LAW, IDENTITY AND VALUES

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1 2023

BUDAPEST | MISKOLC | 2023

CEA PUBLISHING

PUBLISHED BY
CENTRAL EUROPEAN ACADEMIC PUBLISHING
1122 Budapest, Városmajor St. 12.
Tímea BARZÓ, Director-General

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HU ISSN 2786-2542 (print)
HU ISSN 2786-3840 (online)

The Journal was established in 2021 in cooperation with the Budapest-based Ferenc Mádl Institute of Comparative Law. Volume 1 and Issue 1 of Volume 2 were co-published by the Ferenc Mádl Institute of Comparative Law and the Central European Academic Publishing.

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SYMBOLS AND NATION-STATE: LEGAL REGULATION OF SYMBOLS OF POWER OF CROATIA FROM MID OF THE 19TH CENTURY TO 1990

Dalibor Čepulo[1]

ABSTRACT

This study identifies and analyzes the medieval roots of the modern Croatian symbols of power, their modeling and regulation in the 19th century and re-shaping in the dynamic context of the 20th century up to the 1990 Constitution of the Republic of Croatia, and the respective regulation currently in force. This study shows how medieval symbols of the land were transferred by selection and reinterpretation into symbols of the nation and nation-state.

KEYWORDS

symbols of power of Croatia
Croatian state symbols
Croatian coat of arms
Croatian flag
Croatian anthem
nation building
state building

1. Introduction

One of the specificities of the interrelated processes of nation-building and state-building in Europe is their entanglement with symbols and myths that embody the identity and community of a particular nation and state.[2] Nations become visible through symbols and thereby manifest the right to a certain territory and their own political identity and independence.[3] It was Anthony D. Smith in particular who indicated how modern nationalism, confronted with challenges of modernity, revealed the heritage of the past through the reinterpretation of symbols, myths, memories, and values from

1 | Full Professor, Faculty of Law, University of Zagreb, Croatia; dalibor.cepulo@pravo.hr; ORCID: 0000-0002-3937-7521.
2 | Sinclair, 2007, p. 2.
3 | Elgenius, 2011, pp. 2, 3.

https://doi.org/10.55073/2023.1.9-28

ethno-history.[4] Other studies following the same trail have also underlined the importance of symbols as a kind of markers of nation-building.[5]

Based on this, we will reconstruct and analyze the regulation of the symbols of power of Croatia—coat of arms, flag, and anthem—from the beginning of the Croatian nation- and state-building in the first half of the 19th century up to the contemporary regulation of the state symbols of the Republic of Croatia passed by the Croatian Parliament in December 1990. Our focal approach will therefore be a legal-historical one that avoids the detailed description of symbols and iconographic characteristic of heraldic research. The main research issues are the origin and meaning of the symbols of power of Croatia in the formative period of Croatian nation- and-state-building, changes in the principal symbols of power through time and their reasons, the content and forms of the regulations of these symbols, and the meaning of contemporary Croatian symbols of power and their relations with the past.

This study is focused on the modern Croatian symbols of power. The full understanding of these symbols demands a brief reconstruction of their medieval origins, followed by a presentation of the emergence and regulation of national and official symbols of power in the 19th and 20th century, up to the establishment of the Croatian state symbols in 1990.

2. Territorial framework and symbolic antecedents

The territory of the early medieval Croatian Kingdom from the River Drava to the Adriatic Sea included the core of the state (Croatia), the associated peripheral Pannonian region (Slavonia), and the coastal cities acquired from Byzantium (Dalmatia). The official title of this kingdom from the middle of the 11th century was *Regnum Croatiae et Dalmatiae*.[6] The Arpad kings, who assumed the royal power over that area at the beginning of the 12th century, kept the names Dalmatia and Croatia in their official title even though they used the unofficial name *Sclavonia* for the whole area and avoided the term *regnum*.[7] In any case, each of these three areas had its own organization of local government, and as a result of various determinations the terms *Regnum Croatiae* and *Regnum Dalmatiae* emerged from the mid-14th century.[8] Finally, *Regnum Slavoniae* was included in the title of the King as the entire area between the Drava and Sava Rivers in the first half of the 16th century.[9]

The coat of arms of Dalmatia was the first to be recorded in these lands, at the end of the 14th century. It consisted of three crowned golden lion's (leopard's) heads with red tongues on a blue shield, and it was used as a symbol of the whole Croatian-Dalmatian Kingdom, that is, *Sclavonia*.[10] However, at the end of the 15th and the beginning of the

4 | Smith, 1998, pp. 223–224.
5 | Elgenius, 2011, p. 1.
6 | Božić and Ćosić, 2021, p. 60.
7 | To suppress earlier traditions, the Arpads put Dalmatia in the first place, which was passed on by the Angevins. Božić and Ćosić, 2021, pp. 49–51, 60; Peić Čaldarović and Stančić, 2011, p. 28.
8 | Beuc, 1985, pp. 93–94.
9 | Ibid., p. 159.
10 | Božić and Ćosić, 2021, pp. 33, 103; Peić Čaldarović and Stančić, 2011, p. 20.

16th century, new coats of arms appeared that reflected the changes of meaning of the existing coats of arms.[11] Thus, between 1490 and 1495, the 'checkered' coat of arms of Croatia with 4×4 white-red fields and an initial white field appeared in Tyrol and Innsbruck, probably as a symbol of the area claimed by Maximilian Habsburg by hereditary right.[12] After the introduction of that coat of arms, the Habsburgs used the coat of arms with three lion heads exclusively as the regional symbol of Dalmatia.[13] Soon, Wladislaw II Jagiello, in response to Maximilian's heraldic challenge, confirmed in 1496 the coat of arms of *Regnum Sclavoniae* as the area between the Drava and the Sava. It consisted of two horizontal silver bars (later blue), between which was a red field (later white) with a marten and a six-pointed star in the upper right quadrant.[14] Thus, toward the end of the 15th century, the former single area of the King's rule between the Drava and the sea was broken into the three *regna* of Croatia, Dalmatia, and Slavonia, represented by three different coats of arms.[15]

However, the pendulum of history swung back to the other side. The Ottoman conquests in the first decades of the 16th century significantly narrowed and condensed the territory of the Habsburg's Croatia and Slavonia, instigating the unification of their two aristocratic diets into a single Diet, and the already existing jurisdiction of the Slavonic ban over the both areas was made a permanent institution. Together with the unification of the institutions, the unified name for the area kingdoms (less often: Kingdom) of Dalmatia, Croatia and Slavonia began to be used as the official title of the King and ban.[16] Accordingly, the coats of arms of the three *regna* began to be presented next to each other, and at the beginning of the 17th century, the unified coat of arms of Dalmatia, Croatia, and Slavonia appeared.[17] Moreover, the three lands were perceived as a single political area despite the administrative separation of Dalmatia.[18]

The unification of symbols in that proto-national period was to be transformed in the 19th century into the symbolic basis of the Croatian national integration movement.

11 | Božić and Ćosić, 2021, p. 63.

12 | The coat of arms of Croatia on the wall of the mansion in Innsbruck was presented on a separate shield, and then together with the coats of arms of Styria, Carinthia, Carniola, and the Counts of Cilli, whose territories Maximilian Habsburg expected to gain on the ground of inheritance. The checkered shield symbolized the fortified wall and probably referred to Croatia's position as *antemurale Christianitatis*. Božić and Ćosić, 2021, pp. 67–69, 94 et seq.; Jareb, 2010, pp. 14–15.

13 | On the older Croatian symbol (a hand with a sword) that became the coat of arms of Bosnia, see in Božić and Ćosić, 2021, pp. 53 et seq., 66–67. See also Peić Čaldarović and Stančić, 2011, p. 35.

14 | Božić and Ćosić, 2021, pp. 86–88.

15 | Peić Čaldarović and Stančić, 2011, pp. 48–49 et seq.

16 | To justify the inclusion of Dalmatia in the King's title, the coastal area from municipality of Bakar to the Zrmanja River, as well as part of its hinterland, was sometimes called Dalmatia. Beuc, 1985, p. 159; Jareb, 2010, pp. 28–29.

17 | The coats of arms were provided with a schematized crown or the crown of St. Stephen. Jareb, 2010, pp. 29–30.

18 | Peić Čaldarović and Stančić, 2011, pp. 89–90.

3. Formation of the Croatian symbols of power in the nineteenth century

The Croatian national integration movement, which influenced the formation of the Croatian symbols of power, arose as part of the Illyrian movement. The Illyrian Party formed this movement with a program of the national unification of the Illyrians, that is, South Slavic peoples, as well as the political unification of the Croatian lands within Illyrian unification.[19] However, Serbs and Slovenes did not accept Illyrian ideas; thus, the movement was reduced to its Croatian core and soon turned into a Croatian national integration movement. As part of its efforts, the Illyrian party created the Illyrian coat of arms as the umbrella symbol of the Illyrian people, which depicted the alleged symbols of the Illyrian deities in the form of a white crescent and a yellow star on a red shield.[20] This coat of arms was often displayed on profane objects of a wide use—e.g., coffee cups, playing cards, and bags—together with the related coats of arms of Croatia, Slavonia, and Dalmatia, or just with the checkered Croatian coat of arms as a pan-Croatian symbol.[21] In this way, the previously aristocratic symbols acquired democratic legitimacy and became part of the modern national integration symbolism.[22]

Although some bans of the Kingdoms of Dalmatia, Croatia, and Slavonia—which were the highest dignitaries of the country and a symbol of its (virtual) integrity and autonomy—displayed their combined coats of arms on the red flags, official symbols of the country did not exist. [23] However, these flags were a symbol of the ban's honor, that is, a symbol of the function, and not of the country. A significant step forward would come with the appearance of the national tricolor flag and its merger with the 'triune' coat of arms and their use in official protocols.

The Croatian national tricolor with horizontal red-white-blue fields was derived from the characteristic colors of the Croatian, Slavonian, and Dalmatian coats of arms.[24] It appeared in 1848 as a symbol of the nation and freedom, modeled after the already existing tricolors in Europe.[25] It was a new and modern symbol that represented the nation; at the same time, it connected it to the entire national heritage and virtual historical borders. This was in accordance with the two-dimensional national-integration concept of the time based on the historical right, which embodied lands that once formed the medieval Croatian Kingdom, and on the national right, which embodied the single ethnic community in three regions.[26]

In the middle of the tricolor, the connected coats of arms of Croatia, Slavonia, and Dalmatia crowned by the Illyrian coat of arms was inserted. It was first used by lieutenant field marshal Josip Jelačić during his ceremonial installation as ban in 1848.[27] We consider

19 | Banac, 1991, p. 24.
20 | Ibid.; Jareb, 2010, pp. 53–54.
21 | Jareb, 2010, p. 53; Peić Čaldarović and Stančić, 2011, p. 142.
22 | Banac, 1991, pp. 24–25.
23 | Borošak–Marijanović, 1996, p. 50.
24 | Ibid., pp. 50–51.
25 | Ibid.; Elgenius, 2011, pp. 4–5.
26 | Čepulo, 2019, p. 5.
27 | Jareb, 2010, pp. 57–58.

that occasion the birthplace of the modern Croatian symbols of power. The use of the tricolor coat of arms and flag on official occasions continued after Jelačić, making them *via facti* the official symbols of the Kingdoms of Croatia, Slavonia, and Dalmatia—the name that was frequently used in official communication and interchangeably used with the original name Kingdoms of Dalmatia, Croatia, and Slavonia. Due to the perception of that area as a single national space, the official name of the land was soon substituted in public communication and part of the official communication with the term 'the Triune Kingdom', which emphasized the political singularity of that space. Apart from that, the name Croatia was used as a synonym for the autonomous Croatia-Slavonia and as a synonym for the Triune Kingdom.[28] Nevertheless, despite their broad public reception, neither of these names was accepted as an official term.

An attempt to officially regulate the symbols of power already appeared in 1848 but was not realized due to the political turbulence of the time. In the spring or summer of 1848, a Draft Constitution was submitted to the legislative committee of the Croatian State Diet, whose Article 135 provided for the red-white-blue-black as the state colors and for the coat of arms consisting of the Illyrian coat of arms and the coats of arms of Dalmatia, Croatia, and Slavonia.[29] This proposal was not accepted, and new proposals were not submitted after the dissolution of the Diet in early July 1848. The four-color flag probably had no chance to be accepted next to the widely accepted tricolor,[30] yet such a proposal reminds us that 1848 was still a formative period of modern symbols.[31]

Further initiatives were prevented by the 1849 centralist March Constitution and open absolutism introduced in 1853. The imperial decree of September 10 1852, prohibited the use of the national tricolor due to its lack of official or historical legitimacy and provided for the mandatory use of the imperial red-yellow flag and the separate flags of Croatia (red-white) and Slavonia (blue-white).[32] The turbulent period of the provisional constitution from 1860 to 1867 was also not favorable for the official regulation of symbols of the country, whose status in the Monarchy was not entirely clear. Still, the absence of any regulatory attempt on the Croatian side in this period is surprising considering the strong emphasis on state-building of the Croatian Diet of 1861[33]—it would seem that state-building in this period was more substantively oriented, with the regulation of *de facto* already accepted symbols[34] left aside. Importantly, all 'triune' coats of arms used

28 | Peić Čaldarović and Stančić, 2011, p. 23.
29 | Kolanović, 2001, pp. 548–564.
30 | Jareb, 2010, p. 58.
31 | Actors from that era show uncertainty about colors, so the Ban Jelačić described the tricolor as white-red-blue even though he used a red-white-blue flag at the installation, and the imperial decree from 1852 forbade the use of a blue-red-white flag. However, considering the widespread use of the red-white-blue flag it is generally accepted that it had become a national symbol already by 1848. Borošak–Marijanović, 1996, p. 52, footnote 83.
32 | Gross, 1985, p. 81.
33 | Čepulo, 2006, pp. 61–63.
34 | A slightly modified version of the Jelačić flag from 1848 was used at the Ban Josip Šokčević's installation in 1860, the Rijeka County included the tricolor and checkered coat of arms in its coat of arms, and the triune coat of arms was printed on the official editions of the Kingdoms of Dalmatia, Croatia, and Slavonia. Eugen Kvaternik, the opposition deputy in the Diet of 1861, proposed that the Croatian Home Guard should fight under the coat of arms of the Triune Kingdom and the national tricolor. Borošak–Marijanović, 1996, p. 49; Jareb, 2010, p. 64; Kolak Bošnjak et al., 2018, p. 221.

from 1860 to 1867 were crowned with a schematized or Austrian crown but never with the crown of St. Stephen.[35]

The first regulation of the coat of arms and flag of the Kingdoms of Dalmatia, Croatia, and Slavonia was provided in lapidary form only by the sub-dual Croatian-Hungarian Settlement in 1868. It provided that 'in autonomous affairs within the borders of the Kingdom of Dalmatia, Croatia, and Slavonia, coats of arms of the kingdoms with the crown of St. Stephen, shall be used'.[36] The settlement also provided for the viewing of the 'united flag of the Kingdoms of Dalmatia, Croatia, and Slavonia' at the building of the Hungarian Diet at the time when it discussed their common affairs.[37] Yet, the settlement did not describe the images of these symbols—most likely because they were perceived as already determined, as suggested by the formulation of united colors and coat of arms. One might expect that the autonomous Croatian legislation would soon regulate detailed images of these symbols—but this did not happen. We assume that due to the factual acceptance of these symbols, their more detailed legal arrangement was not perceived as an urgent issue at the time when the modernization of government was of primary importance.[38]

A shift occurred in 1876 during the administration of ban Ivan Mažuranić (1873–1880), who aimed at raising the capacities of Croatian-Slavonian autonomy and at turning Croatia-Slavonia into a kind of liberal state-like structure based on the French model of state and nation.[39] Only his government, 26 years after abolishing absolutism, noticed that traffic signs in some parts of Croatia-Slavonia were still painted in colors prescribed during the absolutism, and immediately ordered their removal and replacement with official colors.[40] Yet the official colors to which the respective bylaw referred were not provided by any regulation.

That obvious legal lacuna was finally filled by the new decree of the same Home Government of November 16, 1876.[41] It repeated the content of the previous decree[42] and prescribed the mandatory order of official colors (red-white-blue) on traffic signs. It also prescribed the mandatory use of the official coat of arms and prohibited any other order of colors and use of the Croatian and Slavonic flags from the period of absolutism as well as the individual use of Croatian or Slavonian coat of arms. An integral part of that regulation was the description of the official country's coat of arms, supplemented with the artistic representations of the coat of arms, flag, and traffic signs. The coat of arms consisted of a shield with the coat of arms of Croatia in the upper left field, Dalmatia in the upper right field, and Slavonia below them, with the crown of St. Stephen above the shield. The artistic presentation indicated that the coat of arms of Croatia had 5×5 fields with an initial red field. The regulation did not describe the flag, but the artistic presentation

35 | Jareb, 2010, p. 66.
36 | Art. 61.
37 | For the Croatian-Hungarian Compromise see in Bojničić (ed.), 1911, pp. 3–87; Art. 63.
38 | The installation of the Ban Levin Rauch in 1869 was undertaken under the traditional ban flag with the coat of arms of Dalmatia, Croatia, and Slavonia provided with the crown of Saint Stephen above it. This individual act rather indicated inertia in the use of the (unregulated) traditional symbols than their regulation. See Szabo, 1934, p. 163.
39 | Čepulo, 2019, pp. 61 et seq.
40 | Kosnica, 2019, p. 196.
41 | Naredba broj 18.307 o izgledu grba i zastave.
42 | It seems that the previous decree was rather ineffective in practice. Kosnica, 2019, p. 197.

showed a tricolor without a coat of arms, with Illyrian symbols on top of the banner. The absence of the coat of arms from the flag is surprising, but it was perhaps a way to avoid displaying the crown of St. Stephen on the Croatian flag while the banner incorporated a folk (Illyrian) symbol. In contrast, such a solution indicates that the country's coat of arms was not yet fully stabilized as a standard part of the flag.

The November 16 1876 decree also served as the legal basis for banning the display of flags and coats of arms of other countries. It was the ground on which the Croatian authorities requested that the local authorities of the Greek-Eastern Church, that is, the Serbian Orthodox Church, remove the red-blue-white flag—that was both the flag of the Serbian Orthodox Church and the Principality of Serbia—and remove the coat of arms of the Principality of Serbia painted on the church roof.[43] Apart from that, Mažuranić's government passed a decree in 1878 ordering the mandatory use of a red-white-blue thread for office materials and forbidding the use of white-blue and blue-yellow thread.[44]

The decrees of the Mažuranić government were aimed toward the integration of the country as a single community of all its members, based on the Croatian cultural identity—language, state traditions, and symbols—and against particularization based on the historical ground. Any future Home Government would not repeat such concentration on symbols. Yet it seems that the aforementioned regulation did not succeed in its main goal, which was the standardization of the symbols. Croatia's checkered coat of arms, with an initial white field, was painted in 1878 on the roof of St. Mark's church, which stands directly between the Ban's Palace and the Palace of the Diet. Bogoslav Šulek claimed in his 1883 book The Croatian Constitution that the Croatian coat of arms consisted of 40 fields.[45]

Still, the description of the coat of arms in the November 16 1876 decree probably served as the model for the 1887 bill on the use by authorized private law subjects of the coat of arms of the Kingdoms of Dalmatia, Croatia, and Slavonia.[46] This bill was probably intended to be a Croatian *lex specialis*, given that in 1883 the Hungarian Diet passed a law regulating the use of the coat of arms of the lands of the crown of St. Stephen and the land's coat of arms (i.e., Dalmatian-Croatian-Slavonian)—neither of which was described in that law. The Hungarian Diet empowered the Minister-President of the Hungarian State Government to grant such permissions in exchange for a prior ban opinion.[47] The Croatian bill, however, bound the use of the coat of arms of the Kingdoms of Dalmatia, Croatia, and Slavonia to the permission of the Home Government and the ban, which was inconsistent with the 1883 law. The Croatian law was accepted in the Croatian Diet and sent for the King's approval, but it was not published in the official gazette, which indicates that it was not approved—possibly owing to the conflict of competences.[48]

43 | Kosnica, 2019, pp. 197–199.
44 | Ibid., p. 198.
45 | Šulek, 1883, p. 82.
46 | Art. 1 of that bill referred to paragraph 61 of the Croatian-Hungarian Settlement and then described the coat of arms of the Kingdoms in the same way as the decree of 1876. The use of the coat of arms was subject to the permission of the Croatian Home Government. The use of the coat of arms contrary to this regulation was defined a misdemeanor punishable by a prison term of up to two months or a fine of up to 300 florins (Art. 10). Zakon o porabi grba kraljevina Dalmacije, Hrvatske i Slavonije.
47 | Zakonski članak XV:1883. zajedničkoga hrvatsko-ugarskoga sabora.
48 | Art. 9 of the Croatian-Hungarian Settlement proclaimed the regulation of trademarks and intellectual property to be part of the common jurisdiction and therefore part of the exclusive competence of the Hungarian Diet.

Although the Croatian Home Government occasionally consulted heraldic experts on the regulation of symbols, nothing was done, and different versions of the flag and coat of arms continued to be used in practice.[49] That prompted the ban Ivan Skerlecz to pass a new decree on the flag and coat of arms in 1914. This decree referred to the Croatian-Hungarian Settlement and to the November 16 1876 decree. It provided for the mandatory use of a red-white-blue flag with the coat of arms of the Kingdoms of Dalmatia, Croatia, and Slavonia in the middle and the crown of St. Stephen above it—even though it was not in accordance with the image of the flag without the coat of arms in the November 16 1876 decree. The 1914 decree stipulated that anyone could use this flag, provided that they did so in a proper manner; it did not provide sanctions.[50] The tricolor and the triune coat of arms were widely used in public as national symbols, but the latter was gradually being substituted by the checkered Croatian coat of arms as an all-Croatian national symbol.[51]

Along with the design of the coat of arms and the flag, the song 'Our Beautiful Homeland' was emerging as the Croatian national anthem. The song was probably composed in 1846 based upon the lyrics of Antun Mihanović's 1835 patriotic pastoral 'Croatian Homeland',[52] which was particularly popularized in the last decade of the nineteenth century. Already in the 19th century, the text of the song was treated as a kind of public property and linguistically and stylistically corrected, but it was also subject to politically motivated changes that more clearly delimitated the borders of the homeland and promoted the Croatian nation.[53] The Union of Croatian Singing Societies proposed in 1907 that the Croatian Diet proclaim the song as an official anthem, but the proposal was not considered under the political turbulence of the time.[54]

4. Croatian symbols in the Yugoslav kingdom

The First World War opened the possibility of South Slavic unification. However, the founding of the State of Slovenes, Croats, and Serbs in the South Slavic areas of Austria-Hungary, with its center in Zagreb, had only a provisional significance because, based on the circumstances of the time, that unit had no option other than an urgent unification

49 | The differences regarded the position of the Dalmatian and Croatian coats of arms, the initial red or white field, the flag with or without the coat of arms, and the use of the Dalmatian-Croatian-Slavonian coat of arms or the checkered Croatian coat of arms. Jareb, 2010, pp. 88–90, 99.
50 | Jareb, 2020, pp. 99–100.
51 | Božić and Ćosić, 2021, p. 104; Jareb, 2010, pp. 120, 125.
52 | The song 'Our Beautiful Homeland' was noted down and published in Zagreb in 1862, but oral tradition suggests that it was composed in 1846 by Josif Runjanin, an Austrian Army cadet of Serbian-Orthodox origin. Tomašek, 1990, pp. 30–35, 47–48.
53 | The song 'Croatian Homeland' originally described an idyllic land where two dominant rivers, the Sava and the Danube, convey to the world the Croats' love for their homeland. Yet, in 1862 the Drava River, the border with Hungary, was added, thus more clearly delimiting territory of the homeland, while the word home was replaced with people into the 'Croat loves his people'. Tomašek, 1990, pp. 66–70.
54 | Tomašek, 1990, pp. 87–89.

with the kingdoms of Serbia and Montenegro.[55] Therefore, it is understandable that through its one-month duration, that state did not even try to define its symbols.[56]

The projected unification of the South Slavic parts of the former Austria-Hungary with the kingdoms of Serbia and Montenegro was based on the idea of a single three-named Serbian-Croatian-Slovene nation with a common language.[57] That concept was expressed in the Corfu Declaration of 1917, which laid the foundations for the organization of the future Kingdom of Serbs, Croats, and Slovenes with the Serbian Karađorđević dynasty on the throne. The declaration provided for the single coat of arms, single flag, and single crown of the future state composed of the existing symbols, but it also granted the equality of individual Serbian, Croatian, and Slovenian flags and coats of arms and their free use on all occasions.[58]

Serbia, which annexed Montenegro immediately before unification—proclaimed on December 1, 1918— used its dominant position to dictate unification into a strictly centralized state. The Serbian traditions and government model would be extended to the new state, and in reality, it would function as an expanded Serbia with the hegemonic position of Serbs as a nation of liberators and unifiers.[59]

The new state's provisional coat of arms and flag were already provided in December 1918[60] and were regulated in the Constitution from 1921. The basis of the coat of arms of the Kingdom of Serbs, Croats, and Slovenes was derived from the coat of arms of the former Kingdom of Serbia with a double-headed eagle in flight and a crown of Karađorđević above it. The shield placed in the middle of the chest of a double-headed eagle consisted of three ethnic symbols: 1) the Serbian coat of arms—a white cross on a red field with four fire strikers—in the left third of the shield; 2) the Croatian checkered coat of arms with 25 red fields, starting with a red field in the right third of the shield;[61] and 3) the three golden six-pointed stars and a white crescent on a blue shield as the Slovenian coat of arms below them. The state flag was defined as a blue-white-red horizontal tricolor, which contained the colors of the three national flags but was not identical to any of them.[62]

By 1918, the Croatian 'checkered' coat of arms had become a widely accepted Croatian national symbol. It was adopted by the new regime as symbol of Croats and not as a symbol of some territory. Thus, the symbolic-conceptual shift from the previous dominant historical-territorial denomination toward ethnic denomination occurred in the Kingdom of Serbs, Croats, and Slovenes. From that time onward, the 'checkered'

55 | Goldstein, 2011, p. 111.
56 | The Dalmatian-Croatian-Slavonian flag and coat of arms continued to be used in Croatia-Slavonia, now without the crown of St. Stephen. Jareb, 2010, p. 174.
57 | Such concept was in the spirit of the then fashionable principle of self-determination of people, regardless of the fact that the branches of the three-named people did not share a common memory of the past, nor the myths and symbols characteristic of a nation. Comp. Ramet, 2009, p. 75.
58 | Corfu Declaration see in Šišić, 1920, pp. 96–99.
59 | Banac, 1984, p. 142; Ramet, 2009, pp. 77–78.
60 | Jareb, 2010, p. 166.
61 | The first image of the Croatian coat of arms proposed by the government structured the fields in the form of a double white cross that resembled the white cross of the Serbian coat of arms or even the double cross of the Serbian Orthodox Church Patriarchate. This solution caused outrage among the Croatian public, after which a traditional solution was proposed. Jareb, 2020, pp. 167–168; Peić Čaldarović and Stančić, 2011, p. 176.
62 | Comp. Art. 2 of the Ustav Kraljevine Srba, Hrvata i Slovenaca.

coat of arms remained the exclusive Croatian symbol of power in all subsequent state structures.

The anthem of the new state was not determined, but a ceremonial song was performed on official occasions, consisting of parts of the ceremonial songs of each of the three nations, including the first half of 'Our Beautiful Homeland'.[63]

In the territory of former Croatia and Slavonia, the official use of the flag and coat of arms of the former Triune Kingdom continued until 1924 without the crown of St. Stephen.[64] From then, until 1929, Croatian symbols were used in politics only by the Croatian political parties and individuals. The checkered Croatian coat of arms with 25 fields was used most often; tricolor flags were mainly used without any coat of arms, but flags with the checkered coat of arms were also present.[65] Although the regime was suspicious about the Croatian symbols, there were no serious obstacles to their use until 1929.[66]

However, after the *coup d'état* of January 6, 1929, and the introduction of the absolute power of the King, the previous concept of a single but three-named and, therefore, multicultural nation was replaced by the ideology of radical Yugoslav integralism and the intention to build a newly unified nation while fully erasing individual ethnic identities and their symbols.[67] The country was renamed the Kingdom of Yugoslavia and the law allowed the display of only the state flag. Yet the three-part coat of arms was not changed,[68] and no regulation expressly prohibited or sanctioned the display of tribal flags. Nevertheless, the 1931 Constitution, which retained the symbols of the state unchanged, omitted the national adjectives of individual coats of arms and banned all associations and political parties formed on a religious, tribal, or regional basis.[69] Despite this, decorations of the former Kingdom of Serbia with exclusively Serbian symbols were retained as decorations of the new regime as well.[70]

After the assassination of King Alexander in Marseille in 1934, organized by the radical Croatian movement *Ustaše* and radical Macedonian nationalist organization VMRO, the Croatian flag and coat of arms were used more freely in public.[71] Complex conditions in Europe and inside the country triggered a change in the attitude of the regime toward the 'Croatian Question', and in 1939 the new autonomous unit of the Banate of Croatia was established on a quarter of the state territory with an ethnic Croatian majority.[72] The founding acts of the Banate of Croatia did not provide for its symbols, which were regulated only by a circular of the Cabinet of the Banate of Croatia in September 1940. The circular described the large and small coats of arms of the Banate of Croatia, which had already appeared in practice a few months earlier. The small and large seal contained the checkered Croatian coat of arms with 25 fields, with the initial red field. The large coat of arms consisted of the mantle with double eagles, Karađorđević's crown atop, and shield with the checkered coat of arms in the middle. The small coat of arms consisted of a shield

63 | Tomašek, 1990, p. 87.
64 | Jareb, 2010, p. 175.
65 | Ibid., pp. 194–195.
66 | Ibid., pp. 179 et seq.
67 | Ramet, 2009, pp. 123–124 et seq.
68 | Comp. Zakon o nazivu i podeli Kraljevine.
69 | Comp. Art. 2 and Art. 13 of the Ustav Kraljevine Jugoslavije.
70 | Jareb, 2010, p. 204.
71 | Ibid., pp. 222 et seq.
72 | On the Banate of Croatia see Šlabek, 1997, pp. 19 et seq.

with checkered fields and Karađorđević's crown above it.[73] The flag and anthem were not regulated. However, in practice, the national tricolor flag was used, as a rule, without a coat of arms;[74] the 'Our Beautiful Homeland' was performed as a ceremonial song.[75]

Authorities of the Banate of Croatia did not pay serious attention to symbols. Such an attitude is understandable considering the circumstances in which that unit built its institutional order. However, it is still surprising considering the identity and state-building potentials related to the Banate of Croatia and the respective importance of symbols.

5. Independent State of Croatia

The Kingdom of Yugoslavia and Banate of Croatia collapsed in the short war of April 1941. The *Ustaše* movement, whose main forces returned to their homeland from exile in Italy and Germany, established the Independent State of Croatia (ISC) on April 10, 1941, a totalitarian puppet-state of a Nazi-fascist character with the concentration of all powers in the hands of the Leader.[76] This state annexed the remainder of Bosnia and Herzegovina but ceded the greater part of Dalmatia to Italy.

Soon after the proclamation of the ISC, it provided for regulation of its symbols. The Legal Order on the State Coat of Arms, State Flag, Leader's Flag, State Seal, and Seals of the State's and Autonomous Offices was already passed on April 28.[77] According to this regulation, the state coat of arms consisted of a shield with 25 square fields, with an initial white field, above which was a red triple-braided tendril that framed an empty white field with a large eared letter U, a characteristic symbol of the *Ustaša* movement. The flag was described as a tricolor, with a checkered coat of arms implemented in the middle; on the left side of the red field stood a red triple-braided tendril with an eared U, the same as in the coat of arms. The tricolor flag, without any markings, remained in use as a transitional solution. The description of the mentioned symbols was detailed and accompanied by illustrations. The flag of the Navy and the Leader's flag were designed upon the elements of the fundamental state symbols; later, the flags of the Air Force and of the Army were also provided.[78] Elements from the coat of arms were also present in the large and small state seals provided by the same regulation. The special order on the viewing of flags provided that all state offices and public institutions should display the flag; it also provided the way in which they should be displayed.[79]

Thus, the ISC apparently accepted the same concept of the main Croatian symbol, that is, the checkered coat of arms, as the previous Yugoslav state. Of course, the *Ustaša* symbol was not taken over from the Yugoslav state but decided independently; however, the *ratio* of both solutions was identical, that is, representation of the nation/ethnicity.

73 | Jareb, 2010, pp. 236–238.
74 | Heimer, 2008, p. 51; Jareb, 2010, pp. 238–241.
75 | Tomašek, 1990, p. 87.
76 | On ISC see Goldstein, 2011, pp. 131 et seq.
77 | Zakonska odredba o državnom grbu.
78 | Jareb, 2010, p. 273.
79 | Naredba ministarstva unutarnjih poslova br. 399.

Nevertheless, the same symbol in the *Ustaša* context implied the exclusive nature of the Croatian state and its ethnically determined scope that included Bosnia and Herzegovina, according to the belief that its Muslim population was part of the Croatian people.[80] The initial white field in the *Ustaša* coat of arms was probably set as a difference from the coat of arms of the previous state. It also corresponded to the first registered image of the 'checkered' coat of arms.[81] Regarding the implementation of symbols of the *Ustaša* movement in the state coat of arms, it complied with the authoritarian ideology of the movement and the actual nature of the ISC as a totalitarian party state.

According to the 1941 Legal Order on the Protection of Aryan Honor and of the Blood of the Croatian People, passed upon the Nazi model, non-Aryans and members of the state—that is, persons who were not full citizens of the ISC—were prohibited from displaying the Croatian state, national flags, and national colors and symbols.[82] A similar provision was contained in the 1941 Decree on Changing of Jewish Surnames and on Marking Jews and Jewish Companies, forbidding Jews from wearing the Croatian national colors and displaying the Croatian state and national flags on their apartments.[83]

In addition to the state coat of arms and the flag, the symbol of the *Ustaša* movement itself—the 'eared' letter U, at the bottom of which was a bomb with a burning flame— worn by members of that movement on their uniforms, was often underlined. The new salute 'For the Home Ready' was promoted in public, even though neither of these was regulated by any act.[84] Neither of these features had the character of a state symbol.

The ISC did not provide an anthem, but the song 'Our Beautiful Homeland' was performed as the national anthem; in June 1941, the mandatory text and tune were already standardized. Apart from that, the Drina River—the eastern border of Bosnia and Herzegovina, which became the border of the NDH—and the 'blue sea'—which was not mentioned in the original text of the anthem—were added to the text,[85] effectively incorporating the new borders of the state.

6. Yugoslav federation and Croatian state symbols

On the opposite side, the Communist Party of Yugoslavia organized a nationwide partisan resistance movement to liberate the country and implement a political and social revolution. Therefore, in addition to the military organization, the Partisan movement also built civil governmental structures aligned with the communist social ideology and the state's attempted federal structure. Based on the criticism of the Great Serbian hegemony in Yugoslavia, the Communist Party had already accepted a federal organization, grounded on the Soviet federal model, as a solution for the multinational state.[86] In 1943, the Antifascist Council of the People's Liberation of Yugoslavia (ACPLY), a political

80 | Jelić–Butić, 1977, p. 100.
81 | Jareb, 2010, p. 272.
82 | Art. 5 of Zakonska odredba o zaštiti arijske časti.
83 | Art. 8 of Naredba o promjeni židovskih prezimena.
84 | Comp. Goldstein, 2021, pp. 496–498.
85 | Tomašek, 1990, pp. 87–88.
86 | Vujošević, 1985, pp. 144, 150–151.

representation founded in 1942, declared itself a pre-parliament, elected the government and the presidency, and made certain fundamental decisions. Among its most important initiatives were the decision to build Yugoslavia on federal and democratic principles with the right of every nation to self-determination and secession and the decision on the appropriate federal structure of the country. In accordance with these decisions, individual Yugoslav countries were proclaimed the following year—Federal Democratic Croatia being among them.[87] After communists took over all the power in the country, Yugoslavia was formally constituted as a federation in 1946, and in the following year, the People's Republic of Croatia was proclaimed. Just like the other five Yugoslav republics, it had the status of a federal state in Yugoslavia, with its own constitution, autonomous jurisdiction, and symbols of power.

The first provisional symbols of power of federal Croatia were established by the Supreme Headquarters of the Partisan Army, which in 1941 provided for the use of Yugoslav and national flags with a red star in the middle.[88] In 1943, the provisional coat of arms of Croatia was derived from the provisional coat of arms of Yugoslavia. It consisted of a large red five-pointed star framed by a yellow ear of corn tied with a red-white-blue tricolor and a ribbon with the partisan slogan 'Death to fascism—freedom to the people'. However, flags with the Croatian checkered coat of arms were also used in practice.[89] The song 'Our Beautiful Homeland' was informally performed as an anthem on the partisan side as well,[90] of course, without the changes on the ISC side.

A similar practice in the use of symbols was formally provided after the war by the Croatian authorities,[91] but the final arrangement of the flag and coat of arms in the spirit of Soviet heraldry was provided by the Constitution of the People's Republic of Croatia of 1947.[92] According to the Constitution, the frame of the coat of arms was formed by two curved sheaves of gold-colored grain ears on top of which was a red star; at the bottom of the ear-framed field was an iron anvil and above it a slightly wavy sea from which, in the focal point of the entire coat of arms, rose the Croatian checkered coat of arms with the sun rising above it.[93] This coat of arms and that of all other republics was established upon the common template by a federal commission in cooperation with the republican authorities.[94] The Constitution also provided for an image of the flag, which remained basically the same, that is, a tricolor with a red five-pointed star in the middle.[95]. The symbols of the federal units and state provided by the constitutions of 1946 and 1947 were not changed until just before the breakup of Yugoslavia, with the exception of the addition of the sixth torch to the emblem of the federation in 1963. Thus, the Constitution of the Socialist Republic of Croatia from 1963 Articles 9–19[96] and the Constitution of the Social-

87 | For the respective decisions of ACPLY of 1943 see in Prvo i drugo zasedanje AVNOJ-a, pp. 224–228. On the official name of Croatia see Radelić, 2006, pp. 237–238.
88 | Jareb, 2010, pp. 287–288.
89 | Ibid., pp. 290–291.
90 | Tomašek, 1990, p. 90.
91 | Naredba o vješanju zastave.
92 | Ustav Narodne Republike Hrvatske.
93 | Art. 4 of Constitution of the People's Republic of Croatia of 1947.
94 | Jareb, 2010, p. 304.
95 | Art. 5 of Constitution of the People's Republic of Croatia of 1947.
96 | Ustav Socijalističke Republike Hrvatske, 1963.

ist Republic of Croatia from 1974 Articles 6–7[97] contained the same description of the coat of arms and flag as the Constitution of the People's Republic of Croatia from 1947.

Neither the Constitution of the People's Republic of Croatia nor the Constitution of the Socialist Republic of Croatia from 1963 mentioned the national anthem, although the song 'Our Beautiful Homeland' was continuously performed in that capacity.[98] Finally, with 1972 Amendment I to the Croatian Constitution, that song was officially declared the anthem of the Socialist Republic of Croatia;[99] this provision was retained by the 1974 Croatian Constitution Article 8. It was an expression of the strengthened position of the republics introduced by the constitutional reform of the federation but only after the repressive suppression of the 'Croatian Spring' movement that demanded wider Croatian autonomy and protection of Croatian culture and language.[100]

The acceptance of historical Croatian national symbols of the federal statehood in communist Yugoslavia complied with the basic principles of the organization of the Yugoslav federation. Each republic, except Bosnia and Herzegovina, was based on the right to self-determination of its own constituent nation; each Yugoslav constituent nation was supposed to have its own republic.[101]

Since 1945, the Croatian flag has been displayed on all public buildings and offices together with the Yugoslav flag and almost regularly with the flag of the Communist Party, although the latter was not provided by any formal act.[102] In the areas of Croatia with a significant share of Serbs, the Serbian national flag was displayed, which was identical to the flag of the Socialist Republic of Serbia; national minorities displayed their national flags with an added red star.[103]

Displaying the Croatian flag and coat of arms without the prescribed socialist features was not well received by the authorities. However, it was not incriminated, though it could have been prosecuted depending on the context. The legal basis that was initially used to sanction such cases was Article 2.2 of the Law on Offenses Against Public Order and Peace from 1949, which provided for a sentence of up to 90 days in prison—reduced to 30 days in 1951, and raised to 60 days in 1960—for anyone who provoked, insulted, or belittled the moral and patriotic feelings of citizens in a public place by speaking, writing, or otherwise.[104] The new Law on Offenses against Public Order and Peace from 1977 was more specific and lenient because it penalized displaying the republican flag or coat of arms in a public place without the prescribed features, for which it provided a fine or a prison sentence of up to 30 days.[105] That law also provided for fines for displaying dilapidated, untidy, or damaged flags.[106]

The regime's rigid policy regarding the public displays of symbols became more tolerant after 1966, with the dismissal of Aleksandar Ranković, the powerful head of the secret police. After that, the checkered Croatian coat of arms without a star or other features

97 | Ustav Socijalističke Republike Hrvatske, 1974.
98 | Tomašek, 1990, p. 91.
99 | See Amendment I, in Ustavni amandmani I do XXXVI.
100 | See Goldstein, 2011, pp. 177–183.
101 | Čepulo, 2022a, pp. 43–44.
102 | Jareb, 2010, p. 305.
103 | Heimer, 2007; Jareb, 2010, p. 303.
104 | Zakon o prekršajima protiv javnog reda i mira (1949).
105 | Art. 21 of Zakon o prekršajima protiv javnog reda i mira (1977).
106 | Art. 22 of Zakon o prekršajima protiv javnog reda i mira (1977).

and red-white-blue patterns appeared on numerous consumer products, signs of cultural societies and sports clubs, and even in individual use.[107] It was indicative that in 1969, a misdemeanor charge for public display of the Croatian flag without the red star, which was assessed in the report as displaying the *Ustaša* flag, was rejected on the ground that displaying the Croatian flag without the red star was not punishable by itself, and that such a flag did not contain characteristic features of the ISC flag.[108] The situation changed after the suppression of the 'Croatian Spring' in 1971 when the same judge sentenced five young men to 30 days in prison for drawing a checkered coat of arms without the prescribed features on the mountain gorge above the town. The judge stated that displaying a coat of arms without socialist features is not in itself illegal when such use is part of folk customs, but that in other cases, such use represents a violation of the socialist feelings of citizens that are connected with the national liberation war.[109] Similar practice was used in the 1980s, in the era of deepening political and economic crisis.[110] However, widespread public use of the Croatian coat of arms in consumer products and emblems of various types—with both red and white initial fields—continued unhindered and was not paid particular attention.[111]

Interestingly, despite the decentralization and strengthening of the identity of the republics after 1974, republican symbols did not enjoy explicit protection in criminal law. The largest and most important part of criminal law remained part of the federal jurisdiction, and the federal Criminal Code of 1976 sanctioned only violations of symbols of the federation, not the violation of republican symbols.[112] The weaker protection of republican symbols indicates a weaker significance of republican statehood.

Finally, it should be mentioned that the use of seals and stamps with the coat of arms of the Socialist Republic of Croatia was provided by Croatian legislation from 1947, with the respective amended law from 1977 remaining in force up to 1995.[113]

7. State symbols of the Republic of Croatia

The regulation of symbols of power in Croatia was significantly changed after the multi-party elections in Croatia in April 1990, followed by the constitutional amendments on July 25, 1990, and the legal regulation of symbols in December 1990. The constitutional amendments accepted by the multi-party parliament removed ideological content from the Croatian Constitution. As a provisional solution, the amendments provided that the coat of arms of the Republic of Croatia is the historical Croatian coat of arms with red and white fields and the flag is a tricolor with the Croatian coat of arms in the middle; however, the detailed image of the coat of arms should have been provided by a special law. The Constitution of the Republic of Croatia, adopted on December 22, 1990, introduced only

107 | Jareb, 2010, p. 308.
108 | Ibid., p. 310.
109 | Ibid., p. 311.
110 | Ibid.
111 | Jareb, 2010, pp. 312–323.
112 | Krivični zakon Socijalističke Federativne Republike Jugoslavije.
113 | Zakon o pečatima i žigovima s grbom Socijalističke Republike Hrvatske.

cosmetic changes to the existing provisions on the coat of arms and flag. However, the Law on the Coat of Arms, Flag, and Anthem of the Republic of Croatia and the Flag and Sash of the President of the Republic of Croatia (LCAFA), enacted just the day before the Constitution,[114] elaborated the details of the images and use of these symbols.

LCAFA elaborated that the coat of arms consist of 25 red and white fields with an initial red field and a crown above it consisting of five historical Croatian coats of arms—namely, the oldest known coat of arms of Croatia and the coat of arms of the Republic of Ragusa, Dalmatia, Istria, and Slavonia. It also confirmed the historical tricolor with the coat of arms in the middle as the state flag.[115]

The government's explanation of this final design emphasized the color of the initial field. The acceptance of the red field was explained by the fact that it was more typical of the checkered coat of arms as an all-Croatian symbol, contrary to the white field, which was more typical of its use as a regional symbol. The inclusion of the coat of arms on the flag was explained by the need to distinguish the Croatian flag from other states' flags with the same color combination.[116] The final image of the coat of arms with the added crown was determined by an expert advisory committee composed of historians and one famous designer assembled by the President of the Parliament, an art historian himself.[117] According to him, the crown was added as a symbol of Croatia's integrity and long history as a kingdom.[118] However, the crown has been criticized by a part of the professional public as over-designed, complicated, and not in compliance with heraldic rules and tradition.[119] Potential flaws in the crown were the price paid for the urgent symbolic de-ideologization and quick symbol arrangement despite the turbulent environment. Nonetheless, the provided solution was implemented; however, the modernist concept of the coat of arms released publicly in 2000 did not get a favorable response.[120]

The law determined the text and tune of the anthem, to which the verse blue sea was added; with this change, the territory of the homeland, that is, state territory, was additionally determined.

In addition to the coat of arms, flag, and anthem, the LCAFA regulated the images and rules of use of the sash and flag of the President of the Republic. However, the analysis of LCAFA and other regulations indicates that these symbols were not considered state symbols and did not have characteristic protection.[121] Conversely, Article 18 of the Law on Institutions and other regulations suggests that the name of the state should be considered state symbol with the respective protection provided in criminal law, law on intellectual property, and company law.[122]

LCAFA provides that the coat of arms, flag, and anthem can be used exclusively in the forms established by the Constitution and laws. It also allows parts of the coat of arms and

114 | Zakon o grbu, zastavi i himni Republike Hrvatske.
115 | Comp. Arts. 7 and 10 of LCAFA. The image of 'the oldest known coat of arms of Croatia' reproduces the motif from a coin from the end of the 12th century—a six-pointed yellow star with a white new moon on a blue shield. Božić and Ćosić, 2021, pp. 153–155.
116 | See Jareb, 2010, pp. 343–345.
117 | Peić Čaldarović and Stančić, 2011, p. 207.
118 | Jareb, 2010, pp. 352–354.
119 | Banac, 1991, p. 26; Comp. Božić and Ćosić, 2021, pp. 153–155.
120 | Jareb, 2010, pp. 386–387, footnote 676.
121 | Čepulo, 2022b, pp. 9–10.
122 | Čepulo, 2022b, pp. 8–9, 12–13; Zakon o ustanovama.

flag to be used as part of other emblems if this is established by the statute or other act of a legal person, provided that this does not offend the reputation of the Republic of Croatia.[123] Under the same condition, LCAFA allows the free use of the coat of arms, flag, and anthem for artistic, musical, and educational purposes.

Even before their introduction, the new symbols were met with fierce opposition from a part of the Serbian population in Croatia, supported by a media campaign from Serbia that called them *Ustaša* symbols without any particular explanation.[124] The attacks were motivated by how the symbols represented the Republic of Croatia as an *Ustaša* state, whose formation had to be prevented in accordance with the plans of the Serbian leadership, supported by the Yugoslav People's Army; these plans included turning Yugoslavia or its greater part into the Greater Serbia.[125] Fierce attacks on the Croatian state symbols continued after the formation of Serbian para-states on the territory of Croatia; however, after reintegration of the occupied Croatian territories in 1995 and 1998, Croatian state symbols were introduced throughout the state.[126]

Thus, right before Christmas 1990, the symbols of the Croatian state were definitively regulated. The Constitution and the LCAFA, which determined their images and principles of use, provided the basis for several other laws that regulated various aspects of their use and protection in the coming years.[127]

8. Conclusion

Modern Croatian symbols of power were shaped in the middle of the 19th century based on the symbols of the three medieval *regna* linked together in the single coat of arms whose colors determined the outlook of the tricolor flag that appeared in 1848. These symbols expressed the duality of the territorial and national principles and represented a single nation and its (virtual) territory with delimited external borders. The mentioned symbols were first *via facti* accepted as official symbols; only then were they regulated by law and stabilized through practice in the turbulent circumstances of the time. In their further development, the dominant symbolism of the land was replaced by the nation's symbolism through separation. It intensified the factual use of one of the territorial symbols, the checkered coat of arms—the one closest to the nation's name and medieval heritage. It became an all-Croatian national symbol and a symbol of the emerging nation-state.

123 | Art. 4 of LCAFA.
124 | Goldstein, 2011, pp. 215 et seq.
125 | Ibid., pp. 216–217; Ramet, 2009, p. 488.
126 | On reintegration of the occupied parts of Croatia see Goldstein, 2011, pp. 252–263. Attacks on the Croatian state symbols by the Serbian side gradually ceased after reintegration of the state territory but then aroused the question of public use of the checkered coat of arms with white initial field. The judgment of the High Misdemeanor Court from 2021 stated that such coat of arms is one of variants of the historical Croatian coat of arms, not specific to the coat of arms of ISC and not evoking the memory of the ISC, and therefore did not constitute a misdemeanor. Čepulo, 2022b, pp. 15–16.
127 | Čepulo, 2022b, pp. 11 et seq.

This transition of use of the Croatian checkered coat of arms from an informal national symbol to an official state symbol, denoting the nation, was carried out in the frame of the Kingdom of Serbs, Croats, and Slovenes on the ground of legitimacy of that symbol and its wide public acceptance. This shift contributed to the development of the checkered coat of arms into the only Croatian national and state symbol. The selection of the same coat of arms and the tricolor flag for the symbols of the Banate of Croatia was seen as a precursor of the Croatian nation-state; The Croatian Peasant Party, which stood behind the formation of the Banate of Croatia, had a different motivation to the use of these symbols. Finally, the third independent acceptance of the checkered coat of arms took place within the *Ustaša* movement and in the ISC, despite the previous inclusion of that coat of arms among the symbols of the Yugoslav state. In each of these three cases, the checkered coat of arms symbolized the national principle in different contexts—as an element of the wider Yugoslav national structure, as a symbol of the autonomous nationally marked Banate of Croatia, and as a symbol of the exclusive Croatian national state within the imagined ethnic space (ISC).

In any case, the checkered coat of arms and the Croatian tricolor were established as the national symbols by the 1940s. These symbols were deprived of ideological connotations and, therefore, acceptable to a wide range of users with different ideological postures—from the creators of the integral Yugoslav nation through moderate and radical Croatian nationalists to the Yugoslav communist federalists.

The end result of this non-linear development, the one with a stable core, is the acceptance of the checkered coat of arms as the core of the coat of arms of the Republic of Croatia, whose territorial scope and integrity as well as regional diversity are indicated by the regional coats of arms in its crown.

The transition from symbols of the land into symbols of the nation was even clearer in the case of the anthem; following the same original pattern, the Croatian character of the homeland and prosperous nation-state was emphasized together with a clearer delimitation of its borders.

All these features should be also viewed in the context of a broader regional perspective, where other and potentially concurrent nation-states—Hungary, Serbia, and Italy—or their traditions have been grounded upon the same conceptual and symbolic foundations.

The features of legal regulation of Croatian symbols of power reflected the character of the government that stood behind it. The fact that the symbols of power were shaped in 1848, *de facto* accepted in official use, and only afterward regulated by laconic bylaws suggests that they were not prioritized before 1918. It was similar to the surprising case of the Banate of Croatia from 1939 to 1941. It seems that awareness of the importance of the state symbols was present only in the state ambience of the ISC and the Republic of Croatia, albeit in different contexts. In the first case (ISC), the checkered coat of arms was used as the symbol of an authoritarian party-state program of an exclusive nation-state on the allegedly ethnic and historical Croatian territory. In the other case—the Republic of Croatia—, it was used as an ideologically neutral symbol adjoined with historical regional symbols in the crown that confirmed the country's existing borders and territorial integrity.

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CHILDREN'S PRIVACY RIGHTS, SOCIAL NETWORKING, AND THE MEDIA: POSSIBILITIES AND LIMITATIONS OF (CRIMINAL LAW) PROTECTION

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ABSTRACT

Living in modern times has various advantages, but the protection of privacy is not one of them. Today, we are surrounded by technologies that make our lives easier in everyday task management and entertainment; however, they also increase the risk of privacy violation, by collecting and potentially sharing our personal data. Parents and family very often post photos, videos, and stories of their children online. This is called 'sharenting'. By doing so, especially in the absence of consent from the children, they violate children's privacy. It does not necessarily mean they will be legally responsible for such behavior, though Indeed, their—right to—privacy is protected from violation by other people, media and press. However, if parents violate the privacy of their—underage—children, as with 'sharenting', in Croatia, the children do not have the right to protect themselves, unless it constitutes a criminal offense. Whereas they do have the right to privacy and its protection, it is not from their parents. This problem of media violation of privacy rights is juxtaposed with the freedom of expression. Therefore, this study aims to reveal the legislative and practical implications of this issue in everyday life, addressing: 1. the violation of children's privacy rights by media and press; and 2. the violation of children's privacy rights by their parents or family through 'sharenting' on social networking sites.

KEYWORDS

right to privacy
privacy of children
protection of children's right to privacy
ECtHR case-law on privacy

1. Introduction remarks about privacy issues

With the expansion of technology and it becoming indispensable to our lives, it can safely be said that our normal[2] way of life has ended. We have a new technology normal. Almost everything today is instantly available and accessible on the internet. Nevertheless,

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2 | In this case normal means everyday life without the interference and addiction to technology.

https://doi.org/10.55073/2023.1.29-57

whether we are aware of it or not, this has a price—our privacy. The right to privacy, especially children's—who are a vulnerable group—is a recognized right. International and national regulations, as well as some softer regulations, try to protect it.[3] However, very often, we voluntarily breach our privacy by leaving traces of information everywhere on the internet.

There is one unified definition of privacy and various countries define it differently, according to the context and circumstances prevailing in a particular society.[4] The right to privacy refers to the concept of one's personal information enjoying legal protection from public scrutiny and access; otherwise, it would not constitute a right. Haydel writes, 'privacy generally refers to an individual's right to seclusion, or right to be free from public interference.'[5] In the late 1870s, Judge Thomas Cooley argued that people had the right to be left alone.[6] Warren and Brandeis further elaborated on this concept in their famous paper, 'The Right to Privacy'.[7] They made a significant impact on the right to privacy issue, saying that the violation of privacy can expose a person to psychological pain, which is the same as, or perhaps even greater than, physical injuries.[8] Sharp emphasizes that 'the right to privacy refers to the concept that one's personal information is protected from public scrutiny'.[9] In addition, Prosser significantly contributed to the field; in his article, he referred to Warren and Brandeis's conclusion by organizing the torts in 'four distinct kinds of invasion'.[10] As Richards and Solove noted, Prosser studied torts for decades, devoting a significant part of his career to the tort of breach of privacy.[11]

However, Solove, believes that researchers are lost in trying to find privacy, and are therefore, in a conceptual jungle and mess.[12] Thompson, meanwhile, simply claims that 'nobody seems to have any clear vision of what privacy is',[13] nor, by extension, the right to privacy.

Nevertheless, Archard and Moor attempted to found their way into a privacy mess and tried to define it, or at least determine what it should comprise. Accordingly, Archard defines privacy as having 'limited access to personal information',[14] which includes someone's age, address, phone number, income, race, purchasing habits, ethnic origin, fingerprints, DNA, medical history, blood type, sexual orientation, religion, education, and political assimilation. The right to privacy was defined by Moor as the 'right to limit public access to oneself and to information about oneself'.[15] It refers to limiting public access to information about someone with guarantees of legal protection. Privacy can take different forms; for example,

3 | See Nissim and Wood, 2018, pp. 1–17.
4 | Dragičević Prtenjača, 2014, p. 166.
5 | Haydel, 2009; Other articles in Issues Related to Speech, Press, Assembly, or Petition, Media, General Legal Concepts and Theories, in The First Amendment Encyclopedia presented by the John Seigenthaler Chair of Excellence in First Amendment Studies [Online]. Available at: https://www.mtsu.edu/first-amendment/article/1141/privacy (Accessed: 8 August 2022).
6 | Haydel, 2009; also see Cooley, 1879, p. 29.
7 | See Warren and Brandeis, 1890, pp. 193–220.
8 | Ibid.
9 | Sharp, 2013.
10 | Prosser, 1960, p. 389.
11 | From 1940, when he began studying torts of invasion of privacy, he spent the next thirty years trying to understand and categorize the hundreds of court cases that represented some form of invasion of privacy. Richards and Solove, 2010, p. 1888.
12 | Solove, 2006, pp. 477–478.
13 | Thompson, 2017.
14 | Moor in Archard, 2006, p. 16. See also Moor, 2003, p. 218.
15 | See Archard, 2006, p. 17.

right to personal and family life, dignity, correspondence, home, secrecy of the personal data, photographs and IP addresses internet subscriber information associated with specific dynamic IP addresses assigned at certain times (case *Benedik v. Slovenia).*[16] Often, this right conflicts with the freedom of expression. Thus, as Majnarić notes, it is necessary to weigh competing interests to achieve a fair balance.[17] Analyzing conflicting interests, freedom, and rights, especially between media freedom and personal rights, Radolović states that the right to privacy is really the right to non-disclosure of information about a person's private life—e.g., about health, illness and feelings.[18]

The right to privacy of famous people has proven to be particularly controversial. Badrov believes that privacy protection of such people has narrowed. She believes there is no precise definition of the concept of a public figure; nevertheless, she concludes that there are three basic groups of public figures, two of which are absolute public figures and the third is relative public figures.[19] Such comprehension is in accordance with Haydel's theory, when she states that 'in public, there is little or no First Amendment protection of privacy',[20] because

> In *Cohen v. California* (1971), the Court held that the privacy concerns of individuals in a public place were outweighed by the First Amendment's protection of speech, even when the speech included profanity in a political statement written on a man's jacket.[21]

However, freedom of expression (freedom of speech) in common law, especially in the United States, has a special and primary position, and is protected by the First Amendment.[22]

A slightly different situation exists on the European continent: the European Court of Human Rights (hereafter: ECtHR or the Court) stated in the case *Von Hannover v. Germany* (no. 2) (2012) that even public icons can have the right to privacy. If they are filmed in a public place, it can be considered a violation of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedom (hereafter: Convention), especially if the recording was not done in public interest, but only for entertainment.[23] However, in that concrete case, the Court concluded that Article 8 of the Convention had not been violated.[24]

16 | ECtHR case *Benedik v. Slovenia*, (Appl. No. 62357/14), from 24.4.2018 (final 24.07.2018), paras. 108–109.
17 | Majnarić, 2020, p. 1308.
18 | Radolović, 2007, p. 20.
19 | Badrov, 2007, pp. 80–81.
20 | Haydel, 2009.
21 | Haydel, 2009.
22 | More information about freedom of speech in general are: History.com, Freedom of Speech [Online]. Available at: https://www.history.com/topics/united-states-constitution/freedom-of-speech (Accessed: 4 October 2022).
23 | See ECtHR Judgment *Von Hannover v. Germany* (No. 2) (2012), (Appl. Nos. 40660/08 and 60641/08), 7 February 2012; paras. 31, 32.
24 | *Von Hannover v. Germany* (No. 2), paras. 118, 125, 126.
It considered that the Federal Court of Justice upheld the applicants' request to ban the publication of two photographs that it considered not to contribute to matters of general interest. However, he rejected the applicants' request to ban the publication of a third photo showing the application walking during a skiing holiday in St. Moritz and which was accompanied by an article on, among other things, the deteriorating health of Prince Rainer. – ECtHR case *Von Hannover v. Germany* (No. 2), para. 117.
See also Guide to the Case-Law of the of the European Court of Human Rights- Data protection (last updated on 31 December 2021), p. 20, para. 67.

When it comes to privacy and the right to privacy, special protection should be guaranteed to children. This is the rise of a new area: the protection of children's privacy rights. Livingstone, Stoilova, and Nandagiri emphasized that 'children are perceived as more vulnerable than adults to privacy online threats, such as re-identification, due to their lack of digital skills or awareness of privacy risks'.[25] In addition, when the data is monetized, children can face far more serious threats, regarding their personal data being used for online marketing and commercial activities.[26] Heirman, Walrave, Ponnet, and Van Gool, note that 'commercial websites are increasingly soliciting people' to disclose personal information[27] and urging 'underage visitors to disclose personal information for a variety of data processing activities', by first requiring them to fill in a registration form that records personal information.[28] Without this, they are not given full access to the web content.[29] The possibility of such information disclosure being used for commercial incentives has concerned public, scientists, politicians, and parents.[30] However, adolescents are 'less concerned about possible privacy-related risks, including identity theft and loss of control over personal data'.[31] Accordingly, there is a 'growing concern around the collection, use, and sale of children's information' by private companies to the highest bidder.[32] Parents themselves make some of this information accessible by posting their children's photos, videos, and other personal information on social networking sites. This behavior is called 'sharenting'.[33] Amon, Kartvelishvili, Bertenthal, Hugenberg, and Kapadia note that 'according to the 5Rights Foundation, a London-based non-profit organization focused on creating a safer and more beneficial Internet experience for children and teenagers, extensive datasets containing children's information are being increasingly used for commercial purposes online.'[34]

In most cases, children cannot seek to protect their privacy directly. They cannot fight for their rights on their own, but require their legal guardians' help. In some cases, the interests of the legal guardians—parents—can conflict with the—best—interests of the child, as can be seen in 'sharenting'.[35] Such a violation can also occur when media infringes on children's rights when reporting. With public figures, the media often takes some information from their social network, and publishes the same in the wider media or press. This can also happen with non-famous people when they post on social networking sites, and the media takes over some interesting information or story. Milas Klarić stated that most people do not hear the 'warnings and recommendations of experts, that pictures of children and personal information should not be published on social networks' and in media.[36] In that regard, the media as well as parents and guardians should note

25 | Livingstone et al., 2018, p. 28.
26 | Ibid., p. 28.
27 | Heirman et al., 2013, p. 1.
28 | Ibid.
29 | Ibid.
30 | Ibid.
31 | Ibid.
32 | Amon et al., 2022, p. 5.
33 | 'Sharenting' comprehends posting photos, videos, or stories of their children, by parents. Amon et al., 2022, p. 2.
34 | Ibid., p. 5.
35 | Ibid., p. 2.
36 | Milas Klarić, 2017.

that almost every piece of information published on the internet remains on the internet.[37] Indeed, it can be said that the right to be forgotten, stipulated in the General Data Protection Regulation (GDPR), no longer exists.

2. Children's privacy rights

A famous reality star[38] publishes photos of her children on most occasions, often combining family and business, promoting both. According to Bilan's research, between January 1, 2015 and February 22, 2015, this person posted 440 posts on Twitter and Facebook, 27 of which were with their children. They use Twitter to expand their business and use their children—deliberately or unintentionally—for that purpose.[39] This is only one example amongst others in the celebrity world.

However, such cases are also common among people who are not public figures. By 'sharenting' and posting photos in which the child's identity is not protected, Bilan believes that parents endanger their children's right to privacy. Amon, Kartvelishvili, Bertenthal, Hugenberg, and Kapadia note that 'parents enjoy posting blogs about their children as a way to establish their new identity as a parent, earn extra income, and receive further support.'[40] This observation is in line with the aforementioned case of the famous reality star.

Although public personalities have less privacy than others, Bilan states that this does not mean their children should be exposed to even greater media pressure by publishing their photos on numerous profiles, sometimes even against their will.[41] The media very often takes over some photos and posts on social networking sites—e.g., Instagram and Facebook. Unfortunately, children of public figures cannot choose whether they want to appear in the media. Indeed, they are sometimes insulted in the media, when their parents are being criticized. Negative articles about the children of famous people are accompanied by readers' insults in the comments, which are published online. Many such comments are not removed by administrators; indeed, they are not even recognized as being against children's welfare.[42] Nevertheless, such articles impact children's lives in their social surroundings. They can lose their friends and be exposed to embarrassment and insults. Milas Klarić notes how 'children are much more sensitive than adults and have a harder time dealing with possible problems brought by fame and numerous fans and often cannot cope with the burden that fame carries.'[43]

37 | Amon et al., 2022, p. 2.
The time has change and it is not the same situation that was in past days with the press. Although the information was published, after a while it was going to be forgotten. With today's technology, this is not the case anymore. Everything that is published stays somewhere and can be reached again.
38 | Banner, 2022.
39 | Bilan, 2017, pp. 1763–1765.
40 | Amon et al., 2022, p. 2.
41 | Bilan, 2017, pp. 1763, 1765.
42 | Milas Klarić, 2017.
43 | Ibid.

