children may be adopted.[53] The Family Code also provides that "a child may be placed for adoption only if the parents have consented to the adoption after the child's birth."[54] This also means that prenatal adoption and prenatal consent for adoption are not possible.

However, as mentioned above, the Czech system is unique in this matter, as it acknowledges the adoption of adults. In Czechia, the adoption of minors is interpreted as a benefit for both real and social orphans, as well as unwanted or abandoned minor children.[55] Because

48 | Czech Civil Code, Article 843.
49 | Katonáné Pehr, 2020, p. 1.
50 | Hungarian Civil Code, Article 4:119 (2).
51 | Hungarian Civil Code, Article 4:123.
52 | Holewinska-Lapinska, 1994, p. 74.
53 | Slovenian Family Code, Article 212.
54 | Slovenian Family Code, Article 218 (1).
55 | Králíčková, 2021, p. 99.

of its legal historical roots, Czech Civil Code makes it possible to adopt an adult. The adoption of an adult is regarded as a status change; however, it is not a full change in comparison with the adoption of a minor. The Czech Civil Code prescribes that an adult may be adopted unless it is contrary to good morals.[56] Czech law distinguishes between two types of adoption in this regard. One is analogous to the full adoption of minors. In this issue, the Civil Code stipulates that an adult may not be adopted if it is contrary to the legitimate interest of his biological parents.[57] The Act also prescribes that an adult may be adopted if:

a) they are a blood sibling of the child being adopted by the same adoptive parent
b) at the time the application for adoption was filed, the child being adopted was a minor
c) the adoptive parent cared for the child being adopted as his own already when he was a minor or
d) the adoptive parent wishes to adopt the child of his spouse.

The other type of adult adoption is the one that is not analogous to the full adoption of minors, which is also the title of the legal institution in the given article of the act.[58] This type of adoption is not full adoption when the adoptee remains, especially with regard to the property, connected with his or her family of origin. Additionally, the adoption of an adult does not affect their surname.[59]

5.2. Requirements regarding the adoptive parents

5.2.1. General requirements of adoption

The Hungarian Civil Code stipulates the basic rule that any person whose parental supervision has been terminated by court order or who has been excluded from public affairs, and whose child is under foster care may not adopt a child. The act also prescribes that only a person with full legal capacity can adopt a child. The reason for this regulation can also be found in the aim of adoption, that is, the adoptive parents shall exercise parental control over the child after the adoption and need full legal capacity for this. The Civil Code adds that for the adoption, an identical petition shall be submitted by the person wishing to assume the parenting of a child and the child's legal representative, together with the consent of the child's parents and the spouse of the adoptive parent. It is also worth mentioning that a minor of limited legal capacity over the age of fourteen years may be adopted with their consent. A minor of sound mind under the age of fourteen shall be heard and their opinion shall be taken into consideration, where deemed appropriate.[60] In Hungary, adoption shall be authorized by the guardian authority if the legal requirements are met and if it is deemed to be in the child's best interest.[61] The Hungarian system also emphasizes that in the adoption process, a degree of continuity should be ensured in line with the child's upbringing with particular regard to their family ties, nationality, religion, mother tongue, and cultural background.

56 | Czech Civil Code, Article 846.
57 | Czech Civil Code, Article 847 (2).
58 | Czech Civil Code, Article 848-849.
59 | Czech Civil Code, Article 851 (1).
60 | Hungarian Civil Code, Article 4:120.
61 | Hungarian Civil Code, Article 4:120 (1)-(5).

In contrast, the Czech Civil Code stipulates that adoption is decided by a court on the application of the person who wishes to adopt the child.[62] However, regarding the general requirement of adoptive parents, the same legal solution is present in Czechia, namely that only an adult person with legal capacity can become an adoptive parent, provided that his personal characteristics and way of life, as well as the reasons and motives that lead him to become an adoptive parent, guarantee that he will be a good parent to the child being adopted.

Similarly, the Slovenian legal system emphasizes that, during adoption, a child's ethnic, religious, cultural, and linguistic background should be considered to ensure the continuity of the child's upbringing in a family environment.[63]

The Polish law stresses that a child can qualify for adoption if their parents fail to exercise parental authority over the child because the parents are dead, unknown, have had their parental authority removed, or have consented to the adoption of their child.[64]

5.2.2. The issue of age differences

We can find the same adoption requirements for the given countries. One of the most important requirements of adoption is the age-related issue, that is, whether there is any age difference regulation between the parties, or the age at which one can adopt a child. Determination of the minimum age difference shows the seriousness of adoption, while the maximum age difference is important because it should allow adoptive parents to manage the child in a flexible manner. The significance of the rules on age difference is justified by the fact that adoption can fulfil its purpose if parents undertake the tasks of adoption in a suitable age.[65]

The Hungarian Civil Code establishes concrete regulations regarding the age of the adoptive parent, which must be at least 25 years of age with legal capacity, must be at least 16 years and at most 45 years the child's senior, and who is considered suitable to adopt the child based on their personality and other circumstances. Where an application for the adoption of a child over three years of age is submitted, in the best interest of the child adoption may be authorized if the age difference between the adoptive parent and the child is not more than 50 years. This rule is quite new in the Civil Code because this modification, which allows for a maximum age difference of 50 years between the parties in the case of a child over three years of age, came into effect on March 1, 2021. According to the justification of the modification, this permits a broader possibility for older generations to adopt children. However, the legal literature highlights that the modification will not reach the intended effect, probably because older people would like to adopt younger children.[66]

In the case of adoption by a relative or spouse, the requirement for age differences should not apply. In the case of adoption as a common child, the age and age difference requirement should be satisfied by either of the adoptive parents. If the adoptees are siblings, the age of the older child should be taken into consideration.[67]

62 | Czech Civil Code, Article 796 (1).
63 | Kraljić, 2021, p. 281.
64 | Family and Guardianship Code, Article 119a.
65 | Katonáné Pehr, 2020, p. 3.
66 | Katonáné Pehr, 2020, p. 4.
67 | Hungarian Civil Code, Article 4:121 (2).

We can see concrete age relation rules in the Slovenian solution as well, but the minimum age prescribed for adoptive parents is lower than in Hungary, since the Act stipulates that only a person who has reached the majority and is at least eighteen years of age may be an adoptive parent. By exception, a person who is not eighteen years older than the child may be allowed to adopt where all the circumstances of the case have been examined, and it is established that such an adoption would be in the best interests of the child.[68]

We can also find the rules on age differences in Czech family law, but these are not as concrete as those in the domestic Hungarian model. The Czech Civil Code prescribes that there must be a reasonable age difference between the adoptive parent and the child being adopted, typically not less than 16 years. The act stipulates as an exception, that the age difference between the adoptive parent and the child being adopted may be less than 16 years only where a guardian representing the child in the proceedings consents to the adoption and the adoption is in accordance with the child's interests.[69]

Polish law also emphasizes that the adoptive parent shall be suitably older than the adopted child and shall be in full legal capacity.[70] Such suitability is ascertained at the adoption center, which issues a certificate of the completion of relevant training and an opinion on whether the candidate is qualified to adopt a child.

5.2.3. Rules regarding the family status of the adoptive parents

Another interesting issue in adoption concerns whether a single person or persons living in de facto cohabitation or in a same-sex partnership are entitled to adopt or not and, if they can, on what conditions.

In Hungary, a child may only be adopted by married couples, except where the child is adopted by a relative or by the parent's spouse. Registered partners and de facto cohabitants cannot adopt children. Consequently, the joint adoption of a child by same-sex partners is not allowed. A single person can adopt a child only with the license of the given minister in a justified case.

Slovenian family law prescribes that children may be adopted jointly by spouses or extramarital partners. Under the law, these two partnerships can only be established by partners of different sexes. In Slovenia, same-sex partners cannot adopt a child together. In addition to joint adoption, the law also allows for so-called single adoption. Stepparent adoption occurs if a spouse or extramarital partner adopts the child of their spouse or extramarital partner. This is also carried out exceptionally for a child if it is impossible to obtain adoptive parents who are spouses or extramarital partners, and if this is in the child's best interests. In this case, such a child will also be adopted by one person. In the case of single adoption, a partner from a civil union or de facto civil union can adopt their partner's child.[71]

Cohabitants and same-sex partners are not allowed to adopt a child jointly in Poland because joint adoption is only open to spouses. In Polish legal practice, it is also impossible to adopt one's partner's child because this would lead to the termination of the legal relationship between the child and the parent. Married couples may adopt a child, but it is also possible for a single person to adopt.[72]

68 | Slovenian Family Code, Article 215.
69 | Czech Civil Code, Article 803.
70 | Kosior, Łukasiewicz, 2018, p. 59.
71 | Kraljić, 2021, p. 282.
72 | Andrzejewski, 2021, p. 182.

In the Czech Republic, only married couples are jointly entitled to adopt a child. Besides adoption by a married couple, the law enables adoption by one of the spouses and exceptionally by another person. It is also worth mentioning that the Czech system allows so-called re-adoption, the adoption of an already adopted child.[73]

6. The process of adoption and pre-adoption care

The adoption procedure in Poland can be divided into three stages: the first stage occurs at the adoption center. At this level, a selection of adopters is made for the adopted child and they are provided with appropriate training. In the second stage, the court issues a decision about adoption. The third stage takes place before the head of the civil registry office, where the child's birth certificate is issued.[74]

In this process, pre-adoption care is of utmost importance because it is the most significant benchmark of eligibility for adoption, which can predetermine the relationship between the adoptive parents and the adopted child.[75]

According to Hungarian law,[76] the person wishing to assume the parenting of a child shall provide care for the child in their own home for a period of at least one month. Adoption may be authorized without the period of care in the case if

a) the adoptive parent and the biological parent are married
b) the adoptive parent has been caring for the child in their own home for at least one year with the biological parent's consent, or
c) the child being cared for is adopted by their child protection foster parent, who has been providing childcare and upbringing for a period of at least one year.

The act prescribes that adoption may be authorized if this period of caring for the child proves to be successful. After the mandatory care period has expired, the person who wishes to adopt the child clarifies their intentions.

In Czechia, pre-adoption care is also obligatory, but lasts a longer period of time than in Hungary, having been extended from three months to not less than six months.[77] The new legal rule states that after the parents' consent to adoption and placing the child on the pre-adoption care of the prospective adopters, the exercise of parental responsibility of the child's parents is suspended by the operation of law,[78] and the court must appoint a guardian for the adoptee. The maintenance obligation of the child's parents or other persons is also suspended, as prospective adoptive parents are required to keep the child with them at their own expenses.[79]

73 | Králíčková, 2021, 98.
74 | Kosior, Łukasiewicz, 2018, p. 60.
75 | Barzó, 2017, p. 338.
76 | Hungarian Civil Code, Article 4:128.
77 | Czech Civil Code, Article 829.
78 | Czech Civil Code, Article 825.
79 | Czech Civil Code, Article 829.

7. Conclusions

In this article, we outlined the most important factors and features of adoption in four Central European countries. Generally, the most significant characteristics of the observed area are similar in the four countries, which can be traced back to the common continental legal premises and principles and a similar historical background.

The main purpose, aim, and consequences of adoption are the same in the examined countries, but some differences exist regarding the detailed rules of the types, forms of adoption, the necessary consents, and the prescribed age-related rules.

In light of historical developments, adoption is quite an ancient legal institution the origin of which can be traced back to Roman Law. If we would like to examine the future of adoption, we need to consider some data regarding the number of adoptions.

In the Czech system, regulations on adoption have undergone significant changes because of the new concept of the new Civil Code, such as re-adoption or the adoption of adult persons. Some modifications can be regarded as old-new approaches, such as the adoption of adults, which try to return to the historical roots.[80]

In recent years in Poland, adoption has been regarded as less attractive because of the availability of artificial forms of procreation, which can allow parents to experience parenthood almost from conception. Another important reason is the ease with which the adopted learn about their own roots, which prompts them to establish relationships with the biological family.[81]

The Slovenian manuscript shows that in 2017 in Slovenia, 593 applications were filed for adoption. Two years later, there were 47 adoptions. Thus, many couples in Slovenia wish to adopt a child, but there are not enough children eligible for adoption. The majority of children are adopted by the child's parent spouse or partner. Since the Slovenian legal regime allows single adoption, single persons may adopt four children. As a general number, it can be observed that the waiting period of potential adopters can be more than ten years. This situation may be eased by the possibility of international adoption, and some couples are willing to adopt a child from abroad.[82]

A similarity can be observed regarding the Hungarian situation since couples regarded as eligible for adoption must wait approximately two to five years for a child because the adoptive parents have preferences and wishes regarding the children. Hungarian practice shows that if a couple is more open to a child, they can adopt it easier and earlier.[83] The Hungarian legal environment and practice put great emphasis on the issues of parents' eligibility, which covers the adoption preparation course.

Despite the abovementioned and detailed domestic features, characteristics that are sometimes different in Hungary, Slovenia, Czechia, and Poland, the most important message and aim of adoption remains the same, which is consideration for the best interests of the child.

80 | Králíčková, 2021, p. 99.
81 | Andrzejewski. 2021, p. 182.
82 | Kraljić, 2021, p. 281.
83 | Katonáné Pehr, 2020. p. 4.

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"FAKE NEWS" IN SERBIA: CIVIL LAW PERSPECTIVE

Sanja SAVČIĆ[1]

ABSTRACT

Misinformation concerning politics, economics, health, and other society's spheres is probably as old as society itself. In the era preceding the media and the Internet in particular, this problem was in focus within the small groups. Nowadays, when global network communication intensifies the exchange of information, making it easier and faster, the exponential increase in fake news shows its potential to harm or at least endanger fundamental human rights. The phenomenon of fake news is brought to a new level worldwide. As such, it has been a subject of various research areas. Speaking at the basic level of the legal approach to the phenomenon, fake news as such is nothing more than speech. In this respect, there is no means to forbid fake news just because it consists of false or incomplete information. However, when the consequences of producing and spreading such information jeopardize or harm the public or someone's right or interest, the "fake news" stops being just a social problem and it opens the door of law. In that sense, the approach to this phenomenon in the Serbian legal system will be analyzed in this section, in particular civil law aspects. When the right is harmed, the right holder is entitled to claim action, which leads to repairing consequences. In that sense, several claims are frequently used in civil procedures: demand to determine the infringement, demand to cease the infringement of the right, demand to remove the consequences of the infringement, compensation for damage caused by infringement, and demand to publish judicial decisions. Based on the Serbian case law, the more frequently invoked claim against fake news creators is the claim for monetary damages. Aside from this analysis, there will be satirical content, parody, and similar legally protected 'false' speech.

KEYWORDS

freedom of expression
fake news
legal aspects of fake news
social network
media
liability
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1. Introduction

This study will discuss the actual problem regarding the spreading 'fake news' through social media and the Internet in general, especially within social networks, and on legal means for combat against it.

'Fake news' in its pure meaning warns on the defect. It is the opposite of truth, reality, on a fact-grounded statement. However, it would be a simplification of the global challenge to fight it, and the distinction between this phenomenon and disinformation is eliminated. What makes fake news jeopardizing is the fact that this news is 'intentionally and verifiably'[2] false, and could impact readers, sometimes with serious consequences. For this study, the term fake news will be used in the sense of the online publication of intentionally or knowingly false statements of fact.[3]

The major problem with fake news lies in its qualification as news. Attribute 'fake' comes subsequently, often when readers have already built their opinion or made unlawful action (e.g., left a comment that discriminates someone mentioned in the false story).[4] There are no technical or legal means to prevent the distribution of such information. It is all about the reaction.

In that respect, recommendations for the critical acceptance of news are common. This is nothing but advice, often with the poor application, at least judging according to the influence of fake news on widespread misleading the public discourse on numerous topics (e.g., need to vaccinate). Apart from this social tool, not many means could be used against fake news. The same situation occurs with regard to legal actions. Namely, since only legally recognized injuries could be of significance, the search for an appropriate legal mechanism is placed in a thin legal framework. This article approaches only the narrow categories where "fake news" activates civil law protection.

2. Legal Framework for Combat Against "Fake news" in Serbia: An Overview

To search for effective legal means, it is necessary to consider the legal system as a whole.

The phenomenon of fake news includes several human rights provided by the Constitution law. The first is the right to express thoughts and opinions. The second was the right to be informed.

2 | Allcott and Gentzkow, 2017, p. 213. According to this author, fake news rules out several causes: 1) unintentional reporting mistakes, 2) rumors that do not originate from a particular news article; 3) conspiracy theories (these are, by definition, difficult to verify as true or false, and they are typically originated by people who believe them to be true); 4) satire that is unlikely to be misconstrued as factual; 5) false statements by politicians; and 6) reports that are slanted or misleading but not outright false. (p. 214).

3 | Klein and Wueller, 2017, p. 6.

4 | Colliander, 2019, p. 204.

The Constitution Act of the Republic of Serbia, Art. 46 states that freedom of thought and expression should be guaranteed, as well as the freedom to seek, receive, and impart information and ideas through speech, writing, art, or in some other manner. Freedom of expression may be restricted by the law if necessary to protect the rights and reputation of others, to uphold the authority and objectivity of the court and to protect public health, morals of a democratic society, and national security of the Republic of Serbia.[5] Even so, freedom of thought, as an internal psychological process, cannot be limited by law, since the process is out of cognition and hence out of control of the authorities.

The shaping of an opinion that is supposed to be published depends on the fact that the person has obtained. From that perspective, freedom of thought and expression, as well as freedom of the media, are of the same importance as the right to be informed. Hence, the Constitution of the Republic of Serbia contains an explicit provision that guarantees everyone the right to be informed accurately, fully, and timely about matters of public importance. The media shall have an obligation to respect the right (Art. 51(1)). When it comes to the information kept by state bodies and organizations with delegated public powers, the right to access information shall be exercised in accordance with the specific law (51(2)).

As relevant provisions provide, freedom of expression, in a broad sense, shall not endanger rights that promote higher values: rights and reputation of others, as well as protection of national security, public order, public health, and morality. On the relevance of those rights regarding the individual's dignity, reputation and honor testify that freedom of thought and expression are among the rights that could not be derogated during the war or the state of emergency (Art. 202(4)). Even so, exercise of the right to be informed largely depends on the media and its openness. During the last few decades, it is obvious that social networks tend to dominate the information market.

Speaking at the basic level of the legal approach to the phenomenon, fake news as such is nothing more than speech. In this respect, there is no means to forbid fake news just because it consists of false or incomplete information. However, when the consequences of producing and spreading such information jeopardize or harm the public or someone's right or interest, the "fake news" stops being just a social problem and it opens the door of law.

The social harmfulness of spreading false news in Serbia was recognized decades ago. Accordingly, the Criminal Code once contained a crime called *spreading false news*. This crime is committed by anyone who spreads fake news or rumors that he knows to be false, to cause a serious violation of public order and peace. A person would be fined or imprisoned for up to one year for this crime, and if the crime is committed through the press, radio, television, or other media or similar media or at a public gathering. In the meantime, the crime in this form has ceased to exist, but that does not mean that spreading false news has become allowed.

The criminal offense has changed, and in the changed form it has existed since 2006, in Article 343 of the Criminal Code, entitled *Causing panic and disorder*. This criminal offense is committed by a person who, by presenting or spreading false news or allegations, causes panic or serious disturbance of public order or peace, or thwarts,

5 | Ustav Republike Srbije (Constitution of the Republic of Serbia – CA), Official Gazette of the Republic of Serbia, No. 98/2006, dated on 8 November 2006. English version of the Constitution available at: https://www.propisi.pravno-informacioni-sistem.rs/content.php?id=800, last visited on 19 March 2021.

or significantly hinders the implementation of decisions and measures of state bodies or organizations exercising public authority.

This criminal offense is punishable by imprisonment from three months to three years and a fine. If the criminal offense is committed through the media or similar media or at a public gathering, a prison sentence of six months to five years is threatened. As a consequence of presenting or spreading false news, the legislator, in addition to disturbing public order and peace, also foresaw the frustration or significant obstruction of the decision and measures of state bodies or organizations exercising public authority, and the penalties are increased.

This does not mean that a journalist, when publishing news, must establish absolute truth. If there was an obligation to establish the absolute truth before the news was published, it would deter journalists from publishing the texts, for fear of possible criminal prosecution if the news they published is not true.

Although establishing the absolute truth is not necessary, it certainly does not release the journalist from the duty to check the truthfulness of the information as required by the rules of the journalistic profession and the Code of Journalists of Serbia. This crime can be committed only with intent, which would mean that the journalist, at the time of publishing the news, has been aware that the news they have been publishing was false. If the journalist before publishing checks the truthfulness of the information in the manner prescribed by the law on public information and media and the code of journalists of Serbia, there is no awareness that the information being published is false; therefore, this crime does not exist.

For this crime to exist, it is not enough that the information published is false, but its publication must cause the consequences provided by the Criminal Code: panic or serious disturbance of public order or peace or significant hindrance to the implementation of decisions and measures of state organs.

The Criminal Code stipulates that a person who transmits false news through the media or similar media or at a public gathering constitutes a more serious form of this crime, because false news seems to be available to a larger number of people. Therefore, more severe punishment is envisaged for a more serious form of this criminal offense. If a fake news item is published through a newspaper, radio, television, or other public media, and the author of the fake news item is unknown or the fake news item is published without the author's consent or there are legal obstacles to prosecuting the author, as a rule, the responsible person is the editor-in-chief of that media. If these circumstances exist on the part of the author, and the false news is published in an occasional printed publication, its publisher will be responsible. Under the same conditions, the manufacturer was responsible.

3. Civil Law Concerns of Fake News

To protect the public interest by general and special prevention of future violations, criminal law predicts severe punishments. However, the absence of a crime does not mean that human rights are not violated. Apart from the fact that crime protection does not exclude the measures provided by other legal areas, civil law provides more claims than is the case with criminal provisions.

To explore civil law protection and its scope, it is necessary to make some preliminary remarks.

As already mentioned, "fake news" becomes of legal relevance if its consequences harm or jeopardize someone's rights.[6] The starting point of determining whether it is the case or not is the fact that news in general, and "fake news" as well, is embraced by the meaning of the speech. As such, fake news is protected by the Constitutional Act as freedom of expression and thoughts. This human right is limited in order to protect the rights and reputation of others, to uphold the authority and objectivity of the court and to protect public health, morals of a democratic society, and national security of the Republic of Serbia. It is irrelevant if harmful speech is based on truth or false facts. Jeopardized or harmed rights receive protection provided by civil law mechanisms. The question is who is responsible for unlawful consequences and what the harmed person can claim for.

3.1. Claims in Civil Law Procedure

When the right is harmed, the right holder is entitled to claim action, which leads to repairing consequences. In that sense, several claims are frequently used in civil procedures: demand to determine the infringement, demand to cease the infringement of the right, demand to remove the consequences of the infringement, compensation for damage caused by infringement, and demand to publish judicial decisions. Based on the Serbian case law, the more frequently invoked claim against fake news creators is the claim for monetary damages.

3.1.1. Who can Initiate a Lawsuit?

According to general civil law rules, any person whose right is infringed is entitled to claim a certain action from a responsible person. Concrete requests naturally depend on actions that cause infringement. The purpose of civil protection will be achieved if the right holder is in a position to consume his/her right in the same manner, or in the same range as in the case before infringement occurred. For this reason, an infringed party is always entitled to file a lawsuit.

This general rule was not exceptional. In the case of discrimination, particularly hate speech, the Law on Prohibiting Discrimination empowers certain third entities to initiate lawsuits against liable persons, with all claims except damage compensation. Namely, apart from the originally entitled person, lawsuits could be initiated by the Commissioner for the Protection of Equality, organization, which is in charge of protecting human rights or rights of a certain group of people (e.g., persons with disabilities or homosexuals) and tester[7]. When false information touches one particular person, those additional entitled entities cannot file a claim without their written consent (Art. 102 (3) LPIM).

6 | Krasky, 2017, p. 924.

7 | Tester is, acctually, the person who had deliberately exposed him/herself to discriminatory treatment intending to directly verify the application of the regulations pertaining to the prohibition of discrimination in a particular case may initiate a lawsuit (Art. 46 (3), Law on Prohibition of Discrimination, Official Gazette of the Republic of Serbia, No. 22/2009 and 52/2021, LPD). Those particular cases referred to imposing a ban on an activity that poses the threat of discrimination, a ban on proceeding with a discriminatory activity, or a ban on repeating a discriminatory activity; 2. that the court should establish that the defendant has treated the plaintiff or another party in a discriminatory manner; 3. taking steps to redress the consequences of discriminatory treatment, 4. that the decision passed on any of the previous mentioned lawsuits. (Art. 43 (1, 2, 3 and 5) LPD).