All children have the right to be left alone. As Milas Klarić notes, 'media should always keep this in mind'.[44] Ironically, the media also plays a major role in promoting children's rights. There are different types of media coverage: one that has a positive effect and one that has a negative effect. Emphasizing the intellectual, artistic, and sport achievements of children encourage other children as well, which is a positive effect of the media coverage.[45]

2.1. International regulation and ECtHR case law in child privacy protection

New technology and the internet enables rapid communication among large number of users, and the exchange of large amount of data in various formats, globally. There are an increasing number of online services, systems, and social networking sites which users use, often unaware of the data traces they are leaving.[46] Most people, especially children, are unaware that such data can be abused and constitute a violation of their rights. Livingstone, Stoilova, and Nandagiri highlight the online risks that children face depending on technological affordances, as well as their own online practices.[47] Amon, Kartvelishvili, Bertenthal, Hugenberg, and Kapadia, argue that

> Potential risks include identity theft resulting from the leaking of private, identifiable information; bullying from the child's peers; possession and misuse of photographs by strangers, including for sexual or political motives; and even kidnapping by sexual predators. In addition to overtly malicious actions and intentions, the nature of today's Internet economy allows private corporations to liberally collect vast amounts of information from online users, including children, in the name of marketing.[48]

Because of these concerns and their impact on human rights, the General Assembly of the United Nations adopted resolution 68/167 in December 2013. Special focus was on practices and legislation related to the monitoring of communication, interception, collection of personal data, and protection of human rights.[49] Since 2015, a Special Rapporteur for the right to privacy has been operating within the UN. His /hers, the mandate includes, among other things, collecting data for the purpose of reporting on the right to privacy and compiling recommendations for the protection and promotion of this right; monitoring violations of the right to privacy; and keeping track of challenges to new technologies.[50]

The resolution emphasizes that every state should:

(a) To respect and protect the right to privacy, including in the context of digital communication;

44 | Ibid.
45 | Ibid.
46 | For more see Nyst and Falchetta, 2017, pp. 104–118.
47 | Livingstone et al., 2018, p. 28.
48 | Amon et al., 2022, p. 2.
49 | Resolution adopted by the General Assembly on 18 December 2013 [on the report of the Third Committee (A/68/456/Add.2)] 68/167. The right to privacy in the digital age.
50 | United Nations (no date) Special Rapporteur on the right to privacy [Online]. Available at: https://www.ohchr.org/en/special-procedures/sr-privacy (Accessed: 10 August 2022).

(b) To take measures to put an end to violations of those rights and to create the conditions to prevent such violations, including by ensuring that relevant national legislation complies with their obligations under international human rights law;
(c) To review their procedures, practices and legislation regarding the surveillance of communications, their interception and the collection of personal data, including mass surveillance, interception and collection, with a view to upholding the right to privacy by ensuring the full and effective implementation of all their obligations under international human rights law;
(d) To establish or maintain existing independent, effective domestic oversight mechanisms capable of ensuring transparency, as appropriate, and accountability for State surveillance of communications, their interception and the collection of personal data.[51]

In addition to the Resolution, privacy today is guaranteed by many international, national, and regional documents, some of which are mandatory whereas others represent soft law. The most famous are the Universal Declaration of Human Rights (1948)[52], the Covenant on Civil and Political Rights (1966; subsequently: Covenant)[53], the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950; Convention),[54] and others such as the Declaration on mass communication media and Human Rights (hereinafter: Declaration on mass communication),[55] the Charter of Fundamental Rights of the European Union (subsequently: EU Charter)[56], the Treaty on the Functioning of the European Union (hereinafter: TFEU)[57], the Treaty on the European Union (hereinafter: TEU)[58], Directive 95/46/EC[59] on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (hereinafter: Directive on privacy and electronic communications)[60] and General Data Protection Regulation (GDPR), all of which also apply to children.

51 | Dot 4 p. 2 of the Resolution.
52 | Art. 12 privacy protection and Art. 26 para. 3 the right of choice of education of children–Universal Declaration of Human Rights 1948 (OG-MC-12/09).
53 | Art. 17 of the International Covenant on Civil and Political Rights, 1966.
54 | Privacy protection is guaranteed by Art. 8 (the right to privacy) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Besides Art. 8 in Art. 2 of the (First) Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms guarantees the right to education to everybody especially the children in line with personal convictions of their parents which also may constitute privacy issue.
55 | Council of Europe Declaration on mass communication media and Human Rights, Resolution 428 (1970).
56 | Charter of Fundamental Rights of the European Union (2012/C 326/02) OJ C 326.
57 | Art. 16 of the Consolidated Version of The Treaty on the Functioning of the European Union OJ C 326/2012, 26.10.2012.
58 | Art. 39 of the Treaty on the European Union, OJ C 326/2012, 26.10.2012.
59 | Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995, On the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995.
60 | Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201, 31.7.2002.

Some documents emphasize the protection of children's privacy. The Universal Declaration of Human Rights, in addition to Article 12, also protects the privacy of children through the right to education and choice of education in Article 26 paragraph 3.

The Covenant on Civil and Political Rights protects the privacy of children not only through Article 17 but also Article 14 paragraph 1, regarding 'proceedings [that] concern matrimonial disputes or the guardianship of children'; Article 18 paragraph 4 to 'ensure the religious and moral education of their children in conformity with their own convictions'; Article 23 paragraph 4 that protects the child's rights in the matrimonial merits, specifically dissolution; and Article 24 that generally stipulates the rights of the child to 'measures of protection as are required by his status as a minor',[61] and the right to have a name and nationality.[62]

Some relevant soft law documents regarding children's rights include the Geneva Declaration of the Rights of the Child (1924)[63] and Declaration of the Rights of the Child (1959).[64] However, none of these specifically mention children's right to privacy, although the Declaration does state children's rights to name and nationality.[65]

The Convention on the Rights of the Child (1989) is a special document that protects children's rights, including privacy, and obliges states to respect these rights.[66] Kopić and Korajac state that this convention was the first document in which the child is approached as a subject with rights, and not only as a person who needs special protection.[67] It obligates all states that ratified the Convention to comply with its provisions.[68] Hrabar considers this Convention to be the most important and fundamental international global document protecting children's rights.[69] The spiritus movens of this Convention are to act in accordance with the child's best interest. Article 16 of this Convention guarantees every child the right to legal protection against interference with his privacy, family, home, or correspondence, as well as protection against unlawful attacks on his honor and reputation.[70] Some additional rights protected by the Convention reflects the privacy dimension of the child. Therefore, Article 12 stipulates the right to express their views freely in line with their age and maturity in all matters affecting them, if capable of forming their own views. This is of special importance regarding children's right to consent when taking and publishing their photos, as with all other issues in connection with their privacy. Article 13 regulates the child's right to freedom of expression, and Article 14 regulates the child's freedom of thought, conscience, and religion.

The EU Charter guarantees the right to privacy in Article 7 (Respect for private and family life), Article 8 (Protection of personal data), Article 9 (Right to marry and right to found a family), and Article 10 (Freedom of thought, conscience, and religion), and Article 14 (the right to education of all populations, especially children). Article 24 emphasizes

61 | Art. 24 para. 1 of the Covenant.
62 | Art. 24 paras. 2–3 of the Covenant.
63 | Geneva Declaration of the Rights of the Child, Adopted 26 September, 1924, League of Nations.
64 | Declaration of the Rights of the Child, G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959).
65 | Principle 3 of the Declaration.
66 | Convention on the Rights of the Child (1989).
67 | Kopić and Korajac, 2010, p. 46.
68 | Ibid.
69 | Hrabar, 2016, p. 27.
70 | Art. 16 paras. 1–2 of the Convention on the Rights of the Child.

children's protection and care which is necessary for their well-being, the right to express their views freely which 'shall be taken into consideration on matters which concern them in accordance with their age and maturity.'[71] As for Article 12 of the Convention on the Rights of the Child, this norm can have significant legal importance regarding children's right to provide consent when taking and publishing their photos. Additionally, by Article 32, the child is protected from labor exploitation.

The GDPR regulates children's rights and age of lawful consent in relation to information society services,[72] and also emphasizes the importance and sensitivities of the child's rights and interests, which the controller must bear in mind when processing data. If they conclude that the interest of the child overrides the legitimate interest, they must pursue in that direction (the best interest of the child).[73]

Article 8 regulates that the member states can set the consent age limit to 13 years, but only by law and not by other regulations. The age limit can not be lower than 13 years of age.

Otherwise, the consent age limit for processing of personal information is 16 years, and if the child is under 16 years there has to be consent for the processing of personal information of the parents or the holder of parental responsibility over the child.

In Article 19 of the Implementation of the General Data Protection Regulation Act (IGDPRA), it[74] is defined that when applying Article 6 paragraph 1 dot. a) of the GDPR, the processing of a child's personal data in Croatia is legal if the child is at least 16 years old.[75] In all other senses, the GDPR applies in the same scope as for an adult.

Directive (EU) 2016/800 safeguards children who are suspects in criminal proceedings[76] and guarantees their right to privacy in Article 14 regarding hearings involving children, which should primarily be held in the absence of the public.

The accessibility of personal data of minors who commit illegal activities becomes a special issue. Therefore, in the case of *Rīgas satiksme (C-13/16, EU:C:2017:336)* the Court of the European Union (Curia) decided that police or other authorized bodies would forward

71 | Art. 24 para. 1 of the EU Charter.

72 | Art. 8 Conditions applicable to child's consent in relation to information society services.
1. Where point (a) of Art. 6(1) applies, in relation to the offer of information society services directly to a child, the processing of the personal data of a child shall be lawful where the child is at least 16 years old. Where the child is below the age of 16 years, such processing shall be lawful only if and to the extent that consent is given or authorized by the holder of parental responsibility over the child. Member States may provide by law for a lower age for those purposes provided that such lower age is not below 13 years.

73 | Art. 6 para. 1 al. (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

74 | Implementation of the General Data Protection Regulation Act, Official Gazette, 42/18.

75 | For more see Annual Report on the Work of the Personal Data Protection Agency for the period from January 1, 2020 to December 31, 2020, p. 66 [Online]. Available at: https://www.sabor.hr/sites/default/files/uploads/sabor/2021-04-01/134202/GODISNJE_IZVJESCE_AZOP_2020.pdf (Accessed: 10 August 2022).

76 | Directive (EU) 2016/800 of the European Parliament and of the Council, of 11 May 2016, on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ L 132, 21.5.2016.

the personal data of the perpetrator of the offense or for tort proceedings, even if the person is minor.[77]

2.1.1. ECtHR case-law

The European Court of Human Rights (ECtHR) has a rich case law in the protection of the right to privacy guaranteed under Article 8 of the Convention (Right to respect for private and family life). This paper aims to focus on key and relevant cases, primarily connected to the violation of children's privacy rights; additionally, it will also address some key cases regarding the right to privacy.

The Court in the *Case of Axel Springer AG v. Germany,*[78] states how the right to privacy is a broad concept that cannot be exhaustively defined and which encompasses the physical and psychological integrity of a person; therefore, it can include multiple aspects of a person's identity, such as gender identification, sexual orientation, name, or elements that refer to a person's right to his own image.[79] Furthermore, it notes how this term includes personal information that individuals can legitimately expect not to be disclosed without their consent.[80] Accordingly, the European Court establishes the concept of private life,[81] setting some conditions or key factors that need to be considered when balancing the right to privacy and reputation under Article 8 and freedom of expression under Article 10. These include: (a) contribution to a debate of general interest; (b) how famous the person concerned and the subject of the report is; (c) previous behavior of the person concerned; (d) method of obtaining the information and its veracity; (e) content, form, and consequences of publication; and (f) severity of the imposed sanction.[82]

The court also states that the concept of private life is not limited to the inner circle in which an individual lives as they wish and exclude the outside world, as elaborated in the case of *Niemietz v. Germany.* [83] This right implies protection from taking photographs of others, through which the identity of a person can be uncovered. Therefore, the European Court has a firm standpoint regarding this matter. In the *Case of López Ribalda and Others v. Spain,*[84] the Court stated that a person's image represents one of the main characteristics of their personality because it reveals their unique features. The right to protect one's image is, therefore, one of the 'essential elements of personal development.'[85]

Everyone, including public figures, has a legitimate expectation that their private life will be protected,[86] along with their right to control the use of their images. Therefore,

77 | ...or personal data of the persons exercising parental authority on the ground that the person who caused the damage was a minor. *Judgment of 4 May 2017, Rīgas satiksme (C-13/16, EU:C:2017:336),* para. 33.
78 | ECtHR *Case of Axel Springer AG v. Germany* (Appl. No. 39954/08), 7.2.2012.
79 | *Case of Axel Springer AG v. Germany,* para. 83.
80 | *Case of Axel Springer AG v. Germany,* para. 83.
81 | *Case of Axel Springer AG v. Germany,* para. 83.
82 | *Case of Axel Springer AG v. Germany,* paras. 89–95.
83 | ECtHR *Case of Niemietz v. Germany* (Appl. No. 13710/88), 16 December 1992, para. 29.
84 | ECtHR *Case of López Ribalda and Others v. Spain* (Appl. Nos. 1874/13 and 8567/13), 17 October 2019, para. 89.
85 | *Case of López Ribalda and Others v. Spain*, para. 89.
86 | ECtHR *Case Alkaya v. Tukey* (Appl. No. 42811/06), 9.10.2012 (final 09.01.2013.), paras. 31–33, 40–41. A well-known Turkish actress was the victim of a burglary. One newspaper published that news, citing among other information, her address. After that publication in the newspaper, people, strange people were waiting her in front of her house, so she no longer felt safe.

the Court found the violation of Article 8 in the *Case of Reklos and Davourlis v. Greece*[87], because the applicants had not consented to their newborn's photograph being taken at the private clinic.[88] In another famous case, *Von Hannover v. Germany* (No. 2), the Court proclaimed that the protection of the rights and reputation has particular importance in this area, 'as photographs may contain very personal or even intimate information about a person or his family'.[89] Therefore 'a person's image constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his or her peers.'[90] The case of *Rodina v. Latvia*[91] concluded that even a neutral photo accompanied by a story that portrays an individual in a negative light is a serious violation of their privacy, if they are not seeking publicity.[92] The Court understood how individuals can legitimately expect that their personal information would not be disclosed without their consent in the cases of *Flinkkilä and Others v. Findland*[93] and *Saaristo and Others v. Finland*.[94]

The Court showed special care toward protecting children's privacy rights, especially concerning their photos. Therefore, in the case *N. Š. v. Croatia*,[95] the Court stated that due to children's vulnerability, the protection of their personal data was essential[96] because of their 'identity, well-being and dignity, personality development, psychological integrity, and relations with other human beings'.[97] Hence, in *Bogomolova v. Russia,*[98] which concerned the publication of a child's photograph on the cover page of a booklet entitled Children need a family published by a Center for Psychological, Medical, and Social Support, ECtHR found the case to be in violation of Article 8 of the Convention.[99] In the case, the mother consented to a photo of her son being taken by one person who was traveling with them; however, she was unaware of the purpose for which the picture would be used.

87 | ECtHR *Case of Reklos and Davourlis v. Greece* (Appl. No. 1234/05), 15 January 2009 (final 15.04.2009).
88 | *Case of Reklos and Davourlis v. Greece,* paras. 41–43.
89 | *Von Hannover v. Germany* (No. 2), para. 103.
90 | *Von Hannover v. Germany* (No. 2), para. 96.
91 | ECtHR *Case Rodina v. Latvia* (Appl. Nos. 48534/10 and 19532/15), 14 May 2020 (final 14.08.2020); The applicant, together with her husband and son, brought proceedings against the publisher, the applicant's sister N.Ļ. and her niece's husband J.K. (who had made some of the contested statements) before the Riga City Centre District Court (Rīgas pilsētas Centra rajona tiesa). The applicant requested that fourteen statements in the article be declared false and that the publication of her family's photograph be declared unlawful. para. 12.
92 | *Case Rodina v. Latvia*, para. 131.
93 | ECtHR Case of *Flinkkilä and Others v. Findland* (Appl. No. 25576/04), 6 April 2010 (final 06.07.2010.), para. 75.
94 | ECtHR Case of *Saaristo and Others v. Finland* (Appl. No. 184/06), 12 October 2010 (final 12.01.2011.), para. 61.
95 | ECtHR *Case of N. Š. v. Croatia* (Application No. 36908/13) 10 September 2020 (final 10.12.2020), paras. 92–117.
96 | Guide, p. 71.
97 | *Case of N. Š. v. Croatia,* para. 99.
98 | ECtHR *Case Bogomolova v. Russia* (Appl. No. 13812/09) 20 June 2017 (final 13.11.2017), paras. 54–58.
99 | Guide to the Case-Law of the of the European Court of Human Rights- Data protection (last updated on 31 December 2021; hereinafter: Guide), p. 52, para. 229.

Similarly, in the case of *Söderman v. Sweden*, the court ruled that there was a violation of the right to private life[100] due to the absence of clear legal provisions that criminalize the act of secretly filming a naked child (minor).[101] In addition, in the case of *K.U. v. Finland*,[102] the Court found a violation of Article 8 on account of the lack of a legal basis; this was to enable authorities to oblige an internet access provider to disclose the identity of a person wanted for placing an indecent advertisement of a minor on a homosexual dating site, making the minor a target for pedophiles. This action disabled the identification of the said person to bring him to justice.[103]

Notably, the privacy protection of telecommunications and internet service users must be put in perspective. Sometimes, privacy protection is outweighed by other legitimate interests. However, in this case, there were two conflicting interests regarding the right to privacy: the right to privacy of the perpetrator and that of the minor, plus the legitimate interest to investigate and initiate criminal proceedings. Therefore, privacy protection must not present an obstacle in criminal investigation, as noted:

> An overriding requirement of confidentiality of connection data may, in some circumstances, prove incompatible with Article 8 if it impedes an effective criminal investigation with the aim of identifying and prosecuting the perpetrator of an offense committed via the Internet.[104]

The case of *Gaskin v. the United Kingdom*[105] is a well-known case representing the importance of right to privacy, in which the Court found a violation of Article 8.[106] Although the applicant was not a child when he addressed the court, the case dealt with his personal data when he was a child. Gaskin was placed in public care in the UK as a baby, where he stayed until he reached his maturity. According to his statement, he was abused during that time, and he requested access to his records kept by Liverpool Social Services.[107] Partial access was permitted to him, due to the claims of confidentiality owed to third-party contributors, which prohibited disclosure of his records on the whole. In this case, the national system failed to provide for an appeal because of the refusal by the social services to grant access to all the documents that refer to him. Hence, every system

> must protect the interests of anyone seeking to consult documents relating to his private and family life, and is only in conformity with the principle of proportionality if it provides that an independent authority finally decides whether access has to be granted in cases where a contributor fails to answer or withholds consent.[108]

100 | Art. 8.
101 | ECtHR *Case Söderman v. Sweden* (Appl. No. 5786/08); 12 November 2013.
102 | ECtHR *Case of K.U. v. Finland* (Appl. No. 2872/02), 2 December 2008 (final 02.03.2009), paras. 49–50.
103 | Guide, p. 66, para. 300; Guide, p. 22, para. 80.
104 | Guide, p. 17, para. 49.
105 | ECtHR *Case of Gaskin v. the United Kingdom* (Appl. No. 10454/83), 7 July 1989.
106 | *Case of Gaskin v. the United Kingdom*, para. 49.
107 | *Case of Gaskin v. the United Kingdom*, para. 49.
108 | Guide, p. 60, para. 272.

In the case of *Kurier Zeitungsverlag und Druckerei GmbH v. Austria*,[109] the Court found no violation of Article 10 and prioritized Article 8. The applicant indicated that their freedom of expression had been violated by German courts when they ruled in favor of the minor whose identity and personal data were published by the applicant during his parents' marital disputes.[110] In another case, *Couderc and Hachette Filipacchi Associés v. France,*[111] referring to privacy rights through opposite Prisma or the other side of the coin, of violation of Article 10, the Court ruled in favor of the applicant and its freedom of expression. The Court found how the national 'court ruling against the publication director and the publisher of a weekly magazine for publishing an article and photographs revealing the existence of a monarch's secret child'[112] which would otherwise present an invasion of the Prince's private life,[113] was in line with the ECHR. Following the criteria settled in the *Case of Axel Springer AG v. Germany*,[114] the Court found a violation of Article 10, stating that

> Domestic courts did not give due consideration to the principles and criteria laid down by the Court's case law for balancing the right to respect for private life and the right to freedom of expression, and they exceeded the margin of appreciation afforded to them and failed to strike a reasonable balance of proportionality between the measures restricting the applicants' right to freedom of expression, imposed by them, and the legitimate aim pursued.[115]

According to the Court's view, the press must not exceed certain limits, especially with regard to the protection of the privacy rights, reputation, and rights of others, as in the *Case of Kaboğlu and Oran v. Turkey*,[116] in which the Court found a violation of Article 8. However, the Court emphasized the importance of the press and its role of a 'public watchdog'[117] in providing information on all matters of public interest, especially those that can lead to useful discussion in society.[118] Hence, it highlights the importance of the press following the criteria when reporting certain events, simultaneously indicating the journalists' duty to show prudence and caution,[119] especially when children and their rights are in question.

2.2. Situation in Croatia

Despite regulations that stipulate the protection of children's privacy in the media, journalists continue to frequently violate children's rights. The Child's Ombudsman,

109 | ECtHR *Case of Kurier Zeitungsverlag und Druckerei GmbH v. Austria* (Appl. No. 1593/06), 19 June 2012 (final 19.09.2012).
110 | *Case of Kurier Zeitungsverlag und Druckerei GmbH v. Austria,* paras. 47–51; 52–62.
111 | ECtHR *Case of Couderc and Hachette Filipacchi Associés v. France* (Appl. No. 40454/07), 10 November 2015, paras. 94–153.
112 | Guide, p. 72, para. 315.
113 | *Case of Couderc and Hachette Filipacchi Associés v. France*, paras. 71, 104.
114 | *Case of Axel Springer AG v. Germany,* paras. 89–95.
115 | *Case of Couderc and Hachette Filipacchi Associés v. France*, para. 153.
116 | ECtHR *Case of Kaboğlu and Oran v. Turkey* (Applications No.1759/08,50766/10 and 50782/10), 30 October 2018 (final 18.03.2019), para. 79.
117 | *Case of Kaboğlu and Oran v. Turkey*, para. 79.
118 | *Case of Couderc and Hachette Filipacchi Associés v. France,* para. 114.
119 | *Case of Couderc and Hachette Filipacchi Associés v. France,* para. 140.

therefore, issued a recommendation to the media that specifically concerned the protection of the children's well-being.[120]

In addition, the Report on the work of the Child's Ombudsman in 2021 (hereinafter: Report)[121] stated that there were complaints "in which parents are accused of publishing children's videos–'sharenting.'[122] The Child's Ombudsman further emphasizes that a child's right to privacy is often threatened by family members, for which they often receive complaints from the children.[123] In such cases, parents neglect the welfare of their children and recklessly expose them to the public.[124] When it comes to people known to the public, such as celebrities or public figures, there are claims that they use their children or other people's children for self-promotion and material benefit.[125] There are also cases where some parents complained that the child's relatives (grandparents, uncle) publicly exhibit photos of the child without their consent, or that one parent does this against the wishes of the other parent, which happens quite often in situations of matrimonial disputes and divorce.[126]

Croatian Child's Ombudsman further states in her Report how

> Unfortunately, many parents recklessly publish numerous photos of their own and other people's children in a wide variety of situations on their publicly available profiles. Children of people who are known to the public are additionally exposed because there is a greater possibility that the media will download and publish their photos, considering that parents agree with such publications.[127]

The Child's Ombudsman points to an interesting case that has been going on for three years. It is a case of the violation of the privacy of children filmed during a diving sports competition, whose parents gave consent for the children to be filmed as part of information about the competition. However, the parents subsequently found that a large number of individual pictures of their children in bathing suits were being offered abroad to online sports stores.[128]

2.2.1. Factual context – some cases in media and on social networking sites

After a fifteen-year-old girl from Zagreb was first seriously injured, and then died because of an earthquake, she became the subject of many Croatian portals, which revealed her identity in their reports. Her photos, last homework assignment, the

120 | Preporuke pravobraniteljice za djecu o zaštiti privatnosti djece u medijima (Recommendations of the Child's Ombudsman on the protection of children's privacy in the media) [Online]. Available at: https://www.medijskapismenost.hr/preporuke-pravobraniteljice-za-djecu-o-zastiti-privatnosti-djece-umedijima/ (Accessed: 9 August 2022).
121 | Izvješće o radu pravobraniteljice za djecu za 2021 (Report on the work of the Child's Ombudsman for 2021), Zagreb, 2022 [Online]. Available at: https://www.sabor.hr/sites/default/files/uploads/sabor/2022-04-01/154306/IZVJ_PRAVOBRANITELJ_DJECA_2021.pdf (Accessed: 7 August 2022). (hereinafter: Report, 2021).
122 | Report, 2021, p. 20.
123 | Ibid., p. 19.
124 | Ibid., p. 19; also see Amon et al., 2022, p. 2.
125 | Report, 2021, p. 19.
126 | Ibid.
127 | Ibid., p. 20.
128 | Report, 2021, p. 17.

statements of her best friend and her principal, were published.[129] This is a clear case of violation of the girl's privacy. Another case of privacy violation can be seen in a report on a child as a victim of criminal offenses. The media coverage of a 15-year-old girl who was repeatedly raped, filmed, blackmailed, and abused by a group of young men was extreme. The whole case resonated widely in the media and caused conflicting reactions after it was reported to the police by the school psychologist. The coverage of the protesting people after the suspects were brought to the police was also reported. The media recorded a group of parents and relatives 'who allegedly loudly protested such a procedure by the police, accusing the victim that her behavior gave their sons a reason for a series of mass rapes over the course of a year.'[130] This is an example of the violation of a child's rights with a negative impact. A lot of data were made accessible to the public, from which the identity of that young girl could be revealed. In addition, it must be noted that even if the name, photos, or other personal data were not published and presented to the public, all data by which these children or minors could be identified are considered to be personal data, and the publication of such data would constitute a violation of the privacy right of the child. Gabelica Šupljika emphasized how

> Changing the name in the media, stating the initials, blurring the image, or covering the eyes of the child in the picture does not always mean respecting the child's privacy because his identity is indirectly revealed by numerous other [pieces of] information, noting how often it can be just the way the editor and publisher want to formally protect themselves from a possible lawsuit.[131]

There were several types of research conducted regarding the media coverage and violation of children's privacy in Croatia, by Ciboci, Jakopović Opačak, Raguž and Skelin, (2011),[132] Vlainić (2012),[133] Ciboci (2014),[134] and Ivanuš (2017),[135] and they arrived at a similar conclusion: that the media does not respect professional principles in cases where they report on children.

129 | Hrvatska tuguje za AM: Njena ulica najteže je stradala u potresu Djevojčica (15) je stradala u Đ., gdje je živjela u stanu u suterenu, na nju je pala greda. See Rimac Lesički and Šobak, 2020.
130 | Nevešćanin, 2019.
131 | Gabelica Šupljika, 2009, p. 31.
132 | Ciboci et al., 2010, pp. 103–166.
133 | Vlainić conducted research analysing two most circulated daily newspapers in Croatia in period 1.1.-28.2.2011. analysing 404 articles regarding respect of children's privacy rights by media. She concluded how child's right to privacy is violated when individually reporting on children, which is the case in 13% of articles. Cf. Vlainić, 2012, pp. 43, 54.
134 | Ciboci analysed all articles using the method of quantitative content analysis about children, which were published in all editions of two most circulated daily newspapers in Croatia (the newspapers a) for period January, 1st to June, 30th 2013. and came to the conclusion how both newspapers still often reveal the identity of children in cases where it should be protected, primarily in photographs. Cf. Ciboci, 2014, p. 12.
135 | Ivanuš has concluded in her research study which deals with the issue of mechanisms of media self-regulation regarding the protecting child's rights and interests in the media, how inspite the thorough regulation of the childrens right in media stipulated in the Code of Honor of the Croatian Journalists' Association, that journalists and editors often do not comply with its provisions. Cf. Ivanuš, 2017, p. 86.

Yet another issue, as mentioned in the synopsis, is when parents or people close to the children, publish their photos most often on social networking sites. Bilan emphasizes that children in that context are reduced to objects on social media; thus, violating and infringing their right to privacy.[136]

In one Croatian magazine, a famous pop singer shared a moment with her son, making him famous before he was one year old. Most Croatian people are now acquainted with the little boy's name and his appearance, and a lot of things he does, because the pop singer continues to publish his pictures on online platforms and magazines.[137] A very similar case was that of another famous Croatian singer who appeared in a magazine with his son, who was only a few months old.[138] We can easily follow the lives of these children.[139] They may be the children of famous parents and celebrities, but what are their best interests? They are not (yet) able to give consent regarding having their photos taken or posted. The question is, what will they think about these photos in the future? Most of these pictures are neutral, showing the children in their parents' arms, and it is quite likely that they will be glad they have these pictures published in some magazine; however, it is also possible that they may not be happy. There are children who like to be photographed and others who do not; some may be embarrassed.[140] Parents should protect their children until they are mature enough to decide whether they would like to be photographed and become a part of their parent's public life. Interestingly, and unexpectedly, from research conducted by Amon, Kartvelishvili, Bertenthal, Hugenberg, and Kapadia, it was found that fathers posted more of their children's photos than mothers did.[141]

It is possible that the behavior of grownups, especially parents, can later be transferred to the children, according to the research of Amon, Kartvelishvili, Bertenthal, Hugenberg, and Kapadia.[142] This also follows from the research conducted in Croatia by Kušić,[143] which shows 'how users aged 13–15 years (primary school students) make one-third of the population that uses Facebook in Croatia',[144] posting intimate and confidential details and photos on Facebook that their parents do not know about.[145] Hence,

136 | Bilan, 2017, p. 1752.
137 | *'100 posto Š...': M. objavila fotke nasmijanog B., zbog frizure je pravi bombončić,* Story magazine, 21 July 2022; *'Zadnja fotka ovog ljeta': Maja Šuput otkrila da je došao kraj dvomjesečnog odmora, B. frizura* ponovno oduševila, Story magazine, 27 August 2022. Magazines very often take photos from peoples Instagram or Facebook accounts (as in this case), forgetting that they should not transmit pictures of children at all without the express consent of their parents. Even when the parents agree, the editors need to carefully weigh whether the publication will harm the child. The Personal Data Protection Agency, presented an expert opinion that posts from someone's Facebook profile or other social networks cannot be further transmitted without the consent of that person. They pointed out that posting on one's own FB profile cannot automatically be considered a person's consent to the publication of the same content in public media. Cf. Milas Klarić, 2017. (It was the old Agency; before GDPR-a.)
138 | Tolić, 2022.
139 | Tolić, 2021; A.M.C., 2021.
140 | Amon et al., 2022, p. 2.
141 | Ibid., p. 19.
142 | Ibid., p. 7.
143 | Kušić, 2010.
144 | Ibid., p. 106. It must be noted how this was before GDPR.
145 | Ibid., pp. 115, 122.

Livingstone, Stoilova, and Nandagiri argue that 'children's own online practices have been under substantial scrutiny for privacy risks', and very often children's privacy is considered and viewed from the perspective of adults, especially when talking about the potential risks on the internet, forgetting that they are only children.[146] Children are vulnerable to physical and emotional pain. Therefore, there must be special regulations for their safety and the protection of their privacy.[147]

In addition, Livingstone, Stoilova, and Nandagiri note that children should have basic media literacy, which should include the

> Understanding of their data worlds, digital traces and data flows, as well as the analytical skills needed for personal data management involved in the curating and obfuscating digital data, as well as the ability to demand one's right to privacy.[148]

Grumuša, Marguerite Tomulić, and Anđelić, conducted a research in 2019 on the violation of children's privacy on Facebook by their parents, where parents were mostly unaware of their actions being wrong, if not illegal. Research showed that more than half of the respondents posted photos of their own children on Facebook, and most of them did not ask their children for permission (80%),[149] while only 20% asked for the children's permission.[150] More troublesome is that the majority of parents were revealing their children's identities, showing them in full profile, totally oblivious of the violations to the children's rights and possible danger. Parents and other related people should ask the children if they want their photos to be published on their Facebook accounts, and such actions would be in accordance with Article 24 of the EU Charter and Article 12 of the Convention on the Rights of the Child. On the other hand, if the parents decide that is not in the child's best interest to post the picture on social media, even if their child is asking for it, they should not. The reason lies in the fact that the (Croatian) law gives full confidence to the parents, and it is up to them to decide what is in the best interest of their child. The same opinion is held by Gabelica Šupljika, who notes how

> Revealing the child's privacy can harm the child in many ways. Its can threaten their development, satisfaction of their needs, self-image, and relationship with the social environment. Unfortunately, parental consent and/or the child's consent to media exposure are not always in the child's best interest. Therefore, until every parental decision is in the interest of the child and until media 'workers' in the dilemma between the interests of the public and the rights of the child decide for the public, both parents and media workers are needed to raise additional awareness of the threat to the child's well-being through media coverage.[151]

146 | Livingstone et al., 2018, p. 29.
147 | Ibid., p. 29.
148 | Ibid., p. 24.
149 | Grumuša et al., 2019, p. 90.
150 | Ibid., p. 90.
151 | Gabelica Šupljika, 2009, p. 31.

2.2.2. Legal context

In Croatia, there is no singular definition of privacy or right to privacy. However, the Constitution,[152] provisions of ratified conventions, GDPR, and many national laws, guarantee the right to privacy—for example, the Media Act (subsequently: MA),[153] Electronic Media Act (subsequently: EMA),[154] Electronic Communications Act (subsequently: ECA),[155] and Consumer Protection Act (subsequently: CPA).[156] Therefore, the Consumer Protection Act explicitly forbids merchants from transferring personal data to any third person, contrary to the acts that regulate the protection of personal data—GDPR (Article 11),[157] and obliges merchants to process data in accordance with the GDPR (Article 83 paragraphs 5 and 6), while the Electronic Communications Act protects privacy and personal data explicitly in Articles 5 and 42 paragraph 1, 43, 44, and 99a.

Furthermore, the Media Act defines privacy as family, personal life, and the right to live according to one's own choices.[158] Article 7 of the Act regulates the right to privacy of each individual (and of course children) as a right which is enjoyed by every person,[159] including those performing a public service or duty 'except in cases related to public service or duty performed by a person.[160] Such regulation is in line with the ECtHR case law, which provides protection to the public and 'relatively' public figures from an invasion of privacy, if the recordings are not related to the function they perform.[161] There are also provisions that regulate special cases where a person attracts public attention with their statements, behavior, and other acts from personal or family life. Therefore, the Act stipulates that in such cases these people cannot 'demand the same level of privacy as other citizens.'[162] Their right to privacy is narrower.

In cases where legitimate public interest prevails over privacy protection, there is no protection of privacy.[163] These provisions are often used to shield the media and press

152 | Constitution of the Republic of Croatia, Official Gazette, 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14.
The right to privacy, takes several forms and different Constitutional provisions guarantee its protection, e.g. Art. 34 guarantees the inviolability of the home, as a form of privacy. Art. 35 guarantees everyone the right to personal and family life, dignity, honour and reputation, while Art. 36 prescribes the freedom and secrecy of correspondence and all other forms of communication. Art. 37 guarantees the security and confidentiality of personal data and Art. 40 the right to religion and religious beliefs. All the above articles of the Constitution guarantee various forms of privacy, and point to the need to protect them by law. Interpretation of the above provisions of the Convention and the Constitution of the Republic of Croatia leads to the interpretation that no one (government or other persons) may take actions that would limit the rights of others largely than provided by the relevant provisions of these documents.
153 | The Media Act, Official Gazette, 59/04, 84/11, 81/13.
154 | The Electronic Media Act, Official Gazette, 111/21.
155 | The Electronic Communications Act, Official Gazette, 73/08, 90/11, 133/12, 80/13, 71/14, 72/17.
156 | The Consumer Protection Act, Official Gazette, 19/22.
157 | It also regulates the protection of personal data in cases of determination of the contract (Art. 83).
158 | Art. 2 of the MA.
159 | Art. 7 para. 1 of the MA.
160 | Art. 7 para. 2 of the MA.
161 | See case *Von Hannover v. Germany* (No. 2) paras. 31, 32; *Case of Axel Springer AG v. Germany,* paras. 89–95.
162 | Art. 7 para. 3 of the MA.
163 | Art. 8 of the MA.

from lawsuits. Further on, Electronic Media Act forbids the publication of information that reveals:

> The identity of a child under the age of 18 involved in cases of any form of violence, regardless of whether the witness, victim or perpetrator, or the child attempted or committed suicide, nor disclose details of the child's family relationships and private life,[164] and personal data of minors collected or otherwise obtained by media service providers within the framework of technical measures for the protection of minors may not be processed for commercial purposes, such as direct marketing, profiling, and targeted behavioral advertising.[165]

However, such a stipulation does not explicitly exist in the MA, but the publisher can be held liable for damage, if the damage is caused by the publication of the personal data of the minor.[166]

GDPR is part of the Croatian internal national legal system,[167] as stated by the Implementation of the General Data Protection Regulation Act (IGDPRA).[168] Therefore, violations of the privacy of the child are to be reported to the Croatian Personal Data Protection Agency (hereinafter: Agency or PDPA).[169] There were such cases in Croatia, as can be seen from the Report on the work of the Child's Ombudsman in 2021.[170]

However, besides the GDPR and mentioned regulations, special provisions which regulate the protection of child privacy can be found in the Family Act (subsequently: FA),[171] in Youth Courts Act (subsequently: YCA)[172] which is a child-friendly act[173] and Penal Code (hereinafter: PC)[174] which applies *ultima ratio*.

164 | Art. 24 para. 5 of the EMA.
(5) It is not allowed to publish information revealing the identity of a child under the age of 18 involved in cases of any form of violence, regardless of whether the witness, victim or perpetrator or the child attempted or committed suicide, nor disclose details of the child's family relationships and private life.
165 | Art. 24 para. 6 of the EMA.
(6) Personal data of minors collected or otherwise obtained by media service providers within the framework of technical measures for the protection of minors may not be processed for commercial purposes, such as direct marketing, profiling and targeted behavioural advertising.
166 | Art. 6 para. 5 of the MA.
167 | 'Consequently, on 27 April 2018, the Republic of Croatia adopted the Act on the Implementation of the General Data Protection Regulation which entered into force on 25 May 2018 (OG 42/18)' and the Agency as a supervisory body is founded by that Act – information [Online]. Available at: https://azop.hr/rights-of-individuals/ (Accessed: 28 March 2022).
Personal data protection in Croatia, before GDPR, was regulated by the Personal Data Protection Act (Official Gazette, 103/03, 118/06, 41/08, 130/11, 106/12), which was in force until the end of May 2018.
168 | Implementation of the General Data Protection Regulation Act, Official Gazette, 42/2018.
169 | For more information see Croatian Personal Data Protection Agency [Online]. Available at: https://azop.hr/naslovna-english/ (Accessed: 15 March 2022).
170 | Report, 2021, p. 14.
171 | Family Act, Official Gazette, 103/15, 98/19.
172 | Youth Courts Act, Official Gazette, 84/11, 143/12, 148/13, 56/15, 126/19.
173 | Special protection of the privacy of minors regarding actions taken in the proceeding e.g. the proceeding is secret, etc. and other actions which can have a detrimental effect on the development of minors and there are a lot of provision which protect minor's identity. Therefore, for example it is prohibited to publish the course of the proceedings, as well as the decisions made without the approval of the court. Art. 60 of the YCA.
174 | The Penal Code, Official Gazette, 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21.

Consequently, the Penal Code protects the privacy right of the child with criminal offense Violation of the Privacy of the Child—Article 178 PC, which is placed in offenses against Marriage, Family, and Children. Criminal prosecution can be instituted against persons who

> Disclose or transmit something from the child's personal or family life, publish a child's photograph, or reveal the child's identity contrary to regulations, which caused the child anxiety, ridicule of peers or other persons, or otherwise endangered the child's welfare.[175]

This person can be anyone. Even the parents of the child. When it comes to the victims, a person under the age of 18 is considered a child. Perpetrators can be sanctioned for the basic offense, with imprisonment for a term not exceeding one year.[176] There are also aggravated forms of offense. When the offense is perpetrated in public, or in such a manner that the private details of the child become available to a larger number of people, the stipulated sentence is imprisonment for up to two years.[177] When it is perpetrated by an official person or in the performance of a professional activity, then the stipulated sentence is imprisonment for a term not exceeding three years.[178] Taking this into consideration, it must be noted how not every publication of the child's photo will constitute a criminal offense, but only those that lead to the abovementioned consequences of the criminal offense. In other words, publishing photos that are 'contrary to regulations, which caused the child anxiety, ridicule of peers or other persons, or otherwise endangered the child's welfare',[179] will lead to a criminal offense.

However, the field of protection of children's privacy rights in Croatia is not devoid of problems. Although the Family Law protects the rights and well-being of the child, and by its provision, parents are obliged to and responsible for protecting the rights and well-being of their children—and in certain cases also other close family members—,[180] it seems that parents often do exactly the opposite, as shown by the Child's Ombudsman's Report.[181] Furthermore, in the report, it is stated that the media and press have still not found their way into this field.[182] However, they are in contact with the Child's Ombudsman more often, asking for advice on how to act in these situations.[183]

Currently, the legal regulation of child privacy protection in Croatia is almost entirely in the hands of parents. Therefore, the publication of information about the child is up to the consent of the parents.[184] Currently, there is no regulation in accordance with Article

175 | Art. 178 para. 1 of the PC.
176 | Art. 178 para. 1 of the PC.
177 | 'Whoever commits the act referred to in para. 1 of this Art. through the press, radio, television, computer system or network, at a public gathering or in any other way due to which it has become accessible to a larger number of persons, shall be punished by imprisonment for up to two years.' Cf. Art. 178 para. 2 of the PC.
178 | 'Whoever commits the act referred to in paras. 1 and 2 of this Art. as an official person or in the performance of a professional activity, shall be punished by imprisonment for a term not exceeding three years.' Cf. Art. 178 para. 3 of the PC.
179 | Art. 178 para. 1 of the PC.
180 | Art. 127 para. 1 of the FA.
181 | Report, 2021, pp. 19–20.
182 | Ibid., p. 14.
183 | Ibid., p. 17.
184 | See Ibid., p. 20.

24 of the Charter of Fundamental Rights of the European Union, which stipulates the right to express their views freely, which 'shall be taken into consideration on matters which concern them in accordance with their age and maturity' and Article 12 of the Convention on the Rights of the Child which has similar content, but it should be seriously considered. Of course, when children, as a vulnerable population, are in question, in the context of their inability to fully consent to sharing their information online, there is always the question of age. When can children give their full consent to publishing their photos and other personal information on the internet, or give permission to their parents or others for 'sharing' or collecting their data? Most parents do not receive children's consent prior to posting,[185] and rarely ask for their consent before posting information about them, mostly because the child is too young to provide permission.[186]

Amon, Kartvelishvili, Bertenthal, Hugenberg, and Kapadia, raise the question of the suitable age for consent. They noted how *Ouvrein and Verswijvel,*[187] who conducted the research based on a focus group study, provided a solution to this problem. The solution was created by the adolescents in the focus group. When 'the adolescents were asked about the child's age at which parents should ask for permission before posting online, they agreed on the age of 13 as their general consensus.'[188]

Interestingly,[189] as Amon, Kartvelishvili, Bertenthal, Hugenberg, and Kapadia note, France granted children the legal right to ask their parents to remove or not publish their photos. Therefore, they conclude that 'sharing private photos of children without their consent could cost parents up to 45,000 euros in fines or imprisonment for up to one year.'[190]

This is not only a situation when children's rights are in question, but anyone whose personal information was published without their consent.[191]

In addition, France has a law aimed at strengthening parental control over the means and ways of access to the internet.[192]

Croatia should also consider the possibility of a more comprehensive approach to this problem and seek a solution through additional regulation, either in civil law or even in misdemeanor or criminal law.

2.2.3. Statistics – statistical context

2.2.3.1. CBS data

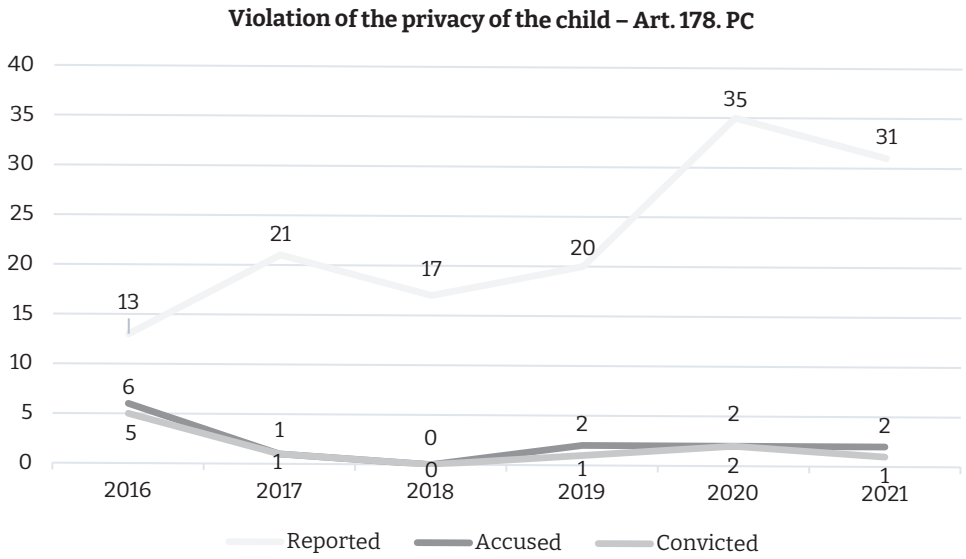
Croatian Bureau of Statistics (CBS) data for criminal offenses against privacy of the child. Violation of privacy of the child[193] will be observed and analyzed for the period 2016-2020.

185 | Amon et al., 2022, p. 12.
186 | Ibid., 2022, p. 21.
187 | See Ouvrein and Verswijvel, 2019, pp. 319–327.
188 | Amon et al., 2022, p. 21.
189 | See also media coverage, Staufenberg, 2016.
190 | Amon et al., 2022, p. 5.
191 | See also media coverage, Fraser, 2012.
192 | The Law is available in France (*LOI n° 2022-300 du 2 mars 2022 visant à renforcer le contrôle parental sur les moyens d'accès à internet)* [Online]. Available at: https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000045287677 (Accessed: 4 October 2022).
193 | Art. 178 of the PC.

Table 1. Violation of privacy of the child[194]—adult perpetrators (reported, accused, and convicted) in period 2016-2021

Year	Reported	Accused	Convicted
2016	13	6	5
2017	21	1	1
2018	17	0	0
2019	20	2	1
2020	35	2	2
2021	31	2	1
Total	**137**	**13**	**10**

Graph 1. Violation of the privacy of the child[195]—adult perpetrators (reported, accused, and convicted) in period 2016-2021



Analyzing the data, most of these offenses were found to be reported in 2020 (35), and 2021 (31). The highest number of accusations and convictions were in 2016 (6/5). However, we must bear in mind that criminal proceedings last, on average, for about three years. Therefore, this is not a real indicator of the situation. From the presented data, it can be said that the reports are in ascending order, with fluctuations. The worrying figures are with regard to the convictions. There were very few convictions in relation to the reported

194 | Art. 178 of the PC.
195 | Art. 178 of the PC.

persons, 10 in total for the observed period (2016–2021). There was a decrease in convictions until 2018, after which the line is flat and near the X-axis. The reasons for such a situation can only be speculated upon until some qualitative research is conducted.

2.2.3.2. The Office of Child's Ombudsman data

In 2021, the Office of Child's Ombudsman acted on 83 individual cases related to the child's right to privacy. Most reports were in connection with the privacy of children in the media—including all social media—, institutions—schools, kindergartens, social welfare institutions, and hospitals—, sports clubs, family, and in other places.[196] In many cases, the Child's Ombudsman forwarded their complaints to the Personal Data Protection Agency (hereinafter: Agency or PDPA)[197] or referred the plaintiff to the contact agency directly as a body authorized to supervise[198] the processing of personal data in accordance with the Implementation of the General Data Protection Regulation Act (IGDPRA).[199] Most reports of violations of children's privacy in the media were related to using their photos or videos during the campaign for local elections, which was usually interpreted as an exploitation of children for propaganda, in order to achieve political goals.[200]

3. Concluding remarks and discussion

Child privacy protection in the Croatian legal system is not entirely covered. Children and their privacy rights do not enjoy suitable protection, despite the existing norms of different international and regional documents and national laws. National laws do not cover or regulate the situation of the child's privacy violation by their parents, as could be seen from the Child's Ombudsman Report. According to the Report of the Office of Child's Ombudsman in 2021, there have been 83 individual cases related to children's right to privacy. Among these, not all are related to the violation of the privacy rights of the children by their parents. In the Report, different types of violations of a child's privacy rights are mentioned.

In extremely difficult cases, some violations can ultimately constitute criminal offenses of Violation of the privacy of the child,[201] by the parents, and even in cases of 'sharenting' mentioned in the paper, but it may be assumed that such situations will be rare. In Croatia, after consulting the CBS data, it was found that there have been only 10 convictions for criminal offenses violating the privacy of the child[202] in the 2016–2021 period.

196 | Report, 2021, p. 14.
197 | More information about the Agency see [Online]. Available at: https://azop.hr/about-the-agency/ (Accessed: 8 August 2022).
198 | Report, 2021, p. 14.
199 | Agency can initiate some administrative proceedings and impose some administrative sanctions, but also can forward the case to the State Attorney's Office if misdemeanour criminal offense is committed. When Agency decide to conduct the proceeding and to act then its decision constitutes the administrative act on which can be file a lawsuit to the administrative court. (Arts. 33–35 of the IGDPRA.)
200 | Report, 2021, p. 15.
201 | Art. 178 of the PC.
202 | Art. 178 of the PC.

For further discussion, the situation must be divided into two groups. The first is when the existing legislation is suitable for child privacy protection rights, but in some cases is not obeyed (media and press coverage). The more worrisome situation when there is no suitable legislation for the protection of the privacy of the children. There is a lack of legislation, *lacuna legis*, considering privacy protection rights in relation to (underage) child parents. In such situations, today in Croatia, children do not enjoy privacy protection from the violations of their parents. Everything concerning publishing photos or videos of children on social in the hands of parents. They are responsible for their children.

Interestingly, the GDPR and IGDPRA note how 16 is the age limit to give consent to the collection and processing of the child's personal data in Croatia. In that regard, it should also be the limit for children to give their consent regarding publishing and posting photos, and disposal of their privacy rights.

However, this limit may seem too high. Perhaps 13 should be age the limit for valid consent on publishing or posting their photos, as arrived at in the study on focus groups consisting of adolescents, which was conducted by *Ouvrein and Verswijvel;*[203] (or 12 or maybe even 10). In any case, it is up to the legislator to decide; but before determining the age limit, it is advisable to conduct additional research regarding the maturity of children to provide fully valid consent.

Therefore, while thinking about which approach and age limit to take, the legislator must bear in mind that the internet is a dangerous place for privacy. Such an environment is fertile ground for abuse. The right to privacy (especially for children) is threatened by potentially unauthorized collection, storage, sharing, etc. of their data. Children are a vulnerable group, and very often are not aware of the menace on the internet. They can be easily manipulated, endangered, and hurt on the internet. The benefits of modern society offered by today's technology attract an increasing number of users, including children. These users leave a (personal) trace, that is, information, which can be further disseminated, or even sold. Information today, as can be understood from some of the research presented in the paper, is money.[204] Therefore, it can be stated that information these days information 'makes the world go'.

There are different types of information on the internet. The most interesting are the personal kind, which we leave all over the web. Thus, this information can remain there for a long time. The time of the printed press is in the past. There should be a new phrase: 'once on the internet, always on the internet.'

The responsibility to secure the child's privacy in all spheres, prevent unlawful behavior, and reduce risks, does not only rest on the legislators, but also the media and press, society, schools, and most importantly, parents.

Therefore, awareness should be raised among young people about online privacy, policies of media, platforms, and willingness to provide personal information online. In addition, children should be educated regarding possible risks and 'the effects of privacy disclosures (including reputational damage, blackmailing, stalking or identity theft), issues related to participation on social networking sites', as noted by Livingstone, Stoilova, and Nandagiri.[205]

203 | Amon et al., 2022, p. 21.
204 | Gleick, 2011, pp. 14–15; see also Stephenson, 2021; Goldstein, 2011.
205 | Livingstone et al., 2018, p. 28.

The media and parents should be especially cautious and vigilant, and journalists and editors must constantly upgrade and nurture their knowledge of children's rights, because their role in reporting on children is decisive.

The people who should protect children and their rights and interests are definitely their parents. It is presumed that they will know what is in their child's best interests and promote it. Unfortunately, as this paper shows, this is not always the case. This phenomenon is not local in nature. It is global, and from the research of Amon, Kartvelishvili, Bertenthal, Hugenberg, and Kapadia,[206] it seems to be spreading like a virus, which must be stopped, or at least reduced. The question is, in whose interest is this? This model satisfies everybody's interests, except those of the children. It satisfies the celebrities (they get more popular), the newspapers (they have more profit), and the public (it quenches their curiosity). Children have the right to privacy, but currently in Croatia, protection of children's right to privacy is totally under the control of their parents. The children in Croatia, as stated earlier, do not actually enjoy the right to protect their privacy from their parents (unless a criminal offense is committed). Therefore, it can be said that they have the right to privacy, but not from their parents. This seems wrong. As stated at the beginning of the paper, everyone has the right to privacy and protection.

herefore, it can be concluded that there should be new, additional regulations to provide better and more comprehensive protection of privacy rights of the children (as in France), and maybe even a new incrimination (criminal offense), regulating situations when parents and other closed relatives or people are 'sharenting' without the children's consent.

206 | Amon et al., 2022, p. 18.

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NON-TERRITORIAL AUTONOMY AND THE LEGAL PROTECTION OF THE SYMBOLS OF RELIGIOUS ORGANIZATIONS AND NATIONAL MINORITIES IN SERBIA

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ABSTRACT

This paper scrutinizes the history of legal rules that regulate the appearance and use of state symbols as well as the evolution of the legal protection of symbols of national minorities and religious organizations. Furthermore, it analyses the history of non-territorial cultural and religious autonomy arrangements in Serbia. It investigated to what extent the institutional arrangements of non-territorial autonomy contributed to the legal protection of the mentioned symbols. The first hypothesis is that certain rudimentary forms of non-territorial autonomy existed in Serbia during the 19th and the first half of the 20th century. However, the focus of legislators in this period was on the regulation and protection of state symbols. In the second half of the 20th century, the preconditions for the development of the protection of national minorities were created, while the scope of the rights of religious organizations was significantly reduced. It was only at the beginning of the 21st century that the collective right to non-territorial autonomy was constituted. At the same time, constitutional and legal provisions protected the right of national minorities to choose and use symbols, which leads to the conclusion that the existing institutional arrangement of non-territorial autonomy contributed to better legal protection of the symbols of national minorities. On the other hand, there is room for additional improvement in the legal protection and regulation of the use of the symbols of religious organizations.

KEYWORDS

national minorities
religious organizations
non-territorial autonomy
symbols
Serbia

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https://doi.org/10.55073/2023.1.59-74

1. History of the legal protection of state, national, and religious symbols in the Principality and Kingdom of Serbia

Strict feudal organizations had not been established in Orthodox European countries for a long time. This is why the coats of arms and western heraldic customs appear relatively late. In Serbia, various heraldic influences became apparent only in the second half of the 14th century.[2] Two symbols were taken from Byzantium and were somewhat modified: a *crux quadrata* with furisons and a two-headed eagle.[3] In later sources, the coat of arms of Serbia appears as a cross with four furisons: *crucem cum quatuor igniariis, quae fusilia diciorus*.[4] The Serbian Orthodox Church also integrated it as a symbol in its coat of arms during the 18th century, and it has been on its coat of arms to this day.[5] In contrast, the double-headed eagle was considered the coat of arms of the Nemanjić dynasty, the most prominent Serbian medieval ruling family.[6] This is the reason this symbol later came into official use. In any case, during the 19th century, both heraldic signs came into use when the Serbian coat of arms and flag were made official.

During the First Serbian Uprising, which lasted between 1804 and 1813, no final decision was made as to which of the various coats of arms in use would be officially accepted.[7] In contrast, the leader of the Second Serbian Uprising, Prince Miloš Obrenović, had no dilemmas. He used only the coat of arms of Serbia and made great efforts for Serbia's right to acquire and freely use its state symbols to be recognized. For this reason, the first draft of the Serbian constitution from 1820 contained a provision on the freedom of trade on land and water under the Serbian flag.[8] This proposal was changed by Russian ambassador Stroganov, who believed that the provisions on the Serbian trade flag would create difficulties in negotiations with the High Porte and question the sovereignty of the Ottoman Empire.[9]

However, the use of the Serbian coat of arms has become widespread. During this period, Serbian state symbols found their place on stamps used by state bodies.[10] Then, in 1830, at the personal initiative of a blacksmith from Zemun, the Serbian coat of arms was displayed on the prince's residence in Belgrade during the enthronement of Prince Miloš.[11] The state coat of arms of the Principality of Serbia was printed on the first issue of the official gazette—Serbian Newspaper—, published on January 5, 1834.[12] Finally, the

2 | Novaković, 1884, p. 42.
3 | Solovjev, 2000, p. 39.
4 | Du Cange, 1680, p. 293.
5 | Constitution of the Serbian Orthodox Church, Glasnik the official gazette of the Serbian Orthodox Church, No. 7-8/1947, Art. 3.
6 | Solovjev, 2000, pp. 85–91; Rajić, 1794, p. 683.
7 | In that period, the coats of arms of Serbia, Bosnia, Triballia, and Nemanjić were used, which were taken from Stemmatografia of Hristofor Žefarović, published in 1741 in Vienna. Stemmatografia of Pavle Ritter (Vitezović), published in Vienna in 1701, probably also had been used as a source.
8 | Gavrilović, 1908, p. 469.
9 | Ibid., p. 475; Prodanović, 1936, pp. 25–27.
10 | Gavrilović, 1908, pp. 705, 729.
11 | Ibid., p. 296.
12 | Novaković, 1884, p. 123.

state coat of arms and the flag were made official in the Constitution adopted on February 2, 1835. The second chapter of the Constitution is entitled 'Color and coat of arms of Serbia' and it regulates the appearance of the national flag and coat of arms. The folk color—flag—is light red, white, and steely dark.[13] The coat of arms of Serbia was actually taken as the national coat of arms, that is, Cross on red field, and between the arms of the Cross, in four equidistant places, furisons facing the Cross are planned. The novelty is that the coat of arms has green mantling on the right side of an oak and on the left side of an olive leaf.[14] The day after the adoption of the Constitution, at the service in Kragujevac, the Metropolitan of Serbia consecrated not only the text of the new Constitution but also the flag with the coat of arms and colors of Serbia.[15] All the above shows how much importance was attached to the new state symbols, which were raised to the sacred level, as symbols of statehood and freedom. Unfortunately, international circumstances did not support the new Serbian Constitution. Under pressure from Austria, Russia, and the Ottoman Empire, Prince Miloš suspended the 1835 Serbian Constitution, only six weeks after it was adopted. Although briefly implemented, this Constitution had a significant impact on the development of Serbian constitutionalism.[16]

Although the struggle to adopt the new Constitution did not give the expected results, efforts continued toward the official recognition of state and legal features. These efforts yielded the first results when, in 1835, by Sultan's decree, the Serbian people were given a tricolor flag with horizontal stripes: red, blue, and white.[17] These colors were already known in Serbia because they are national Russian colors, placed in reverse order. The choice of colors was not by accident. Russian diplomacy opposed the use of the Serbian coat of arms and flag, believing that this violated the sovereignty of the Ottoman Empire. The argument of the Serbian side was that the prince's coat of arms on the national flag does not violate the sovereignty of the sultan any more than the coats of arms of Russian barons and princes violate the sovereignty of the Russian tsar.[18] The choice of the flag, with colors similar to those of the Russian flag, was supposed to make it easier to gain Russian support in the struggle for the legalization of Serbian state symbols.

Although there was a need for a new constitution, its drafting progressed extremely slowly. The High Porte and Russia insisted that provisions on the coat of arms and flag should not be included in the text of the new constitution. Realizing that the issue of state flags would not be resolved by the Constitution, the Serbian delegation applied a tactic similar to that of Prince Miloš a few years earlier.[19] The new Constitution was adopted in 1838 in the form of a solemn order of the Sultan's edict (*hatt-i sharif*), while the issue of the flag and coat of arms was regulated by a special Sultan's decree (*ferman*) from December of the same year. Thus, finally, the Serbian coat of arms, taken from the old Stemmatography, became a recognized coat of arms of the Principality of Serbia with the addition of the prince's crown and purple, and a mantling of olive and oak twigs. In addition, the

13 | This provision was written under the influence of the theory of national colors (*Nationalfarben*), according to which the colors of the flag should correspond to the colors of the coat of arms. Solovjev, 2000, p. 59.
14 | Constitution of the Principality of Serbia, Second chapter.
15 | *Новине Србске* (Serbian Newspaper), No. 6 of 9. 02.1835, p. 43.
16 | Mirković, 2017, p. 130.
17 | Solovjev, 2000, p. 372.
18 | Cuniberti, 1901, p. 435.
19 | *Spomenik Srpske Kraljevske Akademije*, No. 6, pp. 47–48.

arrangement of colors on the flag remained the same, with the addition of four stars on the red field, which, according to some interpretations, marked the vassal status of Serbia as the fourth vassal principality in the empire, along with Wallachia, Moldavia, and Samos.

Despite the fact that several constitutional projects were drafted and the Constitution was passed,[20] after the adoption of the *ferman* which determined the appearance of the Serbian coat of arms, the provisions on the flag in the coat of arms were not included in any of those texts. From 1838, Serbia's coat of arms remained in use until the proclamation of the Kingdom of Serbia in 1882. All this shows that the struggle for independence was conducted not only at the military, diplomatic, and international level, but also at the level of state and legal symbols. The great importance of this issue is best shown by the difficult negotiations that went on for several years between the representatives of Russia, the Ottoman Empire, and the Principality of Serbia. The recognition of national and state symbols was indeed an introduction to the final gain of international legal subjectivity and international recognition of the independence of the Principality of Serbia. This occurred at the Berlin Congress in 1878.

The first Constitution of the Kingdom of Serbia was adopted in 1888. In the first part of the Constitution, Article 2 is Article 1 of the Law on the Coat of Arms of the Kingdom of Serbia. In regard to the flag, the Constitution prescribes that the national colors are red, blue, and white.[21] The 1901 Constitution prescribes the appearance of the coat of arms in a very similar way, but regulates the appearance of the flag in more detail: 'The national flag is tricolor with red on top, blue in the middle, and white on bottom.'[22] The last constitution of the Kingdom of Serbia was adopted in 1903, and with regard to constitutional regulations on the coat of arms and the flag, it does not differ at all from the Constitution of 1888.[23] Special regulations regulated the appearance of military flags in various units of the Serbian army.[24]

The aforementioned regulations on state symbols that were passed in this period of Serbian history regulate only the appearance of state flags but not the manner of their display and their use in general. As there are no rules on the use of state flags, there are no penalties for the possible misuse or desecration of state symbols. If we see that the monarch himself—prince or king—is also a symbol of statehood, it should be noted that the Criminal Code of 1860 prescribed the death penalty for acts directed against the person of the ruler—such as attempting to take the life, handing over the ruler to the enemy, and violent overthrow—, while any violence against the ruler or heir to the throne without the intention of depriving him of life was punishable by imprisonment for 15 years.[25] In addition, insulting civil servants and officials when they were performing their official duties was particularly punished.[26] Taking into account all the above, it can be concluded that the issue of state symbols in the principality and Kingdom of Serbia had a special weight as part of the overall struggle for liberation. More detailed regulations on their use

20 | Pržić, 1924, pp. 42–48; Pržić, 1925, pp. 207–219. 1869 Constitution of the Principality of Serbia.
21 | Constitution of the Kingdom of Serbia, *Srpske novine*, No. 282/1888.
22 | Constitution of the Kingdom of Serbia, *Srpske novine*, No. 76/1901.
23 | Constitution of the Kingdom of Serbia, *Srpske novine*, No. 127/1903.
24 | Decree on the flags of our army, *Srpske novine*, No. 177/1884. Decree on the flags of our army, *Srpske novine*, No. 269/1906.
25 | The 1860 Criminal Code, Arts. 85, 86 and 89.
26 | The 1860 Criminal Code, Art. 93.

have not been enacted, but the focus has been on their design and detailed regulation of their appearance.

In the Principality and Kingdom of Serbia, there were no rules regulating the use and protection of national symbols of different national groups and minorities. Although the legislation mentions the symbols of the Serbian Church,[27] the use and protection of the symbols of religious communities were not regulated in detail. The legislator focused on national and state symbols that were regulated for the very first time in this period.

During Ottoman rule over Serbia, a specific institutional arrangement of non-territorial autonomy was established. This is the Ottoman Millet System. In the Ottoman Empire, 'there was a parallel system of non-territorial governance based on the coexistence of religious/cultural communities called the millets, literally 'nations', which were given religious and cultural autonomy.'[28] The Ottomans conferred autonomy to religious groups on a non-territorial basis, while religious leaders were functionaries of the Ottoman state. In the Principality and Kingdom of Serbia, two types of non-territorial autonomy can be identified. The first is the Gypsy tax collector, who retained juridical and administrative jurisdiction over the nomadic Roma.[29] The second is religious and educational autonomy, which was important for the development of the Serbian Jewish community.[30]

2. The Kingdom of Yugoslavia

The Kingdom of Serbs, Croats, and Slovenes was officially declared at the end of 1918 and internationally recognized during the Paris Peace Conference in 1919–1920.[31] The 1921 Constitution of the Kingdom of Serbs, Croats, and Slovenes regulated the appearance of the state coat of arms and flag. The coat of arms was a combination of Serbian, Croatian, and Slovenian coats of arms placed on the chest of a double-headed eagle.[32] A short provision regulates the appearance of the state flag: 'The state flag is blue, white, red, in a horizontal position to the upright spear.'[33] Unlike the coat of arms, the flag was not a combination of previous national flags, although they were composed of the same colors. The flag of the new state was new in that respect, although it was identical to the tricolor adopted at the Pan-Slav Congress in Prague in 1848.[34] The shape and dimensions of the flag were not prescribed in detail, except for ship flags, which will be discussed later. The military flag was the same color as the state flag, and its use was regulated by the Decree on the Flags of the Army of the Kingdom of Serbs, Croats, and Slovenes from 1924.[35]

27 | Law on eastern-orthodox church authorities, Art. 224.
28 | Erk, 2015, p. 127.
29 | Janković, 2016, p. 323.
30 | Đurić, 2019, pp. 12–13.
31 | Radojević and Dimić, 2014, p. 274.
32 | Constitution of the Kingdom of Serbs, Croats, and Slovenes, Art. 2.
33 | Art. 2, para. 2 of the Constitution from 1921.
34 | Mønnesland, 2013, p. 36.
35 | Decree on the flags of the army of the Kingdom of Serbs, Croats, and Slovenes, Official Military Gazette, No. 2515/1924.

The legal status of minorities in the Kingdom of Yugoslavia was regulated by international treaties concluded at the Paris Peace Conference in 1919,[36] by bilateral agreements between Yugoslavia and a small number of European states, and by its internal law.[37] The 1921 Constitution and a large number of laws and by-laws regulated the rights of minorities in the fields of education, publishing, sports, etc. Apart from the rights guaranteed to minorities by general legislation,[38] certain minorities were additionally protected by bilateral agreements concluded by the Kingdom of Yugoslavia with several neighboring countries.[39] Although international treaties—bilateral and multilateral—recognized certain rights of members of a certain number of minorities, the legal subjectivity of the minorities themselves and their collective rights were not recognized. Therefore, non-territorial autonomy based on ethnic criteria was not established during this period. This is probably why there were no specific regulations regulating the legal protection of the symbols of various minorities in the Kingdom of Yugoslavia.

Regarding religious organizations, special laws regulated their legal status, and constitutions regulated the issue of their internal organization. The constitutions were drawn up by the competent authorities of religious organizations, and they came into force after publication in official journals. Although five constitutions of recognized religions in the Kingdom of Yugoslavia were adopted,[40] only the Constitution of the Serbian Orthodox Church contained a provision about its coat of arms.[41] However, it does not contain more detailed rules on the display, use, and legal protection of that coat of arms. Generally speaking, the use of religious symbols in public spaces was common, but at the same time, unregulated. The same applies to the symbols of religious organizations and their organic parts. From everything stated in this part of the paper, clearly, the use of national symbols within the framework of religious activities has attracted greater public attention and somewhat greater resistance among members of different nations. This clearly indicates that tensions between different nations in the Kingdom of Yugoslavia had a dominantly national and only then—and not always—religious character.

For the use of new state symbols to come to life in a multinational state, it was necessary to regulate their use and the use of earlier state symbols. The statement of the Ministry of Internal Affairs of the Kingdom of Serbs, Croats, and Slovenes on how the state authorities and public institutions act arbitrarily regarding the display of flags during

36 | Treaty between the Principal Allied and Associated Powers and the Kingdom of Serbs, Croats, and Slovenes. [Online]. Available at: http://www.forost.ungarisches-institut.de/pdf/19190910-3.pdf (Accessed: 27 August 2022).

37 | Obradović, 2018, p. 1172.

38 | E.g. The laws that regulated the election of deputies and senators guaranteed the political rights of minorities. The Law on National Schools regulated the education in the languages of minorities.

39 | Such bilateral agreements were signed with Czechoslovakia, Italy, and Romania.

40 | Constitution of the Serbian Orthodox Church, Official Gazette of the Kingdom of Yugoslavia, No. 86/1931; Constitution of the Reformed Christian Church of the Kingdom of Yugoslavia, Official Gazette of the Kingdom of Yugoslavia, No. 36/1933; Constitution of the Islamic Religious Community of the Kingdom of Yugoslavia, Official Gazette of the Kingdom of Yugoslavia, No. 036/1933; Constitution of the German Evangelical Christian Church of the Augsburg Confession in the Kingdom of Yugoslavia, Official Gazette of the Kingdom of Yugoslavia, No. 101/1930; Constitution of the Slovak Evangelical Christian Church of the Augsburg Confession of the Kingdom of Yugoslavia, Official Gazette of the Kingdom of Yugoslavia, No. 72/1932.

41 | Constitution of the Serbian Orthodox Church, Art. 2. 1963 Constitution of Socialist Federal Republic of Yugoslavia, Sec. I.

state ceremonies indicates that there was no uniform use of state symbols in the first period after the joint state of South Slavs was formed. It further states that some institutions display only the state flag, others only the tribal or provincial flag, and some display both. For this reason, it is ordered that state institutions display only the state flag during state and national ceremonies, while private persons and private institutions are explicitly allowed to act according to their own choices and display the flag or flags they wish.[42] This decision was in line with the Corfu Declaration, which provided for the existence of only one state flag that had to be mandatory for all state institutions. It is important that the Ministry does not restrict the use of all other national and provincial flags by private individuals and institutions, but only seeks to regulate and unify the practice of using the state flag by state institutions.

The change came in 1929 when a special regime of King Alexander was introduced. The Law on Holidays of September 27, 1929, stipulates that only the state flag should be displayed on all buildings during public holidays. All state and self-governing authorities and owners of buildings in cities have an obligation to display state flags.[43] In accordance with this law, there are only two national holidays: the day of the king's birth and the day of unification, that is, the day the new state was created (December 1). The same law also prescribes religious holidays for civil servants, during which they are not obliged to be on duty.[44] Given that the number of public holidays has been reduced, the application of this law would not significantly impair the freedom to use other national symbols. The Law on the Name and Division of the Kingdom into Administrative Regions changed the official name of the state to the Kingdom of Yugoslavia. The same law stipulates that only state flags can be displayed and carried.[45] Both laws were published in the same issue of the official journal; therefore, it can be concluded that after their publication, only state flags were allowed to be displayed, excluding provincial or national flags. The intention of the legislator was to accelerate the transition to the use of the new state flag, which was supposed to strengthen the internal cohesion of the new state.

Apart from the flag and coat of arms, the issue of choosing and using the national anthem was of special importance. From the decision of the Minister of Faith on March 15, 1924, clearly the issue of the use of the anthem was unregulated. The act states that the Croatian and Slovenian anthems could not be sung in the church without restraint, and that the Serbian anthem does not correspond to 'the changed state-legal position and the constitutional name of our people and state.' The intention of the decision was probably to say that the Slovenian and Croatian anthems do not have a form that would be appropriate for their singing in religious buildings. On the other hand, the Serbian anthem indisputably had the form of a prayer and began with the invocation of God, but the text of the anthem conflicted with the constitutionally adopted principle of compromise on unitarism.[46] According to the Minister, the practice of singing all three national anthems

42 | Statement on the display of the state flag, Official Gazette of the Kingdom of Serbs, Croats and Slovenes, No. 80/1919.
43 | Law on Holidays, Official Gazette of the Kingdom of Yugoslavia, No. 096/1929.
44 | Law on Holidays, Official Gazette of the Kingdom of Yugoslavia, No. 096/1929, Art. 3.
45 | Law on the name and the administrative division of the Kingdom, Official Gazette of the Kingdom of Yugoslavia, No. 096/1929.
46 | The idea of a three-tribe nation was a kind of compromise unitarism, which represented a central path between an integral Yugoslavia that does not know special peoples or nations and the thesis of the existence of several nations. Mirković, 2017, p. 227.

is not in the spirit of national unity. For these reasons, the Minister of Faith, in agreement with representatives of all recognized religions, decided to omit the singing of national anthems at national holiday celebrations in religious buildings of all recognized religions until the adoption of a national anthem.[47] From this Decision of the Minister of Faith, it can be concluded that there were misunderstandings and intrusions during the performance of national anthems in religious buildings, as well as that there was an expectation that the issue of adopting the national anthem would be resolved quickly.

Contrary to such expectations, a new national anthem has never been adopted. Although no law or regulation regulated the use and text of the national anthem, the first verses of all three national anthems and the last verse of the Serbian anthem in which the word Serbian was replaced by our—king—were sung on ceremonial occasions.[48] This was a Solomonic solution, similar to the one used during the creation of the state coat of arms: the already existing symbols of all three nations served to form the symbols of the common state.

After the adoption of the Constitution in 1921, the focus of the legislator was not on changing or refining the appearance of state flags but on the detailed regulation of the use of these symbols. The Law on flags on warships, merchants, and private ships of 1922 prescribes the appearance and use of several different flags, such as war, trade, and reserve naval officers' flags, and port police flags. In summary, it was prescribed in which way and on which occasions all the mentioned flags were used. The basis of all flags are three horizontal fields of equal width, in colors blue, white, and red.[49] The display of flags on ships was regulated in much more detail by a special rulebook passed in 1934.[50] In that same year, the Instruction on the application of the provisions of the mentioned rulebook was passed, which regulated in great detail the display of flags on Yugoslav ships in various situations.[51]

World War II led to the collapse of the Yugoslavia kingdom. The king and government were in exile in London. Among the last decisions made by the Royal Government was the Decree with legal force on the amendment of the Law on flags on warships, merchants, and private ships from October 2, 1944.[52] In accordance with that Decree, all the flags prescribed by the Law from 1922 remained the same, with the crown and the coat of arms being removed from those flags on which they were intended. The agreement between the Royal Government and the National Committee for the Liberation of Yugoslavia, which preceded the adoption of this Decree, provided that the issue of the political system would

47 | Decision on the ban on singing national anthems in churches and places of worship until the adoption of one national anthem, Official Gazette of the Kingdom of Serbs, Croats, and Slovenes, No. 126/1924.
48 | Mønnesland, 2013, p. 166.
49 | Law on flags on warships, merchant and private ships, Official Gazette of the Kingdom of Serbs, Croats and Slovenes, No. 13/1922.
50 | Rulebook on hoisting (displaying) flags on state, merchant, and private ships of the Kingdom of Yugoslavia, Official Gazette of the Kingdom of Yugoslavia, No. 028/1934.
51 | Instructions for the execution and application of the provisions of the Rulebook on the hoisting (display) of flags on state, merchant, and private ships of the Kingdom of Yugoslavia, promulgated in the Official Gazette of the Kingdom of Yugoslavia, No. 111 of 15 May 1934, Official Gazette of the Kingdom of Yugoslavia, No. 069/1934.
52 | Decree amending the Law on Flags on Warships, Merchant, and Private Ships, Official Gazette of the Kingdom of Yugoslavia, No. 020/1944.

not be raised during the war and that the decision on that issue would be made by the people.[53] The decision to amend the Law on Flags was probably made with the intention of opening space for talks with the National Committee for the Liberation of Yugoslavia without prejudging the future form of government. This Decree of the Yugoslav government, which was passed before the end of the Second World War, indicated that the issue of state symbols would be extremely topical after the end of the war and in the period of the formation of the socialist state.

3. The Socialist Yugoslavia

Although the first constitutions of socialist Yugoslavia regulated the state symbols, they did not regulate the issue of national anthem. Yugoslav last Constitution of 1974 contains a short provision stating that the SFRY has an anthem,[54] which is determined by the federation through federal bodies.[55] The Law on the Use of the Coat of Arms, Flag, and Anthem from 1977 stipulates that only a melody and a text determined by the Assembly of the SFRY can be performed as an anthem. The same law stipulates that, until the Assembly of the SFRY determines the national anthem in accordance with the Law, *Hej Sloveni* will be performed as the anthem, the unofficial anthem of the SFRY until then.[56] This solution was reached after a series of failed competitions and attempts to come up with a new national anthem that would be in line with the social order at the time.

The use, detailed appearance, and protection of the coat of arms, flag, anthem, and other state symbols of the federation were regulated in detail by international treaties, federal laws, and other regulations as well as by laws and regulations of the republics and provinces. Among them, the most important was certainly the Law on the Use of Coats of Arms, Flags, and Anthems from 1977.[57] The analysis of all the mentioned regulations would go beyond the scope of a shorter historical analysis, adequate for the needs of this study.

After 1946, minorities were equated with nations that lived in the territory of the Federal People's Republic of Yugoslavia in many spheres of social life.[58] With the adoption of the Constitution of 1963, there were also changes at the level of terminology, so that the term nationalities was used instead of the term minorities. The 1963 Constitution proclaimed the equality of nations and nationalities in Yugoslavia.[59] The 1974 Constitution of Yugoslavia provides that nationalities, as collectivities, exercise their rights in republics, provinces, and municipalities, as a basic socio-political community.[60] In 1974, Vojvodina

53 | Agreement between the Royal Government and the National Committee for the Liberation of Yugoslavia, Official Gazette of the Kingdom of Yugoslavia, No. 020/1944.
54 | SFRY 1974 Constitution, Art. 8.
55 | SFRY 1974 Constitution, Art. 281 para. 1 item 9.
56 | Law on the Use of the Coat of Arms, Flag and Anthem of the Socialist Federal Republic of Yugoslavia and on the Use of the Face and Name of the President of the Republic Josip Broz Tito (abbr. Law on the Use of Coats of Arms, Flag and Anthem), Official Gazette of SFRY, No. 21/77.
57 | Law on the Use of Coats of Arms, Flag and Anthem, Art. 4 para. 4 and Art. 40.
58 | Bogetić, 2018, pp. 160–205.
59 | 1963 Constitution of Socialist Federal Republic of Yugoslavia, Sec. I.
60 | The Constitutional Development of the Socialist Yugoslavia, p. 470.

and Kosovo, both Serbian provinces, enacted constitutions that permitted the free use of symbols of nationalities. It should be noted, however, that none of these provinces have adopted detailed regulations in this regard. Although the system of protection of minorities has significantly improved, in accordance with the general progress of the protection of national minorities at the international level, there were no special regulations on symbols of nationality as a collectivity.

Regarding religious organizations, it is first necessary to mention that there was a change in the model of the relationship between the state and religious organizations after the Second World War. Churches and religious communities were separated from the state,[61] they lost their public-legal character, and they 'faced serious legal restrictions and permanent state control' over their activities.[62] Special regulations did not protect the right to use religious symbols or symbols of religious organizations, that is, their coats of arms, flags, and similar signs. In practice, people who used religious symbols and thereby publicly expressed their commitment to a certain religious organization often suffered certain consequences or were prevented from exercising the rights available to others.

After the collapse of the Socialist Federal Republic of Yugoslavia, five states were created, including the Federal Republic of Yugoslavia. Of all the newly formed states, FR Yugoslavia inherited the largest number of members from various minorities. The declaration of the people's representatives of Serbia and Montenegro on the basic, immediate, and permanent goals of the common state, adopted at the same time as the Constitution of the Federal Republic of Yugoslavia in 1992, emphasized the determination to ensure the highest standards of protection of the rights of national minorities.[63] The 1992 Constitution recognized national minorities as subjects of collective rights, which was a preparation for the introduction of non-territorial autonomy into the Serbian legal system.

4. Non-territorial autonomy in Serbia

After gaining independence in 2006, the Republic of Serbia improved its inherited system of protecting the rights of national minorities. The legal framework governing the legal position of minorities in Serbia consists of the 2006 Constitution, the Law on the Protection of the Rights and Freedoms of National Minorities,[64] the Law on National Councils of National Minorities,[65] and a series of laws regulating the rights of national minorities in the fields of education, information, representation in local self-government, etc.

The 2006 Constitution guaranteed the national minorities their collective right to self-government and provided for the establishment of National Councils of national minorities: 'Persons belonging to national minorities shall take part in decision-making

61 | 1946 Constitution of the Federative People Republic of Yugoslavia, Art. 25. Law on Amendments to the Law on the Legal Status of Religious Communities, Art. 3.
62 | Božić, 2019, p. 59.
63 | Obradović, 2018, pp. 1180–1181.
64 | Law on the Protection of Rights and Freedoms of National Minorities, Official Gazette of the Federal Republic of Yugoslavia, No. 11/2002, Official Gazette of the Republic of Serbia, No. 72/2009, 97/2013, 47/2018.
65 | Law on National Councils of National Minorities, Official Gazette of the Republic of Serbia, No. 72/2009, 20/2014, 55/2014, 47/2018.

or decide independently on certain issues related to their culture, education, information and official use of languages and scripts through their collective rights in accordance with the law.' Persons belonging to national minorities may elect their National Councils to exercise the right to self-governance in the field of culture, education, information, and official use of their language and script, in accordance with the law.[66] In addition, the Constitution specifies the rights guaranteed to national minorities, predicting that their circle can be expanded. The right of members of national minorities to use their symbols in public places is among the rights mentioned in the Constitution.[67] Therefore, in the Republic of Serbia, the right of national minorities to use their symbols in public spaces is guaranteed by the Constitution, which represents significant progress in the legal protection of national symbols.

The use of national symbols of national minorities is regulated in more detail by the Law on the Protection of the Rights and Freedoms of National Minorities. It guarantees members of national minorities the right to choose and use their national symbols. National symbols are proposed by the National Councils and endorsed by the Council for National Minorities. The law stipulates that the approved national symbols are officially displayed during public holidays of the Republic of Serbia, as well as during holidays of the national minorities,

> [...] on buildings and in the premises of local bodies and organizations exercising public powers, in areas in which the language of the national minority is in official use, i.e., in the manner set forth by the decision on ratification of symbols.[68]

The legislator also provided certain restrictions. It is stipulated that the national symbols of minorities may not be identical to those of other countries.[69] This legal provision was contested before the Federal Constitutional Court, but the said court took the position that this prohibition is not in contradiction with the Constitution and the International Covenant on Civil and Political Rights because

> [...] by choosing and using the symbols and signs of a foreign country, members of a national minority would express their belonging to another country, and thereby they would ignore the belonging of that territory to the sovereign state of which it is a part.[70]

Regarding the use of national symbols, a whole series of situations are prescribed in which they are used exclusively with the state symbols of the Republic of Serbia: during public holidays, the State Flag and the Small Coat of Arms of the Republic of Serbia shall be displayed, whereas when celebrating the holidays of national minorities, the National Flag and the Small Coat of Arms shall be displayed, in both cases in the manner prescribed by the Law on the Appearance and Use of the Coat of Arms, Flag, and Anthem of the Republic of Serbia.[71] In addition, the Law on the Protection of the Rights and Freedoms of National

66 | Constitution of the Republic of Serbia, Art. 75.
67 | Constitution of the Republic of Serbia, Art. 79.
68 | Law on the Protection of Rights and Freedoms of National Minorities, Art. 16.
69 | Law on the Protection of Rights and Freedoms of National Minorities, Art. 16.
70 | IU 196/2002.
71 | Law on the design and use of the coat of arms, flag and anthem of the Republic of Serbia, Official Gazette of the Republic of Serbia, No. 36/2009.

Minorities stipulates that at the entrance to the official premises of the National Council, the symbols of the national minority may be displayed, but with the obligation to display the state symbols of the Republic of Serbia.[72]

In accordance with the Law on National Councils of National Minorities,

> [...] the National Council is an organization legally entrusted with certain public competences to participate in decision making or to independently make decisions about certain issues in the area of culture, education, information, and official use of languages and scripts in order to achieve the collective right of a national minority to self-government in those areas.[73]

The National Council members are elected in direct elections to a four-year term and they are obliged to participate in the work of the council.[74] There have been many discussions about the legal nature of the National Councils,[75] which is not surprising, given the doubts that arise when it comes to non-territorial autonomy in general. The Constitutional Court of Serbia offered a solution in its Decision on the challenge to the constitutionality of the Law on National Councils of National Minorities. The court noted the dual nature of National Councils, which on the one hand are non-state bodies, but on the other hand have a public legal character and are entrusted with public powers.[76] Currently, 23 National Councils are registered in Serbia, including the Federation of Jewish Communities of Serbia.[77] Regarding national symbols, the National Councils decide on their symbols and determine the proposal of national symbols for national minorities.[78] The final decision on the symbols of national minorities is made by the Council for National Minorities, 'ratifying the symbols, signs, and holidays of national minorities.' Members of the Council for National Minorities are presidents of the National Councils of national minorities and heads of state administration bodies—ministers—whose scope of authority includes issues concerning the position of national minorities.[79]

Special decisions of the Council for National Minorities from 2006 have endorsed the national symbols of the Bunjevac,[80] Bosniak,[81] Hungarian, and Croatian national minorities in Serbia.[82] Then, there was a halt in the work of the Council for National Minorities due to the inconsistency of the 2002 Federal Law, with the newly created situation after

72 | Law on the Protection of Rights and Freedoms of National Minorities, Art. 16.
73 | Law on National Councils of National Minorities, Art. 2.
74 | There are exceptions to this rule, that are necessary due to the non-existence or lack of updated special voter lists.
75 | Jovanović, 2013, p. 256; Korhec, 2016, p. 190; Đurić, 2013, p. 55.
76 | IUz – 882/2010.
77 | National Councils of National Minorities [Online]. Available at: https://www.rik.parlament.gov.rs/tekst/103/nacionalni-saveti-nacionalnih-manjina.php. (Accessed: 27 August 2022).
78 | Law on the Protection of Rights and Freedoms of National Minorities, Art. 18.
79 | Law on the Protection of Rights and Freedoms of National Minorities, Art. 18.
80 | Decision on confirmation of national symbols and holidays of the Bunjevac national minority in the Republic of Serbia, Official Gazette of the Republic of Serbia, No. 23/2006.
81 | Decision on Confirmation of the National Symbols and Holidays of the Bosniac National Minority in the Republic of Serbia, Official Gazette of the Republic of Serbia, No. 23/2006.
82 | Decision on Confirmation of the National Symbols and Holidays of the Hungarian National Minority in the Republic of Serbia, Official Gazette of the Republic of Serbia, No. 23/2006. Decision on Confirmation of the National Symbols and Holidays of the Croatian National Minority in the Republic of Serbia, Official Gazette of the Republic of Serbia, No. 23/2006.

2006, when the Union of Serbia and Montenegro disintegrated, and Serbia became an independent state. On October 30, 2009, the Council was constituted in a new convocation, and it ratified the coat of arms, flag, and national holidays of the Bulgarian, Wallachian, Macedonian, Romanian, Ruthenian, and Ukrainian national minorities, while it only ratified the coat of arms and flag of the German and Slovak national minorities.[83] National Councils have regulated the issue of their symbols with their own statutes.

Regarding religious organizations, the 2006 Constitution and Serbian legislation do not regulate the right of religious organizations to use their own symbols. Although the right to the free expression of religious beliefs can also include the right to display religious symbols,[84] the issue of using the symbols of religious organizations as collectives remains largely unregulated in Serbian law. Religious symbols enjoy a certain degree of protection under criminal law, as their exposure to ridicule carries a 1 to 8 year prison sentence. However, the condition is that exposure to ridicule is done with the aim of 'causing or inciting national, racial or religious hatred, or intolerance among peoples or ethnic communities living in Serbia.'[85]

5. Conclusions

The legal protection of national and religious symbols is closely related to the status and recognized rights of the collectivity to which these symbols belong. The establishment of non-territorial autonomy based on national and religious affiliation is generally perceived as a modern achievement. 'The difference between TA and NTA is that the transfer of authority is accomplished at the community level, not territorial level, and thus, theoretically, it does not make a difference where members of the respective community reside territorially.'[86] The paper has pointed out several examples of non-state organizations entrusted with public powers in the territory of Serbia in the past. An excellent example is the millets during Ottoman rule, but also certain ethnic-confessional organizations such as Jewish communities. Religious school communities had a similar position. However, during the 19th century and in the first half of the 20th century, non-territorial forms of autonomy existed only in rudimentary forms. During this period, the legislator's attention was focused on the regulation and legal protection of state symbols. It was a period of the construction and restoration of statehood, and for that reason, special attention was paid to the identity of the state, which is manifested through its symbols.

The position of minorities was not in the focus of the Principality and Kingdom of Serbia, except the Jewish community. The reason for this is the ethnic and religious homogeneity of the state. The situation changed significantly after 1918, when the Kingdom of Serbs, Croats, and Slovenes was pronounced. In the interwar period, members of minorities enjoyed certain rights, but minorities were not considered as subjects of collective

83 | Third report submitted by Serbia pursuant to Art. 25 para. 2 of the framework convention for the protection of national minorities, p. 110.
84 | Đukić, 2021, p. 155.
85 | Criminal Code, Art. 317.
86 | Kovács, 2020, p. 88.

rights, and the collective right to non-territorial autonomy was not constituted. It was only in the second half of the 20th century that the preconditions for the development of non-territorial autonomy were created, which will actually be established by the modern Serbian state at the beginning of the 21st century. From a historical point of view, the legal protection of symbols of national minorities was regulated in detail only at the beginning of the 21st century, coinciding with the establishment of non-territorial forms of autonomy in the Republic of Serbia.

This paper deals with the legal protection of symbols of two forms of non-territorial autonomy: national minorities and religious organizations. Ethnically based non-territorial autonomy in Serbia has a dual nature. National Councils are neither state bodies nor private associations of citizens. They are non-state bodies *sui generis* entrusted with particular public powers. In addition, in the Serbian legal order, religious organizations are not legal entities of public law, but they exercise certain public powers and cannot be classified as legal entities of private law. From the above, it can be concluded that religious organizations are also legal entities *sui generis* with inherent public powers. This similarity stems precisely from the fact that these are two forms of non-territorial autonomy.

Both forms of non-territorial autonomy have the right to determine symbols. National Councils freely regulate their own symbols, while they only propose the symbols of the national community they represent. Religious organizations, in accordance with their broad autonomy in the area of religious self-determination—which borders on sovereignty—, are completely free to prescribe their symbols. The difference is that in the case of National Councils, the law explicitly prescribes the protection and procedures for regulating their symbols, whereas in the case of religious organizations, such a conclusion can be reached based on a teleological interpretation of the provisions of the Law on Churches and Religious Communities. Based on the above, it can be concluded that there is room for *de lege ferenda* around regulating the symbols of religious organizations. It would be desirable if there were explicit legal protection and more detailed regulations on the use of symbols of religious organizations. This would improve the quality of protection of the rights of religious-based forms of non-territorial autonomy.

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SYMBOLS OF NATIONAL MINORITIES IN THE CZECH REPUBLIC, THEIR USE, AND LEGAL PROTECTION

Kateřina Frumarová[1]

ABSTRACT

The article focuses on the issue of symbols of national minorities in the Czech Republic. The issue of symbols of national minorities, their use and legal protection is not given an attention in the Czech Republic—neither in literature nor incaselaw. Czech legislation is also silent in relation to this issue. Even so, we cannot give up on solving that issue. Therefore the article tries to include the right to use the symbols of national minorities under some of the explicitly enshrined rights of members of national minorities and subsequently derive from the general legislation the basic principles and rules for the use of these symbols by members of minorities in practice. In the next part of the article, the author tries to point out the means of protecting the symbols of national minorities and their use—both from the point of view of constitutional, administrative and criminal law. However, even here, the legal regulation is very unsystematic and very fragmented. Based on the above analysis, problematic aspects of the current legislation and practice are pointed out in the conclusion, and proposals and recommendations de lege ferenda are formulated.

KEYWORDS

national minorities
rights of national minorities in the Czech Republic
symbols of national minorities in the Czech Republic
use and legal protection of symbols of national minorities in the Czech Republic

1. Introduction

It is characteristic for every organized community to identify itself in some way, both externally and internally. Its members share common goals, values, and attitudes, and they respect and protect them. It is the symbols that serve as one of the important means to embody the existence of a particular community externally—in relation to other entities—and simultaneously the affiliation of its member to this group. Symbols also reflect solidarity among the members of the community and their internal and emotional ties

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https://doi.org/10.55073/2023.1.75-89

to it. The symbols express the history and traditions, values, and ideas of the community. All this applies regardless of whether such a community is a state or another important community in its territory, especially a territorial self-governing unit—a municipality or a region—, a national minority, a religious community, and others.

The existence, use, and protection of such symbols are usually the object of national legislation—i.e., also Czech legislation. In this respect, state symbols quite logically occupy a supreme position due to the necessity of their existence for every state and their importance and functions both inside the state and outside—in the international environment. This corresponds to their legal regulation, which typically has a constitutional character[2] —further specified in laws—, is relatively detailed—at the level of laws—, and regulates both the use and—public and private law—means of their legal protection.

However, for every state, including the Czech Republic, the various other communities that exist in it are also important; they fulfill certain roles and contribute to the development and formation of values, fulfillment of rights and freedoms, and achievement of other goals and needs in society. These communities and their members always share certain common goals, values, and attitudes. They are also often connected by a common history, traditions, or cultural and other customs. All these elements identify a certain community both internally and strengthen its internal structure, and simultaneously characterize and define it externally. The status and mission of these communities reflect the symbols used by these communities—internally and externally. Among the most significant communities of people in the above-mentioned sense, national minorities can currently be ranked in the Czech Republic.

The article, therefore, focuses in detail on the issue of symbols of national minorities in the Czech Republic. Even though the protection of national minorities and the rights of their members is generally enshrined in constitutional legal norms, no attention is paid to the issue of symbols of minorities, their use, or legal protection—neither in the framework of Czech legislation, nor in the framework of doctrine or practice. Therefore, the article tries to subsume the right to use the symbols of national minorities in the existing legislation and to abstract from this general regulation the basic principles and rules of the use of these symbols by members of minorities in practice. Another goal is to try to actualize the means of the legal protection of this right in the Czech legal system. This question has not been resolved in detail based on partial and fragmented legislation. Nevertheless, the author's effort is to define the means of protection within the framework of constitutional law as well as administrative and criminal law. Based on the above-mentioned analysis, problematic aspects of the existing legislation or practice will also be pointed out, and proposals and recommendations de lege ferenda will be formulated. The article is based on the relevant legislation, publications, and opinions of legal doctrine, as well as jurisprudence—namely Czech courts and ECtHR.

2 | The state symbols are regulated in Art. 14 of the Constitution of the Czech Republic, which stipulates that the state symbols of the Czech Republic are the large and small state coat of arms, state colors, state flag, flag of the president of the republic, state seal, and state anthem.

2. National minorities and their position in the Czech Republic

The most important minorities—not only—in the Czech Republic are national minorities. The Czech Republic and other European countries are aware of the importance of national minorities and strive to protect their rights, needs, and values. As stated by the European Court of Human Rights,

> [...] there is a consensus among the Contracting States of the Council of Europe that the special needs of minorities and the obligation to protect their security, identity, and way of life should be recognized, not only to protect the interests of minorities themselves but also to preserve the cultural diversity that benefits society as a whole...[3]

The support and protection of national minorities is important not only for the existence and development of the minority itself, but also for society at large.[4]

The Czech Republic understands the importance of national minorities and their existence. Their rights and protection are reflected and protected directly at the constitutional level. Article 3 of the Charter of Fundamental Rights and Freedoms states that everyone 'has the right to decide freely on their nationality'. Simultaneously, it explicitly forbids influencing a person's decision-making about their nationality; all forms of coercion leading to denationalization are also prohibited.[5] However, as Bobek rightly points out, the Charter does not specify what is meant by the terms nationality and nation.[6] The legal doctrine primarily tries to interpret these terms. One of the most important works of the 20th century on this topic defines the nation and belonging to it—i.e., nationality—through two elements: subjective —volitional—and objective—cultural.[7] The point is that a certain group of people must share common objective features of the community—e.g., language, tradition, religion—, which can be termed culture. Simultaneously, the individual must identify with this community—the individual's will to be a member—and the community must accept the individual as its member. Czech doctrine understands nationality as belonging to a nation in a cultural-linguistic-ethnic sense, not in a political sense.[8] The nationality is

> [...] a group of inhabitants of a state that is in the minority compared to the rest of the majority population, lives on the territory of the state, and its members maintain traditional, strong and permanent relations with each other, have common ethnic, cultural, religious or linguistic features that distinguish them from the rest of the population, and at the same time they officially expressed their subjective wish to be socially perceived as a national minority.[9]

3 | Judgment of the Grand Chamber of the ECtHR in the Case of Chapman vs. The United Kingdom of 18 January 2001, Complaint No. 27238/95.
4 | For more details see Potočný, 1996, pp. 233–237; or Malenovský, 1998, pp. 169 et seq.
5 | Jílek, 2000, pp. 12–24.
6 | Wagnerová et al., 2012, p. 112.
7 | Gellner, 2006, pp. 52–57.
8 | Petráš, Petrův and Scheu, 2009, pp. 18–30. Compare also Art. 3 of the Framework Convention for the Protection of National Minorities.
9 | Hendrych and Fiala, 2009.

The right to a free choice of nationality represents a negative obligation of the Czech state to respect this choice and not interfere with it. Similarly, the state—public authority—is prohibited from carrying out any targeted denationalization, for example, in the form of pressure on individuals not to declare their nationality or preventing them from observing cultural or linguistic traditions, using symbols and signs associated with nationality, etc. At the same time, it follows a positive commitment consisting on the one hand in the creation of a certain legal framework that will enable the free choice of nationality from the aforementioned provision. This will subsequently enable the use of minority rights guaranteed by Article 25 of the Charter—see these rights in more detail below. The state also has an obligation to protect individuals from possible coercion or the influence of their free decisions by private persons—for example, the adoption of anti-discrimination legislation or the provision of criminal protection of individuals against nationally motivated crimes.[10]

The Charter deals with national minorities and their rights in more detail in Title Three. The Charter states—in Article 24—that belonging to any national minority must not be detrimental to anyone. The concept of a national minority is not defined by the Charter.[11] We find this definition only in the Act on the Rights of Members of National Minorities.[12] According to this Act, a national minority is a community of Czech citizens living in the Czech Republic, who differ from other citizens usually by common ethnic origin, language, culture, and traditions, form a large minority of the population, and simultaneously demonstrate the will to be considered a national minority. The purpose of their existence is a joint effort to preserve and develop their own identity, language, and culture, as well as to protect their interests. Therefore, a member of a national minority is a citizen of the Czech Republic who declares themselves to be of a nationality other than Czech and expresses a desire to be considered a member of a national minority together with others who declare themselves to be of the same nationality.[13] A national minority is a community of persons that meets all the above criteria, 'it is not enough that a certain community of persons shows a will to be considered a national minority'.[14] Article 24 of the Charter is broad. We can therefore consider that the right of a minority member to not be harmed by the use of minority symbols can be subordinated to it.

The Charter further stipulates that the citizens forming national minorities are guaranteed all-round development, in particular, the right to develop their own culture together with other members of the minority, the right to disseminate and receive

10 | Husseini et al., 2021, pp. 177–178.

11 | In this respect, it is not only a problem in the Czech Republic. The court states that it is not its task to express an opinion on whether or not the Silesians are a national minority, let alone to formulate a definition of this term. Undoubtedly, creating such a definition would be a difficult task, especially since none of the international treaties—not even the Council of Europe's Framework Convention for the Protection of National Minorities—define the term national minorities. Judgment of the Grand Chamber of the ECtHR in the Case of the Party of Freedom and Democracy (ÖZDEP) v. Turkey of 8.12.1999, Complaint No. 23885/94.

12 | Act No. 273/2001 Coll., On the Rights of Members of National Minorities.

13 | Critically on the narrowing concept of the minority according to this Act versus the broad concept of the minority according to the Charter, see Wagnerová et al., 2012, p. 543.

14 | Decision of the Supreme Administrative Court of the Czech Republic of 17 August 2021, No. 7 As 324/2020-42.

information in their mother tongue, and to associate in national associations.[15] Under the conditions laid down by statutory regulation, they are also guaranteed rights to education in their language, use their language in official communication, and participate in resolving matters concerning national and ethnic minorities. The implementation of these rights is regulated in more detail in the Act on the Rights of Members of National Minorities, but also in other acts—e.g., the Act on Municipalities, the Act on Regions, the Education Act, the Act on Czech Television, and others.

The above-mentioned rights typically take the form of a positive status, that is, they guarantee certain claims of individuals towards the Czech state.[16] The concrete implementation of these rights is then regulated and fulfilled by the aforementioned laws. It should be emphasized that Article 25 of the Charter binds the rights of members of national minorities to citizenship in the Czech Republic. It is therefore not about the rights of foreigners, only of citizens of the Czech Republic who do not claim Czech nationality, but others—for example, Slovak, Roma, etc. It is questionable whether this narrowing concept is appropriate from a de lege ferenda point of view. Regarding membership of the Czech Republic in the European Union, it would be desirable to consider whether to grant at least some of these rights to foreigners who have settled in the Czech Republic for a long time.[17] However, the law that Article 25 of the Charter implements in practice must be strongly criticized. This is the aforementioned Act on the Rights of Members of National Minorities. This Act applies some of the rights only to national minorities who traditionally and long-term live in the territory of the Czech Republic. It is questionable why these rights are limited only to these national minorities; furthermore, the law does not specify what the criteria are for determining such a minority. In the future, it would be appropriate to remove this restriction from the law.

3. Symbols of national minorities and their use from the point of view of Czech law

Therefore, the Czech Republic and its legal system clearly protect and support the all-round development of national minorities. This support covers several areas, such as the development of culture, traditions, and the use of the mother tongue. Undoubtedly, we can also include support for the use of various symbols and signs to identify and unite a particular national minority. However, specific legislation is lacking in this regard. This right can be subsumed as the more general right to all-round development, the development of the culture and traditions of the minority, and all-round support for its outward expression. Specific—and explicit—legal regulations that would relate to the use of symbols of national minorities and their protection are lacking in this regard. Despite this deficit, we cannot resign ourselves to solving this question. In general, the state always

15 | On the rights of national minorities, see Pospíšil, 2006, pp. 1–187.
16 | Bartoň et al., 2016, p. 209.
17 | The same opinion see Bartoň et al., 2016, p. 210.

has an obligation to respect, fulfill, and protect human rights,[18] including the rights of members of national minorities.

Among the most numerous national minorities in the Czech Republic are the Slovak, Ukrainian, Polish, Vietnamese, German, Russian, and Roma minorities—this is data obtained from the census in the Czech Republic in 2021. Thus, it is clear that in addition to the Roma minority, the other minorities are citizens who claim nationality and are linked to another foreign state. This logically implies the assumption that these members of national minorities will usually use state or national symbols associated with their state—a member of the Slovak national minority in the Czech Republic will, on certain occasions, use Slovak state symbols, for example, the national flag. In relation to these members of national minorities, it is therefore necessary to primarily address the question of whether and how the state symbols of foreign states can be used—by them—in the Czech Republic, and subsequently whether these foreign state symbols and their use are protected by the Czech legal order.

Unfortunately, it must be stated at the outset that the use of foreign state symbols in the Czech Republic is not sufficiently regulated. The only exception is the regulation of hoisting the Czech national flag in the event that it is hoisted together with the flags of other states. The Act on the Use of State Symbols sets precise rules for the placement of the Czech flag in these situations. This issue has only been partially addressed by international agreements on consular and diplomatic missions. However, further adjustments are required. Similarly, the first Czechoslovak regulation, specifically Act No. 252/1920 Sb., did not solve this issue—neither did Regulation No. 512/1920 Sb., which regulated the use of state symbols in the Czechoslovak Republic and paid attention to it. However, the Supreme Administrative Court of the Czechoslovak Republic, in its judgment of 1926, prohibited the association from using a badge made in the colors of a foreign state.[19] Most attention was probably paid to this issue under Act No. 269/1936 Sb., which stipulated that in the territory of the Czechoslovak Republic, state symbols of foreign states may be used permanently only by consuls of these states and extraterritorial persons. Other people could use foreign state symbols only with the permission of the provincial office. Permission could only be granted if the applicant has proven that the foreign state does not object to the use of its symbol in our territory. It should be emphasized that the Act on the Use of State Symbols of the Czech Republic and the rules set therein cannot be applied by analogy to the use of state symbols of foreign states in the Czech Republic. As the Supreme Court of the Czech Republic stated, 'it cannot be successfully concluded that the intention of the Czech legislator in this case should be to subject the use of all state symbols of foreign states to the regime of this Act.' The following legislation completely neglected this issue.

Currently, Czech legislation only includes laws regulating Czech state symbols and their uses. Specifically, it concerns Act No. 3/1993 Sb., On the State Symbols of the Czech Republic, and Act No. 352/2001 Sb., On the Use of State Symbols of the Czech Republic. Therefore, the question is whether the rules established by the Act on the Use of State Symbols of the Czech Republic can be applied in the situation of an explicit absence of legal regulation of the use of foreign state symbols. In other words, it is about answering

18 | Nowak, 2003, pp. 48–51.

19 | Decision of the Supreme Administrative Court of the Czechoslovak Republic, No. Boh. Adm. 5706/1926.

the question of whether analogy legis can be used. When searching for an answer to this question, it is necessary to begin with the essence and meaning of the institute of analogy. That is, what is the analogy for, and under what conditions can it be used?

According to constitutional requirements, the basic prerequisite for the exercise of public power is the existence of a legal basis—principle of legality. However, this does not exclude the possibility of supplementing the law with caselaw or with the decisions of administrative authorities, even with the use of analogy.[20] However especially in the field of public law, the doctrine adopts a very restrictive and cautious approach to the possibility of using the analogy.[21] The prerequisite for using an analogy is the existence of a so-called open false—teleological—gap in the law.[22] If we apply these conclusions to our situation, we must come to the clear conclusion that the Act on the Use of State Symbols of the Czech Republic and the rules set forth in it cannot be applied by analogy to the use of state symbols of foreign states in the territory of the Czech Republic. However, the existence of an open loophole in the law cannot be inferred here. In the Act on the Use of State Symbols of the Czech Republic, the legislator knowingly and deliberately regulated only the use of state symbols of the Czech Republic. This intention is evident not only from the name of the law itself but also from § 1 of this law, which defines the subject of its amendment. The same conclusions are drawn from the explanatory report on this law. It follows from this report that the purpose of the law is to clarify the legal regulation of state symbols (exclusively) in the Czech Republic and to solve the issue of insufficient regulation of their use by various institutions and entities, including citizens. It cannot, therefore, be inferred that the intention of the Czech legislator was to apply this law to state symbols of foreign states and subject their use to the same rules as apply to Czech state symbols. Czech courts also agree with this opinion. As stated by the Supreme Court of the Czech Republic, 'it cannot be successfully concluded that the intention of the Czech legislator in this case should be to subject the use of all state symbols of foreign countries to the regime of this law.'[23]

From the point of view of practice, some cases were resolved in the Czech Republic, which, although related to the use of symbols of foreign states, were not in connection with the realization of the rights of national minorities and their members. These were cases related to the use of these symbols in commercial relations, for example, to promote various services and products—e.g., marking a medical preparation with a symbol reminiscent of the Swiss national emblem and flag, which was supposed to forge a connection with this country in potential customers and increase confidence in the product. Even in these commercial disputes—i.e., in the field of private law—, civil courts do not apply the Act on the Use of State Symbols of the Czech Republic per analogy to the use of state symbols of foreign countries.[24]

20 | The decision of the Constitutional Court of the Czech Republic of 26 April 2005, No. Pl. ÚS 21/04.
21 | Hajn, 2003, p. 123; or Kindl, 2003, p. 133.
22 | For more details, see the decision of the Constitutional Court of the Czech Republic of 25 June 2002, No. Pl. ÚS 36/01, the decision of the Constitutional Court of the Czech Republic of 8 February 2006, No. IV. ÚS 611/05, or the judgment of the Supreme Court of the Czech Republic of 1 June 2017, No. 32 Cdo 2422/2015.
23 | The judgment of the Supreme Court of the Czech Republic of 17 December 2019, No. 23 Cdo 184/2019.
24 | For more details, see the judgment of the Supreme Court of the Czech Republic of 17 December 2019, No. 23 Cdo 184/2019.

The Roma minority in the Czech Republic is also a significant national minority; its members are not nationals of any foreign country. This national minority also has its own symbols, typically the Romani flag and anthem. The Roma flag consists of a blue stripe in the upper half, a green stripe in the lower half, and a red chakra with 16 rays in the middle. Chakra refers to the Indian origin of the Roma. The flag was created in 1933 by the General Union of Romanian Roma, and in 1971, it was approved as the official Roma flag at the first International Roma Congress in London. The Romani anthem is considered to be the Romani song Gejľem, gejľem. This song was declared the Roma anthem at the first International Roma Congress in London—1971. There is no special legal regulation concerning the explicit use and protection of Roma symbols in Czech law. It is, therefore, the same situation as in the case of the use of state symbols of foreign states.

However, the right to use symbols representing the relevant national minority must be understood as part of a broader catalog of the rights of the members of national minorities—see above. The Czech Republic recognizes these rights and guarantees their realization at the constitutional level. However, this right also corresponds to the obligation of the members of national minorities to use the symbols and other signs of their minority only in a legal manner–that is, to respect the rules of the legal system of the state—i.e., the Czech Republic.[25] Although neither theory nor practice focuses on this issue, the following basic rules can be deduced:

The symbols of national minorities always embody the important values, ideas, and traditions of the community—just like the state symbols of any state. Therefore, when using them, the requirement of appropriateness and a dignified way of using the symbol should be respected. A member of a national minority should use the symbol appropriately and with dignity, always regarding the specific situation or occasion in which the symbol is used.[26] These conditions must be carefully weighed for each case and regarding the specific circumstances of the situation.

Furthermore, it must be emphasized that even if it is a right of a member of a national minority, its realization must not consist of the abuse of such a right. The realization of every subjective right must always follow a legitimate goal and must be realized legally. The leading theoretician of Czech law, V. Knapp, states that abuse of law means the use of a certain legal norm in contradiction—not in accordance—with its purpose.[27] Therefore, it is a seemingly permissible act intended to achieve an illegal result. The principle of the prohibition of abuse of law permeates the entire legal system and is one of the most important principles on which the legal system is built.[28] For private law, the principle of prohibition of the abuse of rights is explicitly enshrined directly in the Civil Code, according to which an obvious abuse of rights does not enjoy legal protection. Although

25 | This can be deduced by analogy, for example, from the judgment of the Supreme Administrative Court of the Czech Republic, where the court stated: 'the right of a member of a national minority to use the language of a national minority in official communication, resp. the right to the assistance of an interpreter may not be abused to intentionally and purposefully prolong the proceedings.' Judgment of the Supreme Administrative Court of the Czech Republic of 30 October 2014, No. 6 As 149/2014–21.

26 | The judgment of the Supreme Court of the Czech Republic of 17 December 2019, No. 23 Cdo 184/2019. The court stated that the state symbols and their imitations can also be used for commercial purposes, but this must be done appropriately and with dignity.

27 | Knapp, 1995, p. 184.

28 | Hurdík, 2019, pp. 1077–1090.

this principle is not explicitly enshrined in public law, it is applied here. The Supreme Administrative Court stated:

> [...] the prohibition of abuse of law is a rule of Czech national law, including public law, which results from the nature of the Czech Republic as a material legal state based on certain guiding values, which, in addition to respect for individual freedom and the protection of human dignity, include the respect for the harmonious social order created by law and the denial of the protection of actions that consciously and deliberately use law contrary to its meaning and purpose.[29]

Furthermore, the manner of using the symbol of a national minority must not violate the other legal norms of the Czech legal order. For example, if certain buildings are prohibited by Czech law from displaying flags other than those specified by law—e.g., the president's residence—, these rules cannot be violated and justified by the exercise of the right of a member of a national minority. Symbols of national minorities cannot be used in such a way that would, damage cultural monuments or other people's property rights in general, or which would, violate the prohibition of entering certain areas. Czech administrative practice did not deal with many cases that would concern illegal realization of the right to use the symbols of the national minority; however, several cases can be mentioned here as illustrative.

The case of the activist Miroslav Brož, who hoisted the so-called Czech-Roma flag on his balcony on April 8, 2021, is relevant in this respect.[30] The man placed a red chakra on the state flag of the Czech Republic. In essence, he combined the Czech and Roma flags. Although he wanted to point out the importance of the Roma community and its connection with the Czech state, he did so illegally. The Act on the Use of State Symbols of the Czech Republic stipulates that there must be no text, images, emblem, etc., on the state flag. Thus, the man grossly despised the state flag as a state symbol and committed an administrative offense. He was fined CZK 1,000.[31] If a person hoisted the Czech national flag and the Roma flag next to it properly and in accordance with legal rules, his actions would be legal—the national flag must always be flown in the most honest place.

The Czech Republic dealt with a similar case in 2013. At that time, artist T. Rafa organized an exhibition of flags in Prague entitled 'Tender for the Czech-Roma flag'. The Czech Republic state flags issued here were combined into various forms with the Roma flag. The author and organizers wanted to symbolize the coexistence of the Roma minority and the Czech nation with their proposals. The police of the Czech Republic had all seven flags assessed by an expert, and in three cases, they concluded that this was an administrative offense. The artist was fined CZK 2,000. However, on appeal, this decision was annulled, and the misdemeanor proceedings were terminated. It was stated that this was

29 | The decision of the extended senate of the Supreme Administrative Court of the Czech Republic of 27 May 2010, No. 1 As 70/2008, or the decision of the extended senate of the Supreme Administrative Court of the Czech Republic of 16 October 2008, No. 7 Afs 54/2006.
30 | International Roma Day.
31 | Mne, ČTK (2022) *Vyvěsil českou vlajku upravenou romským symbolem. Dostal pokutu* [Online]. Available at: https://www.idnes.cz/zpravy/domaci/romove-vyveseni-vlajka-magistrat-pokuta.A220113_084812_domaci_mgn (Accessed: 18 February 2022).

a manifestation of freedom of art and freedom of expression, not an illegal act—i.e., it was not denigration or damage to the national flag).[32]

4. Legal protection of the symbols of national minorities and their use in the Czech Republic

Regarding the legal protection of the use of symbols of national minorities, the same applies, as has already been said in relation to the legal regulation of their use. The Czech legal system lacks more comprehensive legal regulations focused on this issue. Even so, it cannot be said that the realization of this right is not provided with legal protection. It can be found at the levels of constitutional law and administrative and criminal law.

As far as constitutional law is concerned, it has already been said that the Charter explicitly regulates the rights of members of national minorities. These are therefore public subjective rights, that is, the rights of an individual in relation to the state, respective to public authority. Certainly, these rights require judicial protection. The most important instrument for legal protection is the possibility of an individual to submit a constitutional complaint to the Constitutional Court of the Czech Republic. A natural or legal person is entitled to file a constitutional complaint if they claim that their fundamental right or freedom guaranteed by the constitutional order was violated by a final decision in a proceeding in which they were participants, a measure, or other intervention by a public authority. Thus, a constitutional complaint represents a specific means of protecting the constitutionally guaranteed rights and freedoms of natural and legal persons. These fundamental rights and freedoms represent the material object of the proceedings and are therefore the focus of the Constitutional Court's attention. The procedural object of the proceedings is the decision, measure, or other intervention of a public authority, which can disrupt this material object, and against which the constitutional complaint is directed.[33] The defect of a decision or other intervention must always fundamentally consist of disregarding the constitutionally guaranteed rights and freedoms of the complainant—in this case, the rights of members of national minorities guaranteed by the Charter. Simultaneously, it is a subsidiary legal remedy—its application must fundamentally precede the exhaustion of all procedural means provided to the complainant by the Czech legal order to protect their right or freedom.

Administrative law also provides protection. It protects the exercise of the rights of persons belonging to national minorities in the form of liability for administrative offenses. The use of symbols by minorities—of course in a lawful manner; see above—can undoubtedly be considered an integral part of the exercise of their rights. An offense is committed by a person who restricts or prevents a member of a national minority from exercising their rights. For example, this could be a situation in which a member of the Roma national minority would be prevented from using Roma flags on certain occasions. A fine of up to CZK 20,000 or a reprimand may be imposed for such an administrative

32 | iDNES.cz and ČTK, 2015.
33 | Filip, Holländer and Šimíček, 2007, p. 491.

offense against a civil cohabitation.[34] Instead of a fine, a sanction of a moral nature can also be imposed, namely, a reprimand. However, a fine and reprimand cannot be imposed at the same time.

In addition, liability for other types of offenses is not excluded, but they are no longer explicitly linked to belonging to a national minority. These may be offenses against property —intentional destruction or damage to the Roma flag—, public order, etc. Administrative authorities decide on guilt and punishment for offenses. Infringement proceedings are always initiated ex officio. Classical criminal law principles are applied in the proceedings, such as the principles: *nullum crimen sine lege*, *nulla poena sine lege*, the presumption of innocence, *ne bis in idem*, *in dubio pro reo*, and others.[35] After the proper remedies—typically an appeal—have been exhausted, the decision regarding the offense can be an object of judicial review, based on an action against the decision of the administrative body in proceedings before the administrative courts.[36]

If the infringement reaches a higher degree of social harm or higher damage is caused, liability for the crime may also arise. Means of protecting the existence of national minorities as well as exercising their rights can also be found in Czech criminal law. The idea of the criminal law protection of these communities and their rights cross-cuttingly permeates the Criminal code.[37] The Criminal Code states that if a crime is committed out of national hatred, it is an aggravating circumstance.[38] In the case of a number of criminal offenses, the commission of a criminal offense on the grounds of belonging to a certain nationality means the fulfillment of a qualified factual basis and the associated higher, that is, stricter, punishment.[39] Specific criminal offenses relating to the given issue are the criminal offense of defaming a nation, race, ethnicity, or other group of persons[40] and the criminal offense of inciting hatred towards a group of persons or restricting their rights and freedoms.[41]

A positive fact in the Czech Republic is that the protection of the rights of members of national minorities is institutionalized. The Government Council for National Minorities operates at the national level. It is an advisory body of the Government of the Czech Republic, whose members are also members of national minorities. The Council monitors compliance with the Constitution of the Czech Republic, the Charter, international treaties on human rights and fundamental freedoms to which the Czech Republic is bound, laws, and other legal norms related to members of national minorities. The Council comments on draft legislation and other measures concerning the rights of persons belonging

34 | Art. 7 of Act No. 251/2016 Coll., On certain offenses.
35 | As the Supreme Administrative Court of the Czech Republic stated in its decision, 'the criminality of administrative offenses is governed by the similar principles as the criminality of criminal offences.' The judgment of the Supreme Administrative Court of the Czech Republic of 31 May 2007, No. 8 As 17/2007.
36 | Act No. 150/2002 Coll., Code of Administrative Justice, Arts. 65 et seq.
37 | Act No. 40/2009 Coll., Criminal Code.
38 | Art. 42 of the Criminal Code.
39 | The ECtHR also calls for a strong investigation of every racially, nationally, or religiously motivated crime. See Judgment of the ECtHR in the Case of Lakatošová a Lakatoš vs. Slovakia of 11 December 2018, Complaint No. 655/16, or Judgment of the ECtHR in the Case of Balázs vs. Hungary of 20 October 2015, Complaint No. 15529/12.
40 | Art. 355 of the Criminal Code.
41 | Art. 356 of the Criminal Code.

to national minorities and prepares various recommendations for the government, ministries, and other administrative authorities to meet the needs of persons belonging to national minorities, especially in the fields of education, culture and media, mother tongue, and social and cultural life. It also proposes the distribution of funds spent by the state budget to support the activities of the members of national minorities.[42]

Members of the Council are representatives of national minorities and public authorities, with at least half of the members of the Council being representatives of national minorities who were nominated by associations of members of national minorities.[43] It is headed by a member of the government—i.e., a minister. It is through the Council that members of national minorities realize one of their core rights, namely, the right to participate in the resolution of matters concerning the national minority. This right includes several sub-rights, including the right to active participation in cultural, social, and economic life and in public affairs, especially those concerning the national minorities to which they belong. In practice, the use of symbols of the national minority and its external presentation—for example, celebrations of various important events associated with the minority, cultural events organized by the minority, etc. —are often associated with the realization of these partial rights.

In addition to the Government Council for National Minorities, the Government Council for the Affairs of the Roma Minority was established in the Czech Republic. It is a permanent advisory body of the Czech government in the area of Roma integration. This Council approves Roma integration strategies, proposes partial measures in Roma integration, approves regular evaluations of the position of the Roma minority in the Czech Republic, proposes state subsidy policy priorities in this area, and ensures international cooperation of the Czech Republic in the area of Roma integration.[44] In this context, the question is whether it is appropriate to establish a separate body for only one national minority. Representatives of this minority group are also members of the second advisory body of the government of the Czech Republic, the aforementioned Government Council for National Minorities. Individual national minorities are fairly represented within the Government Council for National Minorities. Therefore, it is questionable whether the establishment of another separate body for only one of these minorities violates the principle of equal access to all minorities. On the other hand, we can understand the effort to provide the greatest possible cooperation and help in relation to this minority, when the ECtHR also emphasizes its specific status. For example, we can mention the well-known judgment of the ECtHR Grand Chamber 27238/95, Chapman v. United Kingdom, wherein

42 | Government of the Czech Republic (2009) Council for National Minorities [Online]. Available at https://www.vlada.cz/cz/ppov/rnm/historie-a-soucasnost-rady-15074/ (Accessed: 17 May 2022).
43 | Currently, the following national minorities are represented in the Council (1 to 2 members): Belarusian, Bulgarian, Croatian, Hungarian, German, Polish, Roma, Ruthenian, Russian, Greek, Slovak, Serbian, Ukrainian, Vietnamese. Members are also representatives of selected ministries, regions or municipalities, the public defender of rights and others. For more details, see the Statute of the Government Council for National Minorities [Online]. Available at: https://www.vlada.cz/assets/ppov/rnm/RVNM-final.pdf (Accessed: 17 May 2022).
44 | For more details, see the Statute of the Government Council for Roma Minority Affairs [Online]. Available at: https://www.vlada.cz/assets/ppov/zalezitosti-romske-komunity/Statut-Rady-vlady-pro-zalezitosti-romske-mensiny.pdf (Accessed: 17 May 2022).

the court emphasized that 'special attention should be paid to the Roma population, their needs, and their way of life.'[45]

The protection of minorities and their rights is implemented not only at the national level but also at the regional and local levels. A municipality in whose territorial district, according to the latest census, at least 10% of the municipality's citizens belonging to non-Czech nationalities live, establishes a committee for national minorities if the association representing the interests of the national minority so requests.[46] At least half of the members of the committee must be members of national minorities. Regulations at the regional level are similar. According to the latest census, a region in whose territorial district at least 5% of the region's citizens declare themselves to be of a nationality other than Czech live establishes a committee for national minorities if an association representing the interests of a national minority so requests.[47] At least half of the committee members must be members of national minorities.

If the above conditions are met, the establishment of a committee for national minorities is not an internal or organizational matter of the municipality—region—council, which the council can decide based on its discretion. Contrarily, the council is obliged to establish such a committee if the legal conditions are met. This obligation has a constitutional dimension because, among other things, it is through the committee for national minorities that members of a national minority can realize their constitutionally guaranteed rights, in particular, the right to participate in the resolution of matters concerning national and ethnic minorities, according to Article 25 of the Charter.[48] The association, which represents the interests of the national minority in this regard, is thus evidenced by the public's subjective right to establish such a committee. In particular, committees established at the municipal level can be considered important tools for the all-round development of the national minority and for the real realization of its rights in practice (including the use of symbols and signs associated with the minority). At the local level, such a body knows best the local conditions as well as the needs of the minority, but also any problems that need to be solved.

5. Conclusion

The protection of national minorities and their status and rights are enshrined and guaranteed in the Czech Republic at the constitutional level. The lack of a legal definition of the concept of nation and nationality, as well as the relatively narrow interpretation of the concept of national minority in Czech legislation, in particular, the application of certain rights only to national minorities who 'live for a long time and permanently on the territory of the Czech Republic' proved to be a certain problem in this respect. This restriction has no justification nor are the criteria for its application specified in practice. *De lege*

45 | The same opinion – the judgment of the ECtHR Grand Chamber in the Case of D.H. and others against the Czech Republic of 13 November 2007, Complaint No. 57325/00.
46 | Art. 117 of Act No. 128/2000 Coll., On municipalities.
47 | Art. 78 of Act No. 129/2000 Coll., On Regions.
48 | The decision of the Supreme Administrative Court of the Czech Republic of 20 February 2018, No. 9 As 336/2017.

ferenda it would therefore be desirable to remove this legislative deficiency. It would also be desirable to consider whether the rights of members of national minorities should be granted to foreigners living in the Czech Republic for a long time—in addition to citizens of the Czech Republic. The rights of members of national minorities to use the symbols of these minorities are not explicitly enshrined in the Czech legal order. However, it can undoubtedly be subsumed as the more general right to all-round development, the development of the culture and traditions of the minority, including its outward expression.

As for the use of symbols for national minorities, there is no explicit legal regulation in the Czech Republic. Most members of national minorities in the Czech Republic claim nationality that is linked to some foreign states—Slovakia, Ukraine, Poland, etc. It is therefore obvious that these members will, in practice, mainly use the state and other national symbols of these foreign states. However, the Czech legislation does not contain legal regulations for the use of foreign state symbols. The same applies to a specific national minority, the Roma minority, which is not connected to any foreign state but has its own symbols. Czech law also does not explicitly reflect their use. In this regard, the above analysis concluded that even the Act on the Use of State Symbols of the Czech Republic cannot be applied to these situations based on analogy. Therefore, the author introduced basic rules and principles that should at least be respected. The principle of legality is primary, that is, these symbols must be used in such a way as not to violate the prohibitions or orders established by the Czech legal order—that is, the application of the rule that you can do anything that is not prohibited by law. Furthermore, this right should not be abused. Finally, the symbols of national minorities must be used in an appropriate and dignified manner, always with regard to each specific occasion. *De lege ferenda*, it would be desirable for Czech law to establish at least basic and minimum rules for the use of symbols of foreign states on the territory of the Czech Republic.

In the last part of the article, an analysis of the means of legal protection for the realization of the right to use the symbols of national minorities was carried out. The same applies here, as has already been said several times above. Legal regulation is quite austere and fragmented. Even so, protection cannot be waived, as the state—public authority—has an obligation to ensure the protection of the undisturbed exercise of this right. Legal protection is provided by constitutional law—especially in the form of a constitutional complaint—, administrative law—especially in the form of liability for misdemeanors—, and criminal law—liability for criminal offenses. Some means of protection are directly linked to the protection of the rights of national minorities, whereas others generally serve to protect the exercise of any right or freedom. A positive aspect of the protection of the rights and status of national minorities in the Czech Republic is the element of institutionalization of this protection, at the national, regional, and local levels.

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CHANGE OF SEX BY THE ADOPTIVE PARENT AND ITS IMPACT ON THE CIVIL STATUS OF THE ADOPTED CHILD IN VIEW OF THE FUNDAMENTAL PRINCIPLES OF THE POLISH LAW

Janusz Gajda[1]

ABSTRACT

This paper outlines issues connected with gender reassignment in the context of child adoption by a transgender person. In particular, it focuses on the questions of the civil status (and its registration) of the child adopted by such a person. What is striking in Polish law is the lack of a law that comprehensively regulates this issue. This situation is unfavourable as it results in the emergence of various theoretical doubts and inconsistent practice by the judiciary. This applies especially to the basic principle of Polish law, according to which only a woman can be the mother, while only a man can be the father. The said principle applies to both biological and adoptive parents. Therefore, the paper proposes that the Polish legislature pass a law on gender reassignment to normalise, as fully as possible, these issues. It should include provisions concerning, among other things, the permissibility of gender reassignment of a married person and adoption by such a person, as well as the possibility of adoption of a child by a single person who has changed sex. The law should also regulate issues relating to the gender change of the adopter and its impact on the civil status of the adopted child.

KEYWORDS

adoption
change of sex
polish law

1. Introductory remarks

This study was undertaken as part of a grant awarded by the National Science Centre in Poland entitled 'Minors vs. Parents and the State: Contemporary Polish legal conditions of the principle of child welfare and participation.'[2] Under this grant, the legal relationship between parents (adoptive and biological) and adopted children was examined.[3]

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2 | Agreement with the National Science Centre No. UMO-2015/19/B/HS5/03014.

3 | See Gajda, 2020b.

https://doi.org/10.55073/2023.1.91-108

Therefore, this study focuses only on one of the problems with gender reassignment: its impact on the civil status of the adopted child.[4] Several other issues related to the effects of this change have been omitted, such as the marriage of a transsexual person, the change in sex by one of the spouses during their relationship, and the establishment of the origin of the child from a person who has changed his or her legal sex status.[5]

The purpose of this study is to analyse Polish norms related to the issues mentioned in the title. The specificity of the Polish legal system in this regard, as compared to other European countries is discussed. First, there is no law in Poland which comprehensively regulates issues related to gender reassignment.[6] The Polish parliament passed such a law in 2015, but it was not signed by the President of the Republic of Poland.[7] No new laws have been passed to replace it. However, there is no provision prohibiting such changes. Carrying out gender reassignment is therefore possible in practice.[8] The lack of such regulations raises doubts about the procedure under which the change of sex can be carried out, as well as its prerequisites and consequences, including the registration of the civil status of the person changing sex and, for example, of their relatives. The non-existence of explicit regulations relevant to this issue indicates that the judiciary's practices are of particular importance.[9] When analysing the rulings of Polish courts on this matter, one assumes that a legal change in sex is permissible, despite the lack of provisions directly permitting it. Second, the proper procedure is for a transsexual person to obtain a judgment granting a claim for gender determination based on Article 189 of the Code of Civil

4 | According to Art. 2(1) of the Law of November 28, 2014 – Law on Civil Status Records (consolidated text Official Gazette of 2022, item 1681), civil status is the legal situation of a person expressed by the characteristics that individualise him or her, shaped by natural events, legal actions, court rulings or decisions of authorities, and stated in a civil status record. The elements that make up civil status include, for example, the situation of a person in the family, including kinship. (See Kasprzyk, 2018, p. 97.) The kinship linking a child with his parents has also been recognised as one of the typical elements of civil status. See Wojewoda, 2014, p. 29.

5 | I have referred to these issues in other studies. See for example, Gajda, 2017a; Gajda, 2017b. See also Łączkowska-Porawska, 2019, pp. 132–139 and 163–194; Łukasiewicz, 2021, p. 7.

6 | As noted by the European Court of Human Rights, Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950, Official Gazette of 1993, No. 61, item 284, imposes an obligation on states to ensure the right of their citizens to genuine respect for their physical and mental integrity. States are obliged to recognize gender reassignment in transgender people who have undergone surgery, among others, by changing the data regarding their civil status. Nevertheless, it is up to the state to decide whether to introduce legislation for legal recognition of the new gender of such persons. See *Hämäläinen v. Finland* (Application No. 37359/09), Judgment, 16 July 2014.

7 | Gender Recognition Act of September 10, 2015 [Online]. Available at: http://orka.sejm.gov.pl/proc7.nsf/ustawy/1469_u.htm (Accessed: 15 September 2022).

8 | Unlike, for example, in Hungary, where, as a result of a 2009 amendment to the law on civil status registration, a legal change of gender became impossible. (See Łukasiewicz, 2021, pp. 91–92 and the Hungarian legislation cited there.) Meanwhile, according to the European Court of Human Rights, the refusal to recognize a gender reassignment without providing compelling reasons constitutes an unjustified interference with the right to respect for private life. The Court also considered the denial of legal recognition of gender correction without surgery to be such interference. See *Y. T. v. Bulgaria* (ECHR Application No. 41701/16), Judgment, 9 July 2020; *X and Y v. Romania* (ECHR Application No. 2145/16), Judgment, 19 January 2021.