3.1.2. Who Could Be Responsible for the Infringement?

The determination of the responsible person in the civil law term, refers to the identification of the person who would be obliged to take a requested action. As regards "fake news" and its unlawful consequences, to determinate a responsible person, and hence the debtor of the performance, it is necessary to make a distinction between "fake news" published by registered media, from one side, and those published independently of the previous category, from other. Social networks belong to the second group.

In addition, the different approach to the legal consequences of "fake news" depends on the nature of the vulnerable action. If it is discriminatory, stricter rules on responsibility are provided.

The reason for this differentiation is that registered media and discrimination are regulated by *lex specialis* laws.

Therefore, the claim referred to the determination of infringement (to identify whether the publication of information or record had violated a right or interest), to cease the infringement of the right (non-publication of information or record and ban from republishing of information), removing the consequences of the infringement (to hand in a record, to remove or destroy a published record (deleting a video recording, deleting an audio record, destroying a negative, remove from publications, etc.), publishing judicial decisions, shall be filed against the editor-in-chief of the medium in which the information or record was published. This liability of the editor-in-chief arises from the fact that the editor-in-chief is responsible for the content they edit. This is regardless of the question of who the author of the information is, whether a journalist or someone else. In other words, the responsibility of the editor-in-chief exists not only when the author of the information is a journalist, but also when the hate speech published in the media comes from others. In online media publications, indiscriminative publication of readers' comments on a certain topic, in which the ban on hate speech is violated.[8]

When it comes to damage compensation, a journalist or an editor-in-chief shall be liable to cover material and nonmaterial damages of a person referred to in the information that was prohibited from being published in accordance with the media law and who suffered damages because of the publication of the information. The right to compensatory damages also pertains to a person whose restate, correction, or other information that was not published. However, its publication was ordered by the competent court when that person suffered damages. To succeed in the process, the plaintiff must prove the fault of the liable entity for the damages (Art. 112 and 113).

According to the law on prohibition of discrimination, the protection of endangered or violated rights to equality is implemented by a demand directed against the discriminator. If the court establishes that a direct act of discrimination[9] has been committed, or if that fact is undisputed by the parties to the lawsuit, the defendant may not be relieved of responsibility by providing evidence that they are not guilty. This means that if the act of discrimination is proved, the defendant is liable independently and even without

8 | Rašević, 2018, pp. 1309 and 1310.

9 | Direct discrimination shall occur if an individual or a group of persons, on the grounds of his/her or their personal characteristics, in the same or a similar situation, are placed or have been placed or might be placed in a less favorable position through any act, action or omission. (Art. 6, Direct discrimination, LPD).

a fault. Moreover, the defendant has no means of excluding their liability. However, in other cases, when discrimination has been indirectly committed, the plaintiff must prove the likelihood that discrimination has been conducted by the defendant. Then, the provision of evidence that no violation of the principle of equality or the principle of equal rights and obligations shall fall on the defendant (Art. 45 LPD). There is a presumption of a defendant's liability. This corresponds to the general civil law terms of liability.

3.2. Remarks on Damage Compensation

The very fact that "fake news" has been published and even infringement of the right has occurred does not mean that infringed party suffers damage. In this case, the right holder is entitled to claim damage compensation, material, or nonmaterial. It is possible that someone could lose profit in restaurants because of false information on servicing the food that is prepared with expired date groceries, or when someone, based on false information, is connected to the crime group and hence rejected by their society. Owing to harmed dignity, they suffer from nonmaterial damage, which should be compensated. Whether the damage is material or nonmaterial, money compensation is dominant.

When published, "fake news" could be qualified as prohibited information, special media provisions, and anti-discriminatory law will be applied. Unlike the specific rules on damage compensation in the case that harmful content is provided by journalist,[10] on the same request against the media due to damages caused by "fake news" as such, general rules of Law on Contracts and Torts are applied.[11] The same is true in all cases out of the scope of the *lex specialis*.

Therefore, according to the relevant provisions of the Law on Contracts and Torts, a person who causes damage to another is obliged to compensate it, unless they prove that the damage has not been caused by their fault.[12] In this respect, the provision of the law of public information and media provides an obligation of journalistic due diligence. Before publishing the information about an occurrence, an event, or a person, both the editor and the journalist shall check its origin, authenticity, and completeness with due diligence appropriate for the circumstances. Both the editor and the journalist shall convey the accepted information, ideas, and opinions authentically and fully. If the information is taken from another medium, they shall credit that medium.[13] In the context of a fault for the damage, it is difficult to imagine circumstances under which the journalist could be excluded from liability.

Therefore, the basis of liability is the presumed fault of a person whose action caused the damage. Hence, a person who has undertaken an injurious action against someone's

10 | Art. 112-118 of the Law on Public Information and Media.

11 | The reason lies in the provisions of Art. 112 and Art. 113 of the Law of Public Information and Media, that stipulates liability of the journalist and editor-in-chief for damages.

12 | Art. 154(1) Law on Contracts and Torts.

13 | Art. 9. In case law: Judgement of the Higher Court of Pančevo, P.br. 7/10 as of 3ª February 2010, Judgement of the Higher Court of Belgrade, P3 244/14, as of 14 March 2016, Judgement of the Supreme Court of Serbia, Rev. 1477/05, as of 27 December 2005, Judgement of the Court of Appeal in Belgrade, Gž 308/2016, as of 3 February 2017, Judgement of the Higher Court in Valjevo, Gž 507/19, as of 14 May 2020, Judgement of the Court of Appeal in Novi Sad, Gž. 83/11, as of 18 January 2011.

right, concretely human rights (dignity, honor, reputation), is obliged to compensate for the damage caused by wrongdoing. However, this general rule leads to obstacles in its enforcement of fake news damages.

Primarily, there are difficulties in spreading fake news via the Internet. From the aspect of general rules, to succeed with the request for compensation, the damaged right holder must prove that there is a causal link between false information and the damage itself. Their position in the Internet environment where the injury occurred is not simple. This is particularly the case when determining the origin of the misinformation. In addition, it is not necessary for the original source of information to cause damage. This could be the case when "fake news" is artistic, satiric, parody or some other kind of allowed expression, posted on the social network platform but reposted on media websites. Finally, regarding monetary compensation of non-pecuniary damages, success of demand, such as amount, depends on the intensity and duration of suffering.

3.3. Liability for Infringement of the Right Committed on the Internet

The basis of liability in civil law is, as previously mentioned, the presumed fault of the person whose action caused the damage. In particular, a person who has undertaken an action that causes infringement of the right is obliged to compensate for the damage linked to unlawful action.

In traditional civil law perception of action and liability, applying this rule is feasible without exception. However, we encounter difficulties in the causal link between the consequences and infringement committed via the Internet. Namely, from the aspect of general rules, in order to succeed with his request for compensation, the damaged right holder must prove that there is a causal link between the unlawful action and the damage itself. It is obvious that his position in the Internet environment where the injury occurred is not easy.

To better understand the context in which the issue of liability for infringement on the Internet appears to be controversial, it is necessary to identify the entities that are usually involved in the exchange of information through a global computer network. Therefore, the most common problem that emerges daily is when the Internet provider enables the posting of potentially harmful content and its sharing among users. This service is of high importance in the context of this study.

The provider did not directly commit to the injury, but by performing his service, he enabled the injury to incur. Therefore, the responsibility of the service provider is indirect (shared or liability for another). According to the general rules on liability, its determination is based on the issue of carefulness, that is, whether the Internet provider knew or could have known that infringement was being committed through performing his service. In other words, the responsibility of the provider depends on whether they applied fair trade principles while providing his service.

The technological environment in which data is exchanged, the amount of information transmitted via the Internet, and the speed of their flow are only some of the circumstances that make it difficult to assess care. Consequently, it is difficult to distinguish situations in which it has been assumed that the provider knows or could have known about the violation of rights. This is especially important when we consider the general absence of the rights and obligations of the Internet service provider to supervise, that

is, control communication among users.[14] Moreover, "fake news" is not *a priori* infringement of the right but an exercise of the right to express freedom of speech. Hence, the question of liability of Internet provider arises just in case that "fake news" became of legal relevance.

3.3.1. Liability of Internet Intermediaries in Serbia

The liability of Internet intermediaries, that is, information society service providers in the law of the Republic of Serbia, is normally regulated by the Law on Electronic Commerce (LEC).[15]

According to this law, the intermediary is liable for a violation when he knows or could have known about the unauthorized actions of service users or the content of the data and does not remove or disable the access to the given data immediately upon acknowledgment of an unauthorized action or data.[16]

The obligation to monitor the content stored and exchanged via the Internet was not prescribed. However, if there is a reasonable doubt that illegal actions or exchanging illegal content are being performed by using the service, the provider is obliged to inform the competent state authority. Disclosure of user data, as well as content removal and disabling access to suspicious content, is possible only on the basis of a court or administrative decision. The latter directly complements the liability issue of damage compensation. If we consider that a fault as a condition of liability for damages can be excluded when the intermediary proves that he did not act with intent or negligence, the crucial fact depends on what is considered to be negligence in providing services.[17]

It could be imagined that the provider would prevent further infringement by disabling access to unauthorized content or removing unauthorized content. However, such actions could violate the rights of other entities.[18] As the provider, in principle, has no obligation to supervise the exchanged content, the notification of the existence of a breach activates the obligation of the provider to alert the competent authorities and further to act in accordance with their decisions.

Namely, according to the Law on Electronic Commerce (Art. 20 (3, 4, 5, 6, 7)), the service provider is obliged to present, based on an appropriate court or administrative act, all data based on which the detection or prosecution of perpetrators of criminal acts, that is, the protection of the rights of third parties can be undertaken. Regarding notice of unauthorized action or information on the basis of which the service provider acts, it

14 | On April 17, 2019, the European Parliament adopted the Directive on Copyright in the Digital Single Market, which has been criticized in legal circles precisely because it leaves room for monitoring users and other forms of privacy threats. See: Directive EU 2019/790 of the European Parliament and of the Council of the 17 April 2019 on copyright and related rights in the digital single market and amending Directives 96/9/EC and 2001/29/EC, Official Journal of the European Union, L130 of 17th May 2019, also available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0790&from=EN, Accessed 1 feb 2021.

15 | Art. 1 of Law on Electronic Commerce (LEC), Official Gazette of Republic of Serbia, No. 41/2009, 95/2013 and 52/2019.

16 | Art. 18 LEC.

17 | Reljanović, 2016, pp. 119–134.

18 | It is, above all, about the right to freedom of expression and the right to privacy, which are the fundamental values of modern society. Therefore, there is a reason in legal circles to insist on defining the role of the intermediary in terms of infringement of rights, because the intermediary does not have the authority to decide neither on the right, nor on infringement of it.

must contain information about the sender of the notice, a precise description of the place on the website, that is, another electronic display on which inadmissible data appears, as well as the explanation of inadmissibility. The information society service provider is obliged to remove the inadmissible content without delay, and no later than within two working days from the day of receipt of the act of the body competent for application and action according to the law whose provision has been violated, ordering him to remove the illegal content. The competent authority shall issue an act *ex officio* or at the request of a party.

At the request of a third party, the information society service provider is obliged to remove unauthorized content without delay, and no later than within two working days from the day of receipt of the request of that person, unless it considers that the published content is not contrary to law. In that case, the information society service provider may contact the body responsible for application and compliance with the law and request that the competent authority determine whether the provisions of the law have been violated in a particular case, as a result of which the content must be removed. The act of the competent authority referred to ordering the information society service provider to remove unauthorized content must contain a precise description of the place on the website, that is, another electronic display on which inadmissible content appears, as well as an explanation of inadmissibility.[19]

In the context of liability for damages, the provider is considered liable when he has received notification of a possible infringement and fails to alert the competent authorities. Additionally, the provider could be considered liable even if, on the basis of an appropriate judicial or administrative act, he fails to provide information that is relevant for the detection of the person whose action directly caused the damage. In both cases, it is about the fault of the provider because he did not act with the expected care.

3.3.2. Liability of the Direct Perpetrator of the Infringement on the Internet for Damages

Once an entity has been identified (or made probable) that could directly infringe someone's right by its actions, the injured party may file a claim for damages against the person identified as the alleged perpetrator. When it comes to damages committed via the Internet, determining the debtor of compensation is based on the assumption that the person who has been the owner of the IP protocol is also the person who directly undertook the infringement of the right, which caused the damage. This presumed connection between the owner of the IP address, the act of injury, and the damage caused usually corresponds to reality.

19 | In Copyright Law, this mechanism is even more precisely regulated. Pursuant to LCRR, the court may order the person who committed the infringement of copyright or related rights to provide information on third parties who participated in the infringement of copyright or related rights and on their distribution channels, or to submit documents related to the infringement (Art. 213, Law on Copyright and Related Rights, Official Gazette of Republic of Serbia, No. 104/2009, 99/2011, 119/2012, 29/2016, LCRR). The delivery of information may also be ordered to a person who has discovered goods in distribution that infringe copyright or related rights, has provided services in trade that infringe copyright or related rights, has provided services that are used in activities that infringe copyright or related rights, or has been identified by the aforementioned persons as a person involved in the production or distribution of goods or the provision of services that infringe copyright or related rights.

However, according to the general rules on compensation for damages, faults, as the basis of liability, is presumed to be the person whose action or neglect caused the damage. The causal link between the action and the damage, as well as the damage itself, should be proven by the injured party. The presumption that the owner of the IP address has undertaken a detrimental action, to some extent, departs from the application of the general rules on liability.

Therefore, in the case of an online infringement, the presumed fault is grounded on the presumed causal link. Let us remember that the presumption of causality is the basis for strict liability. In the domain of fault liability, the plaintiff must prove that the defendant undertook a harmful action, and his fault was presumed. The basis of liability is the presumed fault of the owner or user, in compliance with the general rules, the designated debtor may be released from liability; if they prove that the damage did not occur by their fault, the right infringement was committed neither intentionally nor due to utter carelessness.

In the context of online infringement, it is difficult to determine the fault, because communication through the Internet and, in particular, through social networks, is based on digital society. However, it can be understood that there are circumstances that would indicate the fault. For instance, the standard of care in Internet exchange of information should include awareness of consequences produced by the fast and wide spread of available content. However, situations in which the defendant did not take damaging action at all are not inconceivable, for example, when he was not physically able to access the Internet from the given IP address. By applying general rules, his liability was excluded. The reason for this is not (only) in the absence of a fault, but in the circumstance that excludes the causal link between the ownership of the IP address and the action taken by which the right infringement was committed. Therefore, if the infringer of the right was not the owner of the IP address, any person could have undertaken a harmful action. The burden of proving the fault falls on the plaintiff, due to which it might happen that the legal protection regarding the caused damage would be left out.

At this point, it is crucial to obtain information on the potential infringer. In terms of proceeding law, persons who are required to provide information have the capacity of witnesses. Thus, a witness may refuse to answer certain questions if there are justifiable reasons for that, especially if he would expose himself to severe indignity, significant property damage, or criminal prosecution of himself or his relatives of a certain type and degree of relationship by answering those questions.[20]

20 | Art. 249(1) of the Law of Civil Procedure (LCP), Official Gazette of Republic of Serbia, No. 72/2011, 55/2014 and 87/2018. In the explanation of the Proposal of the Law on Amendments to the Law on Copyright and Related Rights, in connection with the mentioned amendment, i.e the new provision, it is stated that its introduction requires a harmonization of domestic law with Art. 8 of Directive 2004/48/EU (on the right of information) and the fundamental values of modern European society. However, the European Court in the decision *Bastei Lübbe GmbH & Co. KG* against *Michaela Strotzera*, pointed out that intrusion into family life is considered inadmissible when the copyright holder has at his disposal other means that could ensure the determination of civil liability of the owner of the internet connection. If this is not the case, special protection of the family is contrary to the aim of Directive 2001/29 and Directive 2004/48, which needs to provide the right holder with effective protection. The protection of the family is, therefore, subordinate to the protection of the author. See: Judgement of the Court (Third Chamber) of the 18th October 2018, in Case C-149/17, par. 53.

Therefore, when a right holder has filed a lawsuit against the owner of the IP address linked to damages caused by sharing protected content via the Internet and who apparently did not undertake such action, the court may order the defendant to submit data on persons related to the infringement and set an appropriate deadline for this. In the event that the defendant does not act according to the order, the court may accept the claim and oblige the defendant to pay damages. His responsibility does not refer to undertaking the act of injury, but to failing to provide information about the injury.

4. Final Remarks

The civil law perspective of "fake news' in this observation had two starting points. The first is related to the fact that civil law provisions protect private rights and interests. From that standpoint, the general rule is that there is no claim or action without will or consent of the infringed party. Consequently, public interest, in its narrow meaning, cannot be efficiently and directly protected in civil law procedures. The second viewpoint was *lex specialis* provisions on information that is considered prohibited or discriminatory and that could be applied regardless of whether the information is correct or false. From this perspective, the regulation of liability for a certain infringement is an exception to the general rule of a presumed fault.

In the case of the infringement occurring in media, a journalist or an editor-in-chief shall be liable if the plaintiff proves the fault of the liable entity for the damages. Considering that the presumption of the fault as a general rule in civil law has been settled exactly because of the protection of the infringed party, it is hard to explain why this exception is valid for entities that have, in doing their job, show a higher level of care during the publishing of information.

The second exception is the case of direct discriminatory acts. That is, the presumption of the fault is absolute. The discriminator has no means of rejecting liability. Even this rule could be justified by the nature of situations that constitute direct discrimination. It is difficult to imagine cases in life in which direct discrimination was committed without quilt[21]; the exception is unusual in the legal system.

Finally, applying the general rules on damages caused on the Internet is not possible without certain modifications. One refers to the issue of assumptions about the circumstances relevant to the success of the dispute. According to the general rules, the fault of a person who undertakes a detrimental action is presumed; in this case, it is initially presumed which person has undertaken that action, and only then his fault. The owner of the Internet connection may still be liable for damages due to his failure to provide relevant information. If we contemplate the above rules stipulated by LEC according to which damage can still be borne by the owner of the Internet connection, regardless of the fault for the infringement, it seems that liability for damages for infringement via the Internet does not represent a fault liability in its pure form.[22]

21 | Vodinelić, 2010, p. 233.
22 | Radovanović, 2019, p. 57.

The phenomenon of fake news is much more complex for legislators to deal with the challenge of controlling it.[23] Fake news is the product of human beings, and society should deal with it through various fields of action. In this respect, civil action can be as important as the action of authorities. A major part of this is undertaken by different communities and associations devoted to capturing fake news, to trace the origin of fake news and check its liability.[24] In addition, fake news could be suppressed by increasing the education of journalists as well as the conscience of society itself.

23 | During the Pandemic crisis in 2020, Government adopted the Conclusion on informing the population about the condition and consequences of the infectious disease COVID-19 caused by the SARS-CoV-2 virus (Official Gazette of the Republic of Serbia, No. 48/2020). The Conclusion was considered an attempt to restrict freedom of expression to the extent that it is disproportionate to the officially proclaimed goal. Thanks to the reaction of the journalistic and media community in Serbia, the controversial conclusion ceased to be effective within a short period of time.
24 | For example, in Serbia: https://fakenews.rs/, where everyone could ask for checking of information published by media.

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NORMATIVE APPROACH TO THE INTERPLAY BETWEEN THE CCC AND THE CJEU/ECTHR: JUDICIAL DIALOGUE OR A DICTATE?

David SEHNÁLEK[1]

ABSTRACT

The article aims to identify the rules governing the mutual relationships among the European Court of Human Rights, the Court of Justice, the constitutional courts of EU's Member States, and the EFTA Court. Its second goal is to determine to what extent their decisions and interpretive conclusions mutually bind these courts. The third goal is to present the approach taken by the Czech Constitutional Court towards the European Court of Human Rights and Court of Justice, and their decisions, on the one hand, and that of the Court of Justice to rulings made by the European Court of Human Rights and the EFTA Court, on the other hand. To find an answer to these questions, the article first analysis the normative settings and the links among individual legal systems and also among these courts. The second part of the article focuses on the case-law of these courts and thus on the reality of their "mutual" decision-making. The author concludes that there is a significant difference between the decisions of the Court of Justice and the European Court of Human Rights. While the former has the power to determine the binding and, therefore correct interpretation of EU law, the latter does not have comparable competence when it comes to the European Convention. Therefore, European Court of Human Rights decisions are only de facto binding. However, in the case law of the Constitutional Court, the exact opposite is the reality. The European Court of Human Rights judgments are unquestioningly respected and followed, while the approach to the Court of Justice's decisions oscillates between two extremes. Some of its decisions are fully reflected, while others are silently ignored. Similarly, the Court of Justice works differently with the European Court of Human Rights decisions and the EFTA Court. The Czech Constitutional Court and the Court of Justice also have in common that they treat decisions of the European Court of Human Rights (Czech Constitutional Court) and the EFTA Court (Court of Justice) basically like their own.

KEYWORDS

European Court of Human Rights
the Court of Justice
the Czech Constitutional Courts
EFTA Court
Precedent

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Principle of Homogeneity
the Correct Interpretation
the Binding Effects of Interpretation of Judicial Decisions
Protocol No. 16 to the European Convention

Introduction

The European legal space is specific in that it houses several supreme courts which overlap in their jurisdiction. The mutual relationships among these courts are not satisfactorily, clearly, and convincingly established, as each of them belongs to a different legal order and system. They are part of no clear hierarchy that would make it possible to resolve or avoid potential conflicts among these courts. This circle of courts includes 1) the European Court of Human Rights (ECtHR), 2) the Court of Justice of the European Union (CJEU), 3) the constitutional courts of European Union (EU) Member States, and 4) the European Free Trade Association (EFTA) Court.

The present article aims, first, to identify the normative rules governing the mutual relationships among these courts. Second, it attempts to determine to what extent, and whether at all, these courts are mutually bound by their decisions and interpretive conclusions. The third objective is to present the approach taken by the Czech Constitutional Court (CCC) towards the ECtHR and CJEU, and their decisions, on the one hand; and that of the CJEU to rulings made by the ECtHR and the EFTA Court, on the other hand.[2] The article, thus, focuses on the views of courts that might be perceived as 'threatened' by an external interpretive authority of higher category. While the perspectives of the ECtHR and the EFTA Court would naturally be relevant, this would go beyond the reasonable scope of this study.

The approach we adopt is both normative and factual, based on the actual decisions of these courts.

Lawyers naturally assume that there must be some kind of hierarchy in the judiciary. It is always crucial for a lawyer to determine who will have the last word in a matter they are engaged in. From this perspective, the European space represents an environment characterised by uncertainty. The courts mentioned above are well aware of this issue. Therefore, they tend to try and avoid mutual contradictions in their decisions. The question this study seeks to answer is whether a final interpretive authority can be established *de iure*or at least *de facto* in the European space.

The search for this answer is organised in two stages. The first part of the article uses a normative approach to lay out some general systemic questions. The focus is primarily on the links among individual legal systems (legal orders, i.e. laws of individual jurisdictions) and also among the supreme courts. The reason is simple: the question of how one court influences another is often reduced to the nature of the ensuing decision—whether it is binding, and if so, in what way it serves as a precedent. However, is the fact that that these considerations are only relevant in the framework of a single legal system tends to be neglected. The situation is somewhat more complicated with regard to the ECtHR,

2 | Whereas the first objective focuses on the normative approach, the third explores real practice of the courts.

the CCC, the EFTA Court, and the CJEU. The decisions rendered by these courts constitute parts of various legal systems, which may—but need not—define what effects these decisions have and whether or not they are binding. This has often been disregarded in the literature.

The second part of the present article focuses on the reality of 'mutual' decision-making by individual courts. The simplistic approach used in the literature can owe to the fact that individual courts neglect their mutual systemic links, do not follow up on these links, and treat judgements coming from other courts equivalently. What is also important in this regard is to what extent—and whether at all—they actually take each other's interpretations into consideration.

This article deals primarily with the protection of human rights and freedoms. From this perspective, the EFTA Court's involvement might appear unsystematic at first sight. Nonetheless, there are two reasons for not leaving this court out of our analysis. First, the way this court is asked to interpret the EEA Agreement is very specific, and this, in turn, makes it possible to compare its *modus operandi* with cases not involving such settings, as is true of the European Convention. Second, this is because we can objectively compare decision-making by the CJEU with that of the ECtHR (*sic*). The picture would be incomplete without such a comparison.

However, this study does not examine what can serve as a precedent, i.e. whether decisions rendered by the ECtHR, the CCC, the EFTA Court, and the CJEU are binding *ergaomnes*; which parts of their decisions have binding effects; etc. While these questions may certainly be interesting and relevant from the legal point of view, their examination would go beyond the scope of this study. Thus, the sole decisive aspect is whether a court included in our analysis is bound to follow the interpretation of a legal norm provided by another court.