9 | An analysis of the evolution of the views of Polish judicature in this regard is presented, for example, in Łukasiewicz, 2021, pp. 9–12.

Procedure.[10] This judgment is the basis for altering the person's birth certificate by adding a supplementary note to the certificate.[11] This statement is the starting point for further discussions.

In the absence of a regulation on gender reassignment, it has not been legally resolved whether this should have consequences *ex tunc* or *ex nunc*, that is, from the moment the relevant judgment becomes final. However, as is generally accepted, a judgment establishing gender should produce effects only in the future and not retroactively, that is, from the moment of the person's birth.[12] Therefore, it is unclear how this change affects the adopted child's civil status and registration. Reviewing the relevant legal acts of countries where gender reassignment has been normalised, one can see that, as a rule, the change in the parent's legal sex does not affect the pre-existing status (maternal or paternal) of the transgender person in relation to the child.[13] This person, who is listed on the child's birth certificate, for example, as a mother, continues to be so in the eyes of the law. This is because the child's birth certificate is not amended after this event. A pertinent example can be found in British regulations. According to Article 9(2) of the Gender Recognition Act of 2004,[14] the effectiveness of a gender certificate is excluded for events occurring before its issuance. In addition, according to Article 12, a legal change in gender does not affect a parent's previous status with respect to the child. Moreover, in the absence of an obligation to undergo hormone therapy and corrective surgery, there may be situations in which a person who is legally male but biologically female gives birth to a child. Such a situation, of course, results in doubts as to whether such a

10 | Law of November 17, 1964 – Code of Civil Procedure, consolidated text Journal of Laws of 2021, item 1805, as amended. Regarding the possibility of claiming the determination of sex on the basis of the aforementioned provision, see, for example, the judgment of the Court of Appeals in Wrocław dated 12 February 2021, I ACa 1233/20 with commentary by Krakowiak and Slaski, 2021, pp. 263 et seq. In turn, according to Art. 3(1) of the 2015 Gender Recognition Act, the change was to be made by the court in non-trial proceedings at the request of the person concerned (Art. 4(1) and (2) of the Act). Also in German law, for example, it is possible for a court to declare a gender other than that entered on the birth certificate. See para. 8 Gesetz über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit in besonderen Fällen vom 10.9.1980 [Online]. Available at: https://www.gesetze-im-internet.de/tsg/BJNR016540980.html (Accessed: 21 September 2022). However, it is to be replaced by the Self-Determination Law (Selbstnestimmungsgesetz), under which it will be possible to change the entry specifying gender in the registry book by filing an application with the registry office. See Bundesministeriums für Familie, Senioren, Frauen und Jugend, 2022.

11 | See Art. 24(1) and (2) of the law on civil records. See, e.g., Łukasiewicz, 2021, p. 12; *Y v. Poland* (ECHR Application No. 74131/14), Judgment, 17 February 2022, states that it does not constitute a violation of the right to the protection of private life if the information about the change of sex is included in the full copy of the birth certificate in the form of an additional note, while the abbreviated copy of this certificate indicates the new name and sex after the change. See also the resolution of the Supreme Court of May 8, 1992, III CZP 40/92, LEX 162225, in which it was mentioned that a partial change in the sexual characteristics of a transsexual as a result of hormone therapy and a surgical procedure performed does not create grounds for correcting the entry specifying gender in the birth certificate. The issue of changing the sex of a transsexual person in the rulings of Polish courts is discussed in greater detail, e.g. by Ostojska, 2015, pp. 93 et seq.

12 | Cf. Łukasiewicz, 2021, p. 11.

13 | Such countries include, for example, the UK, Germany, France, Italy, the Netherlands, and Denmark.

14 | Gender Recognition Act 2004 [Online]. Available at: https://www.legislation.gov.uk/ukpga/2004/7/contents (Accessed: 16 September 2022).

person should be entitled to the status of mother or father. This issue was resolved by establishing that being either the mother or father of a child does not need to be linked to the current legal sex of that person. What is more relevant to being a mother is that this person went through the process of becoming pregnant, carrying the pregnancy, and giving birth.[15]

In the context of these observations, it can be recalled that also Article 10(2) of the Polish Gender Recognition Law of 2015 stipulated that the establishment of a new birth certificate based on a final court decision granting a request for gender recognition was not to affect the legal relationship between the person changing sex and third parties. In particular, this rule affected that person's parents and children adopted by him or her before the said ruling became final. This was also to apply to the relationship between that person and his or her biological children.

2. Basic principles of adoption in Poland

Another issue that warrants mentioning is the principles of adoption developed by Polish lawmakers. The key legal acts normalising this institution are the Family and Guardianship Code passed on 25 February 1964[16] and the Act of 9 June 2011 with respect to family support and the system of foster care.[17] From the perspective of this study, the regulations set forth in the first of these two laws are by far more important. In particular, they define the prerequisites for adoption and the consequences of various types.

Analysing the provisions of the Family and Guardianship Code there seems to be a reasonable conclusion, in the absence of an unambiguous position of the legislature in this matter, that there are three basic (distinguished according to the consequences) types of adoption, that is, full, complete and incomplete.[18] In each of these types, nevertheless, adoption results in the emergence of a legal relationship between the adoptive parent and child.[19] However, there are differences with regard to, for example, the registration of the adopted child's civil status. In cases of full adoption, a new birth certificate is always drawn up with the adoptive parents listed as parents.[20] However, in the event of a complete adoption, a supplementary note about the adoption is attached to the child's birth certificate.[21] Even then the guardianship

15 | These issues are signalled by Łukasiewicz, 2021, pp. 37–38. See also the British literature and case law cited in this study.
16 | Law of February 25, 1964 – Family and Guardianship code, consolidated text Official Gazette of 2020, item 1359.
17 | Law of June 9, 2011 with respect to family support and foster care system, consolidated text Official Gazette of 2022, item 447 as amended.
18 | This issue may be considered debatable, but since it is not of major importance from the point of view of the problems of this study, it will not be discussed further. The position expressed in this study was supported by, e.g., Ignatowicz and Nazar, 2016, p. 801; Panowicz-Lipska, 1997, pp. 209 et seq.; Smyczyński and Andrzejewski, 2020, p. 319; Sokołowski, 2008, p. 154; Zegadło, 2014, p. 783.
19 | Arts. 121(1) and 124(1) of the Family and Guardianship Code.
20 | Art. 71 of the Law on Civil Status Records.
21 | Art. 72(1) of the Civil Records Law.

court ruling on adoption may decide whether to issue a new birth certificate.[22] The situation is different for incomplete adoptions. In such cases, there is no possibility of a new birth certificate; only a supplementary note on the adoption is attached to the existing birth certificate.[23] In this note, the adopters are named as the parents. This solution corresponds to the assumption that in a full and complete adoption, the situation of the adopted child should be similar to that of a biological child. Following the ruling on this type of adoption, the legal ties binding the adopted child to his or her biological family are therefore severed. Through adoption, the child acquires rights and obligations with respect to the adoptive parent and his or her relatives, similar to a biological child.

However, the situation differs in the case of an incomplete adoption. This is because the effects consist only of the creation of a relationship between the adoptive parent and adopted child (and his or her descendants). However, the child does not become a relative of the persons related to the adoptive parent. Nor does the adoption sever the ties with the adopted child's biological family.

Regardless of the adoption type, the fundamental consideration is always the welfare of the child.[24] In Poland, only the adoption of a minor is permitted.[25] For this reason it is particularly important that the adoption centre selects the most suitable candidate in the best interest of the child's welfare. In the eyes of the law, this person will become a parent who should create a family environment that is optimal for the child's development. Despite this, it does not seem possible or expedient to create mechanisms for permanent, ongoing supervision of the adoptive family. This is because the Polish legislature tries not to interfere with the family-legal relations. This occurs only in the case of a threat to or violation of the welfare of the child.

3. The concept of parents

If, following a court decision on adoption, a relationship is created between the persons who adopt and the child who is adopted, such as between biological parents and their child, it becomes necessary to discuss the concept of parents under Polish law.

The Family and Guardianship Code, which is fundamental to the parent-child relationship, does not explicitly define this concept. Instead, the notion of parents can be interpreted based on applicable regulations. Thus, to determine who may be parents in Polish law, reference is most often made to the regulations set forth in the Constitution

22 | According to Art. 73(3) of the Civil Records Law, at the request of the adoptee, upon reaching the age of majority, the adoptee may obtain a complete copy of the existing birth certificate.
23 | Art. 71(1) of the Civil Records Law.
24 | Art. 114(1) of the Family and Guardianship Code. Further prerequisites are set forth in the section of the Family and Guardianship Code devoted to adoption.
25 | So, also in this respect, Polish law differs from those legislations that regulate the adoption of an adult. Only by way of example can we mention German and French law. See Arts. 1767–1772 of the German Civil Code (Bürgerliches Gesetzbuch vom 18 August 1896) [Online]. Available at: https://www.gesetze-im-internet.de/bgb/BJNR001950896.html (Accessed: 21 September 2022) and Arts. 344–345 and Arts. 360–370 – 2 of the French Civil Code (Code Civil des Français 1804) [Online]. Available at: www.legifrance.gouv.fr/affichCode.do (Accessed: 17 September 2022).

of the Republic of Poland of 2 April 1997 (especially Article 18)[26] and the provisions of the Family and Guardianship Code governing the origin of the child.[27]

Article 18 of the Constitution does not contain a definition of the term parents. However, it does define marriage as the union of a man and woman. As pointed out in Polish literature, this provision conveys the traditional understanding of the concepts used therein while protecting maternity and parenthood,[28] which are values of particular importance to society.[29]

The provisions contained in the Family and Guardianship Code align with constitutional regulations. As previously mentioned, this law lacks a definition of the concept of parents despite the fact that the concept repeatedly appears in this legal act.[30] It is clear from the code provisions that, according to Polish law parents are the mother[31] and father.[32]Maternity is a prerequisite for establishing paternity. The purpose of the current legislation is to confirm the relationships that occur in nature. It is unacceptable to adopt normative measures that would allow for the creation of constructs that do not correspond to the premise of the legislature. It is not possible to include any person who wants to be defined by the concept of parents.[33] Therefore, under Polish law, the parents cannot be of the same sex. As previously mentioned, the term parents refer only to the mother (female) and father (male). The other parent cannot be of the same sex.[34] It would also be unacceptable for one person to have, for example, a female gender and another a third gender (not female or male).[35] It is also not possible to enter more than two parents into a child's birth certificate. Moreover, the existing rule that the mother is a woman and the father is a man has been recognised as a fundamental principle of the Polish legal

26 | Constitution of the Republic of Poland of April 2, 1997, Official Gazette of 1997, No. 78, item 483, as amended.
27 | Arts. 61–86 of the Family and Guardianship Code.
28 | Banaszak and Zieliński, 2014, p. 353.
29 | See, for example, the judgment of the Constitutional Court of July 16, 2007, SK 61/06, OTK - A 2007, No. 7, item 77.
30 | In particular, the IA section on maternity and paternity.
31 | A woman who has given birth to a child – Art. 619 of the Family and Guardianship Code.
32 | A man whose paternity has been established in one of the available ways. The Polish legislature includes: 1. presumption of descent of the child from the mother's husband (Art. 62 of the Family and Guardianship Code); 2. acknowledgment of paternity (Art. 73 of the Family and Guardianship Code), 3. judicial determination of paternity (Arts. 84–85 of the Family and Guardianship Code).
33 | See Mostowik, 2015, pp. 312–314.
34 | This issue is variously normalised by individual legislatures. See, for example, the regulations of the Austrian Civil Code (Allgemeines bürgerliches Gesetzbuch vom 1 June 1811) [Online]. Available at: https://www.jusline.at/gesetz/abgb (Accessed: 16 January 2022), in which the lawmakers uses such concepts as mother, father, and parent. Vide para. 143 and para. 144 of this code. In contrast, for example, the British legislature, in addition to the terms mother and father, also uses the terms parent and also second female parent. The latter refers to a situation in which the parents are not married or are civil partners. See Birth and Deaths Registration Act 1953, e.g., Sec. 10 [Online]. Available at: https://www.legislation.gov.uk/ukpga/Eliz2/1-2/20, (Accessed: 2 December 2021).
35 | In Polish legislation, unlike in other legal systems (e.g. German or Austrian), the concept of a third (different) gender is not known. Only female and male sexes function. Therefore, it is permissible to enter only one of these genders in the birth certificate. Nor is it possible, not to enter any gender, as stipulated by para. 22(3) Personenstandsgesetz vom 19 February 2007 (BGBl I S 122) [Online]. Available at: https://www.gesetze-im-internet.de/pstg/BJNR012210007.html (Accessed: 17 July 2022). See also, for example, para. 45b of that law.

order, which justifies the prohibitive application of the public policy clause.[36] Therefore, in Poland, issuing a child's birth certificate in which the data of two persons of the same sex are entered as parents is not permissible. The head of the civil registry office was also precluded from registering a foreign birth certificate with two parents of the same sex.[37] Such registration would be contrary to the fundamental principle of the Polish legal order and would therefore constitute a violation of Article 107, point 3 of the Law on Civil Status Records.

The existing rules in Polish law that define the concept of parents are reflected in adoption cases. For if, as previously mentioned, as a result of adoption, the persons adopting become the parents of the child, these persons must be of the opposite sex. Thus, it is not permissible for same-sex couples to engage in a joint adoption. At the same time, it should be added that the Polish legislature does not provide for the institution of a homosexual partnership (or marriage). Joint adoption can only be carried out by spouses, who are a man and a woman. This provision is based on the unambiguous provision of Article 115(1) of the Family and Guardianship Code.[38] This is not considered a sign of discrimination against same-sex couples in Poland. It should be recalled that joint adoption cannot be carried out not only by same-sex partners, but also by different-sex cohabitants or fiancées. In addition, Polish law does not prohibit adoption by a person with a homosexual orientation. Therefore, a person who is not in any relationship can adopt, although adoption by a single person (homosexual or heterosexual) is treated as an exception and is granted based on the special needs of the child. It considers the welfare of the adopted child, which constitutes the fundamental and conclusive basis for adoption.[39]

36 | This position has been reflected in both the literature and the judicature. See, for example, the judgment of the Supreme Court of December 6, 2013, I CSK 146/13; the judgment of the Regional Administrative Court in Lodz of February 14, 2013, III SA/Łd 1100/12; the judgment of the Supreme Administrative Court of December 17, 2014, II OSK 1298/13, LEX 1772336. Cf. also the justification of the judgment of the Supreme Administrative Court of May 6, 2015, II OSK 2419/13, LEX 1780557, and the judgment of the Supreme Administrative Court of May 6, 2016, II OSK 2372/13, LEX 1780419. Crucial in this regard, however, was the resolution of the Supreme Administrative Court of 7 judges of December 2, 2019, II OPS 1/19. See also statements in the literature accepting this position, such as Mostowik, 2019; Mostowik, 2021. However, the issue is controversial, as evidenced both by statements in the literature accepting the permissibility of registration of a foreign birth certificate containing the data of two persons of the same sex as parents. There have also been court rulings accepting just such a position. By way of example, see the judgment of the Supreme Administrative Court of 10 October 2018, II OSK 2552/16; the judgment of the Supreme Administrative Court of 30 October 2018, II OSK 1869/16. Identically also in the judgment of 30 October 2018, II OSK 1870/16; Pawliczak, 2020, p. 51; Zachariasiewicz, 2018, p. 392; Tadla, 2019, p. 154.

37 | This situation is different in Germany. For example, the Federal Constitutional Court, in one of its rulings, stated that parents can be same-sex couples. See Bundesverfassungsgericht, Urteil vom 19 February 2013, 1 BvL 1/11.

38 | The situation is different, for example, in Germany, where, although according to Sec. 1741(2) of the German Civil Code, spouses can jointly adopt a child, but marriage can be entered into by persons of different or same sex (Sec. 1351(1) of the German Civil Code). For examples of other solutions see Arts. 264a–264c of the Swiss Civil Code (Schweizerisches Zivilgesetzbuch vom 10 December 1907) or Art. 346(1) of the French Civil Code. Also, the revised European Convention on the Adoption of Children of 27 November 2008. Allows adoption also by married homosexual couples and registered same-sex partnerships (Art. 7(2)), although the principle of adoption by a couple consisting of a man and a woman is maintained.

39 | Art. 114(1) of the Family and Guardianship Code.

The above remarks are essential for clarifying the issue of the permissibility of adoption by a transsexual person who has undergone a sex reassignment (only legal or biological). It is easy to see that there are two basic possibilities. The first is when the person in question underwent a sex change before the adoption of the child, and the second is when this occurred after the adoption was granted by the court. These issues are discussed later in this paper.

4. Change of sex by the adoptive parent before the adjudication of the adoption

In examining this issue, two cases are considered separately. The first is a joint adoption by spouses. The second is the adoption by a single person.

In a joint adoption, if the spouses are persons of the opposite sex, (both legal and biological), and all the necessary prerequisites, especially the welfare of the child, are met, there is no obstacle to adoption, even if one of the spouses is a transgender person. If one parent has undergone a sex change even before marriage and adoption, it is difficult to present this change as an obstacle to prevent the adoption. Following the adoption judgment, a new birth certificate will be drawn up for the child, which will identify the adopting parents as two persons of different sexes, both legal and biological, in accordance with the basic principle of the Polish legal order relating to the concept of parents.

However, the situation will be different when one of the spouses changes their legal sex after the couple marries. In such cases, spouses have the same legal, albeit different, biological sex. It seems that the court would not rule for joint adoption. This is because the adopted child's new birth certificate would have to include the data of two people of the same legal sex as the parents, which violates the aforementioned fundamental principles of Polish law. The situation becomes difficult if the adoption is granted by the court. The head of the registry office is obliged to refuse to register any event that is contrary to the fundamental principles of the Polish legal order,[40] but he or she is bound by the final court ruling.[41] A copy of such a ruling is sent by the court to the relevant civil registry office.[42] Given this unclear situation, the question arises whether the head of the civil registry office has the authority to refuse to register the civil status in such a case. This is not, after all, a decision of an administrative court issued in connection with the supervision of public administration,[43] which the head is indisputably bound to comply.[44]

40 | Art. 103 of the Law on Civil Status Records.
41 | Art. 365(1) of the Code of Civil Procedure.
42 | Art. 4 of the Civil Records Law.
43 | See Arts. 1 and 3 of the Law of 30 August 2002 – Law on Proceedings before Administrative Courts, consolidated text Official Gazette of 2022, item 329 as amended.
44 | According to Art. 170 of the Law – Law on Administrative Court Proceedings, according to which a final decision of such a court is binding not only on the parties and the court that issued it, but also on other courts and state bodies. In turn, according to Art. 153 of that law, the legal assessment and the court's indication as to further proceedings expressed in its ruling are binding on the authorities whose action was the subject of the appeal.

Otherwise, the concept of supervision is undermined altogether. However, a possible argument in favour of the admissibility of such a refusal could be that the head of the civil registry office is not making a substantive assessment of the legitimacy and accuracy of the court's decision but that the registration of the event (based on the court's decision) would be contrary to the basic principles of the Polish legal order. Accepting such a solution, one would have to assume that the head of the registry office would not assess the court ruling itself (which he or she is obviously not entitled to do) but the effects of the registration of the event is an issue of compliance with the fundamental principles of the Polish legal order.

By accepting such a solution, the head of the civil registry office avoids a situation in which, by concluding a civil status registration based on a general court ruling,[45] he or she would be violating Article 103 of the Law on Civil Status Records. Notwithstanding, this solution is not entirely accurate because the head of a civil registry office cannot have the authority to refuse the final decisions of courts, not only the administrative courts that oversee their activities but also the common courts. Otherwise, the head would be given the function of a super-arbitrator who could challenge court rulings.[46]

Alternatively, other solutions should be contemplated whereby the head of the registry office would make an appropriate entry into the register pursuant to a court ruling without exposing himself or herself to the charge of violating the elementary principles of the Polish legal order. For example, he or she could leave the fields for mother and father blank in the adopted child's birth certificate while providing the data of two persons of the same sex as the parents in the annotation accompanying the certificate based on Article 23 of the Civil Status Records Law. Finally, one might consider filling in only one box (mother or father), depending on the spouse with the legal sex consistent with the biological sex.[47]

However, these solutions are not flawless. Doubts have arisen as to whether the head of the civil registry office may leave sections relating to one or both parents blank when drawing up a new birth certificate for a child of adoption. The Polish law on civil records does not expressly provide for omission of a box for one of the parents.[48] Consequently, it seems that under the current law, it is difficult to recommend a solution that would not raise reasonable doubts regarding compliance with applicable regulations. In this regard, a gap in Polish law is apparent. It is very difficult to address the gap through the interpretation of current regulations, the need for the intervention of lawmakers seems to be the most justified.

With regards to adoption by a single transsexual person, it is necessary to consider the situation in which they have changed not only their legal but also their biological sex and when there has been a change only in legal sex without surgical correction.

In the first case, there does not seem to be any obstacle to granting adoption (provided, of course, that the other prerequisites required by the legislature are met). A person adopting a child will be entered on the birth certificate of the adopted child as either the mother or father. Personal information corresponds to both legal and

45 | And thus respecting Art. 365(1) of the Code of Civil Procedure.
46 | For a more extensive discussion of these problems, see for example, Gajda, 2020a, pp. 18–20.
47 | Cf. in this regard the considerations of M. Wojewoda on same-sex parenthood in the context of registration of events in Poland: Wojewoda, 2020, pp. 36–37.
48 | These issues are more extensively analysed, for example, by Łukasiewicz, 2020, pp. 60 et seq.

biological sex. The same applies to the additional mention of adoption. The first name of the other parent is then entered on the birth certificate according to the parent's indication, and in the absence of such an indication, the first name is chosen by the head of the civil registry office. Subsequently, the surname of the other parent will be entered as the surname of the adoptive parent.[49] Thus, the birth certificate of the adopted child will include data of persons of the opposite sex as parents. In fact, it should be assumed that if a person adopting the child wanted to provide the name of a person of the same sex as the other parent, the head of the registry office would refuse to include it in the child's birth certificate.

The situation becomes complicated again if the person who adopts a child undergoes a change in legal gender only. First, the adjudicating court may raise doubts about whether such an adoption will be compatible with the welfare of the minor child and refuse to decree it.[50] On the other hand, in the event of an order granting the request of the person who intends to adopt the child, a copy of the final order will be sent to the registry office. In such a case, the head is obliged to issue a new birth certificate for the adopted child (and attach a supplementary note to it) in accordance with the order. Depending on the legal sex of the adoptive parent, he or she will include their data in the mother's or father's column.

However, a situation will then arise in which technically everything will be in keeping with the law, but due to the biological sex of the adoptive parent, which is different from their legal sex, there will be a violation of the basic principle of Polish law where only a woman can be the mother, and only a man can be the father. In this case the violation is the fact that the person who is entered as the mother is a biological male with the legal sex of a woman. In this situation, the problem reappears, is the head of the civil registry office bound by the final court decision and take the appropriate action (draw up a new birth certificate or attach an additional note about adoption to the existing one) or, by virtue of the applicable regulation[51] he or she is obliged to refuse to take such action.

5. Change of adoptive parent's sex after the adoption

This section focuses on the situation in which an adoption judgment was made before the adoptive parent's sex changed. This may involve only a change in legal sex, as well as a change in legal sex combined with surgical sex correction. First, whether such a case, especially for joint adoption by spouses, is possible under Polish law should be considered. It can be argued that the court should not grant a transgender person's request to determine his or her gender other than their legal sex if such a person is married and has jointly adopted a child with their spouse. However, as previously

49 | Arts. 71(3) and 72(3) of the Civil Records Law.
50 | This issue may raise analogous questions to the permissibility of adoption by an unmarried homosexual person. On this matter, see for example, the decision of the ECHR (Application No. 43546/02, Judgment, 22 January 2008) in the case of *E.B. v. France*, from which it follows that sexual orientation should not stand in the way of granting adoption permission to a homosexual person if national law allows adoption by a single person.
51 | Art. 103 of the Civil Records Law.

mentioned, the basis for this claim is Article 189 of the Code of Civil Procedure. According to this provision, the plaintiff may demand that the court determine the existence (non-existence) of a right or legal relationship if he or she has a legal interest in it.[52] Thus, such a demand is contingent on the existence of a legal interest[53] on the part of the plaintiff in establishing that he or she is a person of a different sex from that specified in his or her birth certificate. Thus, in this case, there is no basis for the court to consider at all the question of whether the plaintiff remains married or whether they and their spouse have adopted a child. The existence of said interest is a *conditio sine qua non* for the admissibility of an action under Article 189 of the Code of Civil Procedure. In this regard, it is not necessary to meet other additional conditions, such as not being married. In view of this situation, it should be stated that according to current Polish regulations, it is possible for a situation to arise in which one of the spouses, after the court has ruled on joint adoption, can carry out a change in sex (only legal or biological). In the event of adoption a new birth certificate will be drawn up for the child, or an additional note of adoption will be attached. This certificate will include the data of the adopting spouses before one of them changed sex; therefore, it will include the data of the opposite sex. A change in sex by one adoptive parent would not affect the child's civil status registration. Its consequences would not be retroactive but only *ex nunc*. Thus, the adoptee's birth certificate should continue to include data of persons of the opposite sex as parents. The most relevant consideration in this matter seems to be the determination of the adoptive parent's gender at the time of adoption. This is consistent with Article 10(2) of the 2015 Law on Gender Recognition. This also corresponds to the norms of most countries that have decided to regulate issues related to gender reassignment. One example is the German legislation. According to paragraph 11 of the *Gesetz über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit in besonderen Fällen*, a change in the adoptive parent's sex does not affect the relationship between adopted children and the parent, if the adoption took place before the final ruling on the change of the adoptive parent's sex.

As one may suppose, also in the case of a change of sex by a single person who previously adopted a child, the adopted child's civil status will not be affected. The adoptive parent's data from the time of the court's decision on adoption will remain in his or her birth certificate if a new one has been drawn up. These data will also be disclosed in copies of certificates issued by the head of the civil registry office.[54] If, on the other hand, an additional note is attached, the data of the adoptive parent at the time when the adoption ruling became final will also be included.

52 | Regarding this concept, see for example, Zieliński, 2011, pp. 341–344.
53 | I also expressed this view in another study. See Gajda, 2019, p. 180.
54 | For the concept of complete and abbreviated copies of a civil status record, see Art. 44(2) and (3) of the law on civil status records. In turn, according to Art. 48(1) of the Law on Civil Status Records, an abbreviated copy of a birth certificate contains: 1) the surname, first name(s) and gender of the child, 2) the country, date and place of birth, and 3) the family names and first names of the parents.

6. Conclusion

This article confirms the need for Polish lawmakers to enact a law on gender reassignment which regulates this important issue in a comprehensive and detailed manner. The law should specify the prerequisites for the change in question, the procedure to be followed with special attention to the consequences of gender correction. It should include a provision regarding whether a change in legal sex has to be accompanied by a surgical procedure. The introduction of such an obligation is undoubtedly debatable (if only in terms of human rights and freedoms), although, on the other hand, in the event of an obligation to carry out surgical sex correction, a number of current problems would cease to exist. For example, we can mention the case of the birth of a child by a person who is legally male but biologically female, or the judicial determination of paternity of a legally female person who is biologically male. In addition, in the event of adoption, there is no doubt about the sex of the person who adopts the child. Consequently, there would be no difficulties related to issuing a birth certificate for the child (attaching a supplementary note) after the court's decision. Nevertheless, a solution involving no obligation to perform surgical correction of the reproductive organs is also possible.

It is necessary for lawmakers to consider the introduction of a ban on gender reassignment by married persons. This solution would avoid violations of Article 18 of the Constitution of the Republic of Poland which presupposes a different sex of spouses not only at the time of entering marriage but also throughout its duration. In such cases, the joint adoption of a child by spouses after a change in sex by one of them would also be excluded, since the prerequisite for this change would be that the spouses were not married. Should there be a ban on gender reassignment by married persons, joint adoption prior to such a change would be possible; however, gender reassignment would no longer be relevant as long as the transgender person remains married. If this person had applied to the court for a divorce and the court granted the divorce,[55] it would have to be assumed that the change in sex after the divorce (and earlier adoption) would not affect the origin of the child, as recorded on his or her birth certificate. Spouses would continue to be listed as parents of different sexes.[56]

The issue of adoption by a single person who has changed sex should also be resolved. Such an adoption would have to be considered permissible as long as the rules of maternity and paternity were observed; that is, if the adoptive parent had changed their gender, the adopted child's birth certificate would include data from parents of different sexes.

Going slightly beyond the issue of adoption, one could advocate a solution where a transgender woman with a legally male gender gives birth to a child, then the woman's data as the mother should be entered on the child's birth certificate in accordance with Article 61(9) of the Family and Guardianship Code. Similarly, if a legally female biological male becomes the father, then the data of the male biological father should be entered into

55 | A divorce decree would, of course, be possible only if there is a complete and permanent breakdown of the marriage and in the absence of the so-called negative grounds for divorce. See Art. 56 of the Family and Guardianship Code.

56 | On the other hand, if the option is adopted in which the marriage would terminate by operation of law as a result of a change in the sex of one of the spouses, joint adoption would be possible only before such a change.

the child's birth certificate.[57] Indeed, one must agree with the previously cited view that the legal sex of a given parent should not be decisive, but rather his or her biological sex at the time of birth or even conception of the child (in the case of the father).

The proposed solutions could arguably be considered debatable only because of the principle of equality before the law and the prohibition of discrimination for any reason contained in Article 32 of the Polish Constitution. However, as it seems, they correspond to the basic principles of the Polish legal order, according to which the mother is a woman and the father is a man. In addition, they would allow the rights of transgender people to be respected primarily by creating legal rules that define the prerequisites for the permissibility of gender reassignment and normalising its effects.

57 | One could also consider a solution whereby in the event of 'fulfilment' in the role of a parent consistent with biological sex, but contrary to legal sex, there would be a 'return' by law to the legal sex corresponding to biological sex.

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ON THE ADMISSIBILITY OF THE LEGAL TERMINATION OF PREGNANCY: A STUDY OF RECENT APPROACHES IN POLAND

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ABSTRACT

This paper examines the phenomenon of abortion through a legal perspective, while simultaneously adhering to philosophical approaches. The analysis is framed within the context of the inception of human life and the correlation between the protection of concurring fundamental rights, namely the rights to life and personal autonomy (freedom). The evolutionary approach highlighted in this study confirms the hypothesis that the issue of abortion in the Polish legal system has taken a different path when compared to other European countries. This is a peculiar route, as the trends have remained closely linked to political change. The distinctiveness lies in the fact that while in other European countries, the 1990s were associated with pro-choice trends, the opposite, namely the pro-life trend, prevailed in Poland. Thus, starting with the interwar period, with the exception of a brief liberalizing episode in 1996, the Polish legal treatment of abortion can be considered conservative-liberal (abortion compromise). It followed an indication model, covering legal, medical and eugenic considerations. In this paper, the key point concerns a judgment of the Polish Constitutional Court, dated 22 October 2020, which shifted the system to a fully conservative track. In the authors' opinion, at this point, another evolutionary milestone is about to take place. Whereas the path of conservative change remains unfinished, social resistance to this trend is substantial. Another clash between pro-life and pro-abortion options in the field of further potential changes concerning abortion law is expected.

KEYWORDS

abortion
protection of life
termination of pregnancy
foetus
fundamental rights

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https://doi.org/10.55073/2023.1.109-130

1. General remarks

The question of abortion falls within the domain of law, which defines when it is admissible and how it should be performed or bans it altogether, as well as within the domains of several other fields of learning that strive to explain and understand diverse issues related to it. Abortion is a highly topical social problem that is subject to social and political discourse. It has stirred numerous controversies and antagonized various communities. This article traces the development of the abortion law in Poland, by focusing on relevant controversies and emotional disputes. First, it presents the philosophical underpinnings of possible legal treatments of abortion. Second, these treatments are described and their development is traced. Third, it shows how Polish abortion law evolved from the 1920s with a special focus on its present-day criminal law aspects. Emphasis is laid on the latest modification of the law as a result of the decision of the Polish Constitutional Tribunal (hereinafter, CT) dated 22 October 2020 (K 1/20),[3] which declared the provision admitting abortion in the case of a high probability of severe and irreversible damage to the foetus unconstitutional.

The chief hypothesis advanced in this article is that Poland's abortion law follows, in its development, a non-standard path when compared to that in other European systems. Unlike them, Polish law has proceeded in waves and has shown strong tendencies drawing far more on pro-life than pro-choice ideas. This is clearly underscored by peculiar cultural traditions and developments in the political system (transformation). Tendencies to liberalize the abortion law in Poland are associated with the period of the Polish People's Republic (hereinafter, PRL), whereas conservative trends are related to Catholic-Conservative movements. The latter left a strong mark on the transformation of the political system in Poland in the 1990s. After 1989, the Third Republic laid the foundations for the abortion law, while being predominantly guided by the desire to leave behind the PRL legacy, which was branded as inglorious.

2. Philosophical theories on the admissibility of abortion and abortion models

The philosophical underpinnings of the possible legal treatment of abortion concentrate heavily on answering the fundamental bioethical question of when the existence of a human being begins. Can we speak of a human being in the prenatal period already,[4] or is it only from the moment of birth? Anti-abortion views concentrate on the former, arguing that a foetus has an unlimited right to life and inherent human dignity. Pro-abortion or pro-choice views follow a line of argument that denies the notion that the life of a foetus is really protected by prescriptions against killing and in favour of respect

3 | OTK ZU 2021, item 4. Two justices, Piotr Pszczółkowski and Leon Kieres, filed dissenting opinions.
4 | The question may be made even more specific. If it is held that we can speak of the existence of a human being in the prenatal period, then we can ponder over whether it is from the conception or from the zygotic, embryonic, or only from the foetal periods onward.

for human life[5] mainly by claiming that a foetus living in his/her mother's womb is not the same as a human being living on his/her own. It is a human being in a biological or genetic sense, but not in a moral one – it is not a person yet.[6] The pro-choice argument takes into account the woman's perspective and her unfettered right to make decisions on procreation. Attention is also drawn to the unique nature of the relationship between a pregnant woman and a foetus or an unborn child and vice versa, stressing that the foetus is not self-contained and that its existence is conditional, being linked to the life of its mother.[7]

The conflict of two fundamental human rights, namely the rights to the protection of life and freedom arouses controversy vis-à-vis abortion law. Any attempt to resolve the conflict calls for an answer to the question about the beginning of human life. An answer is sought, making use of three fundamental criteria: genetic criterion, and the criteria of potentiality and consciousness. The genetic criterion suggests that at the moment of fertilization, when the DNA of an egg cell and of a spermatozoon merge, a human being – a genetic person – arises. Thus, there is no reason whatsoever for differentiating between a genetic person and human being. The newly-arisen genome determines the development of an embryo and foetus; at a later stage, it decides the biological identity of the organism throughout its life.[8] The adoption of the genetic criterion results in the legal view that it is necessary to protect the legal interest, that human life begins from the moment of conception.[9] Counterarguments to the genetic criterion include the observation that a human being does not owe his/her existence to the genetic record alone; after all, it is present in every biological element of the human body. For the human to exist, something more is necessary – the existence of a complete organism containing a human genetic code.[10] Another argument equalizing a foetus with a human being is the argument of potentiality, which relies on the assertion that from the moment of conception itself, we are dealing with a being that will potentially be a human being.[11] D Marquis referred to potentiality and the future of a foetus in his discussion of abortion. He noted that homicide is the worst of all possible crimes as it annihilates the victim and deprives him/her of any future. By analogy, the same is true of abortion and a foetus. Abortion deprives a foetus of any future and all that it may bring. From this perspective, the termination of pregnancy does not differ from a homicide. A foetus, as any human being, has some future of which it is deprived.[12] A pro-choice retort to the argument from potentiality is not denying the potentiality or the future of a foetus as a person, but rather denying its significance. As J. Baker observed: 'In pro-choice terms, foetuses are only potential persons, and hence

5 | Cf. Baker, 1985, p. 263.
6 | Cf. Warren, 1973, passim.
7 | Cf. Soniewicka, 2021, passim.
8 | Cf. Derek, 2016, pp. 133–134.
9 | Cf. Noonan, 1968, p. 134.
10 | Cf. Derek, 2016, p. 134. A suggestive illustration of the qualitative and not only quantitative difference between a human being and an embryo having a human genetic code was given by G. Annas, who noted that if there are 20 human embryos and 1 two-year-old child in a lab, and a fire breaks out there, we will intuitively rescue the child first and not the embryos – cf. Annas, 1989, pp. 21–22.
11 | Wade, 1975, p. 241.
12 | Cf. Marquise, 2007, passim.

fall into quite a distinct moral category'.[13] A foetus is a potential person, as is a sperm and an egg, because they have the potentiality to develop into an actual human being. As M Rasekh observed, the fact that A will become X in the future does not logically mean that A is X in the present or should now morally be treated as the same as X. Someday, we shall all die, which does not mean, however, that it is admissible to treat all of us as dead.[14] There is a view placing the beginning of a human being at the beginning of his/her consciousness.[15] As MA Warren observed, a foetus belongs to the species *homo sapiens* and satisfies the biological or genetic criterion; however, it is not a person as it is not rational and conscious and, consequently, does not have such a claim on life as a person does.

The views presented above and accompanying arguments in their favour, concerning the beginning of the existence of a human being, what or who a foetus is, and accordingly the admissibility or inadmissibility of abortion, can be categorized, in the opinion of M Rasekh, into four theories. The first two – the theories of sanctity of life and free will – are extreme and do not admit any considerations or discretion that may admit/preclude abortion under certain circumstances. The other two – the theories of value of investment and conscious person – can be considered more moderate.[16] The theory of sanctity of life assumes that life is superior to any other value and that every life has the same value, including that of a mother and foetus. The life of a human being begins at the moment of conception and should be fully protected from then on. From this perspective, abortion is a form of homicide. At the other end of the continuum, the theory of free will assumes that abortion is the right of every pregnant woman, the exercise of which is solely at her discretion. This right supposedly follows from the autonomy and dignity of the woman. Arguments in support of the theory of sanctity of life are refuted by the statement that even if it is acknowledged that a foetus has a right to life, it should be distinguished from the mother's right to her bodily integrity and autonomy. The conflict between these rights is resolved by observing that the foetus cannot use the mother's body without her consent.[17]

The investment theory assumes that every life, including one that has just been conceived and not yet born, is of great value and cannot be wasted. The life of a foetus has such value, too, so it should not be wasted by abortion, if there is no indication for it.[18] An anti-abortion argument does not rest in this case on the right of a foetus to life, but on the value its life has or may have in the future. This shift admits, unlike the theory of the sanctity of life, the performance of an abortion under certain circumstances, such as severe and irreversible damage to the foetus.

The fourth theory – the conscious entity theory – relies heavily on human consciousness arguments and maintains that killing a human being is homicide and a foetus becomes a human being only at a certain point in its development journey. From that moment on, abortion is not admissible. Earlier, until a foetus is considered a human being, the mother has the right to abortion. The question of the point in time when a foetus becomes a human being or rather what makes it a human being remains debatable. The

13 | Baker, 1985, p. 264.
14 | Rasekh, 2005, p. 254.
15 | Cf. Warren, 1973, p. 5.
16 | Rasekh, 2005, p. 253.
17 | Ibid., p. 256.
18 | Ibid., pp. 259–260.

answer is supposedly consciousness. Still, however, it is disputable as to when a foetus acquires consciousness.[19] Nevertheless, the conscious entity theory admits abortion until a certain point in time during pregnancy and strictly rules it out afterwards.

The major arguments for and against abortion outlined above and the four theories based on them underpin specific model legal treatments of abortion. Three models can be distinguished: full protection, indications, and term, also referred to as abortion on request. The full protection model is based on the theory of sanctity of life. It suggests that no circumstances would make abortion legal. Thus, abortion remains a crime, the criminal responsibility for which may be precluded only along general principles as with any other offence. The full protection model is found in some Central American countries (e.g. Honduras and Salvador).[20] In Europe, the only countries that do not admit abortion are Malta and Andorra, although discussions questioning the justness and admissibility of such legislation have been recurrent in recent years.[21] The indications model respects the principle of protection of life. The application of the principle is limited by specifying the circumstances that make abortion legal, namely medical, eugenic, legal, and social ones. Medical circumstances put the life and health of the pregnant woman at risk owing to pregnancy. Health, in this case, can be understood broadly and encompasses mental health as well (e.g. in Finnish law). The eugenic circumstances involve serious genetic defects of a foetus or permanent and irreversible damage to it. The legal circumstances cover a situation in which pregnancy results from a prohibited act (e.g. rape or incest). The social circumstances may be the broadest category, covering various socio-economic considerations. In practice, the legalization of abortion is considered where the pregnant woman's economic situation is bad or where her age is a concern. The indications model relies on the value of investment theory, whereas particular indications are possible reasons for renouncing the protection of the life of a foetus as a legal interest. The indications model (in various forms) is found in Finland, and Poland, whose legal treatment of abortion is analysed below. Unlike Polish law, Finnish law is more liberal, as it permits an abortion up to the 12th week of pregnancy for medical, legal, and/or eugenic reasons, and for a broad spectrum of social reasons, which include situations where the mother already has at least four children, she is under 17 or over 40 years of age, and where childbirth and care for the child would put too much of a strain on her, considering her current and future situation in life.

The third model is abortion on request (term model) where it is legal in principle and the right of a woman to have it is limited solely by the point in time during the pregnancy when it can be performed. This model dominated in Europe at the time of writing, where exceptions include Malta, Andorra, San Marino, Lichtenstein, Poland, and Finland. Over 95 percent of women of reproductive age live in Europe in countries that allow abortion on request or on broad social grounds (Finland).[22] In the term model, it is crucial to indicate the period of pregnancy in which abortion is admissible. The periods vary under each legislative instrument. In Germany, abortion on request is possible until the 12th week of pregnancy, in Spain, until the 14[t]h week. A relatively long period is provided for in the UK, namely the 24th week. Studies show that over 90 percent of abortions in England,

19 | Ibid.
20 | Berer, 2017, p. 20.
21 | Gravino and Caruana-Finkel, 2019, p. 299.
22 | Center for Reproductive Rights, 2021a, passim.

Scotland, and Wales are performed before the 13th week of pregnancy.[23] The term model permits abortions until a certain stage of pregnancy, and is based on the conscious entity theory, with the right of the pregnant woman to decide freely whether to terminate her pregnancy at an early stage being strongly underscored. Some countries have legislated guarantees to ensure that the decision is conscious and not taken hastily. The guarantees provide for mandatory waiting periods and counselling, and a third-party authorization procedure. Mandatory waiting periods require a mandatory time period to elapse between the date on which an abortion is first requested and the date on which it actually takes place. Such requirements are in place, for instance, in Germany, Spain, and Italy. Another procedure that has to precede the performance of an abortion on request is mandatory counselling. It is followed in several European countries (e.g. Germany and Italy) and requires women to undergo prior mandatory counselling or receive mandatory information from their doctors. The rarest limitation to abortion on request, the third party authorization procedure, requires prior permission from parents, spouse, guardians, doctors, or official committees before accessing abortion care, and applies chiefly to underage (e.g. in Slovakian law) or married (e.g. in Japan) women.[24]

The legal admissibility or inadmissibility of abortion forms a continuum between the two extremes of the full-protection and term models. Changes in abortion law go in the direction of liberal solutions, at times very dynamically. A case in point is Ireland, where abortion, consistent with the full-protection model, was held to be an offence, and carried a maximum sentence of 14 years' imprisonment. In 1983, Ireland adopted the eighth amendment to its constitution, whereby human life was to be fully protected from the moment of conception. In 2018, by virtue of a referendum, the eighth amendment was repealed. The next step was the commencement of legislative work on a bill legalizing abortion. In the same year, the Health (Regulation of Termination of Pregnancy) Act, which permits termination under medical supervision, generally up to 12 weeks' gestation, and later if the pregnancy poses a serious health risk or there is a fatal foetal abnormality, was adopted.[25]

Spain followed a similar path. After a period when abortion was totally banned under Gen. Franco, in 1985, the full-protection model was replaced by the indication model, under which abortion was permitted where: (1) the pregnancy was the result of rape, (2) foetal malformations appeared, (3) where the pregnancy was considered a risk for the physical or psychological wellbeing of the woman. It resembled the model in place in Poland. The Spanish model was changed 25 years later, in 2010, when Spanish lawmakers enacted a law providing for the abortion on the term model. Spanish law has permitted, for over a decade now, induced abortions without any prerequisites for up to 14 weeks of gestation. Afterwards, specific medical conditions must be put forth. The time limit after which abortion is absolutely inadmissible is 22 weeks of gestation.

23 | Abortion Statistics, England and Wales, 2019, p. 4.
24 | Center for Reproductive Rights, 2021b, passim.
25 | Taylor, Spillane and Arulkumaran, 2020, p. 37.

3. Legal framework for abortion in Poland: The evolutionary approach

The evolution of abortion law in Poland has been very unique. In the interwar period – bearing in mind the cultural background – a relatively liberal indication model was adopted, making use of the medical, eugenic, and legal criteria. It evolved in the pro-choice direction in the PRL, when it expanded by adding a social (socio-economic) criterion. The political-system transformations of the 1990s brought about changes in abortion law while keeping the indication model. It was based on three criteria (medical, eugenic, and legal). A tendency towards reduction, besides a short episode of reinstituting the socio-economic criterion in 1996, has been maintained to date. The current model in Poland is an indication model that is limited to two criteria: medical and legal. This journey is presented in detail below.

The rebirth of the Polish State in 1919 is taken as the starting point, marking the inception after 123 years of non-existence. Rebirth or the creation of an entirely new legal and political entity was a great challenge, but provided an opportunity to receive the latest philosophical, legal, and social trends. Abortion was a great social and legal problem at the time, provoking heated discussions on the scope of the legal protection of life. The positions taken by Catholic and conservative circles on the one hand and liberal ones on the other, clashed. The liberal trend was represented by authors such as Tadeusz Boy-Żeleński,[26] Irena Krzywicka,[27] and Stefan Glaser, who argued in favour of the liberalization of abortion law so that abortion would be available when medical, legal, and social indications for it were present.[28] It was vital to choose an adequate model. As opinions in the debate clashed, the indication model was chosen rather naturally as it offered some space for compromise. The task of setting the limits of the legality of abortion was given to the Criminal Law Codification Commission, which was set up to prepare a draft Criminal Code. The original draft made the termination of pregnancy legal for the sake of a woman's health and when pregnancy resulted from a prohibited act. The admissibility of abortion for social reasons was considered.

In the final version of the 1932 Criminal Code,[29] however, the conservative option won, represented, for instance, by Juliusz Makarewicz, its principal drafter. The 1932 Criminal Code, Articles 231–234, penalized illegal abortions except where the procedure was performed by a physician to save the life of a woman or where the pregnancy resulted from an offence. Punishments were incurred by both the pregnant woman and the person performing the abortion. At the time, a debate took place in the authoritative juristic literature as to whether criminal responsibility extended to an aider and abettor in aborting

26 | Tadeusz Boy-Żeleński published a series of features in the Kurier Poranny in October-December 1929 with the aim of convincing the jurists of the Codification Commission to decriminalize abortion. A selection of 11 of these features was published in book form, entitled Piekło kobiet in 1933.

27 | Zielińska, 1990, p. 123.

28 | Glaser, 1928, passim, its main theses were repeated in a speech at the 2nd Congress of Polish Lawyers in Sept. 1929.

29 | Order of the President of the Republic of Poland, *J. of Laws* of 1932 No. 60, item 571.

a foetus.[30] The Code in force then used terms such as aborting a foetus, pregnant woman, and foetus.[31] Articles 231–234, formed part of Chapter XXXV, titled Offences against life and health, and remained in force until 1956.[32] Among the conditions making the abortion of a foetus legal, the Code required that the medical necessity of the termination of pregnancy be confirmed by two physicians other than the one carrying out the procedure and that the reasonable suspicion that the conception occurred as a result of a crime be confirmed by a competent prosecutor.

After the Second World War, that is, in the Polish People's Republic (hereinafter, PRL), abortion law was liberalized to a degree, but the changes were gradual. The first piece of legislation making abortion legal was the Medical Profession Act of 28 October 1950.[33] Under Article 16, a physician could terminate a pregnancy only when (1) the procedure was necessary for the sake of the health of the pregnant woman, which was to be ascertained by an opinion of a medical panel; and/or (2) it was reasonably suspected that the pregnancy resulted from an offence specified under Articles 203, 204, 205, and 206 of the 1932 Criminal Code, which was to be confirmed by a public prosecutor.

Major changes in abortion law were brought in the PRL period by the Pregnancy Termination Conditions Act of 27 April 1956 (hereinafter, the 1956 Act)[34]. It extended the catalogue of grounds for a legal abortion by adding difficult living conditions of the woman to it.[35] The indication model adopted earlier was consolidated at this point, having been founded on all three criteria. The 1956 Act repealed Articles 231–234 of the 1932 Criminal Code, replacing them with its Articles 3–6. Until 1969, when another Criminal Code was enacted, the 1956 Act regulated the question of the termination of pregnancy comprehensively and exhaustively. Its preamble stated that the Act aimed to protect women against 'detrimental effects of pregnancy termination in inappropriate conditions or by persons who are not physicians'. Under Article 1, pregnancy can be terminated only by a physician if (1) the termination of pregnancy was supported by medical indications or difficult living conditions of the pregnant woman; and/or (2) it could be reasonably suspected that the pregnancy resulted from an offence. However, abortion was not allowed for the sake of living conditions or despite the criminal origin of pregnancy if there were any medical reasons not to perform it.[36] Although the socioeconomic prerequisite was broadly formu-

30 | Makarewicz, 1933, pp. 327 et seq.

31 | The 1932 Criminal Code, Art. 231, said: 'Any woman who aborts her foetus or permits another person to abort it shall be punished by arrest of up to 3 years'. Art. 232 said: 'He who, with the consent of the pregnant woman, aborts her fetus or gives her aid with this shall be punished by imprisonment of up to 5 years'. The admissibility of abortion was legislated under Art. 233, which said that there was no offence provided for under Arts. 231 and 232 if the procedure was performed by a physician and (a) it was necessary to save the health of the pregnant woman; (b) pregnancy resulted from one of the offences specified under Arts. 203, 204, 205, and 206 of the Code (i.e. it resulted from rape, sexual abuse of a person aged under 15 years or a helpless person, or where a person was sexually abused taking advantage of her dependence on the abuser, or incest). Under Art. 234, 'He who without the consent of the pregnant woman aborts her fetus shall be punished by imprisonment of up to 10 years'.

32 | Siewierski, 1958, p. 314.

33 | *J. of Laws* 1950, No. 50, item 458.

34 | *J. of Laws* 1956, No. 12, items 61, 62.

35 | See the stenographic record of parliamentary debate, 1956, p. 475.

36 | See comments by Szwarc and Śliwowski, 1957, p. 45. The authors drew attention to the fact that the Act did not eliminate interpretation doubts arising in connection with the 1932 Criminal Code.

lated, difficult living conditions of the woman, it was subordinated together with the legal prerequisite, to the medical one. The last-mentioned prerequisite was broadly interpreted to encompass medical indications concerning the health of the woman and foetus.

Criminal responsibility was not borne by the pregnant woman, which resulted from the recognition of two varieties of illegal abortion: performed either with or without the consent of the pregnant woman (or, in an aggravated form, with the use of violence). It was forbidden to force a woman to undergo abortion;[37] to carry out an abortion with the consent of the woman, but contrary to the provisions of Article 1 of the Act;[38] and to provide assistance to a pregnant woman in performing an abortion against Article 1 of the Act.[39]

The 1956 Act was the most liberal statute to regulate abortion under Polish law. The provisions classifying the prohibited acts defying abortion bans were modified in the meantime owing to the enactment of a new Criminal Code in 1969.[40] Its entry into force derogated the criminal law provisions of the 1956 Act that were superseded by Articles 153, 154, and 157 of the new Code.[41] In its original wording, the Code used terms such as 'induces miscarriage', 'terminates pregnancy', 'pregnant woman', and 'termination of pregnancy'. Criminal responsibility for an illegal termination of pregnancy depended on whether the perpetrator terminated pregnancy or had it terminated with or without the consent of the pregnant woman. The 1956 Act did continue until a new statute was enacted in 1993, to specify the legal conditions of the admissibility of termination of pregnancy.

The turn away from liberal tendencies was ushered in by political-system transformations and the rise of the III Republic in which the voice of Catholic and conservative circles came to dominate in such matters.[42] On 1 March 1989, MPs representing the Polish Catholic-Social Union submitted a bill on the legal protection of the conceived child that had been drafted in collaboration with the Polish Episcopate. Thus began concerted efforts taken by radical conservative circles with the support or assistance of the Polish Catholic Church to change abortion law.

Before the enactment of the new statute, on 30 April 1990, the Minister of Health and Social Welfare issued an Executive Regulation to the 1956 Act.[43] It concerned '...

37 | Art. 3. Any person who forces a woman in any manner to terminate her pregnancy shall be punished by imprisonment of up to 5 years.

38 | Art. 4. Any person who terminates a pregnancy with the consent of the pregnant woman but contrary to statue shall be punished by imprisonment of up to 3 years.

39 | Art. 5. Any person who aids a pregnant woman to terminate her pregnancy contrary to statute shall be punished by imprisonment of up to 3 years.

40 | They were repealed as of 1 January 1970 by virtue of the Criminal Code Introductory Provisions Act of 19 April 1969. *J. of Laws* of 1969, No. 13, item. 95.

41 | The 1969 Criminal Code classified the prohibited acts defying abortion law. Art. 153 said: 'Any person who induces miscarriage in a pregnant woman by force or terminates her pregnancy in another manner without her consent or makes her terminate it by resorting to violence, unlawful threat or deceit shall be punished by imprisonment from 6 months to 8 years'. Art. 154 said: 'Any person who with the consent of the pregnant woman, but contrary to statute, terminates her pregnancy shall be punished by imprisonment of up to 3 years. The same punishment shall be inflicted on any person who aids a pregnant woman to terminate her pregnancy contrary to statute'. Art. 157, raised the sanctions for the perpetration of acts defined under Arts. 153 and 154 if they ended in the death of the pregnant woman.

42 | Pietrzykowski, 2007, p. 81.

43 | *J. of Laws* of 1990, No. 13, item 95. Thereby, the Regulation on termination of pregnancy (*J. of Laws* of 1960, No. 2, item 15) was repealed.

professional qualifications to be possessed by physicians terminating pregnancies and procedures to be used in issuing medical opinions about the admissibility of such terminations.' Although the Regulation did not modify the grounds for a legal abortion, it did introduce a number of measures that could actually reduce its numbers. Among them were a mandatory psychological consultation for women intending to terminate their pregnancy and a directive to inform women about the detrimental effects of abortion and the conscience clause, giving a physician the right to refuse the issuance of a certificate of legal admissibility of abortion or to perform it for ideological reasons.

The next important step in the evolution of relevant legislation was taken when a new compromise law, was enacted at the time, comprehensively regulating the admissibility of the termination of pregnancy. The Family Planning, Human Foetus Protection, and Pregnancy Termination Admissibility Act of 7 January 1993[44] (hereinafter, the 1993 Act) restricted access to abortion. It stated that an abortion could be legally performed, provided one of the following conditions was met:

(1) pregnancy posed a risk to the life or health of the pregnant woman (without restrictions owing to the age of the foetus; this was to be determined by a doctor other than the one who terminated the pregnancy, unless it was a case of a life-threatening emergency);
(2) prenatal tests or other medical features indicated a high likelihood of severe and irreversible impairment of the foetus or an incurable life-threatening disease (until the foetus became viable, or capable of living independently outside the body of the pregnant woman); this was to be ascertained by a doctor other than the one who terminated the pregnancy;
(3) a reasonable suspicion arose that the pregnancy resulted from a criminal act and the occurrence of this circumstance was ascertained by a public prosecutor.

The 1993 Act introduced the provision on the protection of human life from the moment of conception and the concept of the conceived child. The preamble and Article 1 proclaimed:

> Considering human life to be a fundamental interest of every human being and care for life and health to be an obligation of the State, society and citizens [...]. Every human being enjoys an inherent right to life from the moment of conception.

The 1993 Act modified criminal law regulations, that is, the provisions of the 1969 Criminal Code by adding Articles 23b, 149a, 149b, and 156a. Under Article 23b, a conceived child could not be subjected to procedures other than those that protect the life and health of the child and/or his/her mother with the exception of procedures specified by the statute.[45] Article 149a laid down conditions for the legality of abortion and specified

44 | *J. of Laws* of 1993, No. 17, item 78.
45 | It was admissible to perform prenatal tests that did not seriously increase the risk of miscarriage when (a) the conceived child belonged to a genetically predisposed family, (b) a genetic disease was suspected that could be cured, partially cured, or its effects could be limited in the foetal period, or (c) severe damage to the fetus was suspected.

responsibility for an illegal abortion.[46] It expressly said that no punishment was to be inflicted on the mother of a conceived child, meaning that although her behaviour constituted the *actus reus* of a prohibited act, a criminal law sanction did not actualize in respect of her, and that no offence was committed, meaning that there was no breach of a sanctioned norm, by a physician performing a legal abortion.[47]

Once the 1993 Act entered into force, liberal-leftist circles raised objections and demanded that the limits of legal abortion be expanded. Their demands were met by the Amending Act dated 30 August 1996,[48] which added Articles 4a–4c to the 1993 Act and had a new liberalizing profile, as seen in its preamble, which proclaimed that: 'life is a fundamental interest of every human being and care for life and health is a principal obligation of the State, society and citizens.' However, it expressly recognized 'the right of every person to decide responsibly on the possession of children and the right to access information, education, counselling and means to exercise this right.' Article 4a introduced and defined the conditions for a legal abortion, and remains in force to date, albeit in truncated form. In its original version, it laid down four conditions for making an abortion legal, of which only two remain now, alongside a suitable procedure. It said that pregnancy may be terminated only by a physician if (1) pregnancy posed a risk to the life and/or health of the pregnant woman, or (2) the prenatal test or other medical indications reflected a high likelihood of severe and irreversible impairment of the foetus or an incurable disease, threatening its life, or (3) reasonable suspicion that the pregnancy had resulted from a prohibited act, or (4) the pregnant woman was in difficult living conditions or her personal situation was complicated.

46 | Art. 149a para. 1 said: 'Any person who causes the death of a conceived child shall be punished by imprisonment of up to 2 years. Para. 2. No punishment shall be inflicted on the mother of the conceived child. Para. 3. No offence defined in para. 1 is committed by a physician who undertakes this action in a public health care establishment when: (1) the pregnancy poses a risk to the life or a serious risk to the health of the mother ascertained by the opinion of two physicians other than the physician undertaking the action mentioned in para. 1; the opinion shall not be necessary in a life-threatening emergency, (2) the death of the conceived child resulted from action undertaken to save the life of the mother or to prevent a serious damage to the health of the mother, the risk of which was confirmed by an opinion of two other physicians, (3) prenatal tests, confirmed by two other physicians other than the physician undertaking the action mentioned in para. 1, indicate severe and irreversible damage to the fetus, (4) it is reasonably suspected that the pregnancy resulted from a prohibited act. In this case a statement from a public prosecutor shall be necessary. Para. 4. In especially justified cases, the court may refrain from inflicting a punishment on the perpetrator of the offence defined in para. 1'. Under Art. 149b: 'Any person who resorts to violence against a pregnant woman and thereby causes the death of a conceived child or otherwise causes the death of a conceived child without the consent of the pregnant woman or resorting to violence, unlawful threat or deceit makes the mother of a conceived child take the life of the child, shall be punished by imprisonment from 6 months to 8 years'. Under Art. 156a para. 1: 'Any person who causes damage to the body of a conceived child or a health disorder in a conceived child, posing risk to his/her life shall be punished by restriction of liberty (community service) of up to 2 years. Para. 2. No offence is committed by the physician if the damage to the body of, and/or health disorder in, the conceived child are a consequence of medical procedures necessary to eliminate the risk to the life and health of the pregnant woman and/or the conceived child. Para. 3. No punishment shall be inflicted on the mother of the conceived child who commits an act defined in para. 1'.

47 | For the distinction between the 'no punishment shall be inflicted upon' and 'no offence is committed' clauses see Pohl, 2020.

48 | *J. of Laws* of 1996, No. 139, item 646.

The adopted indication model was rather broad as it included medical grounds, involving the life and health of the pregnant woman, eugenic reasons, and the broad category of difficult living conditions or complicated personal situation. They all had broad interpretations. Additional restrictions followed from time limits when the termination of pregnancy was admissible. They did not apply only to abortion for reasons that put the life and health of the pregnant woman at risk. In the case of prenatal defects, the termination of pregnancy was possible until the foetus became viable while in the case of the pregnancy being related to an offence and when abortion was justified by socioeconomic reasons, the admissibility of was restricted by a time limit whose end was defined by the phrase 'since the beginning of the pregnancy no more than 12 weeks have lapsed'. Among other procedural conditions that remain in place to date, a mention may be made of those concerning the legal situation of a pregnant minor, the manner of declaring her intent vis-à-vis abortion by her and on her behalf, and the manner of establishing the grounds for a legal abortion. These questions were dealt with by a suitable executive regulation later,[49] which said that the woman's written consent is essential to terminate pregnancy. Consent in writing from the legal representative of a minor or incapacitated woman is mandatory. Consent in writing is mandatory when the case concerns a minor aged over 13 years. Consent of the guardianship court is mandatory in the case of a minor aged under 13 years, where the minor also has the right to express her opinion. The written consent of an incapacitated woman is mandatory, unless the state of her mental health prevents her from giving consent. In the event of a disagreement among representatives, the consent of the court is essential to terminate pregnancy. The occurrence of the medical circumstances making abortion admissible is to be ascertained by physicians. If a pregnancy has resulted from a prohibited act, such an act (an offence) must be ascertained by a public prosecutor.

The 1996 Amendment Act also amended the 1969 Criminal Code that was still in force at the time. Articles 23b, 149a, 149b, and 156a, which had been in force since 1993, were repealed and new Articles 152a and 152b, were added, whereas Article 157 was rephrased. These articles penalized differently illegal abortions, based on whether they were performed with or without the consent of the pregnant woman. This classification extended criminal responsibility for an illegal abortion solely to an individual other than the pregnant woman. The criminal sanction depended on whether the foetus was viable.[50]

The 1996 Amendment Act outraged the conservative circles from the start; in December 1996, a group of senators petitioned the Constitutional Tribunal to examine

49 | An executive regulation issued pursuant to the statutory empowerment included in Art. 4a(10) of the 1993 Act.

50 | Under Art. 152a: 'Any person who uses violence against a pregnant woman or terminates her pregnancy in another manner without her consent or makes her terminate it by violence, unlawful threat or deceit shall be punished by imprisonment from 6 months to 8 years'. The offence carried a higher sanction when in specific circumstances the fetus was viable; then this offence carried the punishment of imprisonment from 2 to 10 years. Under Art. 152b: 'Any person who with the consent of the pregnant woman but contrary to statute terminates her pregnancy shall be punished by imprisonment of up to 2 years. The same punishment shall be inflicted on any person who gives aid to a woman to terminate her pregnancy contrary to statute'. Art. 152a and Art. 152b provided for a higher sanction, imprisonment from 1 to 8 years, for the offender who had committed such acts when the fetus was viable. Under amended Art. 157, if a consequence was the death of person, offences specified in Art. 157a carried a minimum sentence of 2 years' imprisonment, whereas those specified in Art. 157b carried a sentence of imprisonment from 1 to 10 years.

its constitutionality.[51] In a decision dated 28 May 1997 (Docket No. K 26/96), the Constitutional Tribunal found the provision permitting the termination of pregnancy for social reasons to be a contravention of the then constitutional provisions. Sitting *en banc,* with three dissenting opinions, the Tribunal ruled that Article 1(2) of the Act of 30 August 1996 amending the Family Planning, Human Foetus Protection and Pregnancy Termination Admissibility Act (1993),[52] so far as it made the protection of life in the prenatal phase subject to the decision of the ordinary legislature, contravened Articles 1 and 79(1) of the Constitutional Act of 17 October 1992 on the Mutual Relations Between the Legislative and Executive Institutions of the Republic of Poland and on Local Self-Government (hereinafter, Constitution of 1992). It was considered to violate the constitutional guarantees on the protection of human life at every stage of its development. The Constitutional Tribunal observed that Poland was a democratic state ruled by law and that from the constitutional provisions – imposing an obligation to protect and safeguard motherhood and family – it was possible to infer the constitutional protection of human life from conception. Following the Constitutional Tribunal's decision, Article 4a(1)(4) of the 1993 Act (in the wording given to it by the 1996 Amendment Act) lost all force and effect as of 23 December 1997.[53] Three dissenting opinions on the decision were filed in which it was argued that 'it is not the role or the responsibility of the Constitutional Tribunal to resolve general questions of a philosophical, religious or medical nature because they go outside the expertise of judges and competence of courts.'[54]

The CT decision in K 26/96 set the limits to the right to a legal abortion, which now covered three cases: Risk to the life and health of the pregnant woman, severe and irreversible damage to the foetus, and pregnancy being the result of an offence. This continued until the CT declared the eugenic reason for abortion unconstitutional in the decision in K 01/20 dated 22 October 2020, which is analysed below. Thus, the changes in abortion law tended to limit the number of cases when abortion was legal while adhering to the indication model.

In sum, the 1993 Act recognized that life is a fundamental human interest and that care for life and health is a principal obligation of the State, society, and citizens. It recognized the right of every person to decide responsibly on the possession of children and the right to access information, education, guidance, and means to exercise this right. Under Article 1, the right to life is protected, including in the prenatal phase, within the limits set out in this Act. Under Article 4a(1), pregnancy may be terminated only by a physician, where (1) pregnancy poses a risk to the life or health of the pregnant woman, (2) prenatal tests or other medical indications suggest high likelihood of severe and irreversible foetal impairment or an incurable life-threatening disease (this reason was eliminated by the CT decision in K 01/20), and (3) there is a reasonable suspicion that pregnancy resulted from a prohibited act. This law was supplemented by the Criminal Code dated 6 June

51 | The 1997 Constitution had not been in force yet at the time. From 8 December 1992 to 16 October 1997, the Small Constitution (Constitutional Act of 17 October 1992) was in force in Poland.