I. Normative approach to the relationship among legal systems, binding effects of judicial decisions, and interpretation.

As a starting point, we define the basic concepts and establish the general background. The study focuses on courts and their decisions, with an emphasis on the binding effect of these decisions and the interpretations they provide. A systemic approach to this problem is often neglected in case law and literature. Judicial decisions are treated as a general category, regardless of which courts issue them. However, such an approach is problematic and simplistic in terms of the theory of law. This situation can be classified as follows.

1. The ECtHR and the EFTA Court interpret and apply sources of public international law.
2. Constitutional courts interpret and apply national laws and, in some cases concerning the protection of human rights, public international law, and potentially EU law. EU law comes into play, especially if the Constitutional Court's review touches on a rule that partially or fully originates from EU law.
3. The CJEU primarily interprets and applies EU law and public international law.

As a result, the nature, effects, and binding nature of judicial decisions must be addressed in view of the mutual links among the individual legal systems. Analogously, we must deal with the mutual links among these courts as institutions.

1.1. On the interpretation of public international law: the perspective of a national (Czech) court

The interpretation of public international law is governed by the rules of this law.[3] In contrast, its national effects (i.e. the conditions of its application) are mediated by national laws. In the Czech Republic, they are set out in Art. 10 of the Constitution,[4] which considers some international treaties directly applicable in Czech law.[5] In practice, international treaties covered by this provision become part of the law[6] which is to be interpreted and applied by Czech courts. However, the interpretation of these treaties is autonomous. International treaties for the protection of human rights and freedoms form a special category *sui generis* in the Czech legal system. They are considered a part of the Czech constitutional order and, therefore, serve as a benchmark for assessing the constitutionality of ordinary laws (statutes).[7] However, this changes nothing about the fact that they are a source of public international law. The mechanism of their (autonomous) interpretation is, therefore, not affected.

The Czech Constitution governs the relationship between national and international laws, but deals only with the national effects of international treaties. It remains silent in this regard about the decisions issued by international organisations and their bodies. The nature and effects of such decisions can be established and derived from the international treaty which created the given international organisation, and are mediated again through national law. Czech (national) courts are bound by the given international treaty and the way it has been interpreted by an authority of the given international organisation.

Practically speaking, this means, in general, that Czech (national) law first makes it possible to apply an international treaty in the Czech Republic. At the same time, its interpretation is provided in the manner envisaged by that treaty, provided that it comprises such rules. A specific international institution may be involved in the interpretation process. The Czech Republic and its courts must subsequently respect the interpretation provided by such an institution, as they are bound by the relevant treaty. If such rules are absent and no international institution is appointed to ensure correct interpretation, the courts of the contracting states interpret the given international treaty themselves.

3 | These rules are codified for international treaties in the Vienna Convention on the Law of Treaties.

4 | Art. 10 of the Czech Constitution states: 'Promulgated treaties, to the ratification of which Parliament has given its consent and by which the Czech Republic is bound, form a part of the legal order; if a treaty provides something other than that which a statute provides, the treaty shall apply.'

5 | Only some international treaties are directly applicable in the Czech legal order, as only privileged treaties (presidential/parliamentary) are included in the incorporation clause of the Art 10 of the Czech Constitution.

6 | It is sometimes incorrectly postulated that they become a part of Czech law.

7 | Decision of the Constitutional Court Pl. ÚS 36/01 of 25 June 2002.

A mechanism involving an international institution partially applies in the case of the ECtHR and the European Convention. The latter assumes that the Czech Republic, as a contracting state of this international treaty, will follow ECtHR judgements in proceedings to which it was a party.[8] However, the European Convention does not require the Member States and their courts to respect the ECtHR's judgements in general, i.e. in all cases, including the proceedings in which they were not involved. Therefore, it cannot be concluded that the European Convention directly establishes the ECtHR's general power to provide binding and correct interpretation of its text, which would generally have to be followed by courts of the contracting states. There is no explicit normative basis for such a statement. Thus, the Member States and their courts have some room for the autonomous interpretation of this international treaty. Furthermore, the European Convention contains no rule according to which the ECtHR judgements would serve as a source of law or be generally directly applicable in the contracting states.[9]

A relative novelty is Protocol No. 16 to the European Convention, which introduces a mechanism of advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols to the Convention.[10] These opinions will not be binding; therefore, Protocol No. 16 does not make the ECtHR a supreme interpretive authority. This, in no way, diminishes the actual significance of these advisory reports once the protocol enters into force. It is likely that the ECtHR's informal authority will persuade national courts to follow such opinions voluntarily in practice.

1.2. On the interpretation of EU law: the perspective of a national (Czech) court

The situation is different in the case of EU law. EU law is autonomous in relation to both national law and public international law. Unlike public international law, it has a supranational nature and determines the effects it will have on the Member States (i.e. it will be applied directly and with priority over any national law and, thus, also constitutional law). It also determines the rules of its own interpretation. Although the primary law is composed of international treaties, the Vienna Convention on the Law of Treaties is not used for its interpretation. From this point of view, national constitutional provisions, such as Art. 10 of the Constitution in the Czech Republic, as mentioned above, are irrelevant. Consequently, the effects of acts taken by the EU institutions and, thus, of the decisions of the CJEU, are specified by EU law, and not by national law.

The practical consequence of the above is that the space for interpretation of EU law by national courts of the Member States is substantially restricted. The CJEU provides correct and binding interpretation. This power of the CJEU is derived from Art. 19 TEU, according to which it *'[…] shall ensure that in the interpretation and application of the Treaties the law is observed.'* This provision is construed as giving this body an exclusive position in interpreting EU law.[11] The interpretation of EU law provided by the CJEU in its decisions is,

8 | See Art. 46 of the European Convention.
9 | However, the prevailing opinion in Czech legal doctrine is that the Czech Repulic is de facto obliged to comply even with decisions rendered in proceedings concerning other states. The truth is that such an obligation might be set by the domestic law.
10 | See Art. 1 of Protocol No. 16.
11 | TÝČ, 2017, p. 108.

therefore, binding to EU Member States and their judiciary.[12] Judgements of the CJEU are deemed to be (quasi-)precedential. While they do not serve as a source of law as they are not binding *ergaomnes*, in view of the nature of EU law, they are directly and, thus, without any mediation binding on national courts as to the way they interpret EU law.

It could be argued that the previous paragraph only reflects the stance of the CJEU. Some constitutional courts accept the principles of application of EU law formulated by the CJEU only partially or subject to certain conditions. The CCC belongs to these courts.[13] The perspective of the national constitutional courts is understandable. They accentuate the derived nature of the EU and its powers. These could only be derived from national laws and within their limits, which are primarily comprised of the respective national constitutions. I also accept this position, but only to a certain extent. I believe that there is a substantial difference between the founding Member States of the EU and the accession countries. The founders were presented with a fait accompli by the CJEU. Acceding countries, in contrast, knew the circumstances fully and decided to accept the *acquis communautaire* to its full extent, thus including the way the CJEU had defined the characteristics of EU law. Therefore, it is not acceptable for their judiciary to influence and restrict, through its case law, the lawmaker's decision to make the country a part of the EU, as this international organisation operates according to case law of the CJEU.

1.3. On the interpretation of public international law: the perspective of a EU court

1.3.1. Relationship between the EU and international law, and interpretation of international law in general; interpretation of the European Convention

Everything that has already been said regarding the relationship between national and international laws applies *per analogiam* to the relationship between EU law and international law, and to the interpretation of the latter. EU law 'takes the place' of national law and lays down the conditions under which sources of public international law may have effects in EU law and in the law of the Member States. The specific solution is based on case law of the CJEU, since this question is not addressed in primary law, unlike in national constitutions. In principle, the solution devised by the CJEU is very similar to the mechanism in Art. 10 of the Czech Constitution. The difference is that the Czech Constitution does not make international treaties a part of Czech law.[14] In contrast, according to the CJEU, international treaties concluded by the Union have this status and form a part of EU law.[15]

12 | The Court of Justice has had this competence from the very beginning of its existence. Art. 31 of the Treaty establishing the European Coal and Steel Community, Art. 136 of the Treaty establishing the European Atomic Energy Community, and Art. 164 of the Treaty establishing the European Economic Community, as well as Art. I-29 of the Treaty establishing the Constitution for Europe, and the current wording of Art. 19 of the Treaty on the European Union have materially identical wording and have not undergone any change over time that could affect the concept and role of the Court of Justice of the European Union in interpretation of EU law.

13 | For a comprehensive analysis of the case law of the CCC, see Hamulák, 2016, pp. 65–77.

14 | Art. 10 of the Czech Constitution is misleading as it uses formulation that treaties ‚... form a part of the legal order'. This has to be understood that they are part of the directly applicable law in the country. On the contrary, international treaties do not become part of the Czech legal order utsel. Thus, it makes no sense to speak about their legal force in the Czech legal order in relation to its other sources.

15 | Thus, in case of EU law, international treaties may be used as a foundation for derogation of secondary law as they do have higher legal force than secondary law.

This study focuses on the issue of the binding effects of interpretation of judicial decisions in the area of human rights and freedoms. Therefore, the European Convention and its position in EU law are primarily relevant. The ECtHR rulings' influence on the CJEU is also significant in this regard. It is a fact that the EU is still not a party to the European Convention.[16] While Art. 6(2) TEU anticipates that the Union will accede to this treaty, this is yet to materialise. It should be noted that the Council of Europe has already eliminated obstacles to the EU'S accession[17] by adopting Protocol No. 14 to the Convention for the Protection of Fundamental Rights and Freedoms.[18] However, problems persist on the part of the Union. In Opinion 2/13, the CJEU found the draft mutual agreement incompatible with the founding treaties.[19] It should be recalled that this was not the first time this happened, although the legal grounds were different in the previous instance.[20]

Thus, it holds that the EU and CJEU have no duty under international public law to comply with the European Convention. The CJEU cannot be the addressee of the ECtHR decisions.[21] Nevertheless, the European Convention still affects the decision-making of the CJEU. EU law itself demands this. The EU Treaty states that '*[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.*'[22]

General principles are an unwritten source of EU law and are, thus, subject to interpretation by the CJEU according to the rules of interpretation inherent to EU law. However, this does not apply in absolute terms. The Charter of Fundamental Rights of the EU further provides that '*[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law from providing more extensive*

16 | Nevertheless, according to the Court of Justice, EU law must be interpreted in the light of the relevant rules of international law, since international law is part of the EU legal order and is binding on the EU institutions. See judgement of the Court of Justice of 16 October 2012 in Hungary v Slovakia, Case C-364/10, para. 44.

17 | On the relationship between the European Union and the Convention for the Protection of Human Rights and Fundamental Freedoms, see e.g. Kujer, 2011.

18 | See Art. 15 of Protocol No. 14. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention. Available at: https://rm.coe.int/.

19 | A detailed analysis of the reasons goes beyond the scope and focus of this article. See e.g. Forejtová, n.d.

20 | The reason lay especially in the lacking competence on the part of the European Community at that time and the impossibility to cure this shortcoming, even on the basis of Art. 352 of the Treaty on the Functioning of the European Union (at that time, Art. 308 TEC). See the opinion of the Court of Justice of 28 March 1996. Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Opinion 2/94.

21 | Responsibility is borne in this regard not by the EU, but rather the individual Member States. They cannot avoid this responsibility by claiming that a certain decision violating the European Convention was not adopted by them, but rather by an international organisation to which they have entrusted a part of their powers. This follows from the ECtHR case law, e.g. from the judgement of the ECtHR, sitting as a Grand Chamber, in the case of Bosphorus Hava Yolları Turizmve Ticaret Anonim Şirketi v Ireland of 30 June 2005, file No. 45036/98.

22 | Art. 6(3) of the Treaty on the EU.

protection'.[23] What is especially noteworthy is that this provision speaks exclusively about the Charter and its contents and, in contrast, does not explicitly mention the ECtHR, its decisions, and its interpretation activities.

The question is what rationale is behind the given provision. It is apparent that it lies in the need to ensure that interpretation by the CJEU of standards adopted from the European Convention does not yield different results. The same text can be interpreted differently if methods other than linguistic ones are also considered. A problem may be linked, especially with the rule of interpretation of international treaties, according to which such interpretation has to reflect the purpose of these treaties.[24] The purpose of the EU and its law is primarily to achieve economic integration, while the purpose of the European Convention is to protect human rights.[25] Therefore, the Court's interpretation can be specific, precisely in view of the mission it fulfils. In my opinion, the mentioned provision aims to address this problem, as it anticipates either conforming interpretation or a deviation that will ensure a higher level of protection. As a result, the CJEU should not adapt the interpretation of the European Convention unilaterally to the standard of EU law.

In the case of national law and national courts, I have noted cases where a national court was bound by a ruling rendered by the ECtHR and, thus, also by the way the European Convention had been interpreted by that court. Although the preceding paragraph could indicate the opposite, no similar conclusion can be made in relation to the CJEU. There is no normative basis for doing so. The respective positions of the two courts are parallel and independent; neither of them is superior to the other. Consequently, although the CJEU is required to make decisions according to the same norms as the ECtHR, it is not formally bound by interpretation which the latter considers correct.

The question is whether it would be possible to find support for the opposite argument in EU law. The logic could be, for example, that the EU and, thus, also the CJEU should not allow—through their actions—violation of external obligations under public international law. Member States of the EU are bound by the European Convention and, therefore, an organisation established by the Member States must comply with the standards laid down in this Convention, and cannot serve as a pretext for non-compliance. However, this purpose cannot be achieved in this case by reference to Art. 351(1) TFEU, which— from the viewpoint of the EU Member States— aims to ensure compliance with the principle of *pacta sunt servanda*.[26] Third countries will in no way be affected by any potential differing interpretation provided by the CJEU.

The binding effect of the ECtHR case law also cannot be inferred from the Charter of Fundamental Rights of the EU. While the latter states that '*[t]he explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard*

23 | Art. 52(3) of the EU Charter.

24 | Art. 31(1) of the Vienna Convention on the Law of Treaties.

25 | Cf. the arguments presented in an analogous case concerning its relationship to the EEA Court in the opinion of the EU Court of Justice of 14 December 1991. Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area. Opinion 1/91, paras. 49 and 50.

26 | Art. 351(1) of the Treaty on the Functioning of the EU holds that '[t]he rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.'

by the courts of the Union and of the Member States',[27] and the explanations add that *'[t]he reference to the ECHR covers both the Convention and the Protocols to it. The meaning and scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case law of the European Court of Human Rights and by the Court of Justice of the European Union'*[28], these explanations are not legally binding. The phrasing used is also very cautious as it is stated that '*due regard*' shall be given,[29] and not that the courts '*are bound*'. Finally, historical interpretation also contradicts such a concept, because no explicit mention of the binding effect of case law was included in the Charter, although it was considered as one of the options.[30]

1.3.2. Relationship between the EU and international law, and interpretation of international law in a specific case of the EEA Agreement and the EFTA Court

In contrast to the way human rights are protected in the Council of Europe, the relations between the EU and a part of the EFTA Member States[31] are regulated in detail in the EEA Agreement. Given that the EU is involved in this international treaty[32], it forms a source of EU law. It regulates economic issues and, therefore, has a 'sub-constitutional' character. However, the interpretation of this treaty is generally governed by the rules of public international law.

The difference compared to the European Convention lies in the fact that the EEA Agreement may be applied and interpreted directly by the CJEU. In the case of the European Convention, the CJEU applies and interprets the general principles of law whose contents are determined by the Convention.

Given that the EEA Agreement is a common international treaty, there is a potential problem with its interpretation, which—similar to a majority of international treaties—is not centralised and can differ on both sides of the Agreement.

What is specific for the Agreement is that a number of its provisions are identical to those of the TFEU. However, as the Agreement is an international treaty, the notions used therein may carry different meanings than the same terms as they are inherent to EU law.[33]

Both the EU and the member states of the EFTA were aware of these two risks and sought to address them. Regarding the possibility of varying interpretations of the same notions under the EEA Agreement and EU law, the solution is provided in the preamble of the Agreement, which states that '*in full deference to the independence of the courts, the objective of the Contracting Parties is to arrive at, and maintain, a uniform interpretation and application of this Agreement and those provisions of Community legislation*

27 | Art. 52(3) of the Charter of Fundamental Rights of the EU.

28 | Explanations relating to the Charter of Fundamental Rights (2007/C 303/02). Available at: http://eur-lex.europa.eu.

29 | The German and English language versions are phrased similarly as the Czech version, i.e. as a recommendation.

30 | Lock, 2015, pp. 182–183.

31 | The co-operation based on the EEA Agreement does not apply to Switzerland.

32 | As one contracting party together with the Member States of the EU.

33 | See the judgement of the Court of Justice of 26 October 1982 in Hauptzollamt Mainz v C. A. Kupferberg & Cie KG a. A, Case 104/81, para. 30; or its judgement of 9 February 1982, Polydor Limited and RSO Records Inc. v Harlequ In: Records Shops Limited and Simons Records Limited, Case 270/80, para. 15.

which are substantially reproduced in this Agreement and to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition.' Therefore, interpretation and application of the Agreement and of the law adopted on its basis are expected to be homogeneous. What is always important in this regard is the result. The reasoning of rulings rendered by the CJEU and the EFTA Court can differ, including the arguments used therein, provided that the resulting decisions are the same.[34]

The issue of interpreting the EEA Agreement is also addressed in Art. 6, which aims to ensure the homogeneity of its interpretation with EU law. Thus, this provision deals with the problem of lacking a central final interpretive authority. It is assumed that identical or similar rules contained in the Agreement will be interpreted in conformity with case law of the CJEU preceding the signature of the Agreement.[35] Thus, the EFTA Court is solely required to consider case law adopted by the CJEU after the signature of the EEA Agreement[36]. However, there is no practical difference in the ways the EFTA Court applies case law adopted before and after the execution of the EEA Agreement.[37] As a result, the interpretation of EU law provided by the CJEU affects and predetermines the interpretation of the EEA Agreement.

1.3.3. Interpretation of the European Convention by the courts of the Member States in the fields of EU law

It was already noted above that the standards contained in the European Convention *constitute the general principles of EU law*. Indirectly—via general legal principles—the rules comprised in the European Convention have, thus, become a part of EU law, and the same is true of conclusions reached by the ECtHR which have later been voluntarily adopted by the CJEU in its case law.

This statement has a serious impact on the work of the national judiciary. National courts can apply the European Convention directly on the basis of national constitutional rules. However, the same Convention can also be applied, or more accurately, reflected indirectly via EU law.

In the first case, the conditions based on which the European Convention is applied are laid down by national law (i.e. Czech law). In the second case, they are laid down by EU law.

Consequently, the former case (*national rules*) can leave some room for setting the conditions under which the ECtHR case law is reflected by national courts. The possibility of interpreting the European Convention might even be modified, restricted, or subjected to certain conditions by virtue of national acts. In the latter case (*EU rules),* national law has no such options available, as EU law clearly lays down the principles of application. Any failure to respect the ECtHR case law in the latter case can result in violation not only of the European Convention, but also of EU law.

34 | That is why reference is also made to 'creative homogeneity'. See Hlinková, 2016, p. 110.
35 | Cf. also the opinion of the Court of Justice of 14 December 1991. Opinion 1/91, para. 46, which confirms this approach.
36 | See Art. 3 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (Surveillance and Court Agreement).
37 | Hlinková, 2016, p. 109.

I am not aware of any case in which the conditions of applying the European Convention would be differentiated in this way in the Czech Republic. Moreover, no problems arise in this regard. This is because of the highly accommodating approach taken by the CCC to decisions rendered by the ECtHR, which means *de facto* that the European Convention is applied directly and with priority over Czech law (or more accurately, together with it). The Convention is, thus, applied in the same way as EU law—as the country's own law, i.e. Czech law. The only problematic situation is, therefore, a case in which a decision made by the CJEU differs from that taken by the ECtHR. Although this is quite unlikely in practice, it cannot be excluded. In my opinion, the correct solution (from the viewpoint of EU law) would be for the CCC to prefer interpretation provided by the CJEU to interpretation used by the ECtHR. However, I am afraid that the CCC would be hesitant to adopt this solution unambiguously.

1.4. Mutual positions of the ECtHR, the CJEU, the EFTA Court, and the constitutional courts

The ECtHR, the CJEU, the EFTA Court, and the constitutional courts are independent bodies of the judiciary and, therefore, any hierarchy among these authorities is out of the question. These courts do not form part of a single judicial system. Summarising the above, we can state as follows:

- The ECtHR and CJEU are absolutely independent of each other in legal terms. They operate in parallel because they have the powers to address one and the same question, each from their own point of view. Interpretation comprised in a decision of one of these courts is in no way legally binding on the other court. However, they are still in a competitive position. A decision rendered by one court can have a direct influence on the other.
- Parallel positions are also characteristic of the CJEU and the EFTA Court. However, the quality of their relationship is different. When interpreting the EEA Agreement, the EFTA Court is largely subordinate to the CJEU and is bound by the interpretation provided by the latter. There is no competitive relationship between these courts.
- National constitutional courts are subordinate to the CJEU in matters of interpretation. EU law must be interpreted in the way prescribed by the CJEU. National courts have some room for their own creative interpretation only and exclusively within the limits set by EU law and the CJEU.
- The relationship between the constitutional courts and the ECtHR is also unequal. Constitutional courts are required to follow the ECtHR's decisions in proceedings where the country in question is a party to the dispute. Interpretation provided by the ECtHR is also binding on them to this extent. In all other cases, there is no explicit normative basis for inferring any relationship of superiority or subordination. However, as the correctness of interpretive conclusions reached by constitutional courts can be tested before the ECtHR, there can be no competitive relationship between the courts. The ECtHR will have the final say.

II. Reality of relationships among individual supreme courts

2.1. Relationship between the CCC and the ECtHR in case law of the CCC

Focusing on the objective of this study, this section will explore how Czech law and the CCC approach the ECtHR's decisions in practice. The Constitutional Court has commented on the issue of the binding effects of the European Convention and rulings of the ECtHR in several of its decisions. The rhetoric of its case law is consistent, and so is its decision-making.

The Constitutional Court has expressed itself quite unambiguously with regard to decisions of the ECtHR concerning the Czech Republic. It concluded as follows:

'*Direct applicability of international treaties also includes the duty of Czech courts and other public authorities to take account of interpretation of these treaties by the competent international tribunals as bodies called on to comment authoritatively on the interpretation of international treaties. This naturally also applies to interpretation by the ECtHR, where the relevance of the ECtHR's decisions attains the level of constitutional law in Czech practice. Decisions of the ECtHR are binding in individual cases on the Czech Republic and its public authorities in the territory of this country, which also follows from Art. 46(1) of the Convention, which declares that the binding effect of the ECtHR's decisions in individual cases is a "res judicata" characteristic of these decisions*'.[38] It also stated that '*there can be no doubt that the contents of a binding ECtHR judgement in a case against the Czech Republic constitute an obligation following for the Czech Republic from international law. The Czech Republic is required to comply with such obligations not only under international law, but also with reference to Art. 1(2) of the Constitution.*"[39]

However, in the CCC's concept, the binding effect of the ECtHR case law is not limited only to cases directly concerning the Czech Republic. On the contrary, according to the CCC, Czech courts are obliged to also take the ECtHR case law into account in cases involving another country, but relevant for interpretation of the European Convention in the Czech context. At the same time, I consider it legally problematic that this obligation *'applies all the more in a situation where such case law is invoked by a party to proceedings before a Czech common court'*.[40] Thus, the Constitutional Court mixes up the procedural and substantive aspects of the subject. In procedural terms, it is appropriate to deal properly with arguments put forth by a party to the proceedings. However, this argument is irrelevant in material terms. The facts of the case and the legal regulations that should be applied in the given case are primarily important.

The above indicates a very accommodating approach of the CCC to the ECtHR's case law. What is also quite apparent is the Court's frustration with the common courts' ignorance of this case law. Czech courts have the duty to promote fundamental human rights and freedoms, as the Constitutional Court plays only a subsidiary role in this regard. Therefore, they should know well the contents of human rights and freedoms.

38 | Decision of the CCC Pl. ÚS 26/11 of 28 February 2012.
39 | Decision of the CCC File No. II. ÚS 604/02 of 26 February 2004, repeated in CCC decision Pl. ÚS 26/11 of 28 February 2012.
40 | Decision of the CCC Pl. ÚS 26/11 of 28 February 2012.