52 | Act of 7 January 1993 on family planning, protection of the human foetus and the conditions for permissible termination of pregnancy (consolidated text *J. of Laws 2022*, item 1575). Art. 4a(1)(4) contravenes the Polish Constitution of 1992.

53 | Announcement by the President of the Constitutional Tribunal of 18 December 1997 (*J. of Laws* 97, No. 157, item 1040).

54 | A quotation from the dissenting opinion of a CT Justice, Lech Garlicki.

1997,[55] which penalized an abortion contrary to the statute. The legislator adopted the formula of a blank regulation in the Code; thus, the norms typifying illegal abortions still come from the 1993 Act. In its original wording, the 1997 Criminal Code used terms such as 'foetus', 'pregnant woman', and 'termination of pregnancy'. A significant change in connotation in the provisions on abortion offences took place in 1999, when the term 'foetus' was replaced with 'conceived child'.[56] The protection of a conceived child was enhanced by legislating a new provision, Article 157a in the Criminal Code, which penalized causing any damage to the body of a conceived child or a health disorder threatening his/her life.[57] The 1999 Amendment Act consolidated the trend of pro-life changes.

Abortion offences are regulated under Articles 152–154 under the Polish Criminal Code. Article 152(1) typifies a prohibited act involving the termination of the pregnancy of a woman in contrast to the Family Planning, Human Foetus Protection, and Pregnancy Termination Admissibility Act (1993), which has been explained above. The prohibited act involves performing an abortion in cases other than those set out therein, but with the consent of the pregnant woman. It carries a sentence of up to three years' imprisonment. An analogous sanction is provided for under Article 152(2) for aiding a pregnant woman to terminate her pregnancy in contrast to the 1993 Act or urging her thereto. Thus, Article 152(2) typifies a prohibited act involving aiding or abetting but different from the aiding and abetting typified under Article 18(2)–(3) of the Criminal Code as it is directed at the person (pregnant woman) who herself does not commit a prohibited act. Urging a pregnant woman thereto must aim at arousing the intent to terminate the pregnancy. Aiding in the termination of pregnancy may take the form of supplying necessary instruments and pharmaceuticals (including morning-after pills), giving advice or information, such as to how and where pregnancy may be terminated. Article 152(3) regulates an aggravated type of both these offences. The aggravating circumstance is the viability of the child (foetus). The aggravated type carries a sentence of imprisonment ranging from 3 months to 8 years. It is debatable when a child (foetus) becomes viable. It is accepted that a child (foetus) becomes viable in about the 22nd week of pregnancy when it weighs 500g minimum.[58] Article 153(1) penalizes prohibited acts related to the performance of an abortion without the consent of the pregnant woman. Under it,

> Any person who uses violence against a pregnant woman or terminates her pregnancy in another manner without her consent or makes her terminate it by violence, unlawful threat or deceit shall be punished by imprisonment from 6 months to 8 years.

An aggravated form of these offences is dealt with under Article 153(2), which covers the situation when the conceived child is already viable, and carries a sentence of imprisonment from 1 to 10 years. In the case of prohibited acts typified under Article 153, in

55 | The Code entered into force on 1 September 1998. For its original text see *J. of Laws* 1997, No. 88, item 553.
56 | See Amendment Act of 8 July 1999 (*J. of Laws* of 1999, No. 64, item 729).
57 | Such behaviour is punishable by a fine, restriction of liberty (community service), or imprisonment of up to 2 years. No offence is committed by a physician if the damage to the body of, and/or health disorder in, the conceived child are the consequence of medical procedures necessary to eliminate the risk to the life and health of the pregnant woman or the conceived child. No punishment shall be inflicted on the mother of the conceived child who commits such an act.
58 | Zoll, 2017, edge No. 25.

contrast to those specified under Article 152, the life of a child in the prenatal phase and the freedom of the pregnant woman as seen in her right to motherhood are protected.[59] A more severe sentence for performing an abortion, with or without the consent of the pregnant woman, is provided for where the pregnant woman dies as a result of the abortion.[60] Polish criminal law penalizes only the abortion-related offences described here, involving the performance of an abortion by third parties. A woman who terminates her pregnancy or has it terminated does not bear any criminal responsibility. In October 1997, Poland's current Constitution entered into force, after having been adopted on 2 April 1997. Article 38 of the Constitution says: 'The Republic of Poland shall ensure the legal protection of the life of every human being.' Thus, the legislator did not settle the question in the Constitution of when a human life and its legal protection begin.[61]

The implementation of the abortion standard in Polish law was reviewed by the European Court of Human Rights (hereinafter, ECHR), which found that the restrictive abortion standard in Polish law had become even more restricted when it came to its application, frequently leading to the infringement of the rights to privacy and related freedoms. In extreme cases, its application can be considered inhuman and degrading treatment. The ECHR reviewed the indication model adopted in Poland and all three categories of prerequisites for a legal abortion. In *Tysiąc v. Poland*,[62] the Court found that the rights of the applicant had been infringed by denying her the right to abortion despite the fact that the pregnancy posed a risk to her health. In *Z. v. Poland*,[63] the Court found that the right of a pregnant woman to a legal abortion for medical reasons had been infringed upon owing to the failure to use diagnostic testing and to provide treatment. Both the pregnant woman and foetus died. In *R.R. v. Poland*,[64] the Court found that the applicant had been denied access to prenatal tests in time and was consequently denied full information on the health of the foetus and could not decide on a possible legal abortion. Poland had not provided access to legal and guaranteed medical procedures and information on the applicant's state of health. The Court ruled on the legality of denying the right to abortion when the pregnancy resulted from an offence. In *PiS v. Poland*,[65] the Court held that the abortion procedure had been vitiated in the case of a pregnant teenager whose pregnancy resulted from an offence.

Although beginning with 1993, the actual liberalization of Polish abortion law was merely symbolic and short-lived (1996), pro-choice movements continued their efforts.

59 | Giezek, 2014, edge No. 3.
60 | Art. 154(1)–(2) of the Polish Criminal Code.
61 | When this clause was being drafted, it was suggested that the phrase 'from conception' be added to it; however, the Constitutional Commission of the National Assembly rejected this motion. See Ślipko, 2004, p. 9.
62 | *Tysiąc v. Poland*, No. 5410/03, 20. 3. 2007, LEX No. 248817.
63 | *Z v. Poland*, No. 46132/08, 13. 11. 2012, LEX No. 1226411.
64 | *R.R. v. Poland*, No. 276117/04, 26. 5. 2011.
65 | *P. and S. v. Poland*, No. 57375/08, 30. 10. 2012. The cited judgment relates to the case of a raped teenage girl who, in 2008, had serious problems obtaining a termination of her pregnancy, despite meeting all the statutory conditions for doing so and obtaining the relevant certificate from the prosecutor investigating her rape – the pregnancy was the result of a crime. In its ruling, the European Court of Human Rights found that in the circumstances of the case, there had been inhuman and degrading treatment (Art. 3 of the Convention on Human Rights), a violation of the right to respect for family and private life (Art. 8 of the Convention) and the right to liberty and security (Art. 5(1) of the Convention).

Influenced by European and international standards,[66] they made an attempt in 2003–2005 to have a bill passed on planned parenthood[67] (successive bills, having the same purport, were submitted much less effectively much later). The bill departed from the indication model in favour of the model of abortion on request (with a minor concession to the indication model). Thus, it intended to give everyone the right to take his/her own decisions in relation to reproduction under conditions enabling conscious decisions on parenthood. It also intended to give every woman the right to terminate pregnancy in the first 12 weeks.[68] The intensive activity of pro-choice movements stirred pro-life circles to action and make demands that the right to abortion be curtailed further and that the full protection model be adopted. This last demand was satisfied by the CT judgment in K 1/20 of 22 October 2020,[69] which continues to arouse bitter public and legal controversies[70] as it limited the adopted indication model by eliminating the eugenic (embryo-pathological) condition for a legal abortion when prenatal tests or other medical indications suggest a high likelihood of severe and irreversible impairment of the foetus or incurable disease threatening its life.[71] In the judgment, the CT held that Article 4a paragraph 1(2) of the Family Planning, Human Foetus Protection and Pregnancy Termination Admissibility Act (1993) was contravened Article 38 in connection with Articles 30 and 31(3) of the Constitution of the Republic of Poland. In the CT's opinion:

> The legalization of the pregnancy termination procedure when prenatal tests or other medical indications suggest a high likelihood of severe and irreversible impairment of the foetus or an incurable disease threatening its life finds no grounds in the Constitution.

The result of the judgment was the derogation of a legal provision, thus, as of 27 January 2021, Article 4a paragraph 1(2) lost all force and effect. In this context, certain

66 | Kondratiewa-Bryzik, 2009, passim; Zampas and Gher, 2008, p. 249; Hewson, 2005, p. 365.
67 | Paper No. 3215 of the Sejm of the 4th Term. The text of the bill is available at: https://web.archive.org/web/20061210190752/http://www.federa.org.pl:80/dokumenty/3215.pdf (Accessed: 10 March 2023). See also Kondratiewa-Bryzik, 2009, passim.
68 | With statutory restrictions on the same level as before in the case of terminating pregnancy after the lapse of 12 weeks but when the fetus is non-viable; when the life and health of the woman is at risk, abortion is admissible regardless of the advancement of the pregnancy. For the bill on conscious procreation of 17 November 2017 see http://orka.sejm.gov.pl/Druki8ka.nsf/Projekty/8-020-821-2018/$file/8-020-821-2018.pdf. (Accessed: 10 March 2023).
69 | Judgment of the CT of 22 October 2020, K 1/20, OTK-A 2021, No. 1.
70 | This paper concentrates exclusively on analysing the CT judgment on its merits, ignoring the political system and procedural controversies mentioned in legal publications. They centre on judicial appointments and the composition of benches in specific cases. One argument they persistently pursue is that some justices have been appointed to the CT in blatant violation of the rules. These justices, colloquially called doubles, are believed to be *de iure* disqualified from sitting on the CT (See Radziewicz, 2017, p. 45; Cf. Pohl, 2017, p. 57). Other moderate opinions hold that the position of the CT in the Polish system of government is wrong, leaving it hamstrung by excessive partisanship. The fundamental shortcoming of the Polish system of government is certainly the procedure for electing justices by the Sejm by a simple majority of votes. This gives the political parties in power a decisive voice in judicial appointments to the CT. Although candidates must be apolitical and have extensive legal expertise, they are often closely connected to political parties. In extreme cases, they were active politicians before they were appointed to the CT. See Zyborowicz, 2016, pp. 117–118; Otręba, 2016, pp. 78–88.
71 | Gliszczyńska-Garabias and Sadurski, 2021; Rakowska-Trela, 2021; Adamus, 2020.

doubts arise as to the legal consequences of the CT judgment for the scope of penalization. As mentioned in relation to Article 152 ff of the 1997 Criminal Code currently in force, the legislator used the formula of the blank regulation there, specifying that the offender had to bear criminal responsibility for terminating the pregnancy of a woman in contrast to the Family Planning, Human Foetus Protection and Pregnancy Termination Admissibility Act (1993). The derogation of the eugenic condition for a legal abortion expands the scope of penalization. Some authors consider this controversial because, after certain assumptions are made, it may be seen as a violation of the principle of *nullum crimen sine lege*, because the expansion of responsibility follows from the (derogation) decision of a judicial body, namely the CT, and not from amending the statute by the legislative process as a manifestation of the legislator's activity.[72]

Taking a stance by the CT called for a suitable analysis, covering first the question of whether legalization of the infringement of the interest – in this case, the life of a conceived child – is a constitutional value. As this question had been answered in the affirmative, it was necessary to establish whether legalizing the infringements of this interest was justified vis-à-vis constitutional values and, finally, whether the legislator had satisfied the constitutional criteria of resolving such collisions. The criteria relate to the proportionality test specified under Article 31(3) of the Polish Constitution.[73]

4. Polish Constitutional Tribunal Decision K 1/20 – Discussion

The critics of the decision in K 1/20 have raised objections to all three stages of examining the constitutionality of the statute in question. First, with respect to the CT's finding that Article 38 of the Polish Constitution[74] covers the prenatal period from the moment of conception, it is believed that the CT acted *ultra vires*. The rationale was that the CT imparted a specific meaning to the concept of human life that the constitutional legislator did not. Second, the CT ignored the fact that the conceived child is not self-contained and is bound by a unique relationship with the pregnant woman. The relationship features the contingency of the creation of an independent being, pivoting on the fact of birth.[75] Third, criticism is levelled against the manner of defining relationships between constitutionally protected values and rights, and their mutual positioning: the life of a child and the dignity of the woman being its mother. In the case of '[...] eugenic (embryo-pathological) abortion what is at stake is not as much the protection of a woman's dignity at the level of her wellbeing but rather the protection of a woman's dignity touching the core of humanity'.[76] Finally, criticism is aroused by the manner in which the CT conducted the proportionality test.[77] Under this provision:

72 | Gutowski and Kardas, 2020, p. 8; Giezek and Kardas, 2021, p. 44.
73 | See the CT 1997 judgment in K 26/96 cited earlier.
74 | 'The Republic of Poland shall ensure the legal protection of the life of every human being.'
75 | Cf. Soniewicka, 2021, p. 17.
76 | Adamus, 2020, p. 96. Under the Polish Constitution, Art. 30: 'The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities.' As the ECHR decisions held, the dignity of a pregnant woman is related to the prohibition of cruel, degrading, and inhuman treatment.
77 | Art. 31(3) of the Polish Constitution.

> 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 shall not violate the essence of freedoms and rights.

It ought to have been verified whether the statutory right to abortion for eugenic reasons, which emanates from the right of a woman to have her dignity respected and recognizes the inadmissibility of demanding a heroic attitude from her, may be restricted in light of the constitutional standard.[78] Those limitation standards are covered by the subsequent conditions of necessity (usefulness), adequacy, and proportionality in a narrow sense. A correct analysis of such a limitation should begin with the identification of the right or freedom being limited. Next, it should indicate the value for the sake of which the limitation has been made. A closed catalogue of such values is given under Article 31(3) of the Constitution.

A key point in the CT's line of reasoning and the criticisms it evoked is the interpretation of Article 38 of the Polish Constitution, specifically, the recognition that human life is protected from the moment of conception. Disproving this thesis makes counterarguments pointless. Affirming justifies the criticism of the other two aspects. Thus, when viewed on its merits, any challenge to the assertion that an unborn child is covered by the legal protection afforded by the Polish Constitution questions the sense of any additional arguments by the CT. The interpretation cannot be considered arbitrary in the context of a prior CT decision. In a judgment dated 28 May 1996, the CT asserted that

> [...] the value of the constitutionally protected legal interest that human life is, including life in its prenatal phase, must not be differentiated. [...] Thus, from the moment of its coming into existence, human life is a value that is constitutionally protected. This is also true of the prenatal phase.

Although the 1997 decision did not refer to the Constitution in Poland, which came into force only on 1 October 1997,[79] the axiology the decision adopted shared the pro-life outlook. The argument from the continuation of axiological assumptions made in earlier CT decisions cannot be decisive, even less so as the 1998 decision had attracted strong criticism. One reason was its failure to take into account European and international standards.[80]

An answer to the question whether the Polish Constitutional Tribunal could impart to the concept of human life, used in the Polish Constitution, Article 38, a specific meaning (i.e. acknowledge that its protection starts already at the moment of conception, establishing thereby an initial model of constitutional review of statutory provisions)[81] must take

78 | Cf. Judgment of the CT of 22 October 2020, K 1/20, dissenting opinion of CT judge Leon Kieres, OTK-A 2021, No. 1.
79 | When the 1997 Constitution was being drafted, strong efforts were taken to extend in express terms constitutional protection to the prenatal phase of human life. However, these efforts failed. Therefore, the planners did not intend to design a new model of the constitutionality review of existing statutory abortion law provisions (1993 Act) and thus create constitutional grounds for a change of the model followed until then.
80 | Woleński, 1998, pp. 88–98.
81 | In this case, Art. 4a para. 1(2) of the Act of 7 January 1993 on family planning, protection of the human foetus, and the conditions of permissibility of abortion (consolidated text *J. of Laws 202*2, item 1575).

into account all constitutional values and the special relationship holding between the pregnant woman and conceived child, i.e. biological, social and legal ties. In this sense, the decision under discussion is appropriately criticized for its arbitrariness vis-à-vis the concepts used (e.g. mother of a conceived child instead of a pregnant woman), narrative spun (incomplete narrative), and arguments employed (one-sided nature of arguments, absence of any confrontation with a different point of view). These charges gain strength because the interpretation given by the CT in judgment in K 1/20 offers full legitimacy to the rejection of the abortion law model followed thus far. The indication model in place thus far can be abandoned in favour of the protection model with the exception of situations when the life of a pregnant woman is at risk. Thus, the continuation of this trend may lead to the questioning of another condition for the legal termination of pregnancy, namely that of pregnancy being the result of an offence. Its existence is justified, even more so than in the case of a eugenic condition, by the protection of the dignity of a pregnant woman.

5. Conclusion

The evolution of the Polish legal treatment of abortion outlined in this article, going back almost a century, seems to justify the claim that it has taken a specific direction and course when compared to other European countries. Beginning with the interwar period, with the exception of a brief liberalizing episode in 1996, the Polish legal treatment of abortion could be labelled as conservative-liberal. It followed an indication model, covering legal, medical, and eugenic considerations. It used to be called, including in official contexts, an abortion compromise. The judgment of the Constitutional Tribunal of 22 October 2020, being the latest step, as of the time of writing, in this evolution, shifted it to a fully conservative track. The judgment and accompanying opinion may suggest that the evolution may not be over yet and may proceed, taking an extremely conservative course. The legal condition, taking into account the dignity of the pregnant woman, may be questioned, relying on the same line of reasoning used by the Polish Constitutional Tribunal with respect to the eugenic condition.

The judgment of the Constitutional Tribunal made the evolution of the Polish legal treatment of abortion depart even further from the course along which abortion law has developed in other European countries. There, it evolved along an entirely different path, although, as in Poland, countries like Spain and Ireland had a strongly conservative, Catholic segment of society. The CT judgment is exposed to the charge of arbitrariness (conceptual, narrative, and argumentative). It would seem that in the case of so sensitive and significant legal issue that the admissibility of abortion is, arbitrariness should be avoided. All the more so, as narrative presented in this judgment has been used to change the entire course of the legal perception of abortion admissibility. The judgment has marginalized the fact that no consensus on this issue is to be found in the Polish parliament or, more importantly, society.[82]

82 | Cf. The dissenting opinion of a CT Justice, Leon Kieres, to the CT judgment of 22 October 2020, K 1/20, para. 3.3.

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AMBIGUITY AFFIRMED: COMMENTARY ON THE JUDGEMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE CASE OF VALDÍS FJÖLNISDÓTTIR AND OTHERS V. ICELAND OF 18 MAY 2021

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ABSTRACT

The text comments on the European Court of Human Rights judgement of 18 May 2021 in the case of Valdís Fjölnisdóttir and others v. Iceland. The case is another judgement of the ECtHR dealing with the phenomenon of surrogate motherhood. Indeed, the legal consequences of surrogate motherhood vary and result in challenges both in national and international legal contexts. The judgement commented on is of high importance as it dealt with links between surrogate motherhood and adoption, as well as illustrated modern challenges for civil status registration. The text provides for an in-depth analysis of the judgement concerned and identifies some ambiguity and lack of consistence in the Court's approach to surrogate motherhood. In the course of its analysis the Valdís Fjölnisdóttir and others case is assessed as a lost chance in this respect.

KEYWORDS

surrogacy
adoption
foreign civil status registration
ECtHR

1. Introduction

In 2014, the European Court of Human Rights [ECtHR] issued its first judgement on surrogate motherhood and the problems resulting from this phenomenon.[3] Since then, the case law of the Court on surrogate motherhood has been slowly, yet constantly,

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3 | ECtHR, Mennesson v. France, judgement (Chamber) of 26 June 2014, Application No. 65192/11; ECtHR, Labassee v. France, judgement (Chamber) of 26 June 2014, Application No. 65941/11.

https://doi.org/10.55073/2023.1.131-144

developing,[4] including the first-ever advisory opinion issued in 2019 under Protocol 16.[5] However, one can claim that case law has not been extensively developed so far, and some hesitancy and ambiguity in the Court's approach may be detected. The judgement of May 18, 2021, in the case of Valdís Fjölnisdóttir and others v. Iceland[6] is another one contributing to the development of the case law on surrogate motherhood. It is worth analyzing carefully, especially as it places itself within the hesitant approach. It also illustrates the links between surrogate motherhood and adoption, as well as the modern challenges for civil status registration that remain of crucial importance.

2. The facts of the case and the legal context[7]

The applicants Ms Valdís Glódís Fjölnisdóttir and Ms Eydís Rós Glódís Agnarsdóttir were a married couple living in Iceland who concluded a paid gestational surrogacy agreement in the United States. The third applicant, Mr X, was born in February 2013 via a surrogate mother and, on the basis of the agreement concluded, was intended to be the son of the first two applicants, despite not having any biological bonds with them. Ms. Fjölnisdóttir and Ms. Agnarsdóttir were registered in California as parents of the child. A birth certificate and US passport were issued for X. According to the documents, the surrogate mother waived any claim regarding the legal parenthood of X.

After arriving in Iceland with the three-week-old child, the applicants made an inquiry aimed at introducing the child to the national register. They used a form for Icelanders born abroad entitled automatically to Icelandic citizenship, enclosing a Californian birth certificate. Later, the applicants informed the authorities that X had been born through gestational surrogacy. Consequently, Registers Iceland denied the request for child registration. The decision was based on the fact that X had been born in the United States to a surrogate mother. As a result, Icelandic legal provisions on the child's parentage were not applicable, and the child was not automatically entitled to citizenship. Therefore, Registers Iceland considered the third applicant to be a foreign national to whom relevant regulations were applied. As he was considered a foreign national and an unaccompanied minor, in September 2013, and in accordance with Icelandic regulations,

4 | ECtHR, D. and others v. Belgium, decision of 8 July 2014, Application No. 29176; ECtHR, Foulon and Bouvet v. France, judgement (Chamber) of 21 July 2016, Application Nos. 9063/17 and 10410/14; ECtHR, Paradiso and Campanelli v. Italy, judgement (Grand Chamber) of 24 January 2017, Application No. 25358/12; see also judgements delivered after having submitted the present text for publication: ECtHR, A.M. v. Norway, judgement (Chamber) of 24 March 2022, Application No. 30254/18, ECtHR, A.L. v. France, judgement (Chamber) of 7 April 2022, Application No. 13344/20; ECtHR, D.B. and others v. Switzerland, judgement (Chamber) of 22 November 2022, Application No. 58817/15 and 58252/15; ECtHR, K.K. and others v. Denmark, judgement (Chamber) of 6 December 2022, Application No. 25212/21.

5 | ECtHR, Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother (Grand Chamber), request No. P16-2018-001, French Court of Cassation, 10 April 2019, [Advisory Opinion]. See also, e.g.: Margaria, 2020, pp. 412–425; Bracken, 2021, pp. 3–18.

6 | ECtHR, Valdís Fjölnisdóttir and others v. Iceland, judgement (Chamber) of 18 May 2021, Application No. 71552/17 (hereinafter: Valdís Fjölnisdóttir).

7 | Valdís Fjölnisdóttir, paragraphs 5–36.

a legal guardian, Ms M, was appointed for X. However, the child was placed under temporary care of the applicants.

Ms Fjölnisdóttir and Ms Agnarsdóttir appealed against the negative decision concerning registration to the Ministry of the Interior who confirmed the refusal. The Ministry's decision stated that the matter of the child's registration depended on fulfilment of the conditions of Icelandic citizenship and not on the question of recognition of the foreign decision concerning parentage. Under Icelandic law, the woman who gave birth to a child was always considered its mother, regardless of whether the child was conceived using her gametes. Being born in the US via a surrogate mother (considered as the mother of the child by Icelandic law) of US citizenship, in the absence of information about Icelandic citizenship of a father, the child was not automatically entitled to Icelandic citizenship and could not enter the national register. Recently, as a result of a change in Icelandic law at the end of 2015, X was granted Icelandic citizenship and registered. However, Ms. Fjölnisdóttir and Ms. Agnarsdóttir were not registered as his parents.

The applicants sought a judicial review of the Ministry's decision, demanding its annulment and 'a declaratory judgement to the effect that Registers Iceland was obligated to register the first and the second applicants as the third applicant's parents, in accordance with the child's birth certificate.'[8]

While the proceedings before the District Court of Reykjavik were pending, in 2015, Ms Fjölnisdóttir and Ms. Agnarsdóttir divorced, which resulted in the invalidity of the foster care agreement concerning X. After the expiration of the subsequent temporary agreements, the situation regarding the parentage of the child had not changed. Consequently, since December 2019, based on the relevant authorities' decision, the boy has been permanently fostered by the first applicant and her new spouse but has continued to enjoy equal access to the second applicant and her spouse.

Meanwhile, since 2013, the adoption case concerning X has been ongoing from the application of Ms Fjölnisdóttir and Ms. Agnarsdóttir. Initially, the adoption application was put on hold due to the pending case of registration of parentage, as the parents of the child could not become adoptive parents. Following the Ministry's decision to refuse to register, the adoption question arose again. The District Commissioner examined the case, recalling the principle of maternity of the woman who gave birth to the child (and of her husband's paternity), and requested that the applicants submit information about the address of the surrogate mother (and her husband; the confirmation of surrogate mother's marital status was also requested). Under the Icelandic regulations, the Commissioner stated that the consent of the surrogate mother (and her husband) would be required for the adoption, along with confirmation from the applicants and the other party that they had not paid for the consent being given. The applicants disagreed with the reasoning presented. However, the considerations on the basis of Icelandic regulations on adoption matters were interrupted by the applicants' divorce and their withdrawal of their application for adoption.

By the judgement of 2 March 2016, the District Court rejected the applicants' claims for the Ministry's decision of non-recognition to be annulled. The claim to register Ms Fjölnisdóttir and Ms. Agnarsdóttir as the parents of X by civil status services was also rejected. The Court again invoked the principle that the woman who gave birth to a child was considered its mother. Accordingly, the applicants could not be regarded as

8 | Valdís Fjölnisdóttir, paragraph 10.

the parents. As to the question of recognition of the decision to establish parentage by the Californian authorities, the Court applied the public policy clause (*ordre public).* The maternity of the woman who gave birth was recognized as one of the fundamental principles of Icelandic family law, and the decision rendered abroad as manifestly incompatible with it. As surrogacy was banned and punishable in Iceland, recognizing a foreign decision concerning Icelandic residents in this regard would be a circumvention of the law. Despite the fact that the lack of registration had affected the applicants' private and family life, the Court found this interference legitimate and necessary, aimed to protect morality and the rights of others, uphold the ban on surrogacy, and protect the interests of women (exposed to abuses resulting from surrogacy) and children's rights to heritage. The Court noted that the authorities had taken steps to counteract the interference and ensure the child's best interests. X was fostered by Ms Fjölnisdóttir and Ms. Agnarsdóttir, became a resident and subsequently a citizen of Iceland, and this made it possible to preserve the family bond between the applicants.

Furthermore, the District Court recalled the special rule on adoption by foster parents, which may occur without the approval of biological parents, in the child's best interests. Thus, the applicants' divorce prevented a successful adoption.

The applicants appealed against the judgement to the Supreme Court of Iceland. However, the District Court's rejection of the applicants' claims was upheld by the judgement from 30 March 2017. The Supreme Court found once again that only the woman who gave birth to a child conceived by artificial fertilization could be considered its mother under Icelandic law, and that surrogacy was explicitly banned by law. Neither the first nor the second applicant had given birth to the child and were not considered the parents under Icelandic law. Consequently, the authorities were entitled to refuse to recognize family ties that had been established in a manner contrary to the fundamental principles of domestic family law. However, the Supreme Court's answer to the question of the existence of a family life between the applicants (as well as its possible interference by the refusal of registration) was different from that of the District Court. Referring to the Icelandic Constitution and to the ECtHR judgement in Paradiso and Campanelli v. Italy, the Supreme Court reiterated the lack of a biological relationship between the applicants and the child and considered the moment when the family life was established between Ms Fjölnisdóttir, Ms. Agnarsdóttir, and X to be the formal decision to entrust the child to foster care. Therefore, the prior refusal to enter the national register could not have violated the applicants' right to respect for family life.

On 25 September 2017, Ms. Fjölnisdóttir, Ms. Agnarsdóttir, and Mr. X lodged the application against the Republic of Iceland complaining of a violation of their right to respect for private and family life under Article 8 of the European Convention on Human Rights [ECHR]. The applicants submitted that the refusal by the authorities to register the third applicant as the first and the second applicant's child (to recognize the Californian birth certificate, issued in accordance with the law, as the ban on surrogacy did not apply extraterritorially) had amounted to an interference with their right to respect for a private and family life. They argued that the refusal had prevented them from enjoying a stable and legal parent-child relationship (...).[9] Despite regarding X as their son, the first two applicants did not have custody of him, neither legal nor physical. The applicants claimed that the best interests of the boy were not satisfactorily protected by Icelandic authorities. In

9 | Valdís Fjölnisdóttir, paragraph 43.

the course of foster care proceedings, the care being taken of the child was not questioned (on the contrary, the authorities assessed it positively). The applicants argued that the foster care system did not sufficiently protect the stability of their social relationships or their rights in inheritance matters. Furthermore, the instability of social relationships and uncertain legal status caused anguish and distress.

The Government recalled the ban on surrogacy, its justification, and the potential dangers it caused around surrogacy: the Government also submitted the controversial nature of the issue and the existence of a wide margin of appreciation for the State. The Government also stated that neither the first nor the second applicant had applied to adopt the third applicant after their divorce, either as individuals or with their new spouses. It meant, therefore, the inexhaustibility of domestic remedies and inadmissibility of the application. The Government recalled that Article 8 of the ECHR did not guarantee the right to find a family or the right to adopt, and that there had been no violation of the applicants' right to respect for their private and family life.

3. The ruling[10]

The Court considered that the exhaustion of domestic remedies would be examined jointly on the merits closely linked to it. First, the Court assessed whether the relationship between applicants came within the sphere of family life in the meaning of Article 8. The Court recalled, referring to its previous case law, notions of 'family life' and 'family' and their content. Family life requires the existence of close personal ties, and being a family may be based on marriage or factual ties (including same-sex couples). Living together (outside marriage) or other factors of sufficient constancy could serve as indicators of 'family ties'. Furthermore, the provisions of Article 8 do not guarantee neither the right to establish a family nor to adopt. The desire to establish a family is not safeguarded by the ECHR; at the least, potential relationships are protected. The fact that there was no biological bond among the three applicants was not contested. However, the Court noted that the existence of family life might be recognized in the case of *de facto* relations between an adult or adults and a child in the absence of biological ties or a legal tie, provided that there were genuine personal ties. It was therefore necessary to consider the quality of the ties between Ms Fjölnisdóttir, Ms Agnarsdóttir, and Mr X and their 'family' roles respectively, as well as the duration of the applicants' cohabitation. The Court noted the change in the applicants' situation (their divorce) while judicial proceedings were ongoing at the national level and the fact that the Icelandic Supreme Court had the opportunity to examine the factual ties and relationships between the first two applicants, initially together and lately individually, and the third applicant from his birth in February 2013 until the end of March 2017. In the Court's opinion, it was worth emphasizing that the applicants were entrusted with custody of the child. Their divorce did not restrict access to the child for either of them. X was cared for by Ms Fjölnisdóttir and Ms. Agnarsdóttir and, consequently, he had been bonded to them for his entire life. The relationship between the applicants and X was strengthened by the passage of time and reinforced by the legally established foster care arrangement. The first and second

10 | Valdís Fjölnisdóttir, paragraphs 41–42; 56–79.

applicants argued that they had assumed the role of the third applicant's parents and that he regarded them as such. The quality of their emotional bonds has not been contested by the Government. The observation that surrogacy is unlawful in Iceland and criminalized under its jurisdiction, together with principles concerning maternity binding in this State, did not change the Court's conclusion that the requirements of 'family life' have been fulfilled in this particular case.

As a consequence of placing the applicants' situation with regard to the protection of family life, the Court found that the refusal to recognize the first and second applicants as the third applicant's parents, despite the Californian birth certificate to that effect, amounted to interference with the three applicants' right to respect for that family life. Therefore, under Article 8 § 2, it was necessary to check whether this interference was in accordance with law, pursued one or more of the legitimate aims listed in the provision, and was necessary in a democratic society in order to achieve the aim or aims concerned.

The general rule on maternity (for a woman who gave birth to a child) under Icelandic law, although not explicitly stated in legal provisions, was reasoned in detail by the Supreme Court's judgement in the case. Furthermore, regulations introducing the ban on surrogacy and the rule on maternity in situations involving artificial fertilization exist in the Icelandic legal order. After assisted conception treatment, the woman who gave birth to a child was considered the mother, and a woman who consented to her wife undergoing such treatment was considered the child's parent. These conditions were not met in either the first or second applicant cases under Icelandic law. Consequently, considering that this interpretation of domestic law is neither arbitrary nor manifestly unreasonable, the Court concluded that the refusal to recognize the first and the second applicants as the third applicant's parents had a sufficient basis in law.[11]

Furthermore, in accordance with the Government's submission, the Court found a refusal to recognize the applicants as the child's parents pursued a legitimate aim. It was the protection of the rights and freedoms of others, women, and children whose interests were intended to be safeguarded by the ban on surrogacy.

According to the established case law, the Court reiterated the understanding of the notion of necessity in a democratic society. This implies a correspondence of interference to a pressing social need and proportionality to the aim pursued. Of course, a fair balance between the relevant competing interests should be considered. The Court noted that it was not its rule to determine *in abstracto* the appropriate policy for regulating complex and sensitive matters such as issues arising from commercial surrogacy arrangements. It was, however, to determine *in concreto* whether impugned measures taken by State's authorities had been relevant and sufficiently justified, considering the assumed (legitimate) aim. The Court recalled the margin of appreciation enjoyed by the State, although its breadth was restricted by the important facet of an individual's existence or identity under Article 8. However, the Court reiterated the conclusions from previous judgements concerning the question of consensus within the member States of the Council of Europe. In the absence of consensus, either regarding the relative importance of the interest at stake or the best means of protecting it, the margin of appreciation will be wider. In particular, this occurs when the case raises sensitive moral or ethical issues or usually in cases evoking competition of private and public interests or the ECHR rights. In reference

11 | Valdís Fjölnisdóttir, paragraph 64.

to previous judgements, the Court noted that among issues of a delicate nature, allowing a wider margin of appreciation due to the nuanced approach of the countries, proving no consensus, are definitely situations of heterologously assisted fertilization or surrogacy arrangements and the legal recognition of the parent-child relationship established legally abroad as a consequence of them.

Applying the aforementioned principles in the discussed case, the Court noted that the applicants' actual enjoyment of their family life had not been interrupted by the intervention of the State. Non-recognition as parents has affected the applicants' family life; however, the respondent State took measures to safeguard it. The child has been fostered by his intended parents, and foster care arrangements have been rendered permanent, which could provide a certain stability for the family, even after Ms Fjölnisdóttir and Ms. Agnarsdóttir's divorce. The Court also took into consideration the fact that Mr. X was granted Icelandic citizenship, which influenced the regulation of his residence and security of his rights; consequently, it reduced the practical obstacle to the enjoyment of the three applicants' family life. Furthermore, it seemed to the Court that Ms Fjölnisdóttir and Ms. Agnarsdóttir's joint adoption of X had been an option open to them until their divorce. After their divorce, they withdrew from the application to adopt. Thus, no final determination has been made by the Icelandic Supreme Court regarding the two applicants' right to adopt the third applicant. Therefore, the Court pointed out that the issue was limited to the matter of registration of a parental link, which had been the subject of the applicants' judicial proceedings, having been concluded by a final judgement of the Supreme Court of Iceland. The Government's objection to the non-exhaustion of domestic remedies concerning adoption proceedings had been dismissed. Nevertheless, the Court noted that either the first or the second applicant could still apply to adopt the third applicant as individuals, or together with their new spouse. Although this would, of course, raise problems resulting from the fact that it would not have been possible for both applicants together.

It is worth quoting in full the final point of the Court's reasoning: 'Considering all of the above, in particular the absence of an indication of actual, practical hindrances in the enjoyment of family life, and the steps taken by the respondent State to regularise and secure the bond between the applicants, the Court concludes that the non-recognition of a formal parental link, confirmed by the judgement of the Supreme Court, struck a fair balance between the applicants' right to respect for their family life and the general interests which the State sought to protect by the ban on surrogacy. The State thus acted within the margin of appreciation which is afforded to it in such matters. There has accordingly been no violation of Article 8 of the Convention with regard to the applicants' right to respect for their family life.'

The Court found that the conclusions regarding the applicants' private lives were the same as the reasoning outlined above for family life. Moreover, the Court found no grounds to declare violation also alleged by the applicants, of the prohibition of discrimination provided in Article 14 of the ECHR.

The judgement was issued unanimously. However, in the concurring opinion, Judge Lemmens expressed doubts about the lack of separate consideration of 'private life' and 'family life' in the context of the need to protect the rights of the child, the third applicant.

4. Commentary

4.1. Case law on surrogacy and the Valdís Fjölnisdóttir case

As it has already been mentioned in the introduction to the present text, the judgement commented on is another one before the ECtHR dealing with the consequences of gestational surrogacy. To some extent the Valdís Fjölnisdóttir case may be distinguished from the previous cases by the specific position of the adult applicants: two women, who were married and then divorced, having been involved in a 'parental project' under commercialized gestational surrogacy abroad. However, this is not the case's factual specificity, which makes it important and worth considering in more detail.[12] What makes it so is the fact that it demonstrates the ongoing ambiguity of the ECtHR's case law on gestational surrogacy and the Court's hesitancy to directly address this phenomenon and its implications from the perspective of conventional values. In addition, one can even claim that the judgement commented on provides for more inconsistency of the case law when confronted with the Grand Chamber judgement of 2017 in the case of Paradiso and Campanelli, in which the Court dealt with gestational surrogacy without any biological links between the child and the intended parents. As it was the first case of gestational surrogacy decided by the Grand Chamber of the ECtHR, it was perceived as an important step in the development of a consistent line of jurisprudence on the issue. Also, as the Grand Chamber in Paradiso and Campanelli refused to acknowledge the links between the child and the intended parents as forming family life under Article 8 of the ECHR, the judgement was perceived by some commentators as the manifestation of a more restrictive approach towards the interpretation of the notion of 'family life' under the ECHR, as well as towards the phenomenon of gestational surrogacy itself.[13] Neither of these assumptions – of a somewhat wishful thinking character – proved true, as the judgement in the Valdís Fjölnisdóttir case illustrates. The apparent deficiencies of the reasoning in the Paradiso and Campanelli judgement were already identified and expressed in strong language by four judges in their concurring opinion attached to the Grand Chamber judgement.[14] Indeed, the critical arguments raised there should form an important point of reference for further discussion.

4.2. Family and private life

In the Paradiso and Campanelli case, the ECtHR dealt with relations between the intended parents and a child born by a surrogate mother without any biological links between them and did not recognize them as 'family life' under Article 8 of the ECHR.

12 | However, due to the existence of various types of family or *de facto* relationships, various types of surrogacy agreements, various regulations in particular states, and as a consequence of the assumptions adopted by the ECtHR in acknowledging the existence of family life (see below), the Court is forced to analyze in casuistic manner factual specificity of each of the cases, which hinders setting some more general standards. Consequently, the commentators analyzing the Court reasoning do likewise, sometimes noticing ambiguity/inconsistency in the Strasbourg approach but for reasons other than these raised in this text; cf. Bracken, 2017, pp. 368–379.

13 | Cf. Mirocha, 2019, p. 555 and the sources quoted.

14 | Paradiso and Campanelli, Joint Concurring Opinion of Judges De Gaetano, Pinto de Albuquerque, Wojtyczek and Dedov.

However, what was decisive in this respect was the relatively short period of time (eight months) in which the intended parents had had direct contact with the child and 'the uncertainty of the ties [among them] from a legal perspective'. Subsequently, the child was separated from the intended parents by Italian authorities. Although the Court in the Grand Chamber judgement did not acknowledge the existence of family life, it reserved that 'it [did] accept, in certain situations, the existence of *de facto* family life between an adult or adults and a child in the absence of biological ties or a recognized legal tie, provided that there [were] genuine personal ties.'[15] And it was exactly this approach that allowed the Court to establish family life between the three applicants in the Valdís Fjölnisdóttir judgement. The only criterion that actually mattered in this respect was the passage of time; in the latter case, it amounted to four years, which, according to the Court, resulted in strong emotional bonds between the intended parents (by that time divorced) on the one hand, and the child on the other.

Thus, the Court's approach in both judgements referred to was in line with its interpretation of the 'family life' notion visibly developing towards covering relations based on genuine personal links that are close and constant enough. However, such an approach results in far-reaching ambiguity. As aptly noted by the concurring judges in the context of the Grand Chamber judgement in the Paradiso and Campanelli cases:

> [...] the proposed formula is simultaneously both too vague and too broad. The approach seems based on the implicit assumption that existing interpersonal ties should enjoy at least *prima facie* protection against State interference. We note in this respect that close and constant personal ties may exist out of the scope of any family life. The reasoning does not explain the nature of those specific interpersonal ties which form family life. At the same time, it seems to attach great importance to emotional bonds [...]. However, emotional bonds *per se* cannot create family life.[16]

Yet, it seems that to a considerable extent, in the understanding of the Court, they can create family life. In the Valdís Fjölnisdóttir judgement the Court concluded that 'the requirements of 'family life' [had] been fulfilled on the particular facts of the present case. In this regard, the Court [had] taken account of the long duration of the first two applicants' uninterrupted relationship with the third applicant, the quality of the ties already formed and the close emotional bonds forged with the third applicant during the first stages of his life, reinforced by the foster care arrangement adopted by the national authorities and not contested by the Government before the Court.[17] Regarding the 'quality of the ties', it should be noted that the relationships among the applicants were significantly disrupted by the divorce of the two adult applicants. Indeed, the foster care arrangement reinforcing the links between applicants did not transform them into a family life. Thus, these links might have been more appropriately considered as personal ties covered by the concept of private life.

In was stated in the context of the Paradiso and Campanelli judgement that 'the reasoning adopted by the majority [left] it unclear what exactly [was] entailed by private life, what [was] the scope of the protection of the right recognized in Article 8, and what

15 | Paradiso and Campanelli, paragraph 148; Valdís Fjölnisdóttir, paragraph 59.
16 | Paradiso and Campanelli, Joint Concurring Opinion of Judges De Gaetano et al., paragraph 2.
17 | Valdís Fjölnisdóttir, paragraph 62.

constitute[d] an interference within the meaning of Article 8.'[18] The Valdís Fjölnisdóttir judgement only extended this ambiguity to family life.

One particularly important aspect of gestational surrogacy cases in the context of the establishment of family life or private life under Article 8 of the ECHR, and the scope of protection is the way in which the interpersonal links concerned have been established. Indeed, the scope of protection under the ECHR should be especially carefully assessed where the factual circumstances result from illegal or/and immoral activities.[19] When it comes to gestational surrogacy, it is often the case that the intended parents decide to get involved in surrogacy arrangements abroad to circumvent the legal restrictions under national jurisdictions. This is particularly true in the context of commercial surrogacy. Offering by the ECtHR a far-reaching protection under the ECHR to effects of actions taken in clear violation of national jurisdiction of a State Party, while relying on the lack of European consensus on the phenomenon of gestational surrogacy, which results in a wide margin of appreciation enjoyed by a State Party, causes serious doubts, to say the least.[20] Paradoxically, certain significant effects of the circumvention of the ban on surrogacy under national law, which is mostly aimed at protecting children, are nevertheless acknowledged due to the best interest of the child principle applied in a specific case.[21]

One has to admit, however, that in the Valdís Fjölnisdóttir case, the Icelandic authorities themselves contributed to acknowledging personal links between the intended parents and the child, having been intentionally established under foreign jurisdiction to circumvent the national prohibitive regulations, by resting foster care on the former. In contrast, in the Paradiso and Campanelli case, the Italian authorities intervened and separated the child from the intended parents relatively quickly. Thus, it may be claimed that the national authorities' actions in these two cases were guided by different approaches to the best interest of the child principle. Whereas the Italian authorities were guided by the protection of children in general from illicit practices, the Icelandic authorities concentrated on the best interest of the individual child concerned (so they were driven

18 | Paradiso and Campanelli, Joint Concurring Opinion of Judges De Gaetano et al., paragraph 5 in fine.

19 | Cf. Paradiso and Campanelli, Joint Concurring Opinion of Judges De Gaetano et al., paragraph 3.

20 | Carlos Martínez de Aguirre noted in this context, however, that 'the ECtHR is aware that endorsing this conduct [i.e. avoiding national prohibitive or restrictive laws in surrogate motherhood] through its judgements would be tantamount to legalizing the situation created by the intended parents, in breach of important rules of their national Law' (Martínez de Aguirre, 2019, p. 471). Yet, the scope of the Court's 'awareness' in this respect remains arguable. Also note the explicit position of the dissenting judges in the Paradiso and Campanelli judgement who stated that 'Italian law [prohibiting surrogacy] does not have extraterritorial effects. Where a couple has managed to enter into a surrogacy agreement abroad and to obtain from a mother living abroad a baby, which subsequently is brought legally into Italy, it is the factual situation in Italy stemming from these earlier events in another country that should guide the relevant Italian authorities in their reaction to that situation. In this respect, we have some difficulty with the majority's view that the legislature's reasons for prohibiting surrogacy arrangements are of relevance in respect of measures taken to discourage Italian citizens from having recourse abroad to practices which are forbidden on Italian territory [...]. In our opinion, the relevance of these reasons becomes less clear when a situation has been created abroad which, as such, cannot have violated Italian law', Paradiso and Campanelli, Joint Dissenting Opinion of Judges Lazarova, Trajkovska, Bianku, Laffranque, Lemmens and Grozev, paragraph 11.

21 | Cf. Bracken, 2022, p. 204, critically evaluating the fact that in the judgment in question the best interest of the child principle was not considered explicitly.

by 'this particular child approach' as Carlos Martínez de Aguirre would put it[22]). In gestational surrogacy cases, the tension between these two approaches is paramount[23] and, as such, should be precisely and consistently addressed by the ECtHR.

4.3. Surrogacy and adoption, and recognition of foreign civil status

The issue of establishing interpersonal links between intended parents and a child born through surrogacy resulting from a circumvention of binding laws is also evident in the relationship between surrogacy and international (intercountry) adoption and the accompanying international regulations aimed at prohibiting and preventing the sale of children. This relation was also alluded to in the concurring opinion of the four judges in the Paradiso and Campanelli judgement.[24]

In their argumentation, the judges referred to the Convention on the Rights of the Child [UNCRC] among others;[25] the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography [the Protocol];[26] and the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption [the Hague Convention].[27] All of the aforementioned international agreements have a wide scope of application, and all explicitly introduce the ban on the sale of children.[28] This prohibition is fundamental for the Hague Convention, which imposes a number of obligations on State Parties, as well as on individuals who choose to proceed with an intercountry adoption. It is worth considering whether children conceived through surrogacy should be subject to less protection than adoptive children. From a different perspective, those pursuing their 'parental project' through gestational surrogacy (despite domestic bans, if applicable) have more autonomy of action than those seeking intercountry adoption. The issues of the need for the protection of the rights of the children in cross-border surrogacy cases, as well as of solving the multiple challenges of the legal parentage establishment, have been addressed by the Hague Conference on Private International Law [HCCH], under the auspices of which works on a relevant convention, and have been underway for more than 10 years.[29]

It is worth noticing that the response to the surrogacy cases, especially 'coming from abroad', in the states which do not regulate surrogacy or ban it (like Iceland), is the attempt to use the institution of adoption or the recognition of foreign civil status (accepting the consequences of the surrogate motherhood) as the only way to establish legal relationship between the 'intended parents' and a child born by surrogate mother.[30]Interestingly, a link

22 | Martínez de Aguirre, 2019, p. 471.
23 | Cf. März, 2021, p. 276 and the quoted literature.
24 | Paradiso and Campanelli, Joint Concurring Opinion of Judges De Gaetano et al., paragraph 6.
25 | United Nations Convention on the Rights of the Child signed at New York on 20 November 1989, UNTS, vol. 1577, p. 3.
26 | United Nations Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography signed at New York on 25 May 2000, UNTS, vol. 2171, p. 227.
27 | Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, UNTS, vol. 1870, p. 167.
28 | Article 35 of UNCRC; Article 1 of the Protocol; Article 1 of the Hague Convention.
29 | The information reports and projects may be found at the HCCH, no date.
30 | As an example, see the Polish context presented in detail by Gajda and Łukasiewicz, 2019, pp. 709–753 and the sources quoted.

between realizing a surrogacy arrangement and the institution of adoption is visible also in the conclusions of the 2019 Court's Advisory Opinion.[31] The issue of non-recognition of foreign civil status (lack of 'entrance of the intended mother to the national register of births, marriages, and deaths') will be briefly presented in the next paragraph. Here, it is worth referring to the aforementioned doubts about the risk of children's sale. Also, in determining what is relevant for the Valdís Fjölnisdóttir case, one should remember that 'means such as adoption' may include various forms of adult-child relations – in addition to relations based on filiation or parental responsibility, and those based on right to contact or similar under domestic law.

The possibility of adopting a child was not questioned in the Valdís Fjölnisdóttir case. What was subjected to the Court's assessment was the non-recognition of foreign civil status (due to the application of the *ordre public* clause). The Court seems to have elaborated its approach by neither addressing surrogacy as such (or, at least not in a significantly direct way, as stated above), nor requiring entrance of the 'intended parents' to the civil status register as the exclusive solution to protect private or family life (see: the Advisory Opinion), but by checking the degree of 'practical hindrances' that resulted from 'non-entrance' for the applicants.[32] However, many problems of crucial importance remain unresolved.

5. Conclusion

Regrettably, the Valdís Fjölnisdóttir judgement affirmed ambiguity in the ECtHR's approach to gestational surrogacy cases. It may be claimed that the Court does much in order not to address the phenomenon of surrogacy in a more general and structural way from the perspective of the ECHR rights and freedoms. Instead, it prefers to repeat that 'the Court's task is not to substitute itself for the competent national authorities in determining the most appropriate policy for regulating the complex and sensitive matter of the relationship between intended parents and a child born abroad as a result of commercial

31 | Advisory Opinion, conclusion, point 2: 'the child's right to respect for private life within the meaning of Article 8 of the Convention does not require such recognition to take the form of entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad; another means, such as adoption of the child by the intended mother, may be used provided that the procedure laid down by domestic law ensures that it can be implemented promptly and effectively, in accordance with the child's best interests.'

32 | Such hindrances have not been found in the Valdís Fjölnisdóttir case, in which the child was granted citizenship by Icelandic authorities, the foster care agreement was concluded, etc., see Valdís Fjölnisdóttir, paragraph 75. Such a pragmatic approach is present in the last years' case law on recognition of foreign civil status of both domestic and international courts. It has of course its positive (practical) consequences, like a possibility of issuing the documents for a child or providing it with limited 'functional recognition', which enables the child to benefit from the European Union free movement; seeking for protection of *ordre public* at the same time. E.g.: The Polish Supreme Administrative Court (*Naczelny Sąd Administracyjny*) Resolution of 2 December 2019, II OPS 1/19, commented by Mostowik, 2021, pp. 185–203; judgment of the Court of Justice of the European Union of 14 December 2021, V.M.A./Stolichna obshtina, rayon 'Pancharevo', C-490/20, commented by de Groot, 2021, pp. 4–25.

surrogacy arrangements, which are prohibited in the respondent State'[33] and concentrate on the individualized specific circumstances of particular cases. The results are ambiguous and inconsistent.

One may not necessarily share the unequivocal position of the four judges presented in their concurring opinion to the Paradiso and Campanelli judgement that gestational surrogacy is incompatible with human dignity on which the ECHR is based, but one must not ignore the arguments raised in their opinion. It is the Court that should confront itself with this challenging task. In this respect, the Valdís Fjölnisdóttir judgement is a lost chance.

Obviously, gestational surrogacy cases demonstrate a much broader dilemma of the ECtHR's role in the European legal order. Should the Court develop and foster the European standards of human rights protection under the ECHR towards new phenomena, such as surrogacy, or should it rely on the flexible interpretative methods of the ECHR, such as the European consensus and margin of appreciation that allow the Court to await the national developments to be established and safely follow the majority of State Parties? No matter how one answers this mostly complex and intertwined question, one should expect consistency in the Court's approach.

33 | Paradiso and Campanelli, paragraph 180; Valdís Fjölnisdóttir, paragraph 67.

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HISTORY BY AND FOR A NATIONAL CONSTITUTION: THE EXAMPLE OF THE HUNGARIAN FUNDAMENTAL LAW

Péter Pál Kruzslicz[1]

ABSTRACT

The Fundamental Law of Hungary can serve as a very particular, even though not exceptional, especially in Central European region, example for studying the relationship between history and constitution. With two recent events, this study highlights the timely interest for that matter in Hungarian constitutional law. Also, from the beginning, it renders that history and constitutionalism are closely linked in many aspects, already by the definition of constitutional law. In order to be able to analyse in a very complex Hungarian constitutional context the role of history, first, a methodological problem is solved: a clear distinction is made between past, history and memory – also with the help of the two introductive cases. Second, two risks more for the interpretation of history with regards to constitutional law are recalled: the danger of anachronism and the bad influence of historical interruptions. Especially, the second one is identified as a main factor of impact on the Hungarian constitutionalism when handling historical objects or being simply subject to history. Finally, the relation between past, history, and memory with the Fundamental Law of Hungary is described. On one hand, historical narrative plays an identity-creating role, and as such with constitutional symbols but also the symbolic narrative on national history offered by the Fundamental Law, it is a source of legitimacy in the framework of the Hungarian state. On another hand, the so-call historical constitution brings history to the level of constitutional sources even though in a very abstract and indirect way: the achievements of this historical constitution are to be used as guidelines for constitutional interpretation.

KEYWORDS

constitutional history
historical narrative
constitutional symbols
achievements of historical constitution
constitutional identity
constitutional anachronism
historical interpretation

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https://doi.org/10.55073/2023.1.145-158

1. Introduction

In 2022, Hungary celebrated the 800th anniversary of the birth of the so-called Aranybulla (Bulla Aurea), also known as the Golden Bull or, as we prefer to call it, the Hungarian Magna Carta. Issued in 1222, on the 24th of April, Andrew II promulgated it in the form of a royal charter with a golden royal hanging seal (*függőpecsét*)[2]. As part of the unwritten Hungarian constitution, this charter enumerated fundamental privileges of the Hungarian nobility, and as such it remained in force until 1848, when all noble privileges were abolished. More importantly, the document itself, and especially its golden seal, became symbols of Hungarian constitutionalism. An authentic copy of the Bulla Aurea is preserved and exhibited in the building of the Hungarian Constitutional Court, and during their time in office, constitutional judges wear a replica of the seal on a golden collar around their necks when appearing in their official robes to announce their judgments publicly.

In addition, in 2022, the National Assembly of Hungary adopted the Eleventh Amendment of the Fundamental Law of Hungary on the 19th of July[3]. One of the amended provisions concerns the territorial division of Hungary, changing the administrative terminology of former counties (*megye*) to shires (*vármegye*), and renaming the head of the territorial Government Office, formerly Government Commissioner, the shire-reeve (also known as sheriff, *főispán*). Neither of these terms is new. For centuries, these denominations have been used in Hungarian constitutional and public laws. It was after the installation of the socialist regime under the pressure of the Soviet Union that the old terms were abolished, and historical continuity was destroyed. For several years, even after the Communists took power, the head of the departmental administration was referred to by this name. On the one hand, these terms are the conventional, traditional ones; on the other hand, at least nowadays, they seem anachronistic to many, overly historicising modern constitutional and administrative structures.

Both of the above-mentioned examples demonstrate the strong link, the special relationship, one might say, that exists between history and constitution. This relationship is even more significant in Hungary. The preamble of the Fundamental Law of Hungary (National Awoval) contains an extraordinary definition of the constitution that is closely related to this topic: 'Our Fundamental Law shall be the basis of our legal order; it shall be an alliance among Hungarians of the past, the present, and the future'[4]. The first part of the sentence goes is quite self-explanatory: it is a simple, formal definition of the constitution; however, the second part is quite original. It is an important insight into the role of a constitution in a nation-state, but also the particular relationship between Fundamental Law and history can be deduced from it. The same idea appears when one says that a national constitution should answer three questions: where we are coming from, what we are, and what we would like to be[5]. The answers to these questions originate and are rooted in the past.

2 | Zsoldos, 2022.
3 | The Eleventh Amendment of the Fundamental Law of Hungary was published in the Hungarian Official Journal (Magyar Közlöny) on 23 July 2022.
4 | National Avowal of the Fundamental Law of Hungary.
5 | Public lecture of Jean-Marc Sauvé, first vice-president of the Conseil d'État, Constitutional Heritage and European Integration, Hungarian Institute, Paris, September 2012.

What then is the exact role that history plays in a constitution, particularly Hungarian constitutional law? What is the constitutional function of history?[6] Different distinctions should be made to answer this question. In addition, methodological and substantial risks should be avoided. First, the past, history, and memory are three different approaches to history in general, and in constitutional analysis, they should be clearly distinguished. The past reflects the chronology of events that define a nation's history. As components of a common historical experience, such events greatly impact the way of life of any given society, especially its political and constitutional cultures. History is a structured description of one's past. This is the result of research, and as has been said, the historical description of one hour of the past demands several years of research. History is an even more important part of constitutional law.

2. Past, history, and memory – three different constitutional approaches

National constitutions as the framework of the coexistence of a political community are, in fortunate cases, the result of long historical development. The way that we describe our history, the events that are highlighted and emphasised, and the explanations that historians attribute to them have an important impact on the constitutional structure of a state. In Hungary, the first example clearly demonstrates this. The Hungarian Magna Carta is a well-known element of the Hungarian constitutional past. Historical research has focused on its text and context, in light of its adoption for many centuries. However, even 800 years after its promulgation, new approaches can be developed for its study[7]. Often presented as a 'Hungarian version' and compared as such to the Magna Carta Libertatum of 1215, even though both gave legal privileges to nobles, the different contexts in which these documents were adopted should nuance any analysis.

King John Lackland (I) issued the Magna Carta to England's barons to end their rebellion. Although both the king and the nobles accepted the Carta, it did not reflect their real intentions. Neither side complied with it, and the war continued. Helped by Louis VIII of France, the powerful English lords started a civil war that only ended after the death of the king in 1216.

In Hungary, Andrew II was neither weak nor criticised for his fiscal policy. The conflict between the king and nobles was due rather to the strong royal alliance with Bavaria and the appearance of a new class of nobles that the King 'imported' to replace the old ones. The promulgation of a constitutional document was hoped to resolve this conflict, as it was to be respected by all involved; it was not a true source of weakness for the King[8]. Consequently, historically speaking, the two documents cannot be analysed and described in the same frame of reference.

In addition, our memory of the past – being even more structured, layered, and complicated than history – also plays an important role. As we will argue, it is most important

6 | Balogh, 2016, p. 541.
7 | Zsoldos, 2022, p. 5.
8 | Ibid.

in a national constitution, especially in Hungarian constitutional law, from a functional approach[9]. Our memory of the past is mostly nourished by (narratives of) history. Thus, it has a subjective element that makes it very different from history. As much as history wants to be as objective as possible when describing and analysing past events[10], memory is a special approach, highlighting some of them in a particular reading or from a particular vantage point (narrative) and often forgetting or relativising many others.

To return to our first example, we can say that the Hungarian Magna Carta was remembered as a document containing privileges for nobles during the Revolution of 1848, and as such it had to be abolished. However, after the Revolution and the period leading to the Compromise with Habsburgs (1867, 1868), it was recalled that this very same document is the first source of the *ius resistendi* of Hungarians.

This example demonstrates how memory can change the subjective approach to a document of historical significance. Most importantly, memory is also about preservation: the conservation of one specific reading of history.

Therefore, the second example mentioned in the introduction is more characteristic. Why did the Hungarian National Assembly want to return to some historical constitutional terms that could be considered anachronistic from a strictly linguistic perspective? The most likely reason is the preservation of constitutional memory, which, as such, already has a very important function. This memory renders the state's constitutional framework continuous and stable. This refers to the permanent existence of the state with its special political and legal structure. As evidence of such stability, constitutional memories have an important general function without forgetting the special elements that they refer to.

3. Anachronisms and historical interruptions – two major gaps in relation to history

The distinction between past, history, and memory, even though we use history to speak about the constitutional past and our own specific reading of it, is essential for our analysis. Despite the above, we make a clear distinction between them without denying the existence of genuine links. From another perspective, some deeper risks, once again methodological rather than substantial problems, appear. The history of constitutional law by its very nature has a constitutive function in every state. There is constitutional development that establishes constitutional normativity in the long run. This can happen in two different ways: by organic development, when the 'wall' of the constitution is constructed brick by brick according to the form of its 'foundation'; or, by a strategy of interruption, when a new regime begins in opposition and often with the aim of the deconstruction of the old one.

In a Central European, and especially in a Hungarian constitutional context, these questions about historical construction as a continuation or else an interruption of historical 'programs' are raised in a very different way. Because of its history and the fact that

9 | Tribl, 2020.

10 | 'Sine ira et studio', as per the famous expression of Tacitus in the introduction of *The Annals*.

the constitution recalls this idea, a part as much of history as a constitutional memory, that, from the very beginning of modernity Hungary, exposed to foreign occupants, emphasised its continuous constitutional existence[11]. The historical development of its constitutional framework is not only the product of its own constitutional construction (as happens very often in such a model), but the idea of the stability and continuity of constitutional evolution is always simply brought into light as priorities because of the risk of the loss of statehood (as Hungarian historical experience dictates). Because of this, one cannot really speak about organic constitutional development in the Hungarian case, as the external factor has always played a definitive role in this regard in the past.

4. Anachronisms – a first danger of the constitutional approach to history

Because of the above, the risk of anachronism can be considered in other ways as well in Hungarian constitutional law. To demonstrate this, it is sufficient to remember the second example above of the renaming of counties and their administrative leaders. What can be seen as anachronistic in some other parts of Europe, in the Central European region and in particular in Hungary, is simple proof of the special attention paid to constitutional continuity. This does not mean that there is no risk of overly historicising anachronism[12]. One should always remember the famous quote:

> There have been many who could not even recite one principle of our constitution but talked about it in such a way as if they had been knighted by Saint Stephen or Andrew II to act as knights of constitutionalism[13].

With this reference to the Hungarian Magna Carta, the internationally recognised Hungarian professor of the history of law, György Bónis, bade us remember that the danger of anachronism is always present.

This anachronism consists of going back to certain historical periods, taking legal terms or provisions from those periods, and seeking to use and apply them without their reinterpretation and adjustment to modern times. Solely due to the historical value of these constitutional elements and the special importance that they might gain accordingly one would prefer to invoke and apply them even in modern times. However, their meanings cannot be understood outside or without knowing the context in which they were originally adopted. Consequently, the application of these terms in a completely different context centuries later does not make sense. This does not mean that nothing can be deduced and used from earlier constitutional documents and provisions, but that they first must be understood in their original context and then reinterpreted to a new context based on their usefulness and relevance. This exercise is even more difficult because of

11 | The concept of the '1000-year-old constitution' is at the heart of Hungarian constitutional law; see the National Avowal in the Fundamental Law of Hungary.
12 | Vörös, 2020, pp. 40, 41.
13 | Bónis, 1942, p. 2.

the important changes in modern constitutionalism in its fundamental opposition to former medieval and feudal regimes.

However, in Hungary, due to a long lack of independence, modern constitutionalism had difficulty in 'gaining ground', and all the older historical constitutional documents and the constitutional normativity that they provide have not been completely eradicated and disregarded. They can continue to structure and influence Hungarian constitutionalism, while in another, more abstract and indirect way remaining part of Hungarian political culture. The fact that Hungary was ruled under a historical constitution until the adoption of the first written constitution[14], which followed the model of the Soviet constitution of 1936 (and thus was not a modern liberal, but rather a Stalinist constitutional text), renders historical constitutional documents and provisions even more important. However, this makes the danger of anachronism even more real[15]. To avoid it, one should always

(1) Remember the aim of modern constitutionalism (efficient protection of the fundamental rights of individuals and the regulation of the exercise of public power),
(2) exactly understand the context of their adoption, and
(3) be able to reinterpret historical references and the ensuing, possibly anachronistic terms according to their actual context.

The relationship between the past and the present in constitutional law is complex. Anachronism is not the only risk arising from this, which shapes how we draw conclusions from it. History is an evolution, a way to develop a state and nation in a constitutional manner: a legal structure and political community. In such a development, there are mutually enriching and closely connected influences between the political reality of a historical period, the theory developed in the same period, and the reforms that can be achieved in constitutional law.

The actual political context experienced by philosophers and scholars has had a great impact on theories explaining and describing this reality. However, thanks to these analyses, new doctrines may have affected the evolution of constitutional law. From the need for a moral justification of the exercise of power developed in the work of Saint Augustine in the context of Hippo at the end of the Western Roman Empire[16], to the concept of the separation of power announced by Montesquieu in Bordeaux in the middle of the 17th century, where old feudal structures were maintained but modern commerce was also flourishing[17], numerous examples clearly evidence the above-mentioned idea about connections.