What is also clear is the CCC's effort to educate and motivate the common courts to work with the ECtHR case law. This can be demonstrated by the CCC's statement that '*the Constitutional Court perceives the unlawful nature of the decision in interpretation of the Responsibility of the State Act which did not conform to the constitutional order, also including the Convention (based on interpretation provided by the ECtHR). The case at hand illustrates the alarming fact that common courts do not know (or ignore) case law of the ECtHR, whereby they not only negate national remedies in cases of violation of the Convention, but even expose the Czech Republic to the risk of international responsibility for breach of obligations following from the Convention*'.[41]

It should be added that the CCC's decisions correspond to its rhetoric. Thus, the saying 'preach water, drink wine' certainly does not apply in this case. The rulings of the CCC concerning human rights clearly indicate its open approach towards the European Convention and the ECtHR decisions.

I believe in this regard that the 'principle of homogeneity' can be considered to have become a part of Czech constitutional law as a result of the CCC's decisions. The CCC interprets the same rights protected by the Charter and the Convention in the same way. The ECtHR case law is often and broadly reflected in the interpretation process. The way the Court works with these decisions is qualitatively comparable to the manner in which the CCC treats its own earlier decisions. At the same time, if there is a difference in the wording of a right enshrined in the Charter and the same right protected by the European Convention, this difference tends to be neglected (not highlighted) and the right is still interpreted homogeneously, according to the European Convention.[42]

However, the relationship between the CCC and the ECtHR is not completely idyllic. One way to avoid a conflict is to pretend that it does not exist. The CCC has openly adopted this strategy towards the CJEU. It avoids a direct conflict by refusing to interpret or even apply EU law. This practice is not so clear with regard to the European Convention and the ECtHR, but I believe that the CCC still uses this strategy actively, albeit not very often.

I am aware of only one decision where the CCC did not openly agree with the conclusions reached previously by the ECtHR. This was the decision in Smatana,[43] where the CCC stated as follows: '*In spite of the Court's disagreement with the conclusions made by the European Court of Human Rights in the case of Smatana v. the Czech Republic …, where the Constitutional Court was described as a remand court (using this logic, the ECtHR itself could be considered a remand court), it can be agreed that all governmental authorities have the duty to ensure a defendant is not remanded in custody longer than reasonable (Section 102). In addition, it follows from settled case law of the Constitutional Court that, as a rule, all remand cases are dealt with preferentially and even without a motion, because of the quality of the fundamental freedom concerned in such a case, i.e. personal freedom limited by the remand in custody. There is no reason to change this practice and the case at hand was therefore found urgent and the constitutional complaint heard preferentially*'.

The significance of this case is somewhat relativised by the fact that there was no actual conflict here, as the constitutional complaint was eventually found unjustified. The case is marginal and says nothing about the CCC'S relationship with the European

41 | Decision of the CCC File No. II. ÚS 862/10 of 19 May 2010.
42 | This can be clearly demonstrated on decision I. ÚS 2617/15.
43 | Decision of the CCC File No. II. ÚS 2395/09 of 8 October 2009.

Convention and the ECtHR. In general, it holds in my opinion that the CCC does not show any tendencies towards analysing and discussing the ECtHR case law in greater detail, and adheres to it in the vast majority of cases.

2.2. Relationship between the CCC and the CJEU in CCC case law

This section of the article is very brief. Indeed, the CCC is yet to give its 'European legal doctrine' unambiguous contents. The approach to EU law and the protection of human rights ensured by EU law is, thus, characterised in the CCC's case law as follows:

1. EU law as a whole is not a reference system in the review of the constitutionality of national law.[44]
2. Where EU law is taken into account, it is only done indirectly through its radiation into national law.[45]

The CCC's case law, specifically concerning the EU Charter, is more colourful, especially in the case of decisions made by individual chambers. In practice, the EU Charter is considered to be a part of the reference framework for review and a criterion for review, and Czech law emphasises the need to also approach interpretation of the law from the viewpoint of the EU Charter.[46] A greater or lesser willingness to take the EU Charter, as a highly specific source of EU law, into consideration can be found in the individual decisions of the CCC. In some cases it is not taken into the account at all.[47]

The differences in the CCC's approach to the European Convention and the EU Charter are understandable. The Convention has an exceptional position among the sources of law used by the CCC, and the EU Charter cannot match it in this regard. Its scope is limited based on the rule '*if EU law applies, the Charter applies*', which the CCC has embraced.[48]

The above includes the CCC's approach to EU law in general. The second question is the interpretation of EU law by the CCC and, in particular, the way the CCC approaches the possibility of initiating a preliminary ruling procedure. A detailed analysis of this issue would provide sufficient material for a separate article. Therefore, I shall merely summarise the basic principles followed by the CCC. First, by openly declaring that EU law is not a part of the constitutional reference framework, the CCC makes it clear that it cannot see any need to interpret it. In its concept, this is the task of the common courts.[49] If the CCC nevertheless provides such interpretation, this is not to authoritatively determine the contents of the law, but to make it possible to assess the case in terms of Czech constitutional law.[50] Second, the CCC does not consider itself a court or tribunal within the meaning of Art. 267 TFEU. While it does not *a priori* exclude the possibility of referring a

44 | Decision of the CCC File No.Pl. ÚS 10/17 of 3 November 2020.
45 | Decision of the CCC File No.Pl. ÚS 41/17 27 November 2018.
46 | This can be demonstrated on interpretation of the right to protection of privacy under Art. 10 of the Charter. Unlike the provisions enshrined in Art. 8 of the EU Charter, the right to protection of privacy cannot be limited 'on some other legitimate basis laid down by law'; the CCC resolved this problem by using an interpretation conforming to this provision. It did so, however, in a situation where it could have applied the EU Charter directly in terms of EU law. II. ÚS 2778/19.
47 | Decision of the CCC File No.Pl. ÚS 10/17 of 3 November 2020.
48 | Decision of the CCC File No. II. ÚS 2778/19 of 5 November 2019.
49 | Decision of the CCC File No. II.ÚS 1009/08 of 8 January 2009.
50 | Decision of the CCC File No. II. ÚS 3432/17 of 11 September 2018.

question for a preliminary ruling,[51] it does not consider itself obliged to do so, and has not done so yet in practice.[52]

Therefore, I cannot avoid the impression that the objective of the CCC's approach described above is to exclude any impact of EU law on its decisions. I believe that this is done deliberately as the CCC can thus escape the authority of the CJEU, without simultaneously questioning its doctrine of the effects of EU law.

However, the actual reality of the CCC's decision-making and its relationship to EU law and the CJEU is more diverse than it might appear at first sight. The Constitutional Court oscillates between two extremes. This can be demonstrated by the decision in the case of the European Arrest Warrant, where it used the linguistic approach only as a starting point and interpreted the relevant provision of the Charter of Fundamental Rights and Freedoms[53] unusually narrowly.[54] Further, while using other methods of interpretation with preference for an option conforming to EU law,[55] it reached a conclusion opposite to what the wording of the Czech Charter might seem to indicate *prima facie*. This decision was very accommodating towards EU law. It fully reflects the case law of the CJEU concerning the indirect effects of EU law. The Polish Constitutional Court, for example, was not forthcoming in this regard.[56]

The other extreme is represented by the well-known decision in the case of 'Czechoslovak pensions'[57] where the CCC—relying on the *ultra vires* doctrine—unambiguously and openly refused to apply EU law as previously interpreted by the CJEU. However, this case is unique. In general, a cautiously accommodating, albeit reserved, approach towards EU law and case law of the CJEU tends to prevail in the case law of the CCC.[58]

2.3. Relationship between the CJEU and the ECtHR in case law of the CJEU

A number of rights regulated by the Charter of Fundamental Rights of the EU and the Convention are either identical in terms of content and meaning or broad in their material scope.[59] This fact, in itself, reduces the space for possible contradictions between interpretation by the CJEU and interpretation provided by the ECtHR (from the viewpoint of the CJEU).

51 | See the decision of the CCC File No. Pl. ÚS 50/04 of 8 March 2006.
52 | For a more detailed analysis see e.g. Sehnálek and Stehlík, 2019, pp. 181–199; Stehlík, 2019, pp. 150–172; Stehlík, 2019, pp. 117–129; Stehlík, 2017, pp. 577–588.
53 | Art. 14 (4) of the Charter of Fundamental Rights and Freedoms states that '[n]o citizen may be forced to leave his or her homeland'.
54 | According to Filip and Zemánek, this would not even be a case of narrow interpretation because '"[e]xtradition" of a citizen and "abandonment of homeland" are two completely different categories in this regard.' Cf. Zemánek, 2006, pp. 90–95; Filip, 2005, pp. 3–7.
55 | This is a requirement following both from the Czech legal system, especially Art. 1 (2) of the Constitution, and from EU law, even with regard to the pre-Lisbon third pillar. See: Tomášek, 2006, pp. 200–203. In general, also Král, 2005, pp. 218–220.
56 | Wyrok Trybunału Konstytucyjnego z 27 kwietnia 2005 r., P 1/05 Stosowanie Europejskiego Nakazu Aresztowania Do Obywateli Polskich. Available at: http://trybunal.gov.pl/.
57 | Decision File No. Pl. ÚS 5/12 of 31 January 2012
58 | I must also emphasise that the Constitutional Court has identified certain rights within the Czech Constitution (the so called Material Core) that are non-changeable. They cannot, therefore, be changed even by EU law. The problem at the moment is only rhetorical in nature and is, therefore, hypothetical. The actual conflict has not yet occurred. For an analysis see e.g. Molek, 2014, pp. 110–114.
59 | For comparison, see the commentary on Art. 52 contained in the explanations on the Charter of Fundamental Rights.

By definition, the CJEU does not work with the ECtHR case law as often as the CCC. This is understandable, as protection of human rights and freedoms is not the primary objective of this court.

Three ways to employ the ECtHR case law and the European Convention can be inferred, in principle, from decisions of the CJEU. First, the parties often refer to these sources, and the CJEU mentions the ECtHR's arguments in the descriptive part of its judgement, but does not deal with them any further. Second, the CJEU relies on the European Convention as an argument supporting the solution chosen by the Court itself, but provides its own interpretation.[60] Finally, they are reflected most clearly in cases where the CJEU refers directly to the interpretation of the European Convention as provided by the ECtHR, and works with this standard and uses it to derive its own solution to the problem.[61]

A relatively accommodating approach towards the ECtHR case law can be inferred from the decisions of the CJEU.[62] Conflicts are, therefore, quite rare. Nevertheless, there have been cases in which a basically identical case was resolved differently by the two courts. The risk of conflict increases proportionately to the constant expansion of competences of the EU, especially into areas going beyond simple economic cooperation of the Member States.[63]

An example of a different approach to the same issue is offered by the case law of the two courts pertaining to advocates general and the right to a fair trial.[64] This series of cases began with the ECtHR's ruling in the case of Vermeulen v Belgium,[65] without any link to the EU. In that case, the role of an advocate general was similar to that of the Advocates General at the CJEU. The ECtHR ruled in a way that implied a possible issue in the regulation of activities of advocates general of the EU. Nevertheless, the CJEU deviated from the ECtHR's arguments in its own ruling in Emesa Sugar.[66] In doing so, it identified elements distinguishing the position of advocates general in EU law from their analogy in Belgian law to create space for a different legal conclusion. This, undoubtedly, was the right course of action.[67] The ECtHR was subsequently given the opportunity to respond to the ruling of the CJEU in the case of Kress[68], where the former court dealt with an analogy (or rather

60 | See the reference to the wine-making legislation in the judgement of the Court of Justice of 13 December 1979, Liselotte Hauer v Land Rheinland-Pfalz, Case 44/79, paras. 17–19.

61 | See, e.g., the specific quote of interpretation provided by the ECtHR in the judgement of the Court of Justice (Fourth Chamber) of 28 July 2016, JZ v ProkuraturaRejonowaŁódź – Śródmieście. Case C-294/16 PPU, paras. 51 and 52.

62 | Bronckers, 2007, p. 604.

63 | Literature highlights the existence of risks especially in the area of migration and measures of criminal law. See Harpaz, 2009, p. 119.

64 | Cf. Douglas-Scott, 2006, p. 643; Lock, 2015, p. 176.

65 | Decision of the ECtHR in Vermeulen v Belgium, judgement of the Grand Chamber of 20 February 1996, application No. 19075/91.

66 | Resolution of the Court of Justice of 4 February 2000, Emesa Sugar (Free Zone) NV v. Aruba, Case C-17/98.

67 | Work with facts and their impact on legal solutions is developed especially in the Anglo-American legal environment. From this point of view, the procedure taken by the Court of Justice of the EU is a textbook example of evaluating a prior decision and its significance for a decision made in the case at hand. Cf. e.g. Slocum, 2006, p. 138 et seq.; McGregor and Adams, 2008, p. 147.

68 | Decision of the ECtHR in Kress v France, judgement of the Grand Chamber of 7 June 2001, application No. 39594/98.

a model) of the institution of the CJEU's Advocate General in the French legal environment. In this decision, it discussed the conclusions reached previously in the ruling of the CJEU and rejected them.[69] However, no direct contradiction was noted between the arguments used by the CJEU and the European Convention, as interpreted by the ECtHR. The CJEU did not let itself be influenced by such a delicate hint made by the ECtHR and, in case C-127/02[70], it again ruled in a way incompatible with the ECtHR case law, without dealing with the ECtHR's arguments in any way[71] and without any consequences in the subsequent ECtHR case law.

Therefore, it can be stated that even in this—basically exceptional—series of decisions, where the two courts had the opportunity to clarify their mutual positions, they failed to deliver. Instead, while the ECtHR firmly maintained its own approach to interpretation of the European Convention, it adopted in effect a '*defensive position*' towards EU law and the CJEU.[72]

The CJEU cannot be expected to blindly follow the ECtHR and its case law. It has space for its own interpretation of the European Convention. If the CJEU sufficiently emphasises the difference between the facts of the case or the EU legislation in question and the case dealt with by the ECtHR or the national legislation concerned in the given case, it operates within the boundaries that each court, including courts of the Member States, has for its own discretion. In cases of such a justified deviation, the ECtHR can be expected to follow suit, rather than emphasise possible differences. This is the case in majority of the cases. I am convinced that this approach is rational and correct.

2.4. Relationship between the CJEU and the EFTA Court in case law of the CJEU

EU law and the EEA Agreement share a number of identical or highly similar provisions. Therefore, it is not surprising that decisions in which the CJEU was influenced by the EFTA Court in the interpretation of EU law can be found in all areas of cooperation under the EEA Agreement.[73] The case law of the EFTA Court has been taken into consideration both by the CJEU and the General Court, and even by the Advocates General.[74] The CJEU has accepted the authority of the EFTA Court with regard to the interpretation of EU law, and also in connection with the interpretation of the Agreement and the law adopted on its basis.

It is interesting how the CJEU works with decisions of the EFTA Court, on the one hand, and with those of the ECtHR, on the other. In the case of the ECtHR, the CJEU either refers to its decisions in very general terms or, in contrast, adopts relatively extensive arguments presented previously by this other court. The approach to the EFTA Court's decisions is different in this regard. References to these decisions are similar to those of

69 | Cf. Lock, 2015, p. 176.
70 | Judgement of the CJEU (Grand Chamber) of 7 September 2004, LandelijkeVereniging tot Behoud van de Waddenzee a NederlandseVereniging tot Bescherming van Vogels v. Staatssecretaris van Landbouw, NatuurbeheerenVisserij, Case C-127/02.
71 | Unfortunately, the resolution was not published and I am thus forced to work with a quote from that decision provided in the case CooperatieveProducentenorganisatie van de NederlandseKokkelvisserij U. A. v. the Netherlands, Decision (Third Section) of 20 January 2009, application No. 13645/05.
72 | See Kosař, 2006, pp. 135–141.
73 | For an overview, see e.g. Baudenbacher, 2004.
74 | Baudenbacher, 2004, p. 366.

the earlier case law of the CJEU. It is apparent from this point of view that the CJEU perceives the EFTA Court as its equivalent counterpart. This approach resembles the work of the CCC and the way it treats the ECtHR case law.

Even this seemingly idyllic relationship between the two courts can be disrupted in individual cases by different ideas of how a certain situation should be handled. The rulings of the CJEU in Silhouette[75] and of the EFTA Court in Mag Instrument Inc. v California Trading Company Norway, Ulsteen can serve as an example of such a conflict.[76] Both these decisions concerned the Trade Marks Directive[77] and the issue of the exhaustion of trademark rights in a situation where the goods have been placed on the market of a third country. However, the two courts resolved the case differently. While the EFTA Court accentuated the purpose of the trade mark in relation to consumer interests,[78] the CJEU preferred the interest in free trade within the EU and, thus, emphasised the internal market and liberalisation within its framework.

It is worth noting that the CJEU failed to deal with the reasoning of its decision in any way with the differing ruling of the EFTA Court. It, thus, appears that the practice of the CJEU is to reflect the case law of the EFTA Court where it supports its arguments and does not mention it in cases where it does not.

III. Conclusion

The aim of this study was to identify rules governing the mutual relationship among the chosen supreme courts and to determine to what extent, and whether at all, these courts are mutually bound by their decisions and their interpretive conclusions. It follows from these rules that the respective positions of the individual courts in interpretation of the law differ, as do the conditions under which their decisions can affect national and EU laws. The CJEU has the power to authoritatively determine the correct interpretation of the EU Charter and the entire body of EU law. Constitutional and common courts of the Member States are then required to follow this interpretation. This does not mean that decisions of the CJEU serve as a precedent, as this body is not a law-making authority *de iure*, although in a number of cases it ruled *de facto* as if it were such an authority. According to EU law, the courts of the Member States are not bound by every decision of the CJEU,[79] but have to respect the manner in which the EU Court interprets EU law (including international treaties that form part of that law).

The ECtHR does not have any similar power. This provides national constitutional courts and the CJEU with greater space for setting their own interpretation. Only a decision issued in proceedings to which the given country was a party is binding on national courts. Moreover, the ECtHR system is of a subsidiary nature and the ECtHR often works

75 | Judgement of the Court of Justice of 16 July 1998, Silhouette International Schmied GmbH & Co. KG v. HartlauerHandelsgesellschaftmbH, Case C-355/96.
76 | Decision of the EFTA Court of 3 December 1997, Mag Instrument Inc. v California Trading Company Norway, Ulsteen, Case E-2/97.
77 | First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks.
78 | See the ruling in Mag Instrument Inc. v California Trading Company Norway, Ulsteen, para. 20.
79 | That is, even by those judicial decisions which are not addressed explicitly to them.

with the doctrine of appreciation, which leaves room for the courts of the Member States to decide on their own interpretations and solutions. This approach is practically unknown to constitutional courts; the CJEU, too, works only rarely with such a concept, and where it does, to a very limited extent.

The EFTA COURT is restricted in terms of the interpretation of the EEA Agreement. The Agreement explicitly specifies what is merely inferred by a part of the doctrine in the case of the CCC and its relationship to the ECtHR: the European Convention is binding on the Czech Republic and the Czech courts as interpreted by the ECtHR. However, even the justices of the CCC are not unanimous as to whether this is true. While some emphasise the precedential nature of the ECtHR decisions,[80] others accentuate the subsidiary nature of the whole system of the European Convention.

Another goal was to present the reality of judicial decision-making. The judgements reviewed indicate some systemic differences: they are admitted only to a limited degree (CCC) or not at all (CJEU), but they do exist. There is a clear difference in how the CCC approaches decisions of the ECtHR and the CJEU. Similarly, it can be seen that the CJEU works differently with decisions of the ECtHR and the EFTA Court. The CCC and CJEU also have in common that they treat decisions of the ECtHR (CCC) and the EFTA Court (CJEU) as their own. The influence of these courts on the interpretation of law is substantial.

It is also apparent that the general attitude of all the courts involved is open to cooperation and dialogue. The courts tend to avoid conflicts in their decision-making. While disputes occasionally occur, they are usually insignificant. A high degree of imitation and copying of the conclusions is apparent.

Finally, the objective was to determine whether a final interpretation authority can be established unambiguously *de iure* or at least *de facto* in our European space. I believe that none of the courts under scrutiny have such a position. The CJEU comes closest to this mark when interpreting EU law. This court strives actively to prevent any possible threats to this position, which is the reason why the EU has yet to accede to the European Convention. Realistically, however, it cannot prevent the ECtHR or national constitutional courts from making decisions that contradict what it has established. This has already occurred more than once.

80 | The same applies to decisions of the Court of Justice and, within national law, to rulings made by the CCC. Such an approach is often justified by arguments based on the stability of case law, the principle of legal certainty, the principle of predictability of judicial decision-making, hierarchical subordination and the possibility that if a different decision is made than previously by a higher court, the case will eventually arrive at the same court and the court will decide it in the same way (because it so wishes or because it must do so based on the rules of its functioning), etc. In respect of decisions of the Court of Justice, see e.g. Kaczorowska-Ireland, 2016.

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EXTERNAL SYSTEMIC AND COMPARATIVE ARGUMENTS IN THE INTERPRETATION OF THE SLOVAK CONSTITUTIONAL COURT

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ABSTRACT

This contribution aims to analyze the interpretation methodology used by the Constitutional Court of the Slovak Republic in its decision from 4 July 2012 upon protection of property rights and a right to a fair trial. Focus is given to the external systemic interpretative method, especially to the use of caselaw of the European Court of Human Rights.

KEYWORDS

interpretation methodology
Constitutional Court of the Slovak Republic
European Court of Human Rights

INTRODUCTION

The presented article is devoted to one decision of the Constitutional Court of the Slovak Republic (hereinafter 'Slovak Constitutional Court' or 'Slovak CC') from 4 July 2012 dealing with the property rights protection and the consequences of executive immunity of a state as a challenge for the effective judicial protection (hereinafter also 'Slovak CC decision').[2]

This article aims to analyse the interpretation methodology used by the Slovak CC. This specific decision was chosen because, at the first glance, it systematically provided reasoning of the Slovak CC. It summarised arguments of the claimant and relevant state bodies and subsequently presented its perspective based on historical, comparative, systemic, contextual, and even non-legal arguments. Moreover, without expressly naming it, the Slovak CC has also supported its arguments by scholarly works, application of general legal principles, and own case law.[3] Finally, the decisive factor for selecting the decision

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2 | Constitutional Court of the Slovak Republic, PL. ÚS 111/2011, finding from 4 July 2012.

3 | For details upon the methods of interpretation see Zoltan J Toth, The Methods of Statutory Interpretation in the Practice of the High Courts of Hungary. *AnnalesUniversitatisMariae Curie-Sklodowska*, Lublin – Polonia, vol 1, 2016, p. 173 et seq.

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has been the fact that one of the supreme judicial bodies has applied the international law institute of jurisdictional immunities of a state in a rather incomprehensible way compared to the case law of the international judicial bodies.

This article is divided into three main subsections. The first concentrates on the presentation of the factual and legal background of the case. The second points out the main argumentation line of Slovakia's highest state bodies, namely the Slovak Parliament and government, since these bodies are responsible for the adoption and application of the relevant legislation. The third deals with the reasoning of the Slovak Constitutional Court, focusing mainly but not exclusively on the comparative and external systemic arguments since the decision of the Slovak CC from 4 July 2012 has been based on a different approach towards execution immunities of a state being a part of jurisdictional immunities of a state rather than the decision of the International Court of Justice[4] and the European Court of Human Rights (hereinafter 'ECtHR'.[5] Unlike the above-mentioned international judicial bodies, the Slovak Constitutional Court has decided not to interpret immunities first of all as a procedural bar but preferred application of the principle of proportionality as if it was a substantive right. This principle is applied at the level of weighting,[6] as a basic interpretative rule in the area of human rights protection.[7]

The selected decision includes the interpretation of several legal issues; nevertheless, the article especially brings together the interpretation of fundamental human rights, including references to the case law of international judicial bodies; therefore, other domestically important arguments have been intentionally left out, e.g. the legal substance of the objected legal norms or a difference between an administrator of state property, on the one hand, and the owner of state property, namely the Slovak Republic, on the other hand (elaborated within the so-called empirical argumentation line).