The results of these theoretical works have relied upon by decision-makers and practitioners of constitutional law, and they still strongly influence the development of actual constitutional rules, customs, principles, and the way that they are interpreted and applied. However, the different levels of such development should be clearly distinguished, resulting in appropriate understanding and avoiding the risk of misinterpretation. Even though modern principles come from theories describing former political reality, it would be a mistake to use the concepts behind those principles when analysing

14 | The first written constitution of Hungary was the Constitution adopted on 20 August 1949 as Act No. XX.
15 | Bónis, 1942, p. 3.
16 | Szent Ágoston, 2009.
17 | Montesquieu, 2019.

the ancient provisions governing this former reality. When looking at the Hungarian Magna Carta, we cannot speak about modern liberties, but the *ius resistendi* of the nobles can, of course, be interpreted as the first form of protection of constitutional privileges against the ruling monarch. In contemporary contexts, this may also be translated into civil disobedience, an institution which permeates contemporary constitutional discourse in many countries.

5. The problem and consequences of interrupted constitutional development – source of a second danger

If the risk of anachronism is not enough when discussing the relationship between history and constitutional law, specifically in a Central European context, a second problem arises regarding the consequences of the different interruptions of constitutional development. Interruptions in the constitutional history of a state can ruin the results of an organic evolution of the national constitutional structure as it can derail its direction. The constitutional history of Hungary, especially in the 20th century, was characterised by such interruptions. To better understand the relationship between Hungarian constitutional law and history, we should carefully study these interruptions and their consequences and have an attentive reading of what sort of relationship these had on each other.

We use the term interruption where, because of an external factor, the core of a constitutional structure is destroyed and an externally imposed readaptation becomes necessary. For Hungary, such interruptions were caused by both World Wars. Ending the Habsburg Empire, WWI shook the ground under contemporary Hungarian constitutional arrangements. However, the main elements could be maintained, and the historical constitution was readapted to fit the constitutional arrangements of a monarchy without a monarch and to the loss of two-thirds of the historical national territory and one-third of the ethnic national population. At the same time, for obvious historical reasons, the same development could not be followed in the path that was established regarding liberal legislation or a strong parliamentary control of the executive, otherwise characteristic of Hungarian constitutional law from the end of the 19th into the 20th century.

However, the most important interruption from which Hungary could have difficulty recovering even after the regime changed was caused by WWII when the country was occupied first by Nazi Germany and then by the Soviet Union. The loss of sovereignty, in itself a disaster for any state, caused a real interruption, as an 'obligation' due to the pressure of the Soviets to overhaul Hungary's historically founded constitutional framework to create an ideologically based new one. It is interesting to recall that even the ensuing radical changes encroached upon territories of Hungarian historical symbolism: the Stalinist constitution was adopted on the 20th of August, which is Saint Stephen's Day, named after the first Hungarian king, the founder of Hungarian statehood. On the other hand, at the time of the adoption of the Fundamental Law, these interruptions were highlighted clearly in the constitutional preamble, which branded as periods of suspension of

the historical constitution of Hungary[18] and changed the historical narrative of the 1989 constitution, which was less characterised by such an approach[19]. From a purely positivist legal perspective, such a declaration can be considered problematic. Even though it is placed in the constitutional preamble without any normative legal effect, the use of the term invalidity can make one believe that the legal normativity issued from this period of 46 years (from the Nazi German occupation until the first free elections) should be considered invalid, with the consequence of nullity. If for the short period of the Vichy regime, France could make such an argument work, it would be impossible in a different situation and for such a long period of time; for us, the meaning of such a constitutional declaration is deeper than a simple legal provision. It is not a question of legal invalidity but of a lack of continuity: the interruption of Hungarian statehood as Hungarian and constitutional. This means that it was legal, and some acts continue to be applied even today as sources of law despite being gradually replaced, but the regime was not a Hungarian constitutional regime.

Such an interruption has even greater consequences than simple legal or constitutional invalidity. Its impacts and effects can be seen to this day in the Hungarian legal order, in the constitutional framework, and also in its political culture. In this study, we are, of course, only interested in its consequences for the relationship between history and the constitution. This relationship is not only affected by the fact that the organic development of a historically founded constitutional order was broken, and it is remembered as such, but also in that the entirety of constitutional history was put in a new light by the prism of such a constitutional interruption. The constitutional past before the interruption gained special importance; however, it could not be relinked directly with the present constitutional reality. What one could call anachronism, as our second example demonstrated, can also be considered the result of such a particular relationship to history because of the interruption of constitutional development.

6. The relation between the past, history, and memory with the fundamental law of Hungary

After the presentation of these problems and questions, that is:

(1) on the one hand, methodological difficulties – when anachronism or the projection of modern concepts to history must be avoided; and
(2) on the other hand, the substantial consequences they have due to the long-term existence of a historical constitution developed in a special Central European context interrupted in the 20th century,

we summarise our findings about the relationship between the past, history, and memory with the Fundamental Law of Hungary.

18 | As the National Avowal states, 'We do not recognise the suspension of our historic constitution due to foreign occupations. […] We do not recognise the communist constitution of 1949, since it was the basis for a tyrannical rule; we therefore proclaim it to be invalid'.
19 | Trócsányi and Sulyok, 2015, pp. 1–10.

First, it is important to recall that the adoption of the Fundamental Law was mainly justified by historical argumentation. For the first solid political majority after the transition having the opportunity (and necessary votes) to modify the constitution[20], it was obvious that to finish the work started at the time of the change of regime, the adoption of a new constitutional text needed to happen. The former constitution was indeed perfectly modern; however, it lacked a Hungarian character[21].

This Hungarian character is also, we would argue, added to the Fundamental Law by the positioning of the Fundamental Law in view of Hungarian history. In comparison to other national constitutional texts, the past, history, and memory are present in the Fundamental Law of Hungary. As stated in the Introduction, even the definition of the constitution refers to history. In the first, theoretical part of our study, we argue that this is because of the special consequences of a particular national and constitutional history. On the one hand, Hungary has a historical constitution developed over the centuries up to the end of the 19th century, with the adoption of important national acts (such as on the relations between State and Church and on the independence of the judiciary); on the other hand, after a tormented century, the nation saw the adoption of a modern, European constitution (in 1989) without any national character (due to the specific historical and political circumstances of the transition, and its 'revolution by negotiation'). To reconcile the two, particular work on history had to be done[22].

Hungarian constitutional terminology uses history as a source of legitimacy when the Fundamental Law gives a special narrative of the history of Hungary including certain highlighted, willingly chosen elements explaining how they become symbols of Hungary and elements characterising its constitutional arrangements. In developing such an aspect of Hungarian character and history as a source of that character, the constitutional text also seeks to create an identity for the Hungarian nation and statehood, as well as for the Hungarian political and constitutional structures inherent in national identity[23]. These 'constitutional functions' of history (herein highlighted by Hungarian examples) are more or less common to most modern constitutions. For the Fundamental Law of Hungary, history means and represents a historical constitution, the achievements of which have also played a role in the interpretation of the constitutional provisions[24]. Thus, history, as we will argue, is also an indirect and abstract source of constitutional normativity. We present our findings related to constitutional history and the historical constitution below.

20 | The constitutional revision at the time of the change of regime was intended to be temporary, as the Preamble adopted by that time declared; however, even though the different political forces succeeding one another tried to adopt a new constitution, no coalition secured a two-thirds majority in the National Assembly.
21 | Trócsányi, 2014, p. 23.
22 | Ablonczy, 2011.
23 | Treaty establishing the European Union, Art. 4(2).
24 | Fundamental Law of Hungary, Article R); Varga, 2016, p. 86.

7. Constitutional history: source of legitimacy and of identity

History is described by the Fundamental Law of Hungary, but it is not represented, of course, as a series of past events or as a complex process of development. It is cited rather in the third approach mentioned above as a willingly selected memory of some interpreted historical events that build and shape a special, national character. The role of this historical narrative is symbolic but it also has an identity-creating function. No accusations of historicisation or anachronism stand in the face of this, as symbols are almost always and exclusively historically rooted, and constitutional memory also refers to the historical context. Even though one could argue that these characteristics are not particularly Hungarian but are common to many Central European countries, taken together in the special preambular narrative, they can, however, constitute a source of a special, national identity.

Such elements of an identity-creating, symbolic historical constitutional narrative can be found mostly in the National Avowal of the Fundamental Law of Hungary. First, the beginning of Hungarian constitutionalism is brought back to the foundation of Hungary by King Saint Stephen: 'We are proud that our king Saint Stephen built the Hungarian state on solid ground'. The official national holiday of 20 August, Saint Stephen's Day, recalls the founding of Hungary: the historical narrative ties back to this first historical fact. This symbolises the ancient and continuous existence of Hungary. In addition, this symbol emphasises that the Hungarian state and, in a certain way, Hungarian constitutionalism, do not exist only from the period of modern constitutional states. This is a symbolic declaration of thousand-year-old Hungarian statehood in the Hungarian constitutional narrative.

The reference to Saint Stephen also brings into light another special historical element that also has a symbolic, more general importance: as the National Avowal reminds us, he 'made our country a part of Christian Europe one thousand years ago.' On the one hand, the fact that Hungary as a 'country' has been integrated into Europe (which obviously should be interpreted more like a civilisation than a continent) for a thousand years would highlight a choice of values. On the other hand, those values are not only European but belong to a 'Christian Europe'. Christianity and its role will be highlighted in another paragraph, also lending a historical perspective, when the National Avowal states that 'We recognize the role of Christianity in preserving nationhood'. Thus, emphasising the special role of Christianity not as a religion but as one would, say, a cultural and political factor in the foundation and the preservation of the state and the nation is a second element of this national constitutional narrative that apports a unique character to it.

Two other important elements serving as the main pillars for the structure of this historical narrative are the fights for independence related to the community's survival, the freedom of its members, and the traumas of the 20th century. The Fundamental Law declares: 'We are proud of our forebears who fought for the survival, freedom, and the independence of our country' and 'We promise to preserve our nation's intellectual and spiritual unity, torn apart in the storms of the last century'. Concerning these 'storms', the National Avowal also declares:

> We do not recognise the suspension of our historic constitution due to foreign occupations. We deny any statute of limitations for the inhuman crimes committed against the Hungarian nation and its citizens under national socialist and communist dictatorship. We do not recognise the communist constitution of 1949, since it was the basis for tyrannical rule; we, therefore, proclaim it to be invalid.' Even if originally tragic, but from a more positive perspective, the National Avowal continues: 'We agree with the Members of the first free National Assembly, which proclaimed as its first decision that our current liberty was born of our 1956 Revolution.

Summing up: First, in the constitutional historical narrative, there is a reference to the history of modernity to the fights for national independence, which guaranteed the continuous existence of the political community and state institutions, but also, as modern constitutionalism demands, the freedom and liberty of the people. In the Hungarian constitutional historical narrative, the independence of the 'country' must always be in connection with the protection of individual freedoms and fundamental rights. Only an independent, sovereign Hungary can protect its citizens' rights. The symbol of the fights for independence is a special indicator of this. This is also why even tragic fights could be construed as successful as they contribute to the future protection of rights when the state becomes independent (again).

This historical narrative by the constitution, which we called simply 'history', is a source of legitimacy in three different ways.

First, it provides a list of values (i) that are shared by the Hungarian political community, (ii) that give the European cultural and civilizational character of Hungary, and (iii) that are related to the Christian past and culture, but also a special engagement for the preservation of national sovereignty and, in parallel, the protection of individual rights.

Second, this mixture of values creates a special character for the Hungarian nation and the state. As a source of identity, it can also have a legitimising function, creating loyalty between citizens and the state.

Finally, the opposition to totalitarian regimes, the fight for freedom, also provides a third, 'properly constitutional' legitimacy, as these are the main objectives of modern constitutionalism.

8. Historical constitution: more than a symbol, an indirect source of constitutionality

As mentioned above, the relationship between the Fundamental Law of Hungary and history is special because Hungary was ruled under a historical constitution until the adoption, during a period of constitutional interruption or suspension, of the first written Stalinist constitution. The value-neutral constitution adopted for the sake of regime change did not try to define itself in relation to this special historical constitutional fact. The Fundamental Law had to find a way to commemorate this fact without falling into a trap of anachronism. When speaking about the historical constitution, the first thing to remember is the special responsibility of those who are adopting constitutional texts referring to it and of those who are interpreting or analysing those references and the

historical constitution itself. Such a responsibility was also underlined by the Constitutional Court in the first case where it referred to the so-called achievements of historical constitution, wherein constitutional judges stated that 'the responsibility of the Constitutional Court, in such a new situation, is huge, one would say historical'[25].

The Fundamental Law refers to the historical constitution four times: Three times, the term appears in the constitutional preamble, the so-called National Avowal, and once among the constitutional provisions, in Article R), paragraph 3. In the preamble, we read that

> We honour the achievements of our historic constitution, and we honour the Holy Crown which embodies the constitutional continuity of Hungary's statehood and the unity of the nation. We hold that the protection of our identity rooted in our historic constitution is a fundamental obligation of the state. We do not recognise the suspension of our historic constitution due to foreign occupations.

These paragraphs are located between the declaration of values and some more technical and constitutional declarations, serving as a transition between those parts of the constitutional preamble.

It is also through its achievements that the historical constitution reappears in Article R), paragraph 3: 'The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historic constitution'. Thus, only the achievements and not the historical constitution itself can appear as a source of constitutional normativity, but not directly, only as guidelines for interpretation, such as the constitutional preamble parallel to the so-called teleological interpretation[26]. The Constitutional Court also confirms such a very indirect and abstract use of the historical constitution by its achievements when it says: 'This provision does not emphasize the role of the historic constitution as such, but the role of its achievements', therefore, 'when the Fundamental Law opens a window towards the historic dimension of our public law, it values some historically developed institutional precedents, without which our present public law would lack its roots', and, 'when examining cases, the Constitutional Court is obliged to elevate its view to the horizon where sources of legal historical institutions can be found'[27].

One should also remember the famous sentence of István Széchenyi, well-known and recognised politician of the first half of 19th century, according to whom 'the protectors of an 800-year-old constitution can only be uncivilized men'[28]. Regarding this idea, we would state that as the Fundamental Law states (and as it was interpreted by the Constitutional Court of Hungary), the historical constitution is not to be protected; however, its so-called achievements can be used as guidelines for the interpretation of the actual constitutional provisions. The historical constitution only plays a symbolic role, but its achievements require the integration of a new historical dimension into the interpretation of constitutional provisions. As the Constitutional Court argued, some historical institutions of Hungarian public law can be referred to in this regard.

25 | Decision of the Constitutional Court of Hungary in case number 33/2012 on 17 July 2012.
26 | Vörös, 2016, p. 39; Varga, 2016, p. 86.
27 | Ibid.
28 | Bónis, 1942, p. 5.

History, however, not only has a symbolic or identity-creating constitutional function. The continuity ensured by and through the historical constitution led to a particular constitutional provision that obliged the interpreters of the Hungarian constitution to think about some institutions of the historical constitution and use what it contributed to Hungarian public law as a tool in defining constitutional rules. However, neither does it elevate the historical constitution to the rank of positive constitutional law, nor does it elevate its achievements, as even those can only be referred to as guidelines for interpretation. Jenő Szmodis thus calls the Fundamental Law a multi-layered constitution.

This study focuses on the relationship between history and constitutional law. As history is of great importance in Hungarian constitutional law, a fact that we demonstrated with two topical examples, it was interesting to engage in a deeper analysis of its constitutional function. In our opinion, the relationship between history and Hungarian constitutional law is characterised by the two constitutional functions of history: (i) we have constitutional history 'reported' by the constitution as part of a historical narrative in the Fundamental Law, which is one source for its legitimacy, and (ii) the historical constitution is also an indirect source of constitutional normativity, as the Fundamental Law's provision of constitutional interpretation refers to its achievements, which thus can serve as interpretative guidelines for the Constitutional Court.

In order to correctly understand these two functions of history in Hungarian constitutional law, we also examined three methodological but also two substantial problems of constitutions dealing with history, with particular regard to the Hungarian Fundamental Law. All this was intended to prove that not only 'scientifically proven history' but a special view or reading of a 'national myth', a kind of 'memoire' appears in constitutional texts (we earlier called this 'constitutional memory'). We need to reiterate that when we use historical references not only as symbols then it is important to avoid anachronism, especially in a Central European context where the history of the 20th century left a gap between organically developed constitutionalism and the present one, without clearly letting modern constitutionalism settle in for a longer time.

However, such a particular history cannot be the reason for neglecting the organically developed historical roots of Hungarian constitutionalism. On the contrary, a special path must be scouted and paved which leads back to those roots. The historical dimension of the interpretation of actual positive constitutional provisions can definitely mark this path. As the Constitutional Court also recognised, it constitutes a great responsibility and burden for those who would venture on this path, as it should lead from the past to the future and not from the future to the past. Just as the living constitutional tree is growing, so its roots can go further and deeper, and the right balance should be maintained to protect constitutionalism.

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PUBLICISATION OF FAMILY LAW IN CZECHOSLOVAKIA IN THE 20TH CENTURY[1]

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ABSTRACT

This article analyses the development of Czechoslovak family law in the 20th century, with emphasis on changes in family and marriage, status of women in the family, marriage, and society, and changes in the legal status of children (with a focus on state interest in child education). In particular, we introduce the results of our research on the foundation of the system of state social care for children, the emancipation of children and women from the dominance of their fathers, and a communist experiment to place the family under socialist state supervision. We draw attention to how these changes introduced public law elements into family law and how family law became an independent legal branch. To research these topics, we analysed the following legal acts: Act No. XXXI of 1894 on the Marriage Law, which was in effect in Czechoslovakia from the establishment of Czechoslovakia in 1918 until 1950, was amended through Czechoslovak Act No. 320 of 1919 Coll. on Marriage Contract Ceremonies; Family Law Act No. 265 of 1949 Coll., which was in effect from 1950 to 1964; Family Act No. 94 of 1963 Coll. that was in effect from 1964 to 2005; and Act No. 36 of 2005 Coll. on a family currently in effect. In addition, we worked with case law, sociological research, archival sources, etc. In conclusion, the most turbulent turnover in family law occurred in our territory in the 19th century through the Hungarian Act of 1894. The 20th century, however, was the most turbulent regarding the number of changes, some of which the authors analysed in this article.

KEYWORDS

development of the Czechoslovak family law in the 20th Century
status of family members
state interest
marriage
children
women
emancipation

1 | The study is outcome of research tasks carried out in the KEGA Project No. 003TTU-4/2023 on topic Sources of Law in the Era of People's Democracy and Socialism (1948 – 1989) – Preparation of University Textbooks and Development of Skills in Working with Legislation.
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https://doi.org/10.55073/2023.1.159-175

1. Introduction

Family law, which is effective in present-day Slovakia,[4] has undergone essential changes since the 19th century. The demands for secularisation and limitations of the church's influence on marriage led to the introduction of a civil form of marriage and the dissolution of marriage *inter vivos* – said otherwise–divorce. However, traditional rural Slovak society observed these changes from a distance and continued to live according to traditions. The voices calling for further secularisation became louder after the creation of Czechoslovakia, particularly in the Czech countries, with the there-effective Austrian marriage law being less progressive than the Hungarian one. A legislative compromise led to the drafting and adoption of Act No. 320 of 1919 Coll. For Slovakia, this meant that Hungarian law remained in effect (i.e., Act No. XXXI of 1894 on the Marriage Law, hereinafter referred to as the Marriage Act of 1894), in some articles amended through Act No. 320 of 1919 Coll. Therefore, in Slovakia, since 1919, it became possible to conclude civil and church marriage - both completely equal. The failure of Czechoslovak codification efforts in the field of substantive civil law ultimately led to the survival of the dual legal arrangement of family law until 1948/1949. The Austrian Civil Code (ABGB) applied in Bohemia, Moravia, and Silesia, whereas the Hungarian Marriage Act of 1894 applied in Slovakia, both of which were amended by Czechoslovak Act No. 320 of 1919 Coll. on Marriage Contract Ceremonies. The breakthrough change occurred in Czechoslovakia during the so-called People's Democracy with the adoption of the Ninth-of-May Constitution of 1948 and Family Law Act No. 265 of 1949 Coll., which definitively secularised marriage and put families under totalitarian surveillance. Even raising children, an intimate family affair, became a regulated and controlled public matter that remained in socialist Czechoslovakia after the adoption of Family Act No. 94 of 1963 Coll. The liberation of family law from the shackles of totalitarian power occurred through several amendments adopted after 1989, notably Act No. 36 of 2005 Coll. on Family.

In this simplified timeline, it is possible to identify some fundamental turning points in the history of national family law. In the following pages, we introduce these changes, including relevant legislation, court practices, and the social-political background. As part of the development of Czechoslovak family law in the 20th century, we draw the reader's attention to the following issues: a) changes in family and marriage, b) changes in the status of women in family, marriage, and society, c) changes in the status of children (with a focus on state interest in child education).

These changes introduced public law elements into family law. Moreover, family law became an independent legal branch due to the legal diversification promoted by socialist jurisprudence, aiming to shift from bourgeois (liberal) family law based on 'property relations'. Thus, following questions arise: 1. How did the family change in Czechoslovakia during the 20th century? 2. How did the status of family members change? 3. What interest did the state have in the transformation of the family or in female emancipation and why did it try to penetrate the intimacy of the parent-child relationship? Answers to these essential questions will help us clarify the development of Slovak family law.

4 | Until 1918, Slovakia was part of the Hungarian Kingdom. After 1918, it was part of Czechoslovakia.

2. Changes in family and marriage

The transformation of marriage and family in Slovakia started with the adoption of the Marriage Act of 1894, which was in effect in Slovakia until the end of 1949 (as amended by Czechoslovak Act No. 320 of 1919 Coll). The Marriage Act of 1894 raised the threshold of a new era that was more liberal and free and more open to new challenges, clearly rejecting the preservation of the past.[5] Mandatory civil marriage ceremonies were confronted with the conception of marriage as a sacrament,[6] and the dissolution of marriage that became a 'requirement of the new times' clashed with the Christian concept of indissolubility of marriage.[7] The Marriage Act of 1894 avoided defining the institution of marriage, even though a shift from the sacramental understanding of marriage towards its civil contractual character was evident.[8] Jurisprudence in this era settled on the perception of marriage as a contract. However, the fundamental change that matrimonial (and family) law underwent in Slovakia at the end of the 19th century and at the beginning of the 20th century did not have as radical an impact on contemporary Slovak rural society as expected.[9] For traditional Christian Slovak society, marriage was a sacrament, and its dissolution was perceived as negative, even during the first half of the 20th century.[10] After the establishment of Czechoslovakia, the demand for secularisation of marriage appeared prominently in Czech countries. This is evident from the proposal to amend the provisions of the ABGB on marriage law, which had already been submitted at the first constituent meeting of the National Assembly in November 1918.[11] The struggle for the modernisation of marriage culminated in May 1919 and resulted in the adoption of Act No. 320 of 1919 Coll. on the Ceremonies of the Marriage Contract, Separation, and Impediments to Marriage (the Marriage Amendment or Separation Act).[12] Slovakia only introduced the equality of civil and church marriage (i.e. the engaged couple could choose how to enter marriage) and amended marriage announcements.[13] Thus, the dual regulation of family and matrimonial laws continued, which was

5 | Gábriš, 2012, p. 50.
6 | Lanczová, 2018, pp. 15–18.
7 | Laclavíková, 2017, pp. 65–66; see also Petrasovszky, 2016, pp. 29–34.
8 | Herger, 2012, p. 138.
9 | Interesting conclusions on the ethnological research of the Slovak family in this period are available in Botíková, Švecová and Jakubíková, 1997.
10 | 'According to statistics, a 3.3% divorce rate in the 1920s increased to 5.2% in the 1930s, which is a minimal increase for people living in this period … It shows that the changes were slow, more of an individual character, occurring in the urban environment, among non-peasants, mainly intellectuals and the rich. The wider stratum of society inclined to the traditional, as much as possible, unchanging arrangement of relationships.' Lanczová, 2019, p. 276; see also Lanczová, 2017.
11 | The suggested amendment was brief, requiring civil marriage and the possibility of divorce. Its provisions were not to apply to Slovakia, where the effect of the adopted Hungarian regulation was to continue. The suggested amendment by Dr. Bouček et al. is available at: https://www.psp.cz/eknih/1918ns/ps/tisky/t0001_00.htm (Accessed: 10 March 2023).
12 | Veselá, 2003, p. 76.
13 | In Slovakia and Subcarpathian Ruthenia, only Secs. 1 to 12, further on Secs. 25, 26, and 29 of the Marriage Amendment Act applied. On the contrary, Secs. 13 to 24 (on dissolution of marriage and separation from the bed and board), Sec. 27 (on reconciliation attempts) and Sec. 28 (on invalidity of marriage) did not apply here. In these matters, the adopted Hungarian Marriage Act of 1894 remained valid.

supposed to be solved through the expected codification of civil law. However, lawmakers did not complete the Czechoslovak Civil Code for various reasons, especially due to the upcoming events of the Second World War. Moreover, the Civil Code Draft submitted to the National Assembly in 1937 missed articles on family law because of ongoing professional and political disagreements on whether to include them in the Civil Code or codify them separately.[14] When Czechoslovakia was reestablished after WWII in 1945, the dual regulation of family law in the unified state continued. The problems resulting from this legal dualism served as fertile ground for changing family law on a new ideological basis.

The Ninth-of-May Constitution of 1948 declared the protection of marriage and family,[15] as seen in Sec. 10 'Marriage, family, and motherhood are under the protection of the state. The state ensures that the family provides a healthy basis for the national development.' Thus, the Ninth-of-May Constitution became not only an interpretative tool for new judicial practice but also a norm with new revolutionary principles changing family relations (equality between men and women in the family and equal rights for children regardless of their origin) that was directly applied and referred to by the general courts.

The representatives of the People's Democratic regime set as one of the main priorities the transformation of family relations associated with property (and thus demagogically associated with the criticised 'bourgeois family') to primarily personal, in the spirit of socialist coexistence. The new Czechoslovak legal doctrine highlighted that such a transformation occurred in the Soviet Union.[16] The essence of the transformed family law was to deprive the family of its private (intimate) nature and strengthen its public importance.[17] Regulation and control by the state represented a decline in society from capitalism to socialism.[18] The transformation of the legal order in People's Democratic Czechoslovakia was the result of the legal biennium, a reform process initiated under Act No. 265 of 1949 Coll. on Family Law (hereinafter referred to as the Family Law Act of 1949).[19] It introduced the idea of creating socialist family law as a separate legal branch[20] that enshrined both private and property relations between spouses. The Explanatory Report on the Government Family Law Act Draft of 1949 and the entire parliamentary debate during the legislative process showed signs of a fundamental tendentious criticism

14 | Salák, 2017, p. 37.

15 | Constitutional Act No. 150 of 1948 Coll. introduced the new People's Democratic regime.

16 | 'Soviet family law regulates a specific area of social relations, namely legal relations between spouses and between family members, the characteristic feature of which in a socialist society is that personal relations prevail over property relations. … From the beginning, the revolutionary legal consciousness of the Soviet people grasped this fundamental difference between the nature of civil law relations as property relations, and the nature of family law relations, in which the personal, moral and socio-educational elements prevail. … legislation in matrimonial and family issues is therefore not a matter of chance in the Soviet legal system, but results directly from the socialist perception of marriage and family in which the interests of the society correlate to the highest degree with personal interests, but are far from property interests. Bourgeois legal systems understand marriage and family primarily as economic units, the purpose of which is to create, collect and secure family property, and therefore naturally include family law in civil law.' Viktory, 1952, pp. 115–116.

17 | These opinions were already present in the Manifesto of the Communist Party (1848).

18 | Kuklík, 2009, p. 575.

19 | Knapp, 1985, pp. 445–446.

20 | 'The new family law, freed from property rights interests, should not have had its place in civil law, which primarily regulates property relations.' Letková and Martincová, 2018, p. 52.

of bourgeois (capitalist) family law[21] and an emphasis on constitutional principles that changed the character of society and the state.[22]

In the Preamble, the Family Law Act of 1949 defined marriage as

> [...] a voluntary and permanent life partnership between a man and a woman, established in a legal manner, which, as the basis of the family, will in the future serve the interests of all its members and the benefit of society in accordance with its progressive development.

This new socialist marriage was supposed to stand upon the deep emotional relationship between equal spouses. The contractual nature of marriage[23] was rejected as a relic of the bourgeois era. The Family Law Act of 1949 recognised the mandatory civil form of marriage, allowing religious marriage ceremonies only after civil weddings with no legal relevance.[24] The Act of 1949 abolished the factual termination of marriage called 'separation from bed and board' that had existed in legal orders of Christian Europe since the medieval times. Instead of exhaustively listing reasons for divorce, the Act introduced only one general reason: the deep and permanent breakdown of marriage caused by grave problems.[25] The justification for only one general divorce ground[26] was that no list is 'extensive enough to cover diverse and various possibilities' that might lead to divorce.[27]

21 | 'The disintegration of the old capitalist society had an influence on the family, so even now, some broken marriages still exist. One can see this because of separations and all the other accompanying phenomena of corrupt capitalist morality, such as infidelity, moral offenses, prostitution, alcoholism, etc. still occur. But even here today, we can already notice a sharp downward trend in all these sad phenomena, which indicates that marriage and the family in a people's democratic state are recovering as a result of improved economic conditions and morals. It turns out that the best cure for all these social ills is the provision of suitable living conditions - allowing people to lead moral lives only as socialism does, not succumbing to decaying forces and immorality. Honest work, earnings sufficient for a good living, decent clothing and good housing, and the certainty that one does not have to worry about illness, injury, or old age, literally work miracles. The unworthy suddenly become exemplary individuals, and the bad human qualities vanish. We see this each day as the new world collides with the old order, which yet persists in people's thinking and feeling. It is at this time of transition from the old social order to a higher social order that everyone who has eyes to see and ears to hear should realise how the material side of our lives contributes to how permanent marriages will be, how strong basis will the family become for the nation's development. A new morality grows out of construction work. The pioneers of this new socialist morality are our strikers, men, and women, who become role models for their acts for others. We issue a new act so that our working people do not follow the family regulations governed by the morals of an exploitative society, hostile to the working people.' Quoted from the speech of the Minister of Justice Dr. A. Čepička as part of the discussion on the report of the constitutional and legal committee on the government's draft on family law at the 37th session of the National Assembly on 7 December 1949. Steno protocols. Print 382. [Online]. Available at: https://www.psp.cz/eknih/1948ns/stenprot/037schuz/s037004.htm (Accessed: 10 March 2023).
22 | Šošková, 2016, p. 27.
23 | Bělovský, 2009, p. 467.
24 | However, for political reasons, the provision on the permission of religious ceremonies did not appear in Sec. 1 of the Family Law Act of 1949 but in Sec. 7.
25 | Subsection 1 of Sec. 30 of the Act on Family Law of 1949: 'If there has been a deep and irretrievable breakdown between the spouses for serious reasons, the spouse can ask the court to terminate the marriage by divorce.'
26 | The court examined who caused the marriage breakdown (who was guilty of the marriage breakdown).
27 | Laclavíková and Zateková-Valková, 2020, p. 58.

The new socialist family was supposed to be subordinated to the interests of the totalitarian state, as idealistically explained in the Explanatory Report to the Family Law Act of 1949:

> However, the socialist family has a completely different mission in society. The cornerstone of a family is a voluntary and free union of a man and a woman, their affection, and mutual respect. Through a family, healthy people fulfil their natural desires and, above all, educate their children. A socialist family is a solid collective whose members provide each other with moral and material help and care for each other. A socialist family is a collective of workers whose interests are not in conflict with the interests of society but which primarily pursues the common interest of all, the interest of society, which will ensure an increase in the standard of living of all workers and the undisturbed development of their mental abilities'![28] Thus, a progressive higher type of family was to be born, not based on 'property, but on mutual emotional affection to create a healthy basis for the successful education of the children, the future citizens of a new, higher form of state.'[29]

The paradox of time was that the ordinary reality of life pointed to the dysfunctionality of this model. In contrast, an insufficient supply and lack of goods and services strengthened the economic function of the family (and extended family) by searching for 'ways' to ensure self-sufficiency.[30]

The socialist character of the family was strengthened through the following socialist regulations of family law: Act No. 94 of 1963 Coll. on Family (hereinafter referred to as the Family Act of 1963). The recodification of family law began with the Constitution of the Czechoslovak Socialist Republic of 1960,[31] which declared that socialism in Czechoslovakia won. Like the Ninth-of-May Constitution of 1948, it placed 'motherhood, marriage, and the family under the protection of the state.' Further on, Article 26 specified that 'the state and society ensure that the family is a healthy basis for the development of the youth.' The new Family Act followed the previous Act of 1949 and was based on the same ideological principles.[32] The influence of the state and its interference in the family–that is, the etatisation of society increased and intensified. One piece of evidence is the socialist demand for uniform education of children by parents, the state, and social organisations.[33]

In Article I of the Family Act of 1963, in the core principles, we find the definition of the socialist marriage and its purpose: 'Marriage in our society stands for strong emotional

28 | Explanatory Report to Act on Family Law of 1949 [Online]. Available at: https://www.psp.cz/eknih/1948ns/tisky/t0378_02.htm (Accessed: 10 March 2023).
29 | Presentation of the reporter Dr. Z. Patschová on the Act on Family Law of 1949, which took place at the Constitutional Committee of the National Assembly, which discussed the government's draft of 7 December 1949. Steno Protocols. Print 382. [Online]. Available at: https://www.psp.cz/eknih/1948ns/stenprot/037schuz/s037001.htm (Accessed: 3 May 2020).
30 | Hamplová, 2010, p. 5.
31 | Constitutional Act No. 100 of 1960 Coll.
32 | These principles primarily included: the consistent secularisation of family law relations, the equality of men and women in marital relations and towards their children, and the equality of children regardless of their origin. In contrast, it was no longer a requirement for a court to examine the fault for the marriage breakdown. Thus, for the termination of a marriage by divorce it was necessary to take into account only the objective ground for marriage breakdown and the interests of minor children.
33 | Planková, 1964, p. 25.

relationships between a man and a woman, both equal in this bond. The main social purpose of matrimony is the founding of a family and the proper upbringing of children.' The family established by marriage became the 'cornerstone' of society, and it was the society that was supposed to 'protect family relationships in all respects.'[34]

Society protects families because of its crucial functions (biological, economic, and educational),[35] including ideological education. In the spirit of the promoted ideas, economic function was supposed to gradually lose its importance (hands-in-hand with the increase in services provided by the state), together with the weakening of the family as an economic unit.[36] The most important function of the family was education. The family was supposed to be the most suitable environment for upbringing guided by the state, the first place where the child came into contact with social norms and perspectives, and where the child acquired habits, first experiences, and opinions.[37] In education, the socialist state saw the potential to preserve ideals by creating individuals dedicated to the regime.

What were the interests of the totalitarian (people's democratic and subsequently socialist) state? During totalitarianism, the family became the basic unit of society and the centre of the state's interest. According to the rhetoric of the 1950s and the 1960s, existential problems disappeared, which was an advantage over an uncertain life under capitalism. In exchange for the freedom of individuals, from the 1970s, the state led a policy of social corruption (providing marriage loans, social security support, housing for young families, institutionalised childcare–a network of schools, kindergartens, nurseries, etc). The family changed from private to public. However, these measures did not achieve their goals. Society passively accepted social security, and the decline in the population curve became (as in other parts of the world) a new trend.[38]

34 | Art. II of the Family Act of 1963.
35 | Pávek, 1973, p. 56.
36 | In 1964, Oľga Planková indicated that this is essentially a utopian vision that can only become real under communism: 'A family in our society can fulfil the function of providing material security for its members only under the assumption of managing a family household, within which family members mutually assist each other not only in the form of monetary contributions but also by acts of personal care and sharing housework. Despite the great efforts in society to liberate women from heavy housework, there is no complete equality between women, burdened by housework, and men with regard to female work in production, politics, and culture. In most of our families, the house chores exclusively or predominantly burden the women. Here, the remnants of the old division of labour in the family, still preserved today, get manifested. … In the process of building a communist society, this will disappear by gradually transferring the economic function of the family to society, facilitating difficult and time-consuming work, mechanising households, building a dense network of services for citizens, and improving the quality of these services, especially by evenly dividing the increasing household work between men, women, and other family members. In our society, taking care of the household cannot be only a woman's duty, but shall be the duty of the entire family.' Planková, 1964, pp. 15–16.
37 | Planková, 1964, pp. 15–16.
38 | Oľga Planková identified the following as the causes of the declining birth rate: 1. high differentiation in the standard of living of childless families or families with one child on the one hand and families with more children on the other, and 2. the contradiction between maternal duties and women's work and social employment. Planková, 1964, p. 10.

3. Transformation of a woman's position within marriage, family, and society

The revolutionary principle of the Ninth-of-May Constitution enshrined in Article 1(2) establishing equality between men and women in the family and society,[39] was a breakthrough in family law. Nevertheless, the equality principle was not unknown in Czechoslovak law. The Constitution of 1920, containing Article 106(1)[40] proclaimed general equality but did not influence family law, which was traditionally based on inequality between spouses and parents. Even back in the 1940s, the excellent Slovak civil lawyer Štefan Luby stated:

> The principle of gender equality is imperfect and favours the husband, to whom the marriage and family law grants certain prerogatives. These privileges of the husband do not result from the weakness of the female sex (ob imbecillitatem sexus) but from the family structure and the nature of marriage. The co-decision of both spouses is not good for marriage. It needs an individual chief for possible conflict resolution. In current legal systems, the chief is the husband as the head of the family and the head of the household.[41]

The spouses (parents) had unequal rights over their children. Only the father who held the patria potestas[42] was the legal representative of a minor child, had the right to decide who could or could not become the guardian after his death, and had the right to manage and dispose of the child's property. The wife (mother) was responsible for the upbringing of the children while respecting traditional family roles, especially the privileged position and rights of the husband (father). The Act on Family Law recognised joint parental responsibility only in 1949.

The new regime was supposed to introduce true equality between men and women in families and society. It wanted to 'liberate women' from family ties and place them in the work process in the new spirit of proletarian equality. However, the process of emancipation began relatively slowly in predominantly rural Slovakia. The 'female liberation' from the narrow family circle became an often-emphasised replica of the new communist

39 | Ninth-of-May Constitution, Art. 1(2) 'Men and women have the same status in the family and society and equal access to education and all professions, offices, and ranks.'
40 | The Czechoslovak Constitution of 1920 in Art. 106(1) stated that: 'Privileges based on sex, gender, and occupation are not recognised.'
41 | Luby, 1944, pp. 4, 6. To express the mutual relations between spouses, Luby also used the term 'incomplete equality', which he justified by the fact that achieving complete equality of spouses would threaten the unity of the family, forcing the need for frequent court decisions to resolve marital conflicts in the management of (ordinary) affairs. Luby, 1944, p. 8.
42 | Act No. XX of 1877 on Guardianship and Curatorship, Art. 15.

jurisprudence. The model for 'female liberation' was the Soviet Union,[43] highlighting the end of 'slavery of women' and 'overloading women with the housework', which made it impossible for them to become successfully integrated into work beneficial for society, to get a job, to participate in public life, etc.[44]

The constitutional proclamation of equality led to a problematic situation in the Czechoslovak legal order when a specific constitutional provision negated one of the basic principles of family law. The equality principle influenced the personal relations between spouses, alimony, parental rights, and duties (especially the concept of paternal power), that is, many relationships were previously based on the unequal status of husband and wife. The 'bourgeois' family law clashed with the Ninth-of-May Constitution. The only solution was to apply this revolutionary constitutional principle directly to court decision-making activities.[45] Thus, judges faced the difficult task of examining the constitutionality of an act before deciding on its merits[46] (often with the consequent necessity of direct application of the Constitution). This direct application of the Constitution was typical in disputes concerning the right of the husband to determine the place of joint residence of the spouses, alimony, denial of the child's marital origin, etc.[47] Overall, decisions from the 1950s show high judicial activism, ideologically based decision-making,[48] and a distorted mission of law as a tool for the ideological transformation of society.[49] For instance, this was obvious in the decision of the Regional Court in Olomouc on 13 February 1950 No. R II 35/50:

> Our socialism-building society recognises complete equality of men and women in all branches of social life. Women have access to education and all professions, offices, and ranks (Ninth-of-May Constitution, Art. 1). … Under People's Democracy, the inequality of the sexes

43 | Explanatory Report to the Act on Family Law of 1949: 'The equality of men and women exists only in socialism. The bourgeoisie sometimes recognises it in words but does not implement it in deeds and often not even in legal regulations. The Soviet Union showed the whole world the great process of liberating women from centuries of oppression and excellently enabled women to take part in building socialism. Men and women have equal rights not only in the legislation of the socialist state but also in civil and family life. Also, in the countries of people's democracy, a new type of woman is growing up, who fully participates in the working efforts of the nation and at the same time is fully aware of the importance of motherhood and socialist family life.' [Online]. Available at: https://www.psp.cz/eknih/1948ns/tisky/t0378_02.htm (Accessed: 12 March 2023).
44 | 'If a woman stays at home, she is exposed to the danger of bourgeois ideas penetrating the family.' Ulč, 2016, p. 199.
45 | The conformity of the interpretation and use of other legal regulations taken over into the legal order with the Constitution was to be ensured by Art. 171(3) of the Constitution: 'The interpretation and application of all legal acts must be in accordance with the Constitution.'
46 | Kühn, 2005, pp. 35–36.
47 | 'Since the effect of the Ninth-of-May Constitution, the mother also was entitled to deny the marital origin of the child.' The decision of the Regional Court in Prague from February 19, 1949, No. Co XX 11/49, published under serial (publication) number: 59/1949 in the Collection of opinions of the Slovak Supreme Court and decisions of the courts of the Slovak Republic.
48 | Judicial activism meant that the judge applied the law and actively created it, shaped it, and determined its meaning through his interpretation 'to decide ideologically correctly and not to hide behind the wall of legal formalism.' Vojáček, Kolárik and Gábriš, 2013, p. 93.
49 | It was the judge who, as an instrument of change, 'had to apply pre-socialist law in the light of new social realities,' i.e. to apply the new and crucial principle of equality between men and women. Kühn, 2005, p. 19.

> vanished. That was a typical feature of a society divided into antagonistic classes where the woman, condemned to manage the household, performed a private service to her husband and was economically dependent on him. … As our legal order guarantees a woman full employment in social production and supports this employment, her work cannot be the reason to deny her the child custody.[50]

In this case, the question was whether an employed mother could raise and take care of her minor child, for whom the petitioner (father) requested custody. This was based on the principle of equality between men and women.

The direct application of the Ninth-of-May Constitution was legally ensured through Act No. 265 of 1949 Coll. on Family Law[51] and Act No. 266 of 1949 Coll. on Temporary Changes in Some Civil Legal Matters, which repealed the previous legal regulations of family law (relevant provisions of the ABGB, Marriage Act. No. XXXI of 1894, Act No. 320 of 1919 Coll. on Marriage Contract Ceremonies, etc.[52]). However, in the 1950s, courts continued to emphasise the necessity of applying the constitutional principle of equality between men and women. This confirms the slow adoption of this radical novelty in traditionally conservative family law relations, especially in the Slovak part of the Republic.

Socialist Constitution of 1960[53] guaranteed the equality of men and women through compensatory assistance from the state, as is clear from the wording of Article 27:

> The possibility for women to equally engage in family life, work, and public activities is possible because of special adjustment of working conditions, special health care during pregnancy and maternity, the development of facilities and services enabling women to use all their abilities to participate in the society.

The subsequent legal reforms through Act No. 94 of 1963 Coll. on family enshrined the principle of equality between men and women in the first article of the Fundamental Principles, along with the definition of marriage.

However, does this principle bring true equality to the spouses in a material sense? Sociological research reveals that this equality was formal and revolutionary. Barbara Havelková[54] identified three stages of gender policy in socialist Czechoslovakia: the first was the legislative change and enforcement of the concept of equality in family and society (1948–1962); second, the period of consideration (1962–1968); third the period of social corruption (1968–1989).

50 | The decision of the Regional Court in Olomouc from 13 February 1950, No. R II 35/50, published under serial (publication) number: 187/1950 in the Collection of opinions of the Slovak Supreme Court and decisions of the courts of the Slovak Republic.
51 | The purpose of new legal regulation was clear from the Preamble of Act No. 265 of 1949 Coll. on Family Law: 'To bring into life the principles of the Constitution on the equal status of men and women … to ensure the protection of marriage and the family so that the family becomes a healthy basis for the development of the nation.' Equality of men and women influenced all provisions of the new family law code and, of course, the related procedural regulation.
52 | Derogatory provision (Art. 46) of Act No. 266 of 1949 Coll. remembered the peculiarities of the Slovak sources of law and cancelled 'all provisions on matters regulated by this act and family law, including customary rules in the case-law and other sources.'
53 | Constitutional Act No. 100 of 1960 Coll.
54 | For more information see Havelková and Oates-Indruchová, 2015.

She said that, on the one hand, the social, legal, and economic conditions for women in Czechoslovakia had improved, which was significantly evident compared to Western Europe. On the other hand, she criticised formal and material aspects, leading to the retention and acceptance of the concept of a double burden.[55] It is also possible to point out the pragmatism of the people's democratic and socialist legislators in ensuring the policy of female employment, resulting in the feminisation of some work sectors, unequal remuneration,[56] and weakening of the traditional family by breaking ties within it,[57] complemented by the emergence of a new protective position for the state.

4. Transformation of the child's position – Child and his upbringing in the centre of interest of the state

The turn of the 20th century was crucial because of the emancipation of the child from patria potestas and its becoming an object of state interest in health and social policy.[58] In Czechoslovakia, the question arose as to whether the old concept of state care for children was sustainable, especially in Slovakia and Subcarpathian Ruthenia, which preserved the Hungarian system of state children's homes.[59] It emerged alongside the requirement of continuous philanthropy and the conservation of a certain degree of self-help that already existed in society (orphanages and childcare associations). In those times, people had to deal with the devastating consequences of the First World War, which triggered social and health threats affecting children (illnesses, hunger, malnutrition, parental alcoholism, unemployment of family members, labour migration of the breadwinners, out-of-wedlock relations, death of parents and related problems including wandering and begging, relatively high employment of children and youth, mostly in agriculture, etc.). They justified the state's interference in the child protection system. Simultaneously, similar to the women's liberation movement, these issues helped

55 | 'What the double burden meant for women is well demonstrated, for example, in research of the State Population Commission from the early 1960s. Among other things, it focused on how men and women spent their ordinary days. A woman with two children spent an average of nine hours a day working and commuting to and from work, from five to five and a half hours shopping and taking care of the household, a maximum of an hour and a half interacting with the children, an hour and forty minutes taking care of herself, and six hours she spent sleeping. Her husband had four hours more free time each day than she did. In the early 1960s, when women in Western Europe and the United States were complaining about limited life possibilities, the women in Eastern Europe were just absolutely overworked and exhausted.' (Havelková, 2009, p. 197) The jurisprudence addressed the concept of double burden in relation to the economic role of the family, often with the idealistic utopic conclusion that the communist society would solve this problem because families would no longer have economic functions. Planková, 1964, p. 16.

56 | Women did 'male work' for 'female wages' since the people's democracy.

57 | Šošková, 2009, p. 2718.

58 | Franc et al., 2021, pp. 347–348.

59 | State children's homes existed in the old Hungarian system, based on Act VIII of 1901 on State Children's Homes (so-called asylums or menhely in Hungarian). After the establishment of Czechoslovakia, state children's homes remained preserved in Slovakia and Subcarpathian Russia. Though, they did not exist in Bohemia, Moravia, and Silesia.

establish children's rights, including the right to support and care,[60] and public social care for children and youth if the natural family could not or did not provide adequate care, help, and protection.[61] The state verified whether families fulfilled responsibilities towards their children and provided social and legal services for children.[62] In the first half of the 20th century, the Slovak children's social care system was a hybrid system of associations (a network of territorial associations of District Youth Care established in the Czech model) coexisting with state institutions, which became active when the family, as the priority natural environment for the child, failed. However, the state had limited possibilities of truly solving the complex social problems of children, as in the rest of Europe, it struggled with economic crises, epidemics, unemployment, and other threats after the Great War. Before 1948, the failure to solve social problems and problems related to illegitimate origins was severely criticised.

Until the middle of the 20th century, the basis of the relationship between parents and children was the paternal power of the privileged family member, the father, in the position of the breadwinner and protector. Since 1948, patria potestas have been subjected to massive criticism for preserving the unequal status of men and women in the family. Furthermore, it prevented the mother from acting towards children, and, last but not least, it had 'unacceptable bourgeois Roman law origin.' After 1948, Czechoslovak lawmakers introduced the parental authority, which was slowly implemented in practice in the traditional Slovak patriarchal environment. Both Czechoslovak family law codes enforced the principle of equal responsibility of both parents for their children, and this parental authority applies to Slovakia and Czechia until the present day.

The Ninth-of-May Constitution placed marriage, family, and motherhood under the protection of the state. It emphasised that the origin of a child must not be a ground for discrimination, thus definitively eliminating the difference between children born in marriage and those born out of wedlock.[63] This guaranteed 'special benefits and support' to families with more children. In addition, it was closely linked to the state population policy, as seen in Article 11(1): 'The state guarantees children special care and protection; in particular, it takes systematic measures for the population development.' New possibilities for state interventionism emerged. The family, as the basic unit of a socialist society, was primarily supposed to raise children, the foundation and future of the

60 | In September 1924, the League of Nations adopted the Geneva Declaration of the Rights of the Child.

61 | Rákosník, Tomeš and Koldinská, 2012, p. 350.

62 | The legal basis of the new social politics concerning children in Czechoslovakia was Act No. 256 of 1921 Coll. on Protection of Children in Foreign Care and Illegitimate Children and related implementing regulations issued in the 1930s. Furthermore, Act No. 4 of 1931 Coll. on Protection of People Entitled to Alimony, Education or Care (Alimony Act) regulated more effective fulfilment of alimony duty. Act No. 117 of 1927 Coll. on Wandering Gypsies regulated the special regime for children of the wandering Gypsies. Act No. 412 of 1919 Coll. regulated the compulsory vaccination against smallpox (variola) in the Czech countries (not in Slovakia and Subcarpathian Ruthenia, where the Hungarian acts of 1876 and 1887 remained in effect). Act No. 241 of 1922 Coll. on Combating Venereal Diseases regulated controlling and combating venereal diseases. Act No. 86 of 1922 Coll. on Restricting the Serving Out of Alcohol regulated the measures to prevent alcohol use and alcoholism. Act No. 420 of 1919 Coll. on Child Labour regulated the work done by children, etc.

63 | Art. 10(1) of the Constitution of 1948: 'The state protects motherhood, marriage, and the family.' Art. 11(2) of the Constitution of 1948: 'The origin of children shall not harm their rights.'

nation. Education had to comply with the Soviet model: 'A well-educated Soviet youth… should be deeply ideological, alert, optimistic, devoted to the motherland and a believer in the victory of communism, so as not to be afraid of obstacles and able to overcome any difficulties.'[64] Through children, the state was securing the future of its regime. New perspectives on the education of children and youth emerged, emphasising the role and importance of collective education in schools and preschools, including the necessity of the ideological organisation of children and youth into three hierarchical groups (Sparklings, the youngest children; Pioneers, older children; Unionists, young adults ready to join the Communist Party). The main aim of supervision was to shape the 'moral and political profile of a young person.'[65] The State continued to interfere with child education even after 1960, when the Czechoslovak Socialist Constitution of 1960 and the Family Act of 1963 came into effect. This was because, despite the declared victory of socialism, the process of creating a socialist marriage and family continued.[66] In Article 24 of the Constitution of 1960, we find the right to education and its ideological framework in the totalitarian state: 'All education and all teaching are based on a scientific world view and on the close connection of the school with the life and work of the people.' According to Article 26, the state protected motherhood, marriage, and the family – 'the state and society should ensure that the family is a healthy basis for the development of youth.' State and social organisations supplemented the upbringing of children in families.[67]

The 1963 Act on Family harmonised the system of children and youth care[68] with new family law principles, intending to cancel the dual role of the family and state and the dualism of the private and public.[69] Thus, the Act on Family acquired a mixed character. It no longer uses the terms social and legal care for children. Instead, the lawmakers used the expression 'participation of society on the exercise of the rights and obligations of parents.' The education of a young person, the constructor of a new society, became the role of parents, state authorities, and the entire socialist society.

64 | Knapík and Franc et al., 2018, p. 103.
65 | Šolcová et al., 1984, p. 303.
66 | Explanatory Report to the Government Draft on Family Act of 1963 [Online]. Available at: https://www.psp.cz/eknih/1960ns/tisky/t0146_01.htm (Accessed: 10 March 2023).
67 | Glos et al., 1965, p. 191.
68 | The social protection of children and youth underwent a fundamental transformation during the People's Democracy. In 1947, with Act No. 48 of 1947 Coll. on the Organisation of Youth Care, the sector became public, and the private features got abolished (Youth Protection Offices and, since 1956, National Committees substituted the former associations of District Youth Care). Act No. 69 of 1952 Coll. on Social and Legal Protection of Youth fortified the state interference, too. For instance, this was visible in foster care. According to the Explanatory Report: 'Preferred is the placement in collective-care facilities. The collective way of life and upbringing in the collective (in educational facilities for children older than three years, such as children's homes, youth homes, boarding schools of state labour reserves, and homes for working adolescents) reliably instils in the youth the right attitude towards the collective, and make them conscious members of a socialist society.' The Act on Social and Legal Protection of Youth allowed placing minor child/children in families that guaranteed the upbringing of children with love for the people's democratic state and creating an environment favourable to their development. Explanatory Report to the Act on Social and Legal Protection of Youth of 1952 [Online]. Available at: https://www.psp.cz/eknih/1948ns/tisky/t0633_01.htm (Accessed: 10 March 2023).
69 | Explanatory Report to the Government Draft on Family Act of 1963 [Online]. Available at: https://www.psp.cz/eknih/1960ns/tisky/t0146_01.htm (Accessed: 10 March 2023).

National committees played a crucial role in ensuring this task. Parents were responsible to the socialist society itself for the development and upbringing of their children.[70] According to Article V, a socialist society cares for children and their education, including satisfying material and cultural needs, through state bodies, social organisations, schools, cultural facilities, learning centres, and medical centres. Legal science tried to ideologically justify the state's interference in education as a matter of the unity of the state and society:

> Our society appropriately complements the upbringing of children in families with social education in schools, nurseries, kindergartens, youth groups, youth organisations and through the press, radio, and television. Thus, youth education goes beyond the narrow framework of the family environment and becomes a social issue. The upbringing of children in the family and in social institutions and organisations should complement each other and be uniform with regard to content and worldview. ... The most frequently reported defect is the inconsistency of the worldview presented in the family and at school, caused by the remnants of idealistic worldview in some families. As a result, there is an ideological disorientation, or even a split in the character of a child, which can very unfavourably affect all aspects of the child's mental development.[71]

As a matter of course, it was necessary to prevent this 'disorientation'.

5. Conclusion

Under national law, the state began to interfere with family law in the 20th century. This happened primarily through establishing a public system of children's social care, the emancipation of children and women from patria potestas, and a communist experiment to turn the family into a basic unit of socialist society placed under state supervision. Some of these processes also occurred in democratic European countries, but some were typical only of the Eastern Block. Family, marriage, and care for children, including their education as private law institutes, first became supervised and later partially or fully regulated by the state. The family, perceived as a possible 'centre of resistance to the regime,' became the target for sharing the new ideology and scientific worldview. Within the family, the regime could control the individual, his thinking, and actions, thereby influencing society and shaping it according to ideology. The totalitarian state aimed to achieve the loss of privacy, values, traditions, and intimacy, albeit unsuccessfully.

70 | According to Art. IV of the Act on Family of 1963, parents became responsible to society for the versatile mental and physical development of their children, and, especially, for their proper education, so that the unity of the interests of the family and society strengthened.
71 | Planková, 1964, p. 13.

Families were fences[72] – some of them blocked democratic values, although many were protectors.

72 | 'Most ideologies that strive for a radical transformation of the way of life try to "liberate" a person from dependence on close people (and therefore mainly on the family) intending to instigate them to search for support and role models thanks to this newly acquired "freedom" in a different type of social environment – perhaps a party or a political movement. However, the family is, in principle, hostile to revolutions because of the sense of loyalty and respect for values and norms taught within the family. In the family, a person learns the values and moral principles that guide him for the rest of his life, and the family keeps reminding him of these values and principles. A stable family is simultaneously an emotional and social haven for children and parents. The communist regime tried to weaken the family and thus remove the obstacle that prevented the reconstruction of society according to communist ideals. On the other hand, the political leadership set a goal of maintaining a relatively high birth rate, whether for the sake of increasing the prospective number of the workforce or later for prestigious reasons in an attempt to prove that socialist states are not affected by the decline in the birth rate that the West has been experiencing since the 1960s.' Hamplová, 2010, p. 3.

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SOME REMARKS ON THE CJEU'S 'PANCHAREVO' DECISION WITH SPECIAL REGARD TO THE NEXUS BETWEEN THE PRIMACY OF EU LAW AND THE NATIONAL IDENTITY OF MEMBER STATES'

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ABSTRACT

This paper analyses same-sex marriage and adoption and the nexus between the primacy of EU law and national identity of the Member States in the light of the decision of the Court of Justice of the European Union (CJEU) in the Pancharevo-case delivered in December 2021. The CJEU ruled that the Bulgarian authorities were obliged to issue a child's birth certificate, which is a condition for the issuance of an identity document or passport under Bulgarian national law. A Member State may not rely on national law and identity in this respect. The CJEU relied on the principle of 'functional recognition', which it had first adopted in its judgment in the Coman-case.

KEYWORDS

same-sex marriage
adoption
primacy of EU law
functional recognition
principle of effectiveness
national identity

1. Introduction

The rights of same-sex couples to marry and adopt can be considered a topical issue in contemporary life and politics. It is constantly being addressed in practice by national supreme/constitutional and supranational courts such as the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU). This paper analyses the relevant jurisprudence of the latter two fora in the light of the CJEU's decision in the *Pancharevo* case,[2] which was delivered in December 2021. In this case, the CJEU had to decide whether the unconditional prevalence of the right of free movement of persons

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2 | CJEU case C-490/20, V.M.A. v Stolichna obshtina, rayon 'Pancharevo', Judgment, 14. 12. 2021.

https://doi.org/10.55073/2023.1.177-201

under the Founding Treaties over the traditional concept of the family in a given country would be contrary to the national identity of the Member State. The question at issue was whether, in the context of the exercise of rights deriving from EU law, such as the right to free movement, a national authority is obliged to recognise both members of a same-sex couple as the parents of a child, even if it is not possible under national law. The CJEU said that

> [...] the Member State of which that child is a national is obliged (i) to issue to that child an identity card or a passport without requiring a birth certificate to be drawn up beforehand by its national authorities, and (ii) to recognise, as is any other Member State, the document from the host Member State that permits that child to exercise, with each of those two persons, the child's right to move and reside freely within the territory of the Member States.[3]

On 24 June 2022, the CJEU issued a 'Reply by reasoned order' under Rule 99[4] of its Rules of Procedure[5] in the *Rzecznik Praw Obywatelskich* case,[6] which had previously been suspended pending a decision in the *Pancharevo*-case, given that the facts and question posed were identical. In the *Rzecznik Praw Obywatelskich* case, the CJEU reiterated the decision in the *Pancharevo*-case, clarifying the direction of its case law.

The CJEU's response in the Pancharevo-case was predictable given the decision in the Coman-case,[7] which dealt with a similar issue in 2016. In his Opinion in the Coman-case,[8] Advocate General Melchior Wathelet, stressed that '[the case] provides the Court with the opportunity to rule, for the first time, on the concept of "spouse" within the meaning of Directive 2004/38[9] in the context of a marriage between two men'.[10] The CJEU concluded that where a marriage is contracted validly under the rules of another Member State, the other Member State (of which the EU citizen is a national) cannot deny the EU citizen's spouse the right of residence solely on the ground that the Member State in question does not recognise same-sex marriage.[11]

These issues are important as they involve a conflict between two exclusive competences: the rights relating to citizenship of the Union and the free movement of persons–which are the exclusive competence of the Union– and family law issues–which are the exclusive competence of the Member States–and also, if the given

3 | Ibid., para. 69.
4 | Ibid., Rule 99: 'Where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.'
5 | Rules of Procedure of the Court of Justice (OJ L 265, 29. 9. 2012, pp. 1–42).
6 | CJEU case C-2/21, Rzecznik Praw Obywatelskich v K.S. and Others, 24. 6. 2022.
7 | CJEU case C-673/16, Coman, Judgment, 5. 6. 2018. For a detailed analysis of the case, please see: Gyeney, 2018, pp. 149–171.
8 | CJEU case C-673/16, Coman, Opinion of Advocate General Melchior Wathelet, 11. 1. 2018.
9 | Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [...] (OJ L 158, 30. 4. 2004, p. 77–123.)
10 | CJEU case C-673/16, Coman, Opinion, para. 2.
11 | CJEU case C-673/16, Coman, Judgment, para. 51.

Member State claims so, form part of national identity.[12] Although the CJEU stressed in both the Coman and Pancharevo cases that Member States enjoy a wide margin of appreciation under EU law, it decided that EU law should prevail. The reason for this interpretation can be found in the Opinion of Advocate General Julianne Kokott in the Pancharevo-case:

> If the same-sex spouse of a Union citizen with whom that citizen has validly entered into a marriage pursuant to the legislation of a Member State is not classified as a "family member" on the ground that the law of another Member State does not provide for that possibility, this would risk a variation in the rights deriving from Article 21(1) TFEU[13] from one Member State to another, depending on the provisions of their national law.[14]

Thus, to ensure the application of EU law, Advocate Generals in the Coman and Pancharevo cases – Wathelet and Kokott respectively – and the CJEU, adopted the so-called 'functional recognition',[15] based on the principle of effectiveness,[16] stressing that the recognition of a family relationship registered in another country, but not recognised by the national law of the Union citizen's Member State of origin only serves to ensure the application of EU law and cannot result in a change in the national constitutional rules. The author raised two questions in this respect. First, to what extent is this form of mutual recognition – which, by analogy, is reminiscent of the 'Cassis principle'[17] – appropriate in a case where, as Advocate General Wathelet pointed out in his Opinion in the *Coman* case, two exclusive competences are in conflict? In the *Cassis* case, there was no such conflict as the free movement of goods was already a community competence at the time of delivering the judgment. The second question was whether, given that EU law directly or indirectly impacts national legislation in several areas, ranging from tax to family laws, this functional recognition may not lead to a de facto change in national legislation, even if this does not occur de jure. If a Member State is eventually forced to functionally yield to the primacy of EU law in several areas, something that the 7 December 2022 statement of Věra Jourová, the European

12 | Some constitutions/basic laws contain *expressis verbis* reference to national or constitutional identity, namely an explicit 'eternity clause'. Their mere existence and content is determined by the state organ commissioned with the task of interpreting the constitution. In some cases, a so called implicit 'eternity clause' is derived by the constitutional court – or the court empowered to interpret the basic norm – via various methods of interpretation (See Drinóczi, 2018, p. 5). Joseph H.H. Weiler and his fellow co-authors made a statement in 1995 – some 15 years before the issue became mainstream – that the demarcation between EU and national law – that is to say deciding what belongs to national identity – will be done by the supreme courts of the member states. See Weiler, Haltern and Mayer, 1995.
13 | Consolidated version of the Treaty on the Functioning of the European Union (OJ C 326, 26. 10. 2012, pp. 47–390.)
14 | CJEU case C-490/20 V.M.A. v. Stolichna obshtina, rayon 'Pancharevo', Opinion of Advocate General Julianne Kokott, 15. 4. 2021, para. 61.
15 | EAPIL Editorial, 2022.
16 | See CJEU case C-14/83, Von Colson and Kamann v. Land Nordrhein-Westfalen, Judgment, 10. 4. 1984, para. 28.
17 | CJEU case C-120/78, Rewe-Zentral A.g., Judgment, 20. 2. 1979.

Commission's Vice-President for Values and Transparency suggested,[18] will there be any room for manoeuvre left for the Member State even though its Constitution remains otherwise unchanged?

To put the second question in an alternative way, can we say that 'functional recognition' is another example of 'integration by stealth?'[19] The latter question is pertinent as the European Commission, in a 2020 document titled 'A Union for Equality: A Strategy for LGBTQ Equality,'[20] stressed that it is planning to promote the mutual recognition of family relationships within the EU under the motto 'If you are parent in one country, you are parent in every country'.[21] This means two things according to the strategy: first, the Commission intends to hold dialogues with Member States on the implementation of the Coman-judgment.[22] The Commission has made it clear that it will take legal action to enforce the judgment if necessary.[23] Second, the Commission made it clear in the abovementioned document[24] that it intends to initiate a legislative act under Article 81(3) TFEU[25] to promote the mutual recognition of parenthood between Member States.[26] If this plan is implemented, the status of parents legally registered in one Member State will be subject to mandatory recognition in another. In preparation for the draft legislation, a public consultation was carried out in 2021, which showed that most EU citizens

18 | 'It is unthinkable that a parent in one Member State is not recognised as a parent in another Member State. This puts some children at risk, as they would not have guaranteed access to their rights, such as succession, maintenance or decisions on schooling and education'. European Commission, Equality Package: Commission proposes new rules for the recognition of parenthood between Member States. Press Release, 7 December 2022, Brussels (IP/22/7509).

19 | This extension of powers through 'integration by stealth' has become obvious following the 'notorious' decision of the German Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG) on 5 May 2020, which declared an element of the European Central Bank's crisis management strategy to be ultra vires. See Marinkás, 2021, pp. 328–329; see furthermore Schmidt, 2016, pp. 1–21.

20 | European Commission (COM/2020/698 final).

21 | State of the Union Address by President von der Leyen at the European Parliament Plenary (16. 9. 2020).

22 | 'The Commission has engaged into a dialogue with all Member States, including with Romania, following the issuance of the Comanjudgment. In addition, a separate dialogue with Romania is ongoing on the conditions for granting residence to spouses of returning Romanian citizens, but not specific to the situation of same-sex couples.' Answer given by Ms. Dalli on behalf of the European Commission on 1.3.2022 to Parliamentary question E-005164/2021 (17. 11. 2021). Parliamentary question – E-005164/2021.

23 | European Commission (COM/2020/698 final), p. 17.

24 | European Commission (COM/2020/698 final), p. 18.

25 | Article 81(3) TFEU: 'Notwithstanding paragraph 2, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament.'