1. FACTUAL AND LEGAL BACKGROUND AND ISSUE

The proceedings before the Slovak Constitutional Court were triggered by a petition of the District Court Bratislava I (hereinafter 'District Court') which had issued a warrant of execution against the Slovak Republic, Ministry of Justice, to recover a claim granted for payment. Part of the required amount was paid, and the rest remained unpaid.[8] Therefore, the District Court stayed the proceeding until the decision by the Slovak CC was adopted on the compliance of the relevant legal norms with the Constitution of the Slovak Republic and international treaties. This was because Slovakia is a monistic-like country in the case of the international treaties it ratified before 1 July 2001; and according to the

4 | E.g. International Court of Justice, *Jurisdictional Immunities of the State*, Germany v. Italy: Greece intervening, judgement of 3 February 2012.
5 | E.g. European Court of Human Rights, *Al-Adsani v. UK*, application no. 35763/97, judgement of 21 November 2001.
6 | Alexy, 2010, p. 50.
7 | European Court of Human Rights, *Soeringv. the United Kingdom*, application no. 14038/88, judgement of 7 July 1989, para. 89.
8 | Zoltan J Toth, The Methods of Statutory Interpretation in the Practice of the High Courts of Hungary. *Annales Universitatis Mariae Curie-Sklodowska*, Lublin – Polonia, vol 1, 2016, p. 173 et seq., para I.2.

transitory Art. 154c of the Constitution of the Slovak Republic, international treaties on human rights and fundamental freedoms that the Slovak Republic has ratified and were promulgated in the manner laid down by law before 1 July 2001 shall be a part of its legal order and shall have precedence over laws if they provide a greater scope of constitutional rights and freedoms; the Convention is such an international treaty.

The District Court in its application claimed that the disputed provisions of the legislation on the whole meant that the execution was not enforceable against the state property (i.e. things owned by the Slovak Republic, including financial resources, and the claims and other property rights of the Slovak Republic), funds provided from the state budget, or funds on bank accounts held in the state treasury. Therefore, almost none of the assets belonging to the state could be subject to execution, since each property value is either a thing or claim or property right. Provisions cited by the complainant provided the state (and state budget organisations, state contributory organisations, state funds, and certain other entities) total or partial immunity from distraint. This immunity has created a situation in which creditors and satisfaction of their conferred claims are fully dependent on the will of those entities that have been declared mandatory by a judicial decision. Moreover, this situation affects the rights of creditors against the state to own property and use that property in accordance with Art. 20 para. 1 of the Constitution of the Slovak Republic[9], and causes disadvantage in the exercise of the right to property to creditors of one type of receivables—receivables from the state—when compared to other creditors. In contrast, the relevant legislation favours the state in protecting its property rights because the state property is almost completely protected from execution. Therefore, the District Court contested provisions by the complainant and claimed that they were in breach of Art. 20 para. 1 (property rights) in conjunction with Art. 12 para. 2 (anti-discrimination clause) of the Constitution of the Slovak Republic[10] and of Art. 1 of the Additional Protocol of the European Convention on Human Rights and Fundamental Freedoms (hereinafter ECHR).[11] Finally, the District Court also claimed that a part of the fundamental right to judicial protection is the right of access to execution proceedings and that the creditor requesting the recovery of their lawfully awarded debts also applies to their right to judicial protection guaranteed by Art. 46 para. 1 of the Constitution of the Slovak Republic,[12] which corresponds to the obligation of courts and other designated

9 | Art. 20 para. 1 of the Constitution of the Slovak Republic: Everyone shall have the right to own property. Property rights of all owners shall be uniformly construed and equally protected by law. The right of inheritance is guaranteed.

10 | Art. 12 para. 2 of the Constitution of the Slovak Republic: Fundamental rights shall be guaranteed in the Slovak Republic to everyone regardless of sex, race, colour, language, belief and religion, political affiliation or other conviction, national or social origin, nationality or ethnic origin, property, descent or any other status. No one shall be aggrieved, discriminated against or favoured on any of these grounds.

11 | Art. 1 of the Additional Protocol of the ECHR: Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

12 | Art. 46 para. 1 of the Constitution of the Slovak Republic: Everyone may claim his or her right by procedures laid down by a law at an independent and impartial court or, in cases provided by a law, at other public authority of the Slovak Republic.

authorities to deploy the legal conditions for the recovery of such claims even against the will of the subject of obligation. In this context, the District Court pointed out that the conditions for exempting certain proceedings from enforcement should not be designed to mean an exclusion of the right to judicial protection. Disputed legal norms are, therefore, also contrary in relation to the right to judicial protection in conjunction with the anti-discrimination clause of the Constitution of the Slovak Republic.[13]

The claim did not object the understanding of a state's execution immunity as objectively justifiable, for example, by social interests (a part of wages) or privacy issues (inviolability of personal chattels inherently interlinked with a person). The District Court did not dispute that there are reasonable and objective reasons, which may also be a reason to grant executive immunity to the state property. In the case of the state, executive immunity may be considered, for example, in relation to the property to ensure national defence and security, the property of foreign missions, the shares in strategic enterprises, and other assets, if there is a particular public interest. Consequently, defined executive immunity would certainly be an objective and reasonable justification and, thus, constitutionally consistent with Art. 12 para. 2 of the Constitution of the Slovak Republic. Contested provisions, however, provide the state with almost full immunity from execution.

2. MAIN ARGUMENTATION LINES OF THE SLOVAK PARLIAMENT AND GOVERNMENT

The Slovak Constitutional Court has also allowed the supreme executive authority, the Government of the Slovak Republic, to present their arguments that are similar to the usual governmental arguments presented to the ECtHR in case the principle of proportionality is to be examined. Moreover, even the supreme legislative power decided to present its arguments.[14]

In general, the National Council of the Slovak Republic considered the execution immunity of a state to be justified because it protects public interest by exercising public functions that cannot be blocked, as reasonable doubts would otherwise arise about the legitimacy of such a state, which is unable to fulfil its functions representing its *raison d'être*. The National Council analysed the situation and determined that if any state body had been affected by execution, it could have affected funding for the salaries of civil servants in a public agency; and the working capital of a state body such as computers, printers, and office furniture. If that were to happen, any public body could have not performed its duties for which it is legally obliged and would have had to face a legitimate claim by natural and legal persons for violation of their rights, which cannot be applied otherwise than through a public authority, such as the issuance of various licences and concessions or certificates, and administrative decisions. Furthermore, the National Council pointed out that the description of basal functions of the state by the District Court was

13 | Zoltan J Toth, The Methods of Statutory Interpretation in the Practice of the High Courts of Hungary. *AnnalesUniversitatisMariae Curie-Sklodowska*, Lublin – Polonia, vol 1, 2016, p. 173 et seq.
14 | Ibid., I.4 and I.5 respectively.

improper and incorrect, since such an interpretation was based on missed inclusion of a contradiction between the protection of state property as public property intended for public benefit tasks on the one hand and the enforceability of rights on the other (which is, however, also secured from public funds).[15]

Moreover, the National Council believed that the proposal was motivated by the District Court's judicial excessive formalism in the interpretation and application of legal norms. Finally, in the particular case in question, the National Council could not see exclusion of the state from the scope of its law since the executive order was partially paid.

Following the legal reasoning usually applied by the ECtHR, the National Council noted the decision of the Slovak Constitutional Court defining public interest as an accepted reason for restricting fundamental rights and freedoms and tried to prove necessity and proportionality. The National Council was of the opinion that the contested provisions of the laws are proportionate to the aim pursued by them and, therefore, the adopted legislative measures were appropriate, although they limited the fundamental rights or freedom; nevertheless, its negative consequences balance the positives embodied in the overall public interest pursued by them.[16]

The government, represented by the Ministry of Justice of the Slovak Republic, stated that the purpose of the contested provisions of the legislation was to meet the needs of public interest, including the need to ensure the proper functioning of the state. According to the government, no state can function without sufficient financial resources and material base. Moreover, an argument concerning the subject and object of execution was presented, since the Ministry of Justice found it very important in relation to the right to own property—namely the fact that it is a designated administrator of the state property as a distinct person from the owner of the property, the Slovak Republic—which would be executed. The government emphasised that the Law on State Property Administration does not absolve from the responsibility to pay the financial commitment. This rule excludes only the state property employed for public and non-business purposes to be used to satisfy the creditor's claim. The government focused on the nature of the state property and the functions of the state, either internal or external. According to the government, there cannot be a state without ensuring the fulfilment of the performance of these functions because it is the state's duty to protect state property (including funds) required to carry out state tasks or in connection with the performance of its functions, and provide the public activities of benefit. If the state, through its legislative power, does not apply protection of its property (even if in a different way from others), it would lose the only instrument that could prevent destabilisation and disablement not only of public authorities (e.g. the ministries of local government, courts, and police), but, for example, disposing of hospitals, schools, and other important public institutions. Moreover, the government emphasised that the restriction only concerns the state property that can be owned only by the state and the state property earmarked for public and non-commercial purposes. State property used in the business sector (e.g. public undertakings) might be fully or partially executed; therefore, the protection of state property does not apply to all state property.[17]

15 | See e.g. Art. 4 of the Constitution of the Slovak Republic: Mineral resources, caves, underground waters, natural healing sources and streams are a property of the Slovak Republic.
16 | Detailed reasoning of the Slovak Parliament can be found in the Slovak CC decision, part. I.4.
17 | Detailed reasoning of the Slovak government can be found in the Slovak CC decision, part. I.5.

3. REASONING OF THE SLOVAK CONSTITUTIONAL COURT

Given the reasons submitted by the complainant, concerning alleged non-compliance of executive immunity of state property with the fundamental right to judicial protection and the right to a fair trial were essentially identical to the grounds on which his arguments were based in support of the non-compliance of the existing scope of executive immunity of state property, the Slovak CC found it satisfactory to focus on one of the fundamental rights. It declared that while the legal protection of the fundamental right to property and the right to peaceful enjoyment of possessions is oriented towards the substantive legal sphere of creditor claims against the state, the right to judicial protection and the right to a fair trial must provide protection of procedural guarantees of the rights. The Slovak Constitutional Court has already clearly expressed that property rights under Art. 20 para. 1 of the Slovak Constitution also include a requirement that the proceedings concerning the protection of this fundamental right strictly respect the constitutional principles of legal certainty, equality, and non-discrimination.[18] It examined in detail the legislative framework of protection of the right to property and applied it *per analogiam* to the right to judicial protection.[19]

The Slovak Constitutional Court examined the impugned legislation as a whole from historical, application, and comparative views.[20] Within the specific part of the decision, the Slovak CC expressly outlined its interpretation methodology, which has made the decision very systematically processed. The Slovak CC noted that the first partial execution immunity in relation to the state property was explicitly embedded into the Slovak legislation only with legal effect from 1 January 1997.[21] In one of its previous decisions, the Slovak Constitutional Court declared that public interest is a legitimate aim to restrict the right to property, and a special status of the state property is not in conflict with the constitutional principles of equality and equality of civil relations.[22] Nevertheless, the Slovak CC observed that since that time, the legislation has included an increasing number of amendments to the relevant laws, even in relation to the state treasury which used to be a means to recover financial claims, but which became excluded almost without any exception from the scope of the enforcement procedure.[23] Moreover, even execution in relation to the funds provided from the state budget and the budget of the European Union was limited.

While examining the situation, the Slovak Constitutional Court looked at other national legislations. This comparative argument of interpretation includes several aspects of selected legal frameworks, sometimes even their application moments. For example, in Germany, public interest is also involved; however, for state execution immunity in general, property is divided into financial and public property. Financial property might be executed if it ensures public interest only indirectly. As for the Czech Republic, it provides that the enforcement of a decision imposing a state to pay a sum of money leads to the property which the relevant commitment relates to or which has been managed by the state body

18 | Slovak CC, III. ÚS 328/05, finding from 29 March 2006.
19 | Slovak CC decision, part B.
20 | The analysis of the legislation as a whole is presented in the Slovak CC decision in part III.
21 | All previously adopted relevant legal acts upon state property, either during the communist regime or during the first years after its fall, did not cover the issue of limits of execution of State property.
22 | Slovak CC, 92/1998, finding from 3 March 1998.
23 | State Treasury Act with effect from 1 January 2003.

whose activity has established the commitment. If the property is insufficient to satisfy the claim, an authorised person may exercise the remainder of the decision to be carried out by a garnishee order on the account of the Ministry of Finance. Moreover, budget rules impose no restrictions on the execution of the state property. The relevant Austrian legislation is identical to the legislation that was a part of the Czechoslovak legislation until 31 December 1950. According to the legislation, state administrative bodies decide which part of the municipality, or the central state body property that serves the public interest, might be executed to satisfy the creditor. In principle, the Hungarian legal regulation does not contain any distinction between execution as such and execution of state property.[24] All the examples have pointed out that the compared legal frameworks have included a less absolute approach to the concept of execution immunities of a state within legal relations based on vertical subordinate relationships within a state, leaving aside to an international norm to cover interstate relations based on the horizontal relationship of equality.

Following this, the Slovak Constitutional Court emphasised its already adjudicated legal opinion, according to which the property that is the subject of protection guaranteed under Art. 20 of the Slovak Constitution includes not only things, but also rights and other assets.[25] This corresponds to the ECtHR case law, according to which the term 'property' under the convention can embrace 'existing property' or assets, including claims, with respect to which the applicant can argue that they have at least a legitimate hope (expectation) to achieve the effective enjoyment of the right to property.[26]

This is a momentum in the decision of the Slovak Constitutional Court that reminds the reader of the case law of the ECtHR. However, this is not surprising as both courts deal with the protection of human rights and fundamental freedoms. Nevertheless, it is very interesting that after explaining the status of the right to property, the Slovak Constitutional Court applies the proportionality test that even the ECtHR did not apply in relation to the cases that included state immunity because it focused strictly on the application of the state immunity and its consequences and not on the possible variations of that application. Moreover, although the Slovak Constitutional Court considers the status of state immunity from the international law perspective and mentions, for example, the Greek Distomo case, it has obviously decided not even to note the similarly relevant International Court of Justice decision.[27] It follows the usual way of balancing different interests and analyses their conflicts from various methodological perspectives.

Further according to the Slovak Constitutional Court, it is not possible to absolutely limit the fundamental right to property. However, assessment of the legitimacy of restrictions on any fundamental right or freedom means finding a balance between public and private interests. If the restriction is legitimate, there is a question of whether it is also appropriate. The Slovak Constitutional Court considered the relation between the public interest and restrictions on the fundamental rights and freedoms, and consequently expressed its

24 | For the comparison, see the Slovak CC decision, part III.11.2 – III.11.5.
25 | See finding of the Slovak CC No. II. ÚS 19/97.
26 | E.g. European Court of Human Rights, *The Prince Hans-Adam II. of Liechtenstein v. Germany*, application no. 42527/98, judgement, 12 July 2001, para. 83.
27 | International Court of Justice, Jurisdictional Immunities of the State (Germany v Italy, Greece intervening), judgement of 3 February 2012.

doctrinal position that the use of property for the purposes of general interest may justify a restriction on not only property rights, but also other fundamental rights and freedoms.[28]

In relation to the execution case, the Slovak Constitutional Court noted that it was obvious that the property in the administration of the state property administrator is legally designated for use for public and non-business tasks; thus, the legislation pursues public interest. The same might be declared in relation to the other two contested acts of legislation. In summary, the Slovak Constitutional Court finds that the legal regimes of the Law on State Property Administration, the State Treasury Act, and the Act on the Financial Regulation, including an integral part of the executive immunity of state property, are instruments for achieving public interest. For that reason, it concluded that the contested provisions of statutory legislation are legitimate in terms of the achievement of public interest and, therefore, are liable to justify restrictions on the fundamental right to property and the right to peaceful enjoyment of possessions.[29]

As for the proportionality test, the Slovak Constitutional Court has undertaken three phases: examination of suitability, necessity, and proportionality *stricto sensu*. Hence, *stricto sensu* proportionality was preceded by the question of whether the institute restricting certain fundamental rights can enable attaining the objective pursued was at stake, followed by determination of the criteria of necessity, desirability, or use of the least drastic means.

Nevertheless, as has already been pointed out, the Slovak Constitutional Court took the usual way of the ECtHR decision reasoning that included a proportionality test if the aim pursued had been found legitimate. Regarding the criterion of suitability, the Slovak Constitutional Court finds that the measures chosen by the legislature are likely to achieve the intended purpose. In a situation where the owner has a claim against the state and by an enforcement order, they initiate the enforcement proceedings, the executive immunity—as legally defined—is an efficient barrier against the definitive elimination of the use of property for public purposes.[30] Returning, therefore, to analyse the second criterion of the proportionality test, the Slovak Constitutional Court notes that, while opening enforcement proceedings (the only situation when statutory provisions of the contested application are applicable), the legal system does not know of other tools to protect the use of the concerned property for public purposes. According to the Slovak Constitutional Court, such an instrument might be a special order for a judicial bailiff to realise enforcement proceedings against the state, only in relation to its property pertaining to business purposes. However, such a legally regulated order is not stipulated, and the Slovak CC did not find any other legal possibilities to intervene more agreeably with the property rights while maintaining the reviewed execution immunity of a state. Finally, the criterion of necessity of using the least drastic means was also satisfied, despite the fact that the extent of all three contested legal norms gradually shortened the list of units that could be executed.[31]

Moving to the proportionality *stricto sensu*, the Slovak Constitutional Court decided to apply several arguments, namely empirical, systematic, and contextual.[32] In the opinion of the Slovak CC, regulatory developments concerning execution immunity of state assets

28 | Compare another Slovak CC decision, PL. ÚS 11/96.
29 | The Slovak CC decision, part IV, 1.3.4.
30 | The Slovak CC decision, part IV, 1.4.1.
31 | The Slovak CC decision, part IV, 1.4.2.
32 | The Court followed methodological approach of the ECtHR. See the Slovak CC decision, part IV, 1.4.3.

show strong links between the rules embodied in the contested provisions, which provide truly effective and comprehensive protection of state property. However, this is a result of a gradual, poorly controlled development by legislative amendments, rather than a conscious and deliberate legislative act responding to negative practical experiences requiring effective legislative solutions. Regarding the evaluation of creditors' experience in enforcing their claims against the state, the Slovak CC concluded that although there would not be an absolute *a priori* impossibility of execution of state property, there is an indication of extraordinary difficulties in the legal process of claiming their satisfaction. The difficulty is undoubtedly particular in the case of lower amounts, and it usually leads a creditor to resign from their own efforts to bring the satisfaction of their claims adjudicated to fruition.[33]

When analysing systemic arguments, the Slovak CC found it necessary to focus attention on two topics: executive immunity upon state property and the importance of the fundamental right to property. It is interesting to point out here that the Slovak CC noted the procedural character of the institute of immunities that is a bar to the proceedings; however, according to the Slovak CC, it would be a pure formalistic approach if it ignored the significant impact of reviewed execution immunity on the property rights of the creditors. Such an approach is expressly opposite to the position of the International Court of Justice; it is even more interesting that the Slovak CC has not mentioned the International Court of Justice even here; it just determined itself with such an opinion within the lines of its decision.[34]

As for immunity, the Slovak CC emphasised that the relevant law had been elaborated mainly in the international law area, based on the application of the principle *par in parem non habet imperium* and is interlinked with the principle of sovereign equality of states.[35] The Slovak CC noted in accordance with the general understanding that the overall concept of state immunity in the 20th century had mostly been replaced by more restrictive approaches, the development of which was initiated by distinguishing acts of sovereign states on the one hand (*acta iure imperii*) and national private law acts (*acta jure gestionis*) on the other. It is not surprising that the Slovak CC sees a restrictive understanding based on the number of international legal documents, such as the European Convention on State Immunity from 1972 and the United Nations Convention on Jurisdictional Immunities of States and Their Property from 2004. However, it is surprising again that this part of the decision does not include any reference to the International Court of Justice decision[36] at least to explain why it is not relevant, for example, by claiming in general terms that the current decision focuses on the possible use of financial assets related to *acta iure gestionis* (state property used for commercial activities and only indirectly protecting the public interest) and does not deal with *acta iure imperii* as such (of course, a proper reasoning of this claim would have had to follow) or that it is the domestic affair since the dispute is not related to the relationship of more states, but only a position of one state in front of its own judicial authorities. However, the Slovak CC decided to refer to the ECtHR jurisprudence, although, first, it related exactly to the relationship of more states and, second, its decisions have been based mostly on the procedural aspects of the analysed international law concept of jurisdictional immunities of a state.

33 | See e.g. another decision of the Slovak CC, No. II. ÚS 194/08.
34 | The Slovak CC decision, part IV, 1.4.3.
35 | Ibid., part IV, 1.4.3 i).
36 | International Court of Justice, *Jurisdictional Immunities of the State*, Germany v Italy: Greece intervening, judgement of 3 February 2012

Methodologically, this might be considered the most controversial part of the decision since it includes a misunderstanding of the basic background of jurisdictional immunities of states.[37]Jurisdictional immunities of states reflect the current status of sovereign states within international law, namely sovereign equality and independence of these supreme subjects of international law[38] and the principle of non-interference.[39] As has already been pointed out, looking for a solution while exercising these principles in the area of coexistence and, in particular, cooperation among states has resulted in the approach *par in parem non habet imperium*, i.e. there is no jurisdictional power of a sovereign over another sovereign. However, the issue before the Slovak CC concerned the situation of a legally subordinated subject in relation to a state. Legal principles to be applied here are different in this relationship, although the Slovak CC admitted that the relationship between the claimant and the state is not equal. Nevertheless, using logical terminology, the Slovak CC connected the fact that there is a relationship of inequality with the requirement that the tighter the review of the so-called inner immunity of a state must be. Despite the terminology used, the connection has been as if pretended because such an approach ignores the understanding and background of both the concepts.

The Slovak CC has preferred providing comments and presenting its understanding of the case of Al-Adsani v United Kingdom and the importance of this judgement from 2001 within the development of state immunity rules. It emphasised that the decision according to which the rule governing state immunity is a generally recognised rule of international law, and therefore the granting of state immunity cannot be described as disproportionate and therefore contrary to the criterion of proportionality, was adopted only by a majority of one vote. Consequently, it focused on the dissenting opinions of judges and on the following relevant decision of the ECtHR upon state immunity, which followed its stable case law established by the Al-Adsani case.[40]

37 | It is not only the Slovak Constitutional Court that shares this misunderstanding of jurisdictional immunities of States. As if encouraged by the analysed decision of the Slovak Constitutional Court, the Supreme Court also—even more flagrantly—interchanged the concept of jurisdictional immunities of States with diplomatic immunities of State agents. See Supreme Court of the Slovak Republic, decision published under No. 157/1964 Zb.

38 | See United Nations Charter, Art. 2. para 1: The Organisation is based on the principle of the sovereign equality of all its Members.

39 | Ibid., para. 7: Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter Vll.

40 | The relevant case Kalageropoulou and Others v Greece and Germany was considered from the perspective of an individual and their legal application activities that were also subject of the decision of the Greek AriosPagos (Greek Supreme Court), which on 4 May 2000 upheld the first-instance court's decision of 30 October 1997. It was the decision that entitled Voiotia Prefecture and another plaintiff to compensation from the Federal Republic of Germany for murders and damage to property caused during the World War II by German occupation in the village of Distomo. Both Greek court decisions were based mostly on the same view that granting state immunity in case of breach of peremptory norms of international law is an abuse of the right to immunity. However, at the end of the procedure, the Greek government authority (Minister of Justice) did not grant an approval for enforcement, which lead those entitled to bring a complaint to the ECHR (European Court of Human Rights, *Kalageropoulou and Others v Greece and Germany*, application no. 59021/00, decision on inadmissibility, 12 December 2002).

In case of some international treaties, Slovakia is a country of a monistic rather than dualistic system of relationship between international and national law; some international treaties are not only directly applicable, but also have primacy over national laws (not the Slovak Constitution).[41] By its approach in the actually analysed decision, the Slovak CC probably followed Art. 1 para. 2 of the Slovak Republic and acknowledged and adhered to the general rules of international law, international treaties by which it is bound, and its other international obligations in such a way that it formalistically applied rules having the same name but different content.

Instead of challenging the legal opinion of another important international judicial body, the Slovak CC continued with its line of reasoning and pointed out that the fundamental right to property as the second element of systemic examination of the argument is considered to be a standard part of the constitutional catalogue of fundamental rights and freedoms of democratic countries having the ambition to apply rule of law.[42] The Slovak Constitutional Court held that modern democracy is characterised by respect for property rights and the principles of market economy.[43] The Slovak CC, therefore, analysed the property element within the systematic argument in detail, including contextual and value-based argumentation.

It pointed out its legal opinion on the direct and exclusive legal control over things to be the substance of the property right.[44] Moreover, it underlined the opinion that in terms of the social market economy and democratic rule of law, which are clearly proclaimed in the Constitution and further projected into several laws, the property right includes a free opportunity to acquire ownership and other rights over things (in Slovakia with the exception of cases falling under Art. 4 of the Constitution upon the exclusive ownership of the Slovak Republic (e.g. mineral resources) and a freedom to realise legal authority over acquired property that can only exceptionally be limited with regard to the existence of social interest, specifically public interest.[45] The Slovak Constitutional Court, thus, examines the social function of property and comes to the conclusion that the function of ownership is essentially conceived not only individualistically but also in terms of the interests of a citizen of a state as a whole. The decision includes several academic works in this context and a decision of the German Federal Constitutional Court that went on to say that in determining the content and boundaries of ownership, the legislator has the right to carry out a social model, stemming from both the guarantees of private property and their social ties.[46] It is interesting that the Slovak CC found it relevant to include this judgement, although it admitted that cited decisions did not result from decision-making

41 | See decision of the Slovak CC, II. ÚS 91/1999, ruling from 16 December 1999 based mostly on Art. 7 para. 5 of the Slovak Constitution: International treaties on human rights and fundamental freedoms, international treaties for whose exercise a law is not necessary, and international treaties which directly confer rights or impose duties on natural persons or legal persons and which were ratified and promulgated in the way laid down by a law shall have precedence over laws.