26 | A similar initiative is being prepared at the international level by the Permanent Bureau of the Hague Conference on Private International Law (HCCH) with a focus on issues of the recognition of parenthood arising from international surrogacy arrangements. The final report of the expert group – commissioned with the task of elaborating on the issue – is expected to be presented to the Council on General Affairs and Policy of the HCCH in 2023. See Regulation on the recognition of parenthood between Member States. In 'A New Push for European Democracy' (As of 20/02/2023).

supported the proposal,[27] and a preparatory working group was set up.[28] It has met seven times so far, most recently on 22 February 2022.[29] The Justice and Home Affairs configuration of the Council met on 4 February 2022 and discussed the issue.[30] No agreement was reached among the ministers[31] as the Commission, relying on the principle of functional recognition enshrined in the aforementioned CJEU judgments, sought to extend EU competences into an area which, under the Treaties, remained the exclusive competence of the Member States.

On 7 December 2022, the European Commission issued a proposal[32] for a 'Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood.'[33] A key element of the proposal is that a legal parent-child relationship established in one EU Member State should be recognised in all other Member States without any additional legal procedures. The Commission proposed a harmonised template that would be compulsory to accept throughout the EU. It stressed that the regulation would not harmonise substantive family law, which remains a competence of the Member States. Given that Sebastian Kaleta – Secretary of State at the Ministry of Justice of Poland – stated[34] in December 2022 that Poland would veto the proposal, [35] it is unlikely that the proposal will be adopted in its recent form, as the legislative procedure under Article 81(3) of the TFEU requires the Council to make unanimous decisions. This procedure requires the Council to consult with the European Parliament, which is underway.[36] It became clear during the parliamentary debate on 15 March 2023[37] that the Commission's proposal is highly controversial: MEPs argued in favour and against the proposal. MEP Ernő Schaller-Baross[38] emphasised[39] that:

27 | European Commission, Initiative on the recognition of parenthood between Member States Factual summary of the Open Public Consultation. Brussels, October 2021 (No. 6847413).
28 | Expert Group on Recognition of parenthood between Member States (E-03765).
29 | Minutes: 7th Meeting of the Expert Group on the recognition of parenthood between Member States 22 February 2022 (via VTC).
30 | French Ministry of the Interior, 2022, p. 13.
31 | Ellena, 2022; Office of Communication and Promotion of the Polish Ministry of Justice, 2021.
32 | European Commission: Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood. (Brussels, 7.12.2022 (COM(2022) 695 final).
33 | For follow-up information on the proposal please see Procedure 2022/0402/CNS.
34 | 'As long as [this] government is at the helm in Poland, this document will never come into force', he said, adding that it could open the way to further regulations of family law, such as recognition of same-sex marriages or the idea there are 'dozens of genders.' Sowry, 2022.
35 | The Polish Constitution – just like the Fundamental Law of Hungary – *expressis verbis* stipulates that marriage is the union between man and woman. Furthermore, the Polish legal system does not grant homosexual couples the right to enter into a registered partnership. See Andrzejewski, 2021, pp. 162, 175–176. For a Central East European comparison please see Barzó, 2021, pp. 287–322.
36 | See on the website of the European Parliament.
37 | See European Parliament (2019–2024) Verbatim Report of Proceedings (15. 3. 2023).
38 | Non-attached Member (Fidesz-Magyar Polgári Szövetség-Kereszténydemokrata Néppárt).
39 | European Parliament (2019–2024) Verbatim Report of Proceedings (15. 3. 2023.), p. 213.

> Our position, which is based on the provisions of the Fundamental Law of Hungary, is legally and ideologically clear. The mother is a woman, the father is a man, and the concept of family is a national competence. Please respect this![40]

The Italian and French parliaments submitted a reasoned opinion under the Early Warning System[41] aimed at scrutinising the prevalence of the principles of subsidiarity and proportionality by the national parliaments. Both Parliament's upper houses, namely the '*Senato della Repubblica*' of the Italian Parliament (Parlamento italiano) and the '*Sénat*' of the French Parliament (*Parlement français*) stated that the proposed legislation does not comply with the principle of subsidiarity.[42] The senate of the Dutch Parliament (*Eerste Kamer der Staten-Generaal*) initiated political dialogue to inquire about the number of cases where the recognition of parental responsibility and rights of access, succession rights, and name met legal obstacles and to see if there were any alternative solutions to these problems that do not require the initiation of EU legislation.[43] In the meantime, some Member States' courts already 'surrendered' following the Coman-judgment. The Bulgarian Supreme Administrative Court (*Varhoven Administrativen Sad*) ruled that the Australian member of a same-sex couple of French and Australian origin qualifies as a spouse within the meaning of Directive 2004/38/EC in order to comply with the country's obligations under EU law.[44] The Polish Supreme Administrative Court (*Naczelny Sąd Administracyjny*, NSA), in its decision dated 2 December 2019,[45] ruled in line with the principle of functional recognition that was made part of the CJEU's case law by the Coman-case,[46] in a case concerning the registration in Poland of the birth certificates of two foreigners who were parents of a same-sex couple.[47] Although the decision bound the Polish administration, some authors doubt whether similar applications will be dealt as smoothly in practice.[48]

40 | The author's own translation.
41 | Art. 6 of the Protocol No. 2 of the TFEU on the application of the principles of subsidiarity and proportionality.
42 | Parlamento italiano, risoluzione della 4ª commissione permanente (politiche dell'unione europea) doc. xviii-bis n. 2; Parlement français, N° 84 sénat session ordinaire de 2022–2023 (22 mars 2023).
43 | Vragen over voorstel voor een verordening betreffende wederzijdse erkenning van afstamming (COM(2022)695) 24 maart 2023 (172946.01U).
44 | Associated Press, 2019.
45 | NSA, II OPS 1/19 (2019/12/02).
46 | Ibid., para. 10.
47 | The NSA concluded that the refusal to register a birth certificate in Poland on public policy grounds does not prevent authorities from registering the child's *Powszechny Elektroniczny System Ewidencji Ludności* (PESEL) number directly based on the foreign document. PESEL functions as an electronic identity number and is used to issue identity cards, passports, and other official documents. See Kruger, 2020.
48 | Wysocka-Bar, 2020.

2. A brief introduction of the ECtHR and CJEU case laws vis-à-vis the Coman case

2.1. A brief introduction of ECtHR and CJEU case laws

To understand the logic of the judgments delivered in the Coman- and Pancharevo-cases, it is worth summarising the ECtHR's and CJEU's case law. The ECtHR case-law – which is richer than those of the CJEU – is relevant because, according to Article 6(3) of the Treaty on European Union (TEU):[49] 'Fundamental 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.' Accordingly, Advocate Generals Wathelet and Kokott in the Coman- and Pancharevo-cases also referred to the ECtHR's case-law. The author of this paper summarises the substance of the cases cited by the Advocate Generals.

In the 2017 *Orlandi v. Italy*[50] – in line with *Schalk and Kopf v. Austria*[51] – the ECtHR held that the relationship of same-sex couples living together as stable, de facto partners falls not only within the scope of private life, but also within the scope of family life[52] within the meaning of Article 8 of the European Convention on Human Rights (ECHR).[53] According to *K. and T. v Finland*,[54] the existence of family life is a question of fact. The Court argued as follows: '[...] the existence or non-existence of "family life" is essentially a question of fact dep-ending upon the real existence in practice of close personal ties'.[55] The ECtHR arrived at a similar finding in *Eriksson v. Sweden*.[56] In the *Oliari* case,[57] the ECtHR deduced from Article 8 of ECHR that State Parties to the Convention are obliged to grant legal recognition to same-sex couples, as their relationship falls under the right to family life.[58] The ECtHR confirmed its position in *Taddeucci and McCall v. Italy*[59] a year later.

Under the case law of the ECtHR, State Parties to the Convention are obliged to legally recognise same-sex couples. However, as explained in this paragraph, the decision as to how to do so – that is, whether to introduce same-sex marriage or not – is a matter for the discretion of the State, having considered that – based on the well-established case law of the ECtHR[60] – it is for the national legislature to assess and respond to the needs of the

49 | Consolidated version of the Treaty on European Union (OJ C 326, 26. 10. 2012, pp. 13–390).
50 | ECtHR case Orlandi v. Italy, No. 26431/12; No. 26742/12; No. 44057/12 and No. 60088/12, Judgment, 14. 12. 2017.
51 | ECtHR case Schalk and Kopf v. Austria, No. 30141/04, Judgment, 24. 6. 2010, para. 94.
52 | ECtHR case Orlandi v. Italy, para. 143.
53 | Convention for the Protection of Human Rights and Fundamental Freedoms (European Treaty Series – No. 5, Rome, 4 November 1950).
54 | ECtHR case K. and T. v. Finland, Judgment, 12. 7. 2001.
55 | Ibid., paras. 150–151.
56 | ECtHR case Eriksson v. Sweden, No. 60437/08, Judgment, 12. 4. 2012, para. 58.
57 | ECtHR case Oliari and others v. Italy, No. 18766/11 and No. 36030/11, Judgment 21. 7. 2015.
58 | Ibid., para. 165.
59 | ECtHR case Taddeucci and McCall v. Italy, Judgment, 30. 6. 2016, paras. 83–95, 98–99.
60 | See among others: Oliari-case, para. 191; X and Other v. Austria, No. 19010/07, 19. 2. 2013, para. 86. and the cases cited there.

State's society in the most appropriate manner.[61] In the Schalk and Kopf case, the Court was not convinced by the argument of the complainants that the institution of marriage had undergone significant changes since the adoption of the Convention. As the Court noted, there was no consensus at the European level on the right of same-sex couples to marry. Only 6 of the 47 Member States of the Council of Europe guaranteed the right to marry for same-sex couples at the time of deliberating the case.[62] The ECtHR noted that it is clear from a historical interpretation that, when the Convention was drafted, the concept of marriage clearly meant the union of two persons of opposite sexes. No other interpretation had been considered. The grammatical interpretation also supports these findings: it is not accidental that, while other articles use the neutral terms 'everyone' and 'no none', Article 12 of the ECHR[63] refers *expressis verbis* to the sex of the beneficiaries of the right to marry. Consequently, Article 12 cannot be interpreted as creating any obligation for the State to recognise same-sex marriages.[64] In the *Gas and Dubois* judgment,[65] the majority held that there was no discrimination contrary to Article 14 of the ECHR, given that the applicants were not in a comparable situation to married couples, since '[...] marriage confers a special status on those who enter into it.'[66] As Judge *Sicilianos* wrote in his partly dissenting opinion in the Taddeucci-case, if the majority position in the said case is upheld in this respect, that is, the invocation of a breach of Article 14 in such cases would be accepted by the Court, it would render the special protection null and void.[67] Summarizing the above two paragraphs, while CoE Member States are obliged to grant legal recognition to same-sex couples, the choice of the method of legal recognition is left to the discretion of the State; it does not follow from the Convention that the State is obliged to guarantee same-sex couples the right to marry.[68]

Finally, some of the ECtHR's jurisprudence on surrogacy deserves to be highlighted, as they are relevant to the topic at hand. The ECtHR in its first Advisory Opinion – a type of procedure introduced into the European human rights mechanism by Additional Protocol No. 16 to the Convention[69] –, in Case No. P16-2018-001[70] at the request of the Court of Cassation (*Cour de Cassation*) examined how the French legislation 'adapted' following

61 | See de Groot, 2021.
62 | ECtHR case, Schalk and Kopf, para. 58.
63 | Art. 12 of the ECHR: 'Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.'
64 | ECtHR case, Schalk és Kopf, Judgment, paras. 55, 63.
65 | ECtHR case Gas and Dubois v. France, No. 25951/07, Judgment, 15. 3. 2012.
66 | Ibid., para. 68.
67 | It should be recalled at this point, however, that Sicilianos himself notes that the ECtHR should consider reviewing its jurisprudence in the light of recent changes in the way in which same-sex couples are perceived and their legal position. ECtHR, Taddeucci and McCall v. Italy, partially dissenting opinion of Judge Linos-Alexandre Sicilianos, paras. 13, 18–19.
68 | An exception to this is the case of transsexual persons: according to the ECtHR judgment in Christine Goodwin v. United Kingdom, the state has an obligation to guarantee the right to marry persons who have undergone sex reassignment surgery and are legally recognised as the opposite sex to their birth sex, if they wish to marry a person of the opposite sex to their new acquired sex. ECtHR case Christine Goodwin v. United Kingdom, Judgment, 11. 7. 2002, paras. 97–104.
69 | Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 214).
70 | ECtHR, Press Release, No. 132/2019, 10. 4. 2019.

Mennesson v. France.[71] In its advisory opinion, the ECtHR concluded that, under Article 8 ECHR, a State Party to the Convention must grant domestic legal recognition to a legally recognised parent-child relationship established abroad based on a surrogacy agreement between the child and the prospective mother. This does not mean that the State is obliged to register the 'mother-to-be' as the mother in the national civil register based on the information contained in the birth certificate issued by the foreign authority. A State Party to the Convention has wide discretion *vis-à-vis* the form of such legal recognition, as long as the legal instrument granting recognition is properly and effectively functioning and coincides with the best interests of the child. The ECtHR referred expressis verbis to adoption as such a legal instrument.[72] In paragraph 47 of its advisory opinion, the ECtHR stressed[73] that, although in the main proceedings which gave rise to the advisory opinion, it was not the prospective mother's own *ovum* that was used for implantation, if such a scenario – that is to say the implantation of own ovum – comes into reality, the obligation of the State to provide for the possibility of recognition of the parent-child relationship will be even more pronounced.[74] Given that Bulgaria has not ratified the Additional Protocol,[75] it is not bound by the Advisory Opinion. However, in two judgments following the Advisory Opinion, in *C and E v. France*[76] and *D v. France*,[77] the ECtHR reiterated the findings of the Advisory Opinion, made them part of its case law, which was thus binding on Bulgaria.[78]

Following an overview of ECtHR case law, it is worth reviewing some of the CJEU cases relevant to the Pancharevo-case. Having regarded that the European Union does not have the competence to regulate family law relationships in a binding way, there are no decisions of the CJEU that have directly addressed the issue of family relations. However, it has indirectly touched upon the question of the recognition of family relationships. On the one hand, from the direction of the right to free movement of workers, as in the 1992 *Singh-case*.[79] In the said judgment the CJEU held – in line with the Advocate General's opinion[80] – that where a Member State does not guarantee the same rights of residence to the spouse and children of a worker, it constitutes a serious obstacle to the free movement of labour. On the other hand, Advocate General *Niilo Jääskinen* in the CJEU's *Römer-case*[81] approached the issue from the perspective of non-discrimination. The Advocate General stressed that

> [...] it seems to me to go without saying that the aim of protecting marriage or the family cannot legitimise discrimination on grounds of sexual orientation. It is difficult to imagine what causal relationship could unite that type of discrimination, as grounds, and the protection of marriage, as a positive effect that could derive from it.[82]

71 | ECtHR case Mennesson v. France, No. 65192/11, Judgment, 26. 6. 2014.
72 | ECtHR, P16-2018-001, Advisory Opinion, 10. 4. 2019, paras. 46, 53, 55.
73 | Ibid., para. 47.
74 | The Court had the opportunity to rule on such a case a year later.
75 | Chart of signatures and ratifications of Treaty 214 (Status as of 29. 1. 2023).
76 | ECtHR case C. and E. v. France, No. 1462/18 and No. 17348/18, Judgment, 19. 11. 2019.
77 | ECtHR case D. v. France, No. 11288/18, Judgment, 16. 7. 2020.
78 | de Groot, 2021, pp. 5–6.
79 | CJEU case C-370/90. Singh, Judgment 7. 7. 1992.
80 | CJEU case C-370/90. Singh, Opinion of Advocate General Giuseppe Tesauro, 20. 5. 1992, paras. 5, 7, 9, 10–12, 14.
81 | CJEU case C-147/08, Römer, Opinion of Advocate General Niilo Jääskinen, 15. 7. 2010.
82 | Ibid., para. 175.

Another observation made by Advocate General Jääskinen in this case was that marriage and its constitutional protection cannot be invoked as a basis for unequal treatment, because, especially as it comes from Germany's Federal Constitutional Court's (*Bundesverfassungsgericht, BVerfG*)[83] case law – in which the Court consistently held and ruled-out the initially existing differences as unconstitutional – registered partnerships had the same legal effect as marriage.[84]

It is worth emphasizing here that the decisions of the CJEU vis-à-vis family life, referred to in the above paragraph, were not taken in the context of the rights of same-sex couples, but were intended to uphold the right of workers – later referred to as persons – to freedom of movement. Although the CJEU's statements in the above cases, namely that family members have the right to live as a family in another Member State may at first sight appear as a convincing foundation for the CJEU's novel case law, namely the Coman- and Pancharevo-cases, one should remember that the *Singh* case, for example was related to a so-called 'traditional' family, that is, a family formed by opposite-sex spouses.

The principle of effectiveness, which was analysed in the Impact[85] and Dansk Industri[86] cases of the CJEU, argue in favour of implementing the provisions of Directive 2004/38. According to this principle, the national court must interpret domestic law in such a way as to ensure that EU law is enforced, while taking into account all possible solutions. However, the CJEU has articulated, *inter alia*, in the Impact and Dansk Industri cases, that the limitation of the principle of effectiveness is the prohibition of *contra legem* application. That is, the principle of effectiveness cannot lead to an interpretation that contradicts national legislation, including the breach of the non-retroactivity rule.[87]

In the *Erzberger*-case[88] the CJEU aligned with the opinion of Advocate General *Henrik Saugmandsgaard Øe*[89] and noted that

> [...] in the absence of harmonisation or coordination measures at Union level in the field concerned, the Member States remain, in principle, free to set the criteria for defining the scope of application of their legislation, to the extent that those criteria are objective and non-discriminatory.[90]

In a non-harmonised area, any legislation of the host Member State which would be less favourable than the legislation of the EU citizen's Member State of origin cannot be interpreted as an obstacle to free movement. According to the Advocate General:

83 | See particularly: BVerfG, Urteil des Ersten Senats vom 19. 2. 2013 – 1 BvL 1/11 –, Rn. 1-110; BVerfG, Beschluss des Ersten Senats vom 07. Juli 2009 – 1 BvR 1164/07 –, Rn. 1-127.
84 | As Michael Grünberger wrote, the two institutions were 'different but equal.' See Grünberger, 2010, pp. 203–208.
85 | CJEU case C-268/06. Impact, Opinion of Advocate General Juliane Kokott, 13. 11. 2007, para. 183; CJEU case C-268/06. Impact, Judgment, 15. 4. 2008, paras. 51–66.
86 | CJEU case C-441/14. Dansk Industri (DI), Opinion of Advocate General Yves Bot, 25. 11. 2015, para. 43; CJEU case C-441/14. Dansk Industri (DI), Judgment, 19. 4. 2016, paras. 30–32.
87 | In this regard – among others – see the Opinion of Advocate General Kokott in the Impact-case (para. 143) and the Dansk Industri Judgment (para. 32).
88 | CJEU case C566/15, Konrad Erzberger v. TUI AG, Judgment, 18. 7. 2017.
89 | CJEU case C566/15, Konrad Erzberger v. TUI AG, Opinion of Advocate General Henrik Saugmandsgaard Øe, 4. 5. 2017, paras. 75–78.
90 | CJEU case Konrad Erzberger, Judgment, para. 36.

> Article 45 TFEU does not grant that worker the right to "export" the conditions of employment which he enjoys in his Member State of origin to another Member State [...] the migrant worker must take the national employment market as he finds it.[91]

This aligns with the practice of the German Federal Labour Court (*Bundesarbeitsgericht*),[92] cited by the Advocate General, and with the preparatory documents of the German law in question,[93] according to which 'the German social order may not extend to the territory of other States'.[94] Advocate General Saugmandsgaard Øe reiterated the above train of thought in his Opinion[95] in the Eurothermen case a year later, which was accepted by the CJEU.[96] Although the above cases dealt with issues concerning Article 45 of the TFEU, that is, the freedom of employment, they can be applied by analogy to the Pancharevo-case, given that the 'mother right' of free movement of persons is the free movement of workers.[97]

2.2. A brief introduction to the Coman case

In the Coman-case, the question was whether

> [...] the term "spouse" in Article 2(2)(a) of Directive 2004/38, read in light of Articles 7, 9, 21, and 45 of the Charter, includes a same-sex spouse, from a non-EU-Member State, of a citizen of the EU to whom that citizen is lawfully married in accordance with the law of a Member State other than the host Member State.[98]

The Advocate General's opinion rested on two pillars, namely the interpretation of the concept of spouse in EU law and the importance of uniform interpretation of EU law.

As for the interpretation of the term 'spouse', Advocate General Wathelet rejected the position of the Romanian, Latvian, Hungarian, and Polish governments that the concept should be defined based on the law of the host State. The starting point of the Advocate General's argument – in line with the opinion of the plaintiff of the domestic case, the government of the Netherlands and the European Commission –, was that the concept of spouse was a *sui generis* EU concept, as Directive 2004/38/EC, unlike registered partnerships, made no reference to the law of the Member States vis-à-vis marriage. As the Advocate General stated, it follows from the need for the uniform application of EU law and the principle of equality – as established in the CJEU's case law[99] – that terms contained under EU law that do not make any express reference to the laws of the Member States as to their meaning and content must, as a general rule, be interpreted independently and uniformly

91 | CJEU case Konrad Erzberger, k. TUI AG, Opinion, para. 75.
92 | See the case-law cited in endnotes Nos. 7 and 9 of the Advocate General's Opinion.
93 | Ausschuss für Arbeit und Sozialordnung des Bundestages, No. BTDrucksache 7/4845, p. 4.
94 | CJEU case Konrad Erzberger, Opinion, para. 18.
95 | CJEU case C-437/17, Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach GmbH, Opinion of Advocate General Henrik Saugmandsgaard Øe, 25. 7. 2018, paras. 51, 58.
96 | CJEU case C-437/17, Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach GmbH, Judgment, 13. 3. 2019, para. 37.
97 | For the most important CJEU in this regard see Gellérné, 2020, pp. 61–73.
98 | CJEU case Coman, Judgment, para. 17.
99 | The Advocate General referred to para. 28 of the CJEU judgment of 18. 10. 2016 in Case C-135/15 Nikiforidis and the case law cited therein.

throughout the EU.[100] The Advocate General recalled that the Directive refers to a spouse, that is, the choice of terminology does not determine the sex of the spouses. This is the result of a deliberate legislative intention,[101] as the Council did not support the European Parliament's proposal to define the concept of spouse in a manner that would expressly apply to same-sex spouses, given that only two Member States legislated to allow same-sex marriages at the time.[102] At this point, it is worth taking a digression towards a 2018 decision of the German Federal Supreme Court (*Bundesgerichtshof*, BGH),[103] the Council of Judges pointed out that it is clear from the wording of the preparatory documents[104] of the law in question that the legislator did not forget to regulate the issue, but rather deliberately did not extend the regulations to cover same-sex couples. The BGH pointed out that the law provides for the possibility for married same-sex couples to adopt stepchildren. Thus – in its view – the right to family life was not violated.[105] Returning to the Advocate General's opinion in the Coman-case, an examination of the legislative intent revealed that the Commission did not intend the concept of spouse to be definitively fixed and completely separated from the evolution of society.[106] The Advocate General added that the definition of the term 'spouse' that would be limited to the marriage of persons of different sexes would inevitably lead to discrimination on the grounds of sexual orientation, as a consequence of the preambular paragraph 31 of Directive 2004/38/EC.[107] In the case, the CJEU adopted the Advocate General's suggestions,[108] and ruled according to them, but went further by referring to the ECtHR's decision in the Orlandi-case to establish that the relationship of homosexual couples also falls within the ambit of family life.[109]

The other pillar of the Advocate General's opinion in the Coman-case concerned the application of the principle of 'portability of personal status' – as developed in the literature[110] – to Directive 2004/38/EC.[111] The Advocate General referred to a study by

100 | CJEU case Coman, Opinion, paras. 31, 33, 50.
101 | In this respect, see the endnotes Nos. 26–28 of the Advocate General's Opinion and the documents cited therein.
102 | CJEU case Coman, Opinion, paras. 32, 49, 51.
103 | BGH, Docket No. XII ZB 231/18.
104 | Deutscher Bundestag, Gesetzentwurf (19. Wahlperiode) 12. 6. 2018 (Drucksache 19/2665).
105 | Libary of Congress (2018).
106 | European Commission, COM (2003) 199.
107 | CJEU case Coman, Opinion, para. 75.
108 | CJEU case Coman, Judgment, paras. 51, 56.
109 | CJEU case Coman, Judgment, para. 50.
110 | The principle is mainly used in the literature in the context of migration and articulates the need for family ties established in one country to be recognised in another. The principle is limited by the public policy of the host state: the host state is not obliged to recognise child marriages or polygamy. The principle also obliges the State to recognise the right of transsexual persons to marry a person of the opposite sex of their new sex. The latter was also articulated by the ECtHR in the case of Christine Goodwin v. United Kingdom. See Den Haese, 2021.
111 | As a counter-argument to the application of this principle, it is worth considering the *Erzberger* case, in which the CJEU took the view that in a non-harmonised area, any legislation from the host Member State of an EU citizen that would be less favourable than that of his/her Member State of origin cannot be interpreted as an obstacle to free movement.

Silvia Pfeiff,[112] and the principle elaborated there, as he believed that the application of the principle avoided the infringement of national identity under TEU 4(2). A potential infringement would result from a Member State being forced to change its 'traditional concept of the family' as enshrined in constitutional and legal rules to fulfil its obligations under EU law.[113] The questions raised by the referring court fall exclusively within the ambit of the application of Directive 2004/38. It is thus merely a question of clarifying the scope of the obligation arising from EU legislation. An interpretation of the concept of 'spouse' limited to the scope of application of Directive 2004/38 on the right of citizens of the EU and their family members to move and reside freely within the territory of the Member States does not call into question the margin of appreciation by the Member States to legalise same-sex marriages[114] and therefore does not infringe its national identity.

While the part of the Advocate General's argument concerning the uniform interpretation of the concepts of EU law is sufficiently supported by the case law of the CJEU, the applicability of the principle of the portability of personal status to the present issue is rather weak.[115] First, at the time of writing these lines[116] only three States that had ratified[117] the Convention[118] adopted by the Hague Conference on Private International Law (HCCH) in 1978 undertook to accept as valid a marriage contracted in another State party if it met the requirements of the Convention. Second, the Convention, in line with the social attitudes at the time of its adoption, was silent on same-sex marriages. Third, as explained above, the State Parties to the ECHR were not obliged to ensure the portability of personal status by recognising same-sex marriages. In the ECtHR's decision in the Oliari-case, it was held that they were obliged to provide legal protection at least by recognising their marriage concluded abroad as a registered partnership. Fourth, Regulation 2016/1191/EU, which obliges Member States to accept official documents issued by another Member State as valid without any further formality, does not create an obligation to recognise rights not recognised by their national law. It was not applicable[119] when the Coman-case was decided. Last, but not least, it is worth reiterating the findings of the CJEU in the Erzberger-case and the Opinion of Advocate General Saugmandsgaard Øe,[120] namely that, in a non-harmonised area, any legislation of the host Member State of an EU citizen that is less favourable than that of his Member State

112 | Pfeiff argued that: 'the main argument against recognition of the homosexual marriage relates to the desire to protect traditional marriage. However, recognition of the foreign homosexual marriage does not directly undermine traditional marriage in the forum State. It does not prevent heterosexual couples from marrying. Nor does it allow couples of the same sex to marry in the host State. The effect of recognition of the foreign homosexual marriage is therefore confined to the couples concerned and does not undermine the superstructure' Pfeiff, 2017, p. 718. Cited by Advocate General Wathelet in endnote No. 21. of his opinion. (Emphasis added by the advocate general.)
113 | CJEU case Coman, Opinion, para. 41; CJEU case Coman, Judgment, paras. 45–46.
114 | See especially the Schalk and Kopf case of the ECtHR.
115 | See Den Haese, 2021.
116 | 26 March 2023.
117 | See Status Table of Convention of 14. 3. 1978 on Celebration and Recognition of the Validity of Marriages.
118 | 26: Convention of 14. 3. 1978 on Celebration and Recognition of the Validity of Marriages (Entry into force: 1. 5. 1991.)
119 | The Regulation – as a general rule – applicable only from 16. 2. 2019, pursuant to Art. 27(2).
120 | CJEU case Konrad Erzberger, Opinion, paras. 75–78.

of origin cannot be interpreted as an obstacle to free movement, are worth reiterating.[121] Advocate General Saugmandsgaard Øe, in his Opinion in the Eurothermen-case a year later, reiterated the above line of reasoning,[122] which was also accepted by the CJEU in that case.[123]

3. The Pancharevo-case

Summarising the statement of facts[124] of the Pancharevo-case, the plaintiff in the domestic proceedings was a woman of Bulgarian nationality. She and her spouse – a UK citizen – had been living in Spain since 2015. They got married in Gibraltar in 2018. Their daughter was born in Spain in 2019. The birth certificate issued by the Spanish authorities identified the parties as the mothers of the child. On 29 January 2020, the plaintiff applied to the competent Bulgarian authority (*Stolichna obshtina*) for a birth certificate for her daughter, which was necessary for the issuance of her Bulgarian identity document. In support of this request, she attached a certified Bulgarian translation of the birth certificate issued by the Spanish authorities. In its written reply, the authority requested the plaintiff to prove the origin of the child by naming the biological mother, that is, the woman who gave birth to the child under a Bulgarian legal provision, which is considered by the literature to be somewhat outdated,[125] as under the national law in force, the birth certificate reserves one heading for 'mother' and another for 'father'. The applicant refused to provide this information on the grounds that she could not provide it and she was not obliged to do so under Bulgarian law anyway. Following the reply, the authority refused to issue the birth certificate in its decision. The authority – after receiving the reply – refused to issue the birth certificate in its decision. The reasons given for the refusal were that (i) there was no information available on the biological mother of the child; and (ii) the inclusion of two female parents on the birth certificate was contrary to public policy in Bulgaria, as the country's law did not allow same-sex marriage. The plaintiff in the main proceedings brought an action against the decision refusing the application before the Sofia Administrative Court (*Administrativen sad Sofia-grad*), which referred the question to the CJEU. The referring court explained that under Article 25(1) of the Bulgarian Constitution (*Konstitutsia na Republika Balgaria*) and Article 8 of the Bulgarian Law on Bulgarian Citizenship (*Zakon za balgarskoto grazhdanstvo*), a child is a Bulgarian citizen even if he/she does not have a Bulgarian birth certificate, as a child whose ancestor is a Bulgarian citizen is considered a Bulgarian citizen. However, the absence of a Bulgarian birth certificate may constitute a serious administrative obstacle to the issuance of Bulgarian identity documents and may consequently make it difficult for the child to exercise his/her right to free movement and thus the full rights of EU citizens. In essence, the referring

121 | CJEU case Konrad Erzberger, Judgment, paras. 34–36.
122 | CJEU case Eurothermen, Opinion, para. 51.
123 | CJEU case Eurothermen, Judgment, para. 37.
124 | CJEU case Pancharevo, Opinion, paras. 16–27.
125 | The criticism is based on the fact that the principle of *mater sempers certa est* – that is, the identity of the mother is always certain – is no longer upheld in an era where artificial reproduction is available; if the egg is not from the woman who bears and gives birth to the child, the biological mother is the woman who donated the egg. See de Groot, 2021, p. 3.

court asks whether the refusal to issue a birth certificate infringed the rights conferred on that Bulgarian national by Articles 20 and 21 of the TFEU and Articles 7, 24, and 45 of the Charter. Another question before the referring court was whether the registration of two mothers as parents on the birth certificate to comply with the abovementioned EU provisions would breach the national identity of Bulgaria, given that this is not possible under Bulgarian law. The referring court noted that the Bulgarian constitutional tradition protected the traditional concept of the family. The referring court thus asked whether it is necessary to strike a balance between, on the one hand, the national identity of the Republic of Bulgaria and, on the other hand, the right of the child to private life and freedom of movement. In essence, the question was whether a solution such as indicating one of the two mothers on the Spanish birth certificate, who is either the biological mother of the child or has become the mother by other means, such as adoption, in the box headed 'mother', while leaving the box headed 'father' blank, was an acceptable balance between the legitimate interests that were in conflict. Although the CJEU did not refer to the Dansk Industri case in its Pancharevo judgment, it is noteworthy in this respect, as the national court must interpret domestic laws in such a way that all possible solutions are taken into account to give effect to EU law, provided that they do not lead to *contra legem* application.[126] The proposal put forward by the referring court in the Pancharevo-case, namely the registration of one mother, would have been such a solution. The referring court asked in the Pancharevo-case if the CJEU were to find that EU law requires the registration of two mothers of a child on the Bulgarian birth certificate, how this requirement could be implemented in a way that takes into account the national rules in force on birth certificates and respects the national identity at the same time.[127] As a preliminary point, it is worth noting that a significant difference between the interpretation of the Advocate General and that of the CJEU is that the Advocate General also took into account the possibility that the child is not a Bulgarian citizen and therefore not a citizen of the EU, as claimed by the Bulgarian Government,[128] and thus derived the primacy of EU law from two different starting points. The CJEU, on the other hand, taking the interpretation of the referring court's position as given, proceeded on the basis that the child is a Bulgarian national and therefore a citizen of the Union.[129] As the Court did not deal with it in detail, the part of the Advocate General's opinion in which he assumed that the child was not a Bulgarian citizen was considered sufficient to be only outlined by the author. The Advocate General's argument[130] was based on the fact that although Member States are free under international and EU law to decide the conditions under which to grant citizenship to a person and are also free to invoke national identity as a justification in that regard, Member States must, in the exercise of such power, respect EU law insofar as the exercise of that power affects the rights

126 | CJEU case C-441/14, Dansk Industri (DI), Judgment, 19. 4. 2016, paras. 30–32.
127 | CJEU case Pancharevo, Opinion, para. 28.
128 | 'However, since, under Art. 60(2) of the Family Code, the mother of the child is 'the woman who gave birth to that child' ('the biological mother') and it is precisely that information that is lacking in the dispute in the main proceedings, the Bulgarian Government disputed, at the hearing, the referring court's claim that it is established that the child is a Bulgarian national. In other words, Bulgaria does not recognise the parent-child relationship between the applicant in the main proceedings and the child and, therefore, that that child has Bulgarian nationality, on the sole basis of the presentation of the Spanish birth certificate.' CJEU case Pancharevo, Opinion, para. 33.
129 | CJEU case Pancharevo, Judgment, paras. 39–40.
130 | CJEU case Pancharevo, Opinion, paras. 133–134.

guaranteed and protected by the EU legal order. Consequently, the invocation of national identity is not appropriate in a case where the recognition of a family tie established in the Spanish birth certificate prevents the applicant, as an EU citizen, from exercising the rights guaranteed to him by secondary EU law on the free movement of citizens, such as Directive 2004/38 and Regulation No. 492/2011.[131]

In the second part of the Advocate General's reasoning, he analysed the case where the child is a Bulgarian citizen and consequently an EU citizen. As the case file showed, the Bulgarian authorities were willing to issue a birth certificate that would only identify the applicant in the main proceedings as the mother, based on which an identity document could then be issued for her daughter. The Bulgarian Government recalled that, although requested by the authorities in the main proceedings, recognition as the mother is not a condition to prove biological descent. The plaintiff in the main proceedings may have made this declaration at any time.[132] This solution would have undoubtedly brought the case to a swift conclusion and would also have been in line with the judgment of the CJEU in the Dansk Industri case, given that in this case the national court would have interpreted the national legislation in such a way as to give effect to EU law, while considering all possible solutions, without leading to *contra legem* interpretation. However, the applicant in the main proceedings did not accept this, as it would mean that the family relationship that actually existed between his spouse and the child[133] – and that was formally recognised by the Spanish birth certificate – would have been extinguished under Bulgarian law.[134] This would have affected the family life that was effectively established in Spain, adversely.[135] Based on the well-established case-law of the CJEU,[136] the establishment and solid existence of family life implies that the family members concerned may continue that family life upon their return to their Member State of origin. In contrast, as Advocate General Kokott pointed out in paragraph 62 of the Opinion:

> The status of family member forms the basis of numerous rights and obligations arising from both EU and national law. To name just a few examples, from the uncertainties surrounding the child's right of residence in Bulgaria, to obstacles relating to custody and social security, that refusal would also have consequences in matrimonial and inheritance matters. In those circumstances, there is no doubt that the failure to recognise the family relationships established in Spain could deter the applicant in the main proceedings from returning to her Member State of origin.[137]

131 | Regulation (EU) No. 492/2011 of the European Parliament and of the Council of 5. 4. 2011 on the freedom of movement for workers within the Union Text with EEA relevance (OJ L 141, 27. 5. 2011, pp. 1–12).
132 | CJEU case Pancharevo, Opinion, paras. 34, 138.
133 | Based on the well-established case law of the ECtHR: '[…] the existence or non-existence of "family life" is essentially a question of fact depending upon the real existence in practice of close personal ties […] the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life […]' See ECtHR case K. and T. v. Finland, paras. 150–151.
134 | CJEU case Pancharevo, Opinion, para. 113.
135 | Which, according to the ECTHR Shavdarov and Mennesson judgments, means that the persons concerned can '[…] live there together in conditions broadly comparable to those of other families […]' EctHR case Mennesson, para. 92; EJEB, Shavdarov v. Bulgaria, No. 3465/03, Judgment, 21. 12. 2010, para. 40.
136 | See CJEU case C-370/90, Singh, Judgment, 7. 7. 1992, paras. 21–25.
137 | CJEU case Pancharevo, Opinion, para. 62.

The Advocate General examined whether the obligation under EU law infringed on the national identity of the country and stated that

> As regards [...] the refusal to also recognise the British mother as a parent for the purpose of drawing up a Bulgarian birth certificate, it follows from the considerations set out in the previous section that reliance on national identity in accordance with Article 4(2) TEU may justify that refusal. [...] By contrast, as regards [...] the refusal to recognise parentage for the purpose of issuing an identity document in accordance with Article 4(3) of Directive 2004/38, [...] does not appear to have the same legal effects as a birth certificate including that information. An identity document does not have probative function as regards the parentage of a person.[138]

From all this, the Advocate General concluded that

> [...] the entry of the two parents mentioned on the Spanish birth certificate on such a document is not in any way capable of altering the concepts of parent-child relationships or parenthood in Bulgarian law. The only obligations created for the Republic of Bulgaria in that regard relate to the safeguarding of the rights which that child derives from EU law, in particular Directive 2004/38, which lays down, in Article 4(3) thereof, the obligation to issue an identity document to every citizen.[139]

Advocate General Kokott adopted the principle of functional recognition from the Opinion of Advocate General Wathelet in the Coman-case, as did the CJEU. However, the CJEU, unlike the Advocate General, took the child's nationality and status as an EU citizen as given. The CJEU's judgment relied more heavily on Article 21(1) of the TFEU and on the obligation under Article 4(3) of Directive 2004/38/EC to issue an identity card or passport to their nationals, when compared to the Advocate General's opinion. A Member State may not refuse to comply with its obligation on the ground that, under its national law, the issue of such documents is subject to the child being in possession of a birth certificate.[140] Another key element in the reasoning of the CJEU is the right to family life established by the applicant and her spouse, which was recognised by the Spanish authorities when they issued the birth certificate on which both spouses were listed as mothers of the child. The Bulgarian authorities are obliged to recognise this family relationship to allow the child to exercise, together with both parents, the right to move and reside freely within the territory of the Member States under Article 21(1) of the TFEU.[141] Just like the Advocate General's opinion, the CJEU takes into account the provisions of the Founding Treaties and the ECHR, and the relevant CJEU and ECtHR case law, according to which Member States enjoy freedom on whether and how they regulate same-sex marriage and parenthood in their national law. However, while exercising that power, each Member State must respect EU law, and the provisions of the freedom of movement and residence recognised for all EU citizens within the territory of the Member States, and to that end – as stated

138 | CJEU case Pancharevo, Opinion, paras. 149–150.
139 | CJEU case Pancharevo, Opinion, para. 150.
140 | CJEU case Pancharevo, Judgment, paras. 42–46.
141 | CJEU case Pancharevo, Judgment, paras. 48–49.

in the Coman-case – each Member State must recognise the personal status of persons established in another Member State in accordance with its laws.[142]

The CJEU considered whether Member States could rely on national identity under Article 4(2) of the TEU, whereby '[the European Union] shall respect [...] essential State functions, including ensuring the territorial integrity of the State, maintaining law and order [...]'. In this respect, the Court recalled that, according to its previous case-law:[143]

> [...] the concept of public policy as justification for a derogation from a fundamental freedom must be interpreted strictly, with the result that its scope cannot be determined unilaterally by each Member State without any control by the EU institutions. It follows that public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society.[144]

However, in line with the Advocate General's opinion[145] the Court stated that compliance with the obligation arising from the Union law in question does not entail

> [...] an obligation [...] to provide, in its national law, for the parenthood of persons of the same sex, or to recognise, for purposes other than the exercise of the rights which that child derives from EU law, the parent-child relationship between that child and the persons mentioned on the birth certificate drawn up by the authorities of the host Member State as being the child's parents.[146]

At this point, it is worth mentioning the findings of the CJEU which put the rights of the child at the forefront of the examination of the case. As stated in paragraph 65[147] of the judgment:

> In those circumstances, it would be contrary to the fundamental rights which are guaranteed to the child under Articles 7 and 24 of the Charter for her to be deprived of the relationship with one of her parents when exercising her right to move and reside freely within the territory of the Member States or for her exercise of that right to be made impossible or excessively difficult in practice on the ground that her parents are of the same sex.[148]

Thus, the CJEU ruled that the Bulgarian authorities are obliged to issue the child's birth certificate, which is a condition for the issuance of an identity document or passport

142 | CJEU, Pancharevo, Judgment, para. 52.
143 | CJEU, Coman, Judgment, para. 44; see also the C438/14, Bogendorff von Wolffersdorff, Judgment, 2 June 2016, para. 67.
144 | CJEU case Pancharevo, Judgment, para. 55.
145 | CJEU case Pancharevo, Opinion, paras. 150–151.
146 | CJEU case Pancharevo, Judgment, para. 57.
147 | See also, para. 59 of the judgment.
148 | As my colleague Márta Benyusz pointed out during a discussion of views in the topic, all these suggest that the Member State's right to vindicate derogation from treaty provisions on the grounds of public policy is limited by the prevalence of the best interests of the child. See Benyusz, 2021, p. 149; this finding is emphatically confirmed in the CJEU press release. See Court of Justice of the European Union (Press Release No. 221/21).

under Bulgarian national law. A Member State may not rely on national law and national identity in this respect.[149]

4. Summarising thoughts and conclusions

In the Pancharevo- and Coman-cases, the CJEU, adopting the principle of functional recognition – based also on the principle of effectiveness – made part of its case law the applicability of the principle of the 'portability of personal status' to Directive 2004/38/EC, a principle adopted from the theory into the case law of the CJEU. According to the Opinion of Advocate General Whathelet in the Coman-case, the application of the principle avoids the possibility of a different interpretation of the rights deriving from Article 21(1) of the TFEU and from Directive 2004/38/EC in each Member State, without prejudice to the national identity of the Member State, as the Member State is not obliged to change the constitutional rules that form part of its national identity. The main question posed at the beginning of the study is whether, given the fact that EU law directly or indirectly affects national law in many areas, the application of a functional approach may not lead to a de facto change in national legislation even if this does not take place de jure. In other words, if a Member State is ultimately forced to give way to the primacy of EU law in several sub-areas on a functional basis, does it retain room for manoeuvre, even though its constitution remains otherwise unchanged?

To answer this, the author has examined the margin of appreciation that the Member States of the Council of Europe and EU enjoy based on the established case law of the ECtHR and the CJEU in the Pancharevo-case. Given that, under Article 6(3) of the TEU, the fundamental rights guaranteed by the ECHR form part of the EU's legal order as a general principle, the CJEU regularly refers to the case law of the ECtHR. In the Coman- and Pancharevo-cases, for example, the CJEU reiterated, with reference to the ECtHR's case law, that the decision on the right of same-sex couples to marry or have children is a matter for the discretion of the Member States under the ECHR and the case law of the ECtHR interpreting it. In EU law terms, it falls within the scope of the national identity of the Member State, which, according to Article 4(2) of the TEU, is '[…] inherent in their fundamental structures, political and constitutional […]'.

As the ECtHR has stressed – *inter alia* in the Gas and Dubois case – 'marriage confers a special status on those who enter into it'. In accordance with the judgment of the ECtHR delivered in Schalk and Kopf case, the State, acting within its discretion, is free to decide whether or not to confer the right to marry – and the special rights granted by this legal institution – on same-sex couples. As the ECtHR explained in the Schalk and Kopf case, the differences between the rights of marriage and those of registered partners, particularly in relation to having children, are in line with European developments. Articles 8 and 12 of the ECHR, which guarantee the 'right to respect for private and family life' and the 'right to marry' respectively, do not impose any obligation on State Parties in this regard. However, according to the judgments in the Orlandi and Schalk and Kopf cases, the relationship of same-sex couples living together as stable, de facto partners is protected by the rights to private life and to family life within the meaning of the case law interpreting

149 | CJEU case Pancharevo, Judgment, para. 69.

Article 8 of the ECHR. It follows from these findings of the ECtHR that the State Parties to the ECHR are obliged to grant legal recognition to same-sex couples as stated by the Court in the Oliari and Taddeucci-cases. The most widespread form of this, accepted by the Court in several cases, is the institution of registered partnerships, which Bulgaria does not currently guarantee in its national law,[150] thus failing to fulfil its obligations under Article 8 of the ECHR. However, after the CJEU's judgment in the Coman-case, the country's highest administrative court has recognised the Australian same-sex partner of a French national as a spouse within the meaning of Directive 2004/38/EC in order to comply with the country's obligations under EU law.

Finally, it is worth highlighting the ECtHR's Advisory Opinion P16-2018-001 and those judgment which reiterate the findings of the advisory opinion, namely *C. and E. v. France* and *D. v. France,* and thus make them binding for Bulgaria. In these cases, the ECtHR concluded in the context of surrogacy that, under Article 8 of the ECHR, State Parties to the ECHR are obliged to grant legal recognition, domestically as well, to a legally recognised parent-child relationship between a child and prospective mother established based on a surrogacy agreement. However, a State Party to the Convention has a wide margin of appreciation as to the form of such legal recognition, as long as the legal instrument granting it is properly and effectively functioning and the best interests of the child prevails. Under the ECHR, a State is not obliged to register the 'mother-to-be' as the mother in its national civil registry based on the information contained in the birth certificate issued by a foreign authority. The solution offered by the Bulgarian authorities in the *Pancharevo* case, a declaration of maternity, which would have resulted in de facto full legal recognition of the person making the declaration of recognition, is in line with the ECtHR's established case law in this area. One may find a divergence between the case law of the ECtHR and CJEU in this respect, as the latter grants a narrower margin of discretion for Member States in requiring an EU Member State to provide a foreign birth certificate with necessary documents for the exercise of the right of free movement of persons.

Given that the EU does not have competence to regulate family law relationships in a binding manner, no decisions of the CJEU have directly addressed the issue. However, it has indirectly touched upon the question of the recognition of family relationships: first, in the direction of the right to the free movement of workers, as in the 1992 Singh judgment, in which it held that where a Member State does not guarantee the same rights of residence to the spouse and children of a worker, it constitutes a serious obstacle to the free movement of labour; and Second, the Opinion of the Advocate General in the CJEU's decision in the Römer-case, which approached the issue from the perspective of non-discrimination, stating that 'the aim of protecting marriage or the family cannot legitimise discrimination on grounds of sexual orientation.'

However, the decisions of the CJEU vis-à-vis family life, referred to in the above paragraph, were not made in light of the rights of same-sex couples, but to uphold the freedom of movement of workers/persons. Although the CJEU's statements in its case law, including the Singh case, that family members have the right to live as a family in another Member State may, at first sight, appear convincing, the CJEU was indeed ruling on issues relating to so-called 'traditional families', that is, families formed by opposite-sex spouses. The Opinion of Advocate General Saugmandsgaard Øe in the Erzberger-case, in which he argued that in a non-harmonised area, such as family life, any legislation of

150 | Civil unions and registered partnerships (Last checked: 5. 2. 2023).

the host Member State of an EU citizen, which would be less favourable than that of his Member State of origin cannot be interpreted as an obstacle to free movement.

Summarising these findings, one may observe that Advocate General Wathelet's Opinion in the Coman-case marked a significant shift from the well-established case law of the ECtHR and from the rather modest and reserved case law of CJEU in the issue. Wathelet relied on the 'principle of the portability of personal status' to justify the functional extension of the applicability of EU law in a matter which, under the Founding Treaties, falls within the exclusive competence of the Member States. This legal position was taken up by the CJEU and incorporated into its case law by its judgment in the said case. In its judgment in the Pancharevo-case and in its most recent order in the Rzecznik Praw Obywatelskich case, the CJEU confirmed the direction, which was first marked in the Coman-case. This has recently induced the Bulgarian and Polish Supreme Administrative Courts to apply the principle of functional recognition and make rulings contradictory to national law. The process of aligning national case law with EU law has therefore begun.

With the Coman-case, the European Commission now has a case law argument to justify its targets in its 2020 LGBTQ Equality Strategy Document and its legislative proposal submitted on 7 December 2022. This objective is to ensure, through a legislative act, that Member States will mutually recognise parental status registered in another Member State in the future. However, as mentioned in the study, there was no agreement reached among ministers on this issue at the February 2022 Justice and Home Affairs Council, which suggests that the issue outlined in this study will remain a topical one at the political level.

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COMBATING CORRUPTION CRIME IN POLAND: SELECTED LEGAL ASPECTS, WITH PARTICULAR REFERENCE TO THE ROLE OF THE CENTRAL ANTICORRUPTION BUREAU

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ABSTRACT

This article highlights issues related to corruption in Poland. The definition of corruption is examined in national and international terms, for example, as developed by the OECD (Organization for Economic Co-operation and Development) or the World Bank. This study contributes to the discussion of the scale of corruption as well as on the effectiveness of anticorruption agencies. Particular attention has been paid to one of the leading special services entites, the Central Anticorruption Bureau, which was established on 9 June 2006 to address the deepening corruption in both the economic and political life in Poland. The study also examines the role of the prosecutor's office and the efforts to transform its organisational structure to effectively and efficiently combat crime, particularly those related to corruption. In addition, relevant statistics on the effectiveness of anticorruption measures are presented. The fundamental research problem is to understand the current scale of corruption in Poland. The main hypothesis focuses on determining whether the level of corruption has decreased or remained constant since the beginning of the socio-economic transition. This study used the detailed research method—primarily statistics (desk research). Data were collected through face-to-face interviews conducted by the Centre for Public Opinion Research (CBOS). The article ends with conclusions and postulates de lege futura.

KEYWORDS

corruption
combating crime
Central Anticorruption Bureau
prosecution
bribes

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https://doi.org/10.55073/2023.1.203-218

1. Introduction

Corruption is a social phenomenon that is extremely difficult to define because of its polymorphous nature. Owing to its exceptionally complex and pervasive nature the international community, including the European Union Member States, undertake extensive counteractive measures targeting corruption activities. Corruption has been the subject of many studies by researchers of the doctrine and is the subject of numerous court rulings.[2]

The multifaceted nature of corruption makes establishing a uniform definition difficult. According to the Polish PWN dictionary edited by Doroszewski, corruption is considered to be 'accepting bribes by officials or functionaries.'[3] Corruption also ecompasses social demoralisation and bribery.[4] This definition, due to the multifaceted nature of the corruption phenomenon, is too narrow and does not correspond to the variety of forms of corruption, as it focuses only on the subjective elements relating to public officials and officers. The preamble of the Civil Law Convention on Corruption, drawn up on 4 November 1999 in Strasbourg, states that corruption poses a great threat to the rule of law, democracy, human rights, fairness, and social justice, as well as a hindrance to economic development and endangement to the proper and fair functioning of a market economy. Article 2 of the Convention states that corruption means

> [...] requesting, offering, giving or accepting directly or indirectly bribes or any other undue advantage or the promise thereof, which distorts the proper performance of any duty or conduct required of the person receiving the bribe, undue advantage or the promise thereof.[5]

Under the provisions of the Convention, state entities are further obliged to respect, *inter alia*, international cooperation in combating and preventing corruption,[6] legal protection of whistleblowers,[7] responsibility of the parties (the State) for unlawful acts,[8] and the obligation to make reparations.[9]

Arising from the Paris Convention of 14 December 1960 the Organisation for Economic Cooperation and Development (OECD) was launched on 30 September 1961. Upon the commencement of the OECD one of its fundamental objectives was to achieve the highest possible sustained economic growth, employment and living standards in its member countries while maintaining financial stability. In addition, its mandate was to contribute to 'healthy economic expansion' in its member countries as well as third world

2 | See e.g.: Dylus, Rudowski and Zaborski, 2006; Bielecki, 2002; Balcerzak, 2010; Brewster, 2014; Grosse, 2000; Kell, 2006; Nowak, 2008; Pływaczewski, 1993; Palka and Reut, 1999; Dobrowolski, 2005; Górniok, 1995; Dzienis and Filipkowski, 2001; Nowak, 2008; Szelest-Woźny, 2012; Krueger, 1974; Carr and Lewis, 2010; Gathii, 2009; Henning, 2001; Smidt, 2007.
3 | Słownik języka polskiego: korupcja [Online]. Available at: https://sjp.pwn.pl/doroszewski/korupcja;5442652.html (Accessed: 10 July 2022).
4 | Skorupka, Auderska and Łempicka, 1969, p. 305.
5 | Civil Law Convention on Corruption of 4 November 1999, Dz. U. No. 244, item 2443.
6 | Art. 13 of the Convention.
7 | Art. 9 of the Convention.
8 | Arts. 4 and 5 of the Convention.
9 | Art. 4 of the Convention.

countries, which meant working together for balanced economic development, and to promote the development of world trade on a multilateral non-discriminatory basis in accordance with international obligations.[10] One of the tenets of the OECD is the continuous development of anticorruption practices among its member states. Within the scope of its activities, the OECD develops permanent recommendations to combat corruption. Examples include the OECD Convention on 17 December 1997 on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2021 Recommendations on Combating Bribery.[11]

Other important international acts include the United Nations Convention against Corruption adopted by the UN General Assembly on 31 October 2003 by resolution 58/4,[12] and the Criminal Law Convention on Corruption of the Council of Europe in 1999.[13]

Resolution 58/4 of the United Nations Convention dated 31 October 2003 consists of eight chapters, which include, among other regulations, preventive measures, criminalisation and law enforcement, international cooperation, asset recovery technical assistance, and information exchange. It is also worth mentioning that the World Bank Group attempted a systemic approach to corruption and has developed several definitions that relate to both corruption offences and fraud.

According to the World Bank, it is considered a corrupt practice to offer, give, or induce to offer, or give, directly or indirectly, any good in order to unduly influence the actions of another party. Fraud, is any act or omission to act, including knowingly or recklessly deceiving or intending to deceive in order to accept a financial or other advantage or to avoid an obligation.[14] In Poland, a sharp increase in corrupt activities occurred during the period of social and economic transition of the 1990s. This was primarily due to the weakness of the state apparatus and its failure to adapt and develop legal mechanisms for the changing socio-economic and political situation. The main reasons for the increase in crime, including corruption, were historical factors related to the long-standing development of crime; social factors, having to do with the decline of values and authorities; economic factors relating to changes in the ownership structure after the collapse of communism;[15] legal factors, for example, inadequate regulations, instability of the rule of law, and ineffective use of legal instruments; organisational factors such as the restructuring of state bodies, and the lack of qualified staff to deal with crime; international factors such as the gradual opening of borders, and the collapse of the USSR.[16]

An important aspect of the crime of corruption is its perception among citizens, the purported perception of corruption.

10 | Serwis Rzeczypospolitej Polskiej [Online]. Available at: https://www.gov.pl/web.oecd (Accessed: 10 July 2022).
11 | OECD [Online]. Available at: https://www.oecd.org/corruption/oecdantibriberyconvention.htm (Accessed: 10 July 2022).
12 | General Assembly resolution 58/4 of 31 October 2003 United Nations Convention against Corruption.
13 | The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community entered into force on 1 December 2009.
14 | Międzynarodowy Bank Odbudowy i Rozwoju/Grupa Banku Światowego, 2015; Płoskonka, 2003, p. 111.
15 | See Sokołowicz, Gurtowski and Pietrowicz, 2009, pp. 813–822.
16 | See e.g.: Laskowska, 2011, pp. 152–170; Hołyst, 2004, pp. 1009 et seq.; Zybertowicz, 2005, pp. 299 et seq.

The Global Organization of Transparency International (Transparency International) addresses this phenomenon.[17] To date, no ideal mechanism has been developed to assess the degree of corruption in individual countries unequivocally. Every year, Transparency International publishes results related to the perception of corruption. The index ranks countries chronologically according to the degree of corruption among public officials and politicians according to surveys conducted by independent institutions, including the Gallup Institute, the World Bank, and Pricewaterhouse.[18]

Table 1. Corruption Perception ranking of Poland according to Transparency International

Year	Place in the ranking	Points	Number of countries participating in the survey
2021	42	56	180
2020	45	56	180
2019	45	58	180
2018	36	60	180
2017	36	60	180
2016	29	62	176
2015	30	63	168
2014	35	61	175
2013	38	60	177
2012	41	58	176
In 2012, TI changed the methodology of the survey. Unlike in previous years, a scale from 0 to 100 (instead of 0-10) was used, where 0 represents the most corrupt country and 100 the least corrupt. This change is intended to allow accurate observation of trends and comparison of results against previous years.			
2011	41	5,5	183
2010	41	5,3	178
2009	49	5	180
2008	58	4,6	180
2007	61	4,2	180
2006	61	3,7	163
2005	70	3,4	159

17 | Transparency International [Online]. Available at: https://www.transparency.org/ (Accessed: 11 July 2022).

18 | New Zealand ranked first as the country least prone to corruption with a score of 9.55 (variance of 0.07), while Venezuela ranked last with a score of 2.66 (variance of 3.18). Corruption perception index [Online]. Available at: https://transparency.org/en/cpi/2021 (Accessed: 23 January 2018); Ocieczek, 2021, pp. 428–430.

Year	Place in the ranking	Points	Number of countries participating in the survey
2004	67	3,5	146
2003	64	3,6	133
2002	45	4,0	102
2001	44	4,1	91
2000	43	4,1	90
1999	44	4,2	99
1998	39	4,6	85
1997	29	5,08	52
1996	24	5,57	54

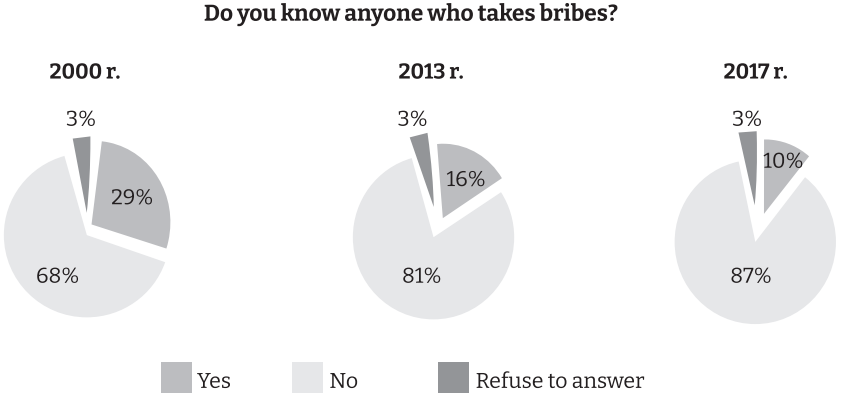
Source: The author's own compilation based on Transparency International data.

According to the Corruption Perceptions Index, Poland was ranked its highest in 2016, while in 2004 and 2005 it was ranked 67th and 70th, respectively, among the countries participating in the Citizens' Corruption Perceptions Survey. For example, in 2022 Hungary ranked 42nd.

Systematically, additional surveys were conducted in Poland by the Center for Public Opinion Research (CPOR). The graph below illustrates Poles' responses to the question, 'Do you know anyone who takes bribes?' The survey covered the years 2000, 2013, and 2017.

From the responses obtained from a sample of 1,034 people, it was found that the level of corruption in Poland decreased over 17 years (2000–2017).

Chart 1. Survey on Bribery I.

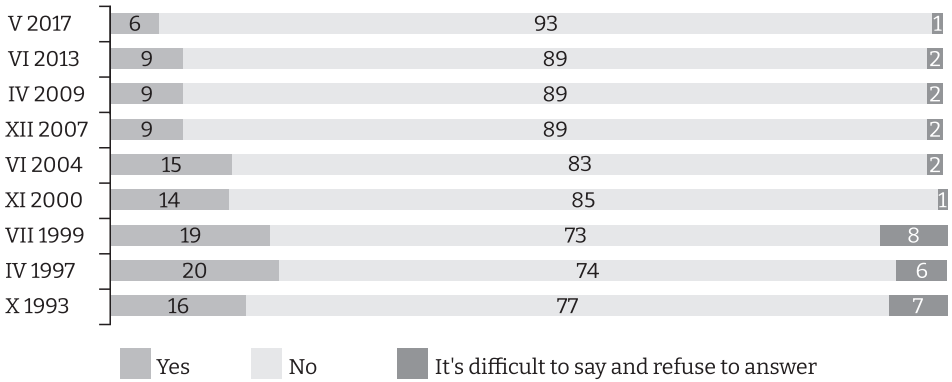


Source: CPOR, SURVEY CONDUCTED 5-14 MAY 2017, N=1034.

In addition, the CPOR's research shows that personal knowledge of bribery is more often declared by people with higher education, with relatively high *per capita* incomes, living in large cities (100–499,000 inhabitants), in the 25–34 age bracket, assessing their financial situation as poor, and declaring left-wing political views. Occupational groups were more likely to be managers, senior professionals, administrative and office workers, and those employed in the service sector. An example of another survey was to determine whether a person has been forced to give a bribe in the last three to four years. The survey covered the period 1993–2017. The responses to this question is shown in Figure 2.

Chart 2. Survey on Bribery II.

Have you been forced to bribe in the last three to four years?



Source: CPOR, SURVEY CONDUCTED 5–14 MAY 2017, N=1034.

The data show that the largest number of respondents answered that they were forced to give a bribe in 1997 and 1999.

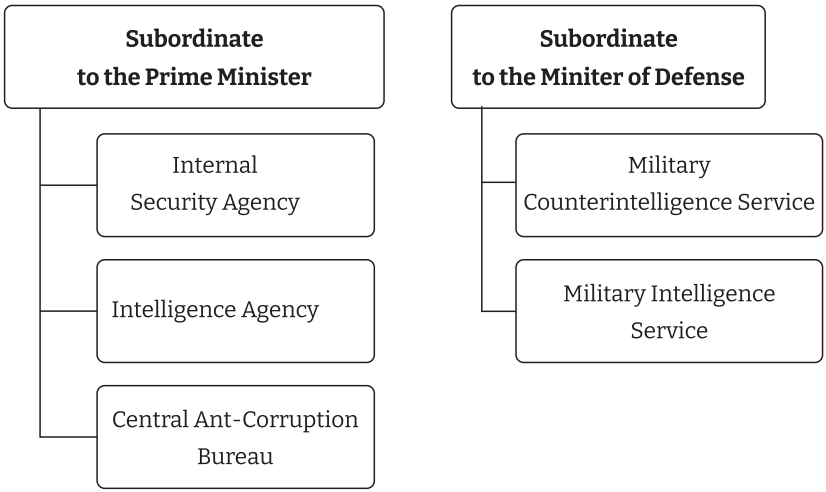
2. The role and tasks of the Central Anticorruption Bureau in combating corruption in Poland

In view of the current problem of corruption-related crime, the state authorities decided to set up a specialised institution to combat corruption. The main premise of the draft law was to combat corruption in state institutions and local government as well as in public and economic life. As a result of consultations and in view of the significant number of corruption-related proceedings, on 12 May 2006 the Sejm passed an act for the establishment of the Central Anticorruption Bureau (CBA). When voting on the CBA Act, 354 MPs were in favour, 43 were against, and 20 abstained. Finally, on 13 June 2006

the President of the Republic of Poland signed the act establishing the CBA as a special service.

It should be mentioned that the CBA is one of the five special services operating in Poland. The following chart illustrates the types of Polish special services and their hierarchy.

Chart 3. Types of Polish special services in Poland



Source: The author's own study.

In the CBA Act the concept of corruption is defined in Article 1(3). According to this provision, corruption is

> Promising, proposing, giving, demanding, accepting by any person, directly or indirectly, any undue pecuniary, personal, or other advantage for himself or herself or any other person, or accepting an offer or promise of such advantage in return for an act or failure to act in the performance of a public function or in the course of business.

In view of the need to clarify the legal definition of corruption, which would correspond to illegal activities undertaken in various spheres of social, political, and economic life, on 1 June 2010 the Polish Government adopted an amendment to the CBA Act which clarified corrupt activities. Pursuant to Article 1(3a) of the CBA Act, corruption is defined as an act: 1. involving the promise, offer, or giving by any person, directly or indirectly, of any undue advantage to a person exercising a public function for himself or herself or for any other person in return for an act or failure to act in the exercise of his or her function; 2. involving the request or acceptance by a person exercising a public function, directly or indirectly, of any undue advantage, for himself or for any other person, or the acceptance of an offer or promise of such an advantage in return for an act or failure to act in the exercise of his function; 3. committed in the course of a business activity involving the

fulfilment of obligations towards a public authority (institution), consisting of promising, proposing, or giving, directly or indirectly, to a person in charge of an entity not included in the public finance sector or working in any capacity for such an entity, any undue advantage, for himself or herself, or for the benefit of any other person, in return for an act or omission to act that violates his or her obligations and constitutes a socially harmful reciprocation; 4. committed in the course of business activities involving the fulfilment of obligations towards a public authority (institution), consisting of requesting or accepting, directly or indirectly, by a person in charge of an entity not included in the public finance sector, or working in any capacity for such an entity, any undue advantage, or accepting an offer or promise of such an advantage to himself or herself or to any other person, in return for an act or omission to act which violates his or her obligations and constitutes a socially harmful reciprocation.