42 | The Slovak CC decision, part IV, 1.4.3 ii).

43 | It was decided so also in the previous decision of the Slovak Constitutional Court III. ÚS 243/2010, 26 January 2011.

44 | Compare e.g. another Slovak CC decision PL. ÚS 30/95, 2 April 1996.

45 | Ibid.

46 | The Federal Constitutional Court of Germany decision of 23 April 1974, 1st Senate, 1 BvR 6/74 and 2270/73 is available at: http://www.servat.unibe.ch/dfr/bv037132.html [online accessed 7September 2021].

activities directly related to state property. Nevertheless, they were considered to be a useful interconnection because the aim of the Slovak CC was the statutory regulation of property ownership associated with the state. This regulation is specific because it serves as a binding law to regulate the ownership of assets. It is true that a state does not have any other real tool to influence the exercise of its right to property;[47] however, very careful consideration is required. This requirement is particularly important in relation to the legal regulation of the status of state property in an enforcement process of a judicial decision, which by definition implies a fault in the process of realisation of a particular legal relationship; in this case, the fault was caused by a state and another procedural barring norm that would cause the failure to fulfil the right confirmed by a judicial decision.[48] By disproportionately favouring a legal position of its own property at the expense of the legal status of a property of another owner, the government can undermine the constitutional guarantees of property rights of individual creditors and, thus, the social aspect of ownership.

The systematic argument of examination of a fair balance between the fundamental right to property and the right to peaceful enjoyment of possessions on the one hand and assessed scope of execution immunity of state property on the other refers to the apparent tendency to reduce state immunity in international legal terms. In the opinion of the Slovak Constitutional Court, it should be more stringent when assessing the (internal) immunity protecting states, since it is assessed with respect to the subordinate entities forming the state's personal substrate, namely the relationship where the already mentioned principle *par in parem non habet imperium* expressing equality of states as subjects, international law is not applicable. The systematic argument similarly indicates the need to consider the width of the impact of the contested restrictions over the fundamental right to property, which are not limited to the individual sphere of the relevant creditor, but through limitations towards the satisfaction of their pecuniary claim, they influence the quality and quantity of their contribution to the development of the social environment as a whole.[49]

Having outlined the understanding and assessment of the system, the systemic argument proceeds effortlessly to a contextual argument. The mere failure to comply with legally adjudicated and enforceable obligations, regardless of the nature of the subjects of legal relations, according to the Slovak CC, is not only an undesirable but also a harmful phenomenon in the context of rule of law.[50] If the ability of a creditor to make use of an effective means to recover the debt is drastically limited, the negative development of the quality of the concerned legal relationship cannot be justified by the rule of law.[51]

Moreover, when the contextual argument has steered the attention of the Slovak Constitutional Court towards the negative effects of restrictions on fundamental rights as a result of prioritising the public interest, it is appropriate to look at other possible impacts of unenforceability, respectively significant restrictions on enforcement of claims vis-a-vis a state. These are mainly oriented towards the economic sphere, where, depending on the amount of the claim of the injured creditor, such an approach can directly affect

47 | See another Slovak CC decision PL. ÚS 28/00, 10 January 2002.
48 | The Slovak CC decision, end of the part IV, 1.4.3 ii).
49 | The Slovak CC decision, part IV, 1.4.3 iii).
50 | Ibid.
51 | Ibid.

economic activity in a broad sense, thus indirectly affecting the economic background of other subjects of law. Furthermore, non-legal aspects of trust of entities forming a personal substrate of a state may adversely affect the level of performance of public duties to the country (e.g. with respect to tax).[52]

Moving to value-based arguments, sometimes even called non-legal arguments, it looks as if the Slovak Constitutional Court decided to include as many arguments as possible. It is submitted that this argument could have been elaborated more since it is actually based on the principles of legal society. The Slovak CC has stressed that the simple legal principle according to which the debtor is obliged to fulfil their commitment must be protected by the legislature. If the debtor fails to comply with their commitment voluntarily, it is important to provide the creditor with effective remedies to satisfy their fundamental right to property. It is even more important if the debtor is a state that should exercise its powers to guarantee the enforcement of legal obligations. If the state as a rule-maker benefits itself to the extent that the creditor is not able, or able only with great difficulty, to have the execution realised, although the property claims are reasonably expected, the value system of the society clearly rewards the creditor's interest in preserving the object and purpose of the fundamental right to property to the public interest in the protection of state property against its withdrawal from performance of public functions.[53] This argumentation line is more comprehensible than an argument based on an international law concept of jurisdictional immunities of a state, since used concepts are similar in terminology but distinct in their background and substance.

It is true that the Slovak Constitutional Court has recognised that the state is a *sui generis* legal entity and, as suggested by the Parliament and government, an exercise of its official authority necessarily implies a certain asset base, which is intended to be protected on purpose. However, it must be noted that this protection is provided by means, which are limited by the rule of law embedded in a constitutional order, with its integral part represented by a catalogue of fundamental rights and freedoms.[54]

Without calling into question the concept of increased level of protection of state property, the Slovak Constitutional Court has noted that the examined protection must be adequate. It has found it unacceptable that persons acting with a state in legal relations concerning an asset are not guaranteed effective and efficient satisfaction of their property claims. Otherwise, the fundamental right to property and the right to peaceful enjoyment of property of such persons move into a position of illusion, not reality. These natural or legal persons who are in legal relations pertaining to the state fulfilling its obligation can then only hope that the state meets this voluntarily.[55]

Finally, to present the formal outcome of the proceedings in front of the Slovak Constitutional Court, it was decided that the concept of execution of immunity of state property that is cumulatively embodied in several legal acts has, therefore, been identified as non-complying with constitutional requirements, stemming from the rule of law (Art. 1 para. 1 of the Slovak Constitution), the fundamental right to property (Art. 20 para. 1 of the Slovak Constitution), and the fundamental right to judicial protection (Art. 46 para. 1 of the Slovak Constitution), since the right to a fair trial includes the right to enforcement

52 | Ibid.
53 | The Slovak CC decision, end of part IV, 1.4.3 iii).
54 | The Slovak CC decision, part IV, 1.4.3 iv).
55 | Ibid.

of judicial decisions. Moreover, the Slovak CC points out the effect that one group of recipients of legal norms regulating the enforcement of decisions are treated differently from creditors that have debtors other than the state. Dissimilarity of the treatment lies in the disproportionate restrictions and withdrawals, or even the inability of such creditors to obtain satisfaction with their confirmed executive claims if the state does not satisfy them voluntarily.[56]

CONCLUSION

Coming to a conclusion about the selected decision of the Slovak Constitutional Court, it is important to point out that one of the highest judicial authorities of Slovakia appears as if it has decided not to consider the relevant decision of the International Court of Justice adopted earlier that year when this International Court of Justice decision was discussed profoundly. The Slovak Constitutional Court has taken a completely different approach to decide upon the relationship of the executive immunity of a state and a fundamental right to property and judicial protection, different even from the approach of the ECtHR. This approach analyses the application of the principle of proportionality, nevertheless, the Slovak CC as if generalised application of the principle of proportionality in relation to fundamental rights protection as such.

Jurisdictional immunity of a state is a rule of customary international law which has been created and shaped on the basis of the principle *par in parem non habet impperium*. The practice of states was examined in the case Jurisdictional Immunities of States by the International Court of Justice, which concluded that the application practice has not yet established an exemption or rather a new rule in relation to the application of the jurisdictional immunity of States in case of infringement of mandatory rules governing basic human rights protection.

Few months following the decision of the International Court of Justice in 2012 based on jurisdictional immunities as a procedural bar to judicial proceedings, the Slovak Constitutional Court held legal standards applying executive immunity as a part of jurisdictional immunities unconstitutional and, therefore, inapplicable. Nevertheless, this decision was not based on the argument that they did not allow execution and, therefore, were not effective in relation to property rights protection or judicial protection but on the argument of application of the principle of proportionality not having met the test of proportionality. Thus, it has not followed either a usual approach of the ECtHR based on the principle of proportionality, since the ECtHR has decided not to apply it exactly in the decisions in the area of state immunity. Nevertheless, to support its argumentation, the Slovak Constitutional Court has applied several means of interpretation; and expressly mentioned historical, comparative, and systemic arguments, including contextual and value-based interpretations. Moreover, without naming them, the Slovak CC has also pointed out its own case law and scholarly works.

Having said that, it is submitted that external systemic and comparative arguments have been applied not the way the original decision makers intended. As only a list of other supreme judicial bodies at the national and international level was on the to-do-list of the

56 | The Slovak CC decision, end of part IV, 3.

Slovak Constitutional Court since presented decisions and reasonings were mentioned but not critically and comprehensively compared and analysed. The presented article has pointed out this understanding of the selected decision of the Slovak Constitutional Court in relation to the jurisdictional immunities of a state applicable within interstate relations between sovereign equals if compared to the execution immunities of a state within national jurisdiction with a state as a superior participant of judicial proceedings.

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EXCERPTS FROM THE DEVELOPMENT OF METHODS OF LEGAL INTERPRETATION

Zoltán J. TÓTH[1]

ABSTRACT

Legal interpretation is a stage in the application of the law, an indispensable operation whereby a judge (or other decision-maker) determines what a legal text means. The text does not stand alone; the words and expressions used in the norm may themselves have multiple meanings even in the context of everyday terminology, not to mention the differences between legal and other professional meanings. Furthermore, a norm has not only a text but also a context, a regulatory environment, a declared legislative purpose, an intention by the lawmaker or a set of moral expectations within which the text can be interpreted, etc. This paper attempts to present how methods of legal interpretation have evolved over the last two centuries and how we have moved from Savigny's Canon to the sophisticated methodologies of today. At the end of the paper, we ourselves will attempt to provide a useful methodological classification of these highly fragmented and diffuse methods.

KEYWORDS

Statutory interpretation
legal argumentation
legal methodology
history of ideas
Savigny
Bielefelder Kreis

I. Introduction

Before studying the development of legal interpretation methods[2] in detail and delineating the evolution of the theoretical history of the relevant methodology, we should clarify what we mean by 'interpretation' because it determines the subject of our examination and the scope of our analysis.

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2 | The present paper is concerned with the presentation of (important aspects of) the development of the theory of methods of legal interpretation, i.e. it is essentially descriptive. Matters of the empirical use of the methods presented and the evaluation of the appropriateness of these methods have been and are dealt with elsewhere.

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There is a difference between the concepts of legal interpretation and legal argumentation (legal reasoning). Legal interpretation is the exploration of the meaning and/or the reason of a legal norm in a specific case, while legal argumentation is a subsequent attempt to justify the application of the norm (in a given way and with a given meaning). Essentially, it is a probabilistic reasoning to prove the premises on which the decision is based are suitable to justify the decision, and they lead to a rationally defensible (though not necessarily the only possible) conclusion.[3] As Neil MacCormick formulated it, interpretation 'is a particular form of practical argumentation in law, in which one argues for a particular understanding of authoritative texts or materials as a special kind of (justifying) reason for legal decisions'.[4] Interpretation is a 'rational'[5] activity whereas argumentation is a 'rationalising'[6] one.[7] In the case of the latter, the focus is more on the power of persuasion rather than on logic, and all arguments are acceptable which are suitable for this persuasion.[8]

According to Wróblewski, *legal* interpretation can be considered at three levels. In the broadest sense ('*largissimo sensu*'), it covers the understanding of all 'cultural objects', i.e. things or phenomena created by humans. In the broad sense ('*sensu largo*'), this concept only includes the interpretation of expressions of the written or spoken language or any manifestation thereof. Finally, in the strict sense ('*sensu stricto*'), we use this concept to explore the meaning of a text only if we have doubts about the 'correct' meaning thereof, and we wish to explore this 'correct', but at first sight not obvious, meaning.[9] Below, we use the latter, the strict sense of the concept of 'interpretation' and wish to draw the arc of the development of the theoretical history of these methods by analysing and delineating the relevant jurisprudential works on this subject.

3 | Argumentation is the prevention of rebuttal, the weakening of the persuasive force of possible opposing views, and, thus, the confirmation of the correctness of the position on which the decision is based.

4 | MacCormick, 1995, p. 467. For the issue of interpretation as a part of argumentation, see, additionally, e.g. Gebauer, 2000, p. 683; Scallen, 1995, p. 1731. and footnote 119 in p. 1734; Jakab, 2013, pp. 1219–1220 and 1230–1231.

5 | The interpretation of statute law is based on the assumption that the legislator is rational. Statute law is deemed to be a reflection of coherent and logical thought. [...] A rational approach to the interpretation of statutes involves constructing and weighing arguments against one another. (Devenish, 1991, p. 225.)

6 | Legal reasoning does not only involve purely rational arguments but also the evaluation of conflicting interests and the making of value judgements which depend on prevailing legal and moral values and very often on common sense. (Devenish, ibid.)

7 | However, this does not mean that ex post justification cannot be logically justified.

8 | This is the summary of the main types of these arguments by Hoecke and Ost: 'While argumentation theory partly encompasses the interpretation theory, it is broader, because it covers all acceptable argumentation strategies outside statutory interpretation, such as references to the authority of court decisions, of doctrinal writers, of sources from foreign legal systems, or of non-legal persons or sources (e.g., religious or political ones). It also covers the argumentation as regards personal evaluations and normative standpoints [...]. In all these cases, the underlying paradigmatic theory determines which kind of arguments and which argumentational strategies are considered to be acceptable within legal reasoning.' (Hoecke and Ost, 1998, p. 198.)

9 | Cf.: Wróblewski, 1969, p. 4.

II. The appearance of the matter of legal interpretation in the field of jurisprudence

At the beginning of the formation of techniques used for regulation of behaviour by written norms, even in Roman law considered to be the most advanced among ancient legal systems (and for a long time thereafter), only two quite diffuse 'methods' were distinguished: the grammatical/literal interpretation and the interpretation based on equity (*aequitas*) (often called the only 'logical' interpretation)[10]. [11]Hence, two extreme views clashed in interpretation disputes: whether, in the case of literal meaning leading to 'unfair' or 'wrong' result, we should insist thereon for legal certainty and predictability or, considering the aspects of righteousness of cases, we should depart therefrom for a more important purpose and make a 'more proper', more equitable decision assuming the representation of a substantive value.[12] In the Middle Ages and the Modern Period, several different summaries were developed about the arguments, topical maxims, and reasoning tricks[13] (often only incidentally related to the issue of legal interpretation) usable in the course of legal argumentation (some of them known as legal logical formulas nowadays); however, these arguments were only accidental and had no system.

The first elements of a later coherent system appeared at Hugo Donellus (1527–1591) who also distinguished two interpretation methods: the 'grammatical', which establishes the literal meaning (*littera legis*) of the text of the statute, and the 'logical' which determines the sense or reason (*ratio legis*) of the statute. It is *always* the latter one which is significant because the *sentential legis*, the (real) meaning of the statute, is what is binding and not the mere letter. If the grammatical meaning covers the 'real' meaning, the grammatical meaning will, of course, be proper but only *because* it is identical to the meaning reached through logical interpretation. However, if the former one tells us more or less than the latter, grammatical meaning must be amended by the 'logical' (actually substantive) interpretation: it must be tightened (*interpretatio restrictiva* – restrictive interpretation) or expanded (*interpretatio extensiva* – extensive interpretation). It was '*duplex interpretatio*'[14] which fundamentally determined the subsequent legal thinking

10 | Cf.: Szabó, 1960, pp. 100, 124, 146 and 153.

11 | In the course of applying the Roman law, many specific techniques were used in the practice to determine the 'proper meaning' but there was no attempt to classify them into a methodological system. Although, there were and there are Roman law specialists (taking, primarily, disciplinary aspects into account) who, still today, provide a systematic description of the interpretation methods of Roman law. Also using the system theory results of the twentieth century, András Bessenyő has such a retrospective approach and recognises three basic interpretation schemas in Roman law: the grammatical-logical interpretation (*interpretatio grammatico-logica*), the historical interpretation (*interpretatio historica*), and the systemic interpretation (*interpretatio systematica*). (Cf.: Bessenyő, 2003, pp. 23–24). On the contrary, e.g. András Földi and Gábor Hamza delineate the classification of Savigny being used even today but also add that the setting up of this classification is expressly the result of the modern legal dogmatic. (Cf.: Földi and Hamza, 1996, pp. 73.)

12 | For the nature of this dilemma permeating ancient and medieval thinking, see: Vékás, 1998, pp. 3–19 (in particular part I of this study, pp. 3–6); and for details of the contemporary concept of Roman law, see: Maine, 1861, pp. 39–58.

13 | For the most important ones in England, see: Holdsworth, 1938, vol. XII, pp. 188–191.

14 | For the methodological concept of Donellus in Hungarian, see: Kiss, 1909, pp. 30–31.

for centuries,[15] insomuch that even after Savigny, who made a breakthrough in the legal hermeneutics, several legal scholars analysed the possible types of interpretation of legal texts on the basis thereof for decades, sometimes also adopting the errors of the thinking of Donellus and mixing up the methods of interpretation with the results thereof.

Hence, long after the categorisation of Savigny, Bernhard Windscheid (1817–1892) also distinguished two interpretation methods: the grammatical (*'grammatische Auslegung'*) and logical interpretation (*'logische Auslegung'*). Windscheid says that interpretation is nothing else but the 'establishment of the content of law'[16] and, according to him (similar to Donellus), we can reach it not through the grammatical processing of the text but through the establishment of the real meaning thereof. The grammatical meaning merely tells us what the words of legal norms in themselves or in the light of the concrete case to be decided by the judge mean, but it does not provide real support to establish the proper meaning when the text has no reasonable meaning or, more frequently, when it has several reasonable meanings.[17] A further problem is that the grammatically proper (understandable) meaning may be incorrect in content (i.e. wrongly worded) which, in such a case, must be tightened or expanded, or changed by the judge.[18] It must be done by the interpretation called (also) by Windscheid 'logical', which has two main techniques (having not too much to do with real formal logic): the examination of legislative history of the given statute (i.e. the legal and social circumstances of the creation of the new legal regulation) and the determination and enforcement of the purpose which the lawmaker intended to reach with that.[19] We can see that, according to Windscheid, 'logical' interpretation is actually the synonym of the 'non-grammatical' interpretation which has the techniques known today as 'historical' and 'teleological' as its main (but not only) methods.

Two decades later, Ferdinand Regelsberger (1851–1911) expressed a similar opinion.[20] He also thought that two types of interpretation existed: grammatical and logical. While the former (which has to be the starting point of all interpretations) explores the meaning of the words used by law on the basis of ordinary or special legal language (if any),[21] the

15 | The *duplex interpretatio* (in its strict sense) did not mean a *methodological* classification but a classification according to the *result* of interpretation. All these may be tracked back to the axiological, therefore eventually, ontological issue of whether only righteous law can be law. It roots in Roman law where this problem manifested in the opposition of *ius strictum* and *ius aequum* (for the relations between the two approaches and their consequences regarding the applicability of the positive law, see e.g.: Tóth J., 2016, pp. 119–120.) and its general legal theoretical consequences materialised in the contradiction between natural law and positive law (which cannot be discussed here even briefly) and later in appearance of human rights and constitutional rights above statutory law.

16 | 'Auslegung ist Darlegung des Inhalts des Rechts.' (Windscheid, 1873, p. 49.)

17 | Windscheid, 1873, p. 51.

18 | Hiernach ist die berichtigende Auslegung entweder einschränkend, oder ausdehnend, oder abändernd. (Windscheid, 1873, p. 53.)

19 | 'Im Besonderen ist hier zweierlei hervorzuheben: der zur Zeit der Erlassung des Gesetzes vorhandene Rechtszustand, … und der Zweck, welchen der Gesetzgeber mit seinem Gesetze hat erreichen wollen.' (Windscheid, 1873, p. 52.)

20 | However, a significant conceptual difference regarding the true nature of analogy existed between them: Windscheid considered it to be an independent operation of interpretation but Regelsberger did not. (Cf.: Windscheid, 1873, pp. 54–58; and Regelsberger, 1893, pp. 155–161.)

21 | Regelsberger, 1893, pp. 145–146.

latter controls this meaning and extends or tightens it if necessary.[22] In the course of that, it takes the following into consideration: i) the comparison between the meaning and the statute in question as a whole, the laws on similar subject ('related' laws), and all legal norms regarding a legal institute or the moral and social tasks of the law ('*die sittliche und soziale Aufgabe des Rechts*'); ii) the purpose of the law ('*der Zweck des Gesetzes*', '*ratiolegis*'); iii) the 'higher principles' ('*höhere Prinzips*', '*ratio juris*'); iv) the historical basis ['*geschichtliche Grundlage*' (i.e. the contemporary social reason for the legislation)] of the given legal regulation; and v) the (subjective) will of the legislator ('*der Willen des Gesetzgebers*').[23] It is clear from the enumeration that Regelsberger also incorporated all operations aiming not explicitly at the establishment of the grammatical meaning into the 'logical' interpretation ('*logische Auslegung*'); hence, the interpretations are also called today as systematic-contextual, teleological, historical, and substantive. However, *duplex interpretatio,* the method of Donellus, prevailed not only in the German but also in the English-speaking world. This is proved by the fact that even the summarising work[24] (not affected by the theories of Savigny, Jhering, Heck, or their followers) of the Englishman Thomas Erskine Holland (1835–1926) published long after the turn of the century knew only two types of methods in the course of '*doctrinal interpretation*' regarding both the private and public law: the grammatical interpretation and the logical interpretation.[25] Further, similar to the German pandectists and legal philosophers of the Modern Ages, he defined the latter as the reference basis of the literal meaning.[26] Finally, as for the Hungarian legal academics, this theory was also followed, *inter alia*, by Ignác Frank[27] in the middle of the nineteenth century and by Imre Zlinszky[28] and Béni Grosschmid[29] at the beginning of the twentieth century.

22 | '*Ausdehnende Auslegung*' (*interpretatio extensiva*) and '*einschränkende Auslegung*' (*interpretatio restrictiva*). (Cf.: Regelsberger, 1893, pp. 152–154.)
23 | Regelsberger, 1893, pp. 147–151.
24 | Holland, 1916.
25 | Cf.: Holland, 1916, 425 and 432.
26 | Furthermore, he also distinguished extensive and restrictive interpretation depending on the possible result of this comparison. (Cf.: ibid.)
27 | According to Frank, 'the scientific explanation is coming from the words of the statute or from the reasons thereof and, accordingly, it is word-explaining or reason-explaining (*grammatica vel logica*)'. (Frank, 1845, p. 59.) However, he classified not only the mere grammatical meaning to the former one but also the meaning called 'systematic' in the modern legal literature; while he considered the latter as a kind of mixture of today's historical and teleological interpretation;, in case of collision, he considered the 'logical' meaning as primal. (Cf.: Frank, 1845, pp. 60–61.)
28 | Zlinszky also classified the modern concept of historical, systematic, and teleological interpretation to the 'logical explanation' (but, similar to Frank, did not use formal logical rules) but he never said that the latter methods were only the accessories or corrections of grammatical interpretation; on the contrary, these were to be applied together with the grammatical interpretation and even the grammatical meaning could depend on the latter ones. (Cf.: Zlinszky, 1902, p. 30.)
29 | Contrary to Zlinszky, Grosschmid completely accepted the view according to which two types of methods exist; and the logical (or 'cause investigating') interpretation (*interpretatio logica*) is secondary to the grammatical (or 'word investigating') interpretation (*interpretatio grammatica*). (Cf.: Grosschmid, 1905, pp. 940–941.) However, he uses the concept of 'logical' explanation in a much stricter sense than his contemporaries; since he considers that it means only the exploration of the subjective historical intention, psychological will of the legislator. '... it is not the word of the statute that obliges but the will of legislator. And the final purpose and the task are always the finding and the determination of the real will.' (Grosschmid, 1905, p. 941.)