The definition of corruption that was finally adopted systemically addressed the problem related to the essence of corruption in its various forms.

According to Article 2 of the CBA Act, the primary objective of the newly established, CBA, is to combat corruption in both public and economic life, as well as in state and local government institutions, and to eliminate activities detrimental to the economic interests of the State. For example, it addresses the identification, prevention, and detection of crimes against: 1. activities of state institutions and local self-governments, as defined in Articles 228–231 of the Act of 6 June 1997—Penal Code, as well as referred to in Article 14 of the Act of 21 August 1997 on the Restrictions on Conduct of Business Activities by Persons Performing Public Functions; 2. the administration of justice, as defined in Articles 232, 233, 234, 235, 236(1), and 239(1); elections and referenda, as defined in Article 250a; and public order, as defined in Article 258; 3. credibility of documents, as defined in Articles 270–273 and 277a § 1, property, as defined in Article 286, economic turnover, as defined in Articles 296–297, Article 299 and Article 305, turnover of money and securities, as defined in Article 310 of the Act of 6 June 1997—Criminal Code, as well as those referred to in Articles 586–592 of the Act of 15 September 2000—Commercial Companies Code and those referred to in Articles 179–183 of the Act of 29 July 2005 on trading in financial instruments in connection with corruption or activities detrimental to the economic interests of the state; 4. financing of political parties, as defined in Articles 49d and 49f of the Political Parties Act of 27 June 1997, if related to corruption; 5. tax obligations, and accounting for grants and subsidies, as defined in Chapter 6 of the Act of 10 September 1999—Fiscal Penal Code, in connection with corruption or activities detrimental to the economic interests of the state; 6. the principles of sports competitions as defined in Articles 46-48 of the Sports Act of 25 June 2010; 7. trading in medicines, foodstuffs for special nutritional purposes, and medical devices, as defined in Article 54 of the Act of 12 May 2011 on reimbursement of medicines, foodstuffs for special nutritional purposes, and medical devices.

Apart from conducting operational and exploratory activities resulting in the initiation and conduct of criminal proceedings in combating corruption, the CBA also conducts other activities aimed at counteracting corruption. Additional tasks performed by CBA officers include: 1. Disclosure and non-compliance with the provisions on the restriction of business activities by persons holding public office; 2. Documenting the grounds for and initiating the implementation of provisions on the return of benefits wrongfully obtained at the expense of the State Treasury or other statutory entities; 3. Uncovering cases of non-compliance with the legally prescribed procedures for decision-making and

implementation: privatisation and commercialisation, financial support, public contract awards, disposal of the property of entities or entrepreneurs; 4. The granting of concessions, authorisations, subject and object exemptions, concessions, preferences, quotas, plafonds, sureties and credit guarantees; 5. Control of the accuracy and veracity of asset declarations or declarations on conduct of business activities by persons performing public functions, referred to in Article 115 § 19 of the Act of 6 June 1997—Penal Code, submitted pursuant to separate regulations; 6. Conducting analytical activities for trends within the CBA's jurisdiction and presenting information in this respect to the Prime Minister, the President of the Republic of Poland, the Sejm and the Senate; 7. Taking other actions specified by separate laws and international agreements.

Within the framework of its competencies, the CBA also conducts joint activities with other service entities, including, *inter alia*, the Public Prosecutor's Office, the Police and others in support of the Government Programme for Counteracting Corruption. The objective of this programme is to reduce the level of corruption in Poland by strengthening preventive and educational measures among society and public administration, as well as to increase the effectiveness of combating corruption.

According to analysts at the CBA, the area's most vulnerable to corrupt activities include infrastructure, digitisation of public administration, use of European Union funds, the Defense health care, energy and environmental protection sectors, and clerical corruption.

In turn, representatives of the doctrine include areas such as the management of public assets, privatisation, special-purpose fund activities, public procurement, tax administration and customs services.

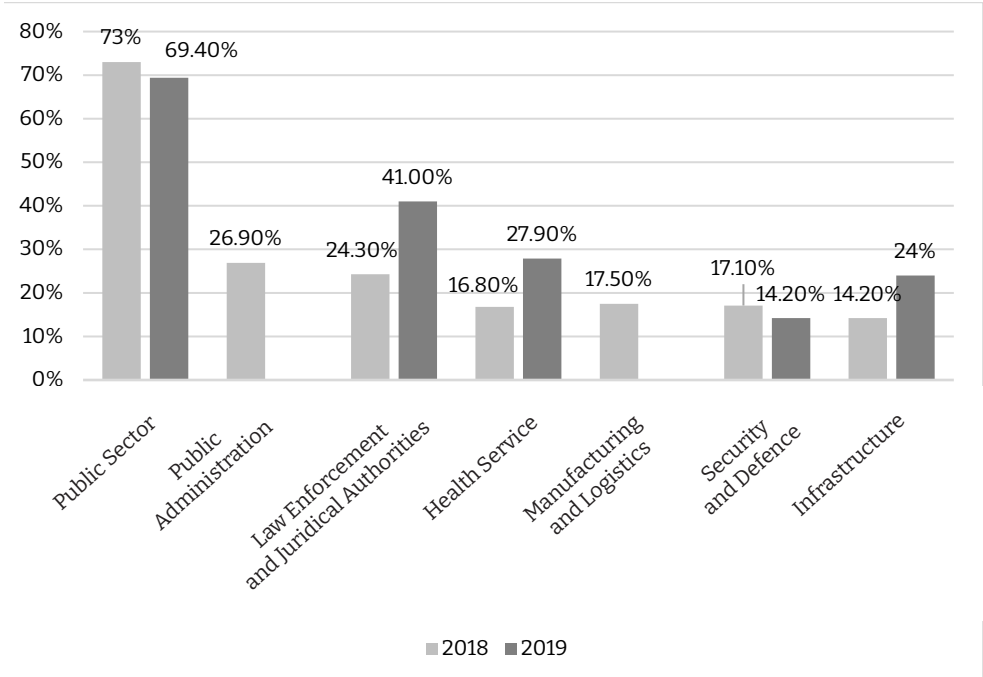
The following chart illustrates the number of pre-trial investigations initiated and conducted by the CBA by various categories.

Chart 4. Number of pre-trial proceedings opened in 2015 due to CBA operations

Source: CBA statistics

The chart below illustrates the areas investigated for corruption-related crime during 2018–2019. The data below were obtained from the Government's Anticorruption Plan, with the CBA as the lead agency.

Chart 5. Areas of Corruption Crime in Poland in 2018–2019.



Source: The author's own compilation based on data obtained from the CBA.

According to data from the CBA, the public sector has the highest risk exposure for corruption. The public sector had the highest number of preparatory proceedings conducted by the CBA. In 2018, this amounted to 895 proceedings, accounting for 72.8% of the total preparatory proceedings conducted. In contrast, 194 proceedings were conducted in the private sector (15.8%) and 140 in the public-private sector (11.4%). In 2019, there was a slight decrease in the percentage of public sector proceedings. Even though it amounted to 69.4%, there were 948 proceedings conducted. Meanwhile there was a significant increase in the number of cases involving law enforcement and the judiciary. The increase was approximately 16.7%.

Apart from the CBA as the most specialised services involved in the fight against corruption in Poland, other institutions are obliged by law to fight this serious issue. These institutions include the Police, the Internal Security Agency, the Polish Border Guard, the Supreme Audit Office, the Polish Ministry of Health, the Polish Ministry of Defense, and the Polish Ministry of Interior and Administration.

The table below illustrates the number of ongoing pre-trial investigations corruption by services dealing with this type of activity.

Table 2. Number of pre-trial investigations into corruption offences conducted by each service in 2018-2019.

Year	Police	Central Anticorruption Bureau	Border Guard	Military Police	Internal Security Agency	National Tax Administration
2018	691(56,2%)	223 (18,1%)	176(14,3%)	95(7,8%)	25(2%)	19(1,6%)
2019	820(60%)	244(17,9%)	170(12,4%)	65(4,8%)	29(2,1%)	38(2,8%)

Source: The author's own elaboration based on data from CBA.

Based on the above data, the Police deal with greatest number of corruption crimes. However, given the size of this agency (over 100,000 officers), it is the CBA (with just over 1,000 officers) that plays a significant role, in combating corruption; those of the most serious nature.

3. Summary

Corruption is one of the most dangerous types of crime. This always occurs when the state agencies fail to adapt the law to the current socio-economic situation. An example of the rapid development of corruption was the period of socio-economic transition mentioned earlier in this thesis. Corruption tends to occur in developing countries that have some degree of political and economic instability. It is economic corruption that causes, among other things, a reduction in the effectiveness of state investment as well as the perception of a country internationally. This negatively impacts economic stability and international investments.

An analysis of the data obtained from both law enforcement agencies and non-governmental institutions (Transparency International, CBOS) allowed us to confirm the main hypothesis that the overall scale of corruption in Poland has decreased over the last 30 years. Currently, one can observe the transfer of corruption to the local government, government administration, and economic sector (Chart 4). Managerial corruption, for example, increased in 2010 and 2011. It is important to note the improvements in the effective prosecution of corruption cases internationally. An example is the recent arrest of senior officials in the European Parliament.[19]

Only transparent legal mechanisms and their effective use can reduce corruption in Poland. The following recommendations can certainly mitigate corruption. Thus, the following actions are required: collaboration at an international level in the fight against corruption, in particular between law enforcement and judicial authorities; coordination of anticorruption activities at both central and local level; new methods of operational work that can effectively reduce crimes of corruption; effective use of current legislation

19 | Gregory, 2022.

including, *inter alia*, the use of non-punishment clauses[20] or confiscation, as well as crown witness in the criminal and procedural sense; educational programmes to promote an honest lifestyle; improving the system of supervision and control of compliance with anticorruption legislation; new legislation against corrupt practices, including, *inter alia*, 'whistleblower law'; unifying the issues relating to asset declarations by relevant persons; the introduction of an integrity test; strengthening the system of transparency in the activities of state institutions, local government and the economy.

Finally, the results of a survey conducted in Poland in the 2000s on ways to fight corruption illustrated that respondents agreed that the most effective way to fight corruption was through strict laws without loopholes and inaccuracies, increasing internal control in individual institutions, and strengthening services to combat this type of crime.[21]

20 | Art. 229(6) of the Penal Code; Art. 296a§5 of the Penal Code; Art. 230a§3 of the Penal Code; Art. 250a§4 of the Penal Code.
21 | Szulik, 2011, p. 634.

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POSSIBLE FUTURE LEGISLATIVE AND SOCIAL TRENDS IN THE PROTECTION OF STATE, NATIONAL, AND COMMUNITY SYMBOLS IN SLOVAKIA

Ján Škrobák[1]

ABSTRACT

The paper deals with possible options and suggestions for changing the constitutional and legal regulations of the protection of state, national, and community symbols in Slovakia. In terms of constitutional regulation, the paper concludes that its change is not necessary—even in the context of the low overall rigidity of the Slovak constitution. In relation to the Act on State Symbols itself, only a change in the regulation of the use of the state emblem on the jerseys of the official national sports teams is proposed. Regarding the area of criminal law and administrative punishment, there is somewhat unclear distinction between the criminal offence of disorderly conduct and the infringement under Article 42(1)(a) of the Infringements Act. The distinction between misdemeanors and infringements is defined in the Criminal Code by means of substantive corrective. Thus, the relationship between the two offences in question is not dysfunctional and the ne bis in idem principle will not be infringed. However, the unclear relationship between the merits of the criminal offence and the infringement casts doubt on compliance with both the requirement of legal certainty and the requirements arising from the principle of nullum crimen sine lege certa. Despite the shortcomings of this approach, the only solution appears to be to leave the boundary between the respective criminal offence and infringement for the judiciary. The paper outlines how the courts approach the assessment of cases of defamation. However, the jurisprudence of Slovak courts in this matter is scarce and currently does not provide answers to all relevant questions. The decisions show the need for an individual and contextual assessment of the social danger of every case of defamation. The paper contains a proposal to create a new criminal offence—the defamation of a state symbol of the Slovak Republic. Criminal protection for foreign state symbols would continue to be provided in the context of the crime of disorderly conduct. This paper also provides proposals to change the regulation of the use of state symbols in public sports events. These amendments are intended to close the loopholes of the current regulation, which reduce its regulatory effectiveness. Furthermore, it is proposed to harmonize the rules governing the use of official stamps with state symbols—coat of arms—and with self-government symbols in relation to municipalities and self-governing regions.

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https://doi.org/10.55073/2023.1.219-233

KEYWORDS
state symbols
municipality symbols
disorderly conduct
defamation of a state symbol
Slovak Republic
constitution

1. Introduction

This paper builds on my monograph chapter on the constitutional and legal protection of state symbols in selected Central European States, from a research project within the Central European Professors' Network; I focused on the description and analysis of the constitutional and statutory regulation of the use and protection of state, city, and municipality symbols, self-governing regions, and national and community symbols in the Slovak Republic. Despite identifying several shortcomings and problematic aspects in regulation, I did not look further to ascertain change or improvement. This paper adopts that objective and aims to analyze and present proposals for new legislative approaches.

The paper specifically focuses on regulation in the following laws:

- The Constitution of the Slovak Republic No. 460/1992 Coll., as amended by later constitutional laws,
- Act No. 63/1993 Coll. on the state symbols of the Slovak Republic and their use, as amended (hereinafter referred to as the State Symbols Act),
- Act No. 300/2005 Coll., the Criminal Code, as amended (hereinafter referred to as the Criminal Code),
- Act No. 372/1990 Coll. on infringements, as amended (hereinafter referred to as the Infringements Act),
- Act No. 302/2001 Coll. on the self-government of higher territorial units (Act on self-governing regions),
- Act No. 1/2014 Coll. on the organization of public sports events and amending certain acts, as amended,
- Act No. 506/2009 Coll. on trade marks, as amended.

From the point of view of systematics, I will first focus on the level of constitutional law, and then on the level of ordinary laws.

I adopt the heuristic inquiry method—focusing mainly on normative texts, but also considering scientific literature—along with analysis, synthesis, deduction, and induction methods in my research. Further, I employ the empirical method of direct observation—focused mainly on media reporting—and deal with decision-making practices of Slovak courts, while focusing on criminal offences of disorderly conduct.

2. Changes in the constitutional regulation of state symbols, city and municipality symbols, self-governing regions, and community symbols

Despite the fact that the constitutional regulation of this matter in Slovakia is rather minimalist,[2] I am of the opinion that *de constitutione ferenda* there is no need to change the regulation of state symbols contained in the Slovak Constitution.

I have not identified any problems or non-functional elements in this regulation, and, to my knowledge, neither have any authors; although, the literature on this topic is quite sparse. I believe that the Constitution provides sufficient protection to the Slovak state symbols, in ensuring their esteem and respect.

The degree of rigidity of the constitutional regulation of state symbols corresponds to the overall rigidity of the Constitution of the Slovak Republic, which is relatively low.[3] It follows that the constitutional regulation of the state symbols of the Slovak Republic could be amended relatively simplistically. Thus, the current state symbols could be replaced with others relatively easily, or eventually even abolished. This risk could only be avoided by changing the constitutional regulation of the constitutional amendment itself. However, this is of course an extremely sensitive and complex constitutional, political, and social issue that goes far beyond the dimension of the state symbols themselves. Increasing the rigidity of the Constitution only to ensure greater stability of constitutional protection of state symbols would be—simply put—an overkill.

Based on common empirical knowledge, it can be argued that there is currently no real threat to the state symbols—in the sense that there would be tendencies in the Slovak discourse to revoke or replace them with other symbols. The only exception in this respect may be the State anthem of the Slovak Republic, for two reasons.

First, in Slovakia there are sometimes discussions, whether the anthem should be replaced by another hymn-song; according to some,[4] the anthem no longer corresponds to the current situation of Slovaks, as Slovakia has been a sovereign state for decades and the revolutionary nature of the anthem (*Nad Tatrou sa blýska*–Lightning over the Tatra) appears to be obsolete. Some people think that the anthem should be a song that praises Slovakia, such as the hymn song *Aká si mi krásna*–How beautiful You are.

Discussions on the exact lyrics of the anthem Nad Tatrou sa blýska are not too distant in the past either. Although they concerned only two monosyllabic words, these two

2 | According to the Constitution of the Slovak Republic (Art. 8), the state symbols of the Slovak Republic are the coat of arms, the State flag, the State seal, and the State anthem. Art. 9 contains a brief description of the symbols and provides that a Law shall lay down the details and use of the state symbols.

3 | See Prusák, 1995, p. 113; Drgonec, 2019, pp. 1205–1206; Petranská Rolková, 2017, pp. 36–40.

4 | *Exprezident navrhuje zmeniť štátnu hymnu* [Online]. Available at: https://domov.sme.sk/c/1480998/exprezident-navrhuje-zmenit-statnu-hymnu.html (Accessed: 9 September 2022).

words fundamentally change the meaning of the text[5]. It cannot be ruled out that such discussions may reappear in the future.

Given the great symbolic value of state symbols and their link to 'national consciousness'[6], it can be said that as long as the Slovak Republic exists as a national state of Slovaks, it is very unlikely that state symbols may be endangered[7] in a way that would require more effective constitutional protection—unless, of course, some fundamental change in the value paradigm of Slovak society should occur.

If the Slovak Republic, as a sovereign State, should cease to exist for some reason, the question of the protection of its state symbols would no longer be relevant—the state symbols would cease to exist as well. If the Slovak Republic were to continue to exist, but the Slovaks would lose their de facto political dominance, and the new dominant national or ethnic group would like to replace the current national symbols with its own symbols, no degree of rigidity in the Constitution would be able to effectively prevent this. If the fundamental social and value paradigm of Slovak society were to change,[8] not even an extremely rigid constitution could prevent a change of state symbols.

Needless to say, in case of both such events, the question of state symbols would be quite secondary in the context of an overall political, legal, and societal change.

The question of state symbols is by nature *a posteriori*. State symbols always reflect a certain social and political reality. If social and political realities change fundamentally, even the strongest bulwarks of a rigid constitution will not be able to prevent constitutional changes to state symbols for a long time. The historical Slovak experience shows that the opposite is true.

Moreover, while the social importance of the constitutional regulation of state symbols is high, it is not so high that it must be seen as the core of the constitutional order. If there were social and political changes threatening the existing constitutional order or even the existence of the state itself, it would be much more important to protect other values, particularly the fundamental rights and freedoms of the people.

5 | In the past, the verse 'Let's stop them, brothers' has also been used in the wording 'Let's stop, brothers'. The semantic difference is evident—the version currently used expresses more fighting spirit, as it calls for unspecified antagonistic entities to be stopped, while the version with the word '*sa*' is more reluctant, defensive, encouraging patient waiting.
The next verse is '—they will get lost'. In the lyrics, the word 'they' can been expressed in two ways — either *ved'sa oni stratia* or *ved'sa ony stratia*. *Ony* is an inanimate pronoun, while *oni* is an animate pronoun. In the first case (corresponding to the current use), the anthem promises, that some inanimate entities will disappear. Those would probably be the thunder and lightning mentioned in the first two verses of the same stanza. In the latter case, it is the disappearance of some living entities, apparently personified enemies of Slovaks. Thus, in the present case, the wording used is both, more abstract as well as symbolic, and does not refer to any group of hostile persons. Clearly, the combination of the different wordings of these verses can achieve considerable shifts in the overall semantic meaning of the first stanza of the anthem, starting with the version where the anthem calls on Slovaks to wait patiently before thunder and lightning pass, up to the version where the anthem calls on them to combat a personalized enemy to be destroyed.
6 | Svák, Cibulka and Klíma, 2009, p. 275.
7 | Such a change in the past was, for example, the emergence of the communist regime in a form antagonistic to religion, which led to the replacement of the double-cross as the symbol of Slovakia and of Slovaks, by a depiction of the mountain of Kriváň with a fire of the partisans.
8 | For example, a victory of totalitarian ideology that would aspire to change the state symbols.

In summary, I consider the existing constitutional regulation of state symbols to be sufficient, since issues not regulated by the Constitution are sufficiently regulated by laws.

There is no regulation of the symbols of self-governing regions, municipalities, or, for example, minority communities in the Constitution of the Slovak Republic. Of course, we can ask ourselves whether this is correct and whether such a regulation should not be included in the constitution.

Constitutional regulation of the right of municipalities, towns, and self-governing regions to have and use their symbols would—symbolically—strengthen their self-governing position. However, it would only be a truly symbolic strengthening, with no real practical added value. The absence of constitutional regulation of the symbols of local and regional self-governing bodies and authorities does not pose any practical problems. I would consider explicit constitutional regulation of the right to self-government[9] to be more important and beneficial for local and regional self-government entities. If such a constitutionally regulated right was incorporated into the Constitution, through interpretation we could also reach a conclusion that it also covers the protection of the right of self-government to have and use its own symbols, without the need for such a provision to be expressly included in the Constitution. Personally, I prefer the Constitution to regulate only those issues that are of essential social and legal importance and need to be regulated by the highest-ranking legal rules.

Regarding the symbols of minority communities, I assess the need for such constitutional regulation in the context of the existing constitutional regulation of the rights of persons belonging to national minorities.[10] These are the rights of an individual and subjective nature, whose entities are natural persons and not associations of natural persons. Constitutional regulation of the protection of national community symbols would interfere with this concept of 'minority' rights to some extent. As the paradigm of constitutional protection of minorities in Slovakia is focused on individual subjective rights, without changing this paradigm, it would seem impossible to regulate the abstract protection of community symbols in the Constitution as such. Thus, without changing the constitutional paradigm of the protection of minority rights, it would be conceivable to regulate the rights of persons belonging to national minorities to use the symbols of those minorities, but not abstractly protect those symbols constitutionally.

Understandably, this is a highly sensitive political issue. It can be assumed that an amendment to the Constitution aimed at constitutionally regulating the protection of national minority symbols would appear to be politically feasible only in very unusual political circumstances, perhaps even then not.

From a strictly legal point of view, the principal legal challenge in the case of constitutionally legislated regulation of the protection of national minority symbols is the fact that these symbols are also—at least in some cases—state symbols of third countries. For example, if Roma communities in Slovakia use their symbols, they are only non-state symbols. However, if, for example, Slovak Hungarians or Chinese people use their

9 | Currently, the concept of matters of territorial self-government is most closely related to this concept within the framework of positive legal regulation, as it is used by the Constitution of the Slovak Republic (in Art. 127a). See Drgonec, 2019, p. 1516.

10 | The rights of persons belonging to national minorities are regulated by the Constitution of the Slovak Republic in Arts. 33, 34.

symbols, they are also likely to be symbols of foreign states. Thus, if the Slovak Constitution expressly provided protection for national minority symbols, it would via facti also provide protection, at least in some cases, to foreign state symbols[11]. This would not only be rather peculiar but could also interfere, on the one hand, with the legal regulation of the use of state symbols of the Slovak Republic, in relation to which the law of course regulates the preferential regime, and, on the other hand, with the current legal regulation of the use of foreign state symbols in the Slovak Republic.

As symbols have mainly symbolic value, it's legitimate if the state and the law protect and prefer their own symbols over foreign ones. In today's world, the question of the existence of states and nations is, to a considerable extent, a question of defining oneself against foreignness. In that regard, the fact that a state protects and favors its own symbols and protects foreign symbols to a lesser extent, or possibly limits their use, seems to me to be the expression of a natural instinct of self-preservation on the state level. The use of state symbols in the territory of the respective state expresses the sovereignty of the state. Therefore, the state symbols of each state need to be regulated and protected by its constitution and legal system.

The expression of state sovereignty of other states in the territory of the Slovak Republic is acceptable only in a very limited manner—for example, designated diplomatic missions or foreign official delegations.

3. Amendment to the State Symbols Act

I have a singular fundamental reservation regarding the State Symbols Act. It concerns the use of the coat of arms of the Slovak Republic on the sports clothing of the official sports representatives for the Slovak Republic. I believe the approach introduced here by amendment to the State Symbols Act introduced by Act No. 126/2019[12] is unreasonably strict.

11 | Of course, it could be avoided, for example, by a solution similar to the legislative solution in Serbia, by explicitly regulating that the national symbols used by national minorities must not be identical to the state symbols of third countries. According to Art. 16 of the Serbian Law on the protection of rights and freedoms of national minorities, members of national minorities shall have the right of choice of national symbols and signs. National symbols and signs may not be identical to symbols and signs of other states. See Law on the protection of rights and freedoms of national minorities [Online]. Available at: http://ravnopravnost.gov.rs/wp-content/uploads/2021/08/43e756834.pdf (Accessed: 24 November 2022).
It would also be possible to allow the use of any symbols of national minorities, but only if they were different from the state symbols of third countries, their use would be subject to constitutional protection.

12 | As a result of this amendment and the new provision in Art. 3(3), the sporting representation of the Slovak Republic in a major international competition—i.e., for example, the World Ice Hockey Championship—, as well as in preparatory matches for such competition, may no longer use the coat of arms on its dresses other than in the manner provided for in this Act. The second sentence of Art. 3(3) of the SsA expressly provides that a sports representation of the Slovak Republic uses the Slovak coat of arms in a major competition, including the preparation for such competition, in particular by displaying it in the manner provided for in this Act on sports clothing.

My criticism is, of course, from a more political perspective and based on value rather than law. However, I think that the rigid requirement that the Slovak Republic's sport representatives must use the coat of arms in major competitions, as well as during the preparation for the competition, particularly by depicting it in the manner laid down in the State Symbols Act on sports clothing, is overly nationalistic. If the national ice hockey teams of Canada, Sweden, or Czechia—and these really are elite national hockey teams—can display stylized emblems on their jerseys, I do not see why this should not be appropriate and possible in the case of Slovakia.

If the argument is put forward that the state co-finances sports federations, and thus the state is justified in expecting the state symbols to be displayed on sports jerseys, only one thing can be said: If the State expects some kind of remuneration—in the form of the display of the coat of arms on jerseys—there is always the possibility to enshrine such an obligation for the sports federations in the financing agreements or in the terms of the grant schemes.

4. Amendments to the Criminal Code and the Infringements Act

In terms of judicial and administrative punishment, I have identified two problems. The first problem is that there is an unclear distinction between the criminal offence of disorderly conduct under Article 364(1)(b) of the Criminal Code and the infringement under Article 42(1)(a) of the Infringements Act, as regards the objective aspect relating to defamation—criminal offence—or derogation—infringement—of state symbols. There is no major semantic difference between these concepts; however, there is a subtle hint suggesting that a more serious act will be required to fulfill the merits of the criminal offence. This corresponds to the general relationship between criminal offences and infringements.

The distinction between criminal offences, namely, misdemeanors, and infringements is expressed in the Criminal Code by a so-called substantive corrective,[13] according to which there is no misdemeanor if, having regard to the manner, in which the act was carried out and its consequences, the circumstances in which the act was committed, the degree of fault and the motivation of the offender, the seriousness of the conduct is negligible. From that point of view, the relationship between the two offences in question is not dysfunctional, even though this might appear to be the case at first glance. The *ne bis in idem*[14] principle will therefore not be infringed. The problem, however, is the unclear relationship between the merits of the criminal offence and the infringement. This casts doubt on compliance with both, the requirement of legal certainty and the requirements arising from the principle of *nullum crimen sine lege certa*.[15]

As a solution, I considered the possibility of a change of Article 42(1)(a) of the Infringements Act, such that the infringement in question would require intentional fault only

13 | Art. 10(2) of the Criminal Code.
14 | Hamuľáková, 2017, p. 55.
15 | Horvat, 2016, pp. 79–88.

in the event of damage or abuse of the state symbol. In the case of derogation, it would be expressly provided that the act must be negligent. If a state symbol was deliberately derogated and the manner, in which the act was carried out, would give it a sufficient level of gravity to pass the material corrective, such an act would be a criminal offence. However, the problem with this solution is that if the court—or the prosecution or the police—was to consider that the defamation/derogation of the state symbol does not give rise to a sufficient degree of social hazard, such intentional conduct would not be punishable as an offence, even though a similar negligent act would be punishable. This solution would therefore not only lead to a slight reduction in the protection of state symbols in the area of infringement law, but would create room for injustice: negligent conduct would be penalized and intentional action in some cases would not.

Unfortunately, in Slovak judicial practice, there are only a very small number of court decisions regarding cases of disorderly conduct under Article 364(1)(b) of the Criminal Code. The cases I have found testify to the importance of the contextual assessment of facts.

For example, in a recent case decided by the Specialized Criminal Court in 2020–2021,[16] the act was committed in September 2019 in Budapest, at the football stadium Groupama Arena, where the EURO 2020 qualifying football match between Hungary and Slovakia was being played. The act was committed in such a way that the perpetrator—in the sector intended for guests, that is for Slovak citizens—in front of the fans present, at a personal distance, in a position indicating readiness for a physical attack, shouted and attacked the victim cheering for the Slovakian team—by hanging a Slovak flag on the visitors' sector. In this incident, the perpetrator covered the Slovak flag with a Hungarian flag in violation of the rules of the UEFA. The attacked person did not submit to his actions; he defended the Slovak flag with his own body and again pulled the Slovak flag out from under the Hungarian flag and hung it on the railing. At the time of the act, the perpetrator was demonstratively wearing outerwear consisting of a black sweatshirt, which had a patch with the Hungarian tricolor on the left sleeve interrupted with the inscription *HARCOS*—warrior—and red and white stripes representing the Arrow Cross Party, but also the neo-Nazi organization Blood and Honor. On the left side of the chest in an early Gothic shield with a red color crowned with olive branches, he had a clearly visible white Ing - rune, which is the symbol of the neo-Nazi organization Blood and Honor.

Therefore, the essence of the assessment of the action as a defamation of the Slovak state symbol was the overlaying of the Slovak flag with the Hungarian flag. However, the overall factual circumstances of the case are very important. It should be mentioned that the court also ruled on the matter of other acts of the perpetrator, with which he fulfilled the facts of various extremist crimes and established the jurisdiction of the Specialized Criminal Court.

Another case of disorderly conduct was determined by a criminal order by the Prešov District Court in 2014.[17] The perpetrator committed the act by committing gross indecency in public, by urinating on the front hood of a police car parked there. The coat of arms of

16 | Judgment of the Specialized Criminal Court, File number: 3T/41/2020, date of decision: April 28, 2021, ECLI: ECLI:SK:SSPK:2021:9520100325.2.

17 | Judgment of the Prešov District Court, File number: 0T/57/2014, date of decision: April 24, 2014, ECLI:SK:OSPO:2014:8114000425.1.

the Slovak Republic was displayed on the front hood of the said vehicle in addition to the inscription police.

I will also discuss a very recent decision by the Supreme Court of the Slovak Republic[18]. Although it does not refer to the crime of disorderly conduct under Article 364(1)(b) of the Criminal Code, it concerns a related merit under Article 364(1)(c) of the Criminal Code—a person commits this subcategory of the crime of disorderly conduct if he or she defames a historical or cultural monument. In the case under consideration, that the perpetrator defamed a registered cultural monument in public, namely the Monument to the Fallen of World War II, in such a way that, with a screwdriver, he forcibly pried and thus removed out of the monument a total of 13 pieces of hammer and sickle symbols, and he damaged five of them, causing damage in the amount of 72 Euros. I view the importance of this decision from two perspectives: on the one hand, it expresses the view of courts of all levels on when it is possible to talk about defamation—albeit in relation to a cultural monument, but with the possibility of generalization also to a state symbol; on the other hand, it also deals with the relationship of this criminal act to freedom of speech.

The Supreme Court of the Slovak Republic stated that, among other things, the criteria used to determine the seriousness of the offense relate to: a) Actions, consequences, and circumstances of committing the offense—test of the objective aspect. b) Degree of culpability and motives for the act—test of the subjective aspect.

The court specifically stated that the mentioned criteria are so different and variable that they can be used to sufficiently distinguish the degree of seriousness of the committed offense in a specific case, or an act showing the characteristics of a crime. The mentioned criteria cannot be evaluated in isolation but in their summary, without some being overrated or stronger at the expense of others. Moreover, the seriousness of some anti-social behavior is usually the dividing line between a crime and an infringement.

The Supreme Court stated that freedom of speech has its limits. In the opinion of the court, it cannot be considered acceptable that freedom of speech results in actions aimed at defaming a cultural monument, even under the guise of fighting against a criminal regime. Only a good path leads to a good goal. Although it may be thorny, it cannot have an aggressive and arbitrary character that violates not only moral but especially legal regulations. The goal achieved in this way, although correct, is sacrificed to the expediency of the procedure, and this is considered unacceptable by the Supreme Court as long as The Slovak Republic should be described as a state governed by the rule of law.

From the decision of the appellate court—that is, the regional court—in this case, it follows that in terms of the interpretation of the term defamation of a cultural monument, such an action must meet two criteria. One is that it must be a physical attack on a cultural monument, and the other is that it shows disrespect for this cultural monument.

These conclusions should obviously also be applied to defamation of state symbols.

Unfortunately, administrative decisions regarding infringements, as well as decisions of the police and the prosecutor's office, by which criminal cases were transferred due to a lower degree of seriousness to administrative infringement proceedings, are not publicly available.

18 | Decision of the Supreme Court of the Slovak Republic, File number: 1Tdo/3/2022, date of decision: September 13, 2022, ECLI: ECLI:SK:NSSR:2022:7118010732.1. The decision of the court of the first instance in this case was the judgment of the District Court Košice I, File number: 7T/35/2018, date of decision: October 21, 2020, ECLI: ECLI:SK:NSSR:2022:7118010732.1.

I conclude that due to the existence of the substantive corrective in the Criminal Code, it can never be ruled out that, in the case of a misdemeanor, the court may assess the degree of social danger as so low that it does not classify the act as a criminal offence. Thus, the only solution appears to be to maintain the *status quo* and to leave identifying the boundary between the aforementioned public offences for judicial decisions with all the risks involved.

The second issue I have identified concerns only the Criminal Code.

I am of the opinion that the *status quo,* when criminal law protection is provided to state symbols through the crime of disorderly conduct, is inappropriate. I have this opinion for several reasons.

On the one hand, the social values that are generally protected by the different subtypes of the crime of disorderly conduct are public order and decency in public space. In the case of state symbols, their dignity must be seen as a value per se—different from values of public order or morality/decency. This value also deserves special protection under criminal law. I therefore consider it necessary to create a separate criminal offence, the object of which is not primarily public order or decency, but the very dignity of a state symbol.

I came to this conclusion based on a study of almost 200 decisions of first-instance courts, as well as appeals courts, in the Slovak Republic,[19] which dealt with disorderly conduct. It can be concluded that in judicial practice, most criminal acts of disorderly conduct have the character of minor acts of violence (fights, assaults, threats of violence)—Article 364(1)(a) of the Criminal Code; a smaller part concerns moral offenses such as sexual—usually perverted—activities in public, what falls under Article 364(1)(e) of the Criminal Code. In the context of this focus, the inclusion of criminal law protection of state symbols in this group seems undignified. This empirical research also confirmed my thesis that the object of protection in the case of the crime of disorderly conduct under Article 364(1)(b) of the Criminal Code is significantly different when compared to more 'common' cases of disorderly conduct.

Another reason I consider it necessary to detach the criminal protection of state symbols from the crime of disorderly conduct and to create a new criminal offence is that, under the present rules, the same criminal law protection is provided to the Slovak state symbols and to foreign state symbols.[20] I do not see any reasons for this. The state should protect its own symbols more than foreign ones.

The solution I propose is to create a new criminal offence—defamation of the State symbols of the Slovak Republic. The offence would be committed by anyone who would, publicly or in a place accessible to the public, defame a state symbol of the Slovak Republic. An intentional fault would be required. The penalty rate would remain unchanged compared to the current situation.

19 | Court decisions regarding these crimes can be found on the website of the Ministry of Justice of the Slovak Republic [Online]. Available at: https://obcan.justice.sk/infosud (Accessed: 25 November 2022). The crime of disorderly conduct is very frequent. Within this crime, however, the cases of the crime under Art. 364(1)(b) of the Criminal Code are very rare.

20 | Ivor et al., 2021, p. 507. In the work of other scholars, one can also encounter a slightly modified view of this question, based rather on what real social concern the defamation of a foreign state symbol will cause. Burda et al., 2011, p. 1235.

At present, Article 364(2) of the Criminal Code lays down the following qualifications justifying a more severe penalty for disorderly conduct: committing the act (a) from a specific motif; (b) by a more serious way of acting; (c) in the presence of a group of persons below the age of 18; (d) against a protected person, or (e) although the perpetrator has been convicted in the previous twenty-four months or punished in the previous 12 months for the same or a similar act.

Of these, only some appear to be relevant for the defamation of a state symbol and should also be kept in the proposed new regulation. In particular, this should be the specific motive, a more serious course of action, committing the act in the presence of a group of persons under the age of 18, and the fact that the offender has been convicted in the previous twenty-four months or punished in the previous twelve months for a similar act.

Finally, it is also worth considering whether it would not be appropriate to impose more severe sanctions on Slovak nationals than on foreigners and persons without citizenship for defamation of the state symbols of the Slovak Republic. Citizens are bound to the Slovak Republic by a commitment of loyalty, and therefore, defamation of their own state symbols can be seen as more reprehensible.

Criminal protection for foreign state symbols would continue to be provided as part of the disorderly conduct crime. Its constituent elements would be modified by inserting the words 'of a foreign State' in Article 364(1)(b) of the Criminal Code after the words 'state symbol'.

5. Proposed changes to the Act on the Organization of Public Sports Events

I have also identified some shortcomings in relation to Act No. 1/2014 Coll. on the organization of public sports events and amending certain acts, as amended (hereinafter also referred to as the Act on sports events).

The organizer of a risk sports event should not only have the obligation to ensure that participants do not bear the state symbols of other states or their predecessors in domestic events. This obligation should *de lege ferenda* also apply to objects resembling such state symbols and to objects that can be arranged to form shapes of state symbols of other states or their predecessors. Similarly, prohibitions on the introduction of such objects should also be explicitly provided in relation to participants in such events. Empirical knowledge resulting, for example, from media coverage shows that in their current form, these prohibitions and obligations can be circumvented relatively easily.[21]

However, the organizer of a risk sports event should also have an explicit obligation to ensure that prohibited items are not only not brought by participants, but by anyone. In

21 | See for example this article: Maďarská vlajka na tribúne vyjde Dunajskú Stredu poriadne draho [Online]. Available at: https://tvnoviny.sk/sport/clanok/74365-madarska-vlajka-na-tribune-vyjde-dunajsku-stredu-poriadne-draho (Accessed: 25 November 2022). In this case, the football club was penalized, but only by the Slovak Football Association based on its internal regulations.

its current form, this ban can be bypassed, for example, by fans not bringing foreign state symbols into the stadium; rather, they would be brought by club employees.

6. Proposed changes in the Act on Trade Marks

I am of the opinion that there is no need for change in relation to the statutory regulation of the use of state symbols in business. The use of state symbols in business, which does not contradict the current wording of the law—particularly, it must be dignified and must not create an incorrect impression that it is an official use of state symbols—is not problematic.

However, there is scope for change in Act No. 506/2009 Coll. on trade marks, as amended. According to the current regulation in Article 5(1)(j) and (k) of Act on trade marks, a sign is not to be entered in the register of trade marks, if: a) it contains a sign of high symbolic value, in particular a religious symbol; b) it contains, without the consent of the competent authorities, signs, emblems, or coat of arms other than those protected under an international convention and which are of public interest.

However, the law should explicitly provide that a state symbol is not eligible for registration—without the consent of the competent authorities—in order to remove any interpretive doubts regarding the above provision.

7. Proposed changes in relation to the symbols of local and regional self-government

Regarding the symbols of cities, municipalities, and self-governing regions, I propose a harmonization of their regulation. In particular, there is no reason to preserve the differences in the regulation of official stamps. While Act No. 369/1990 Coll. on Municipal Establishment does explicitly require the municipalities to use the official stamp of a municipality bearing the coat of arms of the state when performing duties of state administration, and in the exercise of its own self-governing powers, the municipality is required to use official stamps with its own coat of arms. The Act on self-governing regions does not expressly regulate official stamps of a self-governing region. Although I am not aware of any practical problems arising from this inconsistency, I do not consider a non-uniform legislative approach appropriate.

I do not consider it necessary to provide greater penal protection for the symbols of towns, municipalities, and self-governing regions, since their possible defamation is not as dangerous to society as the defamation or derogation of the state symbols.

8. Conclusion

From my perspective, Slovak society should move in the direction of giving more importance to state symbols. My feeling is that Slovaks are a little more lukewarm in this respect compared to several other Central European nations. However, I have not identified any need for change in the constitutional regulation of state symbols. On the one hand, I consider the constitutional regulation sufficient *per se*. On the other hand, any constitutional amendment aimed at increasing the rigidity of the protection of state symbols would still run into the overall low rigidity of the Constitution of the Slovak Republic, and in the event of revolutionary social and political changes, its effect would be thwarted by the radically changed social reality.

Regarding the statutory provisions contained in the State Symbols Act, as the only amendment, I propose cancellation of the legal obligation for sports representations of the Slovak Republic to display the Slovak coat of arms in official international competitions on sports jerseys.

Regarding the area of criminal law and administrative punishment, the problem can be seen in the unclear distinction between the criminal offence of disorderly conduct under Section 364(1)(b) of the Criminal Code and the infringement under Article 42(1)(a) of the Infringements Act. This ambiguity concerns those parts of the objective aspect of the facts of each respective offence that relate to defamation or derogation of state symbols. There is no major semantic difference between these concepts in Slovak, just a mild shade of difference. The distinction between criminal offences, namely, misdemeanors, and infringements is defined in the Criminal Code by means of substantive corrective. Thus, the relationship between the two offences in question is not dysfunctional. The ne bis in idem principle will not be infringed. The problem, however, is the somewhat unclear relationship between the merits of the criminal offence and the infringement. This casts doubt on compliance with both, the requirement of legal certainty and the requirements arising from the principle of *nullum crimen sine lege certa*.

I considered a possible solution in this paper, namely that in the case of the infringement in question,[22] intentional fault would be required only in the event of damage or abuse of the state symbol. The Act would then expressly provide that in the case of derogation such an act must and may be only negligent. However, the problem with this solution is that if the court were to consider that the defamation or derogation of the state symbol does not give rise to a sufficient degree of social hazard; such intentional conduct would not be punishable as an offence, even though a similar negligent act would be punishable. Therefore, this solution creates room for injustice.

Examining dozens of court decisions related to the crime of disorderly conduct, I identified three in the paper that relate to defamation—either of a state symbol or a cultural monument—, and with their help, I outlined how the courts approach the assessment of these proceedings. However, the jurisprudence of Slovak courts in this matter is scarce and currently does not provide answers to all relevant questions for the time being. The decision of the Slovak Supreme Court, which I present in this paper, also shows the need for an individual and contextual assessment of the social danger of every case of defamation.

22 | The infringement under Art. 42(1)(a) of the Infringements Act.

Due to the existence of the substantive corrective, it can never be ruled out that the court may assess the degree of social danger of a specific conduct as so low that it will not classify the act as a misdemeanor. Thus, despite the shortcomings of this approach, the only solution appears to be to maintain the *status quo* and leave the boundary between the respective criminal offence and infringement for the judiciary.

The second issue concerns only the Criminal Code; currently, criminal protection is provided to state symbols through the crime of disorderly conduct. I consider this inappropriate. In the case of criminal law protection of symbols, the protected social value should be viewed as significantly different from public order. Moreover, it does not seem appropriate or dignified if defamation of a state symbol is subsumed under the same criminal offence as the ordinary cases of acts of public disorder. It is also incorrect if the law provides the same level of criminal protection for Slovak state symbols and foreign state symbols in a single set of merits of a criminal offence. That is why I propose to create a new criminal offence—the defamation of a state symbol of the Slovak Republic. This crime would be committed by a person who would, publicly or in a place accessible to the public, defame a state symbol of the Slovak Republic. An intentional fault would be required, while the penalty rate would remain unchanged compared to the current legislation.

Criminal protection for foreign state symbols will continue to be provided in the context of the crime of disorderly conduct.

This paper also provides proposals to change the regulation of the use of state symbols in public sports events. These amendments are intended to close the loopholes of the current regulation, which reduce its regulatory effectiveness. Furthermore, it is proposed that the Act on Trade Marks should expressly provide that the state symbols are not eligible for registration as a trademark.

Finally, I propose harmonizing the rules governing the use of official stamps with state—symbols coat of arms—and with self-government symbols in relation to municipalities and self-governing regions.

I do not consider it necessary to provide greater legal protection for the symbols of towns, municipalities, and self-governing regions, since their possible defamation is not as dangerous for society as the defamation or derogation of a state symbol.

Research into state symbols, in particular its comparative dimension, has led me to believe that Slovak society should have a higher degree of natural respect for its own national symbols and for the state symbols of the Slovak Republic. However, it is almost impossible to force people to respect certain values by legal means and this paper was not intended to deal with extralegal instruments for increasing that respect. Through this paper, I have limited the proposals for legislative changes to what I perceive as necessary. My goal is not to criticize the existing constitutional or legal regulation at any cost, as I perceive them to be, in principle, good and functional.

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REVIEWS

REPORT ON THE INTERNATIONAL CONFERENCE 'THE RULE OF LAW BETWEEN A LEGAL NOTION AND A POLITICAL TOOL' ORGANIZED BY THE DANUBE INSTITUTE IN BUDAPEST ON JUNE 6, 2023

Enikő Krajnyák[1]

ABSTRACT

The report concerns the international conference held on June 6, 2023, organised by the Danube Institute in Budapest with the participation of eminent Hungarian and foreign representatives from the academic and political world. The conference discussed the issue of the evolution and the politicisation of the concept of the rule of law and reflected on the ongoing debates between Hungary and the European Union (EU). The conference contributed to a better understanding of the current developments concerning the concept of the rule of law and its context at the international level. This report summarises the presentations at the conference and reflects on the conclusions drawn from the discussions.

KEYWORDS

rule of law
constitutional identity
European Union
EU rule of law toolbox

Introduction

The international conference titled 'The Rule of Law: Between Legal Notion and a Political Tool' was organised on June 6, 2023, in the Lónyay-Hatvany Villa located in the Castle District of Budapest. The aim of the conference was to give an insight into how distinguished legal minds from several countries review the evolution of the concept and the practical implementation of the rule of law in modern international political relations. The conference was divided into three sessions. The first section was opened by John O'Sullivan (President and founder of the Danube Institute), followed by the presentation delivered by Prof. Csaba Varga (Professor Emeritus at Pázmány Péter Catholic

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https://doi.org/10.55073/2023.1.237-247

University); Gadi Taub, Ph.D. (Senior Lecturer at the Hebrew University of Jerusalem); Prof. István Stumpf (former Justice of the Constitutional Court and Minister in charge of the Prime Minister's Office); and Prof. James Allan (Garrick Professor of Law at the University of Queensland). The presentation of Ákos Bence Gát, Ph.D. (Head of Foreign Affairs at the Danube Institute and Researcher at the National University of Public Service) was followed by a panel discussion with the speakers of the first session, moderated by John O'Sullivan. The third session was dedicated to a dialogue with János Bóka (State Secretary for European Union Affairs of Hungary, Ministry of Justice) moderated by Ákos Bence Gát.

Session 1

The conference and the first session were opened by John O'Sullivan, who emphasised the topicality and importance of the theme of the conference, the rule of law in today's context. The first conference speech was delivered by Prof. Csaba Varga, titled 'On the Rule of Law: Contesting and Contested.'[2] The Professor first pointed out that the concept of the rule of law did not have a common understanding. For instance, the British approach to the 'rule of law' rests on the principle of all-covering justiciability, while the German concept of *Rechtsstaatlichkeit* strives to achieve its goals through comprehensive and across-the-board regulations issued by the force of state authority.[3] The Professor contrasted the development of the Hungarian approach to the rule of law, in which the Hungarian Constitutional Court, established after the change of regime, had a strong role to play. In the jurisprudence of the Court, the rule of law has become a standard of constitutionality and the source of rights and constitutional principles.[4] According to the Speaker, the role of the rule of law differs fundamentally from what it originally meant. Nowadays, in light of the ongoing discussions with the EU, one may observe that the rule of law has become extremely politicised and displaced from legal treatment to a political one; moreover, it is becoming a blackmail tool. The rule of law, however, is inherently contested and should serve as an ideal in ever-changing circumstances rather than being a normative prescription, as it seems to be interpreted recently by the EU. The Professor pointed out that the universalisation of the rule of law was an American view that certainly influenced European political and legal reality, in which the rule of law appeared as a manipulative tool. Instead of abusing and universalising the interpretation of the rule of law, the Speaker reminded the audience of the words of Václav Havel, former President of the Czech Republic:

> There is no need at all for different peoples, religions and cultures to adapt or conform to one another. […] I think we help one another best if we make no pretenses, remain ourselves, and simply respect and honor one another, just as we are.[5]

2 | The key arguments of the speech are based on the following work: Varga, 2021a.
3 | Varga, 2021a, p. 18; see also Varga, 2021b.
4 | Decision No. 31/1990 (15 December) of the Hungarian Constitutional Court.
5 | Cited in Howard, 2011.

Gadi Taub, Ph.D. conducted a presentation titled 'A Coup in the Name of 'The Rule of Law': How the Plan to Reform Israel's Judiciary Was Halted.' The Speaker introduced the Israeli government's judiciary reform plan for the first few months of 2023. The judicial reforms aimed to rebalance the power relations between lawmakers and the judiciary by changing the rules on the selection of Supreme Court judges, thereby introducing certain checks and balances to the Israeli judiciary. Given that Israel does not have a formal constitution, only a set of quasi-constitutional Basic Laws, the judiciary, particularly the Supreme Court, has become extremely powerful without any defined limits of authority. Despite several reform initiatives, the Supreme Court still has sufficient support among liberal members of the Knesset to hinder drastic measures that limit its power.[6] According to the government, the Presenter pointed out that the Supreme Court had overstepped its role, which led to the replacement of the rule of law with the will of judges. The heavily contested legislative proposal was postponed in late March, after a coup d'état with the participation of military reservists in the name of the rule of law, raising the question of whether the power of democratic bodies could be taken through means that lack democratic legitimacy in the name of the rule of law.

Prof. István Stumpf, in his presentation 'The Increasing Importance of Constitutional Identity' addressed the role of the Hungarian Constitutional Court in developing constitutional identity and interpreting the rule of law. The Professor pointed out that the Hungarian Constitutional Court had been a protagonist of the constitutional transition in Hungary, as it had been the first rule-of-law institution during the regime change. The Constitutional Court ensured that the regime change could take place on the grounds of legality and established the rule-of-law standards on the basis of the new Constitution, which ensured that Hungary was 'an independent, democratic rule-of-law state.'[7] The Professor emphasised that the debates on the adoption of the new constitution around 2010 were regarded as the second constitutional revolution.[8] The 2/3 majority of the governing party intended to suppress the excessive power of the Constitutional Court. Entrusting significant powers to the Constitutional Court is more common in Western legal systems. This is in contrast to Hungary and other Central-Eastern European countries, which underwent a fundamental transition from communist regimes to democratic rule-of-law states. The 20-year period from 1990 onwards, as characterised by Prof. Csaba Varga, was accompanied by destructive liberal doctrinarism,[9] a heritage of the communist regime. Conversely, the new Constitution, the Fundamental Law,[10] brought about a fundamental change in Hungarian constitutional legal thinking: it did not accept any compromise from the previous period or the repeal of the historic Constitution. The historic constitution, connected to the symbol of the Holy Crown, embodies the constitutional continuity of Hungary's statehood and the unity of the nation.[11] The Professor also reflected on the relationship between EU identity and Hungarian constitutional identity,

6 | Carmi, 2005, pp. 67–68.
7 | Act XXXI of 1989 on the modification of the Constitution, Art. 2.
8 | See Stumpf, 2022.
9 | Varga, 2021a, p. 149.
10 | The Fundamental Law of Hungary was adopted on April 18, 2011, and entered into force on 1 January 2012.
11 | Raisz, 2012, p. 38.

highlighting that European identity is part of Hungarian constitutional identity,[12] which, as a national identity, should also be respected by the Union.[13]

Prof. James Allan discussed the issue of 'The Political Seduction of Law' from the perspective of a conservative legal scholar. The Professor clarified the difference between the procedural and the substantive aspect of the rule of law, namely, that there was a difference between formally (procedurally) conforming with the rule of law or not conforming with the content of the rule of law.[14] While the former is less complicated to determine, the latter could lead to discussions on the moral content of the rule of law, which is less tangible and identifiable, and therefore, more subjective. The Presenter raised the question of whether it was morally acceptable to use the substantive components of the rule of law as a political tool, and drew attention to the dangers of increasing judicial power, which had been addressed earlier in Gadi Taub's speech in the Israeli context. The examples cited from the practice of the British and Australian courts and the US Supreme Court were particularly interesting, as they were introduced from the perspective of a Professor from the Anglo-American common law system.

Session 2

The second session of the conference was opened by Ákos Bence Gát, Ph.D. with his presentation titled 'The Rule of Law Debate in the EU: A Glimpse behind the Scenes.' The Presenter gave an overview of the rule-of-law instruments of the European Union,[15] including the rule of law framework of the Commission of 2014,[16] the annual rule of law report,[17] the conditionality mechanism,[18] and the procedure based on Article 7 of the Treaty on European Union (TEU). The presentation paid particular attention to the recently enacted conditionality mechanism, which fundamentally differs from the infringement procedure, as in the case of the latter, the last instance is conducted before the Court of Justice of the European Union (CJEU), while there is no available appeal against the conditionality mechanism. The conditionality mechanism projects the suspension of EU funds to the Member States that threaten the financial interests of the EU by not respecting the rule of law. According to the Speaker, this measure had been introduced because the EU could not sanction a Member State for the functioning of the rule of law, but for

12 | See Art. E)(1) of Fundamental Law: 'In order to enhance the liberty, well-being and security of the people of Europe, Hungary shall contribute to the creation of European unity.'
13 | See Art. 4(2) of the TEU: 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. [...]'
14 | See Allan, 2011.
15 | For an overview on development of the EU rule of law mechanisms, see Sulyok, 2021; and their impact on Central European States, see Gát, 2021.
16 | Communication from the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law /COM/2014/0158 final/ (11 March 2014).
17 | Rule of law mechanism, European Commission [Online]. Available at: https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en (Accessed: 8 June 2023).
18 | Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

the protection of the EU budget. The question of whether the conditionality mechanism as a financial mechanism could be regarded as a rule of law mechanism and whether such measures could be applied based on alleged rule of law violations certainly arises, as was also addressed by Advocate General Sánchez-Bordona in his opinion[19] connected to Case C-156/21.[20] Furthermore, the Presenter highlighted that the intention behind the adoption of the conditionality regulation could be connected to difficulties with the rule of law mechanism of Article 7 of the TEU, as determining the existence of a serious and persistent breach by a Member State of the rule of law requires unanimity from the European Council.

The second part of the session was dedicated to a panel discussion and a Q&A with the Speakers from the first and second sessions, moderated by John O'Sullivan. The Speakers reflected on the topics presented earlier at the conference, with a particular focus on how power relations influence the interpretation of the rule of law, allowing the EU to extend the rule of law clause,[21] which could also be observed in the example of the Israeli judicial reform. The Presenters also discussed the shift from democracy and the rule of the people (demos) to juristocracy and the rule of judges, which may limit the role of Member States with electoral and democratic legitimacy.[22] Such developments, however, should also be assessed from the internal perspective of the EU, namely, the ongoing power struggle among EU institutions, which also impacts rule of law debates. The CJEU's approach to the rule of law debate is also remarkable:[23] the Court originally distanced itself from the rule of law debate however, in the recent judgment in the *Minister for Justice and Equality (LM)* case, the Court ruled for the first time in an ongoing rule of law debate concerning Poland.[24][25] The Presenters agreed that all these development directions within or outside the EU underpin judicial activism, which is worth analysing from the perspective of respect for the rule of law.

Session 3

The final session of the conference was a dialogue with Dr. János Bóka, Ph.D., State Secretary for European Union Affairs of Hungary, about the rule of law debate, with a particular focus on the background and current status of the EU discussions with Hungary.

19 | Opinion of Advocate General Campos Sánchez-Bordona delivered on 2 December 2021. Hungary v European Parliament and Council of the European Union, 136–137.
20 | The case referred to here is an action for annulment of Regulation 2020/2092 initiated by Hungary, which was dismissed by the Court. Poland, similarly, contested the legality of the Regulation. See: C-156/21 – Hungary v Parliament and Council, Judgment of the Court (Full Court) of 16 February 2022 (ECLI:EU:C:2022:97); C-157/21 – Poland v Parliament and Council, Judgment of the Court (Full Court) of 16 February 2022 (ECLI:EU:C:2022:98).
21 | On totalitarian approach to the rule of law by supranational entities, see Varga Zs., 2019. For the Hungarian version, see Varga Zs., 2015.
22 | Kis, 2021, p. 6.
23 | Metzinger, 2022, p. 14; Bóka, 2022, p. 81; see also Bóka, 2021.
24 | C-216/18 PPU – Minister for Justice and Equality, Judgment of the Court (Grand Chamber) of 25 July 2018 (ECLI:EU:C:2018:586).
25 | For an extensive analysis on the rule of law discussion and the actions taken by the EU against Poland, see the recent book published in the framework of the Polish-Hungarian Research Platform 2021: Pastuszko (ed.), 2023.

The dialogue was moderated by Ákos Bence Gát. First, the politicisation of the rule of law was discussed, and the Distinguished Guest Speaker highlighted that the rule of law had originally been a political and not a legal concept that had served for the organisation to exercise power. Over the course of a few decades, this political concept has gone through judicialisation and has been applied as a rule by the judiciary. However, there are inherent limitations to how to translate the concept of the rule of law as a rule and how far this concept could be legalised for use in court practice. Namely, the rule of law has primarily been interpreted in a domestic context, as briefly mentioned previously, and is now being formed by EU institutions. For this reason, according to the Speaker, we may speak about the repoliticisation of the rule of law by the EU, and not by domestic institutions, thereby raising a primarily national issue to a supranational level.[26] The Speaker highlighted that despite the absence of any explicit transfer of competence by Member States in connection with the enforcement of the rule of law, there is no debate on the so-called stealthy transfer of powers. However, this process carries the potential of establishing a form of constitutional federalism in Europe that falls outside the direct control of Member States. In situations where Member States disagree with the integration progress, they may be portrayed as challenging the core essence of integration and breaching the principle of cooperative collaboration.[27]

Dr. Bóka also provided an overview of rule of law procedures, which could be categorised according to the extent to which they are connected to the rule of law itself. First, the rule of law procedures, which are directly connected to the rule of law, encompass the Article 7 procedure and the rule of law review cycle. The prior procedure consists of two stages. In the first stage, the Council may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2,[28] including the rule of law.[29] In the second stage, the European Council may determine the existence of a serious

26 | The supranational interpretation of the rule of law is one of the research topics of the Central European Professors' Network 2023 at the Central European Academy. The research group, under the coordination of Dr. János Bóka, Ph.D., carries out research on the different notions of the rule of law, developed by various supranational institutions (including the Council of Europe, the OECD, the United Nations, the OSCE, and the EU). Additionally, they look at the legal basis for the interpretation of such notions, the control mechanisms through which it is examined, and the sanction systems related to such processes. The research gives special attention to the European Union and the issues of EU competencies in the context of national sovereignty and also examines the development of the hierarchy of the institutions controlling the rule of law and its current status. The results of the scientific research are expected to be summarised in a book published by the Central European Academic Publishing in the first half of 2024.

27 | Bóka, 2022, p. 80.

28 | Art. 7(1) TEU reads as follows: 'On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Art. 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure. The Council shall regularly verify that the grounds on which such a determination was made continue to apply.'

29 | Art. 2 TEU reads as follows: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

and persistent breach by a Member State of the mentioned values.[30] In case the existence of a serious and persistent breach is found under Article 7(2), the Council may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council, while the obligations of the Member State under the Treaties shall continue to be binding. It is worth noting that the first stage of the procedure had been triggered against Hungary[31] and Poland.[32] Second, the rule of law review cycle concerns an informal dialogue between certain EU institutions and Member States and results in the publication of an annual rule of law report concerning four issues: judicial independence, the anti-corruption framework, media pluralism, and other institutional issues related to checks and balances, such as civil society.[33]

The second category of rule of law procedures includes the conditionality mechanism,[34] which could indirectly be related to the rule of law as it primarily serves to protect the EU's financial interests by applying the condition to respect the rule of law, but does not aim to restore the rule of law itself. This conditionality mechanism was triggered in connection with Hungary in 2022.[35] Third, the European Semester, the EU's framework for the coordination and surveillance of economic and social policies, was mentioned as a procedure that is not even indirectly related to the concept of the rule of law, but is used to enforce it. The European Semester presents country-specific recommendations to Member States which provide guidance on tackling key economic and social challenges that are only partially addressed or not addressed in their recovery and resilience plans. In the case of Hungary, these recommendations also target judicial independence,[36] which does not seem to be connected to economic or social policies at all.

Dr. Bóka explained the relationship between the mentioned procedures by pointing out that the main idea behind the application of rule of law procedures had been to tackle the same issues from different perspectives to achieve more efficiency as a whole system. The use of certain procedures by different EU institutions or Member States may also be symbolic in showing that they are engaged in the topic regardless of the results of such procedures. According to the Speaker, the efficiency of these measures still needs to be evaluated, as debates were ongoing at the time of the conclusion of the conference and the present report. In addition, the mentioned repoliticisation of the rule of law enables the

30 | Art. 7(2) TEU reads as follows: 'The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Art. 2, after inviting the Member State in question to submit its observations.'

31 | European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Art. 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)).

32 | European Parliament resolution of 1 March 2018 on the Commission's decision to activate Art. 7(1) TEU as regards the situation in Poland (2018/2541(RSP)).

33 | See supra 16.

34 | See supra 17.

35 | European Commission Proposal for an implementing decision on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary, COM(2022) 458 final, 18 September 2022.

36 | 2023 European Semester: Country Specific Recommendation/Commission Recommendation – Hungary, COM(2023) 617 final, 24 May 2023.

application of such procedures as a result of political conflicts between the EU and certain Member States, in the present case Hungary and Poland.

The last part of the dialogue was opened to the audience in the form of a Q&A with Dr. Bóka, who reflected on questions concerning the conditionality mechanism and the suspension of Erasmus funds, rule of law procedures and their compatibility with the principles of the rule of law, and the role of the CJEU in the debate. First, in connection with the planned suspension of the Erasmus programme in Hungary within the framework of the conditionality mechanism, Dr. Bóka highlighted that it was not clear how this measure would contribute to the protection of the financial interests of the EU, particularly in light of the fact that the suspension of the programme would only impact Hungarian exchange students and not incoming foreign students.[37] Furthermore, the question of whether and how these rule of law procedures comply with the rule of law itself arose. As the Speaker pointed out, the values contained in Article 2 of the TEU were primarily applicable to EU institutions and not national institutions. The starting point was that these values had been developed in Member States at the domestic level, and had later become binding for EU institutions by the TEU. Moreover, control over such processes may fall beyond the control of Member States, which justifies the prior statements of the Speakers of the first sessions who pointed out that the rule of law had been used as a political tool by the politically more powerful party to enforce their point of view on other actors. Last, Dr. Bóka, in accordance with the prior Speakers of the conference, emphasised the increasing role of the CJEU in the rule of law debate, highlighting that the Court was no longer a neutral party, but rather became another player in the game that had pushed the stalled machinery of European integration beyond political indecision,[38] which could be controversial in light of the principle of subsidiarity and the absence of any clear transfer of power from Member States. The discussion with Dr. Bóka was particularly interesting not only because of his practical engagement with EU negotiations, but also because he could analyse and explain the ongoing processes as a scholar, thanks to his prior scientific background.

Summary

The international conference titled 'The Rule of Law: Between Legal Notion and a Political Tool' addressed the topical issue of the politicisation of the rule of law at the supranational level, especially at the EU level. The conference was divided into three sessions. The first session granted space for the introduction of the concept of the rule of law from a theoretical perspective presented by Prof. Csaba Varga; the presentation and discussion of a practical example of how the rule of law was used as a political tool in Israel by Gadi Taub, Ph.D.; the presentation of the constitutional transition of Hungary and the

37 | It is also worth noting in this regard that the preparatory document of the conditionality regulation particularly referred to that fact that '[…] the individual beneficiaries of EU funding, such as Erasmus students, researchers or civil society organisations, cannot be considered responsible for such [rule of law] breaches.' See: Proposal for a Regulation of the European Parliament and of the Council on the Protection of the Union's Budget in case of Generalised Deficiencies as regards the Rule of Law in the Member States, COM/2018/324 final – 2018/0136 (COD), Explanatory Memorandum. (Noted by the author.)
38 | Bóka, 2022, p. 81.

development of the interpretation of the rule of law in the practice of the Hungarian Constitutional Court by Prof. István Stumpf; and the analysis of how the substantive content of the rule of law was interpreted by the judiciary in common law states by Prof. James Allan. The second session was dedicated to the evaluation of the development of the rule of law instruments of the EU by Ákos Bence Gát, Ph.D.; and a panel discussion with the involvement of the Speakers. Third, Dr. János Bóka, State Secretary of EU Affairs, provided insights into the current stage of the rule of law debates in the EU and their understanding from the Hungarian point of view.

The conference provided a scholarly platform for discussing the evolution of the interpretation of the rule of law and its application in states where the interpretation and practice of the rule of law do not necessarily correspond with its supranational perception. One may conclude that the concept of the rule of law is not exact and may lead to severe power struggles between individual states and supranational entities. The essence of the rule of law, however, shall be respected by both parties throughout politicised processes. The supranational interpretation of the rule of law is subject to further research in the Central European Professors' Network 2023, in which the interpretation of the notion of the rule of law, related control mechanisms, and sanction systems are examined in the practice of various supranational entities, with a particular focus on the European Union. The results of the scientific research are expected to be summarised in a book edited by Dr. János Bóka, Ph.D., and published by the Central European Academic Publishing in the first half of 2024.

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Design, layout:
IDEA PLUS (Elemér Könczey, Botond Fazakas)
Kolozsvár / Cluj
I. C. Brătianu street, 41–43./18.