III. Savigny's canon of methods of interpretation

The common feature of all these theories was that they had no coherent hermeneutical methodology, but, enumerated, similar to the classical period of the Roman law, the possible methods of interpretation of legal texts in an incidental and arbitrary manner and, reduced the interpretation to the analysis whether the literal meaning of the written norm is identical to any meaning which moved away from the text (to a meaning extractable from the text or even independent from that, i.e. 'external' meaning). Until the middle of the nineteenth century and—as we could see—also for a while after Savigny, there was no outstanding theory which would endeavour to explore systematically and present the different methods of legal interpretation used in the practice. Friedrich Carl von Savigny was the first who attempted to define, distinguish, and systematise the main methods in brief in Volume I of his work 'System des heutigen Römishen Rechts' published in 1840. According to Savigny, the interpretation has four main methods: grammatical, logical, systematic, and historical interpretation.[30] The grammatical interpretation (*interpretatio grammatica*;[31] '*das grammatische Element der Auslegung*') explores the general meaning of the words, expressions, sentences, the text as a whole, and the conjunctions which are attributed to the given word, expression, etc. by an ordinary person who knows the given language well. The logical interpretation (*interpretatio logica; 'das logische Element [der Auslegung]'*) uses the formal rules and logical principles of thinking to determine what the text of a legal norm means (or does not mean). Through systematic interpretation[32] (*interpretatio systematica; 'das systematische Element [der Auslegung]'*), a conclusion regarding the meaning of a legal provision can be drawn from its position in the system of legal norms, and the type and function of the surrounding legal norms. In the course of historical interpretation (*interpretatio historica; 'das historische Element [der Auslegung]'*), we try to determine the real meaning of the legal norm with the help of the (probable) intention of the contemporary legislator creating the legal norm.[33]

Later, a fifth method, the teleological interpretation, also joined Savigny's canon of methods which were also adopted by Hungarian legal academics (e.g. Pál Angyal, Ferenc Finkey, and Károly Szladits) in the first half of the twentieth century.[34] The basis of its use

30 | Savigny, 1840, vol. I, pp. 213–214.

31 | Savigny did not use the Latin names in the course of delineation the methods ('elements') of interpretation.

32 | Savigny did not discuss the interpretation methods in the order considered today as 'conventional' (and also followed in this research) but, firstly, he studied the historical 'element' of interpretation as the third method and defined systematic interpretation only after that as the fourth one.

33 | It is very important to mention that, according to Savigny, these methods do not compete with but complement each other, i.e. in a certain case, we do not apply *either the one or the other* (choosing the method actually best to apply) but *all of them* have to be applied because they can authentically determine the meaning of the text only together (Savigny, 1840, vol. I, p. 125). Furthermore, the meaning of the text cannot always be determined exactly; hence, we only have to try (but that we indeed have to try) to get the closest as possible to the true meaning of the text in the rich range of its meanings (Savigny, 1840, vol. I, p. 216).

34 | According to Pál Angyal, the four main interpretation methods are the grammatical, logical, historical, and systematic interpretation; For Finkey, these are the grammatical, logical, historical, and systematic explanation; while Szladits, besides the classical four methods (grammatical, logical, systematic, and historical interpretation), also defined the evaluative interpretation as an independent fifth type of method. While, in the view of the two criminal law experts (Angyal and

in law was the idea of Jhering according to which law is not a self-contained system to be examined for its own sake,[35] but it contains norms which have tasks to be carried out and functions, i.e. (social) *purposes,* which have to be enforced by judges.[36] This 'goal idea' was further developed by Philipp Heck, who assigned the judges to apply the results of the (also social) balance of interest of the legislator.[37] According to Heck, the judge has the task of seeking the will of the legislator ('*Forschung nach dem Willen des Gesetzgebers*'), namely exploring what social needs the legislator took into consideration when creating the legal norm. However, this is not the search for the psychological will (*subjective* intention) of the 'realistic' legislator but for the causal factors creating the law, namely determining what was (could be) the original (*objective*) purpose of the statute in light of the historical circumstances of the creation thereof.[38] Later, a complete legal theoretical trend developed from this view which was named, as in the title of the cited work of Heck, '*Interessenjurisprudenz*' ('jurisprudence of interest') and which, contrary to the advocates of applying the subjective historical method of Savigny, stood firmly for the objective teleological method.[39] Furthermore, there was one more interpretation method, the evaluative interpretation, the use of which arose, for certain authors, as a requirement (either as an independent method or as a special part of teleological interpretation) in the course of application of law (as the late successor of *ius aequum* in Roman law) from time to time. This method was the most accepted by theory during the blossom of *Wertungsjurisprudenz* ('jurisprudence of values'),[40]and

Finkey), the content of the mentioned interpretation tools was mostly consistent with what Savigny thought about it (with the exceptions that Angyal says that the grammatical meaning did not mean the ordinary but the legal meaning and that the further, non-formal logical elements of 'logical' meaning of *duplex interpretation* are still present in the logical method), for Szladits, it is only true for the first three methods because he also considered the teleological interpretation not recognising it as an independent method but placing it partly into historical and partly into evaluative interpretation (which latter interpretation, by the way, takes substantive 'extent of correctness' into account). (Cf.: Angyal, 1909, pp. 104–105; Finkey, 1914, pp. 99–100; Szladits, 1941, pp. 155–156.)

35 | In his early works, Jhering says exactly the opposite thereof; moreover, this statement does not characterise the entire work of Jhering but only his works following his dogmatic-centric concept analyser period.

36 | '... das Recht kennt nur eine Quelle: den Zweck.' (Jhering, 1877, p. XIII). Jhering also says that the content of the statute can be determined only through its purpose, i.e. the 'teleological further development' ('*teleologische Entwicklung*') of the (merely written) law: (Cf.: Jhering, 1877, p. 426.)

37 | 'The legal community has a strong interest in [the application of] the statute achieving the result which we expect from it [for which it was made] ...' (Heck, 1914, p. 59.)

38 | See: Heck, 1914, p. 64.

39 | For the brief criticism regarding the 'fruitless' opposition of these two methods in the Hungarian scholarly literature, see: Szabó, 2005, pp. 177–178.

40 | Among the Hungarian scholars, István Szászy was the one who, besides staying at the *duplex interpretatio* on the surface, used not only Savigny's methods but also the views of *Interessenjurisprudenz* and *Wertungsjurisprudenz*. Hence, besides the 'grammatical explanation', he distinguished and recognised the 'logical explanation in narrow sense' as the part of the 'logical explanation' (i.e. the use of the rules of the formal logic in the course of the interpretation and, furthermore, he also mentioned four particular types thereof by names); the 'systematic explanation'; the 'historical explanation' (by which he meant the interpretation of legal regulations according to conclusions from the examination of the legislative history); and the 'evaluative explanation' which 'starts from the premise that the legal regulation tries to reach fair results through meaningful objectives' (Szászy, 1947, vol. I, p. 127), namely which contains both the teleological and the substantive elements of the interpretation. It meant that he, as the first among Hungarian scholars, enumerated all interpretation methods which had been defined until then even if only as the part of the interpretation method called 'logical'. (Cf.: ibid.)

its practical use was also recognised and supported by the advocates of two further legal trends, the German 'Free Law School' (*Freirechtsschule*) and the 'Legal Realism' of the United States, which expressly found law as such in judicial proceedings.

The mentioned categorisation of Savigny being supplemented by teleological interpretation (and by 'evaluative' [substantive] interpretation as the improvement thereof) determined the legal theoretical thinking of interpretation methods for nearly a century and a half, insomuch that most often this classical systematisation serves as a basis for legal hermeneutics even today. It was also true for Imre Szabó (the most important representative of the Hungarian legal literature of state socialism), who is known as not only the founder and the most significant representative of the 'official legal theory' but also the most influential Hungarian actor in the science of legal interpretation until today. In his work, he did not (only) rely on the results of Soviet jurisprudence, but (primarily) on Savigny's views. Similar to his great German predecessor, Imre Szabó also distinguished four methods of legal interpretation: grammatical, logical, systematic, and historical interpretation.[41] He neglected even the teleological interpretation (accepted as the result of the legal development after Savigny);[42] overall, he followed his 'master' in everything (wrapping his ideas, of course, in the Marxist-Leninist ideology to a certain extent). The only important difference between them (besides the mentioned ideological aspects) was that he divided these four methods into two categories and saw a relative caesura, a not too strong but even existing line, between the grammatical and logical interpretations (as methods based only on the text of the statute) on the one hand and the systematic and historical interpretations (as methods using also the relationships beyond the text) on the other hand.[43]

41 | According to the definitions of Imre Szabó, the grammatical interpretation 'analyses and examines the text of the statute in its lexical and syntactical sense' (Szabó, 1960, p. 123), namely 'the linguistic analysis (i.e. the examination of the words and the grammatical structures of the legal regulations) is called grammatical analysis' (Szabó, 1960, p. 127). The logical interpretation, besides the rules of conclusion, 'also includes the application of the formal logic principles, of the basics of thinking and of the rules regarding the concept (e.g. defining the concept), the judgements, the proving, etc.' (Szabó, 1960, p. 161). The systematic interpretation 'examines an item as compared to other legal item, a legal institution, the entire statute, codex, the given branch of law, even the entire legal system; and concludes the content, essence, and meaning of the examined norm from the place of the legal item and from its comparison, in the said manner, with other elements of the legal regulation' (Szabó, 1960, p. 171). Finally, in the course of historical interpretation the legal regulation 'has to be examined in historical context going beyond law' (Szabó, 1960, p. 200) which also includes *occasio legis*, i.e. the 'occasion' of the statute (i.e. the concrete event or situation that evoked the need for law-making), the *ratio legis*, the 'meaning' of the statute and, the fact 'how the content of the legal regulation » has developed«, has enriched since its creation' (Szabó, 1960, p. 223).

42 | Imre Szabó says that the purpose of the legal regulation to be established by teleological interpretation is the part of the legislator's will to be determined by historical interpretation; hence, 'beside historical element, there is no need for separate teleological interpretation' (Szabó, 1960, p. 231).

43 | 'The grammatical and logical … interpretation … actually examine only the legal regulation itself being isolated from other legal regulations and taken out from the given branch of law and legal system and, finally, kept away from the social contexts. … after [the] grammatical and logical interpretation, there is a certain caesura and beyond this line, there is the examination of the wider context … of the legal regulation, the analysis of its place in the legal system and its social relations. Hence, beside the first degree … of the interpretation (when the grammatical and the logical elements of interpretation are used), we must talk about a second degree which is *higher*

IV. Attempts to surpass the 'Canon'

Due to the development of jurisprudence and the recent results of legal practice, the gradual disintegration and expansion—with other methods—of the traditional interpretation canon of Savigny began in the second part of the twentieth century, primarily in the German-speaking world. In his five-volume large methodological summarising work[44], Fikentscher took the four plus one division as a basis and completed it only with one method in the middle of the 1970s. Overall, Fikentscher deviated from traditional canon in two ways: on the one hand, he considered the logical and systematic interpretation as a unified coherent interpretation method instead of being two independent methods and, on the other hand, he recognised—similar to others—the evaluative interpretation but only as a tool for controlling the practical correctness of the meaning established on the basis of other methods. Therefore, the following were the methods of 'the Canon', according to him: interpretation on the basis of the text, i.e. literal interpretation ('*Auslegung nach dem Wortlaut*') as the necessary starting point of all legal interpretations; logical and systematic interpretation ('*Auslegung nach Logik und System*') in which logic does not principally mean the application of formal logic but—similar to the concept of the 'system' —the consideration of the legal context of the legal norm; historical interpretation ('*historische Auslegung*') as the use of the legislative history of the concrete norm to establish the intended meaning of the text of the norm; teleological interpretation or 'interpretation according to purpose' ('*teleologische Auslegung*', '*Auslegung nach dem Zweck*'); and'interpretation' on the basis of the 'value of the result' ('*der Wert des Ergebnisses*') which, contrary to the other methods, is not a 'self-righteous' method[45] but merely a subsequent tool to control the meaning established by other methods.[46]

However, the works from the 1980s and 1990s mostly surpassed the traditional division of four plus one and recognised the existence of further recent methods. However, some of them, such as Potacs, gave up the traditional canon only theoretically and in name; since he used a completely different classification than his predecessors, it was incidental and did not constitute a coherent system; therefore, others did not follow this classification later.[47] He said that interpretation had two main types: semantic and pragmatic interpretation ('*semantische Interpretation*' and '*pragmatische Interpretation*'). The former includes the interpretation according to the clear meaning of the words (*klarer Wortsinn*), the interpretation based on the relations of the text of the legal norm (actually the systematic interpretation), the interpretation according to the legislative purpose,

than the first one.' (Szabó, 1960, p. 168; – note in the original – T.J.Z.) At the same time, Imre Szabó (similar to Savigny) emphasises that though 'there is a certain succession in the application of these methodological elements but it does not mean that any or some of these elements would be suitable to establish alone the content of the legal regulation, namely that the following element could be applied only if the previous one did not lead to result. Only the entire method can lead to result.' (Szabó, 1960, p. 233.)

44 | Fikentscher, 1975–1977.

45 | This method came from Ludwig Enneccerus and Hans Carl Nipperdey so as to amend, correct, or substitute teleological interpretation; hence, the latter two methods is to be considered as a single unit.

46 | Cf.: Fikentscher, vol. III, 1975, pp. 668–681.

47 | See: Potacs, 1994.

and the historical interpretation. The latter includes (basically without the determination of thorough systematic relations) *argumentum a contrario* (*Umkehrschluß*); analogy; *argumentum a fortiori* (*argumentum a minori ad maius*, *argumentum a maiori ad minus*); interpretation according to general principles (including fundamental rights); reduction techniques ('*Reduktionen*') just as restrictive, extensive and corrective interpretation (the last three are actually not interpretation *methods* but the *results* of interpretation); and other possible methods as part of the latter ones e.g. the principle of *implied powers*.[48]

Wolfgang Gast, however, distinguished further techniques in addition to the four 'classical' methods of interpretation (literal, systematic, historical, and teleological interpretation) [49]being the 'accessories of the traditional rhetorical toolbar' (which, as we can see, do not cover the formal logical methods). Thus, for example, he emphasised the role of formal logic in the course of interpretation, but only to the extent necessary for resolving the real controversies of the text, i.e. to avoid tautological argumentation (hence, this method of Gast may actually be used merely as a 'negative' tool grounding the exclusion or the rejection of certain interpretation results instead of being a 'positive' tool supporting the establishment of a certain meaning).[50] Furthermore, he classified the following as independent methods: i) the examination of the impact history of the text of legal regulations to be interpreted (including, in particular, the interpretation according to the meaning which is attributed to the texts of the norms by the particular judicial decisions and the judicial case law as a whole in the course of their actual, practical application, i.e. the meaning with which the law-appliers incorporate certain norms into their practice);[51] ii) the opinion of authorities (e.g. commentaries added to the legal regulations to be interpreted or the books and scientific works of authors being considered by the lawyers as authentic in the given professional topic);[52] iii) 'legal ethical reservations', which mean the conception of righteousness of the person who interprets the text (typically of the judge who wants to decide the case somehow) and its maxims, the opposing meaning of which the judge does not want to use in relation to the given written legal norm and which, therefore, can be applied only subsequently, in the course of selecting from the other possible meanings (this way, similar to the formal logical aspects, this can also be considered merely as a 'negative' method); [53]and finally, iv) the 'interpretation according to purposes' being legitimate only in certain circumstances.[54]

48 | As we can see, these are systematic and logical arguments; there is, therefore, no ground for differentiating them as 'practical interpretation' from the systematic interpretation being part of 'semantic interpretation'.

49 | He mentions literal interpretation ('*Auslegung nach dem Wortsinn*') also as grammatical and grammatical-literal interpretation ('*grammatische Auslegung*', '*grammatikalisch-lexikalische Auslegung*'); systematic ('*systematische Auslegung*') as logical interpretation (!) or interpretation according to relations ('*logische Auslegung*', '*Auslegung nach dem Zusammenhang*'); historical ('*Auslegung nach der Geschichte*', '*historische Auslegung*') as genetic interpretation ('*genetische Auslegung*'); and teleological ('*teleologische Auslegung*') as interpretation according to the (objective) purpose of the statute ('*Auslegung nach dem Gesetzzweck*'). (Cf.: Gast, 1988, pp. 110–114 and 132–177.)

50 | Cf.: Gast, 1988, pp. 128–129.

51 | Also, this method is nothing else but the temporal continuing of historical interpretation covering the analysis of legislative history. (Cf.: Gast, 1988, pp. 129–130.)

52 | Actually it means the use of results of jurisprudence in the course of interpretation. (Cf.: Gast, 1988, p. 130.)

53 | Cf.: Gast, 1988, pp. 130–131.

54 | Cf.: Gast, 1988, pp. 131–132.

He also recognised *argumentum a contrario* and analogy, *argumentum a fortiori* and *argumentum ad absurdum,* i.e. the main logical maxims,[55] not as interpretation methods but only as rhetorical tools.[56]

Finally, it is worth mentioning the theory of Franz Bydlinski among contemporary authors. Regarding the interpretation methods, he insisted on the traditional four plus one canon only formally and, in terms of content, he exceeded it; further, he recognised reasoning funds, which he did not call as 'methods of interpretation', but by the schematisation thereof, he anticipated the ideas of the Bielefelder Kreis (see later). Among the interpretation techniques called 'methods of interpretation', Bydlinski differentiated literal (grammatical),[57] systematic-logical,[58] historical (according to the intention of law-maker),[59] and objective-teleological interpretation[60] but he divided the last one into five further subcategories: teleological-systematic interpretation[61] as the interpretation method for determining the objective meaning (independent from the legislator) of the statute (*ratio legis*); constitution-compliant interpretation (interpretation consistent with the constitution);[62] *argumentum ad absurdum*;[63] interpretation according to the 'nature of the thing' ('*Natur der Sache*')[64], which may provide assistance on how to interpret certain obvious and self-evident life relations even with a content opposing the meaning determined by some other methods or may serve as a reference base; and finally, comparative law arguments[65] in the course of which concrete foreign legal rules or legal solutions generally applied in other (mainly similar or the most advanced) legal systems can be used for interpretation of domestic law. Furthermore, Bydlinski also analysed techniques which he did not call 'legal interpretation methods', but which, regarding their functions, are close to them even according to him. Hence, he also recognised the principle '*lex specialis derogat legi generali*'[66] being intended to resolve the (apparent) contradictions of positive law; regarding 'supplementary legal development' among the procedures being able to fill the 'statutory gaps', he specified both types of analogical inference (statutory and legal analogy) and the inverse thereof, the technique of 'teleological reduction' or 'restriction', and the principles *a contrario* and *a fortiori* (*Umkehrschluß* and *Größenschluss*) together with the involvement of universal ('natural') legal principles into interpretation; finally, he also mentioned the application of law and 'legal thinking' in accordance with precedents and the judicial practice.

55 | Analogy is, of course, not one of the logical maxims.
56 | See the delineation of their content later.
57 | Cf.: Bydlinski, 1982, pp. 437–442.
58 | Cf.: Bydlinski, 1982, pp. 442–448.
59 | Cf.: Bydlinski, 1982, pp. 449–153.
60 | In Bydlinsksi's own words, '*wörtliche Auslegung*' ('*grammatische Auslegung*'); '*systematisch-logische Auslegung*'; '*historische Auslegung*' ('*Auslegung nach der Absicht des Gesetzgebers*'); 'objektiv-*teleologische Auslegung*').
61 | Cf.: Bydlinski, 1982, pp. 453–455.
62 | Cf.: Bydlinski, 1982, pp. 455–457.
63 | Cf.: Bydlinski, 1982, pp. 457–459.
64 | Cf.: Bydlinski, 1982, pp. 459–461.
65 | Cf.: Bydlinski, 1982, pp. 461–463.
66 | Cf.: Bydlinski, 1982, p. 465.

V. Paradigm shift in legal methodology: Results of the Bielefelder Kreis

Due to the change in judicial practice, the development of international comparative law, the learning of judicial practices of other legal systems, and the use of new interpretation techniques,[67] it became, as we have seen, increasingly untenable to reduce the interpretation methods to the traditional four or five types. Moreover, in the scholarly literature, it has become widespread that the courts apply methods other than the classical ones to establish the meaning of an ambiguous legal regulation. Partly purposefully for the sake of understanding and systematising these methods but generally to establish the basic principles and features determining the actual operation of jurisprudential practice of different legal systems belonging to the European culture, an international group of legal scholars, *Bielefelder Kreis*[68] was established in the 1980s, which decided to

67 | As a consequence, rules of interpretation have appeared in some international documents and in the domestic law of some countries, which (*inter alia*) are based on the results of the theoretical developments presented above to help the relevant judicial body in the interpretation of the applicable legal provisions. The most famous of these is, probably, the canon of interpretation of the Vienna Convention on Law of Treaties, the use of which has been made compulsory by, e.g. the European Court of Human Rights in the 1975 *Golder* case (*Golder v the United Kingdom*, application no. 4451/70, 21 February 1975). Among 'General rules of interpretation', Article 31 declares that 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. Under the title 'Supplementary means of interpretation', Article 32 defines, not exhaustively, other methods and sources: 'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: *(a)* Leaves the meaning ambiguous or obscure; or *(b)* Leads to a result which is manifestly absurd or unreasonable.' Finally, according to Article 33 (Interpretation of treaties authenticated in two or more languages):' 1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.' (etc.) This is, hence, as mentioned above, also applicable, e.g. to the interpretation of the European Convention on Human Rights.

68 | The prelude of the group's formation was the IVR World Congress in Philosophy of Law and Social Philosophy in Helsinki in 1983 where some participants proposed to map the condition of the contemporary judicial law application. In 1986, following three years of *ad hoc* research, it became serious when these legal scholars decided to carry out a systematic research regarding certain aspects of adjudicating so that participants examine the operating features of the justice systems in their own country. (Cf.: MacCormick and Summers, 1991, pp. XI–XIII.) Finally, the legal scholars of nine countries performed the empirical study of their countries in this respect (until 1990). During the selection of the countries (or the legal scholars thereof), it was also taken into account that the sample must include all important legal systems and one representative of each type of different legal systems (belonging to the European culture). Accordingly, the judicial practice, including the examination of arguments applied during interpretation of legal norms, of the higher courts of Argentina, France, Finland, Germany, Italy, Poland, Sweden, the United Kingdom, and the United States were examined. (MacCormick and Summers, 1991, pp. 1–2.) The broad sense of the concept of '*higher courts*' was applied including not only the supreme court but also all fora entitled to make decision in a certain case at the highest level and courts of appeal, the decisions of which are not

conduct—under the guidance and direction of Robert Summers—a remarkably detailed international research covering all substantial segments of adjudication which enables to determine, *inter alia*, the interpretation methods and reasoning techniques applied by the courts of countries belonging to the European culture in the course of resolving a legal interpretation problem. The results of this survey were published in 1991; according to this, a total of eleven arguments exist which—with larger or smaller regularity—are taken into consideration in the course of interpreting legal regulations by the supreme courts of the countries examined in the research, i.e. on the basis of which the real meaning of the statute(s) being unclear in the certain case can be explored.

These eleven methods were classified into four main categories based on the context in which we interpret the text of legal norms.[69] It can be a simple linguistic context in case of which a general or specific grammatical meaning of the text is established; the context of the social-legal structure when we determine the meaning of the legal regulation based on the legal environment or the operating legal practice which surrounds the given positive legal provisions; the context of the purpose of the legal regulation which (regarding the consequences of law application) presents the judge with an evaluative choice between the linguistically equally correct meanings in the course of determining the meaning of the ambiguous legal norm relevant to the given case; and the context of the intention of the legislator which forces the law-applier to take the explicit or implicit intention (namely the subjective will which led the legislator to create the given legal provision) into account. On the basis thereof, the researchers led by Summers classified the eleven arguments used or usable by courts in the course of legal interpretation in four main categories:[70]the first category (I) is formed by the '*linguistic arguments*', the second (II) by the '*systemic arguments*', the third (III) covers the '*teleological/evaluative arguments*' while the fourth one (IV) contains the '*argument from intention*' which belongs to none of the previous three categories, i.e. a '*transcategorical*' argument over the three other ones.

Two specific methods (1–2) belong to the linguistic arguments (interpretation methods)[71] forming category I: the argument from ordinary meaning (1) and the argument from technical meaning (2). When applying the first one, we try to establish the 'obvious meaning' that would be attributed—based on the everyday meaning of the ordinary words—to the norm in question by a person speaking the given language on an ordinary level. If the everyday meaning would allow interpretations leading to several results, the most generally accepted and the most obvious must be applied; if it is not

the final one; however, constitutional courts and, in general, the interpretation of the constitution were excluded from this research since these, according to the researchers, work with logic and arguments different from the ones used by the ordinary courts in the course of legal (norm) interpretation (MacCormick and Summers, 1991, pp. 13–14). (By 'statutes', they meant not only statutes but all normative actions which were created by a public body entitled to make abstract norms mandatory for citizens and applicable during judicial law application, i.e. any elements of the law (statutes, decrees, or other positive legal norms). (MacCormick and Summers, 1991, pp. 10–11 and 25.) Finally, it has to be mentioned that the concept of 'interpretation', as the subject of the result, was understood in *sensu stricto*, and meant the determination of the actual meaning of ambiguous legal norms (MacCormick and Summers, 1991, pp. 12–13).

69 | Cf.: MacCormick and Summers, 1991, p. 26.

70 | Cf.: MacCormick and Summers, 1991, pp. 21 and 512–515.

71 | I use the terms 'argument' and 'interpretation method' as synonyms below.

possible to decide, the given provision must be understood with the meaning which, as a result of the use of other methods, is probably considered to be the most appropriate in the wider context.[72] On the contrary, the latter argument uses a special technical meaning instead of ordinary one; in this case, we attribute a meaning to a given word or expression which meaning would be attributed also by a person experienced in the particular (legal or other) profession involved. Most often, this technical meaning is the legal professional meaning, but it can happen that a legal norm regulating a particular field uses the technical words of that field; hence, the interpretation must also be conducted in light of these (not legal) *termini technici*.[73]

According to Summers et al., six further methods of interpretation (3–8) were determined in the range of the 'systemic arguments' belonging to category II[74]: the argument from contextual-harmonization (3), the 'argument from precedent' (4), the argument from analogy (5), the logical-conceptual argument (6), the argument from general principles of law (7) and the 'argument from history' (8). In the case of arguments from contextual-harmonization, the meaning of a given legal provision is established on the basis of its position in the legal system. During this, we can consider other parts of the section where the legal provision to be interpreted was regulated, further relevant sections of the same legal regulation, and other pertinent legal norms which can interpret the legal norm in question.[75,76] As the quotation marks (not used below) also indicate, the 'argument from precedent' does not merely mean the consideration of precedents in the course of interpretation, which is typical for *common law* systems, but, in general, the statutory interpretation achieved by the reasoning of previous court decisions. Often, these do not use a concrete previous relevant judicial decision to explore the true meaning of the legal norm with obscure text but a *set* of such decisions; i.e. they do not refer (only) to the 'precedents' in the strictest sense but (also) to the entire case law regarding the legal provision in question. Regardless, the substance of the argument is the same in both cases: the courts interpret the given norm like the other courts did when they decided previous cases with similar facts, i.e. the adjudicating bodies making decisions in the similar cases use the previous judicial decisions as a sample for deciding the given legal interpretation problem.[77]

In the case of argument from analogy (which Summers et al. called '*arguments based on statutory analogies*'[78], but was meant to be a systematic-contextual based extensive argumentation as the *result* of interpretation)[79], we interpret a (an existing) legal norm in light of

72 | Cf.: MacCormick and Summers, 1991, pp. 464 and 512–513.
73 | Cf.: MacCormick and Summers, 1991, pp. 464 and 513.
74 | Arguments other than linguistic (also the systematic ones) can actually have three functions: they can confirm the everyday or technical (namely literal) meaning of the words used by the legal rule; or can underpin the accuracy of the application of another meaning against this grammatical meaning (i.e. can 'deteriorate' literal meaning) or clarify the real meaning of the words, expressions, and sentences having obscure linguistic-grammatical meaning. (Cf.: MacCormick and Summers, 1991, p. 465.)
75 | As we can see, it is actually identical to the systematic interpretation in the classification of Savigny.
76 | Cf.: MacCormick and Summers, 1991, pp. 464–465, 466–467 and 513.
77 | Cf.: MacCormick and Summers, 1991, pp. 467. 487–490 and 513.
78 | Cf.: MacCormick and Summers, 1991, p. 465.
79 | Accordingly, this argument actually covers all others because any other argument can be used to determine the 'significant' similarity in the real meaning of the two statutory provisions.

a relevant legal norm regulating another but similar subject matter[80] so that the meaning of the latter would also cover the case regulated by the former norm.[81][82] In the course of logical-conceptual argumentation, we apply the meaning of a given legal concept generally accepted and elaborated by jurisprudence in the given system in all cases when that legal concept appears in a legal regulation.[83] Hence, through the operation of interpretation, we strive towards conceptual coherence in the legal system and do not use formal logical arguments to establish the implied but not explicit meaning of the text (that we would do by using *interpretatio logica* defined by Savigny). In the case of argument from general principles of law, according to the Bielefelder Kreis, to establish the 'correct' meaning of a certain provision, we use substantive moral principles which serve as (partial) basis for previous court decisions and enable to make 'correct' interpretative decisions, or general principles determining the entire legal system (and usually recognised also on constitutional level), or widely used rules of a branch of law which have the nature of general clauses.[84] Finally, in the course of the 'customary law' interpretation (called 'historical' by Summers et al.), the meaning of the legal norm in question can be determined on the grounds that, regarding the circumstances of the process of legislation, what purpose and function the created legal regulation has;[85] and what meaning or what understanding (solidified and accepted by the lawyers) has been subsequently attached to this legal provision during the long years of its use (including the meaning attributed by courts, the conventional doctrinal understanding, and the fact that the meaning created that way was appropriate also for the legislator; otherwise, it would have changed the text of the norm in question).[86]

The third category contains the teleological and evaluative arguments, with a total of two arguments (9–10): the argument from (statutory) purpose (9) and the argument from substantive reasons (10). The former orders to apply the one from the potential meanings (determinable by other methods) of the legal norm to be interpreted which is oriented mostly to the goal, social purpose, and function of the given norm and (also regarding the expectable factual consequences) serves them the most.[87,88] The latter, in the course of legal interpretation, requires the direct use of values which have or had influence on the legal provision in question and, generally, on the formation and structure of the legal system.

80 | 'The argument from analogy: the governing idea here is that if a statutory provision is significantly analogous with similar provisions of other statutes, or a code, or other part of the code in which it appears, then [...] it may properly be interpreted so as to secure similarity of sense with the analogous provisions *either* considered in themselves *or* considered in the light of prior judicial interpretation of them.' (Cf.: MacCormick and Summers, 1991, pp. 513–514.)

81 | Cf.: MacCormick and Summers, 1991, pp. 467 and 513–514.

82 | In this sense, it is true that, to a certain extent, this kind of argument is accepted and used in every examined country (which would hardly be defensible in the light of the real meaning of analogy). (Cf.: MacCormick and Summers, 1991, 467.)

83 | Cf.: MacCormick and Summers, 1991, pp. 465, 467, and 514.

84 | Cf.: MacCormick and Summers, 1991, pp. 465, 467–469, and 514.

85 | However, the placement of this argument is confusing because, as we will see, it also belongs to the interpretation number 10 the argument from (statutory) purpose.

86 | Cf.: MacCormick and Summers, 1991, pp. 465, 469, and 514. [As we can see, it is a considerably diffuse, diverse argument which also combines the elements of teleological, historical (based on the determination of the legislator's intention), substantive, legal conceptual, and other arguments.]

87 | Cf.: MacCormick and Summers, 1991, pp. 469 and 514.

88 | This method is actually nothing else but the teleological interpretation formed during the doctrinal development after Savigny's classification of four categories.

They may include certain direct moral, political, economic, or social considerations, namely aspects which serve as the theoretical basis of a given legal norm or the entire legal system.[89] Finally, the fourth main category is the argument from intention (11), which itself is—as a transcategorial technique over the arguments of the other categories—the eleventh interpretation method. It seeks the will of the legislator, namely, what it wanted to achieve when creating the norm with such text. It is considered to be 'above' the arguments of other categories because it covers all of them. When applying this method, the judge has to ask what meaning the legislator wanted to attribute to the words, expressions included in the statute, the legal context it wanted to place the provision in question into, whether it wanted to rely on the prior results of court interpretation, whether it wished if the law created by it was interpreted and applied analogously, and so on.[90]

The Bielefelder Kreis says that beyond these eleven methods, there are a few more possible arguments which are, however, rarely used in practice; these are the interpretation according to the meaning attributed to the statute by the implementing body, the legal dogmatic interpretation, and the interpretation based on hypothetical cases.[91] In the case of the first one, the court attributes to the statute a meaning which, in the frames of an expressly interpretative provision, was also attributed by an administrative authority ordered to apply the given statute (either in an abstract way or regarding a particular case but necessarily as a matter of principle). In the course of the legal dogmatic interpretation, we use concrete jurisprudential works, commentaries, and essays of particular legal scholars to determine the actual (legal) meaning of the statute.[92] Finally, in the case of interpretation based on hypothetical cases, the judges consider what underlying effect the given decision would have in cases which, although have not occurred during law application, may occur in the future; in such cases, the task of the law-applier is to make a decision (i.e. to attribute a meaning to the norm in question), the subsidiary consequences of which will also be acceptable in these further possible cases.[93]

VI. Impact of the Bielefelder Kreis: Attempts at classification of methodology in the 21st century[94]

The methodological classification of the Bielefelder Kreis provided the development of argumentation theory with a significant impetus. It had such a huge impact that, from the 1990s, this classification has been the standard of methods of interpretation and

89 | Cf.: MacCormick and Summers, 1991, pp. 469–470 and 514–515.
90 | Cf.: MacCormick and Summers, 1991, pp. 21, 470–471, 515, 522–525.
91 | Cf.: MacCormick and Summers, 1991, pp. 473–474.
92 | This method shows many similarities to the interpretation based on the legal technical meaning of the words (delineated as method number 2 in the classification by Summers).
93 | The Bielefelder Kreis formulated here the legal logical maxim of *argumentum ad absurdum*.
94 | As the title of the present paper itself suggests, we cannot undertake a full or even comprehensive presentation here. We have chosen only authors who have an explicit methodological classification, i.e., who have not simply addressed methodological issues, but have sought to provide an explicit categorisation of methods of interpretation. Here, we have therefore ignored works dealing with general theoretical issues of legal interpretation or with normative approaches to certain methods, leaving their analysis to other papers dealing specifically with the latter issues.

argumentation which the legal academics want to either use without changing (mainly during their legal sociological research) or exceed methodologically or, perhaps, complete or specify. (Sometimes, its use in favour of legal sociological examination and the purpose for development of argumentation theory are present at the same time in the same research.) Eventually, all studies (even if their methodologies do not exactly match the one used by the Bielefelder Kreis) start from this classification and go back to that.[95] However, some new methodological classifications must be highlighted from the further development of history of argumentation theory, which proved to be determinative—either on their own (due to their doctrinal importance) or as the result of their use during the empirical legal sociological research carried out—and also inspired the methodology of the present research.

In his legal sociological study analysing 600 decisions of the Hungarian Supreme Court, Béla Pokol applied a methodological classification differentiating in a total of ten specific arguments[96]: '1. Interpreting the legal text in view of the meaning of the words in everyday language; 2. Interpreting the legal text in view of the special/technical meaning of the words, provided that a given word or phrase has such a meaning either in addition to its everyday meaning or has no other than such a meaning; 3. Contextual interpretation means the type of interpretation of the legal text where the words of each provision are construed in compliance with the meaning attributed to them when fitted in the entirety of the law or a complete body of related laws; 4. Interpreting the legal text on the basis of law logistics maxims; 5. Interpreting the legal text through analogy; 6. Interpreting the legal text on the grounds of precedents set at the time of previously enforcing the given law; 7. Interpretation on the grounds of legal dogmas and doctrines; 8. Interpreting the legal text in the light of implied ethical values of law or certain branches of law; 9. Interpreting the legal text in the light of the aims of the given statute; 10. Interpreting the legal text on the grounds of the will of the legislator.'[97]

Similar to Summers et al., Pokol followed (mostly) the division of the Bielefelder Kreis when he studied the practice of statutory interpretation. Later, András Jakab laid down his own methodology (mainly based also on that of Summers et al.) in the course of explicitly studying constitutional reasoning. Jakab presumed, as we have also done above, that argumentation and interpretation are different (he also used the concepts of 'argumentation' and 'reasoning' as synonyms) and considered 'interpretation' as a specific kind of argumentation.[98] He says, 'Most arguments in constitutional reasoning aim to interpret the constitution',[99] but there are types of argumentation which do not aim at interpretation but something else. According to him, these include the following three arguments:

95 | We do the same in the course of the present comparative law examination.
96 | In his later work in French language, he completed it to eleven arguments, adding the interpretation in light of fundamental constitutional rights and principles (cf.: Pokol, 2007, p. 397); and in his work in Hungarian, he broadened it to twelve arguments also recognising, in addition to interpretation in light of fundamental constitutional rights and principles (cf.: Pokol, 2005, pp. 227–228), the 'interpretation referring to legal principles' (an individual, specific type of interpretation on the grounds of legal dogmas and doctrines) as a new independent method (Pokol, 2005, p. 227).
97 | Pokol, 2001, p. 465.
98 | '[A]rgumentation [...] is used as synonymous [...] with reasoning. Interpretation [...] means determining the content of a normative text. [...] Consequently, what is traditionally called 'a method of interpretation', is in fact a type of argument used to interpret a text.' (Jakab, 2013, pp. 1219–1220.)
99 | Jakab, 2013, p. 1220.

the analogies (including, in the broader sense, also the teleological reduction),[100] establishing the (valid) text of the constitution, and arguments about why the text of the constitution should or should not be applied (briefly: arguments on the applicability of the constitution).[101] In addition to these 'rare exceptions', there are interpretation methods (the majority of arguments)[102] which can be divided into three argument types (and two more methods outside these ones). The first argument type is the 'ordinary or technical meaning of the words', which is identical to the classification of Summers since it covers the plain meaning of the words and the legal and non-legal professional meaning.[103] The second argument type is called 'systematic arguments' within which the 'harmonizing arguments'[104], 'referring the precedents which interpret the constitution'[105], interpretation 'in the light of doctrinal concepts or principles',[106] and 'linguistic-logical formulae based on silence'[107] can be distinguished. The third argument type is the 'evaluating argument'[108] to which 'relying on the objective purpose of the norm',[109] 'relying on the intention of the constitution-maker'[110] (also including '*argumentum ad absurdum*'),[111] and the 'substantive arguments' [interpreting the norms in the light of non-legal (e.g. moral) aspects] belong.[112] Further interpretation methods, which cannot be classified into any of the three groups above, are 'referring to scholarly works'[113] and 'arguments from comparative law'.[114] The above classification served as the basis of Project CONREASON launched in 2015.[115]

100 | Cf.: Jakab, 2013, p. 1221.
101 | Jakab, 2013, p. 1220.
102 | [T]he vast majority of arguments are interpretive in their nature. (Jakab, 2013, p. 1223.)
103 | Jakab, 2013, pp. 1231–1233.
104 | It practically corresponds the argument from contextual-harmonization from the categorization of Summers. (Jakab, 2013, pp. 1233–1235.)
105 | Jakab, 2013, pp. 1235–1239.
106 | Jakab, 2013, pp. 1239–1240.
107 | Here, Jakab classified not only *argumentum a contrario* but also *argumentum a maiori ad minus*, *argumentum a minori ad maius*, and other maxims (which can be classified to *a contrario*). (Cf.: Jakab: op. cit., p. 1240.)
108 | According to Jakab, these are the arguments which help 'beyond the legal context' to interpret the (constitutional) norm. (Jakab, 2013, p. 1241.)
109 | Jakab, 2013, pp. 1241–1243.
110 | Jakab, 2013, p. 1246. To distinguish it from objective teleological arguments, Jakab calls it 'subjective teleological arguments', which method researches the 'intention' of the entity creating the norm [also including the use of the legislative history ('*travaux préparatoires*') as source]. Hence it tries to explore its will definitely.
111 | Jakab, 2013, p. 1249.
112 | Jakab also says that these can be only exceptionally applied, e.g. 'where no other arguments can help, or other arguments lead to interpretations contradicting one another and one has to choose'. (Jakab, 2013, p. 1250.)
113 | Jakab, 2013, pp. 1251–1252.
114 | Jakab, 2013, pp. 1252–1254.
115 | It had the ambitious aim 'to develop the most comprehensive and most systematic analysis of constitutional reasoning that has ever been produced'. (Jakab, Dyevre and Itzcovich, 2015, p. 3.) For this purpose, in the course of the actual research, the research participants analysed, on the basis of the methodology described, 40–40 (a total of 760) leading cases of the constitutional or supreme courts of sixteen countries, of the European Court of Human Rights, and the Court of Justice of the European Union; and tried to define the contemporary characteristics of the 'constitutional reasoning' and the similarities and differences between the certain countries or types of

Finally, we must mention that, for conducting two different empirical legal sociological studies, the author of the present study has set up two methodological classifications: one for the statutory interpretation and one for the constitutional interpretation. Regarding the statutory interpretation methods and developing the views of Bielefelder Kreis, we have distinguished the following methods: (1.) grammatical interpretation: (1/A.) interpretation in accordance with ordinary meaning, and, within it, (1/A.a.) semantic or (1/A.b.) syntactic interpretation; (1/B.) legal professional (dogmatic) interpretation, and, within it, (1/B.a.) simple conceptual (dogmatic) interpretation, (1/B.b.) interpretation explicitly by principles of statutes or branches of law, (1/B.c.) contextual interpretation in its broad sense[116]; (1/C.) interpretation in accordance with the technical terms of other (non-legal) professions. (2.) Contextual interpretation in its narrow sense. (3.) Interpretation in accordance with the former judge-made law. (4.) Interpretation in accordance with other (non-judicial) public authorities in the administration of justice: (4/A.) interpretation as per public authorities' principled decisions; (4/B.) interpretation as per other domestic administrative organs' (e.g. ombudsmen) case decisions and declared opinions; (4/C.) interpretation in conformity with the judgements or sentencing practice of international judicial forums under the scope of their authority. (5) Logical interpretation: (5/A.) *argumentum a minori ad maius*; (5/B.) *argumentum a maiori ad minus*; (5/C.) *argumentum ad absurdum*; (5/D.) *argumentum a contrario*; (5/E.) *argumentum a simili*; (5/F.) other logic formulas. (6) Teleological (purposive) interpretation. (7) Historical interpretation (based on the intent of the lawmaker). (8) Interpretation by particular works of jurisprudence or legal literature. (9) Interpretation on the basis of constitutional rights, principles, values, and constitutional court decisions. (10) Interpretation as per international treaties.[117] (11) Comparative legal interpretation. (12) Interpretation via general principles. (13) Substantive interpretation. (14) Other, legal system-specific methods.[118]

legal systems. The examined fora included the following: the High Court of Australia, the Austrian Constitutional Court, the Supreme Federal Tribunal of Brazil, the Supreme Court of Canada, the Czech Constitutional Court, the French Constitutional Council, the German Federal Constitutional Court, the Hungarian Constitutional Court, the Irish Supreme Court, the Supreme Court of Israel, the Italian Constitutional Court, the Spanish Constitutional Tribunal, the Constitutional Court of South Africa, the Constitutional Court of Taiwan, the Supreme Court of the United Kingdom, and the Supreme Court of the United States. (Cf.: Jakab, Dyevre and Itzcovich, 2017b, p. 26.) We cannot undertake to delineate the results of this comparative legal research. For that, see: Jakab, Dyevre and Itzcovich, 2017b, pp. 761–797.

116 | The expression of 'contextual interpretation' has a narrower and broader meaning. In its broader sense, there are cases belonging to it when a court finds the meaning of a given provision (either in an act or in a decree) on the score of (i.e. in accordance with or in consideration of) other specific provisions of either the same statute or other statutes. Regarding its narrower meaning, I will speak about 'contextual interpretation' in cases when one tries to define the meaning of a legal norm by virtue of the designation that derives *purely* from the emplacement of the provision to be interpreted in the system of the legal norms (i.e. where one can find that provision, namely, in which statute, part, chapter, subchapter, title, article, etc.), without setting it against other statutory provisions.

117 | In respect to this method, only those international treaties etc. have relevance which had been incorporated into the domestic legal system, i.e., which are ratified and promulgated.

118 | As for the Hungarian law, such method is, for example, the interpretation via European Union legal rules. As for other legal systems, e.g., in the component states of a federation, such methods can be the interpretation by federal rules, federal judge-made law, the legislative history of similar subjected federal laws, etc.

The methods of constitutional reasoning, including those of constitutional interpretation, have several similarities with methods of ordinary legal reasoning, but, compared to them, they are—to a lesser but important extent—special in certain aspects.[119] Therefore, it is reasonable to talk about independent constitutional interpretation separated from ordinary statutory interpretation and about constitutional reasoning (including both the methods and other sources). According to our classification, these are as follows: **1. grammatical (textual) interpretation**: *1/A. interpretation based on ordinary meaning:* a) semantic interpretation, b) syntactic interpretation; *1/B. legal professional (dogmatic) interpretation:* a) simple conceptual dogmatic interpretation (regarding either constitutional or other branches of law), b) interpretation on the basis of legal principles of statutes or branches of law; *1/C. other professional interpretation (in accordance with a non-legal technical meaning).* **2. logical (linguistic-logical) arguments:** *2/A. argumentum a minore ad maius; 2/B. argumentum a maiore ad minus; 2/C. argumentum ad absurdum; 2/D. argumentum a contrario/arguments from silence*; *2/E. argumentum a simili, including analogy, 2/F. interpretation according to the other logical maxims.* **3. domestic systemic arguments (systemic or harmonizing arguments):** *3/A. contextual interpretation:* a) in a narrow sense, b) in a broad sense (including the so-called 'derogatory formulae': *lex superior derogat legi inferiori, lex specialis derogat legi generali, lex posterior derogat legi priori*); *3/B. interpretation of constitutional norms based on domestic statutory law (acts, decrees); 3/C. interpretation of the fundamental rights on the basis of jurisprudence of the constitutional court:* a) references to specific previous decisions of the constitutional court (as 'precedents'), b) reference to the 'practice' of the constitutional court, c) references to abstract norms formed by the constitutional court; *3/D. interpretation of the fundamental rights on the basis of jurisprudence of ordinary courts:* a) interpretation referring to the practice of ordinary courts, b) interpretation referring to individual court decisions, c) interpretation referring to abstract judicial norms; *3/E. interpretation of fundamental rights based on normative acts of other domestic state organs* **4. external systemic and comparative law arguments:** *4/A. interpretation of fundamental rights based on international treaties; 4/B. interpretation of fundamental rights based on individual case decisions or jurisprudence of international fora; 4/C. comparative law arguments:* a) references to concrete norms of a particular foreign legal system (its constitution, statutes, decrees), b) references to decisions of the constitutional court or the ordinary court of a particular foreign legal system, c) general references to the 'European practice', the 'principles followed by democratic countries', and similar non-specific justificatory principles; *4/D.* other external sources of interpretation (e.g. customary international law, *ius cogens*, etc.). **5. teleological/objective teleological interpretation (based on the objective and social purpose of the legislation). 6. historical/subjective teleological interpretation (based on the intention of the legislator):** *6/A. interpretation based on ministerial/proposer justification; 6/B. interpretation based on draft materials; 6/C. interpretation referring, in general, to the 'intention, will etc. of the constitution-maker'; 6/D. other interpretations based on the circumstances of making or modifying/amending the constitution or the constitutional provision (fundamental right) in question.* **7. interpretation based on jurisprudence (references to scholarly works)**.

119 | That is why, for example, the research of Bielefelder Kreis delimited statutory interpretation from constitutional interpretation which (mostly in the USA) 'has long been deemed a topic quite distinct from general statutory interpretation'. (MacCormick and Summers, 1991, p. 11.)

8. interpretation in the light of general legal principles(not expressed in statutes) 9. substantive interpretation, directly referring to generally accepted non-legal values.

VII. Conclusion

No categorisation of legal interpretation methods is better than any other; therefore, classification must be adjusted to the purpose of the research. Thus, the specification of the methodology cannot be arbitrary: the delimitation of certain methods and the determination of their scope must always take place for conducting a certain research (in a meaningful manner). However, researches regarding theoretical history prove that this is not given in advance but developed over time, and became recognised only from the end of the twentieth century; however, today it is the substance of methodological thinking. This is how the philosophy of law and the legal sociology, the theory and the practice gradually become inseparable, and how theoretical thinking becomes useful for the legal practice.

The present study could not delineate all methodological classifications significant in the theoretical history. Its aim was to provide an overview of the main development stages of decisive methodological thinking in the theoretical history. The overall conclusion of the study is that the chiselling of the methodology and the fact that methodological thinking is becoming more and more practice-oriented indicates a clearly visible development trend which, nowadays, is important not only for the theory but also for the practice, and the importance of the *method* and its (direct) availability in legal sociological research will surely increase in the near future compared to the current situation.

